NAILING  THE BAR

HOW TO WRITE ESSAY ANSWERS FOR LAW SCHOOL AND BAR EXAMS

The Essential Guide to California Bar Exam Preparation

Torts, Evidence, Contracts, UCC, Remedies, Wills, Trusts, Corporations, Business Organization, Crimes, Real Property, Civil Procedure, Constitutional Law, Criminal Procedure, Community Property, Professional Responsibility

WHAT to Say and HOW to Say It!

Tim Tyler Ph.D.
Attorney at Law

NAILING THE BAR

HOW TO WRITE ESSAY ANSWERS FOR LAW SCHOOL AND BAR EXAMS

The Essential Guide to California Bar Exam Preparation

What to Say and How to Say It.

Tim Tyler, Ph.D.
Attorney at Law

Published by Practical Step Press

--www.PracticalStepPress.com--

ISBN 978-1-936160-05-1

What to Say and How to Say It

This book is a combined and condensed "How To" guide of practical and applied information you need to master to succeed on both law school and Bar exam essays, especially the essay portion of the CALIFORNIA GENERAL BAR EXAM.

If you are taking a formal bar exam preparation course this book is an excellent supplement to the essay instruction provided in such a course.

If you have already taken a formal bar preparation course and failed the California Bar Exam anyway, or if you want to avoid the expense of a formal bar preparation course you can create for yourself a "do-it-yourself" bar prep course that is **MORE RIGOROUS than any formal bar preparation course** by answering the 48 essay questions in this book in a timed setting (48 hours of work plus another 24 hours reviewing the sample answers) PLUS combining this book with the following materials that will provide you with more detailed and expanded instruction:

- **eBook-Simple Contracts & UCC Outline (O-1e)**
- **eBook-Simple Torts Outline (O-2e)**
- **eBook-Simple Crimes Outline (O-3e)**
- **eBook-Simple Criminal Procedure Outline (O-4e)**
- **eBook-Simple Civil Procedure Outline (O-5e)**
- **eBook-Simple Constitutional Law Outline (O-6e)**
- **eBook-Simple Evidence Outline (O-7e)**
- **eBook-Simple Real Property Outline(O-8e)**
- **eBook-Simple California Community Property Outline (O-9e)**
- **eBook-Simple Remedies Outline (O-10e)**
- **eBook-Simple California Wills and Trusts Outline (O-11e)**
- **eBook-Nailing the MBE (MQ2e)**
- **eBook-How to Write Performance Tests for Bar Exams (Qe)**

The study time required by the above course of study comprises about eight weeks of work (at 40 hours per week). For a schedule of how this can be done in only 8 weeks , get the **FREE GBX Study Schedule** from **www.PracticalStepPress.com**.

An advantage of "doing it yourself" is that you can spread the work out over a much longer period of time, and study on weekends. Besides saving on costs, you can study for the bar exam, work to support yourself, and spend some time with your family at the same time.

And in the end, you will have answered as many Performance Tests as you feel necessary, 600 MBE questions, and 126 essay questions posing EVERY ISSUE COMMONLY TESTED on the Bar Exam. That is several times more essay questions that you will be provided in a good bar preparation course, and if you do the above work you are almost certain to pass the California Bar Exam at a fraction of the expense a formal bar preparation course would otherwise cost you.

The rules and analysis presented here (and in all other "Nailing the Bar books) are based on common law, broadly adopted modern rules and the following specific black letter law tested on the California General Bar Exam:

- Civil Procedure: Federal Rules of Civil Procedure. Title 28, U.S. Code and California Code of Civil Procedure.
- Constitutional Law: U.S. Constitution.
- Contracts: UCC Articles 1 and 2.
- Community Property: California Family Code
- Business Organization: Federal Securities Exchange Act.
- Criminal Procedure: 4th, 5th, 6th, and 8th Amendments extended to States by 14th Amendment.
- Evidence: Federal Rules of Evidence and California Evidence Code.
- Professional Responsibility: ABA Model Rules, ABA Model Code, California Business and Professions Code, California Rules of Professional Conduct.
- Wills and Trusts: California Probate Code
- Real Property: Those sections of UCC Article 9 dealing with fixtures.

This book explains **how to outline** essay answers (Chapter 4), **how to spot issues** (Chapter 5), **how to avoid wasting time** (Chapter 6) and **budgeting time** on your essay (Chapter 8).

But the most important part of this book (and all Nailing the Bar books) is the central focus on "NAILING" the elements as explained in Chapter 11. "NAILING" means to write essays focused on the LEGAL ELEMENTS you must prove in your essay by citing given facts.

EXAMPLES of good and bad essay approaches are provided along with **PRACTICE QUESTIONS** with **SAMPLE ANSWERS** and **EXPLANATIONS**.

This book deliberately and necessarily omits discussion of many intricate details of the law that are explained in detail in Nailing the Bar's "Simple Outlines". But MOST OF WHAT **YOU REALLY NEED TO KNOW to pass the essay portion of the California General Bar Exam is in this ONE book.**

Mistakes You Find

We make mistakes like everyone else. If you find mistakes in this book please tell us so we can correct them. By "mistake" we mean typos, calculation errors, reference errors and things like that. Just send us a message **at info@practicalsteppress.com**.

But we definitely do not want to hear about differences of opinion about arguable issues. So if your professor says the rule is different that what we say here, humor your professor. But also do your own independent study in hornbooks and decide those issues for yourself.

Table of Contents

Chapter 1: Why Essays are Critical

The California Bar Exam is one of the hardest bar examinations in the United States. Usually fewer than 50 percent of the students who take it pass.

The Exam Structure: The California Bar currently is taken over three days on the following schedule:

Day 1:

Morning: 3 essays in 3 hours.
The area of law covered by these essays is unknown until the Bar is given, and often the questions "cross over" from one area of law to another.

Afternoon: 1 performance test in 3 hours.
This will require writing one or more memorandums, letters or pleadings.

Day 2:

Morning: 100 multiple choice questions in 3 hours.
These are called MBEs because this portion of the Bar is the Multistate Bar Examination.

Afternoon: 100 multiple choice questions in 3 hours.
Same as in the morning.

Day 3:

Morning: 3 essays in 3 hours.
Same as on Day 1.

Afternoon: 1 performance test.
Same as on Day 1.

Passing Grades: The California Bar recently changed its scoring system. Previously students had to have a total score of 1466 on the first reading to pass. Otherwise, if the score was above 1390, the written work would be read a second time. Now the student must have a score of 1440 on the first reading to pass, and if the score is above 1390 there is a second reading with a more complicated approach to deciding if the student passes or not. This is likely to change again.

Without going into the complicated details, your goal should be to pass on the first reading.

How Bar Exams are Scored: The Bar score is tabulated in a very complicated manner. The actual formula is based on two parts, the "written portion" and the "multiple-choice part".

Essays. First, there are six essays, each worth a maximum "raw score" of 100 points, for a maximum possible total of 600 points on the essay part of the exam. Always give an answer to each question, even if it is a bad answer. If you don't answer at all you get zero, but if you give a very bad answer you get a score of at least a 45.

Performance Tests. And there are two Performance Tests (PTs), each worth a maximum "raw score" of 200 pints, for a maximum possible total of 400 points on the PT part of the exam.

Together the essays and PTs are called the "written portion" (WP) of the exam, and the total possible "raw score" on this WP portion of the exam is 1000 points.

MBEs. There are 200 multiple-choice questions on the Multi-State Bar (MBE) portion of the exam. The maximum "raw score" on this MBE part of the exam of the exam is 200 points.

The written score (WP) and MBE score (MBE) are adjusted and added together as follows:

1. First, the raw written portion score is then "scaled" to give a "scaled written score" (SW) by multiplying it times one factor (F1) and then adding a second factor (F2) as follows:

   SW = WP * F1 + F2

2. Then the raw MBE score is also "scaled" to give a "scaled MBE score" (SM) by multiplying it times a factor (F3) and then adding another factor (F4) as follows:

   SM = MBE * F3 + F4

3. Then 65% of the scaled written score (SW) is added to 35% of the scaled MBE score (SM) to get the final score as follows:

   Final Score = 65% * SW + 35% SM

The scaling factors F1, F2, F3 and F4 are changed for every separate exam given by the Bar, and the whole process seems very scientific until you realize the Bar simply raises and lowers the various "scaling factors" until the number of students passing the exam meets the Bar's own internal goals concerning passing rates.

Generally Improving Essay Performance is the Easiest Way to Pass the Bar Exam. Generally the "scaling factors" used by the Bar in the past have made it much harder to improve overall Final Scores above the passing mark by improving MBE scores as it has been to improve essay scores, as long as MBE scores are not substantially below 70% correct. And improving PT scores is often difficult to do.

Summary. Here is what you need to keep in mind:

1) If you don't get a Final Score over the required amount on the first reading, you will probably fail the Bar.
2) You must answer each essay question to some extent because getting a zero on one essay reduces your Bar score to the point you will almost certainly fail the Bar.
3) Improving your essay performance is generally the easiest way to get your Bar score to the passing level, and improving your PT performance is the most unlikely way to pass unless your prior PT scores were absolutely dismal.

Chapter 2: How the Bar Essays are Graded

Bear in mind that the California State Bar must grade approximately 50,000 essay answers in a limited period of time with consistent results. To do this, they employ a "team" of graders who operate from a grading "key". The Grading Key is the document that produces consistent grading from each member of the grading team.

If the Grading Key requires you to discuss an issue, you must discuss that issue or else points are deducted from your score. No amount of literary brilliance on your part will make up for your failure to list and discuss a required issue.

The Grading Key is a list of the ISSUES you are expected to recognize and address and the RULES of law you are expected to cite.

Certain FACTS are mentioned in the essay question, and the grading key lists those as the facts you should comment on in your ANALYSIS.

Finally, for each issue, you must state a CONCLUSION.

The Grading Key lists REQUIRED ISSUES. If your essay answer lists and analyzes all of the required issues, your essay is given a score of 70 points. For each required issue that you skip, your grade is reduced.

It is critical for you to recognize and state the proper area of law raised by the facts.

Generally the required issues are worth 5 points each. Your essay grade will be reduced (from 70) by 5 points for each required issue that you fail to discuss. Some issues, such as murder and negligence are worth 10 or more points, depending on the question.

Grader mentality. Bar graders are commonly portrayed as evil characters by bar-prep companies. The Bar grader is often portrayed as "Guido", a mean spirited, one-eyed drunk who hates law students in general, and you in particular. None of that is true, so don't swallow this line.

The Bar graders are not "out to get you." They do not get a bonus for giving you low grades. You should never accept the idea that the Bar is a "rigged" contest that can only be won through luck. The fact is that the State Bar and the Bar graders are as disappointed as anyone else that Bar passage rates are so low.

To understand the Bar grader, remember they are government workers. They must

1) grade consistent with the Grading Key,
2) grade a huge number of exams in a relatively short time, and
3) finish all grading by the deadline.

The Bar grader does not think of you as an individual any more than a short-order cook thinks an egg is a baby chicken. She just looks at your essay as a piece of paper that has to be processed.

How Graders Look at your Essays. When the grader first picks up your essay answer, she (or he) first flips through it to get a feel for the quality of your answer based on its appearance. If your writing is messy, your issues are not underlined or numbered, and you display a lot of disorganization, the grader will not be given a good first impression. Mentally, she will stop thinking "possible 70" and start thinking "probable 60". She will not waste a lot of time on your essay if it is an obvious loser.

The grader will next look at the last page of your answer hoping you ran out of time and did not finish. If so, the grader will give you a grade of 45 or 50 without even bothering to read your essay at all. After all, what would be the point of her wasting time on a loser?

The preceding paragraph illuminates the difference between the Bar grader and your dear old law school professor who carefully read even very bad, failing papers. Your professor assessed whether he failed to cover essential points in his lecture, and he considered how he could further improve his students' inadequate understanding of the law. Your professor may even have felt a bit guilty that he had not communicated the principles of law to his class better. In contrast, a Bar grader will immediately dump your paper with a "45" without bothering to read it.

Do not "LOOK" like you ran out of time. Since the Bar grader flips to the last page of your essay to see if you finished, ALWAYS make the end of your essay look like you finished with adequate time. NEVER say "out of time!" at the end of your essay. NEVER put a big, garbled, frantic, scribbled mess at the end of the essay. NEVER write out an outline of the issues that you did not have time to discuss. If you do any of these things, you might as well write, "JUST SHOOT ME BECAUSE I AM STUPID."

Aspire to be Adequate. If your essay appears to have been completed on time, the grader matches the issues you discuss to the issues on the Grading Key. For each required issue, your rule statement and analysis are assessed for <u>adequacy</u>. If you discussed the required issue, your rule statement and analysis are adequate, and you gave some statement of conclusion, then you get the COVETED "70".

If the grader cannot find where you discussed required issues or rules easily, she will not waste her time looking for them. It is essential that you CLEARLY IDENTIFY THE ISSUES and RULES for the Bar grader.

Your answer must explain how the stated rule applies to the stated facts of the question. If no facts from the question are mentioned in your answer, the analysis will be deemed conclusionary and inadequate.

Your answer must state and adequately analyze all issues raised by the question. **An excellent analysis of one issue will NOT recover the points you lost by failing to discuss another issue.**

Bonus Points. Since some bar essay answers are given grades higher than 70, it is obvious that some answers are given bonus points. BONUS POINTS may be given for answers that cite certain additional relevant issues. Also, bonus points may be given for answers that are exceptionally well organized and cite relevant case law. The Bar Grader has some limited freedom to add these bonus points.

The Second Reading. If an exam is scored below a minimum amount (1460, 1440 or whatever) but above some other level, it qualifies for a second reading. The second reading only applies to the "written portion".

The first score given the exam was the coordinated result of eight different readers -- one for each essay and performance test. Each of those Bar Graders was a member of a grading "team." The second reading simply has eight more people look at the exam a second time. Each of these second Bar Graders is a member of the team the same as the first graders.

For each portion the reader will know that the exam has already been given a low score once, and she may know what that score was. If the second reader of any portion of the exam comes up with a significantly higher score than the first reader, it will reflect badly on one of them or the other. Since the Bar Grader will want to avoid having to explain a score that is significantly higher than another member of their "own team," the second set of Bar Graders will usually stick very, very closely to the Grading Key and give no bonus points or "benefit of the doubt."

Therefore, it is unlikely the second reading will produce a much higher overall score than the first reading. In fact, this is the typical result. If the first reading produced a score that was only slightly under the minimum required level, the second reading may result in a passing grade. But if the first score is significantly below that level the second reading is unlikely to help you much.

The moral here is to exceed the minimum required score on the first reading.

Chapter 3: Identify the Area of Law

The first and most critical step in answering a Bar essay question is to figure out THE PROPER AREA OF LAW and TELL THE GRADER. Unlike law school where the student automatically knows the area of law being tested, on the Bar you must tell the Grader the area of law that applies. You must determine the proper area of law upon which to base your answer by looking at the facts and the call of the question.

READ THE CALL OF THE QUESTION!

The California Bar Exam tests on 14 areas of law. Your answer should reflect COMMON and FEDERAL law except where indicated:

1) Civil Procedure (plus comparison to California rules)
2) Community Property (California Rules)
3) Constitutional Law
4) Contracts (and UCC Articles 1 and 2)
5) Business Organization (including corporations, agency and partnership law)
6) Criminal Law
7) Criminal Procedure
8) Evidence (plus comparison to California rules)
9) Professional Responsibility (including some California Rules)
10) Real Property (including UCC Article 9 as it deals with fixtures)
11) Remedies
12) Torts
13) Trusts (California Probate Code, construction)
14) Wills (California Probate Code, omitted child/spouse)

DON'T confuse a Criminal law question with a Tort question. Don't confuse a Constitutional Law question with Civil Procedure.

There can be CROSSOVER questions. But they are most often questions that raise professional responsibility issues within a different context. Always be on the alert for a crossover where one of the parties is identified as a "lawyer" or "attorney".

Remember MISREPRESENTATION is a defense to a Contract action but it can be the cause of action in both Tort and Criminal law.

To determine the proper area of law, read the CALL OF THE QUESTION.

If the question asks for discussion of "crimes," "prosecution," or "charges," it is a criminal law question. If it asks for the actions a PARTY can bring, it is NOT A CRIMINAL law question because only the State can prosecute a crime.

In the excitement of the moment, you might misread the call of the question. So it is critical to CAREFULLY READ THE CALL. Then BE RESPONSIVE TO THE CALL.

Chapter 4: Outline Your Answer and COUNT THE ISSUES!

The second critical step in answering any essay question, whether on the Bar or in law school, is to read the question and COUNT THE ISSUES to be discussed.

The issue outline is simply a list of the issues to discuss, in the order to discuss them. Make it "skeletal" in your own "personal shorthand." Don't waste time writing out detailed issue statements. Jot down **case names** and **special rules** like "*Palsgraf*" and "*International Shoe*." Jot down a few facts if you want, but DON'T WASTE TIME writing out every important fact. [1]

CONSIDER which issues you MUST discuss, which you MIGHT discuss and which are "unintended issues" that the grader does not want to hear about. Decide which issues are so minor, marginal, lacking in facts or attenuated that you should not discuss them. Look for specific wording in the question that indicates which issues are "required issues."

RE-READ THE FACTS to be sure you are not missing issues. Don't look so hard for hidden issues that you miss the issues that are obvious. [2]

Rewrite the outline as necessary, eliminating issues, or reordering issues. Usually you should list the issues in the same order they arise in the fact pattern, but there are exceptions. For example, discuss intentional torts before negligence, and discuss murder before manslaughter.

Professional responsibility crossover issues should usually be discussed either before or after all other issues. For example, where there is a corporations question containing a professional responsibility crossover, discuss the corporation issues first or last, before or after discussing the professional responsibility issue.

Separate issues by party, discussing all rights, liabilities and remedies of each party in succession. If questions involve TWO OR MORE PLAINTIFFS or TWO OR MORE DEFENDANTS it is almost always a bad idea to try to discuss them at the same time.

Follow the Call. On a one-hour question outlining usually requires between 10 and 15 minutes. HOWEVER, if the call of the question actually lists the issues you are to discuss, then this outline process can (and must) be abbreviated. If the issues are listed for you, DO NOT DISCUSS UNLISTED ISSUES.

When the question involves a large number of issues, such as in an evidence question, the call of the question will often list each issue to discuss.

If the call of the question states the things to discuss, your answer MUST REFLECT THE STRUCTURE OF THE CALL.

> If the CALL says "what rights and remedies?" you MUST discuss both the rights and the REMEDIES of the parties as full issues.

---

[1] Some people advocate copying all of the important facts from the essay question to the answer outline. That may help some students but to me it just seems a waste of time.

[2] This is a common error. Don't look so hard for fleas you forget to talk about the elephant.

> If the CALL says, "what evidence objections would be raised, responses given and rulings by the court?" you MUST structure your answer by identifying the OBJECTION, RESPONSE and RULING for each item of evidence.

Jump to the Call then Back. To properly outline an essay question,

> FIRST read SOME of the facts, about ONE-THIRD of the fact pattern;
> SECOND jump to the bottom of the question and determine the CALL;
> THEN go back to the beginning and reread ALL of the facts.

As you read the question, draw lines to the margin and place symbols there designating the issues that might need to be discussed. For example, if two people start to commit a crime, the first issues that might be discussed are "S?" for "solicitation" and "C?" for "conspiracy."

Focus on the AREA of Law. If the question is a contract question -- write a big "K" at the top of the page with a circle around it to reinforce in your mind that the area of law is CONTRACTS. For a tort question put "T" at the top, for crimes a "C", etc. This may seem silly, but just doing it helps you focus on the proper area of law.

After you have read the question completely through, LIST AND NUMBER THE ISSUES on a separate piece of paper (or at the bottom of the question if there is room). Generally it is best to **list the issues in the order they appear in the question**, because that is usually the order of the Grading Key used by the Bar grader.

COUNT the issues! You should have between 5 and 12 issues. A question with less than 5 issues is highly suspicious -- you probably missed something big. Maybe you missed some defenses that are issues by themselves and require thorough analysis. The Bar essay should take ONE HOUR to complete, and if you don't see enough to keep you busy for an hour you are probably missing some issues.

A question with more than 8 issues is a racehorse exam where you have little time to analyze the issues in depth. If you have more than 8 issues, carefully consider whether some of them are "non-issues." A non-issue is something that the Bar does not want you to talk about, and is discussed in more detail later.

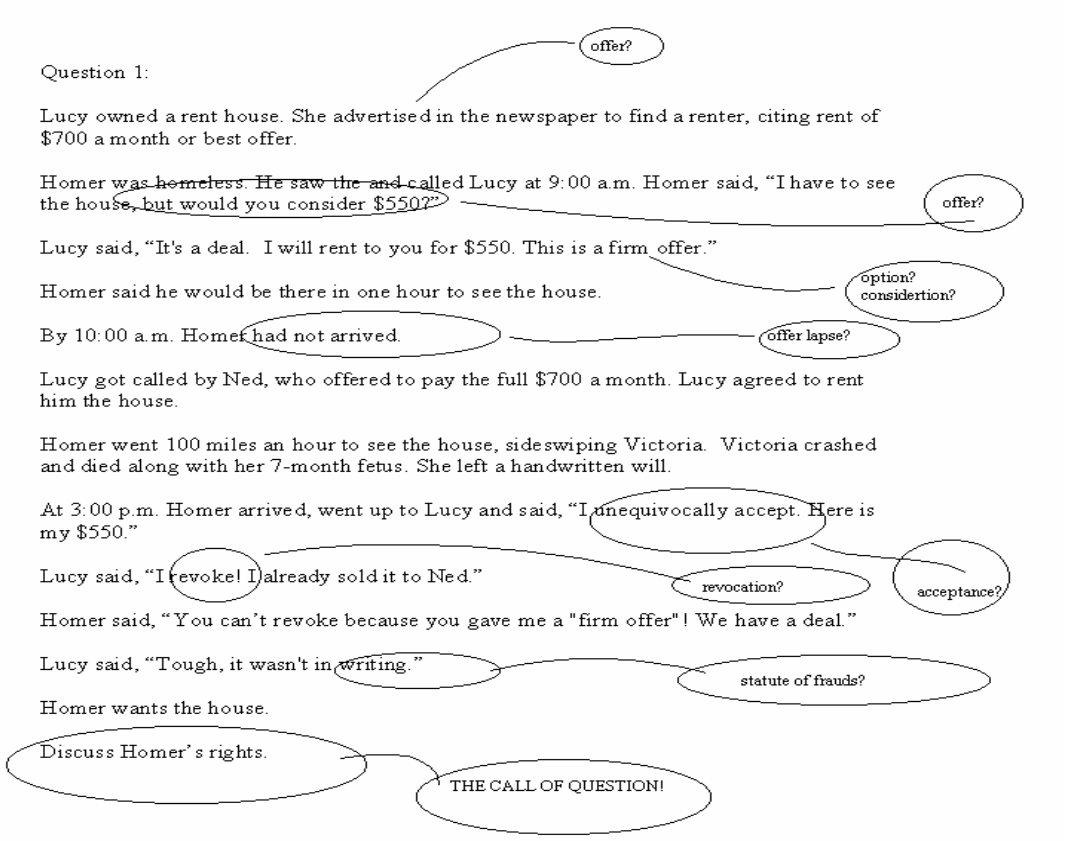
If there are 8 legitimate issues you should plan on spending FIVE MINUTES on each. However, some issues demand more time:

> MURDER requires twice as much writing time as other crimes and almost always raises MANSLAUGHTER as a separate 5-minute issue. Therefore, the discussion of any death usually requires 15 minutes of writing time.
>
> NEGLIGENCE and DEFAMATION require twice as much time as other torts.
>
> CONSTITUTIONAL LAW has fewer issues, but they require more writing time. They take about ten minutes apiece to discuss.

If there are 12 issues to discuss (as there might be on an evidence question), you will only have 3 or 4 minutes to discuss each, and you will have to move very fast.

Read the Call Again. Before you accept your outline as adequate, READ THE CALL OF THE QUESTION ONE MORE TIME and make sure your outline addresses the call.

Example: The example below shows a question (Question 1) about a contract dispute over the rental of a house and how you might mark up the question as you read it.



Following this mark-up on the question itself, you should create a skeletal outline as shown below:

EXAMPLE QUESTION OUTLINE

General CONTRACT statement -- define contract and elements.

1. Choice of law -- UCC (GOODS?) or common law? "house"
2. Does STATUTE OF FRAUDS apply, and is it satisfied? "house" = "land"
3. Was the ADVERTISEMENT an OFFER -- define OFFER.
4. Did H make OFFER at 9:00? "had to see it first".
5. Did L give H a VALID OPTION at 9:00? -- define and explain OPTION contracts.
6. Did H make valid ACCEPTANCE at 3:00? -- define ACCEPTANCE.
7. LAPSE -- hours late.
8. REVOCATION -- not if offer lapsed.

Chapter 5: Issue Spotting

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist.

What do they want to hear? You should realize that the person writing an examination question starts with a list of issues for you, the student, to discuss. Then the question writer creates a fictional fact pattern that is intended to spur you, the student, to discuss those issues. Sometimes an entire paragraph is necessary to raise one issue, and sometimes a single sentence raises two or more issues. An exam question may have some irrelevant facts, but there is almost never a totally irrelevant paragraph. Therefore, consider every paragraph to be important, and usually there are at least as many issues as there are paragraphs.

Subject area? The issue you are to discuss depends on the subject area (contracts, evidence, remedies, etc.) So you must determine the subject area with certainty in order to determine the issues. For example, the Statute of Frauds is always a possible issue with respect to contracts. And the 4th Amendment is always a possible issue with respect to criminal procedure.

Why is this fact presented? Once the subject area is determined, go through the exam question fact by fact, line by line and paragraph by paragraph. For each, ask yourself, "What do they want me to talk about?" and "Why did they present that fact?"

Do not assume facts that are missing from the fact pattern. Rather, recognize that facts will be left out on purpose so that you will discuss the impact of the absence of that fact. For example, the facts often fail to state a defendant's intent. Discuss the implications that the presented facts have on the missing facts. For example, if the defendant stabs the murder victim 47 times, there is an implication the defendant intended to kill (duh!).

Review mnemonics. Go through the mnemonics you have memorized for that subject area, considering each issue that calls for discussion. Don't forget to consider the defendant's defenses and the weaknesses in the case presented by the plaintiff or prosecutor. Weaknesses are intentionally created for you to discuss!

Issue order. Usually the best order for you to discuss the issues is the order in which the issues are raised in the fact pattern. Why? Because all of your classmates are following that order, and that will be the order of the Grading Key. It never benefits you to be an "odd ball" that follows a weird order in discussing the issues.

Watch out for "lawyers" and "attorneys" on the Bar Exam. Almost every time there is a lawyer or attorney on the Bar Exam they want you to discuss professional responsibility.

The Bar spends weeks perfecting the essay questions, and certain key words and fact patterns are used to raise the issues that you are intended to discuss.

The following is a list of 565 words and facts that may indicate intended issues:

CONTRACTS:

Issue Area and Coded Hint:	**Intended Issue:**
FORMATION ISSUES	
1. Order from Advertisement/Catalogue:	Is the advertisement an offer?
2. Claim of reward, prize, bounty:	Is it a general offer validly accepted?
3. Do something (build, paint, etc.):	Unilateral contract?
4. Silently begin performance:	Acceptance by performance?
5. Price/quantity inquiry?	Is this an offer?
6. Performance with silence:	Implied contracts?
7. Oral/telephone/verbally/said:	Is Statute of Frauds satisfied?
8. A "year":	Statute of Frauds?
9. Quantities with prices:	Statute of Frauds? UCC?
10. Custom made goods:	UCC 2-201?
11. Lost writings:	Statute of Frauds?
12. A promise to pay debt of other:	Statute of Frauds? Main-purpose rule?
13. Accepted later:	Offer lapse?
14. Accepts in an hour/day/week:	Offer lapse?
15. "Ok, but…":	Rejection and counteroffer?
16. If I feel like it, decide to, want, etc.:	Illusory promise? Lack of consideration?
17. Accepted, then changed mind:	Mail box rules
18. Rejected, then changed mind:	Mail box rules
19. Sent offer/acceptance/rejection:	Mail box rules
20. Fax communication:	Sufficient UCC writing?
21. Hobby/enthusiast/fan:	Is he a merchant?
22. Only bought, never sold goods:	Is he a merchant?
23. Revocation before end of performance:	Saving doctrines of unilateral contracts?
24. Acceptance with different terms:	Mirror Image Rule? UCC 2-207?
25. Shipped wrong product:	Acceptance under UCC rule?
26. Building code violations:	Illegality of contract?
27. Illegal contracts:	In Pari Delicto?
28. Mistake/Misunderstanding:	Mutual misunderstanding? Peerless case.
29. Ambiguous offer/acceptance:	Objective theory of intent
30. Young, crazy, drunk:	Infancy? Incompetence?
31. Deceit, concealment:	Rescission?
MODIFICATION ISSUES	
32. Modification - not goods:	Lack of consideration? Pre-existing duty?
33. Modification/later agreement - goods:	UCC modification by consent?
34. Modification with increase in $$$	Statute of Frauds?
35. Modification after assignment:	Effect of UCC 9-318 on secured transactions?
INTERPRETATION OF TERMS	
36. More than one paper:	Integration?
37. Other agreements:	Parol Evidence Rule? Four-Corners?
38. Prior dealings:	Course of dealing? Past practices?
39. Ambiguous words:	Plain meaning?

THIRD-PARTIES/ ASSIGNMENT

40. Three parties?	Third party beneficiaries? Assignment?
41. Children, students, patients, tenants:	Intended third-party beneficiaries?
42. Funding agreement:	Proper expression of assignment?
43. World famous architect, artist:	Proper delegation subject matter?
44. Personal services, massage:	Proper delegation subject matter?
45. Covenants regarding future assignees:	Standing of assignee per UCC 9-206?

BREACH ISSUES

46. Performance doubts, insolvency:	Anticipatory Breach?
47. Assurances:	UCC Reasonable Assurances?
48. Unexpected conditions, death:	Impossibility? Impracticality? Mistake?
49. Unexpected difficulties:	Frustration of purpose? Impracticality?
50. Cancellation clauses:	Liquidated damage clauses? Unforeseeable?
51. Seller shipped wrong product:	Buyer's remedies? Cover? Reject? Keep?
52. Failure to act/protect:	Good faith and fair dealing? Duty to act?
53. Multiple shipments:	Divisible UCC contract?
54. Ambiguous grumbling:	Clear Anticipatory Breach or not?

REMEDY ISSUES

55. "Rights and remedies":	Buyer's/Seller's Remedies?
56. Breaching party partially performs:	Quantum Meruit?
57. Non-breaching party fails to act:	Failure to mitigate damages?
58. Land, works of art, etc.:	Specific performance?
59. Personal Services?	No specific performance?
60. Repairs:	Costs limited to fair market value?
61. Sentimental value:	Objective sentimental valuation?
62. Promise, reasonable reliance:	Estoppel?
63. Shipment of non-conforming goods:	Accommodation? Time to cure?
64. Lost profits?	Consequential damages? *Hadley v. Baxendale*

CONTRACT DEFENSES

65. Transfer to an innocent party:	Bone fide purchaser for value?
66. Forced to agree/Unfair:	Adhesion? Unconscionability? Coercion?
67. Young party:	Infancy? Voidable? Ratification?
68. Reliance, Misled:	Estoppel? Detrimental reliance?
69. Illegality:	Defense of illegality?
70. Elderly victim:	Defense of undue influence?
71. Check tendered as “payment in full”	Accord and satisfaction? UCC 3-311?

TORTS:

Issue Area and Coded Hint:	**Intended Issue:**

INTENT

72. Apprehensive/concern:	Assault?
73. Touching/contact/ate/drank:	Battery?
74. Intent to touch/scare another:	Transferred intent to plaintiff.
75. Pranks and jokes:	Intent to cause apprehension/touching?

76. Act by child:	Intent? Knowledge with reasonable certainty?
77. Mistaken entry to land:	No defense to Trespass to Land?

AWARENESS/INJURY BY PLAINTIFF

78. No apprehension:	No cause of action for Assault?
79. No awareness of confinement:	No cause of action for False Imprisonment?
80. Aware of confinement but stays:	False Imprisonment?
81. No awareness of taking:	No cause of action for Conversion?
82. No humiliation/distress:	No cause of action for IIED?
83. No damage to land:	Cause of action for Trespass to Land?

NEGLIGENCE ISSUES

84. Remote plaintiff?	*Palsgraf*. Did defendant have Duty?
85. Injury despite reasonable actions?	Was there any Breach?
86. Defendant is professional?	What is the standard of care?
87. Defendant failed to act?	Did defendant have a Duty to act?
88. Chain of events lead to injury?	Actual cause without proximate cause?
89. Criminal causes the injury?	Intervening superseding event?
90. Negligent acts of two cause injury?	Both Substantial Factors?

DEFAMATION ISSUES

91. Former, retired official, celebrity:	Still Public Figure?
92. Well known/star/performer	Public figure? *New York Times*
93. Crime victim or unwilling person:	Are they a Public Figure?
94. False statements:	Were statements really Defamatory?
95. Written, oral, videotaped:	Libel or slander?
96. Business dealings, Disease, Morals:	Libel per se?
97. Limited distribution of statements:	Publication?
98. News media:	Statements of public interest?
99. Failed to investigate:	Negligence?

INVASION OF PRIVACY

100. Commercial use of photo:	Appropriation of likeness?
101. Said/told/revealed:	Defamation/Public disclosure/Interference?
102. False depiction:	False Light?

ABUSE OF PROCESS, MALICIOUS PROSECUTION, INTERFERENCE

103. Arrested/sued:	Malicious prosecution/Abuse of process?

AFFIRMATIVE TORT DEFENSES

104. Detainment of customer in store:	Shopkeeper's Privilege - reasonable?
105. Pranks and jokes:	No defense to assault/battery?
106. Assumption of risk:	Defense to assault/battery?
107. Silence or acts by plaintiff:	Consent? Implied consent?
108. Negligence by plaintiff:	Contributory/comparative negligence?
109. Forced or protective act:	Necessity? Self defense? Defense of others?
110. Act taken without intention of harm:	Mistake of fact? Reasonable mistake?

CRIMES:

Issue Area and Coded Hint:	**Intended Issue:**
ISSUES RAISED BY THE PARTIES	
111. Two or more criminals:	Accomplice liability/solicitation/conspiracy? **[It only takes one person to do a robbery. If there are two robbers, they want to you discuss this.]**
112. Joint action without agreement:	Implied agreement for conspiracy?
113. Agreement without action:	No OVERT ACT for conspiracy?
114. One party silent and does not act:	Bystander or accomplice?
115. One encourages but does not act:	Solicitation, accomplice?
116. Employee, servant steals:	Larceny or embezzlement?
117. Fetus:	Was there a Homicide?
118. Receiving stolen property:	Wharton Rule? Attempted receiving?
INTENT ISSUES	
119. Delayed theft after entry:	Lack of intent for burglary?
120. Intent is to take own property:	Legal impossibility?
121. Involuntary action:	Lack of intent for any crime.
122. Did not know it would hurt…:	Awareness of risk? Conscious disregard?
123. Anger, jealousy, blind action:	Adequate provocation?
124. Use of gun, knife:	Intent to cause great bodily injury?
125. Thinks sex partner old enough:	No defense to strict liability crime.
126. Thinks sex partner willing:	No defense, rape is general intent crime.
127. Thinks sex partner was wife:	No defense, rape is general intent crime.
128. Intent to burn:	Was the fire set with malicious intent?
129. Criminal act while intoxicated:	Involuntary or voluntary intoxication? Mitigation?
ACTION ISSUES	
130. Takes own property:	Not larceny if not property of another?
131. Smoke, explosion, cutting torch:	Was it Arson?
132. Entered a building, room, safe:	Was there a Breaking? Was it Burglary?
133. Planned crime:	Sufficient for Attempt?
134. Getting weapon:	Premeditation?
135. Theft of land, title, rights:	False pretenses, not larceny/embezzlement.
136. Sex with wife:	No common law rape of wife?
137. Crossing state, county line:	Kidnapping?
138. Police offer stolen goods:	No Receiving of recovered goods?
139. Delayed death, life supports:	Causality? Common law time rules?
140. Lack of criminal intent:	Recklessness? Accident? Common negligence?
LACK OF ACTION TO PREVENT RESULT	
141. By parent, caregiver, rescuer:	Affirmative duty to act? SCRAP
142. By child, onlooker:	Affirmative duty to act?
143. By co-criminal:	Withdrawal from conspiracy? Accomplice?
144. Intentional non-action:	Affirmative duty to act?

LACK OF INJURY/FORGIVENESS BY VICTIM

145. Victim unaware money taken:	Larceny but not robbery?
146. Victim forgives defendant:	Crime is offense against state, not victim.
147. Victim unconscious, unaware:	Defense to robbery, but not rape or larceny.

AFFIRMATIVE DEFENSES

148. Child defendant:	Defense of infancy?
149. Mistake:	DEFENSE of Mistake to negate intent?
150. Drunk/drugged:	Defense of intoxication?
151. Escalation of fight:	Change of AGGRESSOR identity?
152. Protection of fighting party:	"Step into shoes" of aggressor?
153. Protection of person/property:	Reasonable force?
154. Thinks sex partner willing:	Consent is defense to rape.
155. "Could not stop self":	Insanity? Necessity? Lack of intent?
156. Did not know it was wrong:	Insanity - M'Naughten Rule?

CRIMINAL PROCEDURE:

Issue Area and Coded Hint:	**Intended Issue:**

SEARCH WITHOUT WARRANT

157. Pat down:	Terry stop w/o warrant?
158. Drugs in cigarette pack:	Not justified for officer protection?
159. Consent to search:	Did consenting party have authority?
160. Roommate:	No authority to consent?
161. Opening door, box, chest, room:	Improper search w/o warrant?
162. Search of area:	Lurch area? After arrest? Protective sweep?
163. Search after pleasant visit:	Not for protection? Not valid sweep/Terry stop?
164. Search of house during arrest:	Protective sweep?
165. Stop of car:	Probable cause for stop?
166. Border/airport/port:	Border exception?
167. Suspicious appearance:	Probable cause?
168. Plain view:	Did officers have right to be at viewing point?
169. Turning item to examine:	Not in plain view?
170. Entry of dwelling:	Exigency? Hot pursuit?
171. Victim kidnapped or in distress:	Exigency?
172. Alcohol/drugs:	Evanescent evidence?
173. Blood sample taken from suspect:	Unreasonable? Evanescent evidence?
174. Handwriting sample:	Unreasonable?
175. Fingerprints taken:	Unreasonable?
176. Highway checkpoint:	Checkpoint exception?
177. Body search w/o warrant:	Justified by evanescent evidence?
178. "Next day", "later", "hours":	Time sufficient to obtain warrant?

SEARCH WITH WARRANT

179. Magistrate paid for each warrant:	Not neutral?
180. "Police Magistrate":	Neutral magistrate?
181. Magistrate rubber stamps warrant:	No showing of probable cause for warrant?

182. False affidavit:	Facially valid warrant? Warrant even needed?
183. Anonymous tip/informant:	Probable cause?

MIRANDA

184. Suspect silent:	No waiver of rights?
185. Suspect doesn't understand:	No waiver of rights?
186. Ambiguous response to Miranda:	Was Miranda waived?
187. Police statements after Miranda:	Miranda violation?
188. Questions before Miranda:	"Public safety" exception?
189. Questions without Miranda:	"Custodial" interrogation?
190. Police statement elicits confession:	Was statement intended to be interrogation?
191. Subpoena of records:	Forced self-incrimination?

MASSIAH / RIGHT TO COUNSEL

192. Jailhouse snitch:	Police agent?
193. Lineup:	Right to counsel?
194. Questions about another crime:	Prior assertion does not apply?
195. Overheard statements:	Expectation of privacy?
196. Hearing/arraignment/entry of plea:	Right to counsel?
197. Surveillance of suspect out on bail:	Massiah violation?

MISCELLANEOUS

198. Legal seizure after illegal acts:	Fruit of poisonous tree?
199. Denial of ownership:	Loss of standing to object?
200. "Would have discovered":	Exclusion ineffective deterrent?
201. Different government entity:	Exclusion ineffective deterrent?
202. Second trial:	Double jeopardy?

CIVIL PROCEDURE:

Issue Area and Coded Hint:	**Intended Issue:**

SUBJECT MATTER JURISDICTION

203. Federal statute, act of Congress:	Federal question?
204. Federal question in State court:	Removal?
205. Dollar amounts:	Enough for diversity action? Good faith claim?
206. States (State X, Nevada, etc.)	Diversity of domicile?
207. Lives in hotel/motel:	State of domicile?
208. $75,000	Borderline diversity case? Good faith claim?
209. Joinder of parties:	Destroy diversity?

PERSONAL JURISDICTION

210. "Every year" visits:	Minimum contacts?
211. Ownership of land in state:	Minimum contacts?
212. Agreement by phone/internet:	Forum-related cause of action?
213. Service on party flying over state:	Sufficient presence?
214. Answered/Special appearance:	Consent to jurisdiction?
215. Advertisement in state:	Minimum contacts?
216. Corporation:	State of headquarters and incorporation?

217. Transient residents (students, etc.):	State of domicile?

COLLATERAL ATTACK

218. Writ of execution:	Collateral attack?
219. Contempt action:	Improper first amendment restraint?

CHOICE OF LAW IN DIVERSITY ACTION

220. State X law different from State Y:	Eire Doctrine
221. Statutes of limitation:	Substantive or procedural?
222. Federal rule different:	Substantive or procedural?
223. FRCP rule:	Substantive or procedural?
224. No State right to jury trial:	Federal rule supersedes?
225. Change of venue to another state:	What law applies?

CLAIM AND ISSUE PRECLUSION

226. Prior litigation:	Preclusion?
227. Sequential actions:	Preclusion?
228. Associate, partner:	Party in privity?
229. Prior action dismissed:	Decided on merits?

CONSTITUTIONAL LAW:

Issue Area and Coded Hint:	**Intended Issue:**

JUSTICIABILITY

230. Not yet affected:	Unripe cause of action?
231. No longer affected:	Moot case?
232. Pending actions in State courts:	Abstention doctrines?
233. Pending criminal actions:	Abstention doctrines?
234. Congress vs. Presidency:	Political abstention?
235. Action to help others:	Lack of standing?
236. Public support of religion:	Taxpayer standing?

ENUMERATED POWERS

237. Crime control:	Reserved to states?
238. Health, safety and welfare:	Reserved to states?
239. Foreign affairs, treaties, diplomats:	Reserved to executive?
240. Foreign commerce:	Reserved to Congress?
241. Treaties:	Reserved to federal government?

COMMERCE CLAUSE

242. Quarantines, inspection stations:	Commerce clause?
243. State owned business:	Market participant exception?
244. Traffic safety regulations:	Unreasonable restraint?
245. Self use production:	Aggregation doctrine?
246. Price supports for certain goods:	Commerce clause?
247. Domestic purchase requirements:	Commerce clause? Market participant?
248. Restrictions on foreign goods:	Commerce clause?
249. Alcoholic beverages?	21st Amendment exception?

EQUAL PROTECTION

250. Unwed parents	Quasi-suspect class (legitimacy)?
251. Welfare recipients	Equal protection?
252. Immigrants/Moslems	Suspect class (Alienage/Religion)?
253. Dope addicts	Equal protection?
254. White separatists	Suspect class (Race)?
255. Communists	Equal protection?
256. Gays	Quasi suspect? Equal protection?

SUBSTANTIVE DUE PROCESS

257. Denial of vote:	Fundamental right?
258. Privacy, reproduction, procreation:	Fundamental right?
259. Marriage rights	Fundamental right?
260. Homosexual acts	Fundamental right?

PROCEDURAL DUE PROCESS

261. Government acts without notice:	Denial of due process?
262. Government denies hearing:	Denial of due process?

FIRST AMENDMENT PROTECTIONS

263. Prayer in schools:	Separation of church and state?
264. Voucher system:	Separation of church and state?
265. Requiring TV to broadcast debates:	Forced speech?
266. Anti-gang taskforce:	Denial of assembly?
267. School color rules:	Denial of assembly?

ELEVENTH AMENDMENT

268. State sued in federal court:	11th Amendment violation?

COMMUNITY PROPERTY:

Issue Area and Coded Hint:	**Intended Issue:**
JOINT TITLE	
269. Joint ownership, joint tenants:	Joint Title Presumption?
270. "Mary Smith", wife's name:	Married Woman's Presumption? Before 1975?
271. Reconveyance to joint tenancy:	Transmutation agreement? After 1984?
MIXED ASSET	
272. Business, Real Estate, Stocks:	Owned before marriage but managed after?
273. Active management, participation:	Pereira approach?
274. Minimal management, participation:	Van Camp approach?
COMMINGLED ASSET	
275. Bank and stock accounts:	Direct tracing?
276. Account Balance stated:	Family expense tracing?
277. Records destroyed by spouse:	Recapitulation method?

PERSONAL INJURY

278. Car wreck, slip and fall, etc.:	Hurt before marriage? CP or SP?

FEDERAL PREEMPTION

279. Insurance, Social Security, Pension:	Federal preemption?

PENSIONS/RETIREMENT/TIME RULE

280. ERISA:	Federal preemption?
281. Private:	Allocation to community?
282. Stock options:	Allocation via time rule?

DISABILITY PAY

283. Disability in lieu of pension:	Allocation of pension portion?

REIMBURSEMENTS

284. Down payment from SP:	Reimbursement to separate?
285. Improvements paid by SP:	Reimbursement to separate?
286. Loan paid off by CP:	Moore Rule?
287. Child support paid by CP:	Reimbursement to community?

EDUCATION

288. Student loans:	Allocated to student spouse?
289. Education expenses:	Community received benefit?

RECOVERIES

290. Gifts by spouse:	Recovery by community? Spouse alive?
291. Gift of personal property:	Recovery at any time?
292. Sale of personal property:	Any recovery?
293. Conveyance of real property:	Good faith purchaser? How long? Spouse alive?

REAL PROPERTY:

Issue Area and Coded Hint:	**Intended Issue:**

INTERESTS

294. "to A ":	Is Fee Simple presumed?
295. "and his heirs":	Is it Fee Simple?
296. "to A for life":	Is it Life Estate? With a Remainder?
297. "and then to…":	Is it Life Estate? Contingent Remainder?
298. "and then if …":	Contingent Remainder? RAP?
299. "as long as":	Condition precedent? Reverter? Exec. Interest?
300. "unless…", "but if…"	Condition subsequent? Entry?
301. Life Estate:	Reversion or Remainder?
302. Condition precedent:	Reverter? Executory Interest?
303. Transfer of title to "heirs":	Rule of Shelly's Case, Worthier title, Merger?

RULE AGAINST PERPETUITIES

304. Executory Interest:	Rule Against Perpetuities?
305. Contingent Remainder:	Rule Against Perpetuities?
306. "grandchildren"	Class, Rule Against Perpetuities?
307. Survival, age, when, if,:	Rule Against Perpetuities?
308. Class Gift:	Subject to open? Vesting? RAP?
309. Gift to empty class:	When does class close? RAP?
310. Condition subsequent:	Statutory limits? Waiver of entry?

TITLE TRANSFER

311. "kept deed":	Failure to deliver title? Held in trust? Recorded?
312. Recording statute:	Race, Notice or Race-Notice?
313. "Agreed", "said", "promised":	Statute of Frauds? Part performance?
314. Improvements to land:	Statute of Frauds? Part performance?
315. Zoning:	Marketable title? Taking?

JOINT TITLE

316. Joint tenancy:	Ouster, right of survivorship?
317. "Husband and wife":	Tenancy by entireties? Survivorship?
318. Reconveyance to joint tenants:	Common law vs. statutory prohibition.
319. Mortgage:	Title theory state? Assumption of liability?
320. "Wife". "Widow":	Dower rights?

BOUNDARIES

321. River/stream/roadway as boundary:	Accretion, Avulsion?

ADVERSE POSSESSION

322. Trespasser:	Adverse possession, tacking, incapacity?
323. Conveyance to minor:	Incapacity for tolling adverse possession?
324. Coma, insane, incarcerated:	Incapacity for tolling adverse possession?
325. Growing marijuana on land:	Was it "open, visible" possession of land?
326. "knew he was there":	Hostile possession or with permission?
327. More than one trespasser:	Was there Tacking? Privity?
328. Error in written title:	Constructive adverse possession of entire plot?
329. Ouster for many years:	Adverse possession apply?
330. Exclusive use by joint title holder:	Adverse possession apply?

EASEMENTS

331. Crossing land:	Prescriptive easement?
332. Dividing land:	Implied by use/necessity easement?
333. Built wall:	Abandonment of easement?

LAND USE COVENANTS AND RESTRICTIONS

334. Promise to pay or do something:	Covenant that runs with land? Privity of estate?
335. Restrictive use agreement:	Equitable servitude that runs with land? Notice?

336. Plot map/tract development:	Implied reciprocal servitude?

LANDLORD-TENANT

337. Claimed right to enter tenant's land:	Breached implied covenant of quiet enjoyment?
338. Tenant leaves land in dispute:	Constructive eviction?
339. Leaking roof, faulty heater:	Breached implied warranty of habitability?
340. Leaking roof, tenant does nothing:	Waste?
341. Sub-tenant:	Sublease or assignment? Primary liability?
342. Tenant removes property:	Fixtures? Duty of tenant?
343. Tenant leaves property:	Surrender and acceptance? Duty to mitigate?

FINANCIAL LIABILITY

344. Mortgage and life estate:	Duty of life tenant and remainderman?
345. Mortgage:	Assumption of mortgage?
346. Flood, fire, earthquake after sale:	Equitable conversion?
347. Excavation:	Inadequate lateral support? Natural state?

WATER

348. Surface water, rain, drainage:	Common enemy doctrine?
349. River water:	Riparian rights?

REMEDIES

350. Failure to deliver marketable title:	Benefit of bargain? Liquidated damages?
351. Deposit:	Liquidated damages?
352. Breach:	Specific performance?

WILLS:

Issue Area and Coded Hint:	**Intended Issue:**

VALIDITY

353. "when dying said… ":	Oral will?
354. "I would like for…"	Testamentary intent? Precatory language?
355. Handwritten document:	Holographic will?
356. Typewritten and handwritten:	Testamentary statements handwritten?
357. Multiple papers:	Integration?
358. Reference to other documents:	Existent at time? Clearly identified?
359. Codicil:	Republication? Stand alone as will? Signed?
360. Signed with "X":	Signature?
361. Paralyzed testator:	Acknowledged will?
362. Unseeing witnesses:	Conscious Presence Doctrine?
363. Witnessed next day:	Unwitnessed?
364. Foreign will:	Valid in place where drafted?
365. "age":	Is testator an adult?
366. "delusion", "groggy", etc.	Testator of sound mind?

AMBIGUITY AND INTERPRETATION

367. "personal effects":	Ambiguous gift?
368. "friends":	Ambiguous beneficiary?
369. Gift of "my house":	Extrinsic evidence to identify?
370. Gift to "Joe":	Extrinsic evidence to identify?
371. "the money in the kitchen drawer":	Ambiguity, Independent legal significance?
372. "the money in my bank account":	Ambiguity, Independent legal significance?
373. "the remainder to a trust"	Pour-over trust?

MISTAKE

374. Heir thought dead:	Error on face? Intent clear?

GIFT PROBLEMS

375. Insufficient funds:	Abatement?
376. Specific gifts missing from estate:	Ademption?
377. Gifts with mortgages and liens:	Exoneration?
378. Gifts prior to death of testator:	Advancement?
379. Gifts by spouse during life:	Recovery of assets possible?

DEAD BENEFICIARIES

380. Dead beneficiaries:	Lapse, Anti-lapse statutes?
381. Relationships:	Anti-lapse statutes? Blood kin?
382. Simultaneous deaths:	Survival rules? 120 hour survival?

REVOCATION

383. Missing wills:	Revocation by implication?
384. "crossed through", "tore":	Revocation by destruction?
385. Surviving copies:	Revocation of single copy?
386. Subsequent will invalid:	Doctrine of Dependent Relative Revocation?
387. Joint wills:	Irrevocable?

CHALLENGES

388. Testator unable to understand:	Unsound mind?
389. Influence, pressure, urging:	Undue influence?
390. Delusions:	Unsound mind?
391. Interested witness:	Fraud presumed?
392. Beneficiary helps draft:	Fraud presumed?
393. Attorney that helps draft benefits:	Fraud presumed?
394. In Terrorem clause:	When effective?

POWER OF APPOINTMENT

395. "to X to distribute to Y":	Gift, special power of appointment or trust?
396. "power to distribute":	Is it imperative or discretionary?
397. "all of my estate":	Was there exercise of power of appointment?
398. "upon her death":	Testamentary power?
399. Donee with debts:	General power that can be attached?

CLASS GIFTS

400. Class gifts:	When did class close?
401. "grandchildren":	Rule Against Perpetuities?
402. Future gifts:	Who is vested?
403. Death of class member:	Vested? Anti-lapse statute apply?

TREATMENT OF RELATIVES

404. Omitted child:	Pretermitted child?
405. Omitted spouse:	Elective share? Statutory share?
406. Adopted, non-marital, half-child:	How treated?
407. Intestate decedent:	Intestate succession rules? Spouse gets?

CREDITOR'S CLAIMS

408. Creditors of donee of power:	Is the power of appointment general?
409. Creditors of beneficiary:	Disclaimer of will valid?

TRUSTS:

Issue Area and Coded Hint:	**Intended Issue:**

VALIDITY

410. "I would like…":	Intent to create trust? Precatory language?
411. "for friends":	Lack of identifiable beneficiary?
412. Funded at death:	Pour-over trust?
413. Lack of trustee:	Valid trust?
414. Settlor gets benefit:	Invalid as spendthrift/support trust?

TYPE

415. "discretion…:	Discretionary trust?
416. "for support…education…":	Support trust?
417. "assigned…anticipated…"	Spendthrift trust?
418. To a pet, animal:	Honorary trust?
419. No specific beneficiary:	Charitable trust?

REVOCABILITY AND TERMINATION

420. "I revoke!":	Permissible method of revocation?
421. Modification:	Revocable trust?
422. Holdout beneficiaries:	Substantial impact on them?
423. Spendthrift/Support trusts:	No longer a purpose?
424. Sole beneficiary is sole trustee:	Merger rule?
425. Lack of purpose:	Termination?
426. Few assets:	Termination by statute?

GARNISHMENT

427. Creditors…:	Attachment, garnishment?
428. Welfare, child support:	Attachment, garnishment?

CHARITABLE TRUSTS

429. Purpose:	Improper charitable purpose?
430. Impossible purpose:	General or Special? Cy Pres apply?

TRUSTEE DUTY

431. Self dealing trustee:	Breach of Duty of Loyalty?
432. Allocation of expenses:	Impartiality? Correct allocation?
433. Speculative investments:	Prudent Investor's Rule?
434. Stock losses, failure to diversify:	Prudent Investor's Rule?
435. Poor accounting, lack of info:	Duty to Inform Beneficiary?
436. Beneficiary forgives trustee:	Indemnification? Consent? Fully informed?

BUSINESS ORGANIZATION:

Issue Area and Coded Hint:	**Intended Issue:**

BUSINESS FORM

437. Tom, Dick and Harry…:	Partnership?
438. Filed Articles of Incorporation:	Corporation?
439. Did not file:	De facto corporation?
440. Filed incorrect Articles:	Corporation de jure?
441. Tom told Dick to…:	Agency?
442. Control authority:	Agency?
443. Dick agreed to do something:	Scope of agency relationship?
444. Act of "President":	Inherent agency?
445. Limited purpose:	Joint Venture/Joint Enterprise?

PARTNERSHIP LIABILITY

446. Intentional act by a partner:	Within scope of business?
447. Negligence by a partner:	Within scope of business?
448. General partner leaves/dies:	Termination?
449. Limited partner manages business:	Loss of liability limitations? Necessary acts?

PROMOTER LIABILITY

450. Agreement to form corporation:	Promoter liability?
451. Tom obtained a line of credit:	Promoter liability?
452. Dick filed the Articles:	Promoter liability?
453. Articles never filed:	Promoter liability?
454. Harry helps start corp:	Promoter liability?
455. Issued stock to promoters:	Promoter liability? Breach of loyalty?
456. Unsecured notes:	Promoter liability? Watered stock?
457. Promises to work:	Promoter liability? Watered stock?
458. Stock in exchange:	Promoter liability? Watered stock?

PIERCING CORPORATE VEIL

459. No assets:	Evidence of fraud? Pierce corporate veil?
460. No dividends:	Evidence of fraud/misuse of corporation?
461. No officers:	Evidence of fraud? Pierce corporate veil?
462. No shareholder meetings:	Evidence of fraud/misuse of corporate form?
463. Commingling funds:	Evidence of fraud/misuse of corporate form?

SHAREHOLDER DERIVATIVE ACTIONS

464. Purpose of corporation:	Ultra vires doctrine?
465. Directors "failed" or "neglected":	Gross negligence? Business Judgment Rule?
466. "Failed to disclose":	Breach of loyalty?
467. Majority/large shareholder:	Controlling shareholder? Breach of loyalty?

SECURITIES EXCHANGE RULES

468. Certificates, warrants, documents:	Are they securities?
469. Publicly traded:	Registered security?
470. Inside information:	10b and 10b-5 rule violations?
471. Breach of fiduciary duty:	10b and 10b-5 rule violations?
472. Knowledge of information source:	Tippee?
473. No trade on the information:	Lack of standing?
474. Information passed to trader:	Tipper?
475. Tender offer information:	Rule 14e-3?
476. Incorrect public announcements:	Rule 10b and 10b-5? Market manipulation?
477. Buy and sell dates:	Rule 16b short swing trades?
478. 10% Percent ownership:	Rule 16b short swing trades?
479. Buy and sell by officer/director:	Rule 16b short swing trades?
480. Issue and sell, less than six months:	Rule 16b trades? Officer or director?
481. Stock drops and then rises in value:	Rule 16b trades? Disgorge of profit?

DUTIES OF DIRECTORS

482. Proxy fights:	Legitimate policy disputes?
483. Takeover attempts:	Paramount and Revlon rules?
484. Undisclosed interests:	Breach of duty of loyalty?
485. Failure to act reasonably:	Breach of duty of due care? Ratification?
486. Indemnification:	Indemnification per Articles? Bad faith?
487. Bond holders:	No fiduciary duty?

RIGHTS OF MINORITY SHAREHOLDERS

488. Merger:	Appraisal rights?
489. Sale of all assets:	De facto merger?
490. Freeze out:	Inherently unfair terms?
491. Sale of controlling interest:	Minority have interest in premium?
492. Immediate replacement of Board:	Control rights of controlling shareholder?

EVIDENCE:

Issue Area and Coded Hint:	**Intended Issue:**
FORM OF QUESTION	
493. Case-in-chief, redirect:	Improper leading question?
494. "Plaintiff's attorney":	Improper leading question?
495. "Do you recall that … "	Refreshing memory of prior testimony?
496. "isn't it true that…":	Leading?
497. Request to tell "all":	Call for narrative?
498. "isn't it true that you didn't…"	Double negative -- confusing question.
499. "Isn't it true…and then that you…?"	Compound question -- confusing question.

RELEVANCE

500. "often happened", "sometimes":	Does evidence tend to prove?
501. The "cause of action":	Is the evidence related to this issue?
502. Similar happenings:	Very similar? To show existence, notice, or
503. knowledge of a condition?	Character evidence exception?

RELIABILITY

504. Apparently proper question to witness:	Lack of foundation?
505. Apparently proper question to witness:	Assumes facts not in evidence?
506. Witness cannot remember:	Testimony unreliable?
507. Witness is child/incompetent:	Testimony unreliable?
508. Stipulation witness is incompetent:	Attempt to introduce statement as hearsay?
509. Photos:	Lack of authentication by a witness?
510. Documents:	Are they authenticated?
511. "Copies":	Violation of best evidence rule?

PROBATIVE VALUE

512. Gory pictures	Prejudice exceeds probative value?
513. A "series" or "parade" of evidence:	Cumulative? Prejudicial effect?

EXPERT OPINION

514. "The expert testified that…":	Is the evidence outside the expert's area?
515. Expert finds item "repaired…":	Not admissible because not an "opinion"
516. Hypothetical questions:	Does it assume facts not in evidence?
517. Opinion of defendant's mental state:	Improper opinion about criminal defendant's necessary mental state? (Hinkley Rule)
518. Expert "thinks":	State with reasonable certainty?
519. Expert test findings:	Accurate? Trained person?
520. "New test not widely used":	Reliable? Frye test longer the law!

LAY OPINION

521. Lay opinions:	Based on witness' observation, within witness' sphere of knowledge and helpful for jury to understand testimony?
522. Color, speed, smell, temperature, handwriting, size, distance, etc.	Within witness' sphere of knowledge?

EVIDENCE OF PAST ACTS BY A PARTY

523. Character of any party:	Improper to prove conduct in conformity?
524. Bad character of victim:	Introduced by criminal defendant?
525. Good character of victim:	Introduced by prosecution to rebut evidence admitted by criminal defendant?
526. Good character of defendant:	Introduced by criminal defendant?
527. Bad character of defendant:	Introduced by prosecution to rebut evidence admitted by criminal defendant?
528. Bad past acts:	To show intent, motive, plan, identity, knowledge, or elements of an offense?
529. Other wrongful acts:	Common plan or scheme?
530. Habitual behavior:	Strict adherence to a regimen?

CHARACTER EVIDENCE TO IMPEACH

531. Bad character of a party on direct:	Opinion and reputation of truthfulness?
532. Bad character of a party on cross:	Inquiry about acts only?
533. Convictions for dishonesty:	Any crime of dishonesty within 10 years?
534. Convictions of other recent felonies:	"non-dishonest" felonies within 10 years and probative value outweighs prejudice?
535. Convictions of old crimes:	Crimes over 10 years but probative value substantially outweighs prejudicial effect?
536. Specific acts of dishonesty:	Violation of Collateral Evidence Rule?
537. Evidence of honest character:	Has honesty previously been attacked?
538. Evidence of "good" character:	Does it go to truthfulness?
539. "God-fearing", "Church", "Christian":	No evidence of religious beliefs allowed!

OTHER EVIDENCE TO IMPEACH

540. Evidence witness has financial interest:	Evidence of bias or untruthfulness?
541. Evidence witness has family relationship:	Evidence of bias or untruthfulness?
542. Glasses, hearing aid:	Ability of witness to perceive?
543. Age:	Ability of witness to remember and relate?
544. Education, literacy, use of language:	Ability of witness to understand?
545. Inconsistent past statement by witness:	Is witness here to explain? Oath unnecessary.

NON-HEARSAY FOR PROOF

546. Past statement by a party:	Admission of opponent party?
547. Statement by co-conspirator:	Admission of party to conspiracy?
548. Statement by agent or spokesman:	Admission of party?
549. Guilty plea:	Admission of party to essential elements?
550. Nolo Contendere plea:	Not admission of party to essential elements?
551. Inconsistent statement under oath:	Inconsistent and witness here to explain?
552. Consistent past statement by witness:	Consistent with testimony, here to explain and opposition implies testimony is recent fabrication?
553. Identification statement:	After "perceiving" and here to explain?

TESTIMONY REFRESHED

554. Showing witness photos, objects, notes:	Past recollection refreshed?

HEARSAY

555. "Ouch!"	An exclamation and non-assertion?
556. "Why?":	A question and non-assertion?
557. "Help!":	An imperative and not an assertion?
558. "Do you know that…?":	A question or an imbedded assertion?
559. Denials: "I didn't do it!":	A denial or an assertion?
560. "I am dead!":	Purpose to show life rather than death?
561. "I do":	Marriage -- independent legal significance?
562. "I will do it":	Contract -- independent legal significance?
563. "He is bad":	Defamation -- independent legal significance?
564. Startling events:	Excited utterance exception?
565. Crying, screaming:	Evidence for excited utterance?

566. Collisions, explosions, robberies:	Excited utterance exception?
567. "I am dying":	Dying declaration? Witness gone?
568. "I did the crime"	Statement against interest??
569. Testified:	Former testimony exception?
570. "He's my brother, father, etc.":	Statement of pedigree? Witness gone?
571. Nodded:	Assertion by behavior?
572. Silently nodded to other's statement:	Adoption of assertion?
573. Silent as other speaks:	Implied admission by silence?
574. Immediate report of observations:	Present sense impression?
575. Notes immediately after events:	Past recollection recorded?
576. "I am hungry, angry, and in pain":	Statement of current physical, emotional state?
577. "I am going to go somewhere":	Hillmon Doctrine
578. "I was hit by a car, Doctor":	Said for medical diagnosis / care?
579. Records:	Business records? ancient records? public records (certified?) church records? land records? commercial lists? market reports? weather reports? absence of a record?
580. Felony convictions:	To prove fact essential for the verdict?

EXCLUDED ON POLICY GROUNDS

581. "Brakes already repaired":	Inadmissible evidence of remedial measures?
582. "Settlement offer":	Inadmissible to prove fault?

PRIVILEGED COMMUNICATIONS

583. Said to attorney:	Attorney-client privilege?
584. Discovered by attorney:	Attorney Work Product?
585. Said by one spouse to other:	Marital communication privilege?
586. Spouse of criminal defendant:	Spousal privilege?
587. Jury deliberations:	Jury privilege?
588. Physician:	Physician-patient privilege?
589. Priest:	Priest-penitent privilege?

PROFESSIONAL RESPONSIBILITY:

Issue Area and Coded Hint:	**Intended Issue:**

UNLICENSED PRACTICE

590. Paralegal, clerk, secretary:	Unlicensed practice of law?

SOLICITATION OF CLIENTS

591. Solicitation at hospital, ambulance:	Improper solicitation?
592. Advertisements, claims:	Improper solicitation?
593. Guarantees of success:	Improper solicitation?

FULL DISCLOSURE

594. Contrary case law:	Failure to disclose to court?
595. Old friends with opposing counsel:	Failure to disclose to client?
596. Prior work for opposing party:	Failure to disclose to client?

IMPROPER ACCEPTANCE OF CASE

597. Attorney observed event in dispute:	A possible witness in matter?
598. No knowledge or experience:	Make necessary effort to learn?
599. Related to opposing party/counsel:	Conflict of interest? Disclosure?
600. Financial interest, media rights:	Conflict of interest? Honest belief?

FAILURE TO ADEQUATELY REPRESENT

601. Missed deadlines:	Failure to adequately represent?

FEES

602. Contingency fees:	Excessive fees? Family or criminal law?
603. Fee agreements:	Failure to provide written fee agreement?

WITHDRAWAL

604. Action for improper purposes:	Mandatory withdrawal?
605. Claim lacks legal basis:	Permissive withdrawal?
606. Before tribunal:	Court permission required?
607. Attorney physical/mental condition:	Representation ineffective or just difficult?

CLIENT CONFIDENCES

608. Client admits past crimes:	Can attorney reveal?
609. Client threatens future crimes:	Can attorney reveal?
610. Client reveals evidence:	Must attorney conceal or reveal?
611. Client insists on improper action:	Can attorney reveal? Must attorney withdraw?

REMEDIES:

Issue Area and Coded Hint:	**Intended Issue:**

CONTRACTS

612. General damages:	Expectation damages? Reliance damages?
613. Conveyance of benefits:	Restitution?
614. Lost profits:	Consequential damages? Certain in amount?
615. Failure to minimize losses:	Unavoidable losses? Certainty
616. Goods:	Cover? Non-conforming? Time to cure?
617. Previous shipments:	Course of dealing? Gap fillers?
618. Implied contracts:	Reasonable expectation of compensation?
619. Rescue of unconscious party:	Volunteer plaintiff? Implied in law contract?
620. Violation of the Statute of Frauds:	Equitable restitution?
621. Illegal contracts:	In pare delicto? Rescission and restitution?
622. Lack of capacity/minors:	Contract for necessities? Ratification?
623. Mutual mistake:	Rescission and restitution?

SPECIFIC PERFORMANCE

624. Antiques, rare paintings:	Unique so specific performance per UCC?
625. Land:	Unique so specific performance appropriate?
626. Services of actors/Sports figures:	No specific performance per 13th Am.?
627. One sided contract:	Sufficient "mutuality" for specific performance?
628. Complex transactions:	Feasible for court to supervise?

TORTS

629. Intentional torts:	Punitive damages appropriate?
630. Indigent tortfeasor:	Injunction?
631. Determined tortfeasor:	Injunction?
632. Nuisance and repeated trespass:	Injunction -- otherwise repeated
633. Lost profits caused by negligence:	Privity between parties? Foreseeable result?
634. Keepsakes, trophies, mementos:	Objective sentimental value? Repair costs?

RECOVERY OF TITLE

635. Title obtained by false pretenses:	Equitable replevin?
636. Title transferred by tortfeasor:	Good faith purchaser for value w/o notice?
637. Property taken by false pretenses:	Constructive trust? Equitable lien?

ENCROACHMENT, EJECTMENT, ZONING

638. "Knew":	Did defendant knowingly act to encroach?

ESTOPPEL

639. Behavior intended to induce action:	Did silence imply a representation of fact?
640. Promise to pay:	Promissory estoppel.

INJUNCTIONS

641. Immediate needs:	TRO and preliminary injunction?
642. Violence, stalking, threats:	TRO?
643. Restraint on speech:	TRO appealable?
644. Defamation, trade slander:	Inadequacy of legal remedies?
645. Removal of person/property:	Unlawful Detainer inadequate?
646. Complex transactions:	Feasible for court to supervise?
647. Ecology, health, safety:	Balance of public interest?
648. Poor people:	Balance of interests?
649. Trivial claims:	Balance of interests? Likelihood of success?
650. Political issues:	Public interest? Likelihood of success?

EQUITABLE DEFENSES

651. Illegal/wrongful acts by movant:	Defense of unclean hands?
652. Delay, passage of time:	Defense of laches? Resulting prejudice?
653. Subsequent transfer of title:	Bone fide purchaser for value without notice?
654. "without knowing":	Bone fide purchaser for value without notice?
655. Commingled funds:	Defense to claim of constructive trust?

DEFENSES TO CONTEMPT ORDER

656. "Unknowingly":	Lack of notice? No personal jurisdiction?
657. "Next day":	Lack of time to appeal order?
658. Vague terms of order:	Impermissibly vague court order?

ATTORNEY FEES

659. Fee claims:	American rule? English rule? Loadstar?
660. Matter of public interest:	Private Attorney General rule?
661. Civil rights claims:	Statutory fee provisions?

Chapter 6: Avoid Non-Issues, Red Herrings and Splits

It is almost as disastrous to waste time discussing a non-issue as it is to fail to discuss an intended issue. It wastes time and irritates the Bar grader.

Remember, you get ZERO POINTS for discussing any issue that is not on the Grading Key. The Bar grader does not have the authority to give you points for your imagination and inventiveness.

Also remember that while you discuss the non-issue, everyone around you is discussing the intended issues. They are making points and you are being stupid.

How to recognize non-issues. A non-issue is an issue that is not on the Grading Key. Remember that the Bar staff spends weeks writing the Bar questions. For every issue the Bar staff wants you to discuss there will be one or more specific facts as "signs" or indicators. The Bar does not want to be accused of "hiding the ball", so if you see a "really subtle" issue or an issue that you think "most people" will not recognize, it is probably an UNINTENDED ISSUE.

Hints. If the Bar staff fears you might misunderstand an issue, they will add HINTING WORDS. One example would be a word like "reasonable." If the question says some one took "reasonable steps" then that is a clear sign the Bar does NOT want you to waste time analyzing whether or not they were negligent.

The Call. Another way the Bar will direct you is by the CALL OF THE QUESTION. If the call says discuss Joe's liability in an action by Bob, the Bar does NOT want you to discuss criminal law because only the state, and not Bob, could bring a criminal action.

How many issues? Another indicator is the NUMBER of clearly indicated issues. If you can count 6 to 8 clearly indicated issues to discuss, it is unlikely the Bar wanted you to discuss some other hidden issue. For example, if two criminals commit six to eight clear crimes (including conspiracy), and no facts are given to show a solicitation occurred, do not waste your valuable time discussing that very marginal issue that MERGES anyway.

Stay mainstream. Another consideration is that the Bar wants you to discuss **mainstream law school issues**, not marginal or tangential issues of law. For example, the appropriateness of border stops of automobiles by police is a major subject of law school discussion. Smuggling and drug possession is not a major subject in law school. So if a car with drugs is stopped crossing the border, discuss the appropriateness of the stop. Do not waste time discussing "attempted smuggling" or drug possession as crimes.

Example of non-issues. Suppose the question states:

> *"Bill and Ted burst through the open door of the Seven-Eleven store at noon with assault rifles blazing, only to find they had made a big mistake because the store had been deserted weeks before. ... Discuss the criminal liability of Bill and Ted."*

Here the clearest and most important issue to discuss is ATTEMPTED ROBBERY. But the fact that there are two robbers instead of one implies some discussion of CONSPIRACY or ACCOMPLICE LIABILITY may be intended.

In your discussion of attempted robbery, you must define LARCENY because it is an element of robbery, and you must define also ROBBERY as the criminal goal of the ATTEMPT. You can define attempt, robbery and larceny all in one sentence, as follows:

> *"Under criminal law an ATTEMPTED ROBBERY is committed when a SUBSTANTIAL STEP is taken toward committing a ROBBERY, which is a LARCENY, a trespassory taking of personal property with an intent to permanently deprive, from the person by force or fear."*

CONSPIRACY would be a second, independent charge against the defendants because it does not merge into the criminal goal. Further, here there must have been some agreement between Bill and Ted, and they committed an overt act when they burst through the door. Therefore, conspiracy is an issue to discuss.

Another issue raised here is MISTAKE OF FACT. Although it is not an adequate defense, the issue is hinted at here by the hinting words "mistake…deserted weeks before."

But SOLICITATION is a non-issue that you should not waste your time discussing. There are absolutely NO FACTS to show there was a solicitation, so it is a waste of your time to speculate about that issue.

Another non-issue here is BURGLARY. To discourage you from discussing burglary, the facts very deliberately state that the door was "open" and the event was at "noon". These words are hints that burglary is NOT an intended issue to be discussed. In fact, there is almost nothing else the Bar grader could do to stop you from talking about burglary here, other than saying, "don't talk about burglary, stupid."

If the Bar WANTED you to discuss burglary they would say the robbers burst into a "home", or through a "locked door", or at "midnight" and maybe their intent would be to commit a larceny rather than a robbery.

Other non-issues here are ASSAULT or ATTEMPTED ASSAULT. Although a criminal assault is an "attempted battery" and the defendants were attempting to rob someone, the store had been "deserted for weeks" so the issue is too remote in time and possibility to merit discussion.

Finally, MAJOR NON-ISSUES are ASSAULT WITH A DEADLY WEAPON or WEAPONS VIOLATIONS. Although it is probably illegal to have or use weapons in this manner, that is neither a law school nor a Bar topic. Stick to discussion of common law crimes and law school subjects unless clearly told otherwise.

Red Herrings. Although the Bar will give you hints about the issues you are intended to discuss, it will also deliberately throw out a few RED HERRINGS to mislead the careless. A RED HERRING is a fact that hints at a totally different AREA OF LAW from the call of the question. The purpose of the Red Herring is to test your ability to focus on the CALL of the question without being distracted to irrelevant issues.

There is a similarity between a Red Herring and a CROSSOVER issue because both raise issues from a different area of law from the main body of the question. The difference between a

crossover issue and a Red Herring is that the call of the question will ask for discussion of the crossover, but it will not ask for a discussion of the Red Herring.

Example of Red Herrings. Suppose the question states:

> *"Tom sold a car to Dick for $1,000, and Dick promised to pay at the end of the month.*
>
> *Dick used the car to rob a bank and Tom was a witness. The next day, while still fleeing from his crime, he negligently rammed the car into the back of Paula's car. Paula was Tom's casual friend and she died and left Blackacre to Harry, Tom's brother, by an attested will that was only signed by one witness, Tom. When Harry received the inheritance he was married to Wanda but he lived in California, and she had temporarily moved to Nevada to file for a quickie divorce in District Court so she could marry her lover, Tom.*
>
> *Dick didn't pay Tom. What are Tom's remedies?*

Here the call of the question is to discuss Tom's remedies against Dick. The only injury Tom has suffered from Dick is his failure to pay $1,000 for the car. None of the other facts give Tom any cause of action.

Tom's only cause of action is based on CONTRACT. Everything in the second paragraph is a Red Herring because it has absolutely nothing to do with contract law and would have no relevance to Tom's remedies against Dick.

Example of Legitimate Crossover. Suppose the question states:

> *"Tom sold a car to Dick for $1,000, and Dick promised to pay at the end of the month.*
>
> *Dick negligently rammed the car into the back of Paula's car. Paula was Tom's wife and Tom was co-owner of Paula's car. Paula died.*
>
> *Dick didn't pay Tom. What are Tom's remedies?*

Here the call of the question is exactly the same, but Tom has suffered two injuries at the hands of Dick. First, he has a CONTRACT action as before. But secondly, he has a TORT action for wrongful death and property damage based on negligence. Here there is a CONTRACT-TORT crossover question.

Avoid Wasting Time on Split Discussions. A split is conflict of rules that should be mentioned in the rule statement, but not usually be mentioned at all in the analysis.

For example, one might define common law burglary and then state, "Modernly, statutes have extended burglary to all structures and all times of the day." Having stated this, it is a waste of time to let this difference dominate the analysis of the facts. Do not agonize over whether the common law or modern rule applies. Don't try to analyze both possibilities. Simply analyze whether the elements are supported by the facts and state a conclusion without reference back to the split.

As a second example, California law on some issue may differ from that followed by other states. In stating the rule of law, it is important to say, "States are split on this issue," but usually little more needs to be said. AVOID GETTING HUNG UP ON DISCUSSION OF SPLITS.

Where the Bar INTENDS for you to analyze a split of law, the Bar will clearly INDICATE that intent. In that case you should define each of the positions that have been taken, the California view, and whether California is in the majority or minority view.

If you **clearly wonder** if you should discuss the split between California and other jurisdictions, the answer is **clearly, "NO."**

Chapter 7: A WARNING about Example Answers

The Bar selects and distributes exemplary answers. These are answers that the Bar has given high scores. This is a very misleading and counterproductive practice that produces unfortunate results.

The "example" answers selected for distribution by the Bar are often too long, too erudite, too complex and took the applicant too much time to write. Sometimes the statements of law in these answers are even wrong.

Test this for yourself. Select one of the longer answers released by the Bar and try to physically copy it in written form in a time of 45 minutes. People have tried this and physically it often cannot be done. And you know that if you cannot even blindly copy the answer in 45 minutes, the original applicant certainly did not read, outline, compose and write that answer in the allotted time.

Writing ONE excellent essay answer SHOULD NOT be your goal. One excellent essay will NOT get you past the Bar. RATHER your goal should be to write SIX essay answers that are each "good enough" to get a score of 70 or 75. That is what it takes to pass the Bar, and that should be your goal.

Why does the Bar do this? The reason the Bar releases example answers that are actually misleading is that it doesn't have much of a choice. The Bar is a government agency and it cannot refuse to provide examples of good answers, because they are demanded by the public. Government agencies cannot ignore public demand.

Since the Bar must release "exemplary" answers, it must release some of the very best ones written. This simply means answers that have the highest scores.

Since the Bar must release answers with the highest scores, it naturally follows it must often release some that took far too much time to write.

The best answers are those that 1) state all required issues, 2) give correct rules of law for each, 3) give a straightforward analysis, 4) match the stated facts to the elements, and 5) state a simple conclusion, **all within one hour**. The Bar will seldom release that kind of an answer, because it will often be given a score of 70 or 75, not 85.5.

Chapter 8: Budgeting Time

IT IS ABSOLUTELY ESSENTIAL to keep on schedule while taking the Bar. This is true for each segment of the Bar, especially the essays. You must write three Bar essays in three hours. Each essay question is intended to take one hour. You must establish and stick to a time schedule that matches this design. Do not go overtime thinking you will catch up later -- you won't.

YOU MUST HAVE A WATCH OR CLOCK with you when you do the Bar. Set the watch or clock to the hour (9:00 a.m.) When the proctor says, "You may begin," you start that watch or clock at the starting hour.

Do not depend on the clock on the wall when the Bar is given because it will not be set to the hour at the beginning of the test, it may not be easily visible, and it might stop working.

The key to keeping your essay on schedule is to **NUMBER THE ISSUES** on your outline, **COUNT THE ISSUES** and **MARK YOUR OUTLINE** with the time each issue should be finished.

RESERVE 5 MINUTES at the end of each essay to underline issue statements and key words and to check for omissions. Therefore, if you spend 15 minutes outlining, and save 5 minutes at the end, you really have only 40 minutes to write.

Example. Suppose it takes 15 minutes to read the question and create the Question Outline that was created above in Chapter 4. There are 45 minutes left and 7 issues to write about (the beginning "contract statement" is like an issue). If you reserve 5 minutes at the end to underline and check your work, you have to write the 7 issues in 40 minutes. This gives you between 5 and 6 minutes to write about each issue.

FOLLOW THE PLAN -- MARK THE START/FINISH TIMES for each issue on the outline by adding 5 and 6 minutes (alternating) to the outline. Suppose the question on page 10 was the first essay of the morning, at 9:00 a.m. Marking the times for each issue on the outline, alternating 5 and 6 minute schedules, produces the following schedule:

QUESTION OUTLINE WITH TIME SCHEDULE

Start

[9:15] Contract statement -- CONTRACT LAW, define contract and elements.

[:20] 1. Choice of law -- UCC (GOODS?) or common law? "house"

[:26] 2. Does STATUTE OF FRAUDS apply, and is it satisfied? "house" = "land"

[:31] 3. Was the ADVERTISEMENT an OFFER -- define OFFER.

[:37] 4. Did H make OFFER at 9:00? "had to see it first".

[:42] 5. Did L give H a VALID OPTION at 9:00? -- define OPTION, CONSIDERATION. "firm offer"?

[:48] 6. Did H make valid ACCEPTANCE at 3:00? -- define ACCEPTANCE,

LAPSE -- hours late. REVOCATION -- not if offer lapsed.

End = [9:53]

STICK TO SCHEDULE. It does absolutely no good to develop a time schedule if it is not followed.

Check the schedule against the clock as you finish each issue of the essay. If you are behind schedule, shorten the analysis of the next issues to get back on schedule. If you are ahead of schedule, give more extensive rule statements, analysis and citation of facts in the remaining issues to use the extra time you have.

PRACTICE CHECKING THE CLOCK at the end of each issue in practice exams. This has to be practiced until it becomes a regular habit.

MODIFY to meet your personal needs AFTER you are proficient in this approach. You can relax your approach and may be able to eliminate the timing from the outline altogether eventually. But start out with a timed approach first.

Chapter 9: Organizing the Answer

ORGANIZE the essay answer based on the CALL of the question and the AREA of law.

Organized by Call. If the call of the question indicates the organization of the answer, you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. Did the ordinance violate EQUAL PROTECTION?*
> *b. Did the city violate DUE PROCESS?"*

Then, these are the exact issues to discuss and the exact organization to follow. In this case, DO NOT ALTER THE DISCUSSION ORDER OR DISCUSS ANYTHING ELSE.

As a second example, the evidence question on the July 1999 Bar Exam asked for the objection that would be raised to the evidence, the response by the offering party and the ruling by the court for each of several items of evidence. The proper answer to that question should have been organized to reflect the call on these lines:

a. Objection -- What RULE is the objection based on and WHY?
b. Response -- What EXCEPTION might apply and WHY?
c. Ruling -- Sustained or Overruled -- What CONCLUSION would the court reach?

In cases like this, structure your answer EXACTLY AS DIRECTED.

Organization by Area of Law. If the call of the question is general, such as "Discuss the issues raised," then the organization of your answer depends on the AREA OF LAW.

Organization of a CRIME Answer. If the question involves criminal law, your answer should be structured by DEFENDANT. Start with the defendant that took the MOST ACTIVE PART in committing the crimes.

> Discuss SOLICITATION and CONSPIRACY before discussing the criminal goal, but do not discuss solicitation unless there is some factual support.
>
> Discuss DEFENSES based on absence of an element of the crime (a passive defense) as part of your analysis of the crime issue.
>
> Discuss AFFIRMATIVE DEFENSES such as self-defense as a separate issue if it appears to be a required issue.
>
> Discuss MURDER after all lessor crimes such as robbery. But discuss MANSLAUGHTER following the murder, as an alternative lessor offense.
>
> Discuss the liability of second or marginal defendants second, with a focus on ACCOMPLICE and CONSPIRACY LIABILITY.

For example, if "Crazy Bob held up the bank and Dick helped him plan it," the structure of the answer would be:

> ***People v. Bob***
>
> *1) Can Bob be charged with CONSPIRACY?*
>
> *2) Can Bob be charged with ROBBERY?*
>
> *3) Can "Crazy" Bob raise the DEFENSE OF INSANITY?*
>
> ***People v. Dick***
>
> *4) Can Dick be charged with all crimes of Bob under ACCOMPLICE LIABILITY?*

As an alternative example, suppose, "Dick said, 'Let's rob a bank!', so Crazy Bob held up the bank and Dick helped him plan it." Here the solicitation by Dick is so clear that it is another issue that must be discussed.

Organization of a TORT Answer. A tort answer should be structured by plaintiff and defendant.

> Discuss INTENTIONAL torts before NEGLIGENCE.
>
> If DEFAMATION issues are raised you will have to define and discuss negligence to apply *Sullivan v. New York Times*, etc.
>
> Discuss DEFENSES as separate issues if the facts appear to make them required issues.
>
> For example, if "Ted dared Bob to throw at him. Bob threw at Ted, missed and hit Henry," the structure of the answer would be:
>
> > ***Ted v. Bob***
> >
> > *1) Is Bob liable for TORTIOUS ASSAULT?*
> > *Under tort law assault is …*
> >
> > *2) Can Bob raise the DEFENSE OF CONSENT?*
> > *Under tort law CONSENT is a valid defense …*
> >
> > ***Henry v. Bob***
> >
> > *3) Is Bob liable for TORTIOUS BATTERY?*
> > *Under tort law battery is …*

Organization of a CONTRACT Answer. If the question involves contract law, your answer should be prefaced with a statement that defines what a contract is and the basic elements of a valid contract.

> Next, discuss whether the UCC applies or just common law. If the answer is governed by the UCC, immediately settle whether or not the parties are MERCHANTS.
>
> Address the STATUTE OF FRAUDS and need for a writing next.
>
> If the question involves contract FORMATION or BREACH your answer should go through all communications between the parties CHRONOLOGICALLY to determine when the contract formed and/or when the contract was breached.
>
> Discuss the DEFENSES as separate issues.
>
> Tread a discussion of REMEDIES as two separate issues -- the remedy of the BUYER and the remedy of the SELLER.

Organization of a COMMUNITY PROPERTY Answer. If the question involves community property, your answer should begin with a statement of California community property law defining the concepts of separate, community and quasi-community property. If it involves a putative spouse, add an explanation of quasi-marital property. Next your answer should consider, IN ORDER, each item of property mentioned in the question and classify it.

Organization of a WILL and TRUST Answer. If the question involves a will or trust, your answer should begin with a statement of what a will or trust is. Next your answer should analyze whether the will or trust is VALID or not.

General Issue Organization. Other than as stated above, the general organization of issues in your answer should parallel the question. The Grading Key will be based on an expectation that you will usually structure their answer along the lines of the question.

Chapter 10: Issue Statements

Issues Structured by Call. If the call of the question indicates the structure of the issue statements, follow that structure EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. Did the ordinance violate EQUAL PROTECTION?*
> *b. Did the city violate DUE PROCESS?"*

Then, these are the exact issues to discuss.

Issue Structure Otherwise. You should always put an ARABIC number in the left margin for each issue statement. And UNDERLINE the entire issue statement.

DON'T USE ROMAN NUMERALS OR LETTERS for issue statements because they waste your time and the Bar grader probably won't be able to figure them out anyway. She is expecting you to discuss 8 issues, NOT "VIII" issues or "h" issues.

The issue statement should present a SHORT question ending with a question mark (?). It often is a good idea to put the main legal word in the question in UPPER CASE. The question can be a single word or phrase.

The numbers on the issues should match the numbers on your outline or you will get confused and your timing will get completely off!

If you skip a number or two the Bar grader might miss it and think you answered more issues than you really did. That is not a bad thing. So, if you only see 7 issues, but end up with number 8 on your last issue statement, the Bar grader may be tricked into believing you found an eighth issue in there somewhere. That will not hurt you.

Examples:

1) Can Bob be charged with BURGLARY?
2) CRIMINAL ASSAULT?
3) Is Bob liable for TORTIOUS ASSAULT?
4) ADVERSE POSSESSION?
5) Was statement of 6/1 an OFFER?
6) Violation of ATTORNEY-CLIENT PRIVILEGE?
7) RULE 10-b VIOLATION?

Phrasing Issues by Area of Law. The best phrasing for the issue statement depends on the area of law.

Use Straw Man Issues. Set up your issue as a "straw man" so that you can easily "knock it down" by identifying the elements, showing the facts support the elements, and thereby go on to consider other issues. Avoid reaching a conclusion that necessarily precludes discussion of other issues.

Crimes. Always ask if the defendant can be "charged," NOT whether he is "guilty." The reason is that it makes it easier to state a conclusion. The defendant can almost always be charged with the crime.

Don't conclude the defendant is "guilty" of murder, unless the CALL of the question demands it. Just say he can be "charged" with murder, and then you can also argue he could be charged with manslaughter as well. Juries decide guilt, not lawyers. You are going to law school, not jury school. So don't delve into guilt.

For issues of assault and battery, refer to them in the issue statement as "criminal assault" and "criminal battery" to make it clear you recognize this is not a tort issue.

If a defense is an issue, ask if the defendant can "raise" or "claim" the defense, not whether he would be "innocent." Phrase the issue in the form,

> "Can Bob claim SELF-DEFENSE?"

Torts. Always ask if the defendant "can be liable," NOT "guilty." Guilt is a criminal term, not a tort term.

For issues of assault and battery, call them "tortious assault" and "criminal battery" to make it clear this is not a criminal issue.

Raise defense issues the same as for crimes,

> "Can Bob raise NECESSITY as a defense?"

Contracts. In FORMATION and BREACH issues, always cite the communications CHRONOLOGICALLY, citing the time or date of each communication. For REVOCATION the issue is whether it was an EFFECTIVE revocation. For "firm offers" the issue is whether CONSIDERATION is necessary.

> "Was the letter of 6/1 an OFFER?"
> "Was Buyco's statement on 9/1 a contract REPUDIATION?"

Constitutional Law. Be aware that there are actually THREE SEPARATE DUE PROCESS ISSUES.

1. The first is whether a statute FACIALLY violates substantive due process.
2. Second whether there is a violation of substantive due process as APPLIED.
3. Third, there is a question of whether PROCEDURAL due process is violated.

Real Property. As with contracts, where a series of events have occurred over time it is best to raise issues that CHRONOLOGICALLY trace the ownership interest of the property:

> "On 1/1/1960 what was Bob's interest in Blackacre?"
> "On 1/1/1970 what was Bob's interest in Blackacre?"
> "Did Henry gain title on 1/1/1980 by right of survivorship?"

Chapter 11: Nailing the Elements - The HEART of the Essay

The heart of every Bar or Law School Essay is **NAILING THE ELEMENTS.** This means to

1) State an ISSUE raised,
2) State the AREA of LAW that applies,
3) State the APPLICABLE RULE and its **ELEMENTS**, then
4) PROVE that **HERE** EACH and EVERY ELEMENT can be proven by evidence **BECAUSE** a relevant **SUPPORTING FACT** exists in the fact pattern.

State your issue in a manner that allows it to be quickly analyzed and concisely dispatched. And then state the rule of law, underlining the elements that need to be discussed.

After that go to a new paragraph and focus your analysis on the elements of the law first before citing evidence or facts. Only cite them to prove the element of law. Focus on the law; don't focus on the facts. Prove each element of the law by linking it to a fact from the fact pattern with the explanatory word "because."

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State and underline the ELEMENTS of the RULE, and
2) NAIL (prove) each ELEMENT of the rule with a QUOTED FACT.

Cite the AUTHORITY. The big difference between the Bar and law school is that on the Bar you must show the Bar Grader that you know the area of law that applies. Up front in your answer TELL THE GRADER THE LEGAL AUTHORITY your answer is based on.

Start your answer with the word "Under …" and cite the authority for your rule of law.

Examples:

1) Under common law …
2) Under tort law …
3) Under the Statute of Frauds …
4) Under the California Probate Code …
5) Under the UCC …
6) Under the Federal Rules of Evidence…
7) Under the Federal Rules of Civil Procedure …
8) Under Article I of the Constitution, Congress …
9) Under the 1st Amendment…
10) Under Palsgraf
11) Under New York Times v. Sullivan

State the RULE. Generally you should state together all rules of law that apply to the issue. Underline the elements that must be proven.

The Bar grader is looking for the RULE to follow the ISSUE. You must put the rule where the grader expects to find it.

Underline the ELEMENTS of the rule so that your analysis and application of the facts to the rule makes it clear you are proving the elements exist.

Examples:

1) Under common law a BURGLARY is a breaking and entering of a dwelling in the night with intent to commit a felony.
2) Under contract law and OFFER is a manifestation of …
3) Under tort law NEGLIGENCE is a failure to exercise …
4) Under the Statute of Frauds a contract for LAND must usually be in WRITING.

NAIL EACH ELEMENT WITH A FACT. This is the single **MOST COMMON REASON PEOPLE FAIL THE BAR**.

Remember, IF YOU DO NOT NAIL, YOU WILL FAIL!

You must show that each ELEMENT is PROVEN BECAUSE there is a FACT provided to prove it. "Nail" each element with a fact from the question by using the following form:

> "Here [the ELEMENT of law] is PROVEN BECAUSE "[some FACT is given]".

One "Because" for each Element. Use the word "because" and give a "quoted fact" for each and every element in the rule. If the rule has four elements, there should be four "because"s and four "quoted fact"s .

You can combine two or more elements into a statement and otherwise modify this approach. But this general approach MUST be used.

If you follow this "Here … because … "quote"" approach, you will AUTOMATICALLY focus on each element of your rule and to the facts that prove that element.

Example 1: If the question says, "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."

> Analyze burglary as follows:
>
> *"1. Can Bob be charged with BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony or larceny.*
>
> *Here there was a breaking into the house because Bob "forced the lock." And Bob entered because he "climbed inside."*
>
> *Further Bob entered a dwelling because it was a "house", and it was at night because it was by "moonlight".*
>
> *And Bob entered the house of another with an intent to commit a larceny because he wanted to take a "purse" that was obviously not his.*

Therefore, Bob can be charged with burglary.

Example 2: Suppose the question says, "Bob told Jim, 'Shoot Tom'."

Analyze solicitation as follows:

"1. Can Bob be charged with SOLICITATION?
Under criminal law SOLICITATION is the act of urging another to commit an illegal act.

Here Bob acted to urge Jim to do something because he said, "Shoot", and the act he urged Jim to do was illegal because it was to "Shoot Tom."

Therefore, Bob can be charged with solicitation
.

Example 3: Suppose the question says, "Bob pointed a gun at Jim and took his watch."

Analyze robbery as follows:

"1. Can Bob be charged with ROBBERY?
Under criminal law ROBBERY is a larceny, the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive, from the person by force or fear.

Here Bob committed a larceny and took the personal property of another because he "took Jim's watch".

And here he used force or fear to complete the larceny because he used a "gun".

And also Bob committed a larceny from a person because he took the watch "from Jim."

Therefore, Bob can be charged with robbery.

Give a SIMPLE CONCLUSION. This is the least common Bar problem area. All applicants are quick to cite conclusions. The simplest approach is to state, "Therefore…"

About the only error one can make in citing a conclusion is to be WIMPY or WISHY-WASHY. Do NOT give a conclusion like these:

WRONG: "*Bob may be charged with burglary if this is a jurisdiction that has dropped the common law requirement that the building must be a dwelling, or unless the court finds this to be a dwelling because Hobo Joe was sleeping in the alley behind the store. But if Bob was in a common law jurisdiction he could not be charged with burglary."*

WRONG: "*Maybe Bob could be charged with burglary."*

Instead, just say,

RIGHT: *"Therefore, Bob can be charged with burglary."*

Devote more time to discussion of the elements that are NOT clearly supported by the evidence. If an element IS clearly supported by the evidence only discuss it briefly.

> **For example:** *"Bevis got drunk, opened the window to Butthead's house at midnight, climbed inside and went to sleep. The next morning when he woke up he took Butthead's TV and left. Discuss."*

The issue here is clearly burglary and the questionable element is whether Bevis had a felonious intent at the time he entered the house or whether he developed the intent to steal after he got inside. That is why the question says Bevis was "drunk" and "went to sleep." That is the element you are expected to discuss in depth. So with a question like this you should prove the breaking and trespassory entry of the dwelling of another in the night with minimal discussion and then focus on the missing or questionable element -- intent to steal at the time of entry or intent that formed later.

Summary. In summary, a sure-fire approach to issue analysis follows the following pattern:

> *1. {Issue}*
>
> *"Under ... [rule-- element 1 -- element 2]."*
>
> *"Here ... [element 1] ... because ... [quoted fact]." "And here ... [element 2] ... because ... [quoted fact]."*
>
> *"Therefore..."*

Chapter 12: Avoid "Conclusionary" Analysis

Law students are often told their answer is "conclusionary" but that term is seldom explained. Sometimes the student is told to "use the facts." That also is seldom explained.

A "conclusionary" analysis is one that jumps to a conclusion regarding an issue without any analysis of the facts that show the elements of the legal rule are supported by evidence.

The identifying characteristic of a conclusionary analysis is that the word "because" never appears BECAUSE no FACTS are referred to.

Example: Suppose the question says,

> ”Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> A **CONCLUSIONARY** answer is --
>
> *"1. Can Bob be charged with BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony or larceny.*
>
> *Here Bob broke and entered into a house, it wasn't his house and it was at night. He took a purse with intent, so Bob can be charged with burglary.*

The conclusionary analysis jumps to a conclusion that the issue is proven by reference to the rule without reference to supporting facts.

For example, here there is a statement that "Bob broke" but no explanation of how that conclusion was reached. The explanation, that "Bob broke" because he "forced the lock" is absent from the answer.

In an essay there should be one "because" and at least one reference to the facts for every element of every rule. This rule can be relaxed, but if there are few or no "because"s at all, and few references to the facts, the essay is conclusionary and totally unacceptable.

Chapter 13: Avoiding Restating of Facts

Law students are often admonished to "use the facts" but not to "restate the facts". It is seldom explained what that really means. In fact, it is difficult to understand how one must "use the facts" without "restating the facts."

The bad habit of "restating facts" means that the student simply repeats the facts without providing any analysis relating those facts to the elements of the rule.

The identifying characteristic of an answer that simply restates facts is that the word "because" never appears BECAUSE no ELEMENTS are referred to.

An analysis which "simply restates facts" jumps to a conclusion that the issue is proven by reference to the facts without reference to the legal elements of the rule.

Example: Suppose the question says,

> ”Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> An answer with **UNNECESSARY RESTATEMENT OF FACTS** would be --
>
> *"1. Can Bob be charged with BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony or larceny.*
>
> *Here Bob "forced the lock" on the "window" and "climbed into the house" in the "moonlight" to "take the purse," so Bob can be charged with burglary.*

The problem with this answer is that it jumps to a conclusion by simply repeating all the facts, but it does not relate any particular ELEMENT of law to any particular fact.

For example, it says "Bob forced the lock" but it does not explain why that fact is important. The explanation, that Bob's forcing of the lock is important because it is evidence supporting the element of breaking is absent from the answer.

If an answer refers to a lot of "facts" but never uses the word "because" then it is unacceptable.

Follow The Yellow Brick Road. The simple, mechanical way to improve essay analysis is to remember what Dorothy said when she went down the Yellow Brick Road in the Wizard of Oz -- "BECAUSE, BECAUSE, BECAUSE, BECAUSE, BECAUSE."

If you put one "because" in your analysis for each element in your rule, it will simply force you to cite facts. This approach automatically and simply forces you to write a better Bar essay.

Chapter 14: Avoid Paddling

Some law students adopt a pattern of analysis that alternately presents the arguments of each side in the dispute. I call this "sing-song" approach "paddling" because it is like paddling a canoe, first arguing the position of one party, then switching to argue the position of the other side. This can be effective at times, but it is usually inferior to nailing the elements.

Example: Suppose the question says,

> "Loony, a disgruntled and irrational former client, stands outside Larry the lawyer's office every day holding a sign that says, "Don't Use Larry the Crooked Lawyer". There is absolutely no truth to Loony's accusation. Loony lives on a disability pension and has no assets. What will Larry have to show to get a restraining order?"
>
> An answer with a **PADDLING** approach would be --
>
> *"1. Can Larry show the Court has EQUITABLE JURISDICTION?*
> *Under the law of remedies EQUITABLE JURISDICTION requires a showing of inadequate legal remedy, threat of irreparable harm, a favorable balance of interests or public interest and likelihood of success in the underlying action.*
>
> *Here Loony would argue that Larry has an adequate legal remedy because he could bring an action for defamation. Larry would argue that he does not have an adequate legal remedy because Loony has "no assets."*
>
> *Loony might also say that Larry is unlikely to succeed in a defamation action because he is trying to violate Loony's a right to free speech, against the public interest. Larry would argue that Loony's statement is defamation and defamation is not protected speech.*
>
> *Loony might argue that Larry cannot prove he will suffer irreparable harm. Larry would argue that Loony's act is "trade slander," a slander per se so damages would be presumed.*
>
> *Therefore, Larry can establish equitable jurisdiction."*

This "Paddling" approach is not totally worthless, because it does focus on the facts and the elements of the rule. In fact, it is a good approach to follow when there is an element that is not well supported by the facts. In that situation it provides a framework for explaining the strength and weakness of the supporting facts as viewed from each side. But it is simply overdone and often used where it is unnecessary.

Probably the worst thing about this approach is that it gets really irritating to the grader. It is like listening to two children argue.

Chapter 15: Bar Writing Mechanics

It is incredible the weird things people do at the Bar Exam. The following comments cover the simple mechanics of writing the Bar Exam. These points seem obvious but they are the reasons a lot of people fail the Bar.

Do what you always did. For strange unknown reasons, people taking the Bar suddenly do things they have never done before. Don't. If you typed your essay answers in law school, type them on the Bar. If you handwrite in law school, handwrite on the Bar. The Bar is not the time to try new ideas.

Follow your outline! It does you no good to have an outline if you are not going to use it.

Pens. First, whether you handwrite the Bar or type it, buy a small box of good, smooth writing black ink pens. DO NOT come to the Bar Exam with colored pens or a single old gummy ink pen that the Army recruiter gave you. Writing for six hours in three days with a bad pen will kill you.

Pencils. For the MBE only, bring 5 (not more or less) sharpened #2 pencils. Don't use them on essays.

Put your office supplies in a clear zip-lock bag for carrying them around.

Bring a Watch or Clock. Bring one (or more) watch or clock that you can adjust to the hour so you can time your work. Start it when they say, "begin".

Follow line instructions for line spacing and page use. The instructions for handwritten answers may say "use every line." The instructions may say "use both sides of the page." If that is the instruction, DO WHAT THEY TELL YOU TO DO.

Leave lots of blank space. If they say "use every line" that does NOT mean to jamb it all together! Leave extra space between paragraphs, at the bottom of the page, and between issues. Leave space so that if you forget to mention an issue you will have room to go back and insert it. Never switch defendants (plaintiffs) in mid page. Start a new page. Never start a new issue at the bottom of a page. Go to the top of the next page to begin a new issue. Don't be afraid to ask for more paper.

Typewriter ribbons. Bring FOUR or more typewriter ribbons. Put a NEW ribbon in your typewriter at each session. [At 9:00 a.m. on the first day, at 1:00 p.m. on the first day, at 9:00 a.m. on the third day, at 1:00 p.m. on the third day].

Correction ribbon. Put a new correction ribbon in before the Bar Exam starts. Keep the old, partially used one as a spare. Unless you type 90 mistakes a minute like me, one is all you need.

Double space typing on one side only. Double space if you type, on one side of the paper.

Number the typed pages. Number your typed pages on the upper right corner. For the first essay as follows:

First essay -- 1-1, 1-2, 1-3, …1-8.
Second essay -- 2-1, 2-2, 2-3, …2-8.
Third essay -- 3-1, 3-2, 3-3, …3-8.

Do the essays in order. You will be given three essays. Do them in the order given. DO NOT think that you will improve your score by doing them out of order. It will NOT improve your score and it can cause a major disaster. For example, there can be a problem with the third question. If everyone but you is doing Question 1 the proctors might find an ambiguity on Question 3 and make a timely announcement. That would save the day for everyone -- but you!

Further, if you are working on the same question as everyone else, you can feel their anxiety and the pace of their work. You can feel when a question is easy or hard. You can feel yourself getting behind on the time.

Print out each page of the essay as it is completed! If you type on a word processor, DO NOT wait to the end of the essay to print it out. If you have a power failure, you will be screwed. Print each page as it is finished!

Do not underline with the typewriter. Most typewriters underline too slowly. Use ALL CAPS to identify words you feel are important and underline them manually with a pen after the page is finished. This gives you a timely chance to review your answer too.

If you type, finish an essay and put the pages in the folder BEFORE starting another essay. It is an absolute disaster to get your pages mixed up. Keep each essay separate so the pages don't get mixed.

Get some sleep. It is absolutely counter-productive to study all night before the Bar Exam.

Don't get wired. There is a significant subculture of law students who use cocaine and/or amphetamines as a study aid. Frankly, these might work great in the short run, but then you crash. The Bar Exam is a 3-day exam, and if you try to stay wired for three days bad (and funny) things happen about half the way through it. Don't try to pass the Bar by getting wired.

Chapter 16: Bar Answer Formats – WHAT to Say and HOW to Say It

Before you walk into the Bar Exam, you must be able to recite, verbatim, prepared responses to a wide variety of potential questions. If you don't have some prepared responses memorized, you are dead. You will not have enough time to think up a good answer on the spot. You will get "brain lock", run out of time on your essay answers, panic and your goose will be cooked.

For example, you KNOW that there will be professional responsibility questions on the Bar Exam. Since you know this, you better be prepared to recite a response to any such question.

For example, there are only five (count them - 5!) significant issues in the whole study of Constitutional Law and they are "case intensive." If there is a Constitutional Law question, it will require a statement of one of those five rules of law and mention of the case law. The Constitutional Law issues are

1) EQUAL PROTECTION,
2) SUBSTANTIVE DUE PROCESS,
3) PROCEDURAL DUE PROCESS,
4) FIRST AMENDMENT and
5) COMMERCE CLAUSE.

So if you don't have something to say about Miller, Brandenburg, Central Hudson, Mullane, Matthews v. Eldridge, Smith, Lopez, etc. you are not prepared for the Bar.

How? You must develop this ability by repetition and practice. You must memorize and be prepared to recite a significant portion of the material presented in the following chapters if you are to succeed in passing the Bar.

The following chapters provide you with the ISSUES, AUTHORITIES and RULES of law you need to be prepared for all possible Bar questions.

Important Stuff. As you read through the following answer formats, you may be overwhelmed with the feeling that, "There ain't no way in Hell I can memorize all of this." This is a natural reaction. But some of the following is more important than the rest, and the important portions will be identified and marked for you like this → **Important!** As for the rest, you should at least be able to fake it.

How to Memorize. The way to memorize the important portions of the following is like memorizing the Gettysburg Address -- read it, recite into a tape recorder, and play it back against the text.

The Text Format Used Here. In the following answer formats, the text you should MEMORIZE and be prepared to recite verbatim is presented in *italics*. Additional information, comments and notes are presented in plain text.

Four Ploys to Save You on an Exam:

When you are taking Bar exams you will invariably find yourself in perplexing and difficult situations. Here are four ideas you can use to get yourself out of a tight spot.

1. **"Actions Imply Intentions."** If no facts expressly state what the parties' intentions were at the time they acted, their actions (or lack thereof) imply their intentions.

   For Example: You are presented with facts that don't expressly say what a defendant's intentions were at some point in time. You can say, "The defendant impliedly did not intend to steal at the time of the breaking because she did not take the TV until the next morning."

2. **"The Courts Have Often Been Split."** If you are presented with an issue that you have either never seen before or else you recall reading something about it but can't remember which way the Courts decided the issue, you can always say, "The Courts have been split on this issue…" It sounds very "lawyer-like" and it is always true. Then you should probably discuss the "balance rule" and "reasonableness" standards presented below.

3. **"The Court Would Balance."** For almost every issue in every area of law there is some sort of "balance test". In these "balance tests" the Court considers the interests of the parties, the plaintiff and defendant, the interests of the Court itself, the interests of third parties, and the public interest. So if you don't know what the law is or what to say consider saying, "The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice." This sounds good, and you can make it up on the spur of the moment.

4. **"Reasonable expectations…reasonable behavior…reasonable person…"** For virtually every issue in every area of law the rule of law is based on what is "reasonable". Sometimes it is "reasonable expectations", sometimes "reasonable behavior", sometimes "reasonably foreseeable, and sometimes "reasonable person". But it is always "reasonable". So if you use the word "reasonable" liberally in describing the rule of law and the considerations of all concerned, you usually cannot go wrong.

   For Example: Putting this all together, suppose you are presented with some dispute that raises an issue that you have never seen before and don't know the law at all. You have to fake it. A good approach is to say,

   > "The Courts have been split on this issue. The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice. The decision would depend on the reasonable expectations of each party in light of the reasonable needs of third parties and the impact on the Court. Here the reasonable expectation of …. And a reasonable person would believe… And it was reasonably foreseeable that… Therefore…"

   That all sounds pretty good and can get you out of a tight spot where you might otherwise blather on endlessly making several incorrect and self-defeating statements.

Chapter 17: Contract Answer Formats

There are 4 basic types of contract essay questions. They may be combined, and some issues can be skipped if the question does not call for their discussion.

1) **FORMATION** – Raises issues of whether contract ever formed at all. Offer? Acceptance? Intent? When? How?
2) **DEFENSES** – Raises issues of Statute of Frauds. Lack of consideration? Illegal purpose? Underage party? Fraud? Duress?
3) **BREACH** – Raises the issue of who breached first? Was there an anticipatory breach? Major breach? Breach waived? Effect of breach?
4) **REMEDIES** – Raises issues of what each party can recover and how. For non-breaching buyer? Non-breaching seller? Breaching buyer? Breaching seller? Promissory estoppel? Saving doctrines for unilateral contracts?

What to Discuss. If the contract question says, "Bob and Joe had a contract," DO NOT discuss whether or not Bob and Joe had a contract. Obviously it is a BREACH or REMEDY question and NOT a FORMATION question. Don't waste time discussing non-issues.

On the other hand, if there are a lot of questions back and forth about, "Will you take this?" and "Maybe I would accept that," then it is a FORMATION question that needs discussion of OFFER, ACCEPTANCE and so forth.

Mnemonics for contracts essays:

1) *COALL = The required elements of a valid contract -- Consideration, Offer, Acceptance, Legal capacity, Legal purpose.*
2) *MYLEGS = Contracts that require a writing -- Marriage, over a Year, Land, Executor of estate, Guarantor of debt, Sale of goods over $500.*

Why are These Important? Remembering these mnemonics helps you keep a mental checklist of things that might be ISSUES to discuss.

What is a GOOD? A "good" is anything movable and identifiable to a contract at the time of formation. The UCC requires a writing if the "goods" are worth more than $500. The UCC also mentions that a sale of "personal property" that is "not a good" requires a writing if it is worth over $5,000. What does this mean?

Law school professors often have questions that involve two dudes selling a car, a boat or a stereo. Are these "goods" or "personal property"? Does the UCC govern such sales?

The answer is that a car, boat and stereo <u>are</u> goods covered by the UCC. If you can move it at the time of contract, it is a good. But often your professor did not realize it. So he wrote his question expecting you to answer using common law principles. The proper answer, however, is that those are goods and the UCC applies.

What is "personal property, not a good"? The UCC applies the $5,000 limit to the sale of personal property that is not a good. This part of the UCC was mostly intended to apply to the sale of rights such as copyrights.

However, one can conceive of other rights, such as an easement. The easement is "not a good" because it is "not movable" at the time of identification to the contract.

What is NOT covered by the UCC? Certainly contracts for services, stocks, bonds, or intangible property interests do not involve "goods".

What should you do on the Bar? On the Bar, first define "goods", determine whether the item is a good, and say whether the UCC applies. The Bar will not hide the ball on you, so it will be clear from the facts whether you are dealing with a "good" or not. If there is a car, boat or stereo determine it is a "good" and treat it the same as if it were the mythical "widget" that law school professors are so fond of. If there are two companies named Buyco and Sellco, you know it is goods and you know they are usually merchants. Be sure to point it out to the Bar grader.

The Opening Contract Statement. Contract essays are different from most. They almost always ask you to discuss the "rights and remedies" of the parties. This produces awkwardness on how to start.

To get your contract essay started quickly, start it with the following short opening statement, recited VERBATIM. Underline the words as shown. IF YOU TYPE, put these words in "all-caps" and underline them with a pen after you finish the page because it takes too long to underline with a typewriter. By putting them in "all-caps" they stand out more and you can underline faster.

> *"The rights and remedies of the parties here depend on whether or not they had a valid contract. A CONTRACT is a promise or set of promises, the performance of which the law recognizes as a duty and for the breach of which the law will provide a remedy. Every valid contract is based on OFFER, ACCEPTANCE, LEGAL CONSIDERATION, LEGAL CAPACITY OF THE PARTIES and LEGAL PURPOSE."* **[Important!]**

Here is what this does. First, it tells the Bar grader you know this is a contract question. Second it defines a contract (and gets you points). Third, it cites the necessary elements of a contract (and gives you a mental checklist).

COMMON CONTRACT AND UCC ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Does UCC apply?* (**Important!** Frequently an issue and always #1 if UCC applies!)

   Under contract law UCC Article 2 controls contracts for the sale of GOODS. Goods are movable things at the time of identification to the contract. [3]

   Here the agreement was (NOT)) for a sale of goods, because ….

   Therefore, the UCC) does (NOT) determine the rights of the parties.

[3] Be aware, and prepared to say, that special made goods, standing crops, timber, unborn animals and minerals in the land to be removed by the seller are also "goods".

2. *Are the parties MERCHANTS?* (**Important!** This is issue #2 if UCC applies, but otherwise it is no issue at all).

   Under the UCC a MERCHANT is a person who trades in or otherwise holds himself out by occupation or otherwise as knowledgeable about the goods of the contract. Further, a principal that employs an agent that is a merchant is held to be a merchant by implication. [4]

   Here the buyer is (not) a dealer in these goods because … And they are not a merchant by occupation or implication because…Further the seller is (not) a dealer in these goods because… And…Therefore …

3. *Is a WRITING needed?*

   If ONLY common law governs say, [5]

   > ***Under the STATUTE OF FRAUDS certain types of contracts must be written in order to be enforced, and one type is a contract for (*****pick one if it applies here -- *MARRIAGE*, more than a *YEAR*, *LAND*, *EXECUTOR* of an estate, *GUARANTEE* of a debt).*** [6] **[Important!]**

   If UCC say,

   > *Under UCC 2-201, a contract for sale of goods worth $500 or more must be in writing, signed by the party against whom the contract is to be enforced, but between merchants a SALES CONFIRMATION by one listing quantity will bind both parties if the receiving party does not object within 10 days.* [7] **[Important!]**

   Furthermore, the UCC provides exceptions for SPECIAL MADE GOODS, where there is an ADMISSION by the party to be bound that there had been an agreement, or where there has been PARTIAL PERFORMANCE of the contract.

   Here the contract is within (is outside) the statute because …

   And the need for a writing was (not) satisfied because…

---

[4] For a person in "business" to be a "merchant" they either have to DEAL in the goods that are the subject of the contract on a regular basis or else they have to be some type of "expert" concerning these goods or employ an "agent" who is an expert in these goods.

[5] The reason I am saying "ONLY common law" is that even UCC contracts are subject to the common law in some manner, but contracts the UCC does NOT apply to will ONLY be controlled by common law.

[6] The mnemonic is MYLEG. The YEAR means from the date of execution until the earliest date the contract could possibly be completed according to its terms. The main issue when there is a GUARANTOR is the "main purpose rule". The main issue when LAND is concerned is whether the "seller" owns any interest in the land that is being conveyed to the "buyer".

[7] Note that the UCC is being modified and in some States this limit is $5,000 while in others it has still been kept at $500.

Therefore, there was (not) a need for a writing in order for the agreement to be legally enforced as a contract, and the requirement was (not) met because... [8]

[Note: The Statute of Frauds is a required issue if it is an issue at all. By addressing it up front you eliminate the danger of forgetting it later. Address the <u>need</u> here and the <u>adequacy of the writing</u> here or later. The call of the question may indicate it is not an issue.

Some professors insist the Statute of Frauds should only be discussed at the end of the essay in a "Defenses" section. Humor the Prof but if an oral contract cannot be enforced at LAW it forces the movant to plead EQUITY. So that one issue determines the strategy of both parties, and it is not just a "defense" issue.

Further, if the Statute of Frauds is an issue, the Parol Evidence Rule cannot be an issue, and vice versa since the first arises when there is no writing at all and the latter only arises when there is a detailed writing.]

4. *<u>Was the communication of [date] an OFFER?</u>* (Only for a formation question. Watch out for <u>advertisements</u> because they are rarely offers and <u>catalogues</u> are NEVER offers! Skip this altogether if the question says they had an agreement or contract.)

   Under contract law an OFFER is a <u>manifestation</u> of present contractual <u>intent</u> <u>communicated</u> to the offeree such that an objective person would <u>reasonably believe</u> assent would form a bargain. [9] **[Important!]**

   If ONLY common law go on to say,

   At common law a communication was only deemed sufficient to constitute an offer if it specified the <u>parties</u>, <u>subject</u> matter, <u>quantity</u>, <u>price</u>, and <u>time</u> of performance.

   If UCC say,

   The UCC deems a communication sufficient to constitute an offer if it specifies the <u>parties</u> and <u>quantity.</u> The UCC provides "GAP FILLERS" that may be used by the Court to determine any additional terms.

   Here the communication was (not) an offer because ...

   Therefore, the communication was (not) an offer. [10]

[8] While "defenses" are often saved for the end of the essay, this one is so important it is best to address it early in the essay when you have plenty of time. If you wait to the end of the essay before you address this issue and run out of time it may be fatal to your law school career.

[9] The reason a "catalogue" is NEVER an offer is that a catalogue is, by definition, a price list without any specification of quantity.

[10] Many law professors use the term "invitation to negotiate" but that has no specific legal meaning. It just means the communication was not legally sufficient to constitute an offer, so that is what you should say.

5. *Was it an offer for a UNILATERAL CONTRACT?* (Avoid concluding there was a unilateral contract offer unless the facts are absolutely clear.)

   Under the common law a UNILATERAL CONTRACT OFFER is one that unequivocally indicates acceptance can only be manifested by completion of performance by the offeree. [11]

   Here it is (not) unequivocally clear that the offeree can only accept this offer by completion of performance because….

   Therefore this is (not) a unilateral contract offer.

6. *Was the communication (action) of [date] an (implied) ACCEPTANCE?* (SKIP if question says there was an agreement or contract.)

   If ONLY common law, say,

   Under the common law MIRROR IMAGE RULE an acceptance is an unequivocal assent to an offer. (However, acceptance can be implied by silent performance.) **[Important!]**

   If UCC say,

   Under UCC 2-206 an acceptance of an offer not otherwise expressly conditioned may be made in any REASONABLE MANNER, including a promise to ship or shipment of either conforming or non-conforming goods. BUT a shipment of NON-CONFORMING goods as an EXPRESS ACCOMMODATION is not an acceptance. Further, UCC 2-207 allows an acceptance containing varying terms to be effective. [12] **[Important!]**

   Here the communication was (not) an acceptance because …

   Therefore, a CONTRACT WAS FORMED on [date]. (Or else the communication was a REJECTION AND COUNTER-OFFER on different terms.)

   [Note: In a formation question if a contract is formed, it can ONLY be determined by the analysis of the acceptance – that is the only thing that can form a contract.]

7. *Did the VARYING TERMS become part of the contract?* (Only do this if there is a UCC question and the offeree cites a varying term.)

   Under UCC 2-207 varying terms will NOT be included in the contract where 1) the parties are not both merchants. And even if they are both merchants the varying term still does not become part of the contract if the offer expressly limited acceptance and the offeror does not agree to the new term, OR if the varying terms materially alter the contract, OR if the party to be bound objects to the varying terms within a reasonable period of time.

[11] Be VERY RELUCTANT to presume an offer proposes a unilateral contract. The offer must be unequivocally clear and if it is not all modern Courts will presume it is a bilateral contract.

[12] Pay attention to the difference between "I will" and "I can". In a UCC situation there is an ACCCEPTANCE if the seller says "it will" or "it would" supply the goods, and a REJECTION AND COUNTER-OFFER if the seller says "it can, but…" or "it could, but…" citing a varying term.

If the acceptance is expressly conditioned on the varying terms by the offeree, the response is effectively a rejection and counter-offer. Otherwise the varying terms are considered only "proposed modifications".

Here the parties are (not) both merchants because… And the acceptance cited varying terms because… Further, the varying terms did (not) materially alter the contract because …

Therefore…

8. *Had the OFFER LAPSED?* (This issue is frequently tested and poorly taught.)

   Under common law an offer LAPSES AND CANNOT BE ACCEPTED unless it is accepted in a reasonable period of time. Oral offers are deemed to lapse at the end of the conversation, and written offers are deemed to lapse within the timeframe implied by the means of dispatch, absent contrary agreement or implication.

   Here the offer was oral (by fax, telegraph, mail, etc.) so it would be deemed to have lapsed when … Therefore the offer did (not) lapse before the offeree attempted to accept it.

9. *Was the communication of [date] an EFFECTIVE ACCEPTANCE?* (SKIP if question says there was an agreement or contract. This is only a possible issue if there is an "acceptance" by "dispatch" that conflicts with some communication of rejection or revocation.)

   Under the MAILBOX RULES of the common law an acceptance is effective when dispatched, if dispatched in the manner specified in the offer, or by the same or faster means the offer was transmitted where the offer does not specify a means of communication.

   Here the acceptance was (not) effective upon dispatch (receipt) because it was (not) sent by the means specified in the offer (no means was specified in the offer and it was sent at the same or faster means than the offer had been sent).

   [Note: a unilateral contract offer can only be accepted by the requested performance, but NEVER assume the offer is for a unilateral contract offer unless it is unequivocal. Further, modern contract law provides SAVING DOCTRINES as stated below.]

   Therefore …

10. *Was the communication of [date] an EFFECTIVE REJECTION?* (SKIP if not applicable.)

    Under the MAILBOX RULES of contract law a rejection is effective upon receipt while an acceptance may be effective upon dispatch. An EXCEPTION is made if the OFFEROR CHANGES POSITION in reliance upon a communication of rejection, not knowing that an acceptance was dispatched prior to receipt of the rejection. In that case the rejection is effective upon receipt regardless of the fact an acceptance was also dispatched.

    Here the rejection was (not) effective because …

    Here the offeror (did not) change position in reliance on the rejection because…

Therefore …

11. *Was the communication of [date] an EFFECTIVE REVOCATION?* (SKIP if not applicable.)

Under the MAILBOX RULES of the contract law a revocation is effective upon receipt while an acceptance is effective upon dispatch, if sent by the required means, or if no means was specified in the offer by the same means that the offer was sent or by a faster means.

For an unequivocal unilateral offer also say, as appropriate,

> *Under the common law a unilateral offer could be revoked at any time. But modern contract law provides SAVING DOCTRINES that prevent the offeror from revoking a unilateral contract offer if he/she is aware the offeree has commenced the requested act for a reasonable period during which the offeree will be allowed to complete acceptance by performance.*

Here the offeror was aware the offeree had commenced the requested act because…

Here the acceptance was (not) dispatched before the revocation was received because …

Here the acceptance (did not) became effective first because…Therefore …

12. *Was there an IMPLIED-IN-FACT CONTRACT?*

Under contract law an IMPLIED-IN-FACT CONTRACT will be deemed to have existed, even if there is no express agreement between the parties, if one party acts to bestow benefits on the other party reasonably expecting to be compensated, and the other party knowingly accepts those benefits knowing that the other party expects to be compensated.

An implied-in-fact contract is an actual, legal contract. The party that knowingly receives the benefits is liable for a reasonable contract amount to the other party.

Here…because…Therefore…

13. *Was there an IMPLIED-IN-LAW CONTRACT?*

Under contract law an IMPLIED-IN-LAW CONTRACT will be deemed to have existed, even if there is no express agreement between the parties, if one party acts to bestow benefits on the other party reasonably expecting to be compensated, and prevention of unjust enrichment, unjust detriment or other public policy considerations require that the acting party be reasonably compensated.

An implied-in-law contract is a "legal fiction", an equitable remedy requiring the acting party to be paid reasonable compensation.

Here…because…Therefore…

14. *What were the CONTRACT TERMS?*

If an acceptance forms a contract, for common law say,

Under common law an enforceable contract had to include the PARTIES, PRICE, SUBJECT MATTER, TIME OF PERFORMANCE and QUANTITY.

If an acceptance forms a contract, for UCC say,

Under the UCC a contract is enforceable if the QUANTITY and PARTIES are specified. Other terms will be provided by the GAP FILLER provisions of the UCC.

Here the PARTIES to the contract were…, the QUANTITY was…, the PRICE was …, SUBJECT MATTER was... and TIME OF PERFORMANCE was …

Therefore, the contract was (not) specified enough to be enforceable.

15. *Was timely performance a MATERIAL CONDITION?* (This is frequently tested and poorly taught.)

Under contract law a MATERIAL CONDITION may be expressly agreed upon between the parties or implied by the fact that should the condition fail the non-breaching party would be denied the BENEFIT OF THE BARGAIN, the benefit expected when they entered into the agreement. The parties may agree that TIME IS OF THE ESSENCE but if they do not the Court will assess the impact tardy performance will have on the non-breaching party.

Here the parties did (not) agree that "time was of the essence". And tardy performance would (not) deny the non-breaching party the benefit of the bargain because…

Therefore…

16. Does the PAROL EVIDENCE RULE bar evidence of other covenants and terms?

Under the PAROL EVIDENCE RULE evidence of PRIOR or CONTEMPORANEOUS agreements may not be introduced to VARY or CONTRADICT the terms of a FULLY INTEGRATED WRITING unless it is to show evidence of **[DAM FOIL]** *Duress, Ambiguity, Mistake, Fraud, Oral condition precedent, Illegality, or Lack of consideration.* [13] *The Court may determine the "completeness" of a written contract by examining the comprehensiveness of its contents.*

Here …because…Therefore…

[13] 90% of law students have no idea what an "oral condition precedent" is, and it is the most tested of all of these possibilities. It is an oral agreement that a contract party does not have to perform a stated contractual duty UNLESS the condition holds. It is like an oral agreement that you don't have to pay your student loans if you don't pass the Bar Exam.

17. Can LACK OF INTENT be raised as a defense?

Under the OBJECTIVE MAN RULE, there is sufficient INTENT to enter into a contract if an objective observer listening to the parties would have reasonably concluded from their communications that assent would form a bargain.

Here an objective observer would (not) have thought the party to be bound intended to form a contract because…Therefore…

18. Is LACK OF CONSIDERATION a defense?

Under contract law every valid contract, and any modification of a contract, must be supported by CONSIDERATION, a BARGAINED FOR exchange posing sufficient LEGAL DETRIMENT that the law will enforce the agreement.[14] **[Important!]**

For UCC MODIFICATION say,

However, under the UCC a contract supported by legal consideration may be MODIFIED without additional consideration."

Here the promised act was (not) bargained for because…

And there was (not) any legal detriment to the promisee because he had (did not have) a PRE-EXISTING DUTY to…

Further [party] was (not) totally denied the benefit of the bargain because…

Therefore, the contract did (not) fail for lack of consideration.

19. *Was the need for a WRITING SATISFIED?* (This second visit to the Statute of Frauds is only necessary if you did not settle the issue completely at the beginning of the essay.)

As discussed above, this contract would have to be supported by a signed writing under the STATUTE OF FRAUDS (or UCC 2-201) sufficient to show the existence and required terms of the contract.

Here there was (not) a sufficient writing because … Therefore …

20. Was the contract UNCONSCIONABLE?

Under contract law an unconscionable contract will not be enforceable because there is NO REASONABLE FINDING OF INTENT to enter into such a contract. An ADHESION

[14] Consideration is an "exchange" or "quid pro quo" so any promise of a gift, or even an exchange between parties of promises to bestow gifts on each other, is not valid, legal consideration. The vast majority of Courts hold that "past acts" and "moral obligation" are NOT valid consideration. A promise exchanged for a promise is always considered adequate consideration, as long as each promise is not merely to do something that the other party already had a legal duty to perform. But if a party's promise is "illusory" or "empty" the contract is void from the beginning for "lack of consideration". And otherwise if a party fails to perform the promised duty so completely that the other party gets no benefit at all, that is a major breach and again the contract may be said to have failed for "lack of consideration".

CONTRACT is a "take it or leave it" contract that a party is forced to agree to, and it will often be found unenforceable.

Here the contract appears to be unconscionable because… Therefore …

21. *Is DURESS a defense?*

Under contract law only good faith agreements are enforceable. No contract agreement induced by illegal threats is valid. Likewise, agreements induced by deliberate acts to create threats of economic harm are not enforceable. [15]

Here the contract may be argued to be unconscionable (or the result of duress) because…

Therefore …

22. *Is FRAUD (or DECEIT) a defense?*

Under contract law a contract induced through deliberate CONCEALMENT of material facts by a party with a duty to reveal the facts, or by a party deliberately concealing and/or MISREPRESENTATING material facts is unenforceable if it can be shown the party seeking to void the contract would never have agreed to the bargain but for the concealment and/or misrepresentation. [16]

Here there was (not) fraud because …Therefore …

23. *Is INCAPACITY a defense?*

Under contract law a contract cannot be enforced AGAINST one who lacks capacity. EXCEPTIONS are contracts for provision of NECESSITIES of life and where the incapacitated party attains capacity (becomes sane or an adult) and either AFFIRMS or FAILS TO REPUDIATE the contract. [17]

Here the party seeking to avoid the contract was a MINOR (or ADJUDICATED INSANE perhaps) at the time the contract was executed because… And (But) the contract was not (was) for necessities of life because… [18]*And (But) the party to be bound did (not) ratify the contract because…* [19]

Therefore, this contract could (not) be enforced.

---

[15] You are unlikely to ever see a question that suggests threats of physical harm because the answer is too easy. But remember that a contract creates legal duties to perform so a threat to breach a contract is an illegal threat. Any agreement that results is the result of "economic duress" and is unenforceable.

[16] Fraud based on misrepresentation is easy to claim but hard to prove because the movant has the burden of proving the other party intended to defraud them at the time of contract. But fraud based on concealment is much easier to prove because the movant usually only has to prove that the other party knew the facts, had a duty to reveal the facts, and did not reveal the facts.

[17] Note that a contract with an incapacitated party is VALID but possibly unenforceable against that party.

[18] The term "necessities of life" means food, shelter, clothing, medical care, etc. NOT legal representation.

[19] If a previously incapacitated party continues to enjoy the benefits of a contract after the incapacity is removed they may be deemed to have "impliedly ratified" the contract.

24. Is ILLEGALITY a defense?

Under contract law, a contract generally cannot be enforced by a party who knowingly entered into it for an illegal purpose. If the parties are equally guilty, IN PARI DELICTO, the court will generally not intervene. However, if one party is less guilty, the court has discretion to order restitution in equity.

Here … because …Therefore …

25. Is IMPOSSIBILITY a defense?

Under contract law the parties may be excused from performance if performance becomes impossible because of events beyond their control. [20] Here … because …Therefore …

26. Is FRUSTRATION OF PURPOSE a defense?

Under contract law, if the parties enter into a contract knowing that the failure of some condition beyond their control will deny one of the parties the benefit of the bargain, that condition is an implied material condition of the contract, the failure of which excuses both parties from the agreement .[21] Here … because … Therefore...

27. Is MUTUAL MISTAKE a defense?

Under PEERLESS when both parties enter into a contract because of a misunderstanding as to a material fact, there is no "meeting of the minds" and the contract is void from the beginning. Here … because … Therefore...

28. Is UNILATERAL MISTAKE a defense?

Under contract law, when one party enters into a contract because of a misunderstanding as to a material fact the majority view is that the parties are legally bound to the contract unless the other party knew or should have known of the mistake, and in that case the contract is voidable by the mistaken party. Under a minority view the contract is voidable by the mistaken party in any event if they 1) discover the mistake quickly before the other party substantially

[20] The basic concept here is that a MATERIAL CONDITION (i.e. important, "deal-breaking" requirement) of every contract is that performance is not required if it is impossible. If parties expressly state this, it is an EXPRESS material condition. Otherwise it is an IMPLIED material condition. Some professors say impossibility must be "unforeseeable" but that is wrong. All that matters is that the party seeking excuse from performance had no control over the event that created the impossibility.

[21] This is a second example of failure of an IMPLIED MATERIAL CONDITION. The famous case was the renting of an apartment to see the procession of the newly crowned king. When the king became ill the rental contract was without purpose. Lack of foreseeability was not necessary. All that is needed is that both parties know the purpose of the party seeking to void the contract, and that that party had no control over the failure of the condition.

relies on the contract, 2) give prompt notice of the mistake, and 3) reimburse the other party for any expenses caused by the mistake. [22] *Here…because…Therefore….*

29. *Was there an ANTICIPATORY BREACH?*

Under contract law an anticipatory breach is a CLEAR STATEMENT OR INDICATION that a party WILL NOT PERFORM future contractual duties when they become due. This is a major breach as to those duties, the non-breaching party is EXCUSED from performance of all remaining contractual duties, and the future duties of the breaching party are ACCELERATED to the present.

If a party has a REASONABLE BASIS to believe the other party may not perform future contractual duties, the party may demand REASONABLE ASSURANCES and REFUSE TO PERFORM until they are provided. The term "reasonable assurances" generally means a financial guarantee or payment into escrow.

If reasonable assurances are properly demanded and not provided, the failure to respond constitutes an anticipatory breach.

Here there was (not) an anticipatory breach because the party said "…." and that (did not) make it clear they were not going to perform. That did (not) form a reasonable basis for (the other party) to demand reasonable assurances because… Therefore…

30. *BREACH? MAJOR OR MINOR?*

For COMMON LAW say,

Under contract law a BREACH is a failure to perform a contractual duty when it becomes due. A MAJOR BREACH is an act which deprives the other party of the BENEFIT OF THE BARGAIN, and it EXCUSES the non-breaching party from all further performance of contractual duties. It also ACCELERATES the future contractual duties of the breaching party to the present so the non-breaching party can seek IMMEDIATE PAYMENT OF DAMAGES.

For UCC say,

Under the PERFECT TENDER RULE of the UCC any shipment of non-conforming goods is a major breach of contract.

For UCC DIVISIBLE CONTRACT SITUATION say,

Under the UCC a breach with respect to any shipment of goods under a DIVISIBLE CONTRACT does not constitute a breach of the entire contract. A DIVISIBLE contract is one under which goods are to be delivered in separate shipments which can each be evaluated separately under the contract.

Here … because …Therefore…

[22] The difference here is that under the majority view the mistaken party can breach the contract and will be liable for the sum of "expectation" and "reliance" damages of the other party. But under the minority view the mistaken party can void the contract and is only liable for the "reliance" damages.

31. *BREACH OF IMPLIED COVENANT?* (This is a common sense idea that is rarely tested. But it is so poorly taught 90% of law students can't handle it when it does come up.)

    Under contract law an IMPLIED COVENANT by each party to a contract is that they will not act to prevent the other party from performing contract duties and they will take all reasonable steps to assure the other party enjoys the expected benefit of the bargain. Performance of this implied covenant is an IMPLIED MATERIAL CONDITION of every contract. [23]

    Here … because …Therefore...

32. *WAIVER of breach?*

    Under contract law if a non-breaching party lets the breaching party continue performance after a major breach it WAIVES THE BREACH. [24] *The waiver cannot be revoked, and the non-breaching party is forever ESTOPPED from citing the breach as major and can only cite it as a minor breach.*

    Here … because …Therefore…

33. *WAIVER of condition?*

    Under contract law if a party performs a contractual duty that is subject to a condition precedent at a time the condition fails to hold, the party WAIVES THE CONDITION. But once the condition is waived the waiver can be retracted by the waiving party. [25]

    Here … because …Therefore.

34. *Was there an ACCORD AND SATISFACTION?*

    Under contract law an ACCORD AND SATISFACTION is binding on both parties if there is an agreement by the parties to settle a reasonable and good faith claim by one party that the other party has breached the original contract. [26]

---

[23] This is a third example of the failure of an IMPLIED MATERIAL CONDITION. If one contract party is injured because of the unreasonable acts or unreasonable failure to act by the other party, then the material condition fails and the injured party is totally excused from performance.

[24] Technically this is an "election" and not a "waiver" but everyone calls it a "waiver of breach". This is sort of like calling both female and male canines "dogs". Technically only the males are "dogs" and the females are really "bitches". But who says THAT in polite society?

[25] For example, Bevis and Butthead have a labor contract that says Bevis will pay Butthead's wages on Fridays. Bevis' does not have any duty to pay Butthead unless it is Friday. But one week Bevis pays Butthead on Thursday. That "waives the condition" for that week. But Bevis does not have to pay Butthead every Thursday after that because he can "retract the waiver".

[26] Further, under UCC 3-311 acceptance or cashing a "check" marked "satisfaction in full" or something similar generally discharges all liability. There are exceptions, but this UCC provision reflects the common law view.

Here a claim of breach was raised in <u>good faith</u> because … And it was <u>reasonable</u> because… And there was an <u>agreement</u> in settlement because….

Therefore…

35. *<u>Is the plaintiff an INTENDED THIRD PARTY BENEFICIARY?</u>*

Under contract law an INTENDED THIRD PARTY BENEFICIARY is a party that can seek damages for breach of a contract between two other parties because the contract was <u>INTENDED</u> to benefit them.

An INCIDENTAL beneficiary, one that was not intended to benefit from a contract between others, has no ability to enforce the contract or seek damages.

Contracts can only be enforced by VESTED, INTENDED third party beneficiaries that are DONEES, intended to benefit as a GIFT, or CREDITORS, intended to benefit by EXTINGUISHING A DEBT.

At common law vesting was a more demanding requirement than it is modernly. Under the modern view VESTING occurs if the beneficiary becomes aware of and relies on the existence of the contract.

Here ___ was (not) an intended third party beneficiary because… And he (did not) become vested because…

Therefore...

36. *<u>STANDING based on a VALID ASSIGNMENT?</u>* [27]

Under contract law an ASSIGNEE can seek damages for breach of a contract from the contract promisor if the assignee was EXPRESSLY ASSIGNED the rights of an original promisee, the ASSIGNOR, by <u>EXPRESSION OF CLEAR INTENT</u>.

An assignment BECOMES EFFECTIVE when the assignee gives the promisor <u>NOTICE</u> of the specific rights assigned. When the assignment becomes effective the promisor is liable only to the assignee and the rights of the original promisee/assignor are EXTINGUISHED.

If the assignment was in exchange for CONSIDERATION given by the assignee to the promisee/assignor, the assignment is IRREVOCABLE, and it creates a legal contract between the assignee and the promisee/assignor. That contract creates implied warranties 1) that the rights assigned exist, 2) that the promisee/assignor has the authority to assign them, and 3) all documents provided are bone fide. The assignee may seek legal damages from the assignor for a breach of warranty.

[27] If a question says a party that has a current duty to perform (e.g. to build a house) "assigned the contract" to another party that is going to perform the promised duties, then both an ASSIGMENT of rights and a DELEGATION of duties are implied. These should be discussed as two separate issues.

If the assignment was GRATUITOUS it is REVOCABLE until the assignment is made 1) in writing, 2) a token chose is delivered, or 3) detrimental reliance makes revocation inequitable. A gratuitous assignment creates no implied warranties and can only be enforced in equity.

Here … because …Therefore...

[Note: Assignment, delegation and other third-party questions require that you identify the parties and explain all of the rights and liabilities each party has against the other parties. That usually takes so much time that there is little time left for anything else.]

37. *VALID DELEGATION of performance?*

Under contract law the duty to perform under a contract may be DELEGATED to a DELEGATEE by an original promisor/delegator. However, the promisor/delegator remains primarily liable to the original promisee for performance of the contract. The delegation becomes EFFECTIVE when the delegatee agrees to perform the duties of the promisor/delegator.

If the delegatee accepts the delegation in exchange for CONSIDERATION, a legal contract is created between the promisor/delegator and the delegatee, and the original promisee is an intended third-party beneficiary of that contract. As an intended third-party beneficiary the promisee has standing to pursue legal actions against both the promisor/delegator and the delegatee.

If the delegatee GRATUITOUSLY accepts the delegation the delegatee has no legal liability to the original promisee and the promisee can only enforce the delegation agreement in equity by showing detrimental reliance.

Here … because …Therefore...

38. *Effect of ASSIGNMENT on CLAIMS AND DEFENSES?*

Under contract law a promisor may generally assert any claim or defense against the assignee that could have been asserted against the promisee/assignor. [28]

Here…because…Therefore…

39. *Effect of MODIFICATION AFTER ASSIGNMENT?*

MODIFICATION of a contract after it has been assigned is generally effective against the assignee if 1) the contract has not yet been fully performed, and 2) the modification is made in good faith and in accordance with reasonable commercial standards. The assignee acquires CORRESPONDING RIGHTS under the modified (or substituted) contract. [29]

[28] The provisions of UCC Article 9 expressly control this and establish various exceptions. But that Article is NOT TESTED on all Bar exams. So the rule statement above should be sufficient unless your State tests on Article 9.
[29] This is also a UCC Article 9 issue that is note expressly tested on all State Bar exams, but the issue could still arise.

40. <u>COMMON LAW REMEDY of the NON-BREACHING PARTY?</u> [30]

Under common law the non-breaching party has a right to COMPENSATORY DAMAGES calculated as the sum of 1) RELIANCE DAMAGES, the expenses the non-breaching party incurred in reliance upon the promise of the breaching party, and 2) EXPECTATION DAMAGES, the loss of the non-breaching party caused by the breach itself.

If the breaching party has SUBSTANTIALLY PERFORMED, the non-breaching party is still obligated under the contract with an OFFSET for damages against the contract price.

If the breaching party is in MAJOR BREACH the non-breaching party is freed from all obligations under the contract and has a right to an award of all damages caused.

A non-breaching buyer can also seek an order of SPECIFIC PERFORMANCE in equity to force a seller to transfer title of unique property, such as land. Specific performance cannot be used to force performance of personal services by an individual because it violates the 13th Amendment.

Here…because…Therefore…

41. <u>CONSEQUENTIAL DAMAGES?</u>

Under HADLEY V. BAXENDALE, a party to a contract may recover CONSEQUENTIAL DAMAGES such as LOST PROFITS only if it can be shown the damages were **[CCCC]** *1) <u>CONTEMPLATED</u> (foreseen) by both parties at the time of contract, 2) <u>CERTAIN</u> (measurable) as to dollar value, 3) <u>CLEARLY CAUSED</u> by (resulting from) the breach and 4) the loss <u>COULDN'T BE AVOIDED</u>. Here…because…Therefore…*

42. *<u>COMMON LAW REMEDY of the BREACHING PARTY?</u>*

Under common law a breaching party that has SUBSTANTIALLY PERFORMED has a right to recover the CONTRACT PRICE LESS AN OFFSET for damages caused by the breach. The remedy of a party in MAJOR BREACH is to seek RESTITUTION for AMOUNTS PAID and BENEFITS CONFERRED to the extent they exceed the damages of the non-breaching party, to prevent UNJUST ENRICHMENT. Here…because…Therefore…

43. *<u>UCC REMEDY of the NON-BREACHING BUYER?</u>*

Under the PERFECT TENDER RULE of the UCC a non-breaching buyer can either ACCEPT or REJECT non-conforming goods. Also they can REPUDIATE the contract and COVER, or they can AFFIRM the contract and DEMAND CONFORMING GOODS. The measure of damages is the excess, if any, of market or cover price over the contract price. If the goods are unique, they can use SPECIFIC PERFORMANCE to force the seller to transfer possession and title.

[30] It is usually best to discuss remedies from the aspect of the non-breaching party. Your explanation must be tailored to fit the particular facts. In the usual case there is substantial performance and the non-breaching party only has a right to an offset. If there is a major breach the non-breaching party has no obligation to pay anything except restitution to the extent they have benefited from partial performance.

Here … because… Therefore…

44. *UCC REMEDY of the NON-BREACHING SELLER?*

Under the UCC a non-breaching seller can sell rejected but conforming goods at a PUBLIC OR PRIVATE SALVAGE SALE (with NOTICE TO BREACHING BUYER) and demand the difference between CONTRACT PRICE and the SALVAGE SALE price.

Alternatively, in a LOST-VOLUME SITUATION where the seller cannot effectively sell the same goods to someone else, she can demand the BENEFIT OF THE BARGAIN – the difference between the CONTRACT PRICE and their cost of acquiring the goods.

And if the goods have been custom made or for some other reason can not be sold elsewhere the non-breaching seller can demand SPECIFIC PERFORMANCE.

Here … because …Therefore…

45. *UCC REMEDY of the BREACHING SELLER?*

Under the UCC a breaching seller that GIVES NOTICE of an intent to cure has an absolute right to cure the breach WITHIN THE CONTRACT PERIOD, and also has a right to REASONABLE EXTRA TIME in which to cure beyond the contract period if non-conforming goods have been shipped with a reasonable belief they would satisfy the needs of the buyer.

Here … because…Therefore…

46. *Is the LIQUIDATED DAMAGES clause enforceable?*

LIQUIDATED DAMAGES CLAUSES specify that the sole remedy of the non-breaching party is a specified amount of money damages. These clauses are only enforceable if 1) DAMAGES arising from a breach were UNCERTAIN at the TIME OF CONTRACT, 2) the specified amount was REASONABLE at the time of contract, and 3) enforcement after a breach will provide a REASONABLE REMEDY for the non-breaching party.

If contracts involve the sale of UNIQUE PROPERTY, liquidated damage clauses are almost always UNENFORCEABLE because money damages will be inadequate and SPECIFIC PERFORMANCE would be appropriate. Since money damages are inadequate, the liquidated damages clause is an unreasonable remedy. [31]

Here … because …Therefore...

[31] This is frequently tested and poorly taught. Liquidated damages will almost NEVER be a reasonable remedy if the contract is for the sale of unique property. And if the result is unreasonable, it will not be enforced by the Court.

47. *Can PROMISSORY ESTOPPEL be pled?* [32]

Under contract law a contract or promise that is unenforceable at law may be enforced in equity to the extent necessary to prevent injustice, on the basis of PROMESSORY ESTOPPEL

PROMISSORY ESTOPPEL means that 1) the party to be bound promised to do or not do something, 2) the promise was made intending to induce reliance by the party pleading equity, 3) the party seeking equity reasonably relied on the promise, and 4) justice demands that the promise be enforced to some degree.

Here…because…Therefore…

[Note: This argument should only be raised when the contract is not otherwise enforceable at law. This is the only feasible remedy in the case of a "gift promise".]

48. *Can EQUITABLE RESTITUTION be pled?*

Under contract law, where a promise or contract is otherwise unenforceable at law, a party may still seek RESTITUTION in equity to prevent UNJUST ENRICHMENT.

Here … because …Therefore...

Note: The above issue statements provide almost every important issue, definition, rule and term that you will ever see on a CONTRACTS or UCC examination in law school or on a Bar exam. If you know the above issues and responses you have everything you really need. However, for Bar exams you should also briefly review ALL the remaining UCC sections.

[32] Promissory Estoppel is virtually the same principal as Detrimental Reliance. If the party to be bound made a "promise" upon which the party seeking a remedy "relied" it is more often called Promissory Estoppel. If the party to be bound did not make any promise but caused the party seeking a remedy to "rely" on facts as they appeared to be, the remedy is more often called Detrimental Reliance.

Practice Question 17-1: Contract Formation

Lucy owned a rent house. She advertised in the newspaper to find a renter, citing rent of $700 a month or best offer.

Homer was homeless. He saw the ad and called Lucy at 9:00 a.m. Homer said, “I have to see the house, but would you consider $550?”

Lucy said, “It's a deal. I will rent to you for $550. This is a firm offer.” Homer said he would be there in one hour to see the house.

By 10:00 a.m. Homer had not arrived. Lucy got called by Ned, who offered to pay the full $700 a month. Lucy agreed to rent him the house.

Homer went 100 miles an hour to see the house, sideswiping Victoria. Victoria crashed and died along with her 7-month fetus. She left a handwritten will.

At 3:00 p.m. Homer arrived, went up to Lucy and said, “I unequivocally accept. Here is my $550.” Lucy said, “I revoke! I already sold it to Ned.”

Homer said, “You can’t revoke because you gave me a "firm offer"! We have a deal.” Lucy said, “Tough, it wasn't in writing.”

Homer wants the house.

Discuss Homer’s rights.

Practice Question 17-2: UCC Formation, Breach and Remedy

Sellco sent Buyco a catalogue offering widgets at $6 with a 90-day warranty.

On 6/2/99 Buyco wrote Sellco and said, “We hereby accept your catalogue offer and order 5,000 yellow widgets for delivery by 6/8/99 and 5,000 yellow widgets for future delivery, all with the standard 90-day warranty.”

On 6/3/99, Sellco called Buyco and said that they could provide the widgets, but without any warranty. Buyco verbally agreed.

On 6/4/99 Sellco sent a written message to Buyco saying, “This is to confirm your order of 10,000 widgets with no warranty.” Buyco never responded to this message or signed anything that agreed to waive the warranty.

On 6/8/99 Sellco shipped 5,000 blue gadgets (not yellow widgets) to Buyco by mistake. Blue gadgets are almost exactly like yellow widgets and perform the same function, but they look different.

On 6/9/99 Buyco rejected the blue gadgets and sent a letter saying, “You sent us the wrong product, you jerks. We had to buy from another supplier, and they cost us $5. You owe us $25,000 for that."

"You have breached the contract, so don't send us the remaining 5,000 yellow widgets. We will get them from our other supplier.”

What are the rights and remedies of the parties?

Practice Question 17-3: Common Law Breach and Remedy

Homeowner Homer orally agreed with builder Bill that he would pay Bill $100,000 to have a custom built home erected on the land that Homer already owned. They agreed the home was to be done before the winter rains set in.

When Bill was half done building, he discovered he was dying from cancer.

Bill told Homer he was so sick he needed $30,000 more in order to hire a helper or else it would be impossible for him to finish the home in time. Homer offered to pay Bill the extra $30,000 this would take. Homer promised this because he was tired of living in a tent and really wanted to get in the home before winter.

In reasonable reliance on Homer's promise, Bill hired his friend, Fred, and paid Fred wages of $30,000.

The home was all done except for the painting when Bill died. Fred split.

Homer demanded that Bill's widow, Wanda, who was also the executor of Bill's estate, finish the house. She said it was impossible.

Wanda demanded payment of $130,000, but Homer was mad and refused to pay anything.

Homer paid painter Paul $10,000 to finish the painting of the home.

Discuss the rights and remedies of Homer and Wanda (ignoring any actions against Fred).

Practice Question 17-4: UCC Formation, Remedies

On 6/1 Cindy from Buyco called Doris at Sellco and said, "Girlfriend, we want 10,000 of your T-shirts, assorted styles, your item number 12345, printed with our logo over the left pocket, according to the terms and pricing printed in your catalogue. Delivered FOB your docks July 1. My pointy-haired boss needs to see a sample first."

Doris said, "You got it, girl."

On 6/2 Doris at Sellco sent Cindy at Buyco a sample with the Buyco logo printed over the right pocket. Cindy gave it to her pointy-haired boss, Roberto. Roberto put the shirt on inside out, looked in the mirror and thought something was wrong. But he didn't let on because he had been doing some lines. He just said, "Cool."

On 6/3 Cindy from Buyco called Doris at Sellco and said, "Roberto says it's a go. 10,000. You got it?"

Doris replied, "No problemo. On the way, Girlfriend." Doris intended to send a sales confirmation, but her kid, Julian, got sick and you know how it is.

On June 15 Buyco received 10,000 T-shirts, assorted styles, item number 12345, with the Buyco logo over the right pocket. Roberto put on a shirt right-side out and looked in the mirror. Something was wrong besides his hair. "This won't do," he said to Cindy.

"Doris, this shipment ain't right," Cindy said. "These shirts gots the logo over the wrong pocket, Girl. We be rejecting."

"No way," Doris said.

What are the rights and remedies of Buyco and Sellco and why?

Practice Question 17-5: Third Party Contracts

Huey entered into a valid written contract with Louie to buy a piano for his brother Dewey for $2,500. Louie promised the piano would be delivered in time for Dewey's graduation. Dewey was ecstatic. Huey made a down payment of $1,000 and promised to pay an additional amount of $1,500 for the piano in six months.

Louie made a deal with another dealer, Daisy. Daisy agreed to deliver a piano as specified in exchange for an immediate payment of $2,000 from Louie.

After being paid Daisy became insolvent and did not deliver the piano.

Louie blames Daisy.

Dewey was upset he didn't get the piano he expected.

Huey wants his money back.

What are the rights, remedies and defenses of Huey, Louie, Dewey and Daisy?

Chapter 18: Tort Answer Formats

There are 5 basic types of tort essay questions; issues can be skipped if the question does not call for their discussion.

1. **INTENTIONAL TORTS AND NEGLIGENCE** – Intentional torts are deliberate ACTS causing CONFINEMENT, FEAR, OFFENSE or other harm and negligence is a NEGLIGENT act causing harm. If both intentional torts and negligence are suggested by the facts, address the INTENTIONAL TORTS first and the possible defenses. Then address NEGLIGENCE second with the possible defenses to that cause of action.
2. **PRODUCTS LIABILITY –** Anyone who releases an UNREASONABLY DANGEROUS product into the stream of commerce may be held liable for any personal injury, property damage or other economic losses caused, but the extent of liability depends on the legal theory proven by the plaintiff.
3. **DEFAMATION AND INVASION OF PRIVACY** –Defamation is a false assertion causing damage to REPUTATION. Invasion of Privacy can be any of four theories for unreasonable acts causing EMBARRASSMENT or INCONVENIENCE.
4. **NUISANCE** – Nuisance is an unreasonable interference with the plaintiff's ability to enjoy and use private LAND or else to enjoy the use of PUBLIC resources.
5. **MISCELLANEOUS MALICIOUS TORTS -- MALICIOUS PROSECUTION / ABUSE OF PROCESS, INTERFERENCE WITH CONTRACT / INJURIOUS FALSEHOOD, DECEIT** -- Watch out for these. They are often too simple for an entire essay answer so they may be mixed in with intentional torts, negligence or other issues.

Mnemonics for Tort Essays:

- **ABC-FITT** = The intentional torts – Assault, Battery, Conversion, False imprisonment, Intentional infliction of emotional distress, Trespass to land and Trespass to chattels.
- **DARN COPS** = The intentional tort DEFENSES. Discipline, Authority of law, Recapture, Necessity, Consent, Others (defense of), Property (defense of), Self (defense of).
- **SCRAP** = DUTY can be based on Statute, Contract, Relationship, Assumption, and Peril caused (both a TORT and a CRIMES factor).
- **CLUB** = Slander per se – Crime, Loathsome disease, Unchaste behavior, Business practices
- **LAID** = Invasion of Privacy – false Light, Appropriation of likeness, Intrusion into privacy, public Disclosure of private facts.

Recommended Tort Essay Answer Strategies:

1. Discuss INTENTIONAL TORTS first and NEGLIGENCE second.
2. Always DEFINE "INTENTIONAL" in the discussion of the first intentional tort.
3. Discuss both intentional torts and negligence UNLESS it is CLEAR there was **NO INTENTIONAL ACT** done to cause the tortious event that caused the injury.
4. For ASSAULT and BATTERY be clear you are talking TORT and not CRIMINAL law.
5. BATTERY suggests an issue of ASSAULT and possibly INTENTIONAL INFLICTION.
6. FALSE IMPRISONMENT suggests an issue of INTENTIONAL INFLICTION.
7. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS is only for BYSTANDERS.
8. CONVERSION suggests TRESPASS TO CHATTELS.
9. DEFAMATION suggests NEGLIGENCE; separate analysis is often needed.

10. DEFAMATION and PRIVACY INVASION may be in the same question, but often not.
11. MALICIOUS PROSECUTION may suggest FALSE IMPRISONMENT.
12. ABUSE OF PROCESS often suggests a DEFAMATION issue.
13. Discuss the AFFIRMATIVE DEFENSES as separate issues.
14. For NEGLIGENCE, always discuss CONTRIBUTORY and COMPARATIVE NEGLIGENCE. Also maybe ASSUMPTION OF THE RISK.

COMMON TORT ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. *ASSAULT?* [33]

   Under tort law ASSAULT is an intentional act done to cause reasonable apprehension of a battery, and which actually does cause such apprehension. A BATTERY is a harmful or offensive touching of the person. **Important!**

   [Every "intentional tort" has the element of INTENTIONAL ACT! Always DEFINE "intentional act" in the definition of the FIRST intentional tort issue as follows:]

   An INTENTIONAL ACT is one done for the purpose of causing or with knowledge with reasonable certainty that it will cause the result that produces injury. **Important!**

   [ALWAYS state this in your discussion of the first intentional tort. For TORTS an act is intentional if it is done for the PURPOSE of producing a RESULT, or if the actors knows that result will almost certainly occur! But the result does not necessarily have to be injury. All that matters is that the result CAUSES injury.]

   Here … because…

   Therefore, the defendant may be liable for tortious assault.

2. *BATTERY?*

   Under tort law BATTERY is an intentional act to cause a touching of the person of the plaintiff causing harm or offense to the plaintiff. [34] **Important!**

   Here … because…

   Therefore the defendant may be liable for battery.

[33] Note that for "assault" and "battery" you can either call them "tortious assault" or "tortious battery" in the issue statement or else you can say "Under tort law…" in the rule. But somewhere you MUST make it clear you are talking about a tort and not a crime.

[34] Note that the "intent" of the defendant must be to cause a touching, and the touching must cause harm or offense, but the intent of the defendant does not necessarily have to be to cause harm or offense.

3. *CONVERSION?*

   Under tort law CONVERSION is a substantial interference with chattel causing a substantial deprivation of possession. The proscribed legal remedy is forced purchase by the defendant, but the plaintiff may "waive the tort" and seek restitution instead. **Important!**

   Here … because… Therefore the defendant may be liable for conversion.

4. *FALSE IMPRISONMENT?*

   Under tort law FALSE IMPRISONMENT is an intentional act to cause a person to be confined to an enclosed area with no reasonably apparent means of reasonable escape. [35] *Plaintiffs must actually know they are confined, but do not have to know the confinement is illegal.* [36] **Important!**

   Here … because… Therefore the defendant may be liable for false imprisonment.

5. *INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?*

   Under tort law IIED is an intentional, outrageous act which causes severe emotional distress. The plaintiff must present evidence they were caused severe emotional distress. Important!

   [Note: Here "intent" may be shown by EITHER the intentional commission of an outrageous act, regardless of intent, or by almost any act for the purpose of causing emotional distress. Any act is "outrageous" per se if the actual intent is to cause severe emotional distress. And a lack of intent to cause emotional distress is not a defense if the act itself is outrageous.]

   Here … because… Therefore the defendant may be liable for intentional infliction.

6. *TRESPASS TO LAND?*

   Under tort law TRESPASS TO LAND is an intentional act causing an unauthorized entry onto, over, or under the land of another. The defendant is liable for nominal damages and all actual damages caused by the entry.

   Here … because…

   Therefore the defendant may be liable for trespass to land.

[35] A "reasonable person test" determines whether the confinement is without a "reasonably apparent means of reasonable exit."

[36] For example it is false imprisonment to illegally conceal a child away from its lawful guardian even though the child agrees to be concealed. The child lacks legal capacity to "consent" to being taken. And it is false imprisonment to keep a prisoner in jail after the scheduled (legal) release date, even though the prisoner is unaware they have a right to leave the jail. But it is NOT false imprisonment to keep a plaintiff illegally confined if the plaintiff is asleep, comatose, etc. and unaware of their situation.

7. *TRESPASS TO CHATTELS?*

   Under tort law TRESPASS TO CHATTEL is an intentional act causing unauthorized interference with or damage to the chattel of another. The defendant is liable for actual damages measured as the lost rental value of the chattel, the rental costs for temporary replacement of the chattel, and the repair costs to repair the chattel, but not more than the actual cash value of the chattel.

   Here … because… Therefore the defendant may be liable for trespass to chattels.

8. *TRANSFERRED INTENT?*

   Under the tort doctrine of TRANSFERRED INTENT, a defendant who commits an intentional tort towards anybody generally becomes liable for every injury inflicted on everybody, even if the injury caused or the person caused injury is not the original intent. **Important!**

   An exception is that Courts generally will not find IIED based on transferred intent, and Courts may find only negligence and not an intentional tort by transferred intent if the original intent of the defendant was not malicious. [37]

   Here … because… Therefore the defendant may be liable for trespass to chattels.

9. *DAMAGES for INTENTIONAL TORTS?*

   Every defendant that commits an intentional tort is liable for all actual damages actually and proximately caused. Damages consist of SPECIAL DAMAGES, compensation for monetary losses, and GENERAL DAMAGES, compensation for pain, suffering, anxiety, emotional distress, inconvenience, etc. Defendants may also be liable for PUNITIVE DAMAGES if the Court finds they acted with MALICE, an evil or wrongful intent.

10. *DEFENSE of DISCIPLINE?*

    Under tort law a person with recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) *is privileged to act reasonably given the circumstances in a manner that otherwise might constitute a battery or false imprisonment.* [38]

    Here…because…Therefore…

11. *DEFENSE of AUTHORITY OF LAW (PREVENTION OF CRIME)?*

    Under tort law a person is privileged to act reasonably to prevent or stop a FELONY from being committed in their presence. Police may arrest for misdemeanors committed in their presence and for felonies otherwise if based upon reasonable suspicion.

    Here…because…Therefore…

[37] For example, Bevis and Butthead deliberately trespass onto Boomer's land to go hunting. Then Bevis accidentally shoots Butthead. Most Courts would not allow Butthead to claim battery by transferred intent merely because the "intentional trespass" against Boomer caused an injury to Butthead. Butthead may be required to claim negligence.
[38] EVERY defense requires REASONABLE acts. Your defense argument should stress "reasonable" throughout.

12. DEFENSE of RECAPTURE?

Under tort law a person has a qualified privilege to use reasonable force to RECAPTURE their own chattel if 1) they have asked for and have been refused return of the chattel, and 2) they are in fresh pursuit of wrongfully taken chattel, or 3) they lost possession of the chattel through no fault of their own.

Here…because…Therefore….

13. DEFENSE of NECESSITY? [39]

Under tort law a person is privileged to act reasonably as NECESSARY to protect their own safety, the safety of others, and the safety of property. For defense of property to be "reasonable" the value of the property being protected must exceed the damages caused by the efforts to protect it. Reasonable acts done to protect the property of others are a PUBLIC NECESSITY and absolutely privileged. Reasonable acts done to protect the defendant's own property are a PRIVATE NECESSITY and only a qualified privilege. The defendant remains liable for actual damages to the plaintiff.

Here…because…Therefore…

14. DEFENSE of CONSENT?

Under tort law FULLY INFORMED CONSENT from a person with legal capacity is a defense to most intentional torts, but is not a defense to a battery that causes foreseeable great bodily injury.

Here…because…Therefore….

15. DEFENSE of OTHERS?

Under tort law a person is privileged to act reasonably as necessary to defend others from harm. Courts are split when a defendant unknowingly enters a fracas to defend an AGGRESSOR.. Under one view the defendant STEPS-INTO-THE-SHOES of the aggressor and has no privilege because the aggressor could not claim self-defense. In other Courts the defendant is privileged to defend the aggressor in a fracas if they act with a REASONABLE BELIEF they are acting to defend an innocent victim of aggression.

Here…because…Therefore….

[39] The defense of necessity is simply a combination of self-defense, defense of others and defense of property, but it more often is used only when property is being protected.

16. DEFENSE of PROPERTY? [40]

Under tort law defendants are privileged to use reasonable, NON-DEADLY FORCE to protect their property or the property of others. But the use of deadly force merely to protect property is never legal.

State something like the following if there is a suspected theft of goods or services:

Under the SHOPKEEPER'S PRIVILEGE a defendant may use reasonable force to detain a plaintiff for a reasonable period of time to investigate a reasonable suspicion that the plaintiff has stolen goods or services from the defendant.

State something like the following if there was a tortious injury to the defendant:

To protect litigation rights defendants may use reasonable force to as necessary to detain plaintiffs for a reasonable period of time to investigate events that have caused them damages. [41]

Here…because…Therefore…

17. SELF-DEFENSE?

Under tort law a person may act reasonably if NECESSARY to protect their own safety. Modernly the person can "hold her ground" and has is no duty to retreat in most jurisdictions.

Here…because…Therefore….

18. DEFENSE of INFANCY, INSANITY or INCOMPETENCE?

INFANCY, INSANITY and INCOMPETENCE are not defenses for intentional torts.

[Watch for intentional torts by children or insane people! It is a criminal defense but not a tort defense because tort law is to compensate plaintiffs, not punish defendants.]

19. NEGLIGENCE?

Under tort law NEGLIGENCE is a failure to exercise that degree of care that a reasonably prudent person would use in the same situation. To prevail the plaintiff must usually prove DUTY, BREACH, ACTUAL and PROXIMATE CAUSATION and DAMAGES. **Important!**

[Note: If negligence is just one of several issues in the question, the analysis of negligence elements can be contained within the issue of negligence.

If a question involves nothing but the cause of action for negligence, CONSIDER MAKING THE ABOVE AN INTRODUCTORY STATEMENT and then treat each of the elements (Duty, Breach, etc.) as a separate "issue".]

[40] This is effectively the same issue as "Defense of Necessity". "Defense of Property" more often is the stated issue when "deadly force" is a factor. "Defense of Necessity" is more often used when "public necessity" is suggested.
[41] When this is tested 90% of law students fail to grasp the obvious. Litigation rights are personal property.

20. STRICT LIABILITY in NEGLIGENCE?

Under tort law a defendant that engages in any of three activities is STRICTLY LIABLE to any person who is actually and proximately caused injury. These three activities are: 1) keeping a KNOWN, DANGEROUS ANIMAL, 2) keeping an EXOTIC ANIMAL of a type that is not commonly domesticated, or 3) engaging in ULTRA-HAZARDOUS ACTIVITIES that are unusual, pose extreme risks to others, and are usually subject to strict safety regulations. [42]

If a defendant engages in these activities duty is presumed, and if anyone is caused injured as a result breach is presumed as well. Here…because…Therefore…

[Note: Product liability also can pose strict liability, but that is better addressed as part of a product liability analysis, not a "strict liability in negligence" analysis.]

21. DUTY?

Under tort law the general rule is that a person has no duty to act to defend others from harm. [43] *A DUTY to act to protect others from harm ONLY arises under five scenarios:* **[SCRAP]** *STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or where PERIL to the plaintiff is caused by the defendant.* **Important! Important in criminal law as well.**

[Go from here to either discussing negligence per se, duty based on peril or perhaps duty based on relationship, premises liability, etc. as appropriate.]

22. NEGLIGENCE PER SE? [44]

Under tort law a DUTY may be created by a STATUTE (or rule), and violation of the statute is a BREACH of duty making the defendant NEGLIGENT PER SE if the purpose of the statute was 1) to protect the CLASS OF PEOPLE to which the plaintiff belongs by 2) preventing the TYPE OF INJURY that the plaintiff suffered. [45]

Here…because…Therefore….

23. DUTY BASED ON PERIL? [46]

Under PALSGRAF, CARDOZO argued that a DUTY based on PERIL is only owed to people in the ZONE OF DANGER created by the defendant's acts, so there is no liability to any plaintiff outside that area. The Zone of Danger is the area where the acts of the defendant created reasonably foreseeable dangers to others.

---

[42] Ultra-hazardous activities are things that average people simply never do. It is often just a matter of scale.
[43] Any statement that there is a "general duty to act reasonably to protect others from harm" is poppy-cock. There is NO GENERAL DUTY to act to protect others from harm.
[44] If a "statute" is mentioned in the question discuss NEGLIGENCE PER SE first before discussing duty based on PERIL. Usually the facts will not support a negligence per se finding – because it makes the answer too simple for an entire hour of examination.
[45] You may see a "rule" that is not a "statute" as when an employee works for a firm with a "safety rule." The employee ASSUMES the duty of obeying the rule by working at the job. And once assumed, the effect of the rule is the same as a statutory requirement.
[46] Duty is probably the most difficult element of negligence to prove and understand.

ANDREWS argued that if a defendant owes a duty to anyone, and breaches the duty, then she should be liable to all plaintiffs actually and proximately harmed by the breach, even if they were outside the zone of danger. [47] **Important!**

Here the ZONE OF DANGER was…because… [48]

24. *DUTY BASED ON PREMISES LIABILITY?* [49]

Under tort law an OCCUPIER OF LAND has a duty to both those who come onto the land and to those off the land. This is a form of duty based on RELATIONSHIP.

Under the common law an occupier of land had no duty to UNKNOWN TRESPASSERS.

The occupier had a duty to warn and protect KNOWN TRESPASSERS and LICENSEES from known, hidden dangers and artificial conditions. Licensees are people allowed onto the land but not for the occupier's benefit.

The occupier had a duty to reasonably inspect the land and warn and protect INVITEES from known, hidden dangers and artificial conditions. Invitees were people invited onto the land to benefit the occupier.

Finally the occupier of land had a duty to conduct activities on the land with due care to prevent injury to PEOPLE OFF THE LAND.

Modernly these rigid rules by classification have been broadly modified by both statute and Court decision to create a balancing test under which the occupier of land has a duty of due care to ALL PEOPLE to act as a reasonable person would in inspecting, maintaining and using his property so that it does pose serious harm to others.

Here…because….Therefore.

25. *ATTRACTIVE NUISANCE DOCTRINE?*

Under the ATTRACTIVE NUISANCE DOCTRINE an OCCUPIER OF LAND who knows that children have or may in the future trespassed onto her land has a strict duty to inspect for and eliminate any condition posing dangers the children might not fully appreciate because of their young age.

This is a duty based on RELATIONSHIP which poses almost strict liability. The only defense the landowner may raise is assumption of the risk.

Here…because….Therefore.

---

[47] I have read and re-read what Cardozo and Andrews said and I believe this is an accurate interpretation.

[48] It simplifies your answer if you define the ZONE OF DANGER and analyze just where it was in the situation presented. Was anyone in it? If there is nobody in the zone of danger there is no duty.

[49] Duty based on premises liability, a form of RELATIONSHIP DUTY, is the THIRD MAJOR basis after discussing negligence per se (duty based on STATUTE) and duty based on PERIL.

26. BREACH?

Under tort law BREACH means that the defendant did not exercise the DEGREE OF CARE a reasonable person would use in the same circumstances.

In assessing "reasonableness" the STANDARD OF CARE that would be applied to the defendant is…

[Note: Normally little if anything has to be said about the STANDARD OF CARE. But, if the defendant is a CHILD engaged in childlike activities, the standard is the level of care a child of that age and experience would normally use. A child engaged in adult activities is held to an adult standard. And if the defendant is (or represents self to be) a highly trained PROFESSIONAL, a higher standard of care applies. Also, the standard of MEDICAL CARE is the standard in the community or the nation (split opinions). But if the defendant is MENTALLY RETARDED, insane or ignorant, the standard of care is NOT LOWERED below that set for the average member of the community.]

Here there was a BREACH because a reasonable person in the same circumstances would have … [50]

27. BREACH based on RES IPSA LOQUITUR?

Under the doctrine of RES IPSA LOQUITUR an INFERENCE OF BREACH exists if 1) negligence by someone is implied by the facts, 2) the defendant had control of the event or instrument that caused injury, and 3) the plaintiff had no control over the event or instrument causing injury. [51]

Here negligence by someone is implied because… and the defendant had control over the event (or cause of injury) because… and the plaintiff had no control over the event (or cause of injury) because…

Therefore, BREACH could be inferred based on RES IPSA LOQUITUR.

28. BREACH BASED ON NEGLIGENT ENTRUSTMENT?

Under tort law defendants who NEGLIGENTLY ENTRUST third parties with resources or authority are directly liable for injuries actually and proximately caused as a result. [52]

Here…because…Therefore.

[50] Often the best explanation of "breach" is simply to describe what MORE a "reasonable person" would have done that the defendant did not do.
[51] Turn to res ipsa loquitur when the plaintiff is the helpless victim of injury by UNKNOWN CAUSES.
[52] Typically the tested issue is whether a reasonable person would have entrusted the party causing injury.

29. RESPONDEAT SUPERIOR?

Under the doctrine of RESPONDEAT SUPERIOR an employer, master or principal is vicariously liable for all torts committed by an employee, servant or agent, respectively, if the tort is committed within the scope of the employment or agency relationship. [53] *Respondeat superior does not apply to independent contractors.*

Here…because…Therefore.

30. VICARIOUS LIABILITY for JOINT ENTERPRISE?

Under tort law each party to a JOINT ENTERPRISE is vicariously liable for all torts committed by other members of the joint enterprise it the tort is committed within the scope of the enterprise relationship. A joint enterprise is one in which two or more parties agree to work together for mutual benefit and each shares equal rights of control over assets and activities. [54]

Here…because…Therefore.

31. LIABILITY for acts of INDEPENDENT CONTRACTOR?

Under tort law defendant who hires an INDEPENDENT CONTRACTOR to perform duties that are not "non-delegable" by law is NOT vicariously liable for torts committed by the contractor and can only be directly liable because of negligent selection or negligent entrustment of the contractor by the defendant. An independent contractor is a person selected to provide labor services without close and regular supervision. [55]

Here…because…Therefore.

32. The ACTUAL CAUSE or a SUBSTANTIAL FACTOR causing injury?

Under tort law the defendant is the ACTUAL CAUSE of injury if the plaintiff would not have been injured BUT FOR the acts of the defendant. [56]

If two or more defendants acted negligently, the plaintiff would not have been injured if neither had acted, and the plaintiff cannot reasonably prove she would not have been injured but for the acts of each alone, then each defendant is a SUBSTANTIAL FACTOR causing injury. [57] ***Important!***

Here the defendant was the ACTUAL cause of injury (or else a SUBSTANTIAL FACTOR) because …but for…

---

[53] Typically the tested issue is whether the tort was committed within the scope of the relationship.
[54] Typically the tested issue is whether the parties had equal rights of control over assets and activities.
[55] The tested issues are whether the person causing injury is an employee or independent contractor, and whether they were selected negligently or negligently entrusted by the defendant.
[56] Actual cause is the easiest element of negligence to prove and understand.
[57] It is not necessary to define SUBSTANTIAL FACTOR unless you are presented with the odd fact pattern where it is necessary because the plaintiff cannot prove she would not have been injured but for the acts of each defendant alone.

33. PROXIMATE CAUSE? [58]

Under tort law PROXIMATE CAUSE means that the injury suffered by the plaintiff was so DIRECT, NATURAL and FORESEEABLE, so close in time and place, resulting from a CHAIN OF CAUSATION begun by the defendant's acts, unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability for the result. ***Important!***

Generally where two or more acts are actual causes of the plaintiff's injury, the last unforeseeable, intentional act will be an UNFORESEEABLE INTERVENING EVENT that terminates proximate causation, cutting off all liability arising from prior acts. Further, there is generally a rebuttable presumption at law that criminal or intentionally tortious acts by third parties are UNFORESEEABLE, while negligent acts are considered FORESEEABLE. [59] ***Important!***

Here there was (no) PROXIMATE CAUSATION because…

34. DAMAGES?

Under tort law the plaintiff must show ACTUAL INJURY resulting from the acts of the defendant. SPECIAL damages are the plaintiff's out-of-pocket costs, and GENERAL damages are allowed for pain and suffering. However under SURVIVAL RULES generally only SPECIAL DAMAGES can be awarded to the estate of a deceased tort plaintiff and NO GENERAL DAMAGES are allowed. Further, PUNITIVE DAMAGES may be awarded if the acts of the defendant were deliberate and malicious, but NO PUNITIVE DAMAGES can be awarded if only NEGLIGENCE is proven.

35. EGG SHELL PLAINTIFF?

Under the EGG-SHELL PLAINTIFF concept, defendants are liable for all damages they actually cause plaintiffs, even if the plaintiff suffered from pre-existing conditions that result in unforeseeably severe injury. The doctrine of the law is that "defendants must take plaintiffs as they find them." [60]

Here…because…Therefore…

36. CONTRIBUTORY or COMPARATIVE NEGLIGENCE?

Under tort law CONTRIBUTORY NEGLIGENCE completely bars a plaintiff from recovery if any negligence by the plaintiff helped cause their injury. This often produces harsh results and many jurisdictions use the LAST CLEAR CHANCE DOCTRINE to allow a negligent plaintiff to still recover where if the defendant had the last clear opportunity to avoid the accident.

[58] Proximate causation often mystifies law students, but using the rule presented here for "independent intervening events" makes it substantially easier.
[59] This is one of the most powerful decision making tools for both tort and crime analysis. Learn this one!
[60] This only applies to "conditions" over which the plaintiff had no control and did not unreasonably create themselves.

Where negligence by the plaintiff does not cause an accident but does contribute to the injuries many Courts use the AVOIDABLE INJURY DOCTRINE to allocate the injuries between the parties.

In many States the COMPARATIVE NEGLIGENCE approach does not bar the negligent plaintiff from recovery but reduces the plaintiff's recovery to reflect the degree of fault shared by the plaintiff. Some states bar a plaintiff from recovery if they are over half to blame for an accident.

Here … because…

37. *ASSUMPTION OF THE RISK?*

Under tort law ASSUMPTION OF THE RISK is a complete bar to recovery for negligence if 1) plaintiffs put themselves at risk 2) with full awareness of the risks and 3) a conscious acceptance of the risks.

[Note: This is the only possible affirmative defense to a proven claim of Strict Liability or Attractive Nuisance Doctrine.]

Here … because…

38. *NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS?* [61]

Under tort law, a BYSTANDER to an event may bring an action for NEGLIGENT INFLICTION if they suffer severe emotional distress and there is a nexus between the negligent act and the injury based on a PROXIMITY IN TIME, PLACE and RELATIONSHIP. In some jurisdictions a physical manifestation of emotional distress must be shown.

Here … because… Therefore…

39. *PRODUCTS LIABILITY?*

Under tort law anyone who RELEASES an UNREASONABLY DANGEROUS product into the STREAM OF COMMERCE is liable for PERSONAL INJURY or PROPERTY DAMAGE CAUSED. A product is UNREASONABLY DANGEROUS if the dangers it poses outweigh its utility given the commercial practicality for making it safer, without destroying its utility.

Liability may be established based on any of four theories: 1) BREACH OF EXPRESS WARRANTY, 2) BREACH OF IMPLIED WARRANTY, 3) NEGLIGENCE or 4) STRICT LIABILITY IN TORT. [62]

[61] Do not discuss NIED unless the plaintiff is a BYSTANDER who only witnesses or hears about some accident that injures another person. If the plaintiff is actually, physically involved in an event they have an action for NEGLIGENCE and can recover for their "emotional distress" as special damages.

[62] Because there are four theories of product liability, each with their own elements, essay questions often have two plaintiffs and two defendants. That produces four relationships and you are expected to compare and contrast how each product liability theory would benefit or fail to benefit each plaintiff or defendant.

Under a BREACH OF EXPRESS WARRANTY theory the plaintiff must show the defendant sold goods with express representations (express warranty) which made them unreasonably dangerous, and that it was the actual and proximate cause of injury to the plaintiff.

Further, under a BREACH OF IMPLIED WARRANTY theory the plaintiff must show the defendant sold goods by representing they were safe for ordinary use or knowing the buyer's specific intended use (implied warranty), the goods were unreasonably dangerous for that use, and that it was the actual and proximate cause of injury to the plaintiff.

Under a NEGLIGENCE theory the defendant has a duty not to place unreasonably dangerous goods into the stream of commerce. The plaintiff must be a foreseeable plaintiff proximately caused injury by the negligent acts of the defendant.

And, under a STRICT LIABILITY theory the plaintiff must show the seller was a COMMERCIAL SUPPLIER, the product was unreasonably dangerous at the time it left the defendant's control, and the defendant is only liable for non-economic damages.

Here… because… Therefore …

40. DEFAMATION? [63]

Under tort law DEFAMATION is a FALSE statement of material fact PUBLISHED to others about the plaintiff CAUSING DAMAGE to REPUTATION. A defamation may be SLANDER, an oral statement, or LIBEL, a written statement. **Important!**

But many false statements are PRIVILEGED where the defendant speaks to defend a private interest, group interest or the public interest and does so without malice and in a reasonable manner calculated to defend that interest without unnecessarily harming the plaintiff. [64]

Injury to reputation will be presumed where there is LIBEL or SLANDER PER SE. SLANDER PER SE is found where the false statement alleges CRIMINAL behavior, LOATHSOME disease, UNCHASTE behavior or improper BUSINESS practices. **[CLUB] Important!**

Under NEW YORK TIMES and its progeny, a PUBLIC FIGURE PLAINTIFF must prove ACTUAL MALICE, that the false statement was made with knowledge or reckless disregard of its falseness, in order to recover in a defamation action. A PUBLIC FIGURE is a person who has acted to put themselves in the public spotlight. Further, where a matter of PUBLIC CONCERN is at issue, or where the plaintiff seeks punitive damages, the plaintiff must at least prove NEGLIGENCE. **Important!**

Here the statement was FALSE because … The defendant would dispute this because …

---

[63] Generally a defamation question takes an entire hour to answer so it seldom is combined with other issues except that it always involves the issue of "negligence" to some degree, and may suggest invasion of privacy. It is usually a mistake to discuss both defamation and false light concerning the same statement because if it is a statement that would damage one's reputation the issue is clearly defamation, not false light. If the statement does not damage the plaintiff's reputation but only causes embarrassment otherwise, it is not defamation and can only be false light.

[64] This is frequently tested and poorly taught. If a person has a good, valid reason to speak out, and is not motivated by malice, the statement is privileged even if the thing said turns out to be wrong later!

And the statement was NOT PRIVILEGED because (either no valid interest being protected or malicious intent)…Further, the statement was PUBLISHED because…Also the statement was ABOUT the plaintiff because … And the statement at issue was DAMAGING to reputation because…

Therefore, the plaintiff would be able to establish a prima facie case of defamation.

[Now go through the CASE LAW AFFIRMATIVE DEFENSES as part of the defamation analysis.]

HOWEVER, the defendant would argue that the plaintiff is a PUBLIC FIGURE because… [65] *… Therefore, the plaintiff would have to show ACTUAL MALICE because …*

FURTHER, the defendant would argue that the subject was a PUBLIC MATTER because … Therefore, the plaintiff would have to prove NEGLIGENCE because …

Therefore…

41. *FALSE LIGHT?*

Under tort law FALSE LIGHT is the tort of publishing a false portrayal of a person in a manner that would cause them embarrassment or inconvenience. [66]

Here…because. Therefore…

42. *MISAPPROPRIATION of likeness?*

Under tort law MISAPPROPRIATION is the tort of unauthorized use of the likeness of another person for personal gain in a manner that implies endorsement of a product or cause. [67]

Here…because…Therefore…

43. *INTRUSION into the plaintiff's solitude?*

Under tort law INTRUSION is the tort of unreasonable intrusion into the peace and solitude of another person. [68]

Here…because. Therefore…

---

[65] Any person who runs for political office, leads a cause, strives to become a celebrity, or places themselves in front of the television cameras and radio microphones becomes a PUBLIC FIGURE.

[66] The best example of false light is false praise or false statements of fact that ridicule and embarrass but are not literally damaging to reputation -- like publishing articles saying Paris Hilton is a virgin or that Robert Blake was heartbroken when his wife was murdered.

[67] This is usually for business purposes, but it could also be for some other purpose like political advantage. Typically this gives rise to situations where the defendant has reaped a profit without really costing the plaintiff much. In that case the plaintiff "waives the tort" and seeks RESTITUTION, meaning that the plaintiff asks to be awarded the profits of the defendants instead of the injuries they have actually suffered.

[68] Here, as in so many legal issues, the key element AND YOUR WHOLE FOCUS OF ARGUMENT should be on the "unreasonableness" of the defendant's actions.

44. PUBLIC DISCLOSURE OF PRIVATE FACTS?

Under tort law PUBLIC DISCLOSURE is the tort of unreasonably disclosing private facts that a reasonable person would find embarrassing. [69] *Here…because…*

HOWEVER, the defendant would DEFEND on the ground the facts revealed were PUBLIC FACTS. **[This is the main issue in these cases].**

45. PRIVATE NUISANCE?

Under tort law PRIVATE NUISANCE is an unreasonable interference with a person's use and enjoyment of their own land. In the MAJORITY view COMING TO THE NUISANCE is a consideration for the court and NOT A COMPLETE BAR to bringing a nuisance action.

Here B's use of her OWN LAND was INTERFERED WITH by A because…, and the interference was UNREASONABLE because…Therefore, …

46. PUBLIC NUISANCE?

Under tort law PUBLIC NUISANCE is an unreasonable interference with a person's use and enjoyment of public resources. [70] *To have standing the plaintiff must show particular injury, greater than that suffered by the general public. Here…because.. Therefore, …*

HOWEVER, the defendant would DEFEND on the ground that the plaintiff has suffered no greater injury than the general public. **[This is the main defense issue in these cases]**

47. MALICIOUS PROSECUTION?

Under tort law a person is liable for MALICIOUS PROSECUTION if they have instituted or continued a criminal prosecution of another person out of malice and the action was terminated based on its merits because there was no probable cause.

Here there was no probable cause because… Therefore…

48. ABUSE OF PROCESS?

Under tort law a person is liable for ABUSE OF PROCESS if they have brought a civil or criminal action against another person without a legitimate basis out of malice or for an improper purpose. [71]

Here the defendant acted out of malice because… Therefore, …

---

[69] Here, again, the key element is the "unreasonableness" of the defendant's actions. This sort of issue often involves private matters like past employment history and medical problems.

[70] When I first was taught about this tort I believed it had to do only with using public land like highways and parks. But really it has to do with any public "resource" including things so abstract as the right to go down the street without fear of being mugged. If a district attorney could bring an action, then a private party can bring an action, given that they meet the STANDING requirement of suffering a greater injury than the "average" member of the public.

[71] Malicious prosecution only concerns criminal actions that are prosecuted without probable cause. Abuse of process in contrast concerns both civil actions and criminal actions instituted for a wrongful purpose.

49. ILLEGAL INTERFERENCE? [Paraphrase as necessary] [72]

Under tort law a person is liable for unreasonably and illegally interfering with another person's known or apparent business relationships.

Here the defendant's acts caused unreasonable interference because… Therefore, …

50. DECEIT (or FRAUD or MISREPRESENTATION)?

Under tort law a person is liable for making 1) a FALSE STATEMENT OF MATERIAL FACT 2) KNOWING it was false 3) with INTENT TO DECEIVE, 4) that was REASONABLY RELIED upon by the plaintiff, 5) CAUSING the plaintiff INJURY.

Here there was FALSE STATEMENT of MATERIAL FACT because… And the statement was made by the defendant with KNOWLEDGE it was false because…Further the defendant had an INTENT TO DECEIVE because… Also the plaintiff REASONABLY RELIED because… And the plaintiff was INJURED because…

Therefore, …

51. NONDISCLOSURE (CONCEALMENT)?

Under tort law a prima facie case of NONDISCLOSURE (or CONCEALMENT) requires showing 1) a DUTY to disclose material facts, 2) BREACH of that duty, 3) REASONABLE RELIANCE by the plaintiff on facts as they appeared to be, and 4) INJURY CAUSED by the nondisclosure.

Here the defendant had a DUTY to disclose because…And the defendant BREACHED that duty because they did not disclose…Further, this was a MATERIAL FACT because…And the plaintiff REASONABLY RELIED on appearances because…This nondisclosure INJURED the plaintiff because…

Therefore, …

52. TORT RESTITUTION?

Under tort law plaintiffs may "waive the tort" and instead of seeking an award of damages based on their own injury, they may seek RESTITUTION, an award of damages based on the amount the defendant has wrongfully benefited to PREVENT UNJUST ENRICHMENT.

Here…because…Therefore…

Note: The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a TORTS examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

[72] I have heard this called "interference with contract" and then I have heard it called "interference with prospective economic advantage". Pulleezze, if that is not the most awkward legal phrase I have ever heard? Let's just use football terminology and call it "illegal interference".

Practice Question 18-6: Intentional Torts, Negligence, Defamation, Privacy

Perry White owned and ran the Daily Planet, Inc. He told his star reporter, Clark Kent, to go by himself to do a story on former governor, Pete Wilson. White knew Kent had done a lot of stupid, dangerous things in the past, but Kent had gotten counseling and promised to straighten up.

After Kent left the Daily Planet building panhandler Bill Gates recognized him as the star reporter. Gates approached Kent and asked for an autograph. As a prank, Kent (who was secretly Superman) lifted and gently flew Gates hundreds of feet up to the top of a building and stranded him there on a ledge. Gates struggled to get free of Kent's grip. He was not afraid, but was apprehensive he might fall. The crowd below taunted Gates for hours before the fire department could rescue him. Gates was humiliated.

Meanwhile Kent interviewed Wilson and used his X-ray vision to discover that Wilson was missing some of his "manly parts". Further, he saw gaudy women's clothing in the closet that was just Wilson's size. He concluded Wilson was a "drag queen", but did not bother to ask him about this. The clothing really belonged to Wilson's twin sister.

Kent wrote a scathing expose about the former governor under the headline, "Ex-Governor Is Drag Queen Without Manly Parts!" Kent showed the article to White, and he got a big laugh out of it. But White decided the Daily Planet should not publish it.

Discuss the potential liabilities and defenses of the parties as follows:

Gates v. Kent

Gates v. White and the Daily Planet (direct liability only – ignore vicarious liability based on respondeat superior)

Wilson v. Kent

Practice Question 18-7: Crime/Tort Crossover, Murder, Strict Liability

Lydia, a single welfare mother, bought a puppy named Bane.

Bane once bit Lydia's child, but she lived in a high-crime neighborhood and needed a watchdog.

Lydia chained Bane to a tree in her yard and forbid her children to go in the yard. She did not post any warning signs, but the yard was surrounded by an eight-foot chain-link fence topped with razor-sharp concertina wire.

One night when Lydia was away Bevis decided to burglarize her house. He knew Bane was dangerous, but he planned to poison him.

When Bevis entered the yard Bane ripped off his arms and legs. Bevis went to the great beyond, bought the farm, kicked the bucket and punched out.

The District Attorney, G.I. Doolittle, decided to prosecute Lydia for murder and manslaughter because he had been criticized in the local press for being a wimp. There were no statutes against watchdogs. But hey, Lydia was an easy target.

Lydia claims she was just trying to protect herself from being raped and murdered by burglars.

Doofus, Bevis' minor son, filed a wrongful death suit against Lydia. His first cause of action was for negligence based on premises liability because there was no "Bad Dog" sign posted to warn Bevis about Bane. Doofus' second cause of action cited strict liability for because Lydia had a dog that might bite.

What is Lydia's criminal liability and possible defense? What is her civil liability on each count and her possible defenses?

Practice Question 18-8: Invasion of Privacy Torts

The Daily Rag was a tabloid that focused on sports figures. It began to focus on Jody Magio, the first-baseman of the Tulsa Toilers.

First the Daily Rag reported that Jody loved children. In fact, Jody thought children were pests. As a result of the Daily Rag article, Jody was besieged by requests from children asking for autographs.

Then time the Daily Rag printed a picture of Jody naked. The Daily Rag had rented the apartment across the street from Jody's apartment and had a photographer staked out there 24 hours a day. The photo was taken through the window of his apartment with a powerful telephoto lens when he came out of the shower.

Finally the Daily Rag ran a series of articles that revealed Jody had been secretly treated for alcoholism after being arrested for driving while intoxicated.

Jody often bought the Daily Rag to monitor the situation. Then the Daily Rag put a picture of Jody buying the Daily Rag on bulletin boards with the slogan, " Jody Magio reads Daily Rag; So should you!"

Discuss the possible actions Jody might bring against the Daily Rag and their possible defenses.

Chapter 19: Civil Procedure Answer Formats

In the past the California Bar Exam only tested the **FEDERAL RULES OF CIVIL PROCEDURE**. But beginning in 2007 the scope of the exam will be extended to include some State civil procedure rules. It is not clear at this time how important this change will be. The main differences between federal and State rules probably are:

1. Federal Courts have LIMITED JURISDICTION while State Courts have GENERAL (unlimited) JURISDICTION.
2. Federal rules provide for AUTOMATIC DISCOVERY (each party has an affirmative duty to reveal all relevant evidence) while State rules do not.
3. Federal Rule 11 REQUIRES COURT SANCTIONS against attorneys that file pleadings found to be false or frivolous because the attorney failed to conduct a reasonable investigation. State rules allow but do not require sanctions.
4. Federal rules strictly hold that allegations that are not specifically denied in ANSWERS are fully admitted to be true. State rules are looser and allow "general denials".

Otherwise the most important issues in Civil Procedure are whether actions have been brought in the right court, with proper jurisdiction, with proper notice, the proper law to apply, the preclusion of claims and issues that have already been decided, and the rules for removal of cases from State to federal court. Commonly tested issues include subject matter jurisdiction, personal jurisdiction based on minimum contacts, and the correct State law to apply under the Erie Doctrine.

CIVIL PROCEDURE vs. CONSTITUTIONAL LAW. Do not confuse a CIVIL PROCEDURE question with a CONSTITUTIONAL LAW question (But your professor might, and you have to deal with that.)

Constitutional law deals with the provisions of the CONSTITUTION whether there is an actual controversy, the powers of Congress over commerce, and the powers and protections established by the 1st, 5th, 11th and 14th Amendments. The most important issues of Constitutional Law are First Amendment rights, Equal Protection and Due Process guarantees.

Tangential Issues. Civil Procedure necessarily touches on peripheral issues that are more closely regarded in classes on EVIDENCE, REMEDIES and CONSTITUTIONAL LAW. There is no bright line that divides one subject area from another.

For example, the 14th Amendment guarantees due process and in *Mullane* it was held that reasonable notice that would afford an individual an opportunity to be heard is a jurisdictional requirement. Therefore, *Mullane* is a case that impacts both Civil Procedure issues (jurisdiction) and Constitutional Law issues (due process).

Be Prepared. You MUST be prepared to give a good recitation of rules for 1) the SUBJECT MATTER JURISDICTION, 2) PERSONAL JURISDICTION, 3) the ERIE DOCTRINE, 4) ISSUE PRECLUSION (collateral estoppel) and 5) CLAIM PRECLUSION (res judicata).

Mnemonics. Minimum contacts may be shown if there is a Forum Related Cause of Action [FRCA = "fur-kah"] or Continuous And Systematic Activities [CASA = "ka-suh"].

COMMON CIVIL PROCEDURE ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Does the court have SUBJECT MATTER JURISDICTION?*

   Under federal rules of CIVIL PROCEDURE, federal courts have limited SUBJECT MATTER jurisdiction based on 1) DIVERSITY or 2) a FEDERAL QUESTION while State courts have general jurisdiction. [**Important! This must be stated. Then add additional statements conditioned upon the factual situation as follows:**]

   For a Diversity question say –

   Federal SUBJECT MATTER JURISDICTION based on DIVERSITY requires that
   1) all plaintiffs are DOMICILED in different states than all defendants and a
   2) good faith claim for over $75,000.

   DOMICILE means the place a person intends to return to and reside indefinitely.

   Here jurisdiction would be based on diversity because the plaintiffs and defendants are domiciled in different states and the amount in controversy is greater than $75,000.

   For a Federal Question case say –

   Under the WELL-PLED COMPLAINT RULE federal SUBJECT MATTER JURISDICTION requires the statement of an issue ARISING UNDER the -

   1) U.S. CONSTITUTION or
   2) Federal LAW or
   3) Federal TREATIES.

   Here there would be jurisdiction based on federal question because the action is based on federal law.

   If Supplemental Jurisdiction is an issue say –

   If the federal court has proper subject matter jurisdiction, it also has SUPPLEMENTAL JURISDICTION over other state-law claims arising out of the same controversy under 28 USC § 1367 that it could not otherwise hear.

   Here the district court would assert pendant jurisdiction over the issue of [state law based claim.]

If Joinder is a relevant issue say –

COMPULSORY JOINDER of claims is REQUIRED where they arise out of a "common nucleus of operative fact". PERMISSIVE JOINDER of such claims between the parties is

PERMISSIBLE where they are such that it is reasonable to expect them to be litigated at the same time.

Here compulsory joinder would require the claims of [parties] *to be joined because they arise from the same nucleus of facts, and joinder of the claims of* [parties] *could be joined because it would be reasonable to expect them to be litigated at the same time.*

Therefore …

2. *Does court have PERSONAL JURISDICTION over defendant?*

Under PENNOYER v. NEFF federal courts had PERSONAL JURISDICTION over a defendant where there was 1) CONSENT, 2) PRESENCE or 3) DOMICILE. **[Important!]**

DOMICILE means the place a person intends to return to and reside indefinitely.

Under INTERNATIONAL SHOE, jurisdiction may be exercised based on forum State "long arm statutes" if there are sufficient MINIMUM CONTACTS. Minimum contacts exist if there is a FORUM RELATED CAUSE OF ACTION [Mnemonic = FRCA]. *Minimum contacts may also exist if CONTINUOUS AND SYSTEMATIC ACTIVITIES* [Mnemonic = CASA] *by the defendant in the forum State are such that jurisdiction would "not offend traditional notions of fair play and substantial justice" because the defendant "availed himself of the protections of forum State laws".* **[Important!]**

Here there were sufficient minimum contacts because there is [a forum related cause of action / continuous and systematic activities.]

Therefore…

3. *Was NOTICE sufficient to establish PERSONAL JURISDICTION?* [Notice (service) is generally an uncommon issue for a Civil Procedure essay. It is a more likely a procedural due process issue for Constitutional Law essay. But the issue may arise.]

Under MULLANE the due process guarantees of the 5th Amendment require that in any proceeding which is to be accorded FINALITY there must be REASONABLY CALCULATED NOTICE to APPRISE interested parties of the pendency of the action and AFFORD them an opportunity to present objections. Notice is a jurisdictional issue, meaning that the court does not have jurisdiction over the person unless the person is given proper notice.

Here there was [not] *sufficient notice because… And there was* [no] *opportunity to present objections because…*

Therefore…

4. *Is this case brought in the PROPER VENUE?* [MINOR ISSUE]

   Under the federal rules of CIVIL PROCEDURE the proper VENUE for bringing an action is where

   1) Any defendant resides, if all defendants reside in the same state; or
   2) Where the cause of action arose.

   BUT if there is no other district where the action can be brought,

   3) *In a DIVERSITY action, venue would be proper where PERSONAL JURISDICTION can be found over any defendant, AND ---*
   4) *In a FEDERAL QUESTION action, venue would be proper where any defendant can be found.*

   Under ERIE, in a DIVERSITY CASE a change of venue for FORUM NON CONVENIENS (convenience) requires the use of the substantive law of FIRST State where the action was filed, and a change of IMPROPER venue requires use of the substantive law of the SECOND State.

   Here venue was [not] *proper because…*

   Since the original venue was [not] *proper, the substantive law of the first [second] State would be applied.*

   Therefore…

5. *What CHOICE OF LAW applies to the DIVERSITY case?* [MAJOR ISSUE]

   Under the ERIE DOCTRINE the substantive law of the forum State is applied in DIVERSITY actions along with federal procedural rules. **[Important!]**

   Under the original OUTCOME DETERMINATION TEST a law was held to be substantive if it determined the outcome of the case. But after the Federal Rules of Civil Procedure were adopted certain federal procedural rights, such as the right to a jury trial, were held to apply in a diversity action even when they are determinative. **[Important!]**

   It is now generally held that a State rule is substantive only if it regulates out of court behavior and State procedural rules will apply in federal court only when

   1) there is no conflicting or applicable federal rule,
   2) the choice is determinative, and
   3) *the balance of federal and State interests favors use of the State rule.* **[Important!]**

   Here there is [no] *conflicting federal rule and the choice is determinative because… Further, the balance of interests favors…*

   Therefore…

6. *Is REMOVAL proper?* [Tested by the Bar recently.]

   Under the FRCP a case filed in State court to be removed to federal court upon the request of all defendants within 30 days of service of the complaint. Removal is only proper if the federal court would have had proper SUBJECT MATTER and PERSONAL JURISDICTION originally.

   The case cannot be removed based on DIVERSITY subject matter jurisdiction if any defendant lives in the State where the action was originally filed. The case can be removed based on FEDERAL QUESTION subject matter jurisdiction regardless of the citizenship of the parties, as long as the federal court has personal jurisdiction over the defendants.

   Evaluation of the right to removal is based solely on the pleadings, the complaint and answer. To remove based on a federal question it must be raised by the plaintiff in the complaint, not by other parties in an answer or counter-claim.

   If a plaintiff raises a federal question, the federal court has discretion to remove all other claims by both parties along with the federal question claim and to exercise SUPPLEMENTAL JURISDICTION over them if they arise from the same event or series of events AND diversity subject matter jurisdiction would not be destroyed.

   Here…Therefore…

7. *Does ISSUE PRECLUSION bar argument of an issue?* [MINOR ISSUE]

   Under the doctrine of COLLATERAL ESTOPPEL a party is PRECLUDED from arguing an ISSUE that was

   1) *ACTUALLY, FULLY, AND FAIRLY LITIGATED in prior litigation,*
   2) *ESSENTIAL to the prior judgment, and*
   3) *the party raising the issue the second time was a PARTY OR IN PRIVITY WITH A PARTY to the prior litigation.* **[Important!]**

   Here the issue was fully litigated because…

   Further, the issue was essential to the prior judgment because…

   And here there was privity because…

   Therefore…

8. *Does CLAIM PRECLUSION bar litigation of a claim?* [MINOR ISSUE]

   Under the doctrine of RES JUDICATA a plaintiff is PRECLUDED from raising a CLAIM that was previously litigated, 1) between the SAME PARTIES, over 2) the SAME CLAIM or a claim that COULD HAVE BEEN RAISED in prior litigation, if 3) a FINAL judgment was issued based on the MERITS. **[Important!]**

   Here the claim was previously litigated between the same parties because…

And the same claim was, or could have been, raised in the prior litigation because…

And a final judgment was issued on the merits because…

Therefore…

9. *Can the party challenge a judgment with a COLLATERAL ATTACK?*

   Under the FEDERAL RULES OF CIVIL PROCEDURE a COLLATERAL ATTACK will not generally be allowed to challenge the propriety of a court judgment. A collateral attack is a challenge of one District Court's judgment in a subsequent court proceeding, other than an appeal.

   An EXCEPTION is that a lack of JURISDICTIONAL POWER may be challenged. A challenge of SUBJECT MATTER JURISDICTION can be raised at any time during an action, even on appeal. A challenge of PERSONAL or SUBJECT MATTER JURISDICTION can be raised in collateral attack if the party raising the issue defaulted or otherwise did not litigate the issue in the original action.

   Here jurisdiction might be challenged because…

   Therefore…

10. *Does the party have a right to a JURY TRIAL?* [MINOR ISSUE]

    Under the 7th Amendment "in suits at common law the right to a jury" was to be preserved and it has been held to be fundamental in federal court LAW proceedings, even in diversity cases. However, there is no constitutional right to a jury trial in cases at EQUITY. Whether a suit is in law or equity depends on the remedy sought.

    Here a right to jury trial could be claimed because…

    Therefore…

11. *Is the MOTION of the party proper?* [These motions are not usually issues for exams, but check the old exams to see if your professor has an unusual habit of raising them.]

    a) DISMISSAL FOR FAILURE TO STATE CAUSE OF ACTION –

       Under the WELL-PLED COMPLAINT RULE the complaint must expressly claim there is SUBJECT MATTER JURISDICTION, PERSONAL JURISDICTION and a proper CAUSE OF ACTION.

    b) ANSWER –

       Under the FRCP an answer must be served in 20 DAYS stating all AFFIRMATIVE DEFENSES. Allegations of a complaint must be DENIED or they are DEEMED

ADMITTED. No evidence may be presented at trial to challenge such an admission, but admissions in INTERROGATORIES may be later contradicted by evidence at trial.

c) MOTION TO COMPEL –

Under the FRCP ALL RELEVANT, NON-PRIVILEGED EVIDENCE IS DISCOVERABLE, whether admissible or not. Evidence which is covered by a QUALIFIED PRIVILEGE such as ATTORNEY WORK PRODUCT may be discoverable if there is a SUBSTANTIAL NEED and UNDUE HARDSHIP would otherwise result.

A Motion to Compel may result in an Order to compel which may award SANCTIONS. After reasonable time to comply, violation of an Order may result in a finding of CONTEMPT.

d) SUMMARY JUDGMENT –

Under the FRCP a motion for summary judgment is appropriate if NO GENUINE ISSUE OF MATERIAL FACT is in dispute.

e) DIRECTED VERDICT (Judgment as Matter of Law) –

Under the FRCP a motion for directed verdict must be made BEFORE JURY RETIRES to deliberate. The movant must argue that the respondent FAILED TO PRESENT EVIDENCE on an ESSENTIAL ELEMENT of the COMPLAINT or AFFIRMATIVE DEFENSE.

f) JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) –

Under FRCP a JNOV must be made WITHIN 10 DAYS AFTER TRIAL and only if a PRIOR MOTION for directed verdict was denied during trial and NO REASONABLE TRIER OF FACT could have found for the other party.

g) NEW TRIAL –

Under FRCP this motion must be made WITHIN 10 DAYS AFTER TRIAL and requires that the trial verdict be AGAINST MANIFEST WEIGHT OF EVIDENCE.

Note: The above issue statements provide you with the more commonly tested issues, definitions, rules and terms on CIVIL PROCEDURE examinations in law school or on the Bar exam.

A general topic area not listed above is the CERTIFICATION OF CLASS ACTIONS. A general review of the rules governing that (Federal Rule 23) is recommended.

It is somewhat difficult to anticipate how the California Bar Exam will test differences between federal and California rules of civil procedure beginning in 2007. There are numerous differences, but they tend to be minor or detailed. For example federal law requires a defendant to file an answer within 20 days after services of a complaint while California State law provides 30 days.

There are so many different time limits that apply to various civil procedure filings that it is not always possible or wise to try to memorize each and every deadline. But be wary if a civil procedure question states that a party did not act until after a certain number of days passed. That type of fact strongly suggests a time limit has not been met, so the obvious issue to discuss is DID THE PARTY FAIL TO MEET A STATUTORY DEADLINE? Recognizing and discussing the issue will get you most of the credit even if you cannot remember the exact number of days within which the party was supposed to act.

Among the more important differences between California and federal civil procedure rules are the following:

Jurisdiction: Federal courts have limited jurisdiction, and complaints must specifically allege why the court has subject matter jurisdiction. California courts have general jurisdiction and complaints need not state why the court has jurisdiction.

Pleading form: Federal courts have "notice pleading" complaints, short statements why the plaintiff seeks relief, construed in favor of the plaintiff. California courts require "form pleading" or "code pleading" complaints with a more detailed and express statement of the plaintiff's causes of action.

Answer form: Answers in federal courts must specifically deny every allegation in a complaint or the allegation is admitted to be true. Answers in California courts can consist of just a "general denial".

Discovery: Federal courts have automatic discovery rules that require each party to give the opposing party all of the relevant evidence in their possession. Under California rules a party must ask for evidence from the opposing party.

Rule 11 sanctions: Attorneys have an affirmative duty to reasonably investigate the validity of allegations made in pleadings before they are filed in federal courts, and under Rule 11 the federal court can (and does) sanction attorneys who fail to make a reasonable investigation. In California courts sanctions are possible but highly unlikely, and when sanctions are levied they are almost always against the parties filing frivolous actions, not against a party's attorney.

Court procedures: Federal courts assign all actions to the trial judge as soon as the action is filed, and all law and motion and discovery matters are handled by the judge's magistrate. In California courts the trial judge is not assigned until just before trial. All preliminary law and motion actions are handled by "law and motion" judges.

Practice Question 19-9: Jurisdiction, Notice, Choice of Law, Collateral Attack

Tom lived in Sacramento and gambled on the internet, although it was illegal in California. He won $80,000 playing blackjack on Winbig.com, a Nevada-based internet casino that frequently advertised on the Yahoo internet service provider home page.

Internet gambling was legal in Nevada where Winbig.com was located, but Winbig.com would never pay Tom.

Tom discovered that Winbig.com was an unincorporated business owned by Harry the Horse, a shady character who kept his permanent residence in Las Vegas. Harry spent most of the year in California at Lake Tahoe in a hotel room.

Tom sued Harry in the Federal District Court for the Eastern District of California and hired Dick to serve the summons.

Dick served the summons by taping it to the gate of Harry's palatial estate.

Harry found the summons but decided to ignore it.

Tom got a default judgment for $80,000 from the District Court.

When Tom tried to enforce the judgment with a lien on Harry's palatial estate, Harry challenged the judgment.

Discuss:

1) Did the court have subject matter jurisdiction over the matter? How?

2) Did the court have personal jurisdiction over Harry? How?

3) Did Harry have proper notice of the action?

4) If Harry had answered the complaint, and did not object to venue, what should have been the outcome?

5) Is Harry's challenge an impermissible collateral attack?

Practice Question 19-10: Jurisdiction, Preclusion, Choice of Law

Driver Paul and his passenger wife Pliny were from State X, and they were in an auto accident in State Y when they were hit by a car was driven by Dick. Dick was a teacher who lived in State Y, but spent every summer in a cabin in State X. He had a ¼ interest in the cabin.

Passenger Pliny suffered $70,000 in injuries, driver Paul had substantial injuries and defendant Dick was not injured.

Pliny sued Dick for negligence in Federal District Court in State X.

Paul knew of the suit but did not join as a plaintiff.

Pliny served process on Dick under the State X long-arm statute that says personal jurisdiction may extend to any person unless it is inconsistent with federal constitutional provisions.

Dick moved to dismiss for lack of personal jurisdiction, but the motion was denied.

Dick answered Pliny's complaint and claimed Paul caused the accident. The case went to trial and Dick and Paul were each found to be 50% negligent.

Paul wants to file suit against Dick in State X district court. What advice would you give him regarding the following?

1) How could the first court have found personal jurisdiction, and can Dick challenge the personal jurisdiction a second time in Paul's action?
2) When would State X district court have proper subject matter jurisdiction over Dick?
3) Is Paul stopped from bringing an action because his wife Pliny already sued once and Paul did not participate in the first suit?
4) Can Paul move for summary judgment claiming that Dick has already been proven negligent?
5) Can Dick move for summary judgment that he was only 50% negligent?
6) What should Paul do if State X recognizes contributory negligence as a complete bar to recovery while State Y recognizes pure comparative negligence?

Practice Question 19-11: Jurisdiction, Venue, Erie Doctrine, Claim Preclusion

Reno left his home in Nevada, picked up his friend Cal at his home in Truckee, California, and began driving down the California coast to Disneyland. They shared gas and the cost of the rental car, but Reno did all the driving. When they were driving in Santa Barbara County, Reno accidentally ran over Barbara, a pedestrian when she stepped off the curb without looking.

Barbara sued Reno and Cal for $1 million in federal district court in the California district which includes Santa Barbara County within its boundaries.

Reno was served in Nevada. He objected that the court lacked personal jurisdiction over him. His objection was denied. Reno also objected that the venue was wrong, but that objection was also denied.

Cal objected that the court lacked subject matter jurisdiction. That objection was denied despite Barbara's failure to respond.

Then Reno and Cal successfully moved to have the trial transferred to Nevada district court in Reno because they both lived and worked at the nearby casinos.

After a full trial the court held that Barbara's claim was barred because she was partly to blame for the accident and Nevada recognized contributory negligence as a complete bar.

Rather than appeal the court's finding, Barbara filed a second suit against Reno and Cal in Santa Barbara County Superior Court because California law does not recognize contributory negligence as a complete bar. Reno and Cal moved for dismissal citing res judicata.

Discuss the issues raised and explain any basis upon which Barbara might obtain a second complete trial.

Practice Question 19-12: Joinder, Venue, Minimum Contacts

Computer Experts, Inc. (CEI) was headquartered in Alabama. It had no employees in any other state, but it contracted with "independent experts" across the country. Its only advertising was by internet. People with computer problems could call an 800 number and talk to a trained expert about their problems. For this service a charge would be posted to their credit card accounts.

Paula lived in Wisconsin. She called the 800 number after her hard drive crashed and talked to a customer service representative in Alabama. After giving her credit card number and agreeing to the terms and conditions of service her call was forwarded to Andy, an independent contractor in Madison, Wisconsin. One of the terms of the agreement was that Alabama law applied to all disputes.

Andy again requested Paula's credit card number. The next week Andy charged $80,000 on Paula's account.

Paula sued Computer Experts in Wisconsin federal court to recover her losses based on diversity jurisdiction. The cause of action cited was negligence.

Alabama law completely indemnifies any party to a contract for claims by third party crime victims arising out of the criminal acts of an independent contractor. Wisconsin has no such law.

What defenses can Computer Experts raise citing:

1) Subject Matter Jurisdiction?
2) Personal Jurisdiction?
3) Compulsory Joinder of Andy?
4) Improper Venue?

If Computer Experts disagrees with the court's finding, what is its possible recourse?

Chapter 20: Crime Answer Formats

Preliminary Considerations:

1. Every crime requires a MENS REA, evil intent, and ACTUS REUS, evil act.
2. The criminal ACT must be done at the SAME TIME there is criminal INTENT.
3. Criminal law essay questions are identified by the CALL which will ask about what acts the defendant may be "prosecuted" for, for which "charges" may be brought, for which he may be "guilty", etc.
4. Remember there are a bunch of weird, trivial crimes (uttering, mayhem, etc.).
5. If question gives you a statute – read it carefully because it determines the answer.

Answer Structure: Where there is more than one defendant, consider the crimes of each separately:

PEOPLE V. TOM

1. ISSUE –
2. ISSUE –

PEOPLE V. DICK

1. ISSUE –
2. ISSUE –

Mnemonics

CRIMES = "That SCAB-RAT, ROB BEDONI, ATTEMPTED to MURDER a MAN"

a) **SCAB** – often HIDDEN ISSUES.
   i) Solicitation
   ii) Conspiracy
   iii) Assault
   iv) Battery
b) **RAT – usually** OBVIOUS ISSUES.
   i) Rape
   ii) Arson (watch for smoke, fire, explosives, cutting torches)
   iii) Theft crimes (larceny, embezzlement, false pretenses, receiving)
c) **ROB =** ROBBERY
d) **BEDONI = BURGLARY =**
   i) **Breaking**
   ii) **Entry**
   iii) **Dwelling of -**
   iv) **Others in the -**
   v) Night with –
   vi) Intent to commit a felony.
e) **ATTEMPTED --**ATTEMPTED CRIMES
f) **MURDER**
g) MANslaughter

CRIMINAL DEFENSES = "BABY MICE DRIVE PANDAS TO DRINK"

a) **BABY**
   i) Infancy
b) **MICE**
   i) Mistake
   ii) Insanity
   iii) Consent
   iv) Entrapment
c) **DRIVE**
   i) Duress
d) **PANDAS**
   i) Prevention of crime
   ii) Authority of law
   iii) Necessity
   iv) Defense of
      (1) Another or
      (2) Self
e) **DRINK** -- intoxication

Merger. The concept of "merger" of crimes often confuses law students. It means that while a defendant can be accused of a broader crime and all of the narrower, lesser included offenses embodied within that crime, the defendant that is convicted of the broader crime cannot also be convicted separately for the narrower, lesser included offenses. The reason is that conviction and punishment for the broader crime necessarily represents conviction and punishment for every lesser included offense embodied within it.

COMMON CRIME ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1) SOLICITATION?

Under CRIMINAL LAW a SOLICITATION is the crime of urging another person to commit a crime. [73] *The crime of SOLICITATION is complete as soon as the urging takes place, whether the person urged commits the crime urged or not. But if the urged crime is committed the SOLICITATION MERGES into the criminal result and the person committing the solicitation becomes an ACCESSORY BEFORE THE FACT and VICARIOUSLY LIABLE for the crime based on accomplice theory.* [74]

[73] Note that the act urged must be a crime for which the person urged would be prosecuted. If Bevis urges 3-year old Butthead to steal some whisky for him it is not solicitation because Butthead is too young to form criminal attempt. In this odd situation the crime of Bevis is attempted larceny not solicitation.

[74] For example: Bevis urges Butthead to rob a bank. If Butthead doesn't rob the bank Bevis can only be charged with solicitation. But if Butthead does rob the bank at Bevis' urging, Bevis can charged with BOTH solicitation and robbery. He would be VICARIOUSLY LIABLE for the robbery as an ACCOMPLICE (an ACCESSORY BEFORE THE FACT) based on accomplice theory. He cannot be convicted of both solicitation AND robbery because the solicitation is the reason he can be charged with the robbery. The solicitation would MERGE into the robbery as a lesser included offense.

Here A urge B to commit the crime of … because…Therefore, the defendant can be charged with solicitation.

2) CONSPIRACY? [75]

Under COMMON LAW the crime of CONSPIRACY was an agreement between two or more people to work toward an illegal goal. MODERNLY an OVERT ACT in furtherance of the conspiracy goal is often required in many Courts.

Further, under the PINKERTON RULE, a member of a conspiracy is VICARIOUSLY LIABLE for the criminal acts of co-conspirators done WITHIN THE SCOPE of the conspiracy goal. This means crimes that were 1) foreseeable and 2) in furtherance of the conspiracy goal.

Even if the illegal goal of the conspiracy is attained, the CONSPIRACY DOES NOT MERGE into the criminal result, so each member can be convicted of both conspiracy and the other crimes committed during and within the scope of the conspiracy.

[State the next paragraph if the conspiracy is to commit a crime that necessarily requires more than two people. Receiving stolen property is one of those crimes.]

And under the WHARTON RULE a conspiracy requires the participation of more people than the minimum number necessary to commit the criminal act. [76]

[State the next paragraph if a defendant joins a conspiracy in progress.]

If a defendant joins a conspiracy in progress most Courts hold they are not liable for previous crimes of the co-conspirators unless the joining defendant seeks to profit from those prior crimes.

[State the next sentence when crimes are committed after the conspiracy ends.]

A conspiracy ends when the conspiracy goal is ATTAINED or ABANDONED, and vicarious liability will no longer attach based on conspiracy theory. But it may still attach based on accomplice theory.

Here two or more parties, A and B, agreed to work toward an illegal goal because …And there was an OVERT ACT in furtherance of the conspiracy when ….

Therefore...

---

[75] Conspiracy is always a major issue if there are two or more defendants. It creates VICARIOUS LIABILITY for each conspiracy member based on conspiracy theory. If a member of a conspiracy takes an active party in pursuing the criminal goal they become an ACCOMPLICE and are VICARIOUSLY LIABLE base on BOTH conspiracy theory AND accomplice theory. The DEFENSE OF WITHDRAWAL is frequently tested.

[76] Don't even bother citing the Wharton Rule unless it has some application to the facts. The most common situation where it is tested is receiving (or attempted receipt of) stolen property. It also arises in sales of contraband (e.g. drugs).

3) CRIMINAL ASSAULT?

Under CRIMINAL LAW an ASSAULT is the crime of acting with the intention of causing a battery or else to cause apprehension of a battery. The victim of the attempted battery does not have to be aware of the danger. [77] **[Important!]**

Here the defendant attempted to cause a battery (or apprehension of a battery) because …

Therefore…

4) Can the defendant be charged with CRIMINAL BATTERY?

Under CRIMINAL LAW a BATTERY is the crime of acting with the intention of causing a touching of a victim's person and actually causing a harmful or offensive touching. [78]
[Important!

Every criminal battery includes a criminal assault as a lesser included offense because an attempted battery is a criminal assault. The assault merges into the larger crime.]

Here the defendant deliberately acted to cause a touching because…And it caused a harmful (or offensive) touching because…Therefore…

5) RAPE?

Under common law RAPE was an intentional act to have sexual intercourse with a female without consent causing actual penetration, no matter how slight. At common law it was held to be legally impossible for a husband to rape a wife because consent to sexual intercourse was implied by marriage. MODERNLY, the crime of rape has been broadly extended to include any non-consensual sexual act involving penetration, regardless of the relative sexes and marital relationship between the defendant and the victim. [79]

Here there was an intentional act of sexual intercourse because…And the victim did not consent to have sexual intercourse because [80] *…*

Therefore the defendant can be charged with rape.

---

[77] Criminal assault is very different from tort assault because for a tort assault the plaintiff must actually be caused apprehension.
[78] Criminal battery is essentially identical to tort battery.
[79] Statutory rape is the crime of an adult having sexual intercourse with a minor, and it is generally defined as a "strict liability" offense. This means that no "criminal intent" is required, and a "mistake of fact", no matter how reasonable, is generally no defense.
[80] Rape is rarely tested on law school or bar exams. When it is, the main issue is generally whether or not the victim gave valid, fully-informed consent to have sexual intercourse.

6) ARSON? [Any explosion, smoke or flame raises the issue!!]

Under common law ARSON was the malicious burning of the dwelling of another. MODERNLY arson is extended by statute to the burning of other structures. Malice for arson means that the burning must be done with wrongful intent. [81]

Here there was a burning because…And there was a malicious intent to burn because … Therefore the defendant can be charged with arson.

7) *LARCENY?*

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Where the possession was gained by misrepresentation it was called LARCENY BY TRICK. MODERNLY larceny is generally codified as "THEFT". **[Important!]**

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if there is "lost" property at issue.]

Under the RELATION BACK DOCTRINE some common law courts held that a theft of "lost" property by a person who initially intended to return it to the lawful owner was a larceny because a later decision to steal RELATED BACK to make the original taking unlawful. But other courts held this was embezzlement on the theory the original taking formed a "constructive trust." This was especially so if the defendant was a COMMON CARRIER because they generally had a legal duty to take all lost property into constructive trust for the rightful owners.

Here there was a trespassory taking of the personal property of another because…And it was done with intent to permanently deprive because…

Therefore…

[81] Malice for arson requires wrongful intent, meaning that the defendant started the fire intending or knowing that someone would be harmed. But to be "malicious" the burning does not have to be "illegal." Further an "illegal" burning without any intent to harm anyone (for example in violation of zoning ordinances) is not sufficiently "malicious" to support a charge of arson.

8) Can FALSE PRETENSES be charged?

Under common law FALSE PRETENSES was the a MISREPRESENTATION of FACT to obtain TITLE to the property of another with intent to permanently deprive. [82] *MODERNLY false pretenses is generally codified as "THEFT".* **[Important!]**

Here there was intentional misrepresentation of fact to obtain title to property of another because…And there was an intent to permanently deprive because …

Therefore…

9) EMBEZZLEMENT?

Under common law EMBEZZLEMENT was the crime of TRESPASSORY CONVERSION of the property of another by one entrusted with lawful possession with intent to permanently deprive or causing substantial risk of loss. MODERNLY embezzlement is generally codified as "THEFT". **[Important!]**

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if the stolen property was on a common carrier.]

Further, the COMMON CARRIER DOCTRINE held that a common carrier such as a taxicab, bus or ship is entrusted with possession of passenger's property, including lost property, so a theft of passenger property by an employee of a common carrier was more often held to be EMBEZZLEMENT than larceny, even if the property was "lost".

[Only state the next paragraph if "lost" property was stolen.]

When "lost" property was stolen by a defendant who first intended to return it to the lawful owner, many courts found EMBEZZLEMENT on the theory the property was held in a "constructive trust". But other courts applied the RELATION BACK DOCTRINE and held it was a larceny because the decision to steal RELATED BACK to make the original taking unlawful.

Here there was a trespassory conversion of the property of another with intent to permanently deprive or cause substantial risk of loss because …And the defendant was entrusted with possession (or would be deemed to have lawful possession) of the property because…

Therefore the defendant could (not) be charged with embezzlement.

[82] False pretenses involves a purchase that transfers "ownership" of property while larceny and embezzlement only involve taking "possession" without any sort of purchase transaction. A purchase with a stolen credit card is the crime of false pretenses; a purse snatching is a larceny.

10) *Can the defendant be charged with ROBBERY?*

Under CRIMINAL LAW a ROBBERY is a larceny, defined above (or define larceny here if it was not defined earlier), from a person by use of force or fear to overcome the will of the victim to resist. [83] **[Important!]**

Here there was a larceny from the person because…And the defendant used force (or fear) to overcome the will of the victim to resist because…Therefore…

11) *BURGLARY?*

Under COMMON LAW a BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony. The entry of a structure within the CURTILAGE of the dwelling also constituted a burglary. A physical breaking was generally required, but a CONSTRUCTIVE BREAKING would be found if entry was the result of TRICK, VIOLENT THREATS, or CONSPIRACY. **[Important!]**

MODERNLY burglary has been extended by statute to all times of the day and all types of structures. Intent to commit a larceny is generally still sufficient to support a burglary charge, even if the larceny is no longer a felony. Further, the "breaking" element will generally be satisfied if there is a TRESPASSORY ENTRY, an entry without consent, express or implied. **[Important!]**

Here there was a breaking and entry into a structure of another because…But it was not a dwelling because it was…And the intent at the time of entry was to commit a felony (or larceny) because…

Therefore the defendant could not be charged with common law BURGLARY but could be charged modernly.

[More than any other crime you need to compare and contrast the common law burglary against the modern view and state whether the defendant could be charged under both or only modernly. Further, the concept of CONSTRUCTIVE BREAKING is heavily tested and poorly understood by most law students.]

12) *RECEIVING STOLEN PROPERTY?*

Under CRIMINAL LAW RECEIVING STOLEN PROPERTY is the crime of taking possession or control over stolen personal property while knowing it has been stolen from the rightful possessor. Both the defendant that receives the stolen property and the defendant that provides (delivers) the property are liable.

Under the WHARTON RULE there can be no crime of CONSPIRACY TO RECEIVE STOLEN PROPERTY unless there are at least three defendants in agreement. [84]

---

[83] It is critical that the "force or fear" must be used to overcome the will of the robbery victim! And watch out for a defendant that has stolen something and later uses force or fear to prevent another person from recovering lawful possession. This is a "continuing larceny" so the use of force or fear to keep illegal possession (arguably) is a robbery.
[84] This is a topic for discussion virtually every time there is a "receiving stolen property" issue.

[Only state the following if the subject property was placed into the possession of the defendants with the tacit consent of the lawful owner or the police.]

The crime of receiving stolen property is a legal impossibility if the property was in the possession of the defendants with the CONSENT of the lawful OWNER or the POLICE as part of a "sting" operation. In that case most courts hold the crime is ATTEMPTED RECEIVING.

Here…because…Therefore…

13) *ATTEMPTED* [name the crime attempted]*?*

Under CRIMINAL LAW an ATTEMPTED [name the crime at issue here] *is a SUBSTANTIAL STEP taken toward committing* [name the intended crime here]. [85] **[Important!]**

[Only state the following sentence if the facts suggest an issue of LEGAL IMPOSSIBILITY.]

For an attempted crime to be committed, it must be legally possible for the crime to have been completed at the moment of the first substantial step.

Here there was a substantial step toward commission of the crime of [name the crime] *because …And the defendant intended to commit that crime because…*

Therefore ATTEMPTED [name the crime] *can be charged.*

[There are particular rules for some "attempted" crimes:

- **For an attempted crime to be committed, a substantial step must be taken toward commission of the intended crime when the intended crime is legally possible (not factually possible) to commit.**
- **There can almost never be an ATTEMPTED SOLICITATION because any "attempt" usually completes the crime.**
- **There can never be an ATTEMPTED CONSPIRACY because any attempt for form a conspiracy is a solicitation. After that the conspiracy either forms or it does not.**
- **There is no crime of ATTEMPTED ASSAULT because assault by definition is an attempt. It is either an attempt to cause apprehension of a battery (whether the attempt is successful or not) or else it is an attempted battery.**
- **And there is NO ATTEMPTED BATTERY because that is the crime of assault.**
- **There is almost never an ATTEMPTED BURGLARY. It can only occur if the defendants approach a structure with intent to enter it to commit some felony or larceny and then completely fail to enter the structure. Any entry, no matter how minor, completes the burglary.**

[85] There is no such crime as "attempt" and no defendant can be charged with "attempt". SAY WHAT THE CRIME IS that you are claiming to have been "attempted"!

- **EVERY BURGLARY OR ATTEMPTED BURGLARY makes the defendant automatically liable for a SECOND ATTEMPT CRIME because it is a substantial step toward commission the second crime the defendant intends to commit after breaking in.** [86]
- **There can be NO RECEIVING STOLEN PROPERTY and can only be a crime of ATTEMPTED RECEIVING if the subject property was conveyed to the receiving defendant with consent of the lawful owner (or the police).**
- **The crime of ATTEMPTED MURDER requires INTENT TO KILL and no other form of malice for murder will suffice. So there can be NO ATTEMPTED DEPRAVED HEART MURDER and NO ATTEPTED FELONY-MURDER.**
- **There is no such thing as "ATTEMPTED FIRST-DEGREE MURDER" because there are no "degrees" of attempted murder.**
- **There can be NO ATTEMPTED MANSLAUGHTER because the crime is an alternative to a murder charge that requires a completed homicide. If there is a completed homicide the result can only be murder, manslaughter, or no crime at all. And if there is not a completed homicide the result can only be attempted murder or no crime at all, and it can never be 'attempted manslaughter' because no such crime exists.]**

14) *MURDER?* [87]

Under CRIMINAL LAW a MURDER is an unlawful HOMICIDE, the killing of one human being by another, with MALICE aforethought. [88] *MALICE for murder may be 1) an EXPRESS intent to kill, or IMPLIED by 2) intent to commit GREAT BODILY INJURY, 3) intent to commit an INHERENTLY DANGEROUS FELONY, the FELONY MURDER RULE, or 4) intentional creation of EXTREME RISKS to human life with AWARENESS of and CONSCIOUS DISREGARD for the risks, the DEPRAVED HEART MURDER rule.* [89]
[Important!]

Under COMMON LAW there were NO DEGREES of murder but MODERNLY first degree murder is generally codified as a 1) willful, deliberate and premeditated homicide or one 2) done by enumerated means, [90] *or 3) caused by commission of an enumerated felony.* [91]
[Important!]

[86] For example, if Bevis goes to Butthead's house intending to break in and steal his TV, he has taken a substantial step toward commission of two crimes before he ever touches the doorknob and can be charged with both attempted burglary and attempted larceny.
[87] You will always have a murder on criminal law exams and you MUST memorize what you are going to say!
[88] Generally you should consider all homicides you see on law exams to be "unlawful" even if they are "excused" or "justified" by proven self-defense, defense of others, prevention of crime, etc. So murder can ALWAYS be charged as long as there is a homicide with malice aforethought.
[89] "Resisting arrest" was a form of malice for murder in early law but modernly that idea has been abandoned.
[90] Some commonly tested "enumerated means" are torture, poison and explosives.
[91] Generally the first degree murder statutes enumerate all of the same felonies that also qualify for the felony-murder rule (rape, robbery, burglary and arson) but that is coincidental. Another typically "enumerated felony" is kidnapping. Do not say that first degree murder automatically includes all of the felonies that justify application of the "felony-murder rule" because that is up to the various legislatures.

[Only state the following if it is not clear a "living human being" was killed.]

At common law and modernly, a "human being" is a person who was born alive and was not yet dead. [92]

[Only state the following if a death occurs long after the act being blamed.]

The common law held that there was NO HOMICIDE if the victim died more than a year and a day after the act blamed for the death. Modernly this has been broadly extended by statute.

[State the following if the death results from suicide.]

A suicide is not a homicide. But a death by suicide constitutes a homicide when it is actually and proximately caused by the acts of the defendant.

[State the following if more than one person was an actual cause of death.]

The prosecution must prove the defendant was the ACTUAL AND PROXIMATE CAUSE of death, and if more than one act was an actual cause of death, the last, unforeseeable, intentional act generally is the only legal cause of death and it terminates the criminal liability flowing from all prior acts. [93] *Generally negligence by others is presumed to be foreseeable and criminal acts and intentional torts by third parties are presumed to be unforeseeable absent special knowledge.* [94]

[Only state the following if a death occurs during or after the commission (or attempted commission) of an inherently dangerous felony (rape, robbery, burglary or arson).]

Under the FELONY-MURDER RULE, a homicide caused by the commission of an inherently dangerous felony can be prosecuted as a murder if it is the result of acts done within the RES GESTAE of the underlying felony. [95] *The RES GESTAE is the sequence of events beginning with the first substantial step to commit the felony and ending when the defendants leave the scene of the crime and reach a place of relative safety.*

[Only state the following if a death occurs after a break-in to a structure when the defendant's sole purpose for breaking into the structure was to attack the victim.]

---

[92] If the facts state a "fetus" is killed or a baby was "born dead" or "dead at birth" do not assume there has been a homicide. The major issue for you to discuss is whether there was a homicide or not. A "baby born dead" would not be a homicide at common law. Modernly it might support a murder charge under a "fetal murder" statute. But only about half the States have such statutes, and they vary greatly. Even in the States that have "fetal-murder" rules it is still NOT A HOMICIDE and the broadly adopted modern view is that NO MANSLAUGHTER can arise from the killing of a fetus.

[93] For example, OJ poisons his wife, intending to kill her, but just before she would have died anyway a crazed fan, Stalker, sneaks into her hospital room and strangles her. Stalker is the proximate (legal) cause of her death, not OJ, and his act cuts off OJ's criminal liability for murder. OJ can only be charged with attempted murder.

[94] This rule has application to all crimes, and also to all torts. But it is most useful when analyzing negligence in tort questions and murder in crime questions.

[95] At common law the "inherently dangerous felonies" were rape, robbery, burglary, arson, mayhem and sodomy. Modernly sodomy is generally classified as rape, and mayhem is no different from intent to cause great bodily injury. Consequently the felony-murder rule now generally applies to deaths from only rape, robbery, burglary and arson. The common law never held kidnapping to be an inherently dangerous felony, and although it is often an "enumerated" felony for first degree murder, it is not an "inherently dangerous felony" for application of the felony-murder rule.

A murder prosecution cannot be based on the felony-murder rule if the death occurred during a burglary that was committed solely for the purpose of attacking the victim. [96]

[You might need to state the following if the defendant kills <u>immediately</u> upon the occurrence of some outrageous or startling event or statement that causes rage, anger, fear, etc.]

Malice AFORETHOUGHT means an act done with conscious intent and deliberation, no matter how brief, rather than a mindless, instinctual response.

Here there was an <u>unlawful HOMICIDE</u> because the victim was a human being and he was killed by the acts of another human being, the defendant. And there was <u>malice aforethought</u> because….

Therefore the defendant can (not) be charged with murder.

[Once you determine murder can be charged you should almost always discuss the degree of murder that is indicated by the facts as follows.]

Here the murder would (not) be in the FIRST DEGREE because….

15) *<u>MITIGATING FACTORS?</u>* [97]

Under CRIMINAL LAW, MITIGATING FACTORS are factual considerations that do not serve as complete defenses but may be weighed by the jury in determining whether murder should be found in the first or second degree, or whether a murder charge should be reduced to a finding of manslaughter.

Here there were mitigating factors because the defendant was (intoxicated, mentally incapacitated, etc.)… Therefore the jury may find that…

16) *<u>VOLUNTARY MANSLAUGHTER?</u>* [98]

Under CRIMINAL LAW, VOLUNTARY MANSLAUGHTER is an <u>INTENTIONAL</u>, unlawful homicide, the killing of one human being by another, without malice aforethought because of ADEQUATE <u>PROVOCATION</u>. **[Important!]**

ADEQUATE PROVOCATION is provocation sufficient to raise a reasonable person to a murderous rage, which did raise the defendant to such a rage, and which was the actual cause of the homicide. **[Important!]**

---

[96] For example, Bevis breaks into Butthead's house to beat up Butthead. Butthead dies. Bevis has committed burglary (modernly at least) because he has "broken" and "entered" the dwelling with intent to commit a felony. And Butthead has been killed as a result of that "burglary". But the felony-murder rule does not apply if the sole purpose of the "burglary" was to attack Butthead.

[97] This is not a crime or an affirmative defense but it needs to be discussed every time the defendant is intoxicated, mentally impaired, using unreasonable force in self-defense, acting based on a mistake of law or fact, etc.

[98] This is NOT an issue if the killing of the victim by the defendant was CLEARLY NOT DELIBERATE.

But ADEQUATE PROVOCATION CANNOT BE FOUND if the defendant had enough time before the killing that a reasonable person would have COOLED DOWN and no longer would have been in a murderous rage.

Here there was a homicide because… And, adequate provocation might be found because…

Therefore…

17) *INVOLUNTARY MANSLAUGHTER?*

Under CRIMINAL LAW, INVOLUNTARY MANSLAUGHTER is an UNINTENDED homicide, the killing of one human being by another, without malice aforethought as a result of CRIMINAL NEGLIGENCE or during the commission of a MALUM IN SE crime insufficient for a charge of murder. **[Important!]**

CRIMINAL NEGLIGENCE is a deliberate creation of extreme risks to human life but without complete awareness of the risks or without conscious disregard for the risks. [99]

A MALUM IN SE crime is one that involves moral turpitude. [100]

Here there was a homicide because the victim was a human being, and they were killed by the act of the defendant, another human being.

[The following applies if the death was caused by CRIMINAL NEGLIGENCE.]

And the defendant deliberately created extreme risks because…… But the defendant might not have been fully aware of the risks because… [101]

Therefore the defendant may be charged with involuntary manslaughter.

18) REDLINE RULE?

Under the REDLINE RULE a co-felon in many States cannot be charged with murder under the FELONY MURDER RULE simply because a co-felon was killed by a victim, bystander or the police during the commission of a crime.

Here the rule would apply because …

[99] The distinguishing feature between criminal negligence and "ordinary" negligence is that criminal negligence means the defendant DELIBERATELY created extreme risks to others while ordinary negligence means the defendant ACCIDENTALLY created risks to others.

[100] NOT a regulatory violation like a minor traffic offense! Avoid the term "misdemeanor manslaughter" because a "malum in se" crime upon which the charge can be based may be either a felony or a misdemeanor.

[101] Involuntary manslaughter based on criminal negligence often is the crime when the defendant had diminished capacity because they were intoxicated, young, foolish, emotionally upset, etc. because the prosecution cannot prove they were fully aware of the dangers their actions posed to others.

19) KIDNAPPING?

Under criminal law KIDNAPPING is the crime of unlawfully taking or confining people against their will. At common law the victim had to be taken out of the country or across a State line. Modernly this requirement has been dropped.

Kidnapping is not one of the "inherently dangerous felonies" for the Felony-Murder Rule but modernly is often an "enumerated felony" for first-degree murder.

Here…Therefore…

20) MISPRISION?

Under the common law MISPRISION was the crime of knowingly failing to report felonies by others to the police. Modernly there is no general duty to report crimes by others, and the crime of misprision no longer exists generally.

Here…Therefore…

21) COMPOUNDING?

Under criminal law COMPOUNDING is the crime of taking money or something of value in exchange for a promise to not report crimes committed by others.

Here…Therefore…

22) ACCOMPLICE LIABILITY?

Under criminal law ACCOMPLICE LIABILITY is vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable consequences) from the defendant's own criminal acts. Many Courts do not recognize WITHDRAWAL as a defense to accomplice liability. [102]

Here…Therefore…

23) DEFENSE of INFANCY? [Be alert to defendant children and youths!]

Under the COMMON LAW there as a CONCLUSIVE PRESUMPTION that a child under the age of seven could NOT form CRIMINAL INTENT. There was a REBUTTABLE PRESUMPTION that a child between 7 and 14 could NOT form criminal intent, and a REBUTTABLE PRESUMPTION a child over the age of 14 COULD form criminal intent. Modernly similar rules have been adopted by statute.

Here the defense may claim the defendant was too young to form criminal intent because …

Therefore…

[102] While everyone who helps commit a crime can be termed an "accomplice" the concept of "accomplice liability" only has application to those defendants who do not take any significant steps toward committing the crime since they are DIRECTLY liable anyway and can be convicted for that reason along with all the co-criminals.

24) DEFENSE of MISTAKE OF FACT? [103] [A frequently tested issue.]

Under CRIMINAL LAW a MISTAKE OF FACT is a complete defense if it negates implied criminal intent. For GENERAL INTENT crimes only a REASONABLE mistake can negate criminal intent. For SPECIFIC INTENT crimes ANY MISTAKE OF FACT may negate criminal intent whether reasonable or not. Battery, rape, burglary, arson, involuntary manslaughter and murders that are not willful and deliberate or based on the felony-murder rule are general intent crimes. All other crimes are SPECIFIC INTENT crimes.

A REASONABLE MISTAKE OF FACT is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never makes an otherwise unreasonable mistake reasonable.

A MISTAKE OF FACT is no defense to a charge of ATTEMPT if criminal intent is proven and the mistake merely prevented an otherwise criminal act.

Here the defendant's mistake of fact does (not) negate implied criminal intent because…

Therefore…

25) DEFENSE of LEGAL IMPOSSIBILITY? [104]

Under CRIMINAL LAW, LEGAL IMPOSSIBILITY means that an attempted act is not an attempted crime, even if there was criminal intent, when the attempted crime is a legal impossibility at the time of the first substantial step and at all times afterward. [105]

Here the crime charged was a legal impossibility because…

Therefore…

26) DEFENSE of MISTAKE OF LAW?

Under CRIMINAL LAW, A MISTAKE OF LAW about the legality of an act does not alter the legality of the act. If the defendant commits a criminal act believing it is legal, it is still an illegal act. Likewise, if the defendant commits a legal act believing it is illegal, it is still a legal act. [106] *Consequently, mistake of law is NEVER A VALID DEFENSE if a criminal act is actually committed.*

Here the defendant's act was legal (illegal) at the time it was committed because…

Therefore…

---

[103] This is a passive defense but sometimes you might want to analyze it as a separate issue.

[104] There are very few scenarios where this issue arises. One is a scenario where the defendant attempts to murder a victim, but the victim died from other causes BEFORE the defendant acted. Another is a scenario where the defendant attempts to steal something, but it is not the property of "another" WHEN HE ACTS because the defendant already owns it or else because the lawful owner has discarded (abandoned) it.

[105] The most commonly tested fact pattern is shooting a corpse in an attempt to kill a person who has already died from other causes.

[106] For example, Bevis forces his wife Buffy to have sexual intercourse with him because he believes that is his legal right. He can be charged with rape and his mistaken notions as to the law are no defense.

27) DEFENSE of FACTUAL IMPOSSIBILITY?

Under CRIMINAL LAW, FACTUAL IMPOSSIBILITY is a defense that the act actually done by the defendant was NOT A SUBSTANTIAL STEP toward commission of any crime, despite criminal intent, because the act taken could never produce a criminal result under any circumstances. [107]

Here the defendant's act was factually possible (impossible) at the time it was committed because…

Therefore…

28) DEFENSE of WITHDRAWAL? [A commonly tested issue.]

Under CRIMINAL LAW, WITHDRAWAL is a defense that defendants who were members of a CONSPIRACY (or perhaps accomplices) are not liable for crimes committed by other conspirators (accomplices) AFTER the defendants 1) give the other conspirators (accomplices) NOTICE that they were abandoning the conspiracy and 2) the defendants TRY TO STOP the co-conspirators from continuing pursuing the conspiracy goal. [108]

Here the defendants did (not) give NOTICE they were abandoning the conspiracy because… And they did (not) TRY TO STOP the conspiracy from continuing because…Therefore.

29) DEFENSE of INSANITY?

Under CRIMINAL LAW insanity is a defense if it negates criminal intent. The insanity defense is now prescribed by statute in almost all jurisdictions. Under the COMMON LAW M'NAUGHTEN RULE insanity was a defense if a disease of the mind at the time of the act prevented the defendant from knowing the nature and quality of his act, or that they were wrong. Under the IRRESISTIBLE IMPULSE RULE insanity is a defense if the defendant knows it is wrong but cannot stop herself. **[Important!]**

Here the defendant would argue that …Therefore…

30) DEFENSE of CONSENT?

Under CRIMINAL LAW consent is a defense to some crimes [rape, larceny, battery – consent to a touching]. *The consent must be informed, voluntary and given by one with legal capacity. Further, consent is not a defense to an act that causes great bodily harm.*

Here… because…Therefore…

---

[107] For example, Bevis attempts to murder Butthead by sticking pins in a voodoo doll named "Butthead". And clearly it is not an attempted murder if Bevis shoots at Butthead from hundreds of miles away. But as Bevis gets closer and closer to Butthead, intending to shoot him, there is some point at which the act is no longer factually impossible.

[108] This defense varies widely among Courts. The holdings are often fact-bound. Some Courts hold that it is a valid defense only to vicarious liability for subsequent crimes and others hold it is a valid defense to the crime of "conspiracy" itself. Some seem to hold that it is only a valid defense to conspiracy liability, not to accomplice liability.

31) DEFENSE of ENTRAPMENT?

Under CRIMINAL LAW entrapment may be raised as a defense if criminal intent was the product of improper police behavior. Courts are split on the application of the entrapment defense, and under the majority view entrapment is no defense if the defendant was predisposed to commit the crime. Under another minority view entrapment is a defense if police conduct was outrageous and instigated the crime, even if the defendant was predisposed.

Here… because…Therefore…

32) DEFENSE of DURESS?

Under CRIMINAL LAW a defense may be raised to crimes, EXCEPT MURDER, that the criminal act was the result of DURESS.

Here… because…Therefore…

33) DEFENSE of NECESSITY?

Under CRIMINAL LAW a defense of NECESSITY may be raised to certain crimes.

[This defense is really nothing more than self-defense, defense of others, or defense of property. And it is probably best addressed under one of those categories in a criminal law answer. The term defense of 'necessity' more often has tort connotations, especially when it is a 'public' necessity.]

34) PREVENTION OF CRIME (AUTHORITY OF LAW)?

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to PREVENT SERIOUS CRIMES being committed in their presence.

[This is only a defense if a crime is about to be committed or already in progress and the defendant is preventing or stopping the crime in progress. It is no defense if the defendant acts AFTER THE CRIME IF OVER, except in the rare fact pattern when a fleeing felon (like a known serial-killer) is shot while fleeing because it is the only way to protect future victims from future crimes by the same felon.]

Here … because…Therefore…

35) SELF DEFENSE? [A commonly tested issue.]

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to protect himself if he is not the aggressor. [109] *The aggressor in a fracas is the party that started it, continued the violence when the other party attempted withdrawal, or substantially escalated the level of violence.* **[Important!]**

[109] The main issues as to self-defense are 1) Was the defendant the aggressor? AND 2) Were the actions of the defendant reasonably necessary for her protection?

Here…because…Therefore…

36) *DEFENSE of OTHERS?* [A commonly tested issue.]

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to protect others from an aggressor. Courts are split when a defendant mistakenly aids an aggressor. Some Courts say the defendant who mistakenly aids an aggressor STEPS INTO THE SHOES of the aggressor and cannot claim any defense. Other Courts hold that a defendant can claim this defense if they acted on REASONABLE APPEARANCES.

[It is generally NOT reasonable (and not privileged) to shoot fleeing criminals. The only time it is justified by "defense of others" is if the criminal poses a clear danger to the public safety and there is no other feasible way to stop the criminal from escaping. This is often tested.

The use of unreasonable force in self defense, defense of others or defense of property results in an "imperfect" defense claim. Where there is an "imperfect" defense claim, the jury may consider the motivations of the defendant as a MITIGATING FACTOR.]

Here … because…Therefore…

37) *DEFENSE of PROPERTY?* [A commonly tested issue.]

Under CRIMINAL LAW a defendant is privileged to use reasonable, non-deadly force to protect his own property or the property of others from harm.

[Note: This is never a defense to murder because only non-deadly force is allowed. And a defendant has no right to shoot a thief who is running away with his property unless there is evidence the defendant feared the fleeing felon would turn to attack him or some other person present. This "imperfect" defense is a MITIGATING FACTOR for the jury to consider.]

Here … because…Therefore…

[Legal trivia question: What two crimes absolutely require proof of intent to kill?] [110]

[Another legal trivia question: Is the use of a gun or knife sufficient to support a finding that a defendant acted with an intent to kill?] [111]

[110] Attempted murder and voluntary manslaughter. If you said murder or first degree murder you are totally wrong.
[111] No. The mere use of a gun or knife is NOT sufficient to support a finding of intent to kill. The totality of the circumstances must support a finding that there was intent to kill. That means that the defendant must deliberately act in a manner that is almost certain to cause death (e.g. victim is stabbed 25 times, victim is shot in the back of the head, victim is doused with gasoline and set on fire, etc.).

Practice Question 20-13: Crimes, Vicarious Liability

Tom and Dick burst into the 7-11 store in Sacramento through the open door with their guns drawn at midnight. They wanted to rob the store the first night it opened.

"Stick 'em up," yelled Tom.

Unfortunately, the store was empty because they made a big mistake. No one was there. There was no merchandise. The store wasn't going to open until the next week.

They were so mad they ripped the security camera off the wall and threw it in the river.

The next morning Tom and Dick saw themselves on the Dumb Crook Show on TV. The store security camera had filled them trying to rob the empty store. They were afraid they would be caught. So to escape Tom drove real fast to San Francisco with Dick as his passenger.

One the freeway going 75 mph, Tom was distracted and accidentally bumped Victoria's car. She was only going 70 mph, the posted limit. She spun out of control and crashed. She survived, but went into labor, and her full-term, viable baby was born dead.

Tom then got off the freeway and drove down the crowded city surface streets of San Francisco at 80 mph. Dick was silent. The posted limit was 25 miles per hour. The car ran over homeless person Victor. He died instantly.

Discuss the possible charges against Tom and Dick.

Practice Question 20-14: Felony-Murder Rule, Redline Rule

Tom and Dick agreed to kidnap Sally for ransom.

Tom knew that Dick was a convicted rapist, so he said, "Dick! You can't touch this girl. We are just in this for the ransom. Understand?"

Dick swore he wouldn't harm the girl.

Tom and Dick kidnapped Sally and held her for ransom in a rundown motel.

When Tom went to the store Dick had sex with Sally by telling her he would let her go in exchange. Tom was furious and said, "Dick, I quit!" Tom went to a bar, got drunk and fell asleep.

Sally became despondent and hung herself in the bathroom of the motel room.

Police discovered where Dick was and surrounded the motel room. Dick tried to escape and was killed by the cops.

Tom woke up and decided to turn himself in. He called the police and told them everything he knew in an effort to help rescue Sally. He did not know Sally was already dead.

What crimes can Tom be charged with? What defenses can he raise?

Practice Question 20-15: Murder

Kathy Lee decided to kill Mary Kay because her boyfriend Billy Bob dumped her and moved in with that trailer trash. Kathy Lee decided to kill Mary Kay with dynamite.

Kathy Lee went to a "Dynamite R Us Store", but the owner Regis refused to sell her any dynamite. Kathy Lee pulled a gun and asked, "Is that your final answer?" Regis handed over 12 sticks of dynamite. Kathy Lee was happy with the service, but as she put away the gun it accidentally shot Regis between the eyes. Kathy Lee felt real bad.

As Kathy Lee approached Mary Kay's mobile home Ruby Dee gave her a hard look. That was more than Kathy Lee could take, so she smoked Ruby Dee with a round from her '38.

Kathy Lee then put the dynamite under Mary Kay's doublewide "Roseanne Barr" brand mobile home. She realized that the blast would probably kill Billy Bob too, but she figured "a girl's got to do what a girl's got to do."

The blast killed both Mary Kay and Billy Bob.

Discuss the potential first degree murder charges Kathy Lee might face along with her potential defenses.

Chapter 21: Criminal Procedure Answer Formats

Preliminary Considerations. There are 4 basic types of criminal procedure issues:

1) Unreasonable SEARCH AND SEIZURE of evidence -- 4th Amendment
2) Evidence from forced SELF-INCRIMINATION / MIRANDA -- 5th Amendment
3) Evidence without RIGHT TO COUNSEL / MIRANDA-MASSIAH -- 6th Amendment
4) Prosecution in DOUBLE JEOPARDY -- 5th Amendment

If the question involves EVIDENCE, the application of the EXCLUSIONARY RULE will always be the LAST ISSUE because you first decide the legality of the evidence then how the court will react.

COMMON CRIMINAL PROCEDURE ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1) Was the WARRANT INVALID?

Under the 4th Amendment, extended to the states by the 14th Amendment, government is prohibited from unreasonable search and seizure and must properly execute a search warrant particularizing the place to be searched and the evidence sought upon issue by a neutral magistrate based on a showing of probable cause. Probable cause means there is a REASONABLE SUSPICION that a crime has been committed and that the defendant committed it. **[Important!]**

[Define probable cause the first time the term is used.]

Here the search at issue was by the government because [search was by police.] *And there was no probable cause because* [no evidence a crime had been committed -- no evidence the defendant had committed a crime.] *Also the magistrate was not neutral because* [some bias on her part.] *Further the warrant was OVERBROAD and did not clearly specify the place to be searched or the evidence sought.*

Therefore the warrant used in this case was invalid.

2) Was the WARRANT IMPROPERLY EXECUTED?

Under the 4th Amendment, extended to the states by the 14th Amendment, the government is restricted to a search of the place and evidence particularized in the search warrant.

Here the warrant specified the place to be searched as [place stated in warrant] *and the evidence sought as* [evidence stated in warrant]. *But the police* [searched somewhere else.]

Therefore, the search here exceeded the authority established by the warrant and was actually a search without a warrant.

3) Was the search a TERRY STOP that did not require a WARRANT?

Under Criminal Procedure law no warrant is required for a TERRY STOP, where police may PAT and FRISK a person without a warrant searching for WEAPONS if there is an articulable reason to believe it is necessary for safety.

Here the search of the defendant was not necessary for safety because… And the search was not for weapons because…Also the search was more than a pat and frisk because…

Therefore…

4) Was the search a PROTECTIVE SWEEP that did not require a WARRANT?

Under Criminal Procedure law no warrant is required for a PROTECTIVE SWEEP, where police may do a cursory search of the immediate area around them if there is an articulable reason to believe it is necessary for safety.

Here the search of the area was not necessary for safety because…And the search here went too far beyond the immediate area around the police because… Also the search was more than a cursory search because…

Therefore…

5) Was the search with CONSENT so it did not require a WARRANT?

Under Criminal Procedure law no warrant is required if CONSENT is willingly given for the search by someone with legal capacity and authority to give consent.

Here consent was not given willingly because… Also the person did not have legal capacity and was not authorized to give consent because…

Therefore…

6) Was the search INCIDENT TO A LAWFUL ARREST so it did not require a WARRANT?

Under Criminal Procedure law no warrant is required for a non-intrusive search of a person, the immediate "lurch area" around them, and their immediate belongings if it is INCIDENT TO A LAWFUL ARREST. **[Important!]**

An arrest by police is lawful if the defendant commits a misdemeanor or breach of peace in the presence of the police or if police have reasonable evidence a felony has been committed. But a warrant is needed to enter the home of an innocent third party absent some other justification. **[Important!]**

Here the evidence was not found by a non-intrusive search of the defendant's person, the lurch area or in their immediate belongings incident to a lawful arrest because…

Therefore…

7) Was the search subject to an AUTO EXCEPTION that did not require a WARRANT?

Under the AUTO EXCEPTION no warrant is required to search an AUTO, including all compartments and containers within it, if the car is stopped at a border, if reasonably necessary for officer safety, if reasonably necessary to prevent imminent destruction of evidence, if the car is stopped based on probable cause that a crime has been committed and there is reasonable suspicion evidence of that same crime is in the car , or at a checkpoint where cars are stopped on a uniform or systematic basis for purposes of a) traffic safety, b) preventing illegal immigration or c) searching for witnesses to crimes that have been recently committed in the same area. **[Important!]**

Here the car was not stopped because… Therefore…

[Warning! The Supreme Court has changed the "auto exception" twice in recent years. The rule above reflects the Court's holding in *Indianapolis v. Edmond* in November, 2000, and the more recent holding in *Arizona v. Gant* in 2009.]

8) Was the evidence seen in PLAIN VIEW so it did not require a WARRANT?

Under the OPEN FIELDS DOCTRINE no warrant is required for police to discover evidence that is in their PLAIN VIEW while observed by reasonable means from a proper position. **[Important!]**

Here the police were not observing from a proper position by reasonable means because… And the evidence was not in the plain view of the police because…

Therefore…

9) Was the search subject to the HOT PURSUIT exception so it did not require a WARRANT?

Under the HOT PURSUIT exception no warrant is required for police to enter property to make an arrest if they are in hot pursuit of a fleeing suspect.

Here the police were not in hot pursuit of a fleeing suspect because…

Therefore…

10) Was the search without a warrant justified because of EXIGENT CIRCUMSTANCES?

Under the EXIGENT CIRCUMSTANCES exception no warrant is required for police to enter property or search a person if delay to obtain a warrant would pose a risk of injury or death, or the loss of evanescent evidence.

Here there would have been no risk of injury, death or loss of evidence if the police had waited to obtain a warrant because …

Therefore…

11) Were the statements of the defendant obtained in violation of his MIRANDA rights?

Under the 5th and 6th Amendments, extended to the states by the 14th Amendment, forced self-incrimination is prohibited and the right to counsel guaranteed. The MIRANDA rule requires police to advise a suspect he has a right to remain silent and a right to counsel in a CUSTODIAL INTERROGATION. A defendant may expressly, knowingly and voluntarily waive her rights but police may not interrogate or elicit statements from the defendant without assistance of counsel after the rights are asserted. **[Important!]**

Here the defendant was subject to a custodial interrogation because… And the defendant was not properly advised because… Also the defendant did not waive her rights because… Further the police continued to interrogate after assertion of the rights because…

Therefore…

12) Were the statements of the defendant obtained in violation of his RIGHT TO COUNSEL?

Under the 6th Amendment, extended to the states by the 14th Amendment, an accused is guaranteed a right to counsel, and the MASSIAH DOCTRINE prohibits police interrogation of an accused about the accused crime without legal counsel present after the right to counsel attaches. **[Important!]** *An accused has a right to counsel during custodial interrogation* [Also at arraignment, preliminary hearing, physical lineup and entry of plea. Modify the rule to match the facts presented in the essay question.]

Police cannot act to elicit incriminating statements or secretly record the statements of the accused when he is outside of custody pending trial. However they can use testimony of independent witnesses about any incriminating statements by the accused that were not elicited by police action. [Use as facts indicate.]

Here the defendant was an accused and the right to counsel had attached by the time the statements made because… And the statements were improperly elicited by police action because… Further, the accused had a right to counsel at the lineup, and police actions were improper because… Also the police improperly elicited statements about the accused crime because…

Therefore…

13) Would admission of the evidence offered VIOLATE THE RIGHT TO CONFRONT ADVERSE WITNESSES?

Under the 6th Amendment a criminal defendant has a right to confront adverse witnesses.

Here, the prosecution seeks to admit statements by [witness]*, but the defendant is being denied the right to cross-examine that witness in Court because the person who made the statement offered as evidence* [is dead, is not required to testify at their own trial, etc.]

Therefore, this evidence is inadmissible.

[*Crawford v. Washington* 541 U.S. 36 (2004) held that statements by unavailable witnesses constituting "testimony" cannot be introduced at trial against a criminal defendant unless the defendant had an opportunity to previously confront and cross-examine the witness concerning the statement, even if the statement seems to be inherently trustworthy. But a divided Court substantially contradicted that rule in *Michigan v. Bryant,* USSC Feb.28, 2011, holding that seems to indicate only statements made during custodial interrogation are "testimonial" in nature so that statements made during emergencies and "dying declarations" can still be admitted at trial even if the declarant is unavailable.

If two or more defendants are being tried at the same trial, and statements by one about the other are offered as evidence, a different jury must be empanelled for each defendant so the defendant that made the statement can be cross-examined outside the presence of the jury for that particular defendant.]

14) EXCLUSIONARY RULE: Should the evidence be EXCLUDED?

[This is the most important issue and should ALWAYS be discussed AFTER, and separate from, analysis that the evidence was improperly obtained.]

Under the EXCLUSIONARY RULE the Court has discretion to deny the prosecution the use of evidence that is the product of police misconduct if on BALANCE the deterrent effect of exclusion outweighs the negative effects it would have on law enforcement.[112] **[Important!]**

The FRUIT OF THE POISONOUS TREE doctrine may extend exclusion to evidence that results from prior police misconduct. **[Important!]**

The defendant can request exclusion only if the police misconduct violated the defendant's reasonable expectation of privacy. **[Important!]**

Evidence will not be excluded from use to impeach the defendant, where the sovereign offering the evidence to the Court acted in good faith, or where the error is harmless because the evidence at issue would have been inevitably discovered in any case. **[Important!]**

[112] One of the most common mistakes of law students is to state that all illegally obtained evidence MUST BE EXCLUDED. That is NOT TRUE. The judge has discretion to decide whether to exclude illegal evidence or not, based on a BALANCING of the deterrent effect of exclusion against the negative effect on justice in light of the seriousness of police misconduct.

Here the evidence was the product of police misconduct because… The evidence is the fruit of poisonous tree because… And there would be a strong deterrent effect that outweighs the negative impact on law enforcement because… Also the defendant has STANDING because the police violated her reasonable expectation of privacy by… Further, the sovereign offering the evidence seeks to profit from its own misconduct because… And the police misconduct is not harmless to the defendant because…

Therefore…

15) *Is the defendant being subjected to DOUBLE JEOPARDY?* [Rarely an issue]

Under the 5th Amendment the same sovereign cannot try a defendant more than once for the same crime. A separate sovereign can try a defendant for the same crime, and the same sovereign can try a defendant for a different crime arising out of the same acts, if the crime involves different elements.

Here the defendant is being tried twice by the same sovereign for the same crime because…

Therefore…

Note: The essential moral of *Massiah* is that police cannot enlist the help of an agent to do for them those things that the police are themselves prohibited from doing. If the question says a "jailhouse snitch" is questioning a defendant you MUST explain and apply the holding in *Massiah*.

Practice Question 21-16: Searches, Warrants, Double Jeopardy

Police officer Paul observed defendant Dick walking down the sidewalk. From his experience Paul immediately suspected Dick was a drug dealer because he had dreadlocks and red sneakers.

Paul requested a warrant to search Dick's little house, based on an affidavit in which he falsely stated he had a secret informer who claimed to have bought drugs from Dick.

The warrant was issued, and it appeared facially valid. Paul went with Officer Oscar, who acted on a good faith belief the warrant was valid, to Dick's house. At the door Dick's elderly Granny warmly invited the officers in for tea and cookies before they had a chance to inform her of the warrant. Granny lived there, sharing the house with Dick.

Sitting in the parlor the officers observed a marijuana plant (plant A) growing in the window sill. Granny said it was a marigold that belonged to Dick and that he had more growing in his nearby bedroom.

When Dick entered the house, the officers arrested him for possession, a felony. They then searched Dick's nearby unlocked bedroom where they found another plant (plant B) growing.

Officer Paul told Dick, "If you come clean we will go easy on you." Dick blurted out, "This was all Granny's idea! She has been selling this stuff all over town to her gray-haired old pot-head friends."

Based on this statement, Oscar searched Granny's locked room where he found a kilo of cocaine in plain view. Granny was then also arrested for felony possession.

Granny and Dick were both tried for sale of illegal drugs and were acquitted because the jury did not believe Dick's allegation. The DA was so embarrassed he filed new possession charges against both of them.

Dick claims --

He was subject to double jeopardy;
That both marijuana plants were the result of an illegally search; and
The marijuana plants should be excluded.

Granny moves --

She was subject to double jeopardy grounds;
The cocaine was the result of an illegal search; and
Dick's statement was the result of a violation of Miranda rights; and
The cocaine and statements should be excluded.

Discuss.

Practice Question 21-17: Searches, Warrant Exceptions, Defenses

Tom and his lover Dick made frequent trips to Mexico. On one trip Tom and Dick bought some Viagra with the intent of smuggling it into the United States. They thought this was a felony, but they were wrong because the appellate court had decided U.S. drug control laws do not apply to Viagra.

On the freeway, ten miles after they crossed the U.S. border the police tried to pull them over solely because Tom fit a criminal "profile" for drug smugglers based on age and race.

Tom had an overwhelming phobia of body cavity searches. He knew it was wrong, but he could not help himself. He could not stop the car.

State law said that anyone who resists a lawful arrest is guilty of a misdemeanor.

Tom drove away carefully at 55 mph and the police followed him for 20 miles. The police then grew weary of the pursuit and shot at the car. Dick was killed.

Tom is charged with the murder of Dick.

Discuss the criminal liability of Tom for murder and lessor included offenses, and Tom's defenses.

Practice Question 21-18: Standing, Fruit of Poisonous Tree

Policeman Paul took John into custody and questioned him about local drug trafficking. When John denied knowledge Paul beat him severely. John agreed to talk then and reported that Mark was dealing drugs.

Paul began following and watching Mark closely. He saw that Mark often picked up packages at the bus station, drove an erratic and wandering course around the city and then dropped the packages off at abandoned houses. Based on John's statement and his observations he concluded the packages contained illegal drugs.

One day Paul saw Mark pick up a bag from the lockers at the Greyhound Bus Depot and decided to pull him over. So, when Mark changed lanes on the freeway Paul stopped him and said he was being pulled over for driving erratically. He said this to avoid raising Mark's suspicions.

Paul carefully examined the interior of the car with his flashlight while standing outside. He saw a pistol under the front seat.

Paul arrested Mark for carrying a concealed weapon and then searched the entire car. In the trunk he found a kilo of cocaine.

Mark is charged with possession and asks that the evidence be excluded. Discuss the arguments that Mark might make and how the court might rule.

Practice Question 21-19: Searches, Exceptions, Right to Counsel

Officer Omar pulled Dan over because he was driving erratically. Dan was not given a Miranda warning.

Omar suspected Dan was drunk. Dan refused a breath-test, so Omar took him to headquarters where blood was taken from Dan's arm against his will and over his objection.

While being held Omar heard there had been a rape nearby, and the description matched Dan. So he had fingernail scrapings, fingerprints, a voice sample, and a handwriting sample taken. Dan demanded a lawyer, but none was provided.

The next day the blood sample proved Dan was not drunk. But police still held him an hour on "suspicion" for a lineup for the rape. He demanded a lawyer again, but Omar said he wouldn't have to answer any questions at the lineup.

The rape victim was shown 20 photos of men, including a photo of Dan. The rape victim picked Dan. No attorney was present to represent Dan.

Then the rape victim was shown Dan lined up with six paraplegics. The hysterical rape victim identified Dan again. Dan asked for an attorney, but no attorney was present to represent him.

Omar ordered a DNA test on the blood sample already taken from Dan to see if it matched the sperm sample taken from the rape victim. It matched.

Dan was charged with rape. He challenges the stop, the scrapings, prints, voice sample, handwriting sample, photo line-up, corporeal line-up and DNA evidence. Discuss.

Chapter 22: Real Property Answer Formats

Interests in land can be 1) estates, 2) easements, 3) covenants, 4) equitable servitudes, 5) options or 6) security interests.

Real property questions on Bar exams usually involve all of these except for options which are usually more the subject of contract questions than real property questions. Real property questions usually involve one of the following fact patterns:

- **Title Questions.** An estate ("Blackacre") was conveyed to someone, and a series of events has created uncertainty about who holds the title. The question raised is, "Who now holds title to an estate?" This is the most common real property question.
- **Covenants and Servitudes.** Land subject to obligations or use restrictions is conveyed and the question raised is, "Does a covenant bind current owners?" Or, "Does an equitable servitude now restrict land use?"
- **Easement Questions.** An easement is claimed or suggested. The question raised is, "Was an easement created, and does it still exist?"
- **Landlord-Tenant Disputes.** A dispute arises between a landlord and tenants and the question is, "What are the rights and duties of the parties?"
- **Liability Claims.** Claims for payment or damages to land raise the question of, "What are the legal liabilities of the parties?"

Estates. Estates are the right to exclusive possession of land by one or more parties jointly, and are classified by: following fact patterns:

- The means by which possession terminates and
- The immediacy with which possession begins.

Means of Termination of Possession. An estate is a **FREEHOLD** estate if possession is granted in perpetuity or is terminable only by occurrence of a natural event other than the passage of time. This includes acts by the party in possession that violate a condition. If possession terminates after a fixed period of time or is terminable at will (of the grantor) the estate is a **NON-FREEHOLD** estate (often a **LEASEHOLD** estate.) Typical leasehold estates are estates for years and periodic estates (e.g. month to month.)

Immediacy of Possession. If an estate allows immediate possession at the time of creation, it is a **possessory** estate. If possession is to be conveyed in the future from the time of creation, the estate is a **future** estate.

Freehold Estates. There are 10 types of freehold estates. Three are possessory freehold estates and seven are future freehold estates.

The following chart lists the possessory and future estates:

POSSESSORY ESTATES:

1) FEE SIMPLE to B
A → B and his HEIRS

2) FEE TAIL to B
A → B and his ISSUE

3) LIFE ESTATE to B
A → B for LIFE

FUTURE ESTATES:

4) REVERSION to A
A → B for LIFE → A and his HEIRS

5) REMAINDER to C
A → B for LIFE → C and his HEIRS

6) CONTINGENT REMAINDER to ? (or ??) [? / ?? is an unidentifiable person / class]
A → B for LIFE → ? and his/their HEIRS [RAP applies]

7) VESTED REMAINDER SUBJECT TO OPEN to C and also to ? / ??
A → B for LIFE → C and ? / ?? and their HEIRS [RAP applies]

8) POSSIBILITY OF REVERTER to A
A → B (for LIFE or HEIRS) as long as X is true → A and his HEIRS automatically

9) RIGHT OF ENTRY to A
A → B (for LIFE or HEIRS) → A and his HEIRS if X is true and right is exercised

10) EXECUTORY INTEREST to ? / ??
A → B (for LIFE or HEIRS) as long as X is true → ? / ?? and his HEIRS automatically [RAP applies]

The Rule Against Perpetuities (RAP) arises with the future interests of contingent remainder, vested remainder subject to open and executory interests, only.

The question is whether an interest is invalid because it violated the RAP at the moment of creation. To determine this, the people named in the creating instrument (will, deed) are the "measuring lives" and the person who could claim the future title is unknown at the time of creation. The question is whether there is any way, no matter how far-fetched (except disregard the possibility of time-travel, cloning and sperm/egg banks!) that the person with the future interest could remain unidentified for more than 21 years after the death of the people named in the creating instrument? Assume that every person could remain fertile until his or her death.

For Example: Suppose the instrument says "To A for life and then to his grandchildren that survive him." The only named person is "A" so his life is the "measuring life." The "grandchildren" of A have the future interest. When is the latest they could be identified? When A dies. Why? Because the condition states the grandchildren must "survive him" and that implies the identification will take place at the death of A. Since vesting occurs at the death of A, it could not occur 21 years after the death of A, and the RAP is not violated.

Another Example: Suppose the instrument says "To A for life and then to his grandchildren." The only named person is "A" so his life is the "measuring life." The targeted individuals are the "grandchildren" of A. And the time of vesting is when they are born. But it is possible that a grandchild could be born to A more than 21 years after the death of A. Therefore, the RAP is violated in this case.

How to Answer the Most Common Property Question. The most common real property question is "Who holds title?" after numerous conveyances, promises, deaths and other events. Some party staying on the land usually raises a claim or issue of adverse possession.

The proper way to answer this type of question is to sequentially consider the effect of each separate event on the title as a separate issue listed in chronological order. At each chronological step determine who holds title following the stated event, and why.

Mnemonics for Real Property:

HELUVA. The elements to be proven in a claim of ADVERSE POSSESSION are that possession was **hostile, exclusive, long, uninterrupted, visible** and **actual.**

RIPEN. The means by which an EASEMENT might be CREATED are by **reservation, implication, prescription, express grant** or **necessity.**

SURE NAP. The means by which an EASEMENT might be EXTINGUISHED are by **stated conditions, unity of ownership, release, estoppel, necessity, abandonment,** or **prescription.**

TIPS. The burden of a COVENANT runs with the land to new owners if the PROMISE **touches** and concerns the use of the land, was created with **intent** that the burden run with the land, there is **privity** of estate between the party to be bound and the original promisor, and the **statute of frauds** is satisfied.

TINS. The burden of an EQUITABLE SERVITUDE runs with the land to new owners if the USE RESTRICTION **touches** and concerns the use of the land, was created with **intent** that the burden run with the land, there was actual or implied **notice** to the party to be bound, and the **statute of frauds** is satisfied.

COMMON REAL PROPERTY ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *What INTEREST did A have in Blackacre at* [particular time]*?*

   Under REAL PROPERTY law…

   [Often the first issue to address is to define the estate interest of a particular party in the land at issue at a particular point in time. Pick the definition that applies, and then proceed to prove that this is the nature of the party's interest by proving each element of the definition with a fact.]

   a) A FEE SIMPLE estate is a possessory interest in perpetuity that can be bequeathed or conveyed without restriction.

   b) A FEE TAIL estate is a possessory interest in perpetuity that can be bequeathed or conveyed only to a descendant of the original grantee.

   c) A LIFE ESTATE is a possessory interest for the life of a person. If it is not the life of the grantee, it is a life estate "pur autre vie."

   d) A REVERSION is a future interest of the grantor following the natural termination of a life estate.

   e) A REMAINDER is a future interest of an identifiable grantee following the natural termination of a life estate.

   f) A CONTINGENT REMAINDER is a future interest of an unidentifiable grantee following the natural termination of a life estate. Since the grantee is not identifiable, it is subject to the RULE AGAINST PERPETUITIES.

   g) A VESTED REMAINDER SUBJECT TO OPEN is a future interest to an identifiable grantee as a member of a class following the natural termination of a life estate. Since the grantee has an uncertain interest, it is subject to the RULE AGAINST PERPETUITIES.

   h) A POSSIBILITY OF REVERTER is a future interest of the grantor following the automatic termination of a prior estate because of an express condition precedent.

   i) A RIGHT OF ENTRY is a future interest of the grantor following the non-automatic termination of a prior estate because of an express condition subsequent.

   j) AN EXECUTORY INTEREST is a future interest of a grantee following the automatic termination of a prior estate because of an express condition precedent or subsequent. Since the grantee has an uncertain interest, it is subject to the RULE AGAINST PERPETUITIES.

[Important! Be prepared to define estates and future interests.]

2. *Does A have a VESTED future interest in the estate?*

   Under REAL PROPERTY law, a future interest is VESTED when it is unconditionally designated to a named or known person. A future interest is VESTED SUBJECT TO OPEN (or " partial divestment") when the property is designated to the person as a member of a class, and an interest is VESTED SUBJECT TO COMPLETE DIVESTMENT when title is conveyed subject to a condition subsequent.

   Here the interest was vested because… Therefore.

3. *Does the RULE AGAINST PERPETUITIES invalidate A's interest?*

   Under REAL PROPERTY law, the RULE AGAINST PERPETUITIES states that "No interest is good unless it must vest, if at all, within 21 years after a life in being at the creation of the interest". **[Important!]**

   The Rule applies to 1) Contingent Remainders, 2) Executory Interests and 3) Vested Remainders Subject to Open.

   Here the interest is a contingent remainder because… And X was a life in being because he was identified by name in the deed/will. Also the grantee's interest (did not have) had to vest within 21 years of X's death because…

   Therefore the RULE AGAINST PERPETUITIES is (not) satisfied.

4. *What type of JOINT INTEREST does A have in Blackacre?*

   Under REAL PROPERTY law, **[pick one]**

   a) A TENANCY IN COMMON is the default form of joint ownership. The parties may have interests unequal in size, but each has an undivided right to possession. Each interest is freely alienable.

   b) A JOINT TENANCY between two or more people may be EXPRESSLY created if the FOUR UNITIES are satisfied. This means that 1) equal interests in the land are created 2) at the same time 3) out of the same deed or will with 4) equal possession rights. Each party has an equal interest and undivided right to possession. Each interest is freely alienable, but each joint tenant has a RIGHT OF SURVIVORSHIP. **[Important!]**

   A joint tenancy is automatically converted to a tenancy in common by alienation, death, partition, or mortgage in a "title theory" state.

   c) A TENANCY BY THE ENTIRETIES may be created by IMPLICATION between husband and wife in some states with a right of SURVIVORSHIP. Each party has an equal

and inalienable interest and undivided right to possession. California does not recognize Tenancy by the Entireties.

Here the joint interests are … because… Therefore.

5. *Was there an EFFECTIVE TRANSFER OF TITLE to A?*

Under REAL PROPERTY law an effective transfer of title to land requires a manifestation of present intent to transfer that satisfies the Statute of Frauds. Intent may be manifested by delivery, recording or acknowledging the deed to the land. Conditional delivery of a deed as a "will substitute" is not effective, but the Court may reinterpret delivery of a deed between family members to be delivery with retention of a life estate or the conveyance of an executory interest.

Here…because…Therefore.

6. *Did A obtain title or only a SECURITY INTEREST subject to the EQUITY OF REDEMPTION?*

Under REAL PROPERTY law a mortgage lender only holds a security interest and can only gain possession of land through the foreclosure process. Statutory rights to EQUITY OF REDEMPTION allow debtors to recover title for a set period of time after the foreclosure sale.

To determine whether there has been conveyance of a security interest only, the court will consider whether conveyance was for less than fair market value, as payment for another debt, and the terms of any "buy-back agreement."

Here…because…Therefore.

7. *Did A obtain a valid interest under application of the RECORDING STATUTE?* [113]

Under the common law the first grantee conveyed an interest obtained a valid interest except that a subsequent bone fide purchaser for value without notice took title over a prior donee.

Modernly recording statutes determine priority of title. Under a RACE STATUTE the first grantee to record an interest in land obtains a valid interest whether or not they purchase for value or are aware of prior transfers. Under the NOTICE STATUTES the last purchaser for value without notice obtains a valid interest in land whether they record it or not. And, under RACE-NOTICE STATUTES the first purchaser for value without notice to record an interest in land obtains a valid interest.

Here…because…Therefore.

[113] Often when a recording statute is the issue, they give you the applicable statute. When that happens, READ THE STATUTE CAREFULLY and APPLY IT LITERALLY because there is almost always something odd about it. For example, it might say "last purchaser for value" without adding the condition "without notice".

8. *Did A retain title to the land lost when the RIVER CHANGED COURSE?*

   Under real property law a parcel boundary defined by a stream is measured to the center line of the stream, and if the stream changes course suddenly (AVULSION) the parcel will not change size and will continue to be defined by the former streambed. But where a stream changes course gradually (ACCRETION) the parcel changes size and the new, changed streambed becomes the boundary.

   Here…because…Therefore.

9. *Did A obtain FEE SIMPLE because of the MERGER DOCTRINE?*

   Under the MERGER DOCTRINE if two or more consecutive estates vest in the same person they merge into the greater estate and the lesser one is destroyed.

   > [This is a technical issue but might be tested. For example suppose A conveys Blackacre, "To B for life, then to C." B holds a life estate, and C holds the remainder in fee simple. Then suppose B conveys his life estate to C. C now holds both a life estate and the consecutive future estate in the same land, so by application of the Merger Doctrine, C now holds Blackacre in fee simple. The life estate merges into the fee simple remainder.]

   Here…because…Therefore.

10. *Did A obtain FEE SIMPLE because of the RULE OF SHELLY'S CASE?*

    Under the RULE OF SHELLY'S CASE the grantee of a life estate obtains a fee simple estate if the same document grants remainders of the same estate to the heirs of the grantee of the life estate.

    > [This is a technical issue but might be tested. For example suppose A conveys Blackacre, "To B for life, then to the heirs of B." Normally B would only have a life estate. But by application of the Rule of Shelly's Case, B can now claim Blackacre in fee simple because he holds the life estate and his "heirs" hold all future estates in the same land.]

    Here…because…Therefore.

11. *Was A's conveyance of a remainder to his heirs VOID because of the DOCTRINE OF WORTHIER TITLE?*

    Under the DOCTRINE OF WORTHIER TITLE an inter vivos gift of a remainder to the heirs of the grantor is void because a remainder does not go to the heirs until the owner's death.

    > [This is a technical issue but might be tested. For example suppose A conveys Blackacre, "To B for life, then to the heirs of A." B holds a life estate, and the heirs of A appear to hold the remainder. If this conveyance was through the will of A, it is valid. But otherwise it is an inter vivos gift voided by application of the Doctrine of Worthier Title. The remainder after B's life estate would be a reversion to A, and it cannot be gifted by A to his heirs until his death.]

Here…because…Therefore.

12. *What DOWER INTEREST does the WIFE or WIDOW have in Blackacre?*

Under the REAL PROPERTY law of DOWER, a wife or widow had a LIFE ESTATE right to one-third of all inheritable land owned by her husband during marriage. [114]

Here the joint interests are … because… Therefore.

13. *Did A gain an interest in Blackacre through ADVERSE POSSESSION?*

Under REAL PROPERTY law, a person may gain title to property through hostile, exclusive, uninterrupted, visible, actual possession for the period of time set by statute. Where more than one party occupies the land, TACKING allows cumulating the time periods of each where there is PRIVITY between the subsequent parties. **[Important!]**

HELUVA possession! (hostile, exclusive, long, uninterrupted, visible, actual)

Here there was actual hostile possession because… exclusive because… visible because… And TACKING applies based on privity because… Also possession was for the required period … because…

Therefore …

14. *Does A have a valid EASEMENT?*

Under REAL PROPERTY law, an EASEMENT is a non-possessory interest in land that gives the holder a right to enter, maintain, repair and improve the land. **[Important!]**

Easements may be appurtenant to land, the dominant estate, or they may be in gross. They may be created by **[RIPEN]** *reservation, implication, prescription, express grant or necessity. They can be extinguished by* **[SURE NAP]** *stated conditions, unity of ownership, release, estoppel, necessity, abandonment, or prescription.*

Here the easement was created/extinguished by …because… Therefore…

15. *Did the COVENANT run with the land?*

Under REAL PROPERTY law, a covenant is a duty that concerns the use and possession of land. The burden of a covenant runs with the land to new owners if **[TIPS]** *the covenant TOUCHES and concerns the use of the land, there was an INTENT for the burden to run with the land, there is PRIVITY OF ESTATE, and the STATUTE of frauds is satisfied. Privity of*

[114] California does not recognize dower rights but you need to be aware of them and be prepared to address the issue because the Real Property part of the California Bar Exam is to be answered using common law and broadly adopted rules, not California law.

estate means that the party to be bound now held a simultaneous interest in the land with a prior party who was bound.

Here the easement was created by …because… Therefore…

16. *Was there an EQUITABLE SERVITUDE that ran with the land?*

Under REAL PROPERTY law, an equitable servitude is a restriction on the use of land. A servitude runs with the land to new owners if **[TINS]** *the restriction TOUCHES and concerns the use of the land, there was an INTENT for the burden to run with the land, there was actual or implied NOTICE to the party to be bound, and the STATUTE of frauds is satisfied.*

An IMPLIED RECIPROCAL SERVITUDE is created where there is a COMMON PLAN OR SCHEME of tract development which establishes a land use restriction on some of the land. By implication the restriction may extend to other land of the same development not expressly restricted.

Here the servitude was created by …because… Therefore…

17. *Has the landlord breached the IMPLIED COVENANT OF QUIET ENJOYMENT?*

Under REAL PROPERTY law, the implied COVENANT OF QUIET ENJOYMENT is a landlord's duty to assure that no one with paramount title substantially interferes with the tenant's enjoyment of the property. A breach of this duty is a CONSTRUCTIVE EVICTION which can be claimed as a defense if the tenant abandons.

If the landlord substantially interferes with the tenant's enjoyment of the land, the tenant can remain and stop paying rent. But if a third party with paramount title substantially interferes with enjoyment of the land, the tenant who remains must continue to pay pro-rata rent.

Here there was a breach of the implied covenant because … Therefore …

18. *Has the landlord breached the IMPLIED COVENANT OF HABITABILITY?*

Under REAL PROPERTY law, the implied COVENANT OF HABITABILITY is a landlord's duty to assure that residential property is habitable. Some courts hold the Tenant can withhold rent.

Here this is residential property because… And the property was not habitable because

Therefore …

19. What is the TENANT'S DUTY?

Under REAL PROPERTY law, a tenant's duties are to avoid waste and pay rent. MODERNLY payment of rent and use of property are deemed dependent covenants.

Here the tenant breached his duty because…

Therefore …

20. Is the leaseholder prohibited from ASSIGNMENT or SUBLEASE?

Under REAL PROPERTY law, an ASSIGNMENT conveys the entire remaining term of the lease. The assignor retains secondary liability for the remaining lease payments and the assignee becomes primarily liable for all covenants because there is PRIVITY OF ESTATE.

Under REAL PROPERTY law, a SUBLEASE conveys less than the remaining term of the lease. The sublease tenant does not have privity of estate and does not have liability for the remaining lease payments.

The restrictions on assignment and sublease are narrowly construed.

Here the lease did not effectively prevent assignment because…. Therefore…

21. Is the leaseholder prohibited from REMOVING FIXTURES?

Under REAL PROPERTY law, improvements attached to the land become part of the land, but trade fixtures are usually removable at the end of a lease. The tenant must repair any damage caused by the removal. In determining whether fixtures may be removed, the court will look to the intent of the parties, the nature of the items, the method of attachment and the purpose of the improvements.

Here…because…Therefore.

22. Is the leaseholder absolved from liability because of SURRENDER AND ACCEPTANCE?

Under the common law principle of SURRENDER AND ACCEPTANCE a leaseholder was absolved of liability for unpaid rent if the he abandoned the land and the landlord then reentered and retook possession.

Modernly, leaseholders are not automatically absolved of liability. Some jurisdictions will absolve the leaseholder of liability unless the landlord reenters with notice of intent to hold the leaseholder liable. Others require landlords to reenter the land to mitigate rental losses by releasing the land.

Here…because…Therefore.

23. Is A liable for the MORTGAGE on the land?

Under REAL PROPERTY law, a LIFE TENANT is liable for interest on existing mortgage debt and the REMAINDERMEN are liable for payments of principal. Where property is conveyed subject to a mortgage, the property remains subject to the mortgage, but the grantee only becomes personally liable if he or she expressly assumes liability for the mortgage.

Here the liability for the mortgage is …. because… Therefore…

24. What are A's WATER RIGHTS? [Also called "riparian" rights].

Under COMMON LAW, domestic use had superior rights over agricultural or industrial uses to surface water. MODERNLY, some states follow the PRIOR APPROPRIATION DOCTRINE that the first party to use surface water acquired superior rights.

Except where statute controls, there are no recognized rights to underground water.

Here… because…Therefore…

25. Can A claim the STATUTE OF FRAUDS as a defense?

Under the STATUTE OF FRAUDS any unwritten contract transferring an interest in real property was unenforceable at law. However, an unwritten contract may be enforceable in equity under the PART PERFORMANCE EXCEPTION where the buyer has paid all or most of the agreed price. Some states require further that the buyer must either take possession or make valuable improvements to the land. **[Important!]**

Here… because…Therefore…

26. Did seller deliver MARKETABLE TITLE?

Under REAL PROPERTY law, a seller has an AFFIRMATIVE OBLIGATION to deliver marketable title by the closing date. MARKETABLE TITLE is one FREE FROM REASONABLE DOUBT IN FACT AND LAW because of liens, violations of existing zoning, servitudes, rights of reverter, easements, dower rights and restrictive covenants. The existence of land use restrictions at the time of the contract to sell is not a title defect. **[Important!]**

Under the common law a willfully breaching seller that failed to deliver marketable title was liable to the non-breaching buyer for the BENEFIT OF THE BARGAIN, the excess of market value over the contract price. In the case of a non-willful breach, the seller was only obligated to return the non-breaching buyer's deposit. Modernly about half the states (including California) require the seller to give the non-breaching buyer the benefit of the bargain, and about half follow the common law rule.

Here… because…Therefore…

27. Did the breaching buyer have a right to RETURN OF DEPOSIT?

Under REAL PROPERTY law, a non-breaching seller may keep the breaching buyer's deposit as LIQUIDATED DAMAGES if it is reasonable in amount. The deposit is considered reasonable if at the time of contract the parties anticipated there would be damages caused by a breach, the amount of damages was hard to predict and the amount in dispute is a reasonable amount of compensation.

Here… because…Therefore…

28. Which party bears the RISK OF LOSS on property after sale but before closing?

Under the common law doctrine of EQUITABLE CONVERSION the buyer bore the risk of loss after the sale of property, even if the property remained in the possession of the seller because equitable title transferred at the time of the contract and specific performance would be enforced in equity. Modernly, a strong minority of states reduces the risk on the buyer, and some hold the party in possession at risk. **[Important!]**

Here… because…Therefore…

29. Is the adjacent property owner strictly liable for REMOVAL OF LATERAL SUPPORT?

Under common law a property owner was STRICTLY LIABLE for causing subsidence of neighboring land in its natural state by removing LATERAL SUPPORT. But liability for causing subsidence of neighboring structures generally required a showing of negligence.

Modernly some states (including California) require property owners to give notice to adjacent landowners and allow them time to protect structures before excavating. Further, property owners may be absolutely liable for damages caused by excavations below certain depths (Nine feet below grade in California).

Here… because…Therefore…

30. Is the adjacent property owner liable for DIVERSION OF SURFACE WATER?

Under the common law COMMON ENEMY DOCTRINE a property owner was allowed to divert surface water from his property without liability for the consequences. Modernly, some jurisdictions prohibit any diversion of surface waters, and others prohibit diversion of surface waters unless done in a reasonable manner.

Here… because…Therefore…

Note: The Bar recently tested covenants running with the land. The question involved a resident of a planned community who refused to pay $600 a year for security services as was required by his deed. The neighboring landowner had not yet suffered any actual injury as a result of the breach (the security firm continued to provide services), but she was concerned a continuing breach of covenant would deny her security services in the future.

The defendant landowner violated a covenant owed to other landowners, including the plaintiff. That made him legally liable to each and every other landowner for his breach of covenant. The remedy of the other landowners can either be measured as the damages they have each actually suffered as a result of the breach (which was nothing under the given facts) or by legal restitution for the unjust enrichment the defendant has enjoyed as a result of the breach. Under the facts the defendant was liable to the neighboring landowner for the past payments he had refused to make because otherwise he would enjoy an unjust enrichment by enjoying the security services paid for by the other landowners while refusing to pay anything for it himself.

It is essential to understand that covenants running with the land legally bind the owners with a duty to act in some manner, and create legal rights for intended beneficiaries to seek legal remedies, which means damages or else legal restitution.

In contrast, equitable servitudes running with the land equitably bind the owners, and give a Court of equity discretion to enforce the servitude or provide other appropriate remedies for the intended beneficiaries.

Practice Question 22-20: Adverse Possession, Rule Against Perpetuities

The age of majority in State X is 18 years, and it follows the common law Rule Against Perpetuities.

Upon his death in 1970 Tom's will stated, "To Bob I give Blackacre for the rest of his life, then to Bob's oldest living male descendant. I leave all remaining interest of my estate in Blackacre to Bill and his wife, Hillary, as joint tenants with a right of survivorship."

At the death of Tom, Bob was 75 years old and childless.

Monica had an eye for married men. She had an affair with Bill that produced a daughter, Charity, in 1970.

Following Bob's endorsement of Viagra, Monica put some zing into his life, too. Bob's wife, Elizabeth, killed Bob in a fit of jealousy in 1972. Monica left for France with Charity. Two years after Bob's death, through genetic engineering, Monica gave birth to Bob's son, Algore, in 1974.

Unbeknownst to all, Harry the Hippie began camping out on the part of Blackacre far from the main road the day Bob was killed. He grew marijuana there. After five years he got mainstream, built a house, became a rancher, and was eventually elected to Congress where he was leader of the Moral Majority Party. His campaign slogan was, "A Man Who Gets It All."

Harry lived on Blackacre from 1972 to 1991. The State X adverse possession statute establishes a 10 year period. But, it also states that if a person receives an interest in land while lacking capacity, the adverse possession period is extended until 2 years after the incapacity is removed.

Bill and Hillary separated in 1989. Before a divorce could be filed, Bill died in 1990. His will left his entire estate to his long lost daughter, Charity.

In 1992, when Algore was 19 he returned and started an action to evict Harry the Hippie. Charity was 22, and she also started an action against Harry.

a) What was the interest in Blackacre given to Bob in 1970?
b) What interest in Blackacre was given to Bob's descendant 1970?
c) What interest in Blackacre did Bill and Hillary receive in 1970?
d) Who received legal title to Blackacre upon Bob's death in 1972 and in what form?
e) Who received legal title upon Bill's death in 1990 and why?
f) Did Harry have a valid claim based on adverse possession?
g) Was Algore's effort to evict Harry effective?
h) Was Charity's effort to evict Harry effective?
i) Who owns Blackacre now?

Practice Question 22-21: Real Property / Community Property Crossover

Adam, a wealthy anti-tobacco activist, willed his ancestral estate in northern California, Blackacre, to his porn-star daughter Betty, "for as long as tobacco is not smoked upon the land, and then to Ralph Nader and his heirs." Adam gave the rest of his estate to charity.

Adam died from AIDS in 1987.

Betty received her inheritance when she was happily married to her long-time director, Carl, and living in a palatial estate in Beverly Hills.

Betty never actually went to Blackacre. If she had, she would have seen Howie the Hippie had been living there since 1986 in a teepee, doing tai chi between the redwood hot tub and a reflecting pool with very bad feng shui.

The California statute for adverse possession says that, "no person may bring an action in ejectment against any person that has resided openly, hostilely, and continuously upon the land for the prior five years".

After reading, "How to Avoid Probate," Betty reconveyed Blackacre to herself and Carl as joint tenants with a right of survivorship by Grant Deed in 1989. But at the time Betty never intended to give up her separate interest, and she refused to sign anything except the Deed.

Then in 1996, suffering from artistic differences, Betty left Carl and went to Blackacre seeking space and a chance to find her inner child. Instead, she found Howie, and after getting to know him better they celebrated by puffing on a Marlboro, violating the provision of Adam's will.

Howie and Betty moved to Reno for six weeks to establish domicile so Betty could get a quickie divorce and they could get married. But while they were in Reno, and before the divorce was final, Betty got run over by a truck and her valid will directed that her entire estate be given to the Society for the Prevention of Animal Murder (SPAM).

Immediately after Betty's death SPAM, Howie, Carl and Ralph Nader all filed suits against each other, each claiming that they own Blackacre.

Under the common law of real property and California community property law what was the interest of each person in Blackacre and why?

Practice Question 22-22: Priority of Claims, Recording Statutes

Able gave his son Tom a copy of the deed to his house saying, "I hereby give you my house."

The next week Able agreed to sell his house to Dick and handed him a second copy of the deed in exchange for gold. Dick had no idea Able had given the house to Tom.

The next day Able sold his house to Harry and handed him a third copy of the deed in exchange for silver. Harry had no knowledge about Tom and Dick.

Able buried the gold and silver in a secret spot and died that night.

Tom went to the courthouse and recorded his deed the next day. Dick went to the courthouse and recorded his deed an hour later. But Harry never recorded his deed at all.

Who would hold title to the house under:

1. Common Law?
2. A Race Statute?
3. A Notice Statute?
4. A Race-Notice Statute?

Practice Question 22-23: Adverse Possession, Rule Against Perpetuities

Able died in 1970. His will said, "Blackacre, my California estate, to my son, Sam, for life. Then to Sam's oldest surviving child in fee simple. All of the rest of my estate to my other son, Charles."

Sam and Charles both lived on Blackacre for 20 years from 1970 to 1990. Sam didn't like Charles there and kept telling him to get out. Charles refused to leave, and Sam never bothered to evict him.

Sam had a spin with Monica, but he never married her. He announced at a family reunion in 1974 that she could live on Blackacre for the rest of her life. He never gave Monica anything in writing, but she lived on Blackacre and bore Sam two children, Howard, in 1975 and Max in 1976.

Sam died in 1990.

Howard grew up and married Wanda. They had a son Pete.

Howard, age 20, recorded a new deed to Blackacre in 1995 that granted it to, "Howard Smith and his wife, Wanda Smith as Joint Tenants with Right of Survivorship." There was no other writing. Howard and Wanda moved with little Pete to Blackacre in 1995.

Howard died suddenly in 1999, and his will left his entire estate to little Pete.

Wanda caught Charles sleeping with Monica. She was so upset she evicted them both in 2000.

The California statute for adverse possession provides a 10 year time period, and Sam did not suffer from any form of incapacity.

Charles, Monica, Wanda and little Pete all claim they own interests in Blackacre. What valid, enforceable interests, if any, did each person have in Blackacre as follows and why?

1) Able before his death in 1970?
2) Sam from 1970 to 1990?
3) Monica as a result of Sam's announcement in 1974?
4) Howard's interest from 1970 to 1990?
5) Howard's interest from 1990 to 1995?
6) Howard's interest from 1995 to 1999?
7) Wanda's interest from 1995?
8) Pete's interest from 1999?
9) Charles' interest in 1999?

Chapter 23: Community Property Answer Formats

For the California Bar Exam all community property questions are to be answered using the provisions of the California Family Code.

Characterizing Property Held in Joint Title. Perhaps the most complicated community property rules involve the characterization of property held in joint title. You should approach these situations with a **two step process**:

- FIRST ISSUE -- "What was the character of the asset when it was FIRST ACQUIRED?"
- SECOND ISSUE -- "Did the parties do something to TRANSMUTE the character of the asset later?"

When it comes to characterization of assets when first acquired, there are SIX POSSIBILITIES and they should be addressed in this order:

1. IS IT A JOINTLY-HELD ASSET IN A **DISSOLUTION**? If so, the answer is simple.
    a. IN DISSOLUTION jointly held property is presumed to be CP under the SPECIAL JOINT TITLE presumption of FC §2581 regardless of when they got the asset, how they got it, or how title is held, UNLESS there is a clear statement of contrary intent on the deed itself or in some other written agreement that the property is to be considered separate property of one or both spouses.
    b. OTHERWISE, if there is such a clear statement on the deed or in some other written agreement the property is to be considered whatever that written statement or agreement states.

If it is not a dissolution the characterization must either be to distribute property at the death of a spouse or else to determine character during the marriage, perhaps to determine which assets a creditor can reach. So in this case go on to consider the other possibilities as follows:

2. Was the asset ACQUIRED **DURING MARRIAGE**? If not, the asset was obviously acquired as jointly-held SP interests since only property acquired during marriage can be CP. This would be a situation where H and W buy an asset as "joint tenants" or "tenants in common" before they get married or after they separate.

3. Was the asset acquired during marriage by a MARRIED WOMAN in her OWN NAME (e.g. not "Mr. and Mrs. John Doe") by a WRITTEN INSTRUMENT **BEFORE 1975**? If so the Married Woman Presumption applies as follows:
    c. The asset was acquired as SP of the wife if acquired by the WIFE ALONE;
    d. The spouses acquired jointly-held SP interests if the property is conveyed to them (and any other parties as well) as "JOINT TENANCY" or "TENANCY IN COMMON";
    e. The spouses acquired CP if their interest in the property was conveyed to them as "COMMUNITY PROPERTY";
    f. The spouses acquired CP if it was conveyed to THEM ALONE (no other parties) AND they were DESCRIBED IN THE CONVEYANCE AS "HUSBAND AND WIFE";

g. Otherwise, the wife acquired an SP share and the remaining interest conveyed to the husband and wife was acquired by the two of them as CP.

4. Was the asset acquired or reconveyed during marriage **after 1/1/1975 but BEFORE 1985**? If so the General Title Presumption applies as follows:
    h. If title was conveyed to one spouse alone, that spouse acquired SP;
    i. The spouses acquired jointly-held SP interests if the property is conveyed to them (and any other parties) as "JOINT TENANCY" or "TENANCY IN COMMON".
    j. Otherwise the spouses acquired CP.

5. Was the asset was acquired or reconveyed during marriage **after 1/1/1985 by COMMINGLING OR OTHERWISE COMBINING SP AND CP**? If so the General Title Presumption still applies as follows:
    k. If title was conveyed to one spouse alone, that spouse acquired SP;
    l. The spouses acquired jointly-held SP interests if the property is conveyed to them (and any other parties) as "JOINT TENANCY" or "TENANCY IN COMMON".
    m. Otherwise the spouses acquired CP.

This can be a situation where each spouse contributes some SP to buy an asset, or where SP from one spouse is combined with CP to buy the asset. Adversely affected spouses must agree to the transaction, but the asset may be acquired jointly or by one spouse alone.

6. Otherwise, if the asset was acquired or reconveyed during marriage after 1/1/1985 without any commingling or otherwise combining SP and CP, did an ADVERSELY AFFECTED SPOUSE **EXPRESSLY DECLARE AN INTENTION TO TRANSMUTE** THE CHARACTER?
    n. If not, the asset retains the character of the funds used to acquire it.
    o. If so, the General Title Presumption still applies as follows:
        i. If title was conveyed to one spouse alone, that spouse acquired SP;
        ii. The spouses acquired jointly-held SP interests if the property is conveyed to them (and any other parties) as "JOINT TENANCY" or "TENANCY IN COMMON".
        iii. Otherwise the spouses acquired CP.

The six possibilities above, in the order given, determine the character of assets WHEN FIRST ACQUIRED, but the spouses can always TRANSMUTE the character of assets.

- An adversely affected spouse can always transmute the character of their interest in property by an EXPRESS WRITTEN DECLARATION of intent.
- BEFORE 1985 the character of property was IMPLIEDLY TRANSMUTED by conveyance of property from one title form (e.g. community property) to another form (e.g. tenants in common, joint tenancy).
- AFTER 1985 the character of property can still be impliedly transmuted by commingling or otherwise combining SP and CP (e.g. H and W each contribute SP funds combined with CP funds to buy an asset titled "community property".)

Mnemonics:

Think of PEREIRA and VAN CAMP this way: **IRAs pay RATES and PEREIRA gives a RATE of return. Workers in farm labor CAMPS get paid WAGES and VAN CAMP pays a WAGE.**

COMMON COMMUNITY PROPERTY ISSUES AND ANSWERS:

Always follow the CALL of the question, but generally you should START ALMOST ALL COMMUNITY PROPERTY ESSAYS WITH THIS INTRODUCTORY STATEMENT:]

"Under CALIFORNIA COMMUNITY PROPERTY LAW the rights and remedies of the parties will depend on the characterization of their property. All property acquired during marriage in California are characterized as COMMUNITY PROPERTY, regardless of form, unless they are otherwise classified by law.

Property acquired before marriage, by gift, bequest or devise, or after permanent separation is characterized as SEPARATE PROPERTY. Further, all interest, profits, rents, royalties, dividends, and issue produced by separate property is also separate property."

If the facts say property was acquired by a married couple while living outside California add this:

"Property acquired during marriage while living outside California which would have been community property if living in California is classified as QUASI-COMMUNITY property."

If the facts suggest one or both members of a marriage are PUTATIVE SPOUSES add this:

"If parties reasonably believe they are legally married when they actually are not, they can claim the status of PUTATIVE SPOUSE and property acquired during the period they believed themselves to be married is classified as QUASI-MARITAL property.

If a marriage is not legal, but neither party claims the status of a PUTATIVE SPOUSE the only remedies of the parties are under contract law as provided for in the case of MARVIN v. MARVIN."

Then add this:

"Generally the character of an asset does not change when the form of the asset changes.

These characterizations are legal presumptions that generally can be overcome by tracing an asset to property of a different character.

If the facts involve a dissolution of a marital relationship, add this:

> *"In a dissolution the general rule is that the community property, quasi-community property* [*and quasi-marital property*] *will be equally divided between the parties and each party will be granted their separate property. However there are exceptions. The parties will be each liable for their own debts that arose before marriage, and for debts that arose after separation other than debts incurred for necessities of life. The Court will allocate the debts that arose during marriage or incurred after separation for necessities of life between the spouses in the manner that will best protect creditors."*

[This entire introductory statement of law, as modified to fit the given facts, is Important!

After giving the introduction start discussing the issues, classifying the assets of the parties by citing legal presumptions.]

1. *Is* [name of spouse] *a PUTATIVE SPOUSE?* **[This is only an issue if the marriage is not legal.]**

   Under community property law the status of PUTATIVE SPOUSE may be claimed by parties to a relationship that reasonably, but erroneously, believe they are legally married. California does not recognize common law marriage unless the parties became legal common law spouses in another State that does recognize common law marriage before relocating to California.

   If a spouse establishes and claims the status of a putative spouse the property acquired during the marriage is deemed to be QUASI-MARITAL property and will be divided as if it were community property.

   If neither party to an invalid marriage claims and establishes that they are a putative spouse the interests of the parties in property acquired during the relationship is solely based on express or implied contract agreements pursuant to the holding in MARVIN v. MARVIN, and is not determined by the California Family Code.

   Here the marriage was not valid because… And [name of spouse] *did (not) reasonably believe (he/she/they) were legally married because…* [Name of spouse] *would (not) benefit from claiming the status of putative spouse because…*

   Therefore [name of spouse] *would (would not) be able to claim to be a putative spouse and (but) would (would not) claim that status.*

2. *What is the character of [Each Pre-marriage Asset]?*

   Under community property law separate property generally remains separate during marriage despite changes in form, unless there has been an express transmutation. Further all rents, issues and profits of separate property are separate property. Earnings of a spouse and minor children while living separate and apart are also separate property. And increases in the value of separate property are separate property except to the extent it is attributable to community effort.

Here [Asset] *was acquired before marriage (while living separate and apart, as rent, profit, etc. from separate property, by inheritance, as a gift, etc.) because…*

Therefore it would be characterized as SEPARATE PROPERTY.

3. *What is the character of [Each Post-marriage Asset]?*

Here the [Asset] *was acquired during marriage in California because… And it would not be classified as separate property because…*

Therefore it would be classified as COMMUNITY PROPERTY.

4. *Does the SPECIAL TITLE PRESUMPTION apply?*

Under Family Code §2581 in a dissolution all jointly held property, regardless of form of title and regardless of when it was acquired, will be treated as if it were community property UNLESS there is a clear statement of contrary intent on the deed or there is proof the parties entered into a written agreement that the property is separate property.

Here this is a divorce situation and the property is held in joint form because… And there is no evidence the deed or any written agreement provided that this would remain separate property.

Therefore...

[As stated in the introductory comments, if the characterization of property is for the purpose of allocating property in a dissolution, this is the applicable statute unless there is clear written evidence in the deed or an agreement the asset was to remain separate property. It does not have any exceptions based on when or how the property was acquired. Therefore, in a dissolution scenario there is no need to discuss other issues like the General Title Presumption and Married Woman's Presumption.]

5. *Does the MARRIED WOMAN'S PRESUMPTION apply to* [Asset] *making it SEPARATE PROPERTY of the wife?*

Under the MARRIED WOMAN'S PRESUMPTION of Family Code § 803 any property acquired by a married woman in her own name by a written instrument prior to 1975 is presumed to be:

- *SEPARATE PROPERTY if acquired by her alone;*
- *Acquired as a TENANT IN COMMON if the property is conveyed to her along with two or more other people and the conveyance does not indicate otherwise title form;*
- *Acquired as COMMUNITY PROPERTY if acquired with the husband alone, and the conveyance describes them as "husband and wife" but does not otherwise indicate the title form;*
- *Acquired as SEPARATE PROPERTY otherwise.*

If property was acquired by a husband and wife before 1975 and the conveyance did not describe them as "husband and wife" or indicate the title form the wife is deemed to have

received a ½ interest in the property as a TENANT IN COMMON but the other ½ interest is deemed to have been received by both the husband and wife as COMMUNITY PROPERTY. In these odd situations the wife is deemed to have an interest in ¾ of the property, ½ as her separate property and ¼ as an inchoate interest in the other ½ held by the community. **[Important!]**

Here [Asset] *the wife acquired property by a written instrument because …, and the wife acquired title in her own name because …Further, the wife acquired title before 1975 because …*

Therefore, the MARRIED WOMAN'S PRESUMPTION in this case would overcome the general presumption, and the wife's joint tenant interest would be her SEPARATE PROPERTY.

[As stated in the introductory comments, this is generally not the governing rule if the distribution of property is the result of a dissolution. Family Code §2581 was adopted later and applies to all jointly-held assets in divorce regardless of when or how they were originally acquired.]

6. *Is* [Asset] *COMMUNITY PROPERTY because it was held in JOINT TITLE?*

Under the GENERAL TITLE PRESUMPTION property held or acquired during marriage in joint form as "community property", "husband and wife" or "Mr. and Mrs." is generally presumed to be COMMUNITY PROPERTY. Property jointly held as "joint tenants" or "tenants in common" is presumed to be jointly held SEPARATE PROPERTY. And property held in the name of one spouse alone is presumed to be their SEPARATE PROPERTY.

Here [Asset] *was held in joint title and/or during marriage as "husband and wife" because…* [quote supporting facts.]

Therefore, this would be presumed community property unless some other rule applies to the contrary.

[As stated above, the General Title Presumption is the general rule except in the case of dissolution or unless the Married Woman's Presumption applies, that would be determinative. For property acquired after 1/1/1975 the General Title Presumption is always determinative (except in dissolution) except that implied transmutation is not allowed after 1/1/1985.]

7. *Was the SEPARATE PROPERTY* [Asset] *of* [Spouse] *TRANSMUTED to COMMUNITY PROPERTY when put in JOINT TITLE?*

Under COMMUNITY PROPERTY LAW, after 1984, any transmutation must be proven by an express declaration, in writing, by the spouse whose interest will be adversely affected. Any transmutation or prenuptial agreement must be based on full disclosure. However, this does not apply to the characterization of commingled or otherwise combined separate and community property. **[Important!]**

[As stated above, implied transmutation is always a consideration after determining the initial character of property. Until 1/1/1985 transmutation could be implied by any act to change the title of property such as conveying it from one spouse alone into a joint tenancy. But after 1/1/1985 an express, written statement of intent to transmute is required. This applies to prenuptial agreements as well because they are effectively transmutation agreements in anticipation of marriage. However the rule requiring a written statement of intent does not apply to property that commingles or otherwise combines separate property and community property.]

Here the character of [Asset] *was originally separate/community because … And the title change was after 1984 because… Also there was no written declaration of express intent to transmute the character of the property by* [Spouse] *because … Further there was not full disclosure because …*

Therefore, the title change did not effectively transmute the character of [Spouse's] *separate property interest.*

8. *How much of the* [Mixed Asset] *VALUE is SEPARATE and how much is COMMUNITY?*

Under COMMUNITY PROPERTY LAW when a SEPARATE PROPERTY asset of one spouse is increased in value by COMMUNITY EFFORT during the marriage the resulting value must be allocated between separate and community estates.

When the community effort is the main factor giving the asset value, the PEREIRA approach is used, giving a representative rate of return to the separate property interest, with the balance of appreciation allocated to the community.

When the separate property asset is the main factor giving the asset value, the VAN CAMP approach is used to give the community a representative wage, with the balance of appreciation allocated to the community.

Here the [Mixed Asset] *originally was the separate property of* [Spouse] *because … And the asset increased in value during the marriage because of community efforts because… Also the community effort was [the major / a minor] factor because …*

Therefore, the [PEREIRA / VAN CAMP] approach is the appropriate method to allocate the value of this asset.

9. *How much of the* [Commingled Asset] *VALUE is SEPARATE and how much is COMMUNITY?*

Under COMMUNITY PROPERTY LAW when separate and community funds have been commingled, the burden is on the spouse claiming a separate interest to identify the separate portion through DIRECT TRACING.

If DIRECT tracing is impossible, FAMILY EXPENSE TRACING can be used to show the LOWEST INTERMEDIATE BALANCE of separate property during the marriage.

If both DIRECT and FAMILY EXPENSE TRACING are impossible because records are lost, through no fault of the party claiming a separate interest, the RECAPITULATION method may be allowed in rare situations.

Here the [Asset] *contained commingled separate and community funds because … And [DIRECT / FAMILY EXPENSE] could not be used because …*

Therefore...

10. *What is the character of a PERSONAL INJURY AWARD?*

Under COMMUNITY PROPERTY LAW a PERSONAL INJURY AWARD is separate property of the injured spouse if the injury occurred before marriage, and it is community property if the injury occurred during marriage.

Nevertheless, in DISSOLUTION the entire award will be given to the injured spouse UNLESS the court finds that would be unjust because of the particular facts. In any event, in DISSOLUTION the injured spouse can never be given less than 50% of the award.

Here…because… Therefore…

> [Note this has been frequently tested. If the personal injury award is separate property it always goes to the injured spouse, every time, but in divorce the community has a right of reimbursement for community funds spent to pay for associated medical expenses. But if it is community property it STILL usually goes to the injured spouse in divorce generally AND the community has no absolute right to reimbursement. However, the family Court (judge) has discretion to give some of the award to the community as justice demands.]

11. *What is the character of PENSIONS or RETIREMENT PAY?*

Under COMMUNITY PROPERTY LAW future PENSION or RETIREMENT PAY or other benefits that are partly earned during marriage are community income to the extent the right to receive the benefit was earned during marriage.

The Court will apply a TIME RULE. The community interest is the portion of the total benefit equal to the portion of the total employment history that occurred during the marriage.

Each spouse may claim future pension of the other spouse even if the other spouse's pension rights have not yet vested.

If a pension is available to be taken by one divorced spouse, the other spouse may exercise a GILMORE ELECTION to immediately receive his or her community property portion, even if the spouse that earned the pension elects to continue working and postpone retirement.

Disability income payments after dissolution of marriage may actually contain a community property retirement pay component requiring allocation.

Here…because… Therefore…

[It is important here to understand and be able to "do the math". Suppose H was employed for 2 years before marriage with a company that provided pension benefits, then married W, and the marriage lasted 10 years. Then at the time the marriage ended H had been employed for a total of 12 years. The community interest in his pension is 10/12. In a dissolution W will get half the community interest in the pension, 5/12. H will get the rest, 7/12.]

12. *Does FEDERAL LAW PREEMPT STATE LAW?*

    Under the SUPREMACY CLAUSE of the U.S. Constitution, federal law preempts State law where there is a direct conflict. Federal law preempts State community property law with respect to ERISA pensions, social security and in many issues involving military pay and service benefits.

    Here…because… Therefore…

13. *Does* [Spouse] *have a reimbursement right for the use of Separate Property used as a DOWN PAYMENT or to fund IMPROVEMENTS to or PAY OFF LOANS against* [a Community Property Asset]*?*

    Under COMMUNITY PROPERTY LAW, for purposes of dissolution after 1983, any separate property funds spent to acquire or improve or pay against loans used to acquire or improve jointly held property must be reimbursed from the community if they are 1) traceable and 2) there was no written waiver of the right to reimbursement by the party seeking reimbursement. **[Important!]**

    Here the down payment was traceable to [Spouse's] *separate property because…And the money was used to acquire (or improve) an asset because…Also this is a dissolution after 1983 because…Further, there was no written waiver because …*

    Therefore, [Spouse] *has a right to reimbursement of the down payment amount.*

    [Family Code § 2640(b) provides for reimbursement of separate property funds spent for "acquisition" of community assets, and "acquisition" is defined to include payments for improvement or payments against loans for acquisition or improvement. There is no reimbursement payment of interest, taxes or insurance. And unlike the *Moore* approach shown below, no share of capital appreciation is given the separate interest.]

14. *What is the COMMUNITY interest in* [Separate Property Asset] *because of LOAN PAYMENTS made with community funds?*

    Under the MOORE approach the community acquires an interest in separate property assets if community funds are used to pay down loans against the property. The community interest is the amount of community funds paid to reduce the loan principal balance (c) plus the portion of total capital appreciation equal to the part of the original purchase price (b) paid for with community funds. **[Important!]**

    [The *Moore* approach is now broadly accepted as the applicable rule.

<u>You must learn the math</u>! If the house originally cost C and at divorce the value is V, capital appreciation is V-C. If the community pays down the mortgage balance by amount P, the community has a right to that amount back. In addition, the community has an interest in the appreciation equal to (P/C * (V-C)). In all the community interest is P + (P/C * (V-C)).

This can produce an unfair result unless property appreciation (V-C) occurs during the marriage at about the same rate as before the marriage. Suppose W buys a house for $100,000 and it goes up in value over 20 years by $400,000. Then W marries H while still owing a mortgage of $50,000. If W and H then pay off the loan the community interest is $250,000 ($50,000 + ½ of the gain of $400,000) even though all the appreciation occurred before the marriage when W was sole owner. If W and H divorce H will get $125,000 even though only $25,000 of "his" money was used to pay off the loan.]

Here the [Asset] *was <u>separate property</u> because… And <u>community funds</u> were made to make mortgage payments because…*

Therefore, the community interest in the house is…

15. *<u>Should the community be reimbursed for EDUCATION EXPENSE?</u>*

Under COMMUNITY PROPERTY LAW the obligation for <u>student loans</u> will be allocated to the spouse benefited upon dissolution. Further, the community will be reimbursed for <u>education expenses</u> by the benefited spouse, to the extent the community has not already substantially benefited. The community is presumed to have fully benefited if the educational expense was incurred more than <u>10 years</u> previous to dissolution.

Here… Therefore…

16. *<u>Should the community be reimbursed for GIFTS OF COMMUNITY PROPERTY?</u>*

Under COMMUNITY PROPERTY LAW a <u>gift</u> of <u>community property without written consent</u> can be set aside in total as long as the <u>giving spouse is alive</u>. After the death of the other spouse, one-half of the gift can be set aside.

Here… Therefore…

17. *<u>Should the community be reimbursed for SALE OF COMMUNITY PERSONAL PROPERTY?</u>*

Under COMMUNITY PROPERTY LAW each spouse has equal management and control of community property and may dispose of it without the consent of the other spouse except that 1) it may not be <u>given</u> away, 2) it may not be <u>sold below fair value</u>, and 3) <u>furnishings</u> of the home or <u>clothing</u> of the other spouse and minor children may not be sold without consent.

Here… Therefore…

18. *Should the community be reimbursed for MISAPPROPRIATION OF COMMUNITY REAL PROPERTY?*

    Under COMMUNITY PROPERTY LAW a conveyance of community real property without written consent can be set aside in total at any time if the buyer knows of the marriage. Where the buyer does not know of the marriage and is a good faith purchaser for value the sale of real property can be set aside for ONE YEAR if the conveying spouse is alive. Where the spouse selling the real property is dead, one-half of the transaction can be set aside in the one year period.

    Here… Therefore…

19. *Should the community be reimbursed for CHILD SUPPORT PAYMENTS?*

    Under the California Family Code child support debts are considered to be "pre-marital debts" regardless of whether the debt arose before or during marriage. The community has a right to reimbursement for any community property funds used to pay child (and spousal) support if the debtor spouse has separate income that could be used to pay the debt at the time it is paid.

    Here… Therefore…

20. *Should the community be reimbursed for MEDICAL EXPENSES from a PERSONAL INJURY AWARD?*

    Under the California Family Code the community has a right to reimbursement for any community property funds used to pay medical expenses if they are caused by a personal injury for which the injured spouse received a SEPARATE PROPERTY PERSONAL INJURY AWARD.

    Here… Therefore…

21. *Should the community be reimbursed for PAYING PRE-MARITAL DEBTS?*

    Under the California Family Code the community has a right to reimbursement for any community property funds used to pay pre-marital debts if the debtor spouse has separate income that could be used to pay the debt at the time it is paid.

    Here… Therefore…

Note: I highly recommend that you read my "Simple California Community Property Outline" which is, to my knowledge, the ONLY outline available that explains California community property law.

Practice Question 23-24: Federal Preemption, Reimbursement

Howard met Wanda while he was in the U.S. Navy. She was attracted to him because he had 100 shares of Microsoft.

Howard proposed, and on the way to the church Wanda was hurt in a car accident. She and Howard got married anyway, and Howard was shipped overseas.

Howard bought Military Life Insurance through the Navy with Wanda as the beneficiary, using payroll deduction.

Howard's Microsoft shares never paid a dividend, but they kept splitting.

Howard and Wanda lived in several different states before settling in California.

After Howard left the Navy, he kept paying the life insurance premiums out of his earnings.

Howard's mother gave him a Sacramento house in 1973 by a deed naming the grantee as, "Howard Smith". Howard had read the book, "How to Avoid Probate", so he recorded a new deed in 1985 granting the house to "Howard Smith and Wanda Smith as Joint Tenants with Right of Survivorship."

Wanda received a personal injury award of $50,000, and she used all the money to remodel the house.

Howard went to law school, and Wanda worked to pay the bills.

Although Howard's legal practice is very successful for 11 years, all of the money went into a 401K retirement plan.

Wanda started having an affair with plumber Paul, so she threw Howard's clothes out the door and filed for divorce.

How would the property and debts of Howard and Wanda be divided?

1) There are now 10,000 shares of Microsoft worth $1 million.
2) The Military Life policy now has a cash value of $10,000.
3) The house was originally worth $30,000, but now it is worth $250,000.
4) Of the home value, $50,000 is attributable to the money from Wanda's personal injury award.
5) Wanda earned $50,000 that went to Howard's education.
6) The 401K has a value of $50,000.
7) They still owe $25,000 in student loans.
8) The law practice has a value of $300,000.

Practice Question 23-25: Reimbursement to Separate Property

When Hank and Wendy got married they had nothing. But when Wendy's grandfather died he left her $20,000. Hank and Wendy used $10,000 as down payment on a condemned house. The total price of the house was $30,000. Before they could move in the used $5,000 more of Wendy's inheritance to renovate it.

They put the remaining $5,000 in the bank, and they both worked. They added their combined paychecks and soon the joint bank account grew to $10,000.

Hank worked for the government for 8 years, but he had to work for 10 years to be vested in the retirement system.

Wendy went to beauty college and learned to do makeup. She paid for it with $5,000 she took out of the bank and said was from her grandfather's bequest.

One day Hank moved out. He told Wendy that he "just wanted some space." A month later he moved back. Then he moved out again. Wendy found out that Hank was seeing another woman, Chiquita. Wendy asked Hank to go to marriage counseling with her, and he agreed.

But a week later, while still living apart, Hank won $30 million in the lottery. Hank phoned to say he wanted a divorce.

Hank says that all of the lottery money is his and that he is never going to go back to work for the government.

Their house is paid off, and worth $200,000, and they have $3000 in the joint bank account.

How will their assets and liabilities be divided?

Practice Question 23-26: Reimbursement, Van Camp

Howard and Winnie each owned property when they got married. Howard had paid $100,000 for his house, and Winnie owned a 6-unit apartment building worth $300,000. Howard owed $50,000 on his mortgage, and Winnie owed $250,000 on her own mortgage. They moved into Howard's house and rented out the apartment Winnie used to occupy.

Howard worked at a factory. Winnie mostly hung out at the country club, but she also rented out the apartments when there was a vacancy.

During the marriage $100,000 in rent from Winnie's apartment house was used to make the loan payments on the apartments. The remaining $30,000 was deposited into their joint bank account where Howard deposited his pay checks.

They used the joint bank account to make the loan payments on their house, and they spent an additional $20,000 to renovate the kitchen.

One day Winnie discovered that Howard had sold the house they were living in to his brother, Bubba.

Winnie filed for a divorce. The house was appraised at $200,000 and the apartments were worth $900,000. The mortgage on the house had been reduced to $25,000 and the mortgage on the apartment had been reduced to $200,000. Their joint bank account was empty.

Discuss:

1) Winnie says Howard had no right to sell the house.
2) Winnie says the community has a $100,000 interest in the house because of the loan payments and remodeling.
3) Howard says the community has a $300,000 interest in the apartments because of the loan payments.
4) Howard also claims the community has an interest in the apartments because Winnie managed them.
5) Winnie says she has a separate property interest in the house because she never signed a transmutation agreement.

Chapter 24: The Constitutional Law Answer Formats

More than perhaps any other subject in law school, Constitutional Law essays demand that you memorize prepared statements of the law. There are only a limited number of issues, so issue spotting is seldom difficult. But the rules of law are long and complex. You need to MEMORIZE in advance what you are going to say for rule statements and explanations of the law.

Due Process Guarantees primarily protect individuals (rather than a class) from arbitrary treatment and especially denial of fundamental rights. If a fundamental right is involved that is not a first amendment right (e.g. marriage, sex, abortion) and a suspect class is not involved, consider a due process analysis. If the fundamental right is guaranteed by the First Amendment (e.g. freedom of expression, religion, association) discuss it as a First Amendment issue, not a due process issue.

Know Your Fundamental Rights. The fundamental rights focused on in Constitutional Law essays are the 1st Amendment rights (speech, religion, travel, and association) and the rights to vote, privacy, and personal autonomy.

The focus of questions is the balancing of the rights of the individual with the needs of society and the historical involvement and role of government.

Essay questions involving freedom of speech, religion, travel and association usually focus on behavior that is disruptive or injurious to others. For example, shouting "fire" in a crowded theater, using illegal drugs (e.g. peyote) or killing animals as part of religious services, or associating with groups that engage in criminal activity as an extension of political beliefs (e.g. IRA).

The rights of privacy and personal autonomy usually focus on sex (e.g. abortion, contraception, homosexuality) and family issues (e.g. right to marry, discipline and education of children).

Other fundamental rights (right to jury trial, prohibition of excessive fines and cruel punishments and criminal protections) are usually not the focus of Constitutional Law essays because they are more the parvenu of Civil Procedure and Criminal Procedure classes.

Non-Fundamental Rights. The rights to weapons, education, employment, housing, profit, rent, use of property and welfare are not fundamental.

Equal Protection protects classes, especially traditionally oppressed groups, from unequal treatment and the arbitrary assignment of individuals into groups for disparate treatment. If a suspect class (e.g. Arabs, Mexicans, foreigners, non-citizens) or quasi-suspect class (e.g. women, illegitimate children) is involved focus on an Equal Protection analysis. If no suspect or quasi-suspect class is involved (e.g. the disabled, mentally retarded, aged, unmarried people) consider whether the classification is overbroad or under-inclusive, because an equal protection analysis may still be appropriate. But if the classification is not overbroad, not under-inclusive, and not based on a suspect or quasi-suspect class equal protection usually provides a fatally weak argument.

Immunities and Privileges. The "Immunities and Privileges" clause of the 14th Amendment is totally unimportant and should never be discussed. It is never going to be the “right” answer on a multiple-choice question either.

The "Immunities and Privileges" clause of Article IV of the Constitution has some importance and application. But it does not prevent a State from denying or charging non-residents more for hunting and fishing licenses and similar permits. These have been found to be non-fundamental rights. The State only has to show a rational relationship to an important State interest. It would be sufficient for the State to show that it was trying to conserve natural resources for its own residents.

However, the Immunities and Privileges clause of Article IV does prevent States from denying individuals from moving from one State to another to work, to do business, and to pursue a trade or profession. One major aspect of this is that States cannot prevent lawyers practicing law in other States from entering their State to pursue that same profession. Consequently, States may deny law students from out-of-State law schools from sitting for their bar exam, but they cannot prevent out-of-State lawyers from doing likewise.

Be Prepared. You MUST be prepared to give a good recitation of rules for 1) JUSTICIABLE actions, 2) the COMMERCE CLAUSE, 3) EQUAL PROTECTION, 4) SUBSTANTIVE DUE PROCESS, 5) PROCEDURAL DUE PROCESS, 6) FREEDOM OF RELIGION, and 7) FREEDOM OF SPEECH.

Mnemonics.

> **Standing on an Absolutely Ripe, Smooth Polpaya.** Justiciability of a case requires analysis of STANDING, ABSTENTION, RIPENESS, MOOTNESS, POLITICAL impact
>
> **DO FICA.** Unprotected forms of speech are DEFAMATION, OBSCENITY, FIGHTING words, INCITEMENT of violence, and misleading ADVERTISING.
>
> **SLAPS.** Obscene speech appeals to the prurient interest in sex or excretory functions and is totally devoid of redeeming SCIENTIFIC, LITERARY, ARTISTIC, POLITICAL or SOCIAL value.
>
> **ARTS.** The 1st Amendment guarantees the freedom of ASSEMBLY, RELIGION, TRAVEL and SPEECH/expression.

COMMON CONSTITUTIONAL LAW ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Is there a JUSTICIABLE CASE?*

> **[This is ALWAYS THE FIRST ISSUE TO CONSIDER in a Constitutional Law essay. Mnemonic = Standing on an Absolutely Ripe Smooth Polpaya?]**

Under Article III of the CONSTITUTION the federal courts may only address "actual cases and controversies" presenting ACTUAL PERSONAL INJURIES that can be REDRESSED by the court. To be JUSTICIABLE in federal court a matter must present an actual case or

controversy brought by a person with STANDING (facing personal injury)*, RIPE for review* (denial would result in immediate and permanent harm) *and not MOOT* (not already resolved with finality by other means). *The matter must not be purely POLITICAL* (conflicting with the separation of powers)*, or requiring ABSTENTION* (because it would conflict with pending State or criminal proceedings or interfere with State determination of State law). **[Important! Abbreviate the above as appropriate.]**

Here there is STANDING because the plaintiff faces actual PERSONAL INJURY since … And the matter is RIPE for review since denial of review will cause immediate harm from … Further, the matter is not MOOT because there has been no FINAL resolution of the issue since … Also, the matter is not POLITICAL and presents no conflict with the separation of powers because… Finally, the matter does not call for ABSTENTION because there is no conflict with any pending State actions.

Therefore, the matter presents a JUSTICIABLE CASE.

2. *Is the subject law within the ENUMERATED POWERS of Congress?*

Under the provisions of the Constitution Congress is granted enumerated powers and all other powers not granted Congress or denied to the states are expressly reserved to the states by the 10th Amendment. Only the states have general powers to protect the health, safety and welfare of the people. Congress only has the power to "tax and spend" to protect the general welfare.

Here the law involves the regulation of… The Constitution does [not] expressly reserve to Congress the power to regulate this activity.

Therefore…

[Note: In two recent cases involving guns near schools (*Lopez*) and the Violence Against Women Act the Supreme Court held Congress had exceeded the bounds of its constitutional authority.

Although Article I gives Congress the power to "tax and spend" for the general welfare, it is generally held that direct regulation of crime, health, safety and welfare issues within the states is expressly reserved to the states.

But states may be forced to meet federal rules if they opt to participate in a federal program such as Medicaid or the federal highway program. This was the mechanism by which the Carter administration forced all states to lower highway speed limits to 55 m.p.h. nationwide in the late 1970s.]

3. *Does the case present a VIOLATION OF THE COMMERCE CLAUSE?*

Under the COMMERCE CLAUSE of Article I Congress is specifically empowered to regulate interstate commerce and this power has been broadly interpreted under the AFFECTATION DOCTRINE to include any activity which has an aggregate effect on interstate commerce. **[Important!]**

States have concurrent power under COOLEY to regulate commerce within their borders, unless PREEMPTED expressly by Congress or implicitly where Congress has established a comprehensive federal regulatory scheme or where the subject requires uniformity of national laws. [115] **[Important!]**

State attempts to intentionally discriminate against out-of-State business in favor of private businesses within the State are per se invalid. Likewise, other State regulations which are an unreasonable burden on commerce are invalid. **[Important!]**

The court will determine the propriety of such regulations by balancing the legitimate interests of the State against the burden on commerce. State regulation that would otherwise would be illegal may be upheld it the State is a MARKET PARTICIPANT, under application of the 21st Amendment regulation of alcoholic beverages, and otherwise where the regulation is narrowly tailored and rationally related to a legitimate State purpose. **[Important!]**

Here … because…Therefore…

> **[Note: You MUST be prepared to state some prepared response for a COMMERCE CLAUSE question. You can abbreviate or shorten as the situation requires. In some cases a State is improperly obstructing commerce, and in other cases Congress may be improperly citing the commerce clause as justification for a statute that it has no enumerated power to enact.]**

4. *Does the case present a violation of EQUAL PROTECTION?*

Under The 14th Amendment states are prohibited from denying equal protection to all people by deliberately treating a class different from similarly situated people without proper justification. Equal protection is also violated if a classification is so over or under inclusive that its application is arbitrary. **[Important!]**

The BURDEN of justifying deliberate discrimination depends on the nature of the class and the right being burdened. If a State law burdens a SUSPECT CLASS or a FUNDAMENTAL RIGHT, it is the STATE'S BURDEN to prove the law is NECESSARY to attain a COMPELLING State interest. **[Important!]**

A suspect class is one that has been historically subjected to injustice (race, nationality, alienage). And fundamental rights are those ROOTED IN OUR NATION'S TRADITIONS AND IMPLIED IN THE CONCEPT OF ORDERED LIBERTY. The courts have recognized these as the rights to vote, privacy, criminal process, personal autonomy and the 1st Amendment guarantees of speech, religion, travel, and association. **[Important!]**

If a State law burdens a QUASI-SUSPECT class (sex, legitimacy) it is the STATE'S BURDEN to show its action is SUBSTANTIALLY RELATED to an IMPORTANT State interest. **[Important!]**

---

[115] States are prohibited from regulating economic activities that, because of their nature, demand uniform national laws. This is true even if Congress has remained "dormant" and failed to enact the necessary legislation. This concept is what is referred to as the "dormant commerce clause". That term is so frequently misused to refer to other situations that it is best for law students to eschew the use of the term "dormant commerce clause" altogether.

In all other cases, it is the PLAINTIFF'S BURDEN to show that the State act it is not rationally related to a legitimate State interest. RATIONAL RELATIONSHIP demands credible evidence that discrimination against this particular class is more likely achieve the State goal than application of the law against similarly situated groups. **[Important!]**

Here … because… Therefore…

[Note: You MUST be prepared to state some prepared response for an EQUAL PROTECTION question. You can abbreviate or shorten the answer given above as the situation requires. In some cases a State is improperly acting, and in other cases Congress may be improperly impacting a group. If it is State action, you only have to cite the 14th Amendment. If it is federal action, you must also cite the 5th Amendment due process guarantees as extended to equal protection application.

The important analysis is whether the group has been "historically subjected to oppression." If this is a religious group (Mormons, Jews, Moslems, etc.) or a political group (communists) the question becomes less one of equal protection and more one of 1st Amendment rights of religion, assembly, travel and speech.

There must be deliberate discrimination against a class, but the "class" itself may simply be all people who want to participate in some prohibited activity.

While Congress has plenary (absolute) control over immigration and citizenship, that power is still subject to fundamental guarantees of due process and equal protection.]

5. *Does the case present a violation of SUBSTANTIVE DUE PROCESS?*

Under the 5th and 14th Amendments SUBSTANTIVE due process is guaranteed. These guarantees are broadly applied and given substantive meaning to prevent arbitrary government conduct. **[Important!]**

If a FUNDAMENTAL RIGHT is infringed, it is the GOVERNMENT'S BURDEN to show that the law is NARROWLY TAILORED to further a COMPELLING government interest. **[Important!]**

Fundamental rights are those ROOTED IN OUR NATION'S TRADITIONS AND IMPLIED IN THE CONCEPT OF ORDERED LIBERTY. The courts have recognized these as the rights to vote, privacy, criminal process, personal autonomy and the 1st Amendment guarantees of speech, religion, travel, and association. [No fundamental rights to government services, to employment or to profits.] **[Important! Abbreviate as appropriate.]**

If NON-FUNDAMENTAL rights are infringed, it is the PLAINTIFF'S BURDEN to show the government act is NOT RATIONALLY RELATED to a LEGITIMATE State interest because there is no credible evidence the act is likely to achieve a legitimate government goal.

Here … because…Therefore…

[You must determine if the right being infringed is fundamental. If it is, the government has a burden of showing that its action is necessary. If it is not, the plaintiffs have a burden of showing the government either has an improper purpose or the law has no rational purpose as written.

Example 1: Suppose a State passes a law that no one can vote unless they can spell "chrysanthemum". Since voting is a fundamental right, the State must prove this law is necessary for some important purpose. The State would fail to meet this burden.

Example 2: Suppose a State passes a law that no one can get a driver's license unless they can spell "chrysanthemum." Since driving is NOT a fundamental right, the plaintiff must prove this rule has no relationship to a legitimate State interest. The plaintiff would meet this burden by showing that people who meet the test are not any better drivers than those who fail.]

6. *Does the case present a violation of PROCEDURAL DUE PROCESS?*

Under the 5th and 14th Amendments PROCEDURAL due process is guaranteed. Government may not deprive the people of life, liberty or property interests without due process. Due process requires sufficient NOTICE of the pending deprivation and an OPPORTUNITY TO BE HEARD. **[Important!]**

Under MULLANE notice must be REASONABLY CALCULATED TO APPRISE THE INDIVIDUAL A FINAL DETERMINATION OF RIGHTS IS PENDING. **[Important!]**

Under MATTHEWS v. ELDRIDGE a full evidentiary hearing is required where the threatened government action would deny a FUNDAMENTAL RIGHT. Where the right threatened is not fundamental, the required hearing depends on a balancing of the private interest, the government interest and the risk of erroneous deprivation. **[Important!]**

Here … because…Therefore…

7. *Does the case present a violation of FREEDOM OF RELIGION?*

Under the 1st Amendment, extended to the States by the 14th Amendment, the government is prohibited from making any law "respecting an establishment of religion or preventing the free exercise thereof," and it is the GOVERNMENT'S BURDEN to justify infringement by showing it is necessary to attain a compelling interest. **[Important!]**

Under LEMON, the ESTABLISHMENT CLAUSE is not violated if 1) the PRIMARY PURPOSE is SECULAR, 2) the PRIMARY EFFECT does not promote religion, and 3) EXCESSIVE ENTANGLEMENT between church and State is not fostered. **[Important!]**

Under SMITH and YODER the FREE EXERCISE CLAUSE is not violated if it is a 1) NEUTRAL law of 2) GENERAL APPLICATION that 3) only burdens RELIGIOUSLY MOTIVATED CONDUCT unless 4) the restriction on religiously motivated conduct SERVES TO RESTRICT THE RELIGION itself. **[Important!]**

Here … because…Therefore…

[Note: There appears to be a conflict between the holdings in *Smith* and *Yoder.* The rational resolution of that conflict appears to be that in *Yoder* the Court felt the State law (requiring children to attend school to a certain age) would actually restrict free exercise of the religious belief by restricting associated conduct. In *Smith* the Court apparently felt the government act (denial of unemployment payments) would not impact the free exercise of religious belief by restricting conduct.

Unless the facts state otherwise, assume all religious beliefs are sincerely held by the people in Constitutional Law questions. The question may present weird or offensive religious practices. Never present your own beliefs in your answer or discuss the correctness of the religious belief described in the fact pattern!]

8. *Does the case present a violation of FREEDOM OF SPEECH?*

Under the 1st Amendment, extended to the States by the 14th Amendment, speech is a fundamental right, and the government is prohibited from infringing on the freedom of protected expression in a public forum unless the GOVERNMENT SHOWS it is narrowly tailored and necessary for a compelling State interest. Further, no government regulation of speech is valid if it is substantially vague, overbroad or constitutes a prior restraint. **[Important!]**

It is the PLAINTIFF'S BURDEN to show that restraints on unprotected speech are not rationally related to a legitimate State interest. These areas are defamation, obscenity, fighting words, incitement of violence and crimes, and false advertising. **[DO FICA]**

Under MILLER speech is OBSCENE if it appeals to prurient interest in sex or excretory functions and is totally devoid of redeeming SCIENTIFIC, LITERARY, ARTISTIC, POLITICAL or SOCIAL value. **[SLAPS]**

Under BRANDENBURG speech is unprotected if the INTENT is the IMMEDIATE and LIKELY incitement of violence.

Under CENTRAL HUDSON lawful, truthful advertising (commercial speech) is less protected and can only be restricted by a NARROWLY DRAWN law to advance a SUBSTANTIAL STATE INTEREST.

Reasonable TIME, PLACE and MANNER restraints can be placed on even protected speech in the public forum if they are 1) content neutral, 2) narrowly drawn, 3) reasonable, 4) to serve a significant State interest and 5) alternative avenues of communication are available.

[Chose and abbreviate the above rules as necessary to meet the call of the question.

Time, place and manner restraints are frequently tested, and the key element for analysis is whether the restraint is content neutral and equally applied to all forms of expression.]

Here … because…Therefore…

9. *ISSUE – Does the case present a violation of the 11TH AMENDMENT?*

Under the 11TH AMENDMENT, an individual generally cannot sue a State in a federal court. However this general rule is subject to several exceptions. Generally individuals can sue subdivisions of states (cities, counties, districts) in federal court. Further, individuals can seek injunctions against State officials in federal courts. Further, individuals can generally sue a States under statutes adopted by Congress pursuant to the provisions of the 14th Amendment because it followed and superseded the 11th Amendment and specifically authorized Congress to pass laws necessary to enforce its guarantees.

Here the action is in federal court and it is brought by an individual because… And the suit is not against a State because the defendant is ….

Therefore, the 11th Amendment would (would not) bar this action.

[Traditionally, the 14th Amendment has given Congress the power to abrogate the 11th Amendment by passing legislation allowing individuals to sue states that deny of due process and equal protection. But recent decisions have limited or clarified this power. Since this is an important and recent development, be on alert for a question raising this issue!

Recently in *Regents of the University of Alabama v. Garrett* (No. 99-1240, decided February 21, 2001) the Court held that the 14th Amendment allows Congress to abrogate the 11th Amendment only to prevent a State from improperly denying due process and/or equal protection. States may deny equal protection if they (1) have a rational basis for doing so and (2) the group burdened is not a suspect or quasi-suspect group. Further, the 14th Amendment does not authorize Congress to enact laws requiring States to provide unequal treatment intended to benefit or penalize targeted classes.

The Americans with Disabilities Act (ADA) required States as employers to provide "reasonable accommodation" to the disabled, and allowed individuals to sue States in federal court to the extent "reasonable accommodation" was denied. But in *Regents* the Court held (1) that states have a rational basis for refusing to provide reasonable accommodation and (2) the disabled are not a suspect or quasi-suspect class. Further, it held a denial of "reasonable protection" to a targeted class is a denial of beneficial and unequal treatment, not a denial of equal protection.

Therefore, the Court held that the 14th Amendment does not authorize Congress to abrogate the 11th Amendment by allowing individuals to sue a State (not a sub-unit, city, county, etc.) in federal court for refusal to provide targeted classes of individuals with beneficial and unequal treatment.

Be on the alert for questions where individuals sue states in federal courts under federal statutes intended to help certain classes of individuals (e.g. disabled, aged or mentally retarded people).]

Practice Question 24-27: Equal Protection, Due Process

The Sierra Lakes County Water District, a subdivision of the State of California, had a problem with hidden breaks in the sewer laterals that connected its sewer mains to homes in the area. It was responsible for locating and repairing this legitimate public problem.

In order to locate and fix these breaks, the District needed access fittings called "property-line clean outs" installed.

The District did not want to pay for the installation of these "property-line clean outs" itself, so it came up with a plan to make the local property owners pay to install the "clean outs".

The District had an existing ordinance "G". This ordinance said, "Individual property owners must install property-line clean outs on their sewer laterals at their own expense if the District determines it is necessary for the public health, safety or welfare".

So the District told 50 randomly selected property-owners, "The District has determined that it is necessary for the public health, safety or welfare that you install property-line clean outs on your sewer lateral." The District actually had no evidence there were any leaks in the private portions of the 50 laterals selected. Rather, they were selected because their property was located near the District's oldest sewer lines.

Homer was a property-owner. The District told Homer that if he did not do as told within 90 days, the District would enter his property, install the "clean out" and charge him for the work.

Homer filed for an injunction against the District in federal court. Analyze the following issues that have been raised:

1) Did Homer present an actual case or controversy?

2) Was Ordinance G was unconstitutional as written?

3) Was there a violation of Equal Protection?

4) Was there a denial of Substantive Due Process?

5) Was there a denial of Procedural Due Process?

Practice Question 24-28: Federal Powers, Equal Protection, Due Process

Because of concerns over terrorism, Congress passed a law that said it is illegal for immigrants to the United States from Kashmir to purchase guns unless they were citizens of the U.S. To justify its action, Congress specifically cited both its plenary power over immigration and the Commerce Clause in enacting the law.

Abdul was a resident alien from Kashmir and this law really made him mad. He had never tried to buy a gun, but he wanted equal rights.

Mohammed was also a resident alien from Kashmir. He tried to buy a shotgun and was turned away.

Abdul and Mohammed filed an action protesting this violation of their fundamental 2nd Amendment rights to bear arms. They also claimed this law violated their 14th Amendment rights to equal protection and due process. They argue no notice was given to them that Congress would pass such a law and they were given no opportunity for a hearing on the matter.

While this matter was pending in federal court, Mohammed became a U.S. citizen.

Discuss the issues raised.

Practice Question 24-29: Justiciability, Commerce Clause

After being rocked by rolling blackouts and power shortages California established the State Power Commission (SPC). The SPC immediately began construction of a new nuclear power plant outside Santa Barbara called Rancho Estupido.

To promote domestic fuel production and ensure the financial viability and safety of Rancho Estupido the SPC sponsored three major pieces of legislation.

First the California Power Act (CPA) was passed. The CPA prohibited all State and local agencies from buying electricity if it was not generated within California.

Second, the SPC promulgated new regulations for all nuclear plants in the State under the Nuclear Safety Act (NSA). The regulations were much stricter and better than the comprehensive regulations established by the Federal Nuclear Regulatory Commission many years before.

Third, the SPC proposed the Protective Gas Act (PGA) which would make it illegal for any natural gas producer to transport any natural gas out of California. The PGA is pending in the Legislature.

Price, Gouging and Extort owns and operates a natural gas fired power plant near Las Vegas, Nevada. Because of the CPA it has lost $1 billion because it could not sell power for electric chairs in California prisons. And it was considering building a nuclear power plant near Los Angeles but feels the NSA regulations would make the power plant unprofitable. And because of the PGA it feels it will soon be denied access to cheap natural gas from the Mojave Basin.

PG&E filed a complaint in federal district court in California attacking the CPA, the NSA and the PGA all on constitutional grounds.

Discuss.

Practice Question 24-30: Justiciability, Privacy Rights

In 1994 the Legislature passed a law making it illegal to provide an abortion to a minor without parental consent. The law did not provide for any exceptions.

Ann, a healthy 17 year old college student, sought an abortion to terminate a pregnancy that resulted from a date-rape incident.

Ann's physician refused to perform the abortion without parental consent, and Ann is unable to obtain parental consent because her father is a zealous anti-abortion protester.

The Center for Public Law requested a court order allowing Ann to obtain an abortion without parental consent, and the district attorney opposed. The request was denied, and the denial was appealed to federal district court.

The federal district judge held that the State law was a violation of the 14th Amendment because it did not provide for any recognition of extenuating circumstances.

The district court order was stayed pending appeal to the 9th Circuit and was reversed on appeal based on a finding that parental control over children was a more fundamental right than individual privacy.

Two years later the U.S. Supreme Court heard the case over the State objection that the court lacked jurisdiction because Ann is now an adult and no longer subject to the law. She gave birth to the child in question four years previously.

The Supreme Court held that the law, as written, violated the rights of Ann under the 14th Amendment regardless of the protections it provided to her father.

1. What was the argument against the court hearing the case?
2. Upon what reasoning did the Supreme Court decide to hear the case?
3. Upon what portion of the 14th Amendment did the Center for Public Law base its arguments?
4. Reflecting upon the reasoning of *Roe v. Wade* and associated case law, what was probably the basis for the Supreme Court's ultimate decision?

Chapter 25: The Business Organization Answer Formats

Applicable Law. In the past the California Bar Exam only tested students on "Corporation Law" and not on agency law or general business organization law (e.g. partnership law). But beginning in 2007 the Bar will broaden the subject matter to include agency and general business organization law. This is not a major change.

The terms "Business Law", "Business Organization" and "Corporations Law" are used in the issues and answers below to represent the common law concepts of partnership and agency, generally accepted concepts of "corporation law", specific provisions of the Securities Exchange Act, and the provisions of the Internal Revenue Code related to taxation of corporations. The issues and suggested answers presented below should be supplemented as appropriate by reference to statutes specific to your particular State.

COMMON BUSINESS ORGANIZATION ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *What was the FORM of business relationship?*

   Under BUSINESS LAW the RELATIONSHIP between two or more people engaged in a business for profit can be a GENERAL or LIMITED PARTNERSHIP, a CORPORATION, or a simple AGENCY RELATIONSHIP. The DEFAULT form of business whenever two or more people JOIN together for a business profit is the GENERAL PARTNERSHIP.

   LIMITED PARTNERSHIPS and CORPORATIONS require filing and approval by the government. A corporation requires the filing of ARTICLES OF INCORPORATION.

   An AGENCY RELATIONSHIP exists where one party, the AGENT, is authorized to act and agrees to act for another party, the PRINCIPAL.

   Here ... because ... Therefore...

   [This is often a good way to start a business organization essay. It immediately creates a focus on the rules of law that apply. Abbreviate the rule statement as appropriate.

   Sole Proprietorships are ignored here because law-school essays seldom involve them.

   Note that not everything casually described as "partners" creates a partnership. If Tom and Dick agree to be "partners" in forming a corporation, the form of the business relationship is a corporation, not a partnership.

   The only important distinction between a partnership and a joint venture is that the latter has an expressly limited scope.]

2. *What are the RIGHTS AND LIABILITIES of a general partner?*

   Under BUSINESS LAW general partners share equal control of the business unless otherwise agreed, and each is jointly and severally liable for all liabilities arising out of the acts by the other partners within the scope of the business. All profits and losses pass through to the general partners.

   Here … because …Therefore…

   [The most common issue that arises is whether one general partner will be personally liable for the ill-considered act of another partner. Perhaps Tom runs over a pedestrian while driving the company vehicle and the question is whether his partner Dick is personally liable in the resulting wrongful death suit. The focus of analysis should be on whether Tom was acting within the scope of the business at the time of the accident.]

3. *What TERMINATES a general partnership?*

   Under BUSINESS LAW a general partnership automatically terminates with the DEATH of any partner, by unilateral WITHDRAWAL of any partner, or by AGREEMENT. No partner can transfer his share except by unanimous agreement.

   Here… because…Therefore…

4. *What are the rights and liabilities of a LIMITED PARTNER?*

   Under BUSINESS LAW a limited partnership consists of one or more general partners and one or more limited partners, and formation requires government approval. The general partner has unlimited liability, but the limited partners' liabilities are limited to the amounts invested. To maintain limited liability, the limited partners must refrain from management decisions. The profits and losses of limited partnerships pass through to the individual partners, but losses are subject to passive loss limitations under both federal and California tax law.

   Here…because…Therefore…

   [One common essay question scenario is a limited partner that meddles in the daily operations of the business to the point they can be held personally liable as a general partner.]

5. *What TERMINATES a limited partnership?*

   Under BUSINESS LAW a limited partnership automatically terminates with the DEATH of a GENERAL partner, or by AGREEMENT. A LIMITED partner can transfer his share subject to agreed limitations, but a GENERAL partner can only transfer his share by unanimous agreement.

   Here… because…Therefore…

6. *What are the rights and liabilities of a SHAREHOLDER?* **[Abbreviate as appropriate.]**

Under BUSINESS LAW a corporation is formed upon proper filings and approvals by State and IRS. The liability of a corporation shareholder is limited to the amount of their investment. The corporation is controlled by a board of directors, and the shareholders have no direct control over the corporation.

A legally incorporated corporation is a DE JURE corporation. When necessary documents are not filed but the parties have proceeded in a good faith belief a de jure corporation exists a shareholder may claim a DE FACTO corporation exists as a defense against unlimited liability.

A corporation can be formed as either a "C" corporation or an "S" corporation. Also a corporation may be formed as either "general" or a "closely held" corporation.

The income of a "C" corporation is taxed at corporate income tax rates. Any remaining surplus can be passed to the shareholders as dividends, taxable a second time under personal income tax law. Losses of a "C" corporation can NOT be passed to the shareholders, so they do not have any direct ability to "write off" the losses.

The income and losses of a "S" corporation can be passed through to the shareholders, but losses are subject to passive loss restrictions under federal and California law.

Stock of a "general C" corporation is freely transferable, subject to SEC requirements involving registration, but the stock of "closely held" and "S" corporations are subject to transfer restrictions involving the number of shareholders and the relationship between them. To protect its own legal status, the "closely held" or "S" corporation will usually have a "right of first refusal" when a shareholder wishes to sell her interest.

Here the rights and liabilities of the shareholders…because…Therefore…

> **[Abbreviate the above as appropriate to the situation. Generally you are not required to know anything about "C" and "S" corporations. The important feature of a corporation that you should expressly state in your essay answer is that the shareholders are generally not liable for more than they have paid for stock. The exception to this is the "piercing of the corporate veil" but that is very rare and requires proof that it is necessary to prevent fraud, as discussed below.]**

7. *What TERMINATES a corporation?*

Under BUSINESS LAW a corporation has perpetual life unless the board decides to dissolve the corporation and liquidate the assets.

Here…because…Therefore…

8. What are the rights and liabilities of an AGENCY PRINCIPAL?

Under business law an agent is a party that agrees to act on the behalf of another party, the principal, with approval from the principal. Under BUSINESS LAW a principal is liable for all acts taken by an agent, if they are undertaken within the SCOPE of the agency relationship.

The existence and scope of an agency relationship depends on the level of control of the principal over the actions of the agent.

An agency relationship may be 1) ACTUAL by EXPRESS or IMPLIED AGREEMENT, 2) INHERENT in the AGENT'S POSITION or 3) APPARENT from the ACTIONS of the parties that prevent them by ESTOPPEL from later denying the agency relationship. **[Important!]**

A party that reasonably relies on the existence of an agency relationship may raise ESTOPPEL to prevent subsequent denial of the agency.

> **[The most common essay scenario is an "apparent agency" implied by the acts and words of the parties. Remember, if they look like an agent, talk like an agent and act like an agent, they will generally be deemed to be an agent!]**

Here an agency relationship existed because … The relationship was actual / inherent / apparent because…Therefore …

9. Did A have PROMOTER LIABILITY? **[This is a frequent issue.]**

Under BUSINESS LAW a PROMOTER is anyone who helps organize, finance or form a new corporation. Promoters have a FIDUCIARY DUTY to the new corporation and must not obtain SECRET or UNJUSTIFIED PROFITS from their position. **[Important!]**

Promoters are PERSONALLY LIABLE for financial commitments they make prior to the filing of Articles of Incorporation. They are liable under BREACH OF WARRANTY theory if they MISREPRESENT that they 1) WILL ACT or 2) HAVE ACTED to form a corporation, 3) that a corporation EXISTS, or 4) that an existing corporation AUTHORIZES them to act on its behalf.

A promoter is not liable for commitments made on behalf of a "corporation to be formed" or for commitments made after the Articles of Incorporation are filed.

Promoters that act under a good faith belief that the Articles of Incorporation have been filed when they have not been, and no DE JURE corporation exists, may argue that a DE FACTO corporation existed as a defense against unlimited personal liability.

Here…because…Therefore…

10. *Should the court PIERCE THE CORPORATE VEIL?* **[A frequent issue]**

    Under BUSINESS LAW a shareholder may be PERSONALLY LIABLE for obligations of the corporation if a court finds it is NECESSARY to pierce the corporate veil to PREVENT FRAUD and ACHIEVE EQUITY. **[Important!]**

    Courts may find evidence of fraud where the corporation was 1) DELIBERATELY UNDERCAPITALIZED, or 2) RUN AS A PROPRIETORSHIP with NO CORPORATE FORMALITIES, a COMMINGLING of funds and NO DIVIDENDS paid to shareholders.

    Here…because…Therefore…

    > **[A Court will only pierce the corporate veil if it is necessary to prevent fraud. The factors listed above are illustrative of reasons a finding of fraud may be reached. But law students often assume this is easy to do. It is not. Those who enter into business contracts and other agreements with corporations assume the risk that they will not be able to collect if the corporation becomes insolvent.]**

11. *Can a corporate action be voided by a SHAREHOLDER DERIVATIVE ACTION?* **[frequent issue, select appropriate section and abbreviate as appropriate]**

    Under BUSINESS LAW a shareholder may bring a DERIVATIVE ACTION on behalf of the corporation 1) under the ULTRA VIRES doctrine, 2) for DIRECTOR GROSS NEGLIGENCE, and/or 3) for BREACH OF FIDUCIARY DUTY by DIRECTORS, OFFICERS or CONTROLLING SHAREHOLDERS.

    Under the ULTRA VIRES DOCTRINE a shareholder can have a corporation action declared VOID if it is outside the scope of the declared corporate purpose.

    Under the BUSINESS JUDGEMENT RULE, good faith decisions by disinterested directors are VOIDABLE if they are the result of GROSS NEGLIGENCE because the directors breached their DUTY OF DUE CARE to act as a reasonably informed, prudent person would, and the breach is NOT RATIFIED by a vote of the SHAREHOLDERS. **[Important!]**

    Under BUSINESS LAW corporate actions are VOID or VOIDABLE if there is a BREACH OF LOYALTY by DIRECTORS, OFFICERS or CONTROLLING SHAREHOLDERS because of FAILURE TO DISCLOSE a personal interest in a corporate action.

    A corporate transaction is VOID if there is CLEAR ABUSE shown by UNFAIRNESS to the corporation or PERSONAL ADVANTAGE or MOTIVE by the breaching party. A corporate transaction is VOIDABLE if there is no clear abuse but the transaction HAS NOT BEEN RATIFIED by the informed and disinterested directors and/or shareholders. **[Important!]**

    Before bringing a shareholder's derivative action the shareholder generally must first demand corrective action by the corporate Board of Directors and allow time for corrective action unless such a demand would be obviously futile.

    Here…because… Therefore…

[Warning! The issue of when corporate actions arising from a breach of loyalty are void and when they are voidable has been heavily tested by the Bar in recent years.]

12. *Does RATIFICATION by the shareholders provide adequate defense?*

Under State corporation laws a corporate action that involves director negligence or breach of fiduciary duty by directors, officers or controlling shareholders may not be voided if it is if properly RATIFIED.

Under the BUSINESS JUDGEMENT RULE, good faith decisions by disinterested directors may be ratified by fully informed shareholders. But a BREACH OF LOYALTY by directors, officers or controlling shareholders must be ratified by the informed and disinterested directors and/or shareholders, and this is possible only if the breach was not a clear abuse.

If a corporate action is the result of a breach of loyalty and clearly abusive to the corporation, it is void from the beginning and cannot be ratified by the informed and disinterested directors and/or shareholders because any such action would be, itself, a breach of loyalty to the corporation.

Here …because…Therefore…

13. *Was the instrument a SECURITY that was required to be REGISTERED?*

Under the SECURITIES EXCHANGE ACT a security is a financial interest the profit from which depends on the efforts of others. All securities must be registered with SEC if they are PUBLICLY TRADED or sold by an ISSUING COMPANY, securities UNDERWRITER or securities DEALER. An underwriter is a party that buys a security with a plan to resell. A security does not have to be registered if it is a PRIVATE PLACEMENT, a sale to fewer buyers and for a smaller amount than certain limits set under the Act.

Here…because…Therefore…

14. *Is the defendant LIABLE under RULE 10b for INSIDER TRADING?* **[frequently tested issue]**

Under the SECURITIES EXCHANGE ACT RULES 10b and 10b-5 any person is liable for losses caused by MARKET MANIPULATION, DECEIT or use of an ARTIFICE TO DEFRAUD if they make MISLEADING STATEMENTS or KNOWINGLY TRADE on information resulting from a BREACH OF FIDUCIARY DUTY. **[Important!]**

When trading takes place using confidential "inside information" in violation of fiduciary duties to the corporation, both "tippers" and "tippees" are liable for all losses suffered by other shareholders. A "tipper" is a person who knowingly reveals confidential inside information in breach of or knowing that it has been obtained through a breach of a fiduciary duty to the corporation to keep the information confidential. A "tippee" is a person who knowingly trades on such information.

The SEC always has standing to bring an action for a violation of 10b/10b-5. But for shareholders to bring a 10b/10b-5 action they must show that they suffered losses because they traded shares during the period deceitful practices were being used.

Here…because…Therefore…

[This is a frequently tested issue. Those within a corporation who have a fiduciary duty to keep information confidential are primarily the officers, directors, attorneys and accountants. But it also includes anyone else who owes those individuals or the corporation a fiduciary duty. Generally employees of a corporation and other people with access to confidential corporate financial information have a fiduciary duty not to trade on the basis of the information or reveal it to others.]

15. *Is the defendant LIABLE for TRADING on TENDER OFFER INFORMATION?*

Under the SECURITIES EXCHANGE ACT RULES 14e-3 any person is liable for losses caused by trading on information concerning a tender offer, WHETHER OR NOT THERE IS A BREACH OF FIDUCIARY DUTY.

The SEC always has standing to bring a 14e-3 action.

Here…because…Therefore…

[This has not been an issue of much interest in many years because the use of tender offers for "corporate takeovers" declined substantially in recent years.]

16. *Is defendant LIABLE for SHORT SWING TRADING?* **[frequent issue]**

Under the SECURITIES EXCHANGE ACT RULES 16b an OFFICER, DIRECTOR or SIGNIFICANT SHAREHOLDER must DISGORGE PROFITS made on short swing trades in REGISTERED securities. A short swing trade is a profit (or avoided loss) on a buy/sell or sell/buy within 6 months. Rule 16b applies to any person who is an OFFICER or DIRECTOR at the time of EITHER purchase or sale, and to any SHAREHOLDER who owns at least 10% of the corporation PRIOR TO BOTH the purchase and the sale. **[Important!]**

The profit that must be disgorged is calculated as the difference between the SALE PRICE and the LOWEST price the stock sold at during the time held by the individual.

And the profit is disgorged to the corporation, not to individual shareholders.

Here…because…Therefore…

[For "significant shareholders" to be liable, they must own at least 10% of the corporation prior to both the purchase and the sale of securities that creates the "trade" in question.

Suppose defendant bought 1000 shares of company stock at $10 a share, that it fell to $5 a share and bounced back to $9. Suppose that the defendant then sold it for $9 a share, all in less than 6 months. Although the defendant suffered a loss of $1,000, they still have to disgorge a "16b" profit of $4 per share ($4,000) because the stock was sold for $9, more than the lowest traded price of the holding period, $5. *Ouch!*]

17. Did the plaintiff have a valid complaint regarding a PROXY FIGHT?

Under CORPORATION LAW Shareholders have the right to present proposals at the annual shareholders' meeting and to have legitimate POLICY proposals mailed to other shareholders with proxy statements.

There is NO FEDERAL law requiring corporations to provide opposition groups with SHAREHOLDER LISTS, but MANY STATES have such laws where the list is wanted for a PROPER PURPOSE.

The corporation may pay PROXY FIGHT EXPENSES for one or both sides IF the fight is over legitimate POLICY ISSUES and not merely for the purpose of retaining control.

Here…because…Therefore…

> **[A 'legitimate policy proposal' is any proposal that is relevant to the operations and profits of the corporation, regardless of the political or social motivations of the proposing party. If a proposal might improve the corporate image (e.g. protecting whales) or reduce corporate exposure to future litigation and legal liability (e.g. stop selling tobacco), it is a legitimate proposal. If the proposal is solely intended to promote social welfare or political issues with little or no nexus to improving profits of the corporation (e.g. protesting war) it is not a legitimate policy proposal.]**

18. What are the rights of MINORITY SHAREHOLDERS in the case of a MERGER?

Under CORPORATION LAW mergers often give shareholders APPRAISAL RIGHTS. Some states hold that a sale of ALL ASSETS is a de facto merger that gives stockholders appraisal rights, but other states hold there are no appraisal rights in these cases if the stock is publicly traded. A shareholder claiming a "FREEZE OUT" has the burden to prove inherent UNFAIRNESS.

Here…because…Therefore…

19. What are the rights of MINORITY SHAREHOLDERS in the case of a SALE OF CONTROLLING INTEREST?

Under CORPORATION LAW the control of a corporation can only be sold by selling stock. A controlling stockholder has the right to sell his controlling interest at a premium price, and the buyer of a controlling block can directly control the corporation. Any premium paid for control belongs to selling shareholder unless breach of fiduciary duty is shown.

Here…because…Therefore…

20. What are the duties of DIRECTORS in a TAKE OVER SITUATION?

Under the PARAMONT RULE corporate directors may resist a take over if it is reasonably seen as a threat to corporate operations. But under the REVLON RULE the directors have a duty to MAXIMIZE SHAREHOLDER RETURN if the corporation clearly will be taken over in any event.

Here…because…Therefore…

21. *What are the duties of DIRECTORS toward BOND HOLDERS?*

Under CORPORATION LAW, the duty of the corporation to the bond holders is set out in the INDENTURE AGREEMENT. The corporation must redeem bonds where corporate assets are being liquidated. Other than that, there is no implied fiduciary duty to the bond holders.

Here…because…Therefore…

22. *Can the corporation INDEMNIFY the directors and officers?*

Under CORPORATION LAW, the corporation can indemnify its agents if they act in GOOD FAITH, and this can be broadened in the Articles of Incorporation. Otherwise, the corporation cannot indemnify its agents for BREACH OF DUTY to the corporation or settlement of third party claims.

Here…because…Therefore…

Practice Question 25-31: Promoter Liability, Rule 10b, Rule 16b

Alice, Bob and Carol started an internet bar preparation service called BarPrep.com on 1/1/2000. They agreed to be equal shareholders and directors. They all gave themselves stock certificates for 10,000 shares. Each share had a par value of $1.

Bob contributed $10,000 cash to the corporation, went to the Bank, opened a bank account and secured a $100,000 line of credit for BarPrep.com, Inc. He gave the bank the impression the corporation already existed.

Alice promised, in exchange for her shares, that she would quit her job and work for the corporation for one year.

Carol gave $10,000 in exchange for her shares.

Alice worked for the company like she promised. She filed Articles of Incorporation on 2/1/2000.

From its inception the corporation borrowed money under its line of credit, but it never formally assumed responsibility for paying back the debt.

BarPrep.com went public and its properly-registered IPO (initial public offering) was a huge success on 5/1/2000.

Bob told Time Magazine on 5/15/2000 their sales were up 10,000%. Carol knew this was not true, but she didn't say anything and sold her interest at a big profit on 5/15/2000.

BarPrep.com went out of business on 7/1/2000 and its stock is worthless.

Putz is a disgruntled shareholder. He bought the stock on 5/1/2000, but he decided not to sell it for a quick profit on 6/1/2000 because of Bob's comments.

The Bank is owed $100,000.

What direct and derivative actions could the Bank and Putz bring against Alice, Bob, Carol and the Corporation?

Practice Question 25-32: Securities Exchange Rules

Sandy started an internet firm that delivered singing telegrams in Spanish. She incorporated as MuyCaliente.com on January 1, and it was a hot stock. Sandy gave herself 100,000 shares worth $1 each because she was the President. She was not listed on any stock exchanges, so she funded expansion by selling additional shares over the web.

Sandy was interviewed by the L.A. Times and she said her sales were increasing 100% per month. This was not true.

Stock prices soared after the article, but Sandy had no intention of selling until Yang, founder of the internet auction site oBey, sent her a confidential e-mail that he soon intended to make a public offer to buy up to 200,000 shares at $200. This price was very attractive because the market price of shares was only $100, and that reflected the distorted earnings report.

To take advantage of Yang's offer Sandy bought another 100,000 shares for $100 a share on June 14. The next day the market price dropped to $90 a share, but on June 16 it rose to $110. At that point Sandy sold all of her 200,000 shares to Yang for $200 a share for a total of $40 million.

On July 1 the SEC charged Sandy with trading unregistered securities and violation of SEC Rules 10b-5, 14e-3, and 16b.

Discuss.

Practice Question 25-33: Promoter Liability, Piercing Corporate Veil

Betty hired Ann as her secretary to help her form a corporation to develop real estate. While Betty secured a line of credit from Big Bank, Ann typed out the Articles of Incorporation using forms she got from a book published by Yolo Press. Ann filed the Articles with the Secretary of State, and they said the purpose of the corporation was real estate development.

The corporation was named TheCorp and it had no assets. Betty was the sole director, so she gave herself $1million in stock and made herself President and Chairman of the Board.

From the beginning TheCorp was undercapitalized, and since Betty was the only owner she did not follow many formalities. If she could not pay Ann, she gave her large blocks of stock instead. They would often laugh that Ann was a "paper millionaire". Eventually most of Betty's creditors were holding stock in TheCorp as "IOUs" from the many times Betty could not pay cash.

Eventually TheCorp grew to become a publicly held multi-national conglomerate with interests in real estate development, chemical manufacturing and insurance. Although it was a large corporation Betty ran it like her own business because she owned 40% and Ann owned 11%. Betty paid no dividends, and she often commingled her own funds with the corporation investments.

In 1979 TheCorp contracted to purchase a $200 million oil refinery and entered into long-term oil purchase contracts. Betty agreed to these commitments without any investigation because her family owned a share of the oil refinery and would reap a huge profit.

The Coptic oil embargo caught Betty by surprise. Overnight the oil refinery was worthless, and TheCorp was committed to purchase of oil at a price far above market. Big Bank claims TheCorp owes it $100 million.

Shareholder Lenny brought a derivative shareholder action to void the purchase of the oil refinery and the oil contracts by citing the Ultra Vires Doctrine. He also sought to have Ann held liable as a promoter, and Betty to be held liable for gross negligence under the Business Judgment Rule. He also asks that the refinery purchase be voided based on a breach of loyalty.

As a defense Betty and Ann held a special shareholder's meeting and voted as a block to ratify the challenged corporate actions.

1. Is Ann liable as a promoter?
2. Is Betty liable to Big Bank?
3. Can Ultra Vires be used to void the purchase of the refinery and the oil contracts?
4. Does the Business Judgment Rule apply to these facts?
5. Is the refinery purchase void as a breach of loyalty?
6. Can Lenny "pierce the corporate veil" to attack Betty's personal assets?

Chapter 26: The Evidence Answer Formats

Federal Rules versus State Rules. In the past the California State Bar has tested law students based on knowledge of the Federal Rules of Evidence. Beginning in 2007 it has been announced the Bar will begin testing based on knowledge of both federal rules and State rules. There are thousands of differences, but generally they are rather minor. Where there are important differences they will be pointed out below.

Spell "hearsay" right. Do not ever write "heresay"! It is "hear" like with the EAR and "say" like with the MOUTH. If a person "hears" something is true and is asked to "say" it in court to prove it is true, that is "hearsay".

Follow The Call of the Question! If the call of the evidence question asks for the "objection, response and ruling," you MUST structure your answer by giving the objection with an explanation of the evidence rule, the response with explanation of the exception to the rule (if any) and the ruling of the court. This would be as shown in this example:

> *1. OBJECTION - HEARSAY. Hearsay is …* (give rule). *Here this is an out-of-court statement because… And it is offered for proof of the matter asserted because… Therefore it would be hearsay.*
>
> *RESPONSE - EXCITED UTTERANCE. An excited utterance is an exception where* (give rule)… *Here the declarant was excited because… Therefore the excited utterance exception may apply.*
>
> *RULING - OVERRULED. Here the court would find the excited utterance exception applies because….*

Chronological Considerations: Evidence issues should be considered (not necessarily written about and discussed) in this chronological order:

1. **WITNESS QUALIFIED?**
   - Personal **KNOWLEDGE**?
   - **MEMORY** of events?
   - Ability to **COMMUNICATE**?
   - Testifying under **OATH**?

2. **PROPER FORM OF QUESTION?**
   - **LEADING** question?
   - Calls for **NARRATIVE** answer?
   - Compound, **CONFUSING**, or vague question?
   - **LACK OF FOUNDATION** / Assumes facts unsupported by other evidence?
   - **NON-RESPONSIVE** answer?

3. **RELEVANT EVIDENCE?**
   - Does the evidence sought tend to prove a **MATERIAL FACT**?
   - Does the risk of **UNFAIR PREJUDICE** outweigh the probative value?

4. **PRIVILEGED EVIDENCE?**
   - **ATTORNEY-CLIENT?**
   - **ATTORNEY WORK PRODUCT?**
   - **SPOUSAL / MARITAL?**
   - **REMEDIAL MEASURES?**
   - **INSURANCE COVERAGE?**
   - **OFFERS IN COMPROMISE?**

5. **OPINION EVIDENCE?**
   - Is **LAY WITNESS** testifying about subjects of common knowledge (e.g. speed)?
   - Is **EXPERT** giving **OPINION** based on expertise?
   - **SPECIFICALLY EXCLUDED** opinion about **CRIMINAL INTENT**?

6. **CHARACTER EVIDENCE:**
   - Offered by **CRIMINAL DEFENDANT**?
   - Offered to **REBUT** attack on character?
   - Offered to **ATTACK or PROVE GENERAL HONESTY** of witness?

7. **HEARSAY:**
   - An **ASSERTION** of fact?
   - To **PROVE the fact** asserted?
   - Does it have **INDEPENDENT LEGAL SIGNIFICANCE**?
   - Does an **EXCEPTION** apply?

8. **DOCUMENTS:** Proffered documents raise
   - **RELIABLE? Authentication by custodian? Certified public record?**
   - **BEST EVIDENCE RULE apply?**
   - **CHARACTER EVIDENCE? Records of criminal conviction?**
   - **HEARSAY? Exceptions apply?**

Mnemonics. You may (or may not) find the following two mnemonics helpful.

PROPHES – Evidence checklist:
- Does the evidence have **Probative** value?
- From **Reliable** witness and documents?
- Is it an admissible **Opinion**?
- Do **Privileges** exclude?
- Is it **Hearsay**?
- Is there an **Exception**?
- Do evidence **Substitutes** apply based on presumptions and judicial notice?

MOCK -- Witness testimony must be reliable and based on:
- **Memory** of the events related,
- **Objectivity** concerning the events,
- **Capacity** to observe, understand and relate the events, and
- **Knowledge** of the facts related.

San Francisco Police Department Investigation: The hearsay exceptions where the declarant must be unavailable:

- **S**tatements against interest,
- **F**ormer testimony,
- statements of **P**edigree or family history,
- **D**ying declarations, and
- Other **I**nherently reliable evidence.

I Pee ACID -- Federal "NON-hearsay":

- **I**nconsistent **P**rior statements by the testifying witness subject to cross examination,
- **A**dmissions of a party opponent,
- **C**onsistent statements to rebut innuendo the testifying witness fabricated testimony,
- **Id**entification of a person by the testifying witness after perceiving him/her.

I'M a PINKO -- Evidence of other crimes or acts can be admitted to show

- **I**dentity,
- **M**otive,
- **a P**lan,
- **I**ntent,
- **N**otice
- **K**nowledge or
- **O**pportunity.

COMMON EVIDENCE ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Is the WITNESS QUALIFIED?* **[Objection: Lack of foundation, calls for speculation]**

   Under the rules of evidence, a FOUNDATION must be laid by putting the witness under oath and establishing that the witness has PERSONAL KNOWLEDGE of events and ability to remember and relate them to the Court.

   Expert witnesses must be shown to have specialized knowledge such that their opinions would be of assistance to the finder of fact.

   Here the witness had personal knowledge (specialized knowledge) because…

2. *Is the QUESTION LEADING?* **[Do not discuss if the question is not leading. Objection: Leading]**

   LEADING questions that suggest the answer sought are generally objectionable on direct examination. They can only be asked on 1) CROSS-EXAM, 2) where the witness is HOSTILE, 3) to REFRESH MEMORY of prior statements or 4) about a PRELIMINARY MATTER such as qualifying a witness to prove they have personal knowledge about the events in dispute.

Here … because…Therefore...

3. *Is the question COMPOUND, VAGUE, CONFUSING, LACKING FOUNDATION or CALLING FOR SPECULATION?*

   Questions that are COMPOUND, CONFUSING, VAGUE, LACKING FOUNDATION (based on assumption of facts that have not yet been established by previous testimony), or that CALL FOR SPECULATION by the witness are objectionable.

   Here … because…Therefore...

4. *Does the QUESTION CALL FOR A NARRATIVE?*

   Under the rules of evidence questions CALLING FOR a NARRATIVE ANSWER are generally considered improper because they threaten to delay trial and open the door to introduction of hearsay evidence.

   Here … because…Therefore...

5. *Is the ANSWER NON-RESPONSIVE?*

   Even if a question asked of a witness is proper, the witness' response must reflect the question asked and be responsive to it.

   Here … because…Therefore...

6. *Is the evidence RELEVANT?* **[Always consider RELEVANCE next for all evidence. Relevance is the THRESHOLD ISSUE, meaning that evidence is not admissible unless it is relevant. Objection: Irrelevant.]**

   Under the rules of evidence only relevant evidence is admissible. Evidence is relevant if it TO PROVE a MATERIAL FACT. CIRCUMSTANTIAL evidence is admissible if a REASONABLE INFERENCE NATURALLY FLOWS from it concerning a MATERIAL FACT. **[Important!]**

   Here the evidence TENDS TO PROVE … because … and that fact is MATERIAL to the case because…

   [It is critical to establish why the evidence is being offered. Consider this carefully each time because often the evidence offered can prove two or more different things. Yet it is often inadmissible hearsay for one purpose and not inadmissible hearsay for the other purpose.

   Further, if the parties have stipulated to a fact, evidence proving that fact generally cannot be introduced because it is irrelevant after the stipulation.]

7. *Is the evidence UNFAIRLY PREJUICIAL?* **[Objection: Unfairly prejudicial.]**

   Under Federal Rule of Evidence 403 the Court has discretion to exclude even relevant evidence may be excluded if the PROBATIVE VALUE is SUBSTANTIALLY OUTWEIGHED by the risk of UNFAIR PREJUDICE, CONFUSION, DELAY or where it is CUMULATIVE. **[Important!]**

   Here the probative value is not substantially outweighed by the possible UNFAIR prejudice because…

   Therefore…

   > **[Warning: The term "unfair prejudice" or "undue prejudice" never means evidence that is damaging to one side or the other simply because it is helps settle a material issue in dispute. In fact that is the very best kind of evidence. Courts want evidence that helps settle the material issues in dispute. "Unfair prejudice" means evidence that raises a risk that the finder of fact (jury) will be swayed by emotion (anger, sympathy, bigotry, etc.) to favor one side or the other because of facts about one of the parties that are so irrelevant to the actual issues in dispute that it does not actually help much to settle the issues in dispute as much as it inflames unfair prejudice.]**

8. *Is the LAY OPINION INADMISSIBLE?* **[Objection: Calls for speculation.]**

   Under the rules of evidence a witness shown to have PERSONAL KNOWLEDGE of events can only give OPINION as to matters of common knowledge – taste, speed, color, etc.

   Here the witness had PERSONAL KNOWLEDGE because … And the OPINION requested concerns a matter of common knowledge because …

   Therefore...

9. *Is the EXPERT TESTIMONY Admissible?* **[Objection: Improper expert opinion/ Lack of personal knowledge/ Hearsay/ Speculation.]**

   Under the rules of evidence EXPERT OPINION testimony is admissible only where the witness is shown to have SPECIAL KNOWLEDGE OR SKILLS HELPFUL TO THE JURY, and offers an expert opinion based on that expert knowledge.

   Here the expert has SPECIAL KNOWLEDGE because … And the expert's testimony would help the jury because …

   > **[Warning: This is heavily tested and poorly taught. The expert witness testimony must state an OPINION based on the expertise itself that would be helpful to the finder of fact (jury), and NOT a statement about something that the expert saw, heard, or perceived during her investigation that any lay witness could have seen, heard or perceived in precisely the same manner, and**

NOT an opinion that any lay person could form equally well based on the same evidence.

For example: An automotive expert can examine brake pads involved in an accident and give an expert opinion whether they could stop the automobile in question within a certain distance in dispute. But the automotive expert cannot testify that, "When I talked to the defendant he seemed very nervous, and before I could examine the brake pads I was told the defendant removed and discarded them." That is not an 'expert opinion' because it has nothing to do with any 'expertise'.

The "expert witness" rule allows the witness to give an expert opinion based on information, observation and writings that experts normally would rely on, INCLUDING HEARSAY. But if the expert starts giving opinions that are NOT based on expert knowledge beyond the ability of the finder of fact to comprehend for itself, and if the expert starts stating what other people have told her, it opens the door wide to hearsay and speculation by the "expert" which is totally inadmissible because it is no more helpful to the finder of fact than if any other lay witness said the same thing.]

10. Is the DOCUMENT RELIABLE? **[Objection: Best Evidence Rule.]**

Under the BEST EVIDENCE RULE ORIGINAL DOCUMENTS must usually be presented to prove the contents of a writing, if they are available to the party offering the evidence, and PHOTOS must be authenticated by a witness who can testify that they accurately depict what they are intended to show.

Here the documents are RELIABLE because…

[Warning: This is frequently tested but not well taught. The phrase "prove the contents of a writing" means to prove a PARTICULAR DOCUMENT said something. In these situations the original document (not a copy) must be produced. For example, in a dispute over the written terms in a signed, written contract, the original contract must be offered unless it is unavailable to the offering party.

In contrast, the phrase "prove the contents of a writing" does NOT apply when written records are offered to prove the truth of the facts written in the record, not to prove that a particular document said a particular thing. In these cases an authenticated copy of the record is admissible.

For example: To prove the age of a person, authenticated copies of birth certificates, driver's licenses, or baptismal certificates could be offered. It does not matter that the originals are not offered because the purpose is to prove the age of the person, not to prove that a particular document indicated the age.]

11. Is the evidence subject to the ATTORNEY-CLIENT PRIVILEGE? **[Objection: Privileged.]**

Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. The ATTORNEY-CLIENT privilege is an absolute privilege in California (CRE 950 et seq.) and probably all States held by the client over all confidential communications between attorney and client.
The privilege cannot be used to commit a crime or fraud or where revelation is reasonably necessary to prevent a crime.
The privilege does not survive the death of the client.

Here…because…Therefore…

12. *Is the evidence subject to the ATTORNEY WORK PRODUCT PRIVILEGE?* **[Objection: Privileged.]**

Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. The ATTORNEY WORK PRODUCT privilege is recognized as a qualified privilege in most states. The privilege can be overcome by showing the movant has 1) a need for the information sought and will 2) substantially suffer if the information is not provided.

Here…because…Therefore…

13. Is evidence of SUBSEQUENT PRECAUTIONS admissible? **[Objection: Privileged.]**

Under Federal Rule 407 and California Evidence Code 1151 evidence of SUBSEQUENT REMEDIAL MEASURES is not admissible to prove negligence or culpability. However, they might be used to prove control over the property or to rebut claims that no safety precautions were possible. **[Important!]**

Here…because…Therefore…

14. Is evidence of OFFERS TO COMPROMISE admissible? **[Objection: Privileged.]**

Under Federal Rule 408 and California Evidence Code 1152 et seq. evidence of OFFERS TO COMPROMISE is not admissible to prove liability for or invalidity of a claim. **[Important!]**

Here…because…Therefore…

15. Is the evidence subject to the MARITAL COMMUNICATION PRIVILEGE? **[Objection: Privileged.]**

Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. Under California Evidence Code 980 and in most States the MARITAL COMMUNICATION privilege is held by each spouse and shields confidential communications between spouses during marriage both during and after marriage. The privilege cannot be used to commit a crime or fraud, and there is no privilege in proceedings between spouses or in certain criminal proceedings (e.g. child abuse proceedings).

Here…because…Therefore…

16. *Is the evidence subject to the SPOUSAL PRIVILEGE?* **[Objection: Privileged.]**

    Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. Under California Evidence Code 970 et seq. and in most States the SPOUSAL privilege is held by a spouse during marriage in most states that allows them to elect not to testify against the other spouse about a criminal matter during marriage. The privilege cannot be used to commit a crime or fraud. If a spouse testifies in such a proceeding at all, the privilege is permanently waived as to that proceeding.

    Here…because…Therefore…

17. *Is the evidence subject to the PHYSICIAN-PATIENT PRIVILEGE?* **[Objection: Privileged.]**

    Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. Under California Evidence Code 990 et seq. and in most States the PHYSICIAN-PATIENT privilege is held by patients in many states and allows them to shield confidential communications with physicians during medical treatment from discovery in civil actions.

    Here…because…Therefore…

18. *Is the evidence subject to the CLERGY-PENITENT PRIVILEGE?* **[Objection: Privileged.]**

    Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. Under California Evidence Code 1030 et seq. and in most States the CLERGY-PENITENT privilege is held by both clergy and penitents in many states and allows them to shield penitential communications from discovery.

    Here…because…Therefore…

19. *Is the evidence subject to the GOVERNMENTAL/POLICE PRIVILEGE?* **[Objection: Privileged.]**

    Under Federal Rule 501 STATE PRIVILEGE rules are adopted in federal court. Under California Evidence Code 1040 et seq. and in most States the GOVERNMENTAL and POLICE privileges are held by a government entity in many states and allows it to shield confidential information acquired in the course of duty or from police informants from discovery. The privilege may be absolute when established by statute or qualified when based on public policy grounds. Here…because…Therefore…

20. *Is the evidence subject to the MILITARY SECRETS PRIVILEGE?* **[Objection: Privileged.]**

    Under Federal Rules of Evidence a MILITARY SECRET privilege may be claimed by the head of a federal agency based on national security considerations. The privilege may not be claimed in a criminal case unless the criminal case is dismissed.

    Here…because…Therefore…

21. *Is the evidence subject to the JURY DELIBERATION PRIVILEGE?* **[Objection: Privileged.]**

Under Federal Rule 606 and California Evidence Code 1150 JURY DELIBERATIONS may not be revealed in testimony except for whether improper extraneous information or influences were brought to bear on the jury.

Here…because…Therefore…

22. *Is the evidence NON-HEARSAY?* **[Important!]**

Under federal rules of EVIDENCE is NON-HEARSAY and can be presented for the truth of the matter asserted if it is –

1) *An ADMISSION OF A PARTY OPPONENT or*

If the DECLARANT IS AVAILABLE to TESTIFY, a –

2) *PRIOR INCONSISTENT STATEMENT under oath;*
3) *PRIOR CONSISTENT STATEMENT used to rebut impeachment; or*
4) *PRIOR STATEMENT OF IDENTIFICATION of a PERSON after perceiving them.*

[NOTE: This is heavily tested and poorly understood by law students. It is a MAJOR DIFFERENCE between federal and California rules of evidence. Be sure you understand if you are supposed to be using federal rules or both federal and State rules. This is NOT hearsay for federal law but it is hearsay SUBJECT TO EXCEPTION for California law.

Mnemonic: I Pee ACID = Inconsistent Prior witness statements, Admissions of a party, Consistent prior statements of a witness, IDentification by the witness.

Each of these federal "non-hearsay" issues can be addressed as follows:]

23. *Is the evidence admissible as an ADMISSION OF A PARTY OPPONENT?* **[Objection: Hearsay]**

Under Federal Rule of Evidence 801(d) (2) an assertion is not hearsay if it is an admission of a party opponent. **[Important!]** *But under California Rules it is hearsay subject to an exception (California Evidence Code (CRE) §1220-1228.)*

An admission may be express or implied by behavior or even silence where it displays intent. It may be made directly or by a co-conspirator or an agent of the declarant acting within the scope of authority. It can also be a statement by another person that has been expressly or impliedly adopted by the declarant.

Under federal Rule 410 a no-contest (nolo contendere) plea is not an admission of guilt, but under California rules it may be considered an admission.

Here …because…Therefore…

[Warning: This is ALWAYS TESTED.

An assertion may include a nod of head, wink of eye or even silence if it is intended to convey a message. But involuntary outbursts and exclamations ("Ouch!"), questions ("Why?") or imperatives ("Stop!") are not assertions and not hearsay at all. But an exclamation, question, or imperative with additional words added may be an implied assertion of a fact such as "Ouch, Bob!", "Why did you hit him?" or "Stop, thief!"

Guilty pleas to other crimes (by opposing parties) are admissions of the party opponent under both federal and California rules. But nolo contendere pleas (no contest pleas) and withdrawn guilty pleas are NOT admissions of a party opponent under federal rule 410, but there is no such exception under California law.

Introduction of an admission of a co-conspirator as being a vicarious "admission of a party opponent" requires proof the conspiracy existed, that the defendant was a member, and that the disputed statement was made in the course of and in furtherance of the conspiracy goal.

There is a split in the federal courts, but the majority holds that an admission by any member of a conspiracy can be introduced as the admission of all members, even if a member joined the conspiracy after the statement was made. State laws may also vary on this point.]

24. *Is the evidence admissible as an INCONSISTENT PRIOR STATEMENT?* **[Objection: Hearsay]**

Under Federal Rule of Evidence 801(d) (1) an assertion is not hearsay if it is an inconsistent prior statement under oath and the declarant is available to explain or rebut the statement. If the statement was not made under oath it can still be introduced to impeach the credibility of a witness. **[Important!]** *Under California rules this is considered hearsay subject to exception if the witness is available to testify (CEC §1235).*

Here …because…Therefore…

25. *Is the evidence admissible as a CONSISTENT PRIOR STATEMENT?* **[Objection: Hearsay]**

Under Federal Rule of Evidence 801(d)(1) an assertion is not hearsay if it is a consistent prior statement offered to rebut a charge or implication that their testimony is a fabrication or result of improper influence or motive. The evidence is only relevant if the prior statement was made before the improper motive is alleged to have arisen.

[Important!] *Under California rules this is considered hearsay subject to exception if the witness' credibility has been attacked and the witness is available to testify (CEC §1236).*

Here …because…Therefore…

26. *Is the evidence admissible as a STATEMENT OF IDENTIFICATION?* **[Objection: Hearsay]**

Under Federal Rule of Evidence 801(d) (1) an assertion is not hearsay if it is a statement of identification of a person after perceiving the person if the declarant is available to testify about the statement (whether they testify or not). **[Important!]** *Under California rules this is considered hearsay subject to exception but the witness must testify that she made the identification and it truly reflected her opinion at the time. (CEC §1238).*

Here …because…Therefore…

[This is an important difference between federal and California law. Under the federal law the witness does not have to actually testify, and may not remember anything at all. Under California law she must testify and say she remembers making the identification and it reflected her true opinion at the time.

Note: The DECLARANT must be AVAILABLE for the above exceptions of inconsistent prior statement, consistent prior statement, and identification of a person.]

27. Is the evidence HEARSAY? **[Objection: Hearsay.]**

Under the rules of evidence HEARSAY is an 1) an OUT-OF-COURT ASSERTION 2) offered to PROVE THE TRUTH of the matter asserted. **[Important!]**

An ASSERTION is a statement that something has HAPPENED, EXISTS or IS TRUE.

Here …because…Therefore…

[WARNING: This is ALWAYS TESTED.

An assertion may include a nod of head, wink of eye or even silence if it is intended to convey a message. But involuntary outbursts and exclamations ("Ouch!"), questions ("Why?") or imperatives ("Stop!") are not assertions and not hearsay at all. But an exclamation, question, or imperative with additional words added may be an implied assertion of a fact such as "Ouch, Bob!", "Why did you hit him?" or "Stop, thief!"

There are many exceptions to the hearsay rule. For the following group of hearsay exceptions it DOES NOT MATTER IF THE DECLARANT IS AVAILABLE TO TESTIFY.]

28. *Is the HEARSAY ADMISSIBLE as an EXCITED UTTERANCE?*

    Under Federal Rule of Evidence 803 and California Evidence Code 1240(b) HEARSAY can be admitted as an EXCITED UTTERANCE if it is a statement by a declarant about a startling event while still under the stress of excitement.

    Here …because…Therefore…

29. *Is the HEARSAY ADMISSIBLE as a PRESENT SENSE IMPRESSION?*

    Under Federal Rule of Evidence 803 and California Evidence Code 1240(a) and 1241 HEARSAY can be admitted as A PRESENT SENSE IMPRESSION if it is a description or explanation of an event by a declarant made during or immediately after the event.

    Here …because…Therefore…

30. *Is the HEARSAY ADMISSIBLE as a statement of MENTAL, PHYSICAL or EMOTIONAL CONDITION?*

    Under Federal Rule of Evidence 803 and California Evidence Code 1250 HEARSAY can be admitted as a statement of current MENTAL, EMOTIONAL or PHYSICAL CONDITION if it is a statement of the declarant's present state of mind, health, pain, feelings, intent, conduct, purpose, plan or motive at the time of the statement. Under the HILLMON DOCTRINE a declarant's statement of future plans is admissible circumstantial evidence where subsequent acts by the declarant are a material issue that could be naturally inferred from the statement.

    California rules do not allow admission of statements of memory or belief to prove the fact remembered or believed, but they do allow admission of statements about prior (not current) mental, emotional or physical condition if the declarant is unavailable, the evidence is relevant to prove the mental, emotional or physical condition, and the statement is inherently trustworthy.

    Here …because…Therefore…

31. *Is the HEARSAY ADMISSIBLE as a statement for MEDICAL DIAGNOSIS or TREATMENT?*

    Under Federal Rule of Evidence 803 HEARSAY can be admitted if it is a statement of past and present health, pain, events, acts and feelings made by the declarant to obtain MEDICAL DIAGNOSIS OR TREATMENT. Under California Evidence Code 1253 similar evidence can be admitted, but only if the declarant is a child under 12 years old and the statement offered concerns child abuse or neglect.

    Here …because…Therefore…

32. Is the HEARSAY ADMISSIBLE as a PAST RECOLLECTION RECORDED?

Under Federal Rule of Evidence 803 and California Evidence Code 1237 HEARSAY can be admitted as a PAST RECOLLECTION RECORDED if it is an accurate record of an event made or adopted by the declarant soon after while facts were fresh that can no longer be clearly remembered by the declarant. THE WITNESS (not necessarily the person who records the record) MUST BE AVAILABLE AND TESTIFY that the recorded recollection is accurate. Further, the proponent may only read the record into evidence, and the recorded recollection cannot itself be entered into evidence.

Here …because…Therefore…

33. Is the HEARSAY ADMISSIBLE as a BUSINESS RECORD?

Under Federal Rule of Evidence 803 and California Evidence Code 1270-1272 HEARSAY can be admitted as a BUSINESS RECORD if it is a written record that a knowledgeable custodian of records testifies was made in the regular course of business at or near the time of an event with reliable information. **[Important!]**

Here …because…Therefore…

34. Is the HEARSAY ADMISSIBLE as a PUBLIC RECORD?

Under Federal Rule of Evidence 803 and California Evidence Code 1280-1284 HEARSAY can be admitted as a PUBLIC RECORD. Under federal Rules 1005 and California Evidence Code 1230-1232 the record may generally be proven by certification rather than by testimony from a custodian of records.

Federal/State Difference: Generally police reports cannot be used by prosecution as evidence against a criminal defendant under the federal rules but they CAN be used for this purpose under the California rules.

Here …because…Therefore…

35. Is the HEARSAY ADMISSIBLE under some other RECORD EXCEPTION?

Under Federal Rule of Evidence 803 and various sections of the California Evidence Code HEARSAY can be admitted if it meets the description of certain other RECORDS including land records (CRC 1330), boundary records (CRC 1323), ancient records (CRC 1331) that are over 20 years old (federal) or 30 years old (California), vital statistics (CRC 1281, 1316), church records (CRC 1315), family records (CRC 1312), commercial listings (CRC 1340), market and weather reports (CRC 1340), learned treatises (CRC 1341), and felony convictions (CRC 1300) if presented to prove facts essential to the verdict.

Further, the absence of certain such records may be introduced as evidence that an event DID NOT HAPPEN because otherwise it would normally be duly recorded.

Here …because…Therefore…

[Note: For the foregoing hearsay exceptions it does not matte if the declarant is available or not. But for the following five (5) exceptions, the DECLARANT MUST BE UNAVAILABLE to testify (either dead, missing or refusing to testify).

The mnemonic for these is San Francisco Police Department Investigation for –

- **Statement against interest**
- **Former testimony**
- **Pedigree statements**
- **Dying declarations**
- **Inherently trustworthy.]**

36. *Is the HEARSAY ADMISSIBLE as a STATEMENT AGAINST INTEREST?*

Under Federal Rule of Evidence 804 and California Evidence Code 1230 HEARSAY can be admitted as a STATEMENT AGAINST INTEREST if the declarant is unavailable, the declarant had personal knowledge and the statement is adverse to the declarant's pecuniary, proprietary or legal interests. But a party's statement of criminal liability offered as a defense by another defendant cannot be admitted without corroborating evidence. **[Important!]**

Here …because…Therefore…

37. *Is the HEARSAY ADMISSIBLE as FORMER TESTIMONY?*

Under Federal Rule of Evidence 804 and California Evidence Code 1290-1293 HEARSAY can be admitted as FORMER TESTIMONY. The declarant must be unavailable and the opposing party has to have had a fair opportunity and motive to question or cross-examine the declarant at the time the statement was made. **[Important!]**

> [Note: California limits use to civil actions if the opposing party was not a party to the action in which the statement was made. California also allows use even if declarant is available in proceedings deciding to make a child a ward of the court.]

Here …because…Therefore…

38. *Is the HEARSAY ADMISSIBLE as a statement of PEDIGREE?*

Under Federal Rule of Evidence 804 and California Evidence Code 1310-1311 HEARSAY can be admitted as a statement of PEDIGREE or FAMILY HISTORY if the declarant is unavailable. If the subject of the statement is not the declarant, the declarant must be shown to be closely related or associated with the subject person.

Here …because…Therefore…

39. Is the HEARSAY ADMISSIBLE as a statement of a DYING DECLARATION?

Under Federal Rule of Evidence 804 and California Evidence Code 1242 HEARSAY can be admitted as a DYING DECLARATION by a person who believes death is imminent concerning the cause or circumstance of the death in a homicide or civil proceeding. **[Important!]**

Federal/California Difference: *Under federal rules the declarant must be unavailable.*

Here …because…Therefore…

40. Is the HEARSAY ADMISSIBLE as a statement of INHERENT TRUSTWORTHINESS?

Under Federal Rule of Evidence 804 HEARSAY can be admitted if it is shown to be INHERENTLY TRUSTWORTHY and the declarant is unavailable and notice is given to the opposing party.

California has no exact counterpart to this but under California Evidence Code 1350 hearsay can be admitted in a criminal trial for a serious offense if there is clear and convincing evidence a witness is unavailable because they have been killed or kidnapped by or for the defendant to prevent them from testifying.

Here …because…Therefore…

> [Note: A common source of "other" trustworthy statements is grand jury testimony where the declarant is no longer available.]

41. Is a WRITING USED TO REFRESH a witness' memory HEARSAY?

Under Federal Rules of Evidence 612 and California Evidence Code 771 a writing shown to a witness to refresh their memory of an event is not hearsay as the witness afterwards is able to testify without depending on the writing or object.

The witness may be shown the writing to refresh their memory in court after the writing is first presented to the court and to the opposing party.

If the witness is shown the writing outside of court, before testifying, the court has discretion to require the writing to be produced and shown to the opposing party.

The opposing party may have the writing admitted into evidence.

Here the witness has some memory of the event and the documents are only being used to refresh memory because…

Therefore…

42. Can evidence of PAST ACTS BY A PERSON be admitted to PROVE THE PERSON ACTED IN CONFORMITY with character at a time in dispute?

[WARNING: Character evidence is frequently tested and poorly taught. It is evidence of PAST ACTS by a PERSON that is presented to prove either:

1. **The MATERIAL FACT that the person (not necessarily a witness) acted in a certain disputed manner because it was in conformity with their PAST ACTS, OR**
2. **That a WITNESS is generally dishonest (or honest) person who is to be disbelieved (or believed) because of their PAST ACTS of honesty or dishonesty.**

Note: The character evidence rules all deal with people, not animals, machines or inanimate objects.

TWO ENTIRELY DIFFERENT SETS OF RULES apply depending on which of these two basic purposes the evidence is being presented for.

Further, evidence of PAST ACTS by a person (not necessarily a witness) can always be admitted to prove material facts other than conduct in conformity with character such as IDENTITY, MOTIVE, a PLAN, INTENT, NOTICE, KNOWLEDGE or OPPORTUNITY [I'M a PINKO]. Evidence for this purpose is not subject to the character evidence rules.

And evidence can always be used to attack the credibility of a WITNESS, and that is to prove the WITNESS could not OBSERVE events, cannot REMEMBER events, cannot accurately RELATE events, or is so BIASED she could not FAIRLY COMPREHEND events as they occurred. Evidence for this purpose is also not considered "character evidence" and is not subject to character evidence rules.

Further, WITNESSES may always be confronted with evidence of PRIOR INCONSISTENT STATEMENTS, and if the reliability of their testimony is impeached in this manner evidence of PRIOR CONSISTENT STATEMENTS may be introduced into evidence to rehabilitate the witness.]

Under Federal Rule of Evidence 404 and California Evidence Code 1101 evidence of a person's PAST ACTS cannot generally be used to prove THE PERSON ACTED in conformity with character on a specific occasion. However there are exceptions to this general rule.

The first EXCEPTION is that evidence of HABIT, a strict adherence to a regimen, can be used to prove a person acted in conformity with their past habitual practices.

Second, a CRIMINAL DEFENDANT can generally use relevant character evidence about HIMSELF to prove he did not act in the manner he has been accused. Generally this consists of evidence he is honest or non-violent.

Likewise, the CRIMINAL DEFENDANT can introduce relevant character evidence about the alleged VICTIM. This generally is evidence the victim was violent, was consenting or to explain physical evidence of rape.

However, past sexual acts by an alleged victim of a sexual assault generally cannot be admitted by the defendant to prove the victim consented to have sex at the time in dispute.

When the CRIMINAL DEFENDANT presents character evidence of this type he OPENS THE DOOR for PROSECUTION to present opposing character evidence of a like kind.

Finally, under both federal and California law evidence of PAST SEX ACTS by a defendant can be admitted to prove the defendant committed sex acts against an alleged victim in conformity with character in both civil and criminal actions.

Here …because…Therefore…

43. *What can evidence about the PAST ACTS OR EXPERIENCES OF A PERSON be admitted to prove if NOT THAT THEY ACTED IN CONFORMITY?*

Under federal Rule 404(b) and California Evidence Code 1101(b) evidence of a person's PAST ACTS that are similar to acts in dispute can generally be offered to prove MATERIAL FACTS OTHER THAN THAT THE PERSON ACTED IN CONFORMITY with character.

The purposes for introducing evidence of past acts include to IDENTITIFY them as a person who committed some act, that they had a MOTIVE to commit the act, that their past actions were of a PLAN or scheme of action, that they acted INTENTIONALLY, that they had NOTICE of a condition, to prove they KNOWLEDGE of a fact and negligently disregarded it, or to prove they had an OPPORTUNITY (ability) to commit the disputed act. [Mnemonic=**I'M a PINKO**. **Important!]**

SIMILARITY between past acts and an act in dispute need not be very high to prove that an act by the opposing party was done with knowledge and intent [e.g. that an infant was hit **on purpose** rather than by accident]. *Greater similarity is needed to prove the opposing party acted at all* [e.g. that the **defendant molested** a child]. *Highest similarity is needed to identify the defendant as the person who committed some act* [e.g. that **the defendant was the person who robbed** the store].

Likewise, evidence of extremely similar happenings (or the lack of such happenings) can be introduced to prove a party had knowledge and notice (or the lack thereof) of the likelihood such events might happen. [This is not an issue of the character of the "happenings" because character evidence only concerns people. Rather it is an issue of the party having (or lacking) awareness and knowledge of the possibility of an event because of past experiences that gave (or did not give) them knowledge such events are likely.]

Here …because…Therefore…

44. *Is evidence of PAST ACTS OF HONESTY OR DISHONESTY admissible to prove the HONESTY OF A WITNESS?*

    Under federal Rule 608 et seq. and California Evidence Code 785 et seq. evidence of OPINION and REPUTATION attacking the honesty of a WITNESS (not proving honesty) is generally admissible on direct examination. Evidence that a witness is honest (rather than dishonest) cannot be introduced until the honesty of the witness has been attacked. When such testimony is allowed it generally must be in the form of opinion and reputation.

    Generally the COLLATERAL EVIDENCE RULE bars the introduction of extrinsic evidence of specific acts of honesty or dishonesty to prove the honesty or dishonesty of a witness. But under federal rules the court has discretion to allow witnesses to be questioned about such specific acts of honesty or dishonesty on cross-examination.

    A major exception to the Collateral Evidence Rule is that evidence of PRIOR CONVICTIONS for ANY CRIME OF DISHONESTY can always be introduced to attack the honesty of a witness if it is no more than 10 years old.

    Further, evidence of a PRIOR FELONY CONVICTION that did not involve dishonesty MAY be introduced to impeach if the probative value outweighs the risk of unfair prejudice, and the conviction is no older than 10 years.

    Finally, evidence of a PRIOR FELONY CONVICTION that is over 10 years old MAY be introduced to impeach if the probative value SUBSTANTIALLY OUTWEIGHS the risk of unfair prejudice and opposing party has been given PRIOR WRITTEN NOTICE.

    Here …because…Therefore…

45. *Is EVIDENCE ABOUT A WITNESS admissible for to prove ANYTHING ABOUT THEM BESIDES HONESTY OR DISHONESTY?*

    Under the rules of evidence the general rule is that evidence about a witness can always be admitted to prove they lacked the ability to OBSERVE, HEAR, REMEMBER, RELATE, UNDERSTAND the events in dispute or give a fair, objective and UNBIASED statement of the events.

    Further, witnesses may be confronted with INCONSISTENT STATEMENTS under Federal Rule 613and California Evidence Code 769-770. And if the reliability of the witness is impeached, PRIOR CONSISTENT STATEMENTS may be introduced to REHABILITATE.

    Here …because…Therefore…

46. *Can the evidence by established by JUDICIAL NOTICE?*

    Under the federal rules evidence may be established by JUDICIAL NOTICE if it is a fact of COMMON KNOWLEDGE so broadly known that it is INDISPUTABLE. The court can also take judicial notice of rules of law, pleading, practice, professional conduct and the legal meaning of words and phrases.

Practice Question 26-34: Experts, Character Evidence, Offers in Compromise

Two cars collided at an intersection. Plaintiff Pete's car was struck by a red truck which sped away. Pete's 5-year old son, Winston, was in the car with him. Pete was injured but Winston was not.

Witness Wally took a picture of the truck as it left the scene. He gave the film to the police. The police developed the film and could read the license plates. They determined the truck belonged to defendant Dick.

Pete sued Dick for personal injury and property damage. Dick answered with a denial that it was his truck that hit Pete. Second, he said that if it was his truck it was being used without his permission or knowledge. Third he answered that Pete was responsible for the accident on a negligence theory.

Before trial it is stipulated that Winston is incompetent to testify because of his young age.

At the trial:

1) Pete's attorney asked his first witness, Wally, "When you got to the scene of the accident you heard Winston say who caused the accident didn't you?"

2) Wally testified that when he got to the accident scene Winston was crying hysterically from the stress of the event.

3) Wally testified that immediately after the accident and while still under the stress of the accident Winston excitedly exclaimed, "The red truck ran the red light and hit us."

4) Wally testified that in his opinion Pete is a good driver.

5) Pete testified that he offered to settle for $20,000 and Dick counter offered only $10,000.

6) Wally said he took photographs of the fleeing truck, and the photos developed by the police were then offered into evidence.

7) Dick's lawyer called him to the stand and asked him to describe certain acts by Wally that suggested he is senile and needs glasses.

8) Dick presented a witness who said Wally had lied to her on several specific occasions.

9) Dick presented an auto safety expert who testified that repair records showed Pete's car had new brakes installed after the accident.

What objections could be raised, what would be the response, and how would the court rule?

Practice Question 26-35: Admissions, Witness Character, Character Evidence

1) In his civil trial against Lydia for dog bites he suffered from her dog, Bane, Bevis called Lydia as his first witness and after laying a foundation asked, "You told neighbors that you knew your dog, Bane, was dangerous, didn't you?" Lydia's attorney objects that the question is hearsay. The objection is overruled.

2) Then, after Lydia denied that her dog, Bane, was dangerous, Bevis asks, "Isn't it true that you pled nolo contendere six months ago to perjury?" An objection is raised that this is hearsay. The objection is overruled.

3) Next, on cross-examination Lydia's attorney asked her, "You are a single mother on welfare with small children, aren't you?" Bevis objects that the question is leading. The objection is sustained.

4) Bevis then offers into evidence three photographs he took of Bane snarling and snapping at his photographer. Lydia's attorney objects to the photos as irrelevant and prejudicial. The objection is overruled.

5) Bevis then offers declarations into evidence that Bane had bitten three people in the last seven years to prove the dog had bitten him. Lydia's attorney objects that the evidence is insufficient in amount and regularity to prove habit. The objection is overruled.

6) Bevis then puts Lydia's housekeeper, Juanita, on the stand and after laying a foundation asks her, "Did Lydia's son tell you her dog would bite?" Lydia's attorney objects that the evidence is improper use of character evidence to prove conduct in conformity. The objection is overruled.

7) Next, on cross Lydia's attorney says, "Juanita, your opinion of Lydia is that she is an honest woman, isn't it?" Bevis objects that the question is leading. The objection is overruled.

8) On re-direct Bevis asked Juanita, "Were you aware that Lydia pled nolo contendere six months ago to perjury?" Lydia's attorney objects that this is improper used of specific act evidence to impeach Lydia's honesty on re-direct. The objection is overruled.

For each item of evidence, did the court rule properly and why? Explain other objections that should have been raised.

Practice Question 26-36: Hearsay, Hillmon Doctrine, Excited Utterance

On June 1 Devon was drinking in a bar when he told the bartender, "I'm tapped out. I'm going to go rob someone." An hour later Granny was knocked to the ground and her purse snatched. Wally rushed to help her, and she shouted, "My Bible! He took my Bible!

The police wrote down Granny's description of the robber. She said he had a scar on the back of his left hand. Granny signed an affidavit that her statement to police was accurate.

On June 10 police arrested Snitchy for drug possession. For a reduced sentence he offered information. He said that Devon had bragged to him about taking Granny's purse.

When confronted Devon told Officer Oscar he had been in Chicago the day of the crime. But at a lineup Granny pointed to Devon and said to Officer Oscar, "That is the man that robbed me!"

Devon was arrested based on Granny's identification. He had a crescent scar on his hand, and Granny's Bible was found in his house.

By the time of trial Granny had suffered a massive stroke.

1. The prosecutor introduces the bartender and asked, "What did Devon say he planned to do?" The defense objected that this was hearsay, but the prosecutor cited the Hillmon Doctrine.

2. The prosecutor introduced Wally and asked, "What did Granny say about a Bible being stolen in the robbery?" The defense objected that this was hearsay.

3. The prosecutor introduced Granny, but she said she could not remember who robbed her. Then he introduced Officer Oscar, who said that at the lineup Granny pointed at Devon and said, "That is the man that robbed me!" The defense objects that this is hearsay.

4. The prosecutor asked Oscar, "Where did Devon say he was on the day of the crime?" The defense objected this was hearsay, but the prosecutor claims it is an inconsistent prior statement.

5. The prosecutor had Oscar identify the sworn statement signed by Granny, and it was offered to prove Granny saw a scar on the robber's hand just like Devon's. The defense objected that it was hearsay, but the prosecutor claimed it was a "past recollection recorded" that Granny swore to be accurate at the time of signing. Granny cannot remember the document.

6. The prosecutor introduced Snitchy and asked, "What did Devon tell you about the robbery?" The defense objected this was hearsay.

7. On cross the defense asked Snitchy, "Isn't it true that you got a reduced sentence in exchange for your testimony against Devon?" On redirect the prosecutor offers Snitchy's pal, Itchy, who will testify that on June 5 Snitchy told him that Devon admitted he robbed Granny. The defense objects that this is double hearsay.

Discuss based on Federal Rules of Evidence.

Chapter 27: The Professional Responsibility Answer Formats

Applicable Law. The issues and answers given below are based generally on the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Code of Professional Responsibility, the ABA Canons of Professional Ethics and the ABA Code of Judicial Conduct.

Warning! Your answer should **apply the highest standard of ethical behavior to every professional responsibility issue**. If California rules of professional responsibility allow attorneys to meet a lower standard than the ABA rules, or if you believe the highest standards are "too strict", always keep that information to yourself, because you are not going to gain favor by suggesting that you might act in a less ethical fashion simply because you know you "can get away with it".

Always look for and address potential **conflicts of interest** in every professional responsibility situation. Potential conflicts of interest are obvious if one attorney represents two or more clients.

Always lean in favor of full disclosure of every potential conflict of interest to every client and obtaining the clients' fully informed consent, preferably in writing.

Issue Spotting. More than any other subject, Professional Responsibility issues can be **crossover issues** interwoven into other subject areas of law. It requires some mention of an ATTORNEY or LAWYER in an essay question that deals with some other area of law.

So, watch out for "corporation attorneys" in corporation law questions and for mentions of "attorneys" in wills and trusts questions. If a will or trust is invalid, some attorney probably screwed up. Look to the call of the question to see if you should discuss professional responsibility issues or not.

Watch out for "Larry the Lawyer" and "Annie the Attorney" in an evidence or civil procedure question. If any lawyer or attorney "forgets" or "fails" there is a possible professional responsibility issue to discuss.

COMMON PROFESSIONAL RESPONSIBILITY ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Did attorney IMPROPERLY SOLICIT CLIENTS?*

   Under the rules of PROFESSIONAL ETHICS an attorney cannot directly contact potential clients in person, by telephone seeking to represent them in legal matters except close friends, close family members, current clients or former clients.

   Further, attorneys can never use 'runners' or 'cappers' to seek clients.

   In general attorneys can only seek new clients by means of general advertising. And misleading advertising is never allowed. Further, attorneys cannot by any mens imply or promise clients that they are guaranteed success.

Here…because…Therefore…

> **[This is often the first issue presented by the fact pattern in a professional responsibility question. Look for attorneys calling or seeking out a potential client.**
>
> **It is never unethical for a third party to refer a potential client to an attorney unless the facts state or imply that there is an understanding or practice under which the attorney will reward the third party for the referral.]**

2. *Did attorney IMPROPERLY ACCEPT the case because she has a CONFLICT OF INTEREST?*

   Under the rules of professional responsibility an attorney has a DUTY OF LOYALTY to each client. Therefore, an attorney must not accept a new case if he has a conflict of interest unless 1) he reasonably believes the potential conflict will not affect his judgment and 2) the client consents after being fully informed.

   To avoid conflicts of interest an attorney must avoid representation in any event if 1) his close friend or relative represents the opposing party, 2) he has a financial interest in the outcome, 3) he has media rights in the client's story, 4) he has made loans to the client, other than advancements for litigation costs, or 5) he previously represented the opposing party in the same matter.

   Further, the attorney cannot enter into business transactions with the client unless 1) the terms are fair, 2) there is full disclosure, 3) the client has opportunity for independent counsel and 4) the client gives written consent.

   Here…because…Therefore…

   > **[This is one of the most commonly tested scenarios. The attorney may be an old friend of the opposing counsel, or may have represented the opposing party in another matter. The best response in all these situations is that if the attorney REASONABLY believes his judgment will not be affected she should fully disclose the potential conflict to the client and obtain the client's written consent. Otherwise the attorney should refuse to represent the new client.]**

3. *Did attorney IMPROPERLY ACCEPT the case because she LACKS ABILITY?*

   Under the rules of professional responsibility an attorney must not agree to accept a case if she cannot adequately represent the client because she lacks expertise, unless she either acquires expertise or associates with an experienced attorney.

   Here…because…Therefore…

4. *Did attorney IMPROPERLY ACCEPT the case because she is a potential WITNESS?*

   Under the rules of professional responsibility an attorney must not agree to accept a case if she cannot adequately represent the client because she is likely to be a percipient witness.

   Here…because…Therefore…

5. *Did attorney FAIL TO ADEQUATELY REPRESENT CLIENT?*

   Under the rules of PROFESSIONAL ETHICS an attorney must KEEP CLIENT INFORMED of all significant developments in the case, to RESPONSIBLY SUPERVISE case, to ZEALOUSLY REPRESENT the client's interests and to promptly COMMUNICATE SETTLEMENT OFFERS to the client.

   Here…because…Therefore…

   [This is also one of the more commonly tested scenarios.]

6. *Did attorney CHARGE AN IMPROPER FEE?*

   Under the rules of PROFESSIONAL ETHICS an attorney must NOT CHARGE AN EXCESSIVE FEE. Whether a fee is excessive depends on the general level of fees charged by other attorneys in the community for similar services, the difficulty of the case, the skill and experience of the attorney and other factors.

   Further, it is also improper for an attorney to charge a CONTINGENCY fee for a CRIMINAL or FAMILY LAW case. California allows contingency fees in family law matters, but only if it is in the client's best interest, will not result in an excessive fee and will not cause the attorney to have an impermissible conflict of interest.

   Here…because…Therefore…

   [Whenever the dollar or percentage amount of a fee is stated in a fact pattern you should consider whether to pose this as an issue. If the fee is stated in dollars it is often impossible to say with certainty that it is excessive, so you can only pose the issue, give the rule and a conditional conclusion.

   For contingency cases (e.g. personal injury cases) percentage fees often are structured 30-33% if settled before arbitration or trial, 40% after arbitration or trial, and 50% after appeal.]

7. *Did attorney CONTACT A REPRESENTED OPPOSING PARTY?*

   Under the rules of PROFESSIONAL ETHICS an attorney may not communicate directly with opposing parties concerning a matter if they are known to be represented by counsel.

   Here…because…Therefore…

8. *Did attorney IMPROPERLY REVEAL CLIENT SECRETS?*

   Under the rules of PROFESSIONAL ETHICS an attorney may not improperly reveal client confidences. The ATTORNEY-CLIENT privilege covers all confidential communication between the attorney and the client. Further, the attorney has a duty to reasonably protect the secrecy of other non-confidential revelations by the client.

   Here…because…Therefore…

   [This is commonly tested. Be alert for situations in which the attorney questions the client in the presence of a third party that is not the attorney's employee, partner or associate! That is always improper because nothing said by the client is confidential, and it is all discoverable to the detriment of the client.]

9. *Did the attorney ATTEMPT TO AVOID MALPRACTICE LIABILITY to the client?*

   Under the rules of professional responsibility an attorney may not attempt to exonerate himself from or limit his liability to the client for his personal malpractice.

   Here…because…Therefore…

10. *MAY attorney WITHDRAW FROM CASE?*

    Under the rules of PROFESSIONAL ETHICS an attorney MAY WITHDRAW if the client APPROVES, and otherwise if the client's CLAIM LACKS LEGAL BASIS, if continued involvement MIGHT VIOLATE DISCIPLINARY RULES, if the attorney has FRICTION WITH CO-COUNSEL, or if the attorney's physical and mental state makes it HARD TO CONTINUE. In any case, after the matter is before the Court, withdrawal REQUIRES PERMISSION OF THE COURT.

    Here…because…Therefore…

11. *MUST attorney WITHDRAW FROM CASE?*

    Under the rules of PROFESSIONAL ETHICS an attorney MUST WITHDRAW if FIRED by the client, and otherwise if the client's purpose is FRIVOLOUS and has NO LEGAL BASIS, if continued involvement WOULD VIOLATE DISCIPLINARY RULES, or if attorney's physical and mental state makes him INEFFECTIVE. Again in any case, after the matter is before the Court, withdrawal REQUIRES PERMISSION OF THE COURT.

    Here…because…Therefore…

    [This is heavily tested and poorly understood by Bar Exam students. When an attorney MUST withdraw because further pursuit of the client's cause of action is frivolous, the failure to withdraw is of itself an ethical violation.]

12. *Did attorney ACT IMPROPERLY AT TRIAL?*

    Under the rules of PROFESSIONAL ETHICS an attorney may not present PERSONAL OPINIONS at trial, pay expert witnesses CONTINGENCY or EXCESSIVE fees, COMMUNICATE with or HARASS JURORS, or make PREJUDICIAL or DISCOURTEOUS REMARKS at trial.

    Here…because…Therefore…

13. *Did attorney HIDE MATERIAL FACTS FROM COURT?*

    Under the rules of PROFESSIONAL ETHICS an attorney cannot hide material facts, evidence or applicable legal precedent from the Court. Likewise, an attorney may not present evidence or legal precedent before the Court that is known to be false or incorrect.

    Here…because…Therefore…

14. *Did attorney ACT IMPROPERLY AS PROSECUTOR?*

    Under the rules of PROFESSIONAL ETHICS a PROSECUTOR may not pursue criminal charges without PROBABLE CAUSE. Further the prosecutor has a duty to protect the DEFENDANT'S RIGHTS to COUNSEL, a HEARING, to FAVORABLE EVIDENCE, and to PREVENT PREJUDICIAL STATEMENTS BY POLICE.

    Here…because…Therefore…

15. *Did attorney THREATEN ADMINISTRATIVE, DISCIPLINARY OR CRIMINAL CHARTGES TO ADVANCE POSITION in civil actions?* [Rarely tested issue.]

    Under the rules of PROFESSIONAL ETHICS an attorney cannot threaten to institute administrative, disciplinary or criminal charges in order to advance his position in a civil matter.

    Here…because…Therefore…

16. *Did attorney HELP AN UNLICENSED PARTY PRACTICE LAW?* [Rarely tested issue.]

    Under the rules of PROFESSIONAL ETHICS an attorney cannot assist an unlicensed person to practice law.

    Here…because…Therefore…

17. Did attorney LIE ON A BAR APPLICATION? [Rarely tested issue.]

Under the rules of PROFESSIONAL ETHICS an attorney cannot lie on his own or anyone else's bar application.

Here…because…Therefore…

18. Did attorney IGNORE A COURT ORDER? [Rarely tested issue.]

Under the rules of PROFESSIONAL ETHICS an attorney cannot ignore or willfully disobey an order of the court.

Here…because…Therefore…

Practice Question 27-37: Solicitation, Failure to Communicate, Withdrawal

On September 1, 1999, Ahmed was taken into custody and placed in ABC Hospital because he was acting strangely. The law said that Ahmed could be held for 72 hours against his will. ABC Hospital ordered Ahmed to sign a "voluntary admission" form that he could not read. He signed the form without knowing what it was.

Every day Ahmed asked to go home, but he was locked in and told he could not leave. He was forced to take drugs every day that conflicted with his heart medicine. After 10 days Ahmed was provided an interpreter and a hearing. The hearing officer ordered Ahmed to be released immediately.

Ahmed saw "Bigdog Mark's" ad on TV which said, "I am the Bigdog – the best there is and have never lost a case!" This was not true because Bigdog was a very poor lawyer who had lost many cases.

Ahmed called Bigdog. Bigdog Mark knew a sucker when he saw one. He had Ahmed sign a retainer agreement that gave him a 60% contingency fee.

The applicable statute of limitations required suit to be filed within a year, but Bigdog drank a lot and had never even seen a case like this one.

Bigdog Mark never bothered to look up the applicable law because he had a hearty handshake and a great personality. There wasn't anyone he hadn't been able to out-drink or out-talk.

Bigdog Mark negotiated with ABC Hospital for two years trying to settle the case but the most they ever offered to settle was $2,000. Bigdog Mark was ashamed of his failure to get a better offer. He thought that offer was so ridiculous he never told Ahmed about it.

Ahmed kept calling to find out what was going on, but Bigdog Mark did not return the calls because he realized the time for filing suit had run out.

Finally Bigdog Mark filed suit and made a lot of discovery demands to make Ahmed happy. ABC Hospital hired lawyers, answered and provided a lot of documents. They moved to dismiss on the grounds the statute had run. The court dismissed the suit and Bigdog told Ahmed the judge just didn't like people from his dry part of the world.

What, if any, trouble might Bigdog be with --

1. The State Bar of California?
2. Ahmed?
3. ABC Hospital?

Practice Question 27-38: Improper Acceptance, Conflict of Interest

Two cars collided at an intersection. Plaintiff Pete Wilson's car was struck by a red truck that sped away. Pete believed the other driver was Tricky Dick Nixon.

Pete had his friend Wally Mondale take a picture of Tricky Dick's truck the next day. Wally gave the film to the police and told them it was taken at the scene of the accident as the truck sped away. The police developed the film and could read the license plates. They determined the truck belonged to defendant Tricky Dick Nixon.

A month after the accident Pete hired "Larry the Lawyer". Pete confided to Larry that the pictures taken by Wally were fake. Larry assured Pete he would keep that secret so he could pursue a big recovery from Dick.

Larry did not tell Pete that he had also witnessed the accident that fateful day and that he did not think the other vehicle was Dick's.

Larry did not keep Pete informed about the progress of the case.

Two years later Larry told Pete that he had been too busy to pursue recovery or file suit.

Larry did not tell Pete that the statute of limitations barred any action after one year.

Pete was furious at Larry for the delays. Larry felt he better do something so he filed a complaint in State court alleging that Dick was negligent. Larry knew Pete's case was barred by the statute of limitations, but he figured it would appease Pete.

Tricky Dick hired Atlee the Attorney. Atlee did not tell Dick that he and Larry were old chums from McDuff School of Law.

Larry told Atlee the photos were fake. Atlee and Larry then reached a secret agreement that Larry would urge Pete to drop his action because Wally's pictures were fake. In return Atlee agreed to urge Dick not to file a counter claim on the ground the statute of limitations was unclear.

Discuss the rights of –

Pete v. Larry

Dick v. Larry

Dick v. Atlee

Practice Question 27-39: Limitation of Liability, Incompetence

Jim was contacted by Marty with a complaint about her landlord. She complained he had begun an extensive remodeling project that was constantly disrupting her water, gas and electrical service and exposing her to excessive noise, dust and fumes. Jim visited the apartment and when he got there the water had been turned off.

Jim wrote to other tenants in the apartments asking if they had experienced the same problems Marty had reported. Jim felt that this might turn up some corroborating witnesses to support Marty's claims. He also realized this might turn up some additional plaintiffs that would make this a bigger case.

Three other tenants called Jim saying they also wanted to sue the landlord. Jim agreed to represent Marty and the three other tenants on a contingency basis. He had each client sign a fee agreement that indemnified him from possible malpractice claims.

Jim contacted the landlord on behalf of his clients and he denied that there was any construction going on.

Jim had never handled a case like this one and knew nothing about the law in this area. Jim read up on landlord-tenant law. Then he filed suit on the behalf of the tenants.

Jim paid the filing fees himself with an understanding he would be reimbursed for costs out of any resulting settlement.

The landlord's attorney, George, called Jim and told him he had violated ethical rules by sending out letters improperly soliciting clients and taking a case where he was a potential witness. He also said that Jim's complaint slandered his client. George threatened that if Jim did not drop the suit immediately his client would sue both Marty and Jim for defamation and he would also "report him to the State Bar" for ethics violations.

Discuss Jim's ethical violations.

Discuss George's ethical violations?

Practice Question 27-40: Failure to Communicate, Inadequate Representation

Frank ran advertisements on late-night TV that showed him handsomely sitting in a stately office before a bank of impressive law books, but it was all just a prop. In his ads he said he had never lost a case, and that was true because he never took any case to trial. He just lived off the retainers and dumped the cases he could not settle.

Maria came to Frank to get a divorce from her wealthy but abusive husband Paco. She asked how much he charged and mentioned she had previously been injured in an auto accident where the attorney charged 40 percent. Sensing a windfall, Frank told her that many attorneys charged 30 or even 40 percent, but that he would handle her divorce for only 10% of the property settlement.

Frank filed the divorce papers but then turned to other matters. Maria would often call him, but he would reject the calls and just bark at the receptionist, "Voice mail!" Maria was frustrated, and Paco's attorney, Murphy, was frustrated too, because Frank was doing nothing and her settlement offers never even received a response.

Eventually the court served Frank with an Order to Show Cause why the case was not going forward. When he failed to respond the court sanctioned him.

Discuss Frank's ethical violations.

Chapter 28: The Will Answer Formats

Applicable Law. The issues presented in this section are likely to arise in every law school class on WILLS and every Bar Exam with questions in this area of law. The essay approach presented here is generally applicable to every State. However the California Bar Exam tests specifically on the provisions of the **California Probate Code** and California case law. So that is the law reflected here. If you are not studying California law you will need to modify the rules of law to match your situation as appropriate. Even though your State may follow a different rule of law, the issues to be analyzed are always the same no matter what State you are in.

> **For example**, the validity of a Will is always the first issue to consider (but not necessarily to write about). In California a Will is not valid if it is not signed. Your State may allow an unsigned Will. But whether you are in California or elsewhere you should always consider discussing whether a Will is valid or not. If this is your issue, you should state the rule for your jurisdiction, apply the facts to the rule and conclude whether the Will was valid or not.

Mnemonics (that are often silly and may or may not be useful)**:**

> **WIDOWS COPE:** Will must be **W**ritten with **I**ntent to give away at **D**eath, **O**fficially **W**itnessed and **S**igned. "Officially" refers to the **CO**nscious **P**resenc**E** Doctrine.
>
> **If you don't have enough money, you might have to live in A BASEMENT:** ABATEMENT occurs if the estate doesn't have enough money to make all stated gifts.
>
> **STRIPTEASE DEMI (Moore) GENERATED REAL INTEREST:** Gifts by order of priority (reverse abatement) are **S**pecific, **D**emonstrative, **G**eneral, **R**esidual, **I**ntestate.
>
> **I got the EXXON STATION free of debt:** EXONERATION means a gift is given free from all mortgage debts.
>
> **My DIM SUM is gone!:** ADEMPTION means a specific gift lapses if missing from the estate.
>
> **DDRR:** Doctrine of Dependent Relative Revocation.

COMMON WILLS ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Is the* Will *VALID?* **[Always consider this issue first if there is any Will at all unless the facts expressly state the Will is valid. Abbreviate as appropriate.]**

   Under the CALIFORNIA PROBATE CODE a Will is only valid at the death of the testator, and to be valid, Wills must be SIGNED by the testator and show TESTIMENTARY INTENT, the intent to distribute property at death. A SIGNED Will is PRESUMED VALID.

Wills can be either holographic or attested. A HOLOGRAPHIC Will is valid if SUBSTANTIAL portions are in the HANDWRITING of the testator. An ATTESTED WILL may be signed by the testator's mark, and witnessed by two disinterested witnesses who were present when the testator signed or acknowledged the Will. **[Important!]**

[WIDOWS = written, intent, death, officially witnessed, signed.]

Under the CONSCIOUS PRESENCE DOCTRINE it is not necessary that the witnesses physically see the testator sign the Will as long as they were present and consciously aware of the testator's signing or acknowledging the Will.

[COPE = Conscious Presence Doctrine]

FRAUD IS PRESUMED if one of the witnesses has a financial interest in the Will. It does not invalidate the entire Will, but the interested witness gets only the smaller of an intestate share of the estate or the gift stated in the Will.

A FOREIGN WILL, one that was not executed in California, will be valid in California if it would be valid in the State or country where it was executed, where the testator resided at the time of execution, or where the testator resided at the time of death.

Here…because…Therefore…

2. *What documents COMPOSE THE WILL?*

Under the INTEGRATION DOCTRINE separate papers may compose a Will where they are CONNECTED PHYSICALLY, SEQUENTIALLY or by CONTINUITY OF THOUGHT.

Further a Will may INCORPORATE OTHER DOCUMENTS BY REFERENCE if they EXIST at the time the Will is executed and are clearly IDENTIFIED.

Further, a subsequent CODICIL may incorporate a prior Will, but only if the codicil is signed, witnessed (or handwritten as a holographic codicil) and evidences testamentary intent so that it would STAND ALONE as a VALID WILL. If a codicil incorporates a prior Will, it REPUBLISHES the prior Will.

Here…because…Therefore…

3. *How will a Will be INTERPRETED?*

Under the CALIFORNIA RULES OF CONSTRUCTION a Will is interpreted according to the EXPRESS INTENT of the testator based on the PLAIN MEANING of the words of the instrument. The court will try to AVOID INTESTACY and GIVE EFFECT TO ALL STATED TERMS.

If a Will shows INTENT TO GIVE, extrinsic evidence may be introduced to clarify WHAT GIFT was intended and WHO the intended recipient was.

Here…because…Therefore…

4. *Is the Will FATALLY AMBIGUOUS?*

   Under probate law a Will must clearly IDENTIFY PROPERTY or VALUE to be given, and must clearly show an INTENT TO GIVE.

   Gifts to POUR OVER TRUSTS, gifts conditioned on future events, and gifts of unstated amounts, such as the balance of a bank account, will not fail for uncertainty where the trust, future event or asset has INDEPENDENT LEGAL SIGNIFICANCE. But gifts of unstated amounts based on descriptions that have no independent legal significance, such as the amount hidden in a secret location, are fatally ambiguous.

   EXTRINSIC EVIDENCE may be used to determine the identity of the GRANTEE of a gift or the THING meant to be given.

   Here…because…Therefore…

5. *Will the court rewrite the Will because of a MISTAKE?*

   Under probate law, MISTAKES OF OMISSION, the mistake of failing to state a gift in a Will, cannot be corrected. MISTAKES OF DESCRIPTION, the mistake of describing a gift or the recipient incorrectly, can be corrected by rewriting the Will, but the mistake must be apparent on the FACE OF THE WILL. EXTRINSIC EVIDENCE can be used to make clear the TESTATOR'S INTENT.

   Here…because…Therefore…

6. *What is the CHARACTER OF A GIFT?*

   Under probate law the CHARACTER of a gift is determined by the designation of its SOURCE in the Will.

   A SPECIFIC GIFT is a gift of specifically identifiable property. A GENERAL GIFT is a gift of property that is not 'fungible' and not specifically identifiable such as a gift of money. A Will may designate that a general gift be distributed in periodic payments as an "annuity". A DEMONSTRATIVE GIFT is a general gift that specifies a fund or source from which the amount should be raised. A RESIDUAL GIFT is a gift of the immeasurable remainder of the estate after all specific, demonstrative and general gifts have been distributed. And an INTESTATE GIFT is any remaining property of the estate after all other gifts have been distributed. It is allocated by the rules of intestacy.

   Here…because…Therefore…

7. *What if the ESTATE DOESN'T HAVE ENOUGH MONEY?*

Under probate law there is an ABATEMENT where the estate has insufficient funds to make all of the stated gifts. Gifts are allocated from an estate to grantees in the order of 1) SPECIFIC, 2) DEMONSTRATIVE, 3) GENERAL, 4) RESIDUAL and 5) INTESTATE. [California law also gives preference to relatives of the testator over non-relatives in allocating specific, general and demonstrative gifts. Probate Code § 21402.]

[If you don't have enough money, you might have to live in A BASEMENT.]

[STRIPTEASE DEMI (Moore) GENERATED REAL INTEREST: Specific, Demonstrative, General, Residual, Intestate.]

Here…because…Therefore…

8. *Is a SPECIFIC DEBT given FREE OF DEBT?*

Under the COMMON LAW the gift of an asset was with EXONERATION -- made free of all debts. MODERNLY SPECIFIC GIFTS are made SUBJECT TO existing liens and debts unless there is an EXPRESS showing of CONTRARY INTENT. A statement of general intent is insufficient.

[I got an EXXON STATION free of debt.]

Here…because…Therefore…

9. *What if a SPECIFIC GIFT is GONE FROM ESTATE?*

Under the MAJORITY VIEW a specific gift lapses by ADEMPTION if the named asset is no longer in the estate in its stated form at the time of death. Under CALIFORNIA'S liberal view a specific gift is still valid, even if the gift is gone from the estate, as long as the value of the stated form of the gift CAN BE TRACED to a different form and evidence supports a finding that the testator intended for the donee to receive those proceeds. [116]

[My DIM SUM is gone! (I know these suggestions are really lame but I had trouble remembering abatement, ademption and exoneration. You do what you have to do). "Ademption by satisfaction" means that a gift provided for in a Will or Trust is no longer in the estate because the grantor gave the same property to the beneficiary during life. Under PC §21135 the gift is deemed to have been satisfied during life and the beneficiary no longer has any right to the gift at death.]

Here…because…Therefore…

[116] Statutes provide that specific gifts lost or converted by actions of third parties give the donee a right to the equivalent value of the gift. But if the testator causes an asset to be sold, case law holds that the gift lapses unless evidence shows the testator intended for the donee to receive the proceeds of the sale.

10. *Does the stated gift LAPSE when the GRANTEE DIES BEFORE THE TESTATOR?*

    Under probate law a gift that lapses reverts to the residual estate of the grantor. Under the CALIFORNIA ANTI-LAPSE STATUTE [Probate Code §2110] *a gift to a person who DIES BEFORE THE TESTATOR will not lapse if it is 1) to BLOOD KIN, a WIFE or FORMER WIFE, and 2) NO ALTERNATIVE BENEFICIARY is specified and 3) NO CLEAR SURVIVAL REQUIREMENT is stated in the Will. Where the anti-lapse statute is applied, the gift goes to the ISSUE of the deceased grantee.*

    Here…because…Therefore…

    [This is a frequently tested issue.]

11. *Was the Will EFFECTIVELY REVOKED?*

    Under probate law a Will can be revoked ALL OR IN PART by an EXPRESS DECLARATION, by a PHYSICAL ACT of destruction, by OPERATION OF LAW where there is a divorce, or by IMPLICATION where the original Will disappears while in the possession of the testator.

    If a Will is revoked by operation of law because of a divorce, it will be automatically revived by operation of law if the same couple remarries.

    Here…because…Therefore…

12. *Can the revoked Will be REVIVED by operation of the DOCTRINE OF DEPENDENT RELATIVE REVOCATION **[DDRR]**?*

    Under the doctrine of DEPENDENT RELATIVE REVOCATION, a SAVING DOCTRINE designed to avoid intestacy, an EXPRESS REVOCATION that does not physically destroy a Will is reversed if the revocation was INTENDED to take effect only if a subsequent Will was valid. EXTRINSIC EVIDENCE may be introduced to prove the testator's intent.

    Here…because…Therefore…

    [This is a frequently tested issue.]

13. *Is a JOINT WILL binding after the death of a spouse?*

    Under probate law a Will that expresses a joint agreement between husband and wife that a no new Will can be executed after the death of the first spouse with respect to distribution of the assets that exist during the marriage is a valid contract that cannot be revoked after the death of the first spouse.

    However, it does not reduce the statutory rights of a second spouse (of the surviving spouse) to an ELECTIVE SHARE of the surviving spouse's estate, and it does not prohibit

the surviving spouse from executing a separate Will for distribution of assets acquired after the death of the first spouse.

Here…because…Therefore…

14. *Can the Will be CHALLENGED on the basis of INCOMPETENCE?*

Under probate law a Will is invalid if the testator is of UNSOUND MIND such that he COULD NOT UNDERSTAND the TESTAMENTARY ACT, his PROPERTY, his RELATIVES, or he suffers from a DELUSION.

Here…because…Therefore…

15. *Can the Will be CHALLENGED on the basis of UNDUE INFLUENCE?*

Under probate law a Will is invalid if clear or strong evidence shows the testator's FREE WILL WAS OVERCOME. Undue influence is PRESUMED where an ATTORNEY or someone with a CONFIDENTIAL RELATIONSHIP helps draft the Will and then benefits.

In CALIFORNIA there is no presumption of fraud in such cases if an independent attorney provides a CERTIFICATE OF INDEPENDENT REVIEW.

If undue influence is shown the Will remains valid but the gift to the party exerting undue influence is limited to the smaller of an intestate share or the gift stated in the Will.

Here…because…Therefore…

16. *Can the Will be CHALLENGED on the basis of FRAUD?*

Under probate law a Will is invalid if FRAUD is shown based on a 1) KNOWING 2) FALSE STATEMENT of 3) MATERIAL FACT, made with an 4) INTENT TO DECEIVE and which does cause the testator to 5) ACT IN RELIANCE. **[Important!]**

In CALIFORNIA fraud is PRESUMED if one of the two witnesses to the Will (and there are only two witnesses) also receives a gift under a Will. There is no presumption of fraud if an independent attorney provides a CERTIFICATE OF INDEPENDENT REVIEW.

If fraud is shown the Will remains valid but the gift to the party exerting undue influence is limited to the smaller of an intestate share or the gift stated in the Will.

Here…because…Therefore…

17. *What kind of POWER OF APPOINTMENT was granted?* **[Abbreviate as appropriate. Focus on what it was, not on what it wasn't!]**

Under probate law a POWER OF APPOINTMENT is authorization by a "donor" allowing another person, the "donee", to distribute the property of the donor to one or more "appointees".

A power of appointment may be GENERAL or SPECIAL. A GENERAL power of appointment authorizes the donee to distribute the donor's property to anyone, including the donee. A SPECIAL power of appointment limits the donee to distributing the donor's property to a specific class of "permissible appointees".

A power of appointment may also be IMPERATIVE or DISCRETIONARY. AN IMPERATIVE power of appointment requires the donee to distribute the property. A DISCRETIONARY power of appointment gives the donee discretion as to whether to distribute the property of the donor or not.

A TESTAMENTARY power of appointment is one that authorizes the donee to only distribute the property of the donor through the Will of the donee upon his/her death, preventing the donee from distributing the property during his/her own lifetime.

Here there was a grant of a power of appointment because… And the power of appointment was SPECIAL (GENERAL) because…Further, the power of appointment was IMPERATIVE (DISCRETIONARY) because … And, it was (not) a TESTAMENTARY power of appointment because…

Therefore…

18. *Was the POWER OF APPOINTMENT properly exercised?* **[Abbreviate as appropriate.]**

Under the MAJORITY VIEW the effective exercise of a power of appointment is implied any time the donee distributes "all" of his/her own estate by a Will, even if the power of appointment granted to him/her by the donor is not expressly mentioned in the Will, unless the original power of appointment required an express statement of intent by the donee.

In the MINORITY AND CALIFORNIA VIEW a donee does not effectively exercise a power of appointment via his/her own Will, even if the Will says "all" of the estate is being given, unless the donee makes an express declaration of intent concerning exercise of the power of appointment in his/her Will.

Further, exercise of a power of appointment pursuant to a CONTRACT to exercise the power in certain manner is only valid if the power to exercise exists at the time the contract is executed.

In California, if a donee fails to effectively exercise a power of appointment, the donor's property is distributed as directed by the donor or by the donee or to the takers in default named by the donor, if any. Otherwise, the property of the donor is distributed as follows:

> *If the power of appointment is IMPERATIVE the property generally goes equally TO THE SPECIFIC CLASS OF APPOINTEES designated by the donor.*
>
> *If the power of appointment is DISCRETIONARY the property generally reverts TO THE ESTATE OF THE DONOR.*

But if the power of appointment is DISCRETIONARY and GENERAL and the DONEE INEFFECTIVELY TRIED TO TAKE THE PROPERTY HIMSELF the property generally reverts TO THE ESTATE OF THE DONEE.

Here…because…Therefore…

19. *How is a CLASS GIFT distributed?*

Under probate law a CLASS GIFT is a gift of an AGGREGATE SUM to a BODY of persons UNCERTAIN IN NUMBER at the time of the gift that all get EQUAL SHARES, each share DEPENDENT ON THE ULTIMATE NUMBER OF PEOPLE in the class.

The CLASS CLOSES on a CURRENT GIFT at the time of the testator's death. Classes for FUTURE GIFTS USUALLY close when the gift TAKES EFFECT IN BENEFICIAL ENJOYMENT FOR THE FIRST CLASS MEMBER. But under common law classes for FUTURE GIFTS to EMPTY CLASSES do not close until the class CLOSES NATURALLY.

Here…because…Therefore…

20. *Is a person's right to a class gift VESTED?*

Under the RULES OF CONSTRUCTION it is presumed a testamentary gift vests at the time of the testator's death. The law favors the INTENT of the testator, BLOOD RELATIVES, and EARLY VESTING.

Here…because…Therefore…

21. *Did a beneficiary meet the SURVIVAL requirement?*

Under common law a survival requirement requires the donee of a gift to survive after the death of a stated measuring life. Under the CALIFORNIA PROBATE CODE, which applies both to both intestate and testate inheritance, an heir must survive for 120 hours (5 days) or more after the decedent.

Here…because…Therefore…

22. *Is this a PRETERMITTED CHILD?*

A pretermitted (omitted) child is a child of a decedent that is not provided for in the decedent's Will (or Trust). Under CALIFORNIA PROBATE CODE 21620 et seq., pretermitted children that were a) born or adopted after the execution of a Will (or Trust), b) unknown to the testator, or c) mistakenly believed to be dead by the testator at execution of the instrument have a right to an intestate share of the decedent's estate UNLESS --

1) Omission from the Will (or Trust) was intentional as evidenced by the terms of the instrument, or
2) All or most of the decedent's estate was given to the other parent of the omitted child, or

3) The decedent provided for the child by transfers made outside of the instrument.

Here…because…Therefore…

[Important! Especially be aware of category 2) above. This has been heavily tested.]

23. *Is this an OMITTED SPOUSE?*

Omitted (pretermitted) spouses are surviving spouses of decedents that married the decedents after execution of Wills or Trusts and are not provided for in the decedents' Wills (or Trusts). Under CALIFORNIA PROBATE CODE 21610 et seq., omitted spouses are entitled to ONE-HALF (1/2) of the community and quasi-community property and an INTESTATE SHARE of the decedent's separate property UNLESS --

1) Omission from the Will or Trust was intentional as evidenced by the terms of the instrument, or
2) The surviving spouses waived their rights to the decedent spouses' estates in valid instruments, or
3) The decedent provided for the surviving spouse by transfers made outside of the instrument.

Here…because…Therefore…

[Important! This is not an "intestate share" of the decedent spouses' estates because the surviving (omitted) spouse only gets HALF of the community property instead of all of it as would be the case when a spouse dies intestate. Instead the surviving spouses only get to keep the half of community property belonging to them plus an intestate share of the deceased spouses' separate property.]

24. *What is the person's RELATIONSHIP for purposes of intestate inheritance?*

Under the CALIFORNIA PROBATE CODE, a HALF-BLOOD child is treated as a whole-blood child, and NON-MARITAL children are treated as marital children. ADOPTED children are treated the same as natural children of the adopting parents in most cases and have no intestate claim against the estates of their biological parents.

Here…because…Therefore…

25. *Is the IN TERROREM clause valid?*

Under the CALIFORNIA PROBATE CODE, an IN TERROREM clause which threatens to disinherit any party that challenges a Will is valid, but NARROWLY CONSTRUED.

Here…because…Therefore…

26. *In an INTESTATE SITUATION what COMMUNITY PROPERTY does a SURVIVING SPOUSE get?*

Under the CALIFORNIA PROBATE CODE a SURVIVING SPOUSE of an intestate deceased gets ALL COMMUNITY PROPERTY and a share of the deceased spouses separate property.

Here…because…Therefore…

> **[The counter-part to this in States that do not use community property law is the 'elective share' or statutory share provisions that guarantee a surviving spouse a minimum portion of the deceased spouse's estate.]**

27. *In an INTESTATE SITUATION what SHARE OF SEPARATE PROPERTY does a SURVIVING SPOUSE get?* **[Abbreviate as appropriate.]**

Under the CALIFORNIA PROBATE CODE the surviving spouse of an intestate deceased gets ALL of the separate property if the deceased has NO SURVIVING ISSUE, PARENTS or ISSUE OF PARENTS.

The surviving spouse gets ONE HALF of the separate property if the deceased is survived by ONE CHILD OR ISSUE OF ONE CHILD, ANY PARENT or ANY ISSUE OF PARENTS.

The surviving spouse gets ONE THIRD of the separate property if the deceased is survived by TWO OR MORE CHILDREN OR ISSUE OF TWO OR MORE CHILDREN. **[Important!]**

Here…because…Therefore…

> **[Here again the counter-part to this in States that do not use community property law is the 'elective share' or statutory share provisions that guarantee a surviving spouse a minimum portion of the deceased spouse's estate.]**

28. *In an INTESTATE SITUATION how is the SEPARATE PROPERTY DIVIDED among the relatives other than the surviving spouse?*

Under the CALIFORNIA PROBATE CODE the separate property not given to the surviving spouse is divided into as many shares as there are living members and dead members with living issue in the nearest generation with any living members. By statute, property goes first to issue of the decedent if there are any. If there are no issue of the decedent the property goes to the parents of the decedent, if alive, and otherwise to the issue of the parents, if any. If there are no living parents or issue of parents the property goes to the grandparents of the decedent, if alive, and if not to the issue of the grandparents, if any. **[Important! Direction of distribution is DOWN, UP, DOWN, UP,**

DOWN -- <u>Down</u> to issue, <u>up</u> to parents, <u>down</u> to issue of parents, <u>up</u> to grandparents, <u>down</u> to issue of grandparents.]

Here…because…Therefore…

[The distribution scheme above is very common across the States. And if there simply are no kin found at all the property of the decedent "escheats" to the State.

The California Probate Code has a peculiarity if there are no grandparents and no issue of grandparents. Before distribution to other next of kin (who would have to be issue of great-grandparents or even more remotely related) California law provides for distribution to <u>issue of predeceased spouses</u>. This is never going to be tested on a bar or law school exam.]

29. *<u>Can an heir DISCLAIM AN INTEREST in an estate?</u>*

Under CALIFORNIA PROBATE CODE §275 et seq. an heir, either testate or intestate, or other beneficiary of a testamentary transfer can disclaim an interest in an estate, in whole or part, by a <u>written disclaimer</u> within a <u>reasonable time after becoming aware of the interest</u>, and the disclaimer is binding. The effect of the disclaimer is that the gift that would have gone to the beneficiary is distributed as if the beneficiary predeceased the testator.

Here…because…Therefore…

[This is unlikely to be tested, but almost all States have similar provisions. The main use of disclaimers is to prevent inheritances and trust distributions from damaging the financial situation of beneficiaries that are too old or too disabled to actually receive any real benefit from the gift. Often the gift would just cause them injury by loss of their Medicaid and/or SSI benefits. By disclaiming the gift automatically is redistributed to the issue of the disclaiming beneficiary (if any) or to other beneficiaries.]

30. *<u>ISSUE – Was an amount received by an heir an ADVANCEMENT?</u>*

Under California Probate Code sections 6409 and 21145 property given to a future heir or beneficiary of a grantor by the grantor during life is presumed to be a GIFT and NOT AN ADVANCEMENT of the share of the grantor's estate the beneficiary would otherwise have inherited at the death of the grantor UNLESS:

1) the <u>decedent declared</u> the conveyance to be an advancement of the inheritance in a <u>contemporaneous writing</u>, or
2) the <u>recipient acknowledged in writing</u> that the conveyance was an advancement of his future inheritance

OR - if a grantor's Will or Trust provides for a gift to a future beneficiary at the death of the grantor, a gift during life to that same beneficiary is deemed to be an ADVANCEMENT if -

> *3) the decedent's Will or Trust provided for the deduction of lifetime gifts from shares beneficiaries would otherwise receive, or*
> *4) specific property given to a beneficiary during life is the same specific gift promised to the beneficiary in the decedent's Will or Trust.*

If a future heir or beneficiary dies before the grantor after receiving an advancement the advancement is treated as full or partial satisfaction of gifts provided for in the deceased grantor's Will or Trust and distributions to the issue of the deceased heir or beneficiary because of the anti-lapse statute, if any, will be reduced accordingly. But intestate distributions will not be reduced unless that was expressly provided for in the declaration of the deceased grantor or the acknowledgement of the deceased heir. [PC §6409] **[Important!]**

Here…because…Therefore…

> **[For Example: T executes a Will that gives B $100,000 and one of T's Ford automobiles from T's estate at his death. But before he dies T gives B $10,000 and one of his Ford automobiles to B. If T does not declare the gift of money to be an advancement in a contemporary writing, B does not acknowledge it to be an advancement, and T's Will does not provide for deduction of lifetime gifts it will NOT be deemed to be an advancement. But if B dies before T, the gift will lapse, unless the anti-lapse statute keeps the gift from lapsing (e.g. B might be blood kin of T). If the gift does not lapse, and it is not an advancement, the gift of money to B will be distributed to B's issue. But the gift of the Ford automobile will be deemed to be an advancement because T gave B the same specific property he planned to give B at his death. That gift was an advancement and it also constituted "ademption by satisfaction".]**

31. What are DOWER, CURTESY and the STATUTORY SHARE rights of a surviving spouse?

Under the COMMON LAW a surviving spouse was protected by the system of DOWER and CURTESY. This meant that a surviving spouse held an interest, often one-third or one-half, in real property owned by the deceased spouse during the marriage, even if it has been sold or devised by the deceased spouse at or prior to death.

MODERNLY in the States that do not use the community property approach the surviving spouse is allocated either an ELECTIVE STATUTORY SHARE or a choice between the elective share and the amount allocated in the Will of the deceased spouse.

Here…because…Therefore…

> **[Generally a surviving spouse must choose to either take what the deceased spouse has provided for them by Will or else chose to take the statutory share and abandon the gift provided in the Will.]**

32. Can a surviving spouse RECOVER TRANSFERRED ASSETS?

Under CALIFORNIA LAW each spouse may has the right to buy community personal property or sell community personal property without the consent of the other spouse. But community personal property cannot be given away or sold for less than fair market value without the consent of the other spouse. And community real property cannot be gifted or sold, even for fair market value, without the written consent of the other spouse.

If a deceased spouse has given away community PERSONAL property without consent of the surviving spouse only one-half of it can be recovered by the surviving spouse after the death of the first spouse (Mazman v. Brown (1936) 12 Cal.App.2d 272, Estate of Wilson (1986) 183 Cal.App.3d 67.).

If a deceased spouse has given away or sold community REAL property without the surviving spouses' consent the transaction can be voided by the surviving spouse, but when community real property is sold to a bone fide purchaser for value without notice of the marriage (BFPV) the transaction can only be voided within one year after the sale.

Other States are split on this issue. SOME allow recovery of assets transferred by the deceased spouse only if a FRAUDULENT INTENT can be shown. OTHER States allow recovery of assets only if they were RECENT TRANSFERS.

Here…because…Therefore…

Practice Question 28-41: Integration

After Terri died three separate pieces of paper were found in her Bible. One piece of paper was typed on a typewriter. It was dated 1/1/90 and signed by Terri. It said, "Being of sound mind and body I hereby bequeath as my last Will and testament all of my property to the people and in the manner as stated in the attached list."

Nothing was attached to the first piece of paper, but there was a second unsigned piece of paper dated 1/1/95. It was in Terri's handwriting and said,

> "I don't want my worthless son, Sam, to get anything. So to my friend Tom all of the money in my kitchen drawer. To my friend Harry, the balance of my checking account at Union Bank. "

The third piece of paper in the Bible was handwritten and signed by Terri. It was undated and it said, "In addition to the provisions of my Will dated 1/1/90 and the codicil dated 1/1/95 I also want to give my sister Ruby my prize begonias.

Terri's son, Sam, challenges these documents on the grounds that three separate pieces of paper do not form a complete and valid Will.

Further, Sam claims that the first piece did not properly incorporate the second piece by reference, and that the second piece cannot stand alone because it is both unsigned and fatally vague as to the gifts to Tom and Harry because no amounts were stated.

Finally, Sam argues that the third piece of paper fails to create a Will because it is undated and there is no way to know when it was written.

Discuss.

Practice Question 28-42: Advancements, Ademption, Disclaimer, Exoneration

Tom's wrote a valid Will dated 1/1/95 making the following gifts:

> "To my son Allen, $10,000. To my son Bill my 100 shares of Yahoo! stock. To my son Cliff, Whiteacre. To my friend Don, $1,000,000. All of the rest of my estate should be distributed to my sons Allen, Bill and Cliff in a manner as might provide them each an equal benefit under the Will in its entirety."

At the time this Will was drafted, Whiteacre was worth $500,000. Tom also owned 100 shares of Compaq worth $10,000, and the 100 shares of Yahoo! were worth $10,000.

Don was financially distressed and approached Tom for a loan. Tom said, "I was going to leave you money in my Will, but I better give it to you now when you really need it."

So Don wrote the following: "I, Don, hereby acknowledge a gift of $1,000,000 from Tom as an advancement in fully on my interest in his estate under his Will dated 1/1/95."

Don died later on 1/1/98 leaving his entire estate to his daughter Diane.

At Tom's death on 1/1/99 his estate consisted of Whiteacre and shares in Compaq worth $1,000,000.

The 100 shares of Yahoo! mentioned in the Will, adjusted for splits, would have been worth $10,000,000, but no Yahoo! stock was found in Tom's account. Tom had sold the Yahoo! stock in 1996 for $10,000, and the proceeds had long been spent.

Further, Whiteacre now was worth $1,000,000, but it carried a mortgage of $900,000.

Cliff got sued for sexual harassment, and the jury awarded the plaintiff $10,000,000 in punitives. Cliff has one child, Charles. Cliff sent Allen a letter disclaiming his interest in the estate.

Bill claims he is owed $10 million. Allen says Cliff and Charles should get nothing. Charles claims he should get Whiteacre free from debt. Diana claims she has $1 million coming as Don's heir.

This occurred in a State where the anti-lapse, disclaimer and ademption statutes are similar to California's.

How will Tom's estate be distributed?

Chapter 29: The Trust Answer Formats

Applicable Law. The issues presented in this section are likely to arise in every law school class on TRUSTS and every Bar Exam with questions in this area of law. The essay approach presented here is generally applicable to every State. However, some specific rules reflect the provisions of the **California Probate Code** and California case law. If you are not studying California law, insert your own STATE name and you will need to modify the rules of law to match your situation as appropriate. Even though your State may follow a different rule of law, the issues to be analyzed are always the same no matter what State you are in.

> **For example**, California presumes all trusts are revocable unless otherwise stated in the trust instrument. In contrast some States presume all trusts are irrevocable unless otherwise stated. If a question states that the trust instrument "did not state whether the trust was revocable" you should discuss whether the law favors or disfavors revocability in your State.

COMMON TRUSTS ISSUES AND ANSWERS:

Always follow the CALL of the question. But for a general CALL like "Discuss" follow the following order:

1. *Was the PRIVATE TRUST VALID?* [Often the first issue to address.]

   Under the probate code a private trust is a legal entity in which a TRUSTEE holds legal title to PROPERTY for an IDENTIFIABLE BENEFICIARY who holds equitable title.

   A valid private trust must be created by 1) EXPRESS INTENT, 2) have an identifiable BENEFICIARY, 3) PROPERTY, and 4) a PURPOSE. No private trust fails for lack of a trustee.

   Private trusts only fail if they have no identifiable beneficiary, no apparent purpose or no property. If a private trust is invalid for lack of a beneficiary or purpose, the property reverts to the estate of the Settlor (Grantor). **[Important!]**

   Here…because…Therefore…

2. *Can property of a DISCRETIONARY TRUST be GARNISHED OR ATTACHED?*

   Under the probate code, a DISCRETIONARY TRUST is one where the trustee has DISCRETION to choose WHEN, HOW MUCH and WHICH of one or more potential beneficiaries to pay. The assets of a discretionary trust can be GARNISHED, but the trustee CANNOT BE FORCED to make distributions to beneficiaries.

   Here…because…Therefore…

3. *Can property of a SUPPORT TRUST be ATTACHED?*

   Under the probate code, a SUPPORT TRUST is one that makes the trustee responsible for the SUPPORT or EDUCATION of the beneficiaries. The trustee has a duty to INFORM and ACT to support the beneficiary, but NO LUXURIES can be paid for. A support trust CANNOT BE GARNISHED normally.

   Here…because…Therefore…

4. *Can a SPENDTHRIFT TRUST be ATTACHED?*

   Under the probate code, a SPENDTHRIFT TRUST is one that STATES in the trust INSTRUMENT that the interest of the beneficiary cannot be assigned, anticipated or seized by legal process. A spendthrift trust cannot be self-settled. The trustee of a spendthrift trust CAN PAY FOR LUXURIES and the trust CANNOT BE GARNISHED normally.

   Here…because…Therefore…

5. *When can SUPPORT and SPENDTHRIFT TRUSTS be ATTACHED?*

   Under the probate code, the court may force the trustee of a SPENDTHRIFT or SUPPORT trust to pay 1) CHILD AND SPOUSE SUPPORT, 2) FELONY RESTITUTION PAYMENTS, 3) PUBLIC ASSISTANCE, and 4) where EXCESSIVE AMOUNTS are held in trust and attachment is in the interest of EQUITY.

   Here…because…Therefore…

6. *When is a trust REVOCABLE?*

   Under the CALIFORNIA probate code, a trust is PRESUMED REVOCABLE unless the trust instrument states contrary intent. In some States trusts are presumed to be irrevocable unless the trust instrument states it is revocable.

   Revocation must be done exactly as specified in the instrument, if there is a provision, otherwise by the Settlor delivering a writing to the trustee during the life of the revoking Settlor.

   Here…because…Therefore…

7. *When can a trust be MODIFIED?*

   Under the probate code, a REVOCABLE trust can always be MODIFIED by the Settlor.

   An IRREVOCABLE TRUST can be modified only at the request of the TRUSTEE or a BENEFICIARY.

   An IRREVOCABLE TRUST can be modified by agreement of ALL BENEFICIARIES AND THE SETTLOR or by the agreement of SOME BENEFICIARIES AND THE SETTLOR if the modification would not substantially impair the rights of the remaining beneficiaries.

AN IRREVOCABLE TRUST that is NOT A SUPPORT OR SPENDTHRIFT TRUST can be modified by agreement of THE BENEFICIARIES ALONE if the trust is no longer necessary for its original purpose.

Here…because…Therefore…

8. *What TERMINATES a trust?*

Under the probate code, a trust terminates as SPECIFIED in the trust instrument. A revocable trust may also be REVOKED by the Settlor. Under the MERGER RULE a trust also terminates when the SOLE TRUSTEE IS THE SOLE BENEFICIARY. A trust also terminates any other time it has NO PURPOSE or by statute when it has TOO LITTLE PROPERTY to be practical.

Here…because…Therefore…

9. *Is the CHARITABLE TRUST VALID?*

Under the probate code, a CHARITABLE TRUST is a trust established for CHARITABLE PURPOSES, with UNASCERTAINABLE BENEFICIARIES and it is monitored by the ATTORNEY GENERAL.

Under the CY PRES DOCTRINE a GENERAL PURPOSE charitable trust may be REFORMED when the original charitable purpose becomes impossible.

The CY PRES DOCTRINE does not apply to a SPECIFIC PURPOSE charitable trust and the trust property reverts to the Settlor or to the Settlor's estate if events leave a specific purpose trust without purpose.

Here…because…Therefore…

10. *What are the DUTIES OF THE TRUSTEE?*

Under the probate code, a trustees DUTY is to obey the trust INSTRUMENT and the PROBATE CODE. Further, the trustee has a DUTY OF LOYALTY and a DUTY OF DUE CARE.

The DUTY OF LOYALTY is to administer the trust solely FOR THE BENEFICIARY, to be IMPARTIAL between beneficiaries, to NOT SELF-DEAL with trust property, and to AVOID CONFLICTS of real and apparent INTEREST.

The DUTY OF DUE CARE is to use REASONABLE CARE in MANAGING TRUST PROPERTY and make it productive, to PROPERLY ACCOUNT FOR INCOME AND ASSETS, and to PROVIDE ACCOUNTINGS and INFORM the beneficiaries.

Here…because…Therefore…

[This is probably the <u>most frequently tested issue</u>. If a question states a series of events involving trust property and the associated trustee's actions (or inaction) as to each event, the effect of each of those separate events generally should be addressed as a <u>separate issue</u> regarding the duty of the trustee to act prudently and in loyalty to the beneficiaries.]

11. <u>What is the PRUDENT INVESTOR RULE?</u>

Under the PRUDENT INVESTOR RULE, the trustee has a duty to INVEST trust property as a PRUDENT INVESTOR would do, using REASONABLE CARE and substantial DIVERSIFICATION considering the PURPOSES of the trust.

Here…because…Therefore…

[This is also a heavily tested issue. The Settlor (Grantor) of a revocable trust can invest trust property any way she wishes because it is <u>her money</u>. But as soon as the Settlor dies and anyone else that is not the Settlor assumes the role of trustee, the new trustee must <u>immediately act to diversify</u> the trust investment portfolio to protect the beneficiaries!

If you ever see the trustee investing in common stocks, the prudent investor rule is the issue intended for discussion.

Law students (along with law professors and lawyers in general) usually have no idea what "diversification" really means or what 'prudent investment' means. Here are some general rules of prudent investing of trust funds:

As a general rule the trust property should be invested in assets that are both safe (for the benefit of principal/resulting beneficiaries) and which produce income (for the income/life beneficiaries).

Generally no more than 5% to 10% of the trust estate should be invested in any one corporate stock, and often it is a good idea to avoid direct investing in corporate stock altogether.

If the trust estate is invested in mutual funds they should generally be "large capitalization growth and income funds". No more than 80% of the total trust estate should be placed in such funds. And no more than 40% of he trust estate should ever be placed in any one fund.

The balance of the estate (20%-30%) should be placed in a variety of safe, interest bearing assets such as federally insured Certificates of Deposit, U.S. Treasury Bills, insured money market accounts and diversified intermediate term bond funds.]

12. *What is the TRUSTEE'S DUTY to INFORM THE BENEFICIARY?*

    Under the probate code, the trustee has a duty to keep the beneficiary REASONABLY INFORMED of what trust assets are and what the beneficiaries' rights are with respect to those assets. The trustee has an affirmative duty to provide an ACCOUNTING of trust property to the beneficiaries.

    Here…because…Therefore…

13. *What is the TRUSTEE'S DUTY to ALLOCATE INCOME AND EXPENSE?*

    Under the probate code, the trustee has a duty to PROPERLY ALLOCATE INCOME AND EXPENSE items between the INCOME and PRINCIPAL BENEFICIARIES. Allocation depends on receipt before or after the INCOME DATE, which is usually the date of death.

    Income and all other receipts of the trust before the INCOME DATE are counted as principal of the trust, even if they are 'interest' or 'dividends'. Appreciation of trust assets, capital gains realized on sales of trust assets, and distributions of stock dividends and stock splits are also counted as capital of the trust regardless of when it occurs. These receipts are allocated to the CAPTIAL ACCOUNT and the income beneficiary has no right to receive them.

    Distributions of income and cash dividends (not stock dividends) received after the income date are counted as income of the trust and should be allocated to the INCOME ACCOUNT and distributed to the income beneficiary.

    Expenses of the trust such as taxes and trustee fees are generally allocated between the capital and income accounts on a pro-rata basis.

    Here…because…Therefore…

14. *When can a trustee be RELIEVED OF LIABILITY for a BREACH of duty?*

    Under the probate code, the trustee can be relieved of liability for a breach of duty as long as it is not done INTENTIONALLY, in BAD FAITH, RECKLESSLY or with GROSS NEGLIGENCE. The trustee can also be relieved of liability if the COMPETENT BENEFICIARY KNOWING gives INFORMED CONSENT.

    Here…because…Therefore…

Note: Probably the most common issues tested on TRUST questions are the fiduciary duties of the Trustee.

15. Is this a PRETERMITTED CHILD?

[The pretermitted (omitted) child rule applies to Trusts the same way it applies to Wills. While it is most commonly tested on Will questions, be prepared for it on Trust questions also.]

16. Is this an OMITTED SPOUSE?

[The omitted (pretermitted) spouse rule applies to Trusts the same way it applies to Wills. While it is most commonly tested on Will questions, be prepared for it on Trust questions also.]

Practice Question 29-43: Will/Trust Crossover, Pretermitted Child

Larry the Lawyer lived in Sacramento. He borrowed $100,000 from Banker Bill and loaned it to his sister Tilly, a competent adult. Larry then helped Tilly draft a signed, handwritten will, but they forgot to date the will.

The will clearly said that if Larry forgave the $100,000 claim against Tilly's estate at her death the $100,000 would be placed in a trust (Trust A) for Larry, the income beneficiary, for the rest of his life and then the corpus would be distributed to Larry's son Benny. The will provided for a spendthrift clause that would keep creditors from reaching the income and principal in the trust.

Tilly's will also said, "Since my only son, Sammy, died in the war, I want the balance of my estate to go to Larry, because I know he will use it to take good care of my little dog, Fifi, for the rest of her life." No other instruction was given. Larry refers to this as Trust B.

Tilly died without any known kin except Larry and left an estate of $1million, including the ancestral estate, Greenacre. Larry forgave the $100,000 loan.

Larry defaulted on his loan to Banker Bill. He defended Trust A from attack by Bill by raising the spendthrift clause. Larry defended the property in Trust B from Banker Bill by saying he was only the trustee, not a beneficiary.

Larry and Bill reached a good faith settlement that Bill would drop his claim against Larry if in return Larry would sell Bill Greenacre from Trust B for $100,000 below market value. Banker Bill bought Greenacre at this bargain price and gave it to his daughter, Princess. Princess accepted title to Greenacre in good faith and without knowledge of how her father acquired the property.

Sammy suddenly appears after recovering from amnesia.

Discuss the following issues:
1) Was the handwritten will facially valid?
2) Is Trust A facially valid?
3) If Trust A is valid, is the spendthrift clause effective?
4) Is Trust B facially valid and if not where does the trust property go?
5) Why might the will provisions benefiting Larry be held invalid?
6) If Trust B is valid can Princess keep Greenacre?
7) What portion of the estate can Sammy claim?

Practice Question 29-44: Charitable Trusts, Cy Pres, Reversion

Joe, an unmarried man, put $10,000 into an irrevocable Trust X for his daughter, Mollie. Tom was appointed the trustee and he was given complete discretion. The trust instrument said the trust could not be assigned, anticipated or seized by legal process.

Joe put $1 million into an irrevocable Trust Y. The trust instrument said the beneficiary was "the son of Joe." Tom was appointed the trustee. The trust instrument said the purpose of the trust was to provide for the support and education of Joe's son. At the time the trust was created Joe had no sons.

Joe also put $1 million into an irrevocable Trust Z. The trust instrument said the purpose of the trust was to support the research work at the Alien Nation School pioneered by Dr. Kookie. The Alien Nation School was appointed the trustee. Dr. Kookie had spent years trying to prove humans had descended from time-travelers from the planet Moron. The entire world scientific community considered Dr. Kookie a nut.

Joe had a son, Ronnie, born to Wilma.

Dr. Kookie skipped the country after being accused of embezzlement. The Alien Nation School then was sold to a local charity and renamed the Shanana Coalition School for Universal Love.

Joe petitioned the court to modify Trust Z to benefit a UFO group on the grounds that the original purpose was impossible. Shanana objected that Joe had no standing and asked the court to modify Trust Z to support its research into the peace process.

Joe died suddenly with a will leaving his entire estate to Mollie.

Ronnie died intestate and under state law his estate went to his mother.

Discuss the following issues:

1. Was Trust X originally valid if Tom had complete discretion?
2. Was Trust Y originally valid if it had no identifiable living beneficiary?
3. Was Trust Z a valid charitable trust given its purpose?
4. Could Joe properly petition the court to modify Trust Z?
5. Could the court reform Trust Z to the purpose requested by Shanana?
6. Where does the money in Trust Y go when Ronnie dies?
7. Where does the money in Trust Z go if the court finds the purpose impossible?

Practice Question 29-45: Trustee's Duties, Impartiality, Attachment

Donald Duck set up three separate trusts for his nephews Huey, Louie and Dewey and he appointed Daisy Duck the trustee with complete discretion. Daisy had no interest in the trusts.

In his will he put $1 million in trust for Huey.

He also put $1 million in trust for Louie with directions that the money be used for Louie's education and support.

He also put $1 million in trust for Dewey with directions that the funds could not be anticipated, assigned or seized by legal process.

Daisy never liked Dewey, and Huey was her favorite. After Donald died the trusts generated income of $4,000 a month. But Daisy would give Huey $5,000 a month, Louie $1000 a month, and Dewey $500 a month. Huey got more money than he needed, Louie's income was adequate, and Dewey had to work to supplement his trust payment.

Huey, Louie and Dewey formed HLD Corporation and asked Daisy to support them in their business venture with half the trust funds. Daisy refused to invest any money from the trusts in the boys' new corporation.

Then, Huey, Louie and Dewey each asked Daisy for money from the trusts to buy luxury cars. Daisy bought Huey a new luxury car, Dewey an old car, and she refused to buy Louie any car.

Then, Huey, Louie and Dewey lost money gambling at Daffy Duck's casino. Daisy gave Huey the money to pay his debts, but refused to give Louie or Dewey any money at all.

Daffy got a judgment against them and filed a lien against each trust. Daisy refused to pay out any money to satisfy the judgments.

Daisy is sued by Huey, Louie, Dewey and Daffy.

Discuss the liabilities of Daisy –

1. for not paying the nephews equally,
2. for paying Huey more than his trust earned,
3. for refusing to support the boys in financing HLD Corporation,
4. for refusing to buy Louie a car,
5. for refusing to help Louie and Dewey pay their debts, and
6. for being forced to pay trust money to satisfy Daffy's judgment.

Chapter 30: The Remedy Answer Formats

"Remedies" is the most poorly formulated and taught of all law school subjects. The case books and hornbooks on this subject have so many inconsistent statements and terminology it is almost indecipherable. The Internal Revenue Code is easier to read and more logically consistent than much of what passes for the "Law of Remedies".

A brief overview of "remedies" will be given here, but it is highly suggested that you get my **"Simple Remedies Outline"**. You can order it through any book store by giving the "ISBN" number (ISBN 978-1-879563-94-0).

A "Remedies" question, as that term is used in law school and Bar preparation, generally means the consideration of these few questions:

1. WHY should a moving party (movant) be provided any remedy at all? What is the "cause of action"?
    a. Do they have a LEGAL RIGHT to a remedy based on common law or statute? If so, they have a legal cause of action.
    b. If not, they have no legal cause of action, should a Court exercise discretion to provide a remedy in EQUITY anyway? If so, they have no legal cause of action, but do have an equitable cause of action.

2. If the Court should provide any remedy at all, either based on a legal cause of action or based on an equitable cause of action, WHAT actual remedies should it provide? What can the Court do?
    a. Is award of a money judgment an ADEQUATE remedy?
        i. If so, that should be the remedy, but just HOW should the amount of that money judgment be measured?
        ii. A Court of equity can grant a money judgment the same as a Court of law.
    b. If a money judgment is not an adequate remedy, then some equitable remedy is needed, but just WHAT would be an adequate remedy?

You must consider these questions chronologically when you are confronted with a "Remedies" question.

Does the Movant have any LEGAL RIGHT to a REMEDY?

Movants have a LEGAL RIGHT to a remedy if they can present a prima facie case supporting each element of a LEGAL CAUSE OF ACTION and the responding parties (respondents) have NO EFFECTIVE LEGAL DEFENSES. For example, non-breaching parties have a legal right to bring an action for breach of contract, and that action gives them a right to an award of damages or legal restitution.

If the Movant has NO LEGAL RIGHT to a Remedy, Should EQUITY Provide a Remedy?

Movants have no legal right to a remedy if they either have NO LEGAL CAUSE OF ACTION or else the defendant has an EFFECTIVE LEGAL DEFENSE.

In this case the Court (judge, not jury) has DISCRETION to provide an EQUITABLE remedy to the extent it is NECESSARY to either 1) PREVENT INJUSTICE or to 2) PROTECT THE PUBLIC INTEREST.

INJUSTICE typically means that the movant faces unavoidable and irrevocable harm that the movant does not deserve to suffer or else that the respondent would reap an unjust enrichment that the respondent does not deserve to enjoy.

Protection of the PUBLIC INTEREST typically means preventing the frustration of reasonable commercial expectations that would harm commerce and the public good. And a Court of Equity can provide a remedy on this basis even if no unjust benefit would otherwise be enjoyed by the respondent.

Does the Movant have a LEGAL RIGHT to a REMEDY but NO ADEQUATE LEGAL REMEDY?

Movants with legal rights to remedies may have NO ADEQUATE LEGAL REMEDY. In that case a Court of equity has discretion to provide an equitable remedy instead. For example, a non-breaching party may have a legal right to an award of damages, but if the property in dispute is unique, that is not an adequate remedy and the Court may award specific performance, an equitable remedy.

If Movants have NO LEGAL RIGHT to a remedy, can they plead one of FOUR EQUITABLE CAUSES OF ACTION or "Theories"?

Movants that have no legal cause of action may plead for an equitable remedy if they can prove the required legal elements of one of four recognized EQUITABLE CAUSE OF ACTION. Often these are called "equitable theories" rather than "causes of action".

In each of these situations a Court of equity has discretion to provide a remedy (usually in the form of a money judgment) if it is necessary to either prevent unjust enrichment or to prevent injury to the public interest as a result of frustration of reasonable commercial expectations.

1) Implied-in-Law Contracts.

An **implied-in-law contract** is an equitable cause of action or "theory" that arises when movants act to confer benefits on the party to be bound with a reasonable expectation of receiving compensation in return, but for some reason have no legally enforceable contract rights.

2) Promissory Estoppel.

Promissory estoppel is an equitable cause of action that arises when the party to be bound makes a "promise" to the movant with no expectation of getting anything in exchange but it causes the movant to change position in reliance.

3) Detrimental Reliance.

Detrimental reliance is an equitable cause of action that arises when a party to be bound causes the movant detriment by acting or deliberately and knowingly refraining from acting in a manner that causes the movant to be misled concerning the true facts of a situation.

An action for an equitable cause of action for **detrimental reliance** may arise if a legal cause of action for fraud or concealment is suggested by the facts, but cannot be proven with certainty.

> **For example:** Bevis paints a copy of the Mona Lisa and puts it up for sale at a garage sale for $100, not claiming it to be the 'real' Mona Lisa, but not saying anything one way or the other. Butthead buys it believing it to be the 'real' painting by Leonardo De Vinci. Butthead cannot prove fraud or concealment because Bevis did nothing to unreasonably mislead him. He cannot prove detrimental reliance either because nobody would reasonably believe they could buy the 'real' Mona Lisa at a 'garage sale' for $100.

4) Equitable Servitudes.

The three equitable causes of action listed above, implied-in-law contracts, promissory estoppel, and detrimental reliance, are the ONLY equitable causes of action (equitable theories why a party deserve a remedy) about 90% of the time. About the only remaining equitable cause of action that does not fit into one of the above categories is the **equitable servitude.**

Equitable servitude arises when the party to be bound takes title to land with **notice** that the land is subject to land use restrictions that were intended to run with the land to future owners. Sometimes the land use restrictions have been placed on the surrounding lands of the movants, but not on the land of the respondent. In that case there may be an **implied reciprocal servitude.**

What Remedies can a Court of EQUITY Provide?

A Court of equity can provide three possible remedies, award of a MONEY JUDGMENT, the same as a Court of law, an INJUNCTIVE ORDER, or DECLARATORY RELIEF.

When a Court of equity awards a money judgment, it is called EQUITABLE RESTITUTION (because it is being awarded in equity, not law, and it is "restitution" not "damages". "Damages" can only be awarded by a Court of law.

When a Court of equity issues an Injunctive order it may be called an award of specific performance, a temporary restraining order (TRO), a preliminary injunction, or a permanent injunction.

Declaratory relief means that the Court can issue a finding that provides a remedy to the movant, but no party is told to do or not do anything. An example of declaratory relief would be a finding that certain property is being held in CONSTRUCTIVE TRUST for the

movant, or a finding that title to land in dispute properly belongs to the movant (e.g. a "quiet title" action).

REMEDIES DECISION TREE -

The logical, stepwise approach to discussing REMEDIES is this –

1) If the movant can prove a LEGAL CAUSE OF ACTION and the LEGAL REMEDY is ADEQUATE (e.g. money judgment, writ of possession, eviction order, etc.) there is no equitable jurisdiction. The movant has the burden of executing the judgment.
2) If the movant can prove a LEGAL CAUSE OF ACTION but the LEGAL REMEDY is INADEQUATE the Court can provide an equitable remedy (e.g. specific performance).
3) If the movant has NO LEGAL CAUSE OF ACTION but can prove an EQUITABLE CAUSE OF ACTION (e.g. detrimental reliance) the Court can provide an equitable remedy that can be a money judgment, an injunction, or declaratory relief.

COMMON REMEDIES ISSUES AND ANSWERS:

Always follow the CALL of the question. But if the CALL is general the following sequence of issues often arises.

EQUITABLE JURISDICTION:

1. *Does the Court have EQUITABLE JURISDICTION?*
   The general prerequisite to plea for equitable relief is to prove EQUITABLE JURISDICTION exists. The movant must prove IRREPARABLE HARM is threatened, that there are INADEQUATE legal remedies, and that the BALANCE OF HARDSHIP and/or PUBLIC INTEREST favor the plaintiff. In addition, the requested relief must be FEASIBLE for the court.

   [At this point the student would present analysis applying the given facts to the rule and a conclusion. That is omitted hereafter to save space.

   The important point here is that no matter how a 'remedies' issue arises, DO NOT DISCUSS EQUITABLE REMEDIES until you have first explained why the movant has no adequate legal remedy. That may be because there is no legal cause of action or because the legal cause of action that does exist would produce an inadequate remedy.

   The various legal remedies are peculiar to the various causes of action. For purposes of exams those are generally CONTRACT, TORT and REAL PROPERTY causes of action.]

REMEDY ISSUES PECULIAR TO CONTRACT AND "GIFT PROMISE" SCENARIOS:

2. *Legal remedies of non-breaching party after BREACH of contract?*

   Under contract law, upon a finding of SUBSTANTIAL PERFORMANCE constructive conditions of performance are excused, the duty of the non-breaching party to pay the contract price ripens, and the non-breaching party must pay the contract price LESS AN OFFSET FOR DAMAGES CAUSED by the breach. [This is the most common situation and it is **Important** that you understand at least this.]

   The non-breaching party after a MAJOR breach is released from all obligations to perform and also has a right to an award of a money judgment. The non-breaching party can seek a money judgment in the amount of DAMAGES actually suffered or an award of LEGAL RESTITUTION. [This does not always have to be stated.]

   Contract DAMAGES are measured as the sum of RELIANCE DAMAGES (out of pocket expenditures made in reliance on the existence of the contract) and EXPECTATION DAMAGES (the amount the non-breaching party expected to benefit from performance of the contract measured at the time of the breach). [This does not always have to be stated.]

   Expectation damages may include CONSEQUENTIAL DAMAGES for LOST PROFITS. But under Hadley v. Baxendale the breaching party is only liable for consequential damages if they could CONTEMPLATE, at the time of contract execution, that the non-breaching party would suffer such damages, and the non-breaching party can prove the damages with CERTAINTY, that the damages were CAUSED by the breach and they COULD NOT BE AVOIDED after the breach. [CCCC]

   LEGAL RESTITUTION is an alternative money award measured by the amount of BENEFITS CONFERRED by the non-breaching party on the breaching party under the contract. [117] *In many cases legal restitution is limited to the monetary amount of the contract.* [118]

3. *Remedy of breaching party after MAJOR BREACH of contract?*

   Under contract law a party that commits a MAJOR breach has no legal remedy. Therefore they can plead in equity for EQUITABLE RESTITUTION based on IMPLIED-IN-LAW CONTRACT for a money judgment sufficient to prevent unjust enrichment up to the limit of the contract price.

---

[117] For example, Bevis agrees to paint Butthead's house (a service worth $5,000) in exchange for Butthead painting his portrait (a service of uncertain and dubious value). If Butthead completely repudiates the agreement after Bevis fully performs, Bevis cannot prove he has suffered any "out of pocket" expenses, and he cannot prove that the promised portrait would have had any monetary value. But he can still demand a money award in restitution in the amount of $5,000 because he conferred benefits of that amount.

[118] For example, Bevis agrees to build a house for Butthead for $100,000. Before he finishes Butthead repudiates the contract. That is a major breach by Butthead (anticipatory repudiation). Bevis has a right to a money judgment in the amount of EITHER the damages he has suffered (out of pocket expenses plus lost profit expected from the work he has done) or legal restitution measured by the benefits he has conferred on Butthead, but not more than the contract price (e.g. if the construction completed is worth more than $100,000 Bevis' award in restitution is limited to the contract price of $100,000).

4. *Was there an IMPLIED-IN-FACT contract?*

   Under contract law an implied-in-fact contract is a LEGALLY BINDING CONTRACT that forms when parties offer to confer benefits to the other parties with a REASONABLE BELIEF they will be compensated in return, and the other party KNOWINGLY ACCEPTS the benefits. The performing parties have a RIGHT to recover the amounts they expected to receive in compensation, but not more than a reasonable amount. The primary defense to a claim of implied-in-fact contract is that the performing parties were VOLUNTEERS without any reasonable belief they would be compensated.

5. *Was the contract LEGALLY RESCINDED?*

   Under contract law LEGAL RESCISSION means that a party with a right to void a contract effectively repudiates the agreement. [119] *Once the contract has been rescinded both parties may still seek EQUITABLE RESTITUTION based on IMPLIED-IN-LAW CONTRACT to prevent unjust enrichment.*

6. *Was there an IMPLIED-IN-LAW contract?*

   Under contract law an implied-in-law contract is an EQUITABLE CAUSE OF ACTION when parties offer to confer benefits to the other parties with a REASONABLE BELIEF they will be compensated in return, but there is no legally binding contract because the other party DID NOT KNOWINGLY ACCEPT the benefits or for some other reason (e.g. the Statute of Frauds is not satisfied). A Court of EQUITY has discretion to provide EQUITABLE RESTITUTION to the extent it is NECESSARY to PREVENT UNJUST ENRICHMENT or to PROTECT THE PUBLIC INTEREST. The primary defense to a claim of implied-in-fact contract is that the performing parties were VOLUNTEERS without any reasonable belief they would be compensated. The remedy provided generally would be a money judgment of the smallest amount necessary.

7. *Can the movant obtain SPECIFIC PERFORMANCE?*

   If there is a legally enforceable contract concerning title to UNIQUE PROPERTY, an award of a money judgment generally will produce an inadequate remedy. In that case the Court has discretion to award an order of SPECIFIC PERFORMANCE. Generally a refusal of a Court to award specific performance will be held to be an abuse of discretion unless the Court specifically finds that in fact the property at issue is not unique.

   A defense to a request for specific performance is a claim that there is NO MUTUALITY OF REMEDY. Generally this means that a Court will not issue an order of specific performance if there is a substantial likelihood the party seeking the order might not perform contractual promises in return. [120]

[119] For example, a minor or other party lacking capacity can repudiate a contract agreement. But the other party may seek equitable restitution to prevent unjust enrichment.

[120] For example, Bevis promises to sell Blackacre to Butthead for $1 million on credit. But when he hears Butthead is a pauper he refuses to deliver the Deed. If Butthead seeks specific performance a Court of equity has discretion to refuse the request unless Butthead can prove Bevis will actually be paid the $1 million he has been promised.

8. *Can the movant prove PROMISSORY ESTOPPEL?* [121]

   In equity promissory estoppel is an EQUITABLE CAUSE OF ACTION to enforce a gift promise.

   The movant must show that 1) the person to be bound made express or implied promises, with 2) the intention of inducing reliance on the promise by the party seeking a remedy, that 3) the person seeking remedy changed position in reasonable reliance on the promises by the party to be bound, and that 4) injustice will result if the court does not provide a remedy. The remedy provided generally would be a money judgment of the smallest amount necessary to compensate the movant for damages suffered.

9. *Was the contract EQUITABLEY RESCINDED?*

   Under contract law EQUITABLE RESCISSION means that the Court has found the contract to be void. [122] *Once the contract has been rescinded both parties may still seek RESTITUTION to the extent they have acted under the terms of the contract to confer benefits to the other contract party. If the parties had originally acted under a legally enforceable contract this is LEGAL RESTITUTION, a right to restitution, and if the contract was void from the beginning (perhaps because it was illegal) this is EQUITABLE RESTITUTION, relief granted at the discretion of the Court.*

REMEDY ISSUES PECULIAR TO OR SUGGESTING TORT SCENARIOS:

10. *What are the legal remedies of a TORT PLAINTIFF?*

    Under tort law a plaintiff may seek a money judgment in the amount of DAMAGES actually suffered or an award of LEGAL RESTITUTION.

    Tort DAMAGES are generally classified as SPECIAL DAMAGES (out of pocket losses caused by the tort, such as medical expenses, lost wages and lost profits) and GENERAL DAMAGES (compensation for pain, suffering, aggravation, inconvenience, etc.)

    LEGAL RESTITUTION is an alternative money award measured by the amount of BENEFITS ENJOYED by the tortfeasor as a result of the tort. [123] *The tort plaintiff is said to have "waived the tort" and sued in restitution. The plaintiff can sue for both damages*

[121] If there is an EXPRESS GIFT PROMISE this is the cause of action. Promissory estoppel differs from an implied-in-law contract in that there is just a "gift promise" without reasonable expectation of compensation in return. Many authors and professors may confuse the two or use the terms almost interchangeably. I am limiting the term "implied-in-law contract" to just those situations where there is a reasonable expectation of compensation in return.

[122] For example the Court may find there has been a failure of a material implied condition, supervening illegality, or perhaps that the contract was illegal from the beginning.

[123] Legal restitution for a tort is frequently the preferred remedy in cases of misappropriation of likeness. For example, Bevis uses a picture of Butthead without his permission as the "before" example to advertise his cosmetic surgery practice. If Butthead suffers no actual damages he can still "waive the tort and sue in restitution" to obtain a money award of the amount Bevis has profited from his tortious conduct.

and restitution, but can only take one or the other, not both. Legal restitution in tort law is not limited in any manner. [124]

In addition, the plaintiff can generally seek an award of PUNITIVE damages upon a showing that the defendant intentionally caused harm in a manner that was malicious, oppressive or fraudulent. [125] *Punitive damages awards are not allowed if they constitute "excessive punishments" in violation of 8th Amendment guarantees. There is no bright-line rule. A BALANCE TEST will be applied and the reasonableness of punitive damage awards will be judged in comparison to the actual damages suffered and the need to punish and deter wrongful conduct.*

11. *<u>When is INJUNCTIVE RELIEF appropriate in a TORT ACTION?</u>*

Under tort law plaintiffs generally are awarded money judgments in the amount of DAMAGES actually suffered or an award of LEGAL RESTITUTION. However, in certain circumstances a money judgment may be an inadequate remedy, and the Court may order injunctive relief.

In NUISANCE actions the use of land is at issue, and land is generally unique. Therefore the Court generally will issue an injunctive order to stop the activities that create the nuisance. However the Court must apply a BALANCE TEST and may the determine that the public interest and impact on the defendant are so important the activity should not be stopped and in those cases the Court will award the plaintiff a money judgment measured either by the amount the activities of the defendant have reduced the value of the plaintiff's land, or else by the amount the activities have enriched the defendant.

Injunctive relief is also appropriate when the tortious acts of the defendant are likely to be repeated to cause the plaintiff repeated injury because award of a money judgment has no deterrent effect.

12. *<u>Can the movant prove DETRIMENTAL RELIANCE?</u>* [126]

In equity detrimental reliance is an EQUITABLE CAUSE OF ACTION if 1) the defendant <u>caused appearances to be misleading</u> or 2) otherwise <u>knowingly, deliberately and wrongfully allowed the plaintiff to act based on a misunderstanding</u> of the facts, 3) the plaintiff <u>acted or changed position</u> in 4) <u>reasonable reliance</u> on the apparent facts, and 5) <u>injustice</u> will result if the court does not provide a remedy. The remedy generally is a money judgment of the smallest amount necessary to compensate for damages suffered.

---

[124] For example, Bevis agrees to pay Butthead for $1,000 for the right to use his photograph (as the "before photo") to advertise his acne cream in Italy for six months. But the sales response is so good Bevis uses the photo world wide for several years. Butthead has suffered no damage (no out of pocket expenses and no lost profit expected from the work he has done) so he would seek legal restitution measured by the benefits Bevis has enjoyed by misappropriating his likeness. There is no limit on the restitution he can obtain because this is a tort action, not a contract action.

[125] Note that punitive damages are almost never allowed for a contract cause of action or for actions based on claims of negligence. Punitive damages may be awarded for causes of action claiming "recklessness" which means that the defendant <u>deliberately created extreme risks to others</u> even if there was no actual intent to harm others.

[126] If there is NO EXPRESS PROMISE and NO IMPLIED-IN-FACT CONTRACT, and the movants did not act with a reasonable belief they would be compensated there is no basis for a cause of action suggesting 'contract law' and this is the best argument. It suggests 'tort law', but is an equitable remedy, <u>not a legal remedy,</u> because no actual tort can be proven.

However, punitive damages may be justified if defendants acted with malice, for oppression or for fraud.

Further, plaintiffs may seek EQUITABLE RESTITUTION measured by the benefits wrongfully obtained by the respondent.

REMEDY ISSUES PECULIAR TO REAL PROPERTY SCENARIOS:

13. *Can the PART PERFORMANCE DOCTRINE be used to enforce an ORAL CONTRACT for the sale of land at law?*

Under the PART PERFORMANCE DOCTRINE many States will allow the LEGAL enforcement of an ORAL LAND SALE CONTRACT even though the Statute of Frauds is not satisfied, if the plaintiff can prove certain facts. States vary but generally the plaintiff must 1) take possession of the land, 2) pay all or most of the purchase price or else 3) make valuable improvements, and 4) otherwise act in a manner so inconsistent with the behavior of a mere renter that the Court must conclude that there was, in fact, an oral agreement to sell the land.

Generally a money judgment is inadequate remedy in these cases and SPECIFIC PERFORMANCE will be ordered.

If the moving party is unable to prove the elements of the PART PERFORMANCE DOCTRINE there is no legal remedy, and in that case the movant has no right to specific performance but may still be able to obtain a more limited equitable remedy of EQUITABLE RESTITUTION under a plea of IMPLIED-IN-LAW CONTRACT. [127]

14. *Was there a COVENANT RUNNING WITH THE LAND?*

Under real property law a covenant is generally a LEGALLY ENFORCEABLE AFFIRMATIVE PROMISE TO PERFORM A DUTY that runs with the land to bind and benefit future owners. It can be enforced AT LAW, much as a contract would, if it 1) touches and concerns the land, 2) is intended to run with the land, 3) there is privity of estate, both horizontally when the covenant is created and vertically binding the present owners to the promise of the original owners, and 4) the Statute of Frauds is satisfied by a writing.

While a covenant is binding against DONEES and those who INHERIT land, even if the party to be bound has no NOTICE, it cannot be enforced against a BONE FIDE PURCHASER FOR VALUE WITHOUT NOTICE. Consequently notice is often an associated issue.

Generally a money judgment is adequate remedy in these cases. The moving party may sue for either ACTUAL DAMAGES suffered or else for LEGAL RESTITUTION. [128]

[127] Implied-in-law contract is more appropriate here than a claim of promissory estoppel because this was a 'contract' promise and not a 'gift' promise.

[128] For example, Bevis buys a home in a gated community subject to a covenant that he must pay homeowner dues of $1,000 each year. For five years he refuses to pay. The homeowner's association does nothing. Butthead, another homeowner in the community always paid his dues. He can sue Bevis for a money judgment of $5,000 on a claim of

If the moving party is unable to prove there was a covenant running with the land there is no legal remedy but the movant may be able to obtain a limited remedy if EQUITABLE RESTITUTION under a plea of DETRIMENTAL RELIANCE.

15. *Was there an enforceable EQUITABLE SERVITUDE?*

Under real property law an equitable servitude is AN EQUITABLE CAUSE OF ACTION to enforce a LAND USE RESTRICTION that runs with the land to bind and benefit future owners. It can enforced AT EQUITY, not at law, if it 1) touches and concerns the land, 2) is intended to run with the land, 3) the person to be bound takes possession with notice of the restriction, , and 4) the Statute of Frauds is satisfied by a writing. Privity of estate is not an issue.

Generally a money judgment is NOT an adequate remedy in these cases so INJUNCTIVE RELIEF is generally provided.

16. *What is the appropriate remedy for an ENCROACHMENT?*

Under real property law, if a defendant INTENTIONALLY ENCROACHES on the land of a plaintiff the appropriate remedy is an INJUNCTIVE ORDER forcing the defendant to REMOVE THE ENCROACHMENT under penalty of contempt. Anything less will generally be held to be an abuse of discretion by the Court.

While an injunctive order is an equitable remedy, the underlying cause of action is actually for trespass to land since the encroachment represents a continuing trespass.

But if a defendant accidentally encroaches onto the land of the plaintiff, or perhaps buys land with an existing, unknown encroachment, the Court will generally apply a BALANCING TEST. If the Court determines that ordering removal of the encroachment would injure the defendant substantially more than it would benefit the plaintiff the Court may award the plaintiff a money judgment in EQUITABLE RESTITUTION instead of ordering the encroachment removed.

ISSUES INVOLVING RECOVERY OF TITLE AND POSSESSION:

17. *Is the plaintiff entitled to LEGAL REPLEVIN?* [129]

Under remedy law a party HOLDING LEGAL TITLE to property that is wrongfully in the possession of a defendant has a legal right to recover possession. This process is called LEGAL REPLEVIN and it is primarily statutory and administrative in nature. [130]

---

legal restitution. Butthead does not have to prove that he has suffered any injury himself. All he has to prove is that he has standing to bring an action, that Bevis is legally bound by the covenant, and that he has wrongfully received benefit of $5,000 by violating the covenant. It is restitution because Butthead has conveyed benefits to Bevis (by paying his own dues) and Bevis did not perform in return.

[129] The term "restitution" is often used when the correct term is "replevin". Restitution means that one party has deliberately conveyed benefits to the other party and seeks compensation in return. Replevin means that one party is in possession of an asset that the other party claims belongs to them by law (legal replevin) or based on equitable considerations (equitable replevin).

A defense to a legal replevin action is that the movant can be forced to post a bond to compensate the respondent if the replevin action is proven to be without basis.

18. *Is the plaintiff entitled to a finding of CONSTRUCTIVE TRUST and an order of EQUITABLE REPLEVIN?* [131]

    Under remedy law a party that proves EQUITABLE TITLE to a specific asset wrongfully possessed by another party may obtain a finding that the property has been held in CONSTRUCTIVE TRUST, and may also obtain an order to obtain possession and title to the asset along with all profits and income that have accrued on it. This is called an action of EQUITABLE REPLEVIN. [132]

    Equitable replevin is a remedy (what the court can do), not an equitable cause of action (why the court should provide a remedy). The underlying cause of action can be breach of contract, conversion or an equitable cause of action such as an implied-in-law contract.

    A specific defense to a request for a finding of constructive trust is that the property claimed by the movant represents a COMMINGLING of the funds of the movant and the respondent.

19. *Is the plaintiff entitled to an EQUITABLE LIEN on the property of the defendant?*

    Under remedy law a Court of equity may award a money judgment with an equitable lien against specific property of the defendant if necessary to prevent injustice because an award of money damages would otherwise be an inadequate remedy. [133]

INJUNCTIVE RELIEF ISSUES:

20. *Can an INJUNCTION be obtained?*

    If the plaintiff can prove EQUITABLE JURISDICTION, he may be able to obtain a TEMPORARY RESTRAINING ORDER (TRO), PRELIMINARY INJUNCTION or PERMANENT INJUNCTION.

---

[130] For example, to repossess chattel the legal title holder (lender) must go through certain statutory steps to obtain a 'writ of possession' and have it executed by the County Sheriff to regain possession of the chattel.

[131] Equitable replevin is extremely similar to, and possibly embodied in, an order of specific performance involving chattel. Both equitable and legal replevin are remedies specific to chattel, while an order of specific performance may involve real property. An order of specific performance in the case of chattel typically orders the party to be bound to deliver possession of the chattel in dispute to the movant, and that part of the order embodies equitable replevin.

[132] The significance of a finding of constructive trust is that the Court finds the plaintiff holds title to a specific asset and orders it to be conveyed to the movant. If the Court merely awards a money judgment the burden would be on the plaintiff to collect on the judgment, and that is often a much more difficult task. Further, if the defendant is subject to money judgments awarded to other plaintiffs, the property the defendant holds in constructive trust for this particular defendant is not subject to the judgment liens of the other plaintiffs.

[133] The significance of an equitable lien is that even though the burden to collect on the money judgment is still on the plaintiff, the equitable lien takes precedence over other liens and encumbrances against the property of the defendant.

A TRO and a PRELIMINARY INJUNCTION are provisional remedies that normally require a BOND to be posted to compensate the enjoined party if the injunction is improperly obtained.

A TRO can be obtained on an ex parte application and lasts for 15 days. No appeal is allowed unless the order raises first amendment issues or constitutes a DE FACTO PRELIMINARY INJUNCTION.

A PRELIMINARY INJUNCTION and PERMANENT INJUNCTION can both be appealed. In CALIFORNIA a mandatory injunction, which requires action by the enjoined party, is automatically STAYED during the period of appeal.

An injunction is enforced by the threat of a CONTEMPT ORDER.

21. *What are the DEFENSES TO CONTEMPT?*
An accusation of contempt can be defended on the grounds that 1) the court that issued the order LACKED JURISDICTION, 2) that there was NO WILLFUL VIOLATION, 3) that the order was VAGUE, or 4) that the defendant was not given NOTICE of the injunction.

A COLLATERAL ATTACK on the original injunction will only be allowed on the grounds of 1) JURISDICTION, 2) that the order was a BAD FAITH RESTRAINT ON FIRST AMENDMENT RIGHTS, or 3) that the defendant had NO OPPORTUNITY TO APPEAL.

GENERAL EQUITABLE DEFENSE ISSUES:

22. *Does the plaintiff face actual INJUSTICE?*

In EQUITY the moving party must prove she faces INJUSTICE if the Court does not provide an equitable remedy. Injustice means that the movant WILL LOSE something they deserve to receive, OR that the respondent WILL GAIN something more than they deserve to have. [135]

23. *Can the defense of LACHES be raised?*

In EQUITY there are only two equitable defenses. The DOCTRINE OF LACHES is a plea that the plaintiff UNREASONABLY DELAYED seeking relief, and the delay has caused PREJUDICE to the position of the defendant.

24. *Can the defense of UNCLEAN HANDS be raised?*

In EQUITY the second equitable defense is a claim of UNCLEAN HANDS. A Court of equity will not award a remedy to a party that seeks to profit from her own wrongdoing.

[135] I add this at the risk of sounding simplistic, but it is amazing how many law students favor every plaintiff's plea without considering whether they are the victim of any injustice of any sort.

ATTORNEY FEES:

25. *<u>Can the plaintiff recover ATTORNEY FEES?</u>*
Generally, under the AMERICAN RULE each party is responsible for its own attorney fees. However, a CONTRACT or STATUTE can provide for an award of attorney fees to the PREVAILING PARTY in specific cases. Fees may also be awarded under the PRIVATE ATTORNEY GENERAL theory and COMMON FUND THEORY. Commonly fees would be based on customary fees in the area, and the federal LODESTAR approach awards reasonable rates multiplied by a reasonable number of hours.

Practice Question 30-46: Statute of Frauds, Implied-in-Law Contract

Homer felt sorry for his brother Boomer and told him he could live in a dilapidated old house he owned if he fixed it up. Homer told Boomer that if he made the house habitable he could live there rent-free for 10 years.

Boomer moved in and fixed the house over a period of many months. He spent $5,000 of his own money in the process. In all Boomer spent 500 hours working on the house.

When Boomer started working on the house it had a market value of only $50,000. But when he was done the house looked so good Ivana Trump offered Homer $200,000 for it.

Homer sold the house to Ivana and told Boomer to get out. He told Boomer he would reimburse him the $5,000 he spent.

Boomer wants to stay in the house for the next 10 years like he was promised. Comparable housing for that period of time would cost him $100,000 in rent.

What are Boomer's remedies?

Practice Question 30-47: Injunctive Relief

For weeks Reverend Bob led anti-abortion protesters picketing Doctor Feelgood's office, chanting so loudly it interfered with his ability to treat his patients. They often trampled Feelgood's flowerbeds, and one night the office was set on fire. One protester entered his office and poured a foul-smelling liquid on his carpets.

Feelgood sued the good Reverend. Bob did not answer, and Feelgood got a default judgment against him for $10,000 in actual and punitive damages. But Feelgood found that the judgment was of no value because Bob had all of his assets hidden. Because the judgment had no impact, Bob continued to picket Feelgood.

Feelgood next tried turning his lawn sprinklers on whenever he was picketed so that the protesters would get wet. That plan failed because the next night vandals destroyed his sprinklers.

Feelgood then obtained a temporary restraining order preventing Bob and his followers from coming within 200 yards of his office or saying anything that would disturb Feelgood's patients.

Bob tries to appeal the TRO and have it withdrawn on several grounds.

First, Bob argues he has a right to appeal the TRO because his picketing is guaranteed by the First Amendment.

Second, he argues the TRO is overbroad.

Third, he argues that there is no equitable jurisdiction because Feelgood has legal remedies and can bring another action for nuisance and trespass.

Fourth, he argues that the balance of public interest in protecting the First Amendment rights of free speech, religion and assembly are in his favor.

Fifth, he argues that because he tried using lawn sprinklers against his followers Feelgood comes to court with "unclean hands."

Sixth, he argues that by first bringing a suit against him, Feelgood waived equitable jurisdiction, and is now barred from seeking an injunction by the Doctrine of Laches.

Discuss.

Practice Question 30-48: Implied-in-Law Contract, Constructive Trust

Bevis took a car to Doofus' repair shop and entered into a valid, enforceable contract under which he would pay $5,000 to have it totally overhauled with a new engine, new upholstery and new paint. In leaving Bevis said that he was doing a favor for a friend.

Doofus spent $3,000 on parts and labor. After he completed all the work the police arrived and informed him that the car had been reported stolen by its owner, Butthead. They seized the car and returned it to Butthead.

The same day Butthead sold the car to Gomer for $8,000, its fair market value. He put the $8000 in his bank account where he already had $12,000 for a total of $20,000.

The day after that Doofus asked Butthead to pay him the $5,000 he was owed. Butthead refused to pay it, and he went on a gambling spree losing almost $18,000. Then he won back $3,000 on a slot machine, leaving him with exactly $5,000 in the bank.

Bevis has disappeared. Doofus believes that Bevis and Butthead were working together to defraud him but he has no solid evidence. Butthead denies knowing anyone named "Bevis".

Doofus hires you to represent him. Butthead had no insurance on the car and is deeply in debt. He threatens to declare bankruptcy.

With this evidence, what causes of action will not work against Butthead? What causes of action will work? What would be the measure of Doofus' remedy? What approach might assure Doofus' recovery?

Does Doofus have any possible cause of action against Gomer? What is Gomer's best defense?

Chapter 31: Conclusion

Brilliant law students often fail to grasp that the essay grader is merely a low-paid government worker, hard pressed to consistently grade a large number of essay answers in a relatively short time. The imagination, style, flair and insights that might win you accolades for essays in the law school review will get you no points from the Bar grader, and they may hurt.

The Bar grader merely wants you to spot and state the ISSUES. For each issue you are to state the AREA of law and RULES that apply. For each rule, you are to identify the important ELEMENTS of the rule that must be proven. And for each element you must explain how the FACTS given serve to prove that element.

By citing FACTS, you prove the ELEMENTS. By nailing the ELEMENTS you prove the RULE. And by proving the RULE you prove the ISSUE. When the issue is proven, state a CONCLUSION and move on. The logical progression is just that simple.

You MUST be prepared to recite, verbatim, certain rules of law. You MUST cite certain cases like Palsgraf. You do not have to memorize everything in this book, but you must be prepared, for example, to recite concise definitions for murder, negligence, and constitutional law without hesitation. During the Bar Exam is not the time or place to begin composing a statement explaining these complex legal concepts.

You don't have to be brilliant to nail the Bar. The essay approach in this manual is simplistic and mechanical because it works. The key is the use of the **"Here"/"because"** word combination. Following are sample essay answers for each of the 46 practice questions presented above. The word "because" appears hundreds of times in those 46 sample answers! The word "Here" should address an ELEMENT to be proven, but don't say "Here…Here…Here…" Instead say "Here…And…Also…" and so on. The word "because" should nail that element with a given FACT. And QUOTE THAT FACT whenever possible.

Nailing the elements in this manner is the key to nailing the Bar Exam, and that is what you will do if you follow the approach presented here.

Appendix A: Sample Answers

Sample Answer 17-1: Contract Formation

Homer v. Lucy

The rights and remedies of the parties depend on whether or not there was a valid contract. A contract is a promise or set of promises the performance of which the law will recognize as a duty and for which the law will provide a remedy. Every valid contract is based on OFFER, ACCEPTANCE, LEGAL CONSIDERATION, LEGAL PURPOSE and LEGAL CAPACITY OF THE PARTIES.

1. *Does the UCC apply?*

The UCC governs contracts for the sale of GOODS. Goods are movable things at the time of identification to a contract. Otherwise only COMMON LAW governs the contract.

Here the contract is for immovable property because it is for the rent of real property, a "house".

Therefore, COMMON LAW principles govern this contract.

2. *Is a WRITING REQUIRED?*

Under the STATUTE OF FRAUDS certain types of contracts must be in writing to be enforced. Most contracts for an interest in LAND require a writing. However most States do not require a writing for periodic tenancies of a year or less.

Here the question involves an interest in land because the alleged agreement was to rent a "house". And there was no writing here because "it wasn't in writing." But it would be a month-to-month lease so no writing would be necessary.

Therefore, no writing is required by the Statute of Frauds, and the contract is not unenforceable for the lack of a writing.

3. *Was the ADVERTISEMENT an OFFER?*

Under contract law an OFFER is a manifestation of present intent to enter into a bargain sufficiently specific that an observer would reasonably believe assent would form a bargain and communicated to the offeree. Advertisements are generally not offers because they usually fail to identify the parties or the quantity being offered.

Here the advertisement was not specific as to the parties because it did not guarantee that Lucy would rent to the first person to respond.

Therefore, the advertisement was PRELIMINARY NEGOTIATION and not an offer.

4. *Was the 9:00 statement by Homer an OFFER?*

Offer is defined above. Here the statement by homer did not manifest intent to enter into a bargain because he said he "had to see the house first."

Therefore the statement was preliminary negotiation and not an offer.

5. *Was the 9:00 response by Lucy a firm OFFER giving Homer an OPTION?*

Offer is defined above. Under common law an OPTION is an offer which cannot be revoked for a period of time because there is an agreement, supported by CONSIDERATION, that the offer will remain open. CONSIDERATION is an exchange of promises posing legal detriment such that the law deems it sufficient to support an agreement.

Here Lucy promised to give a "firm offer", but Homer gave no promise or value in exchange. Therefore, Lucy received no legal consideration in exchange for her promise and her promise cannot be enforced against her.

Therefore, Lucy's offer did not give Homer an option, and it could be revoked by Lucy at any time.

6. *Was the 3:00 statement by Homer an effective ACCEPTANCE?*

Under the MIRROR IMAGE RULE of the common law an ACCEPTANCE had to be an unequivocal assent to the terms of an offer. A verbal offer is deemed to lapse at the end of a conversation, and a written offer is deemed to lapse within a reasonable time after communication.

Here Homer accepted unequivocally but not during the conversation and not within the time the parties had agreed upon. So the offer by Lucy had lapsed by the time Homer arrived and he did not have the power to accept.

Therefore, Homer's effort to accept was ineffective.

[This is a very simple start-off question. The main lesson is that contractual offers lapse AUTOMATICALLY if they are not accepted within a reasonable period of time, and a reasonable period is whatever the offeror specifies or else what the parties agree to be the time period for acceptance.]

Sample Answer 17-2: UCC Formation, Breach and Remedy

Sellco v. Buyco

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy. Every valid contract is based on OFFER, ACCEPTANCE, CONSIDERATION, LEGAL PURPOSE and LEGAL CAPACITY OF THE PARTIES.

1. *Does the UCC apply?*

The UCC governs contracts for the sale of GOODS. Goods are movable things at the time of identification to a contract. Otherwise only COMMON LAW governs the contract.

Here the question involves a sale of moveable things because the 'widgets' were to be delivered.

Therefore, the UCC applies here.

2. *Are the parties MERCHANTS?*

Under the UCC MERCHANTS are people who deal in the goods or hold themselves out as knowledgeable about the goods in a contract. Here Sellco and Buyco are merchants because they are dealers in these types of goods. Therefore, the parties are merchants.

3. *Is the NEED FOR A WRITING satisfied?*

Under UCC 2-201 a contract for the sale of GOODS over $500 requires a writing. Under the UCC a contract between MERCHANTS may satisfy the need for a writing against both parties if there is a sales confirmation indicating the quantity sent to one party by the other and the receiving party does not object to the representation of a contract.

Here there is a need for a writing because the cost of the goods is over $500.

But the original contract satisfied the need for a writing because these are merchants and the original offer was in writing and stated most of the terms. Then on 6/4/99 Sellco sent a "written" message confirming the order without the warranty term. This satisfied the need for a writing because Buyco did not object in a timely manner.

Therefore, the need for a writing is satisfied.

4. *Was the catalogue advertisement an OFFER?*

Under contract law an OFFER is a manifestation of present contractual intent communicated to the offeree that is so specific that an objective observer would reasonably believe assent would form a bargain. An advertisement is never a valid offer unless it clearly identifies the QUANTITY of goods for sale and the PARTY to whom the offeror is willing to sell them. Here the advertisement is not an offer because the catalogue does not specify either the quantity or the party to whom Sellco is willing to sell. Therefore, the catalogue itself is not an offer.

5. *is the communication of 6/2/99 an OFFER by Buyco?*

Offer is defined above. Here the communication from Buyco expresses present contractual intent because it says "we hereby accept". The offer is specific as to parties because it says "we" and "your", and it is specific as to a quantity of "5,000" now and "5,000 for future". This is specific enough for an offer because it objectively appears assent would form a bargain. Therefore, this is a valid offer.

6. *Is the communication of 6/3/99 by Sellco a COUNTEROFFER?*

Under the COMMON LAW MIRROR IMAGE RULE an acceptance had to be an unequivocal assent to an offer, but UCC 2-206 allows acceptance in any reasonable manner showing assent to an offer. And UCC 2-207 allows acceptance with varying terms. Between merchants an acceptance with varying terms is effective if the variance is not material. An acceptance with materially varying terms is considered a counteroffer.

Here the acceptance of the order with a denial of the warranty would be an acceptance with a materially different term because warranty is very important. Therefore, this would be seen as a counteroffer, rather than an acceptance.

7. *Was the 6/3/99 agreement by Buyco an ACCEPTANCE?*

Under the UCC acceptance of an offer can be made by any reasonable means showing assent to an offer. Here Buyco showed assent because it "verbally agreed". Therefore, Buyco accepted Sellco's offer to supply the goods without warranty.

8. *What were the TERMS of the bargain?*

Under the COMMON LAW a contract had to be specific as to time, price, quantity, subject matter and parties. Under the UCC only quantity and parties must be specified and all other terms can be supplied by the UCC's GAP FILLERS.

Here the parties are specified as Sellco and Buyco. The quantity is 10,000 yellow widgets at a price of $6. The contract is a DIVISIBLE contract because the goods are to be shipped in installments and can be delivered in two separate shipments of 5,000 widgets each.

9. *Did Sellco BREACH by shipping non-conforming goods?*

Under the PERFECT TENDER RULE of the UCC goods must be supplied exactly as ordered. A supplier can CURE the shipment of non-conforming goods if there is still time or within additional time if the original shipment was reasonably believed to satisfy the buyer's needs.

Here Sellco shipped non-conforming goods because it was a "mistake", and there is no time to cure because the shipment was on the deadline of "6/8/99".

Therefore, Sellco breached by shipping non-conforming goods, and there is no time to cure.

10. What is Buyco's REMEDY?

Under the UCC a buyer who receives nonconforming goods can generally REJECT the goods and REPUDIATE the contract. A REPUDIATION is a clear expression of intent not to perform. But under the UCC a buyer who receives a shipment of nonconforming goods under a DIVISIBLE CONTRACT can only reject that shipment and they cannot repudiate the remaining contract.

A buyer who receives non-conforming goods can also COVER by buying the goods elsewhere. The buyer's remedy is to demand the excess of the cover price over the contract price from the breaching seller.

Here this was a divisible contract because the goods were to be shipped in two installments and the failure to ship one did not defeat the purpose of the other. Therefore, Buyco can only reject the first installment, and it cannot repudiate the rest of the contract.

Here Buyco was able to cover at a price of $5, less than the $6 contract price. Therefore, Buyco has suffered no loss as a result of the breach and can seek no damages from Sellco.

11. Did Buyco BREACH when it refused to accept the second shipment?

Repudiation is defined above. Here Buyco clearly repudiated the remaining portion of the contract because it indicated intent not to perform when it said, "don't send us" the second shipment. Since this was a divisible contract and Buyco had an obligation to accept the second shipment, this was repudiation and a breach.

12. What is Sellco's REMEDY?

Under CONTRACT LAW compensatory damages are the rule and the non-breaching seller has a duty to mitigate damages. A non-breaching seller may demand specific performance if the goods have been created and are unique, and the seller may demand lost profit in a "lost volume" situation. Also, the seller may sell the goods at salvage sale, after notice to the breaching buyer, and demand the difference between contract price and salvage price.

Here Sellco could demand its lost profits on the second shipment because Buyco refuses to perform and it appears Sellco has lost both sales volume and profits.

Sample Answer 17-3: Common Law Breach and Remedy

Homer v. Wanda

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy. Every valid contract is based on OFFER, ACCEPTANCE, CONSIDERATION, LEGAL PURPOSE and LEGAL CAPACITY OF THE PARTIES.

1. *What LAW applies?*

The UCC governs contracts for the sale of GOODS. Goods are movable things at the time of identification to a contract. Otherwise only COMMON LAW governs the contract.

Here the contract does not involve movable property because it involves building a house.

Therefore, the COMMON LAW governs.

2. *Is a WRITING REQUIRED?*

Under the STATUTE OF FRAUDS certain types of contracts must be in writing to be enforced. A contract for an interest in LAND requires a writing. Also, a contract that takes more than a year to complete requires a writing.

Here building a house does not involve an interest in land and it could be done in less than a year.

Therefore, no writing is required by the Statute of Frauds

3. *Was the MODIFICATION of the contract supported by CONSIDERATION?*

Under COMMON LAW a contract modification must be supported by CONSIDERATION, that exchange of promises which forms sufficient legal detriment that the law will find sufficient to enforce the modification at law.

Here Bill incurred no new detriment because he was already obligated to build the house for $100,000. Since Homer received nothing more in exchange for his promise he received no consideration for modifying the contract.

Therefore, the modification of the contract was not supported by consideration and it is unenforceable at law by Wanda against Homer.

4. *Can Wanda claim modification is supported by PROMISSORY ESTOPPEL?*

Under the theory of PROMISSORY ESTOPPEL an agreement that otherwise is unenforceable at law for a lack of consideration may be enforced by equity. Promissory estoppel may apply where the party to be bound made a 1) promise with 2) intent to induce reliance and there 3) was reasonable reliance and 4) failure to enforce the promise would cause an injustice. Further, to plea equity one must have CLEAN HANDS.

Here there was a promise because Homer "promised" to pay $30,000. Here there was an intent to induce reliance because Homer "was tired of living in a tent." Here there was reasonable reliance because Bill "hired Fred" in "reasonable reliance" on the promise. But here there would be NO INJUSTICE because Bill was induced to do only that act which he was already legally obligated to do -- finish the house. And Homer did not get anything he did not have a right to get.

Therefore, since there would be no injustice caused by failing to enforce the promise made by Homer, promissory estoppel would not apply to enforce the contract modification.

Further, Bill (Wanda as his representative) does not come to equity with CLEAN HANDS. Homer's promise that Wanda seeks to enforce was elicited from him in response to Bill's threat to breach the contract. That was an illegal threat (in violation of Bill's legal duty to perform) so no Court of Equity will enforce it.

5. *Can Wanda raise the defense of IMPOSSIBILITY?*

Under contract law the defense of IMPOSSIBILITY excuses a breach where the performance of a contract has become impossible due to events unforeseen and unforeseeable at the time of contract formation. Impossibility means that performance is physically impossible or so financially impossible that enforcement of the contract would be inequitable.

Here Wanda could have finished the house because all that remained was the painting. This is proven because Homer hired Paul to do the painting.

Therefore, Wanda cannot claim impossibility as a defense.

6. *Did Wanda provide SUBSTANTIAL PERFORMANCE or commit a MAJOR BREACH?*

Under contract law a breach is a failure to perform a contractual duty that is due to be performed.

A MAJOR BREACH is one which denies the non-breaching party the BENEFIT OF THE BARGAIN. A major breach completely excuses the non-breaching party from any further legal obligation under the contract, and the breaching party can only plead equity.

A MINOR BREACH is one in which the breaching party has given SUBSTANTIAL PERFORMANCE. A minor breach does not release the non-breaching party from contractual obligations. Upon a finding of specific performance the constructive conditions shielding the non-breaching party are excused and they must pay the contract price LESS AN OFFSET FOR PROVEN DAMAGES.

Here there was substantial performance by Wanda (and Bill) because the home was all done "except for the painting". The minor breach only cost an additional $10,000 to cure -- so the house was 90% finished by Bill and Wanda.

7. *What is Homer's REMEDY?*

Under contract law Homer can receive compensatory damages because this was a minor breach. Here it cost Homer $10,000 to finish the house so he can claim an offset of $10,000 against the contract price of the home ($100,000). He owes Wanda the balance of $90,000.

Sample Answer 17-4: UCC Formation, Remedies

Buyco v. Sellco

1. *Does the UCC apply?*

The UCC governs contracts for the sale of GOODS. Goods are movable things at the time of identification to a contract. Otherwise only COMMON LAW governs the contract.

Here there was a contract for the sale of moveable things because there was an agreement to sell "T-shirts", and they were to be delivered.

Therefore the UCC will govern this contract.

2. *Are the parties merchants?*

Under the UCC merchants are those who deal in or otherwise hold themselves out as experts in the goods that are the subject of the contract.

Here Sellco deals in T-shirts because it has a "catalogue" and Buyco is impliedly a dealer in T-shirts because it is buying "10,000" shirts at a time.

Therefore, the parties are both merchants.

3. *Was the statement by Buyco on 6/1 an offer to buy?*

Under contract law an OFFER is a manifestation of present contractual intent communicated to the offeree that is so specific that an objective observer would reasonably believe assent would form a bargain.

Here the statement by Cindy is certain as to quantity and parties because it states "10,000" and the parties are Buyco and Sellco by implication. She said they wanted the shirts printed with the logo over the left pocket. But there is no showing of present contractual intent at that time because Cindy said her "boss needs to see a sample first." That statement implies that there is no intent to enter into a bargain at that time.

Although Doris assented by saying, "You got it girl," it was only an agreement to provide a sample and no reasonable objective observer would believe that Doris' assent formed a bargain since Cindy clearly indicated there would be no agreement until they received a sample.

Therefore, the statement by Cindy is not an offer.

4. *Was the statement by Doris on 6/1 an offer to sell?*

Offer is defined above. Under UCC 2-204 a contract may be formed in any manner sufficient to show an enforceable agreement between the parties, even if the time and place of the agreement cannot be exactly determined.

Here Doris manifested an intent to sell T-shirts when she said, "You got it girl," and then sent a sample of the 10,000 shirts she was willing to sell at the stated price. This was sufficient to constitute an offer because the parties and quantity were specified by the context of the conversation, and by saying "You got it girl" Doris was essentially offering to sell 10,000 shirts as shown by the sample. That means the shirts were going to have the logo printed over the right pocket, because that is how the sample was done. Cindy understood it to be an offer because she assented to it by unequivocally assenting with the words, "It's a go."

Therefore, the statement and tender of a sample by Doris on 6/1 was an offer.

5. *Was the statement by Cindy on 6/3 an acceptance?*

Under UCC 2-206 an acceptance can generally be made in any reasonable manner showing assent to an offer. And UCC 2-207 allows acceptance with varying terms. Between merchants an acceptance with varying terms is effective if the variance is not material. An acceptance with materially varying terms is considered a counteroffer.

Here Cindy communicated to Doris that "it's a go" and that was a communication of assent. And since the assent was based on the sample received, it was an acceptance of Sellco's offer to sell shirts with the logo printed over the right pocket.

Therefore, Cindy's statement on 6/3 was an acceptance of Doris' offer.

6. *What were the terms of the contract?*

The terms of a bargain are defined by the terms of the offer. Under UCC 2-313 any sample or model that is a basis for an offer creates an express warranty that the whole shipment will conform to the sample.

Here Doris established the offer by sending the "sample" with the logo printed over the right pocket. The offer was to sell 10,000 shirts like the sample she had provided for Roberto's inspection. And Cindy unequivocally assented to the terms of that offer when she said "it's a go."

Therefore, the agreement was for shirts with the logo over the right pocket as shown on the sample.

7. *Was a writing required?*

Under UCC 2-201 a contract for the sale of goods worth $500 or more must generally be in writing. One exception is that no writing is needed if they are specially manufactured goods unsuitable for sale elsewhere.

Here the shirts were to be specially manufactured and unsuitable for general sale because they were to be printed with the logo of Buyco.

Therefore, no writing was necessary for this contract.

8. *Did Buyco breach by rejecting?*

Here Buyco breached because the goods conformed to the contract terms, yet Buyco refused to accept them.

Buyco would argue that it really wanted to have the logo printed over the left pocket as originally stated by Cindy on 6/1, but since Sellco made the offer by sending the sample, and since Buyco accepted the offer after receiving the sample, the configuration of the sample controls the terms of the agreement.

Therefore, Buyco breached when it rejected the goods.

9. *What is Sellco's remedy?*

Under the UCC a non-breaching seller may seek specific performance or sell the rejected conforming goods at salvage and claim damages measured by the excess of contract price over salvage price.

Here the goods were specially made and probably could not be sold at salvage.

Therefore, Sellco could demand payment of the full contract price from Buyco (specific performance).

[ANSWER EXPLANATION: This question focuses on a VERY IMPORTANT POINT -- The "offer" is the combination of words and actions that justifies the other party to say "OK". This is my "OK" rule. If saying "OK" would reasonably form a bargain, it constitutes assent by the offeree, and the prior representations of the other party constitute the offer.

Here Doris could not form a bargain on 6/1 by saying "OK" because Cindy clearly said they would not agree to the purchase until Roberto approved a sample. All "OK" would mean in that context is, "Ok, we will send you a sample." But on 6/3 when Cindy said "It's a go" her assent was sufficient to form a bargain. Since she was accepting after receiving a sample of the goods offered, the sample controls. UCC 2-313 is the controlling principle. You don't have to memorize the section number, but you should understand the concept.

So Cindy was the offeree and Doris was the offeror. Since the offeror sets the terms of the bargain, the terms of the offer was determined by the sample shirt Doris provided for Roberto's approval. That offer was accepted by Cindy when she said "It's a go."

Note that Cindy cannot define the terms of the offer first and then assent to the same terms later because that would make her both the offeror and the offeree.]

Sample Answer 17-5: Third Party Contracts

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1. *Does the UCC apply?*

Under contract law the UCC governs contracts for the sale of goods. Goods are all things moveable and identifiable to the contract at formation.

Here the contract is for a sale of a moveable thing because it is for the sale of a "piano" that was to be "delivered". Since it can be moved, it is a "good".

Therefore, the UCC will govern.

HUEY v. LOUIE

2. *What are Huey's REMEDIES against Louie?*

Under the PERFECT TENDER RULE of the UCC a non-breaching buyer in a non-delivery situation can demand conforming goods, repudiate the contract or buy goods to cover and demand the excess of the cover price over the contract price.

Here Louie has breached because he did not deliver the promised piano. And Huey "wants his money back."

Therefore, Huey has several remedies available. If he just wants to repudiate the contract and get his money back he can get a judgment against Louie for $1,000. Huey's right to recover from Louie is reduced to the extent he is able to recover from Daisy.

HUEY v. DAISY

3. *What are Huey's rights against Daisy under the DELEGATION contract?*

Under contract law a DELEGATION is an agreement to convey the duty of performance under the first contract from the original promisor to a delegatee. The promisor in the first contract retains liability to the promisee. The delegatee also assumes liability to the promisee of the first contract if she expressly accepts the delegation.

If the original agreement between the promisor and promisee was a contract supported by consideration, and the delegation contract between a delegator/promisor and a delegatee is also supported by consideration, the delegation contract is a third-party beneficiary contract in which the original promisor is an intended CREDITOR third party beneficiary of the delegation contract. Therefore the promisee can enforce the delegation contract against both the delegator and the delegatee.

A delegatee can raise all legal defenses that would otherwise have been available to the promisor in the original contract between the promisor and promisee.

Here there is a delegation contract between Louie and Daisy supported by consideration because Daisy expressly accepted the duty by agreeing to deliver the piano in exchange for money.

Therefore, Huey has the legal right to enforce Daisy's promise to deliver the piano.

4. *What are Huey's REMEDIES against Daisy?*

A promisee under a contract can enforce the delegation contract as an intended third party beneficiary against a delegatee in the same way as the original promisee of the delegation agreement could have.

Here Huey's remedies against Daisy are the same as his remedies against Louie. Huey can enforce against Daisy to recover his $1000 the same way he could have enforced against Louie.

Therefore, Huey can get a judgment against Daisy for $1000. But Huey's right to recover from Daisy is reduced to the extent he recovers from Louie.

LOUIE v. DAISY

5. *What are Louie's rights against Daisy under the DELEGATION contract?*

Delegation is defined above. Here the delegation from Louie to Daisy is a contract between them because Daisy promised to deliver the piano to Dewey in exchange for $2,000. Louie is the promisee.

Louie has a right to damages against Daisy in the amount of $3,500. That is calculated as the sum of his expectation damages, the $1,500 he expected to get from Huey in six months that he will not get because of Daisy's breach, plus his reliance damages of $2,000, the amount he is out-of-pocket because he gave it to Daisy in reliance on the contract.

Louie's right to recover from Daisy is reduced to the extent that Daisy repays Huey the $1,000 he is due.

DEWEY v. LOUIE

6. *What are Dewey's rights as a THIRD PARTY BENEFICIARY?*

Under contract law a THIRD-PARTY BENEFICIARY CONTRACT is one with a main purpose of providing a benefit to a third party. The contract can be enforced at law against the promisor by the original party, the promisee, or by a vested beneficiary. A beneficiary vests upon becoming aware of and changing position in reliance on the contract. A CREDITOR beneficiary (receiving re-payment of a debt) can enforce the contract at law against a promisee. A DONEE (the recipient of a gift) can only enforce the contract at equity against a promisee based on promissory estoppel.

Here Dewey was an intended third party beneficiary because the purpose of the contract is to benefit Dewey by giving him a "piano." And apparently he is a DONEE beneficiary because the purpose was to give him a present for his "graduation."

Huey is the promisee because Louie promised to "deliver" the piano. Louie is the promisor because he has promised to deliver the piano to Dewey.

Therefore, this is a third-party beneficiary contract, and Dewey as intended donee beneficiary. In that capacity Dewey can enforce the original contract against Louie at law in the same manner and extent that Huey could have.

7. *What are Dewey's REMEDIES against Louie?*

Dewey's remedies would be the same as Huey. If Huey repudiates the contract and demands return of his $1,000, Dewey's remedies at law against Louie are reduced to the extent Louie and Daisy repay Huey.

DEWEY v. DAISY

8. *What are Dewey's rights and remedies against Daisy?*

Since Daisy agreed to perform the duties of Louie, Daisy assumed the same legal liability to Dewey that Louie had. And since Dewey has the same enforcement rights as Huey, Dewey's rights and remedies to enforce the contract against Daisy are the same as his rights against Louie. To the extent Huey is repaid by either Louie or Daisy, Dewey's rights against Daisy are reduced.

DEWEY v. HUEY

9. *What are Dewey's rights and remedies against Huey?*

Since Dewey is a DONEE beneficiary, he has no legal right to force Huey to enforce the contract with Louie. Since Huey has repudiated the contract and seeks his money back, Dewey has been denied the benefits he expected under the purchase agreement. For compensation, Dewey and can only seek compensation from Huey in equity based on a cause of action for promissory estoppel (if he was promised the piano) or detrimental reliance (if he was injured by relying on the contract Huey had with Louie).

[ANSWER EXPLANATION: The point of this question is that both the beneficiary and the promisee can enforce a contract at law against a promisor. Further, a delegation contract can be enforced by the delegator (against the delegatee) and by the promisee(s) of the underlying contract. You should identify each party as promisee, promisor, delegatee, beneficiary, etc. because that designation determines their RIGHTS and REMEDIES.

Every delegation contract embodies a third-party beneficiary contract within it.]

Sample Answer 18-6: Intentional Torts, Negligence, Defamation, Privacy

GATES V. KENT

1. *Can Kent be liable for TORTIOUS ASSAULT?*

Under tort law an assault is an intentional act done to cause and which does cause reasonable apprehension of an immediate battery, a harmful or offensive touching. An intentional act is one done for the purpose or with knowledge with reasonable certainty a result will occur.

Here Kent acted intentionally because he "lifted and flew" Gates as a "prank". He acted with intent because it was a "prank" for the purpose and result of causing Gates to be "apprehensive". And Gates was reasonably apprehensive because he was held "hundreds of feet" in the air.

Therefore, Kent is liable for assault.

2. *Is Kent liable for BATTERY on Gates?*

Under tort law a battery is an intentional act to cause a harmful or offensive touching.

Kent acted with intent because he was pulling "a prank", and it caused an offensive touching because Gates "struggled" to get free and a person would be reasonably offended to be grabbed by a stranger.

Therefore, Kent is liable for battery.

3. *Is Kent liable for FALSE IMPRISONMENT?*

Under tort law a false imprisonment is an offense against the dignity of a person by confining them to a defined space against their will without any reasonably apparent means of reasonable exit and the plaintiff is aware of the confinement.

Here Gates was confined to the top of a building, because he could not reasonably escape. He was aware of his confinement because he was "apprehensive" of falling. He had no reasonably apparent means of escape because not even the firemen, who would be trained in rescue techniques, could figure out how to rescue him "for hours".

Therefore, Kent is liable for false imprisonment.

4. *Is Kent liable for INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?*

Under tort law intentional infliction is an outrageous act intended to cause emotional distress which does cause severe emotional distress. Many courts have held that "mere embarrassment and humiliation" are not enough evidence for a jury to presume the plaintiff suffered "severe emotional distress".

Here there was an outrageous act because it was outrageous for Kent to "fly" Gates to the top of a building and strand him there in front of a crowd. The act was with intent because it was for the purpose of causing Gates to be humiliated. Here there was an emotional injury to Gates because

he was "humiliated." But there is no evidence Gates suffered any emotional distress other than embarrassment.

Therefore, Kent is not liable for IIED unless Gates can prove he suffered severe distress.

GATES V. WHITE AND DAILY PLANET

5. *Are White and the Planet directly liable for NEGLIGENCE?*

Negligence is the failure to exercise that degree of care which a reasonably prudent person would use in similar circumstance. A prima facie case of negligence requires a showing of DUTY, BREACH, CAUSATION and DAMAGES.

There is no general duty to protect others from injury. But a duty can be established by STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or PERIL caused by the defendant.

Under PALSGRAF Cardozo said that a DUTY based on peril is only owed to those within the ZONE OF DANGER where peril to others is reasonably foreseeable. Under Andrews' view if a duty is owed and breached as to anyone, the liability for the breach should extend to all who are foreseeably injured, even if they were not in the zone of danger.

Here the defendant, White caused reasonably foreseeable danger to others by sending Kent on assignments because he "did a lot of stupid, dangerous things". And Gates was a foreseeable plaintiff in the zone of danger (in Kent's path), so White owed Gates a duty of due care.

BREACH is the failure to exercise due care. Here White clearly breached his duty because he kept Kent as the "star reporter" while aware of Kent's dangerous behavior doing "many stupid things".

ACTUAL CAUSATION means that the plaintiff would not have been injured but for the actions of the defendant. Here Gates would not have been injured but for the actions of Kent, and Kent would not have acted as he did if he was not allowed to do so by White.

PROXIMATE DAMAGES are those which were foreseeable and flow directly from the acts of the defendant, rather than from intervening events. Here White's breach was the PROXIMATE CAUSE of Gates' injury because it was a foreseeable and direct result of White sending Kent off by himself to do the story.

Gates was INJURED because he suffered an assault, a battery, a false imprisonment and emotional distress.

Therefore, Gates can establish a prima facie case of negligence and White and the Planet could be directly liable for placing Kent in a position where he posed danger to others.

WILSON V. KENT

6. *Can Kent be liable for DEFAMATION?*

Under tort law a DEFAMATION is the publication of a false statement by the defendant about the plaintiff to third parties causing injury to the reputation and standing of the plaintiff. A written

defamation is libel, and general damages are more likely to be presumed. A spoken defamation is slander. Slander per se is a defamatory statement alleging a "loathsome disease", criminal activity, unchaste behavior, and unethical business practices. Other slanderous statements generally demand a showing of special damages before general damages will be presumed.

Under SULLIVAN v. NEW YORK TIMES and its progeny an action for defamation against a PUBLIC FIGURE requires a showing of actual malice, knowledge or reckless disregard for the falseness of the statements by the defendant. Further, where a matter of PUBLIC INTEREST is at issue, the statements by the defendant require a showing of at least NEGLIGENCE.

Here there was a false statement that Wilson was a "drag queen" because the clothes actually belonged to his "sister". It was harmful to reputation because of the nature of the statement. And, Kent published the statement to a third party, White.

Pete Wilson would be held a public figure, because he was "governor". He may argue that he is private figure because he is only a "former" governor; that argument would fail because he re-injected himself into the public eye by agreeing to be "interviewed".

Negligence is evidence because Kent "did not bother to ask" the truth, but Wilson must prove actual malice, not just negligence. It might be argued that Kent had a reckless disregard for the truth because he could have readily ascertained the truth and made no effort to do so.

Finally, it would be difficult for Kent to prove his reputation had been damaged to any extent if the only person who saw the story was White.

Therefore, Kent is not liable for defamation unless the finder of fact concludes he acted with reckless disregard for the truth, and even then the only damage to reputation would be the amount that the story caused White to think less of Wilson.

7. *Is Kent liable for INVASION OF PRIVACY based on PUBLIC DISCLOSURE OF PRIVATE FACTS?*

Under tort law a person is liable for the public disclosure to others of private facts about the plaintiff which are true but likely to cause embarrassment and humiliation.

Here Kent disclosed to others because he "told White".

And the facts are private because Kent could only determine them via his "X-Ray vision". The facts were embarrassing because they were about Wilson's intimate physiology.

Therefore, Kent could be liable for invasion of privacy, but here again the only damage would be the disclosure to Wilson since nobody else saw the story.

[Defamation and negligence answers generally take almost an entire hour to answer, so you have to abbreviate your "regular" answer to fit the amount of time allocated here.

Understand that plaintiffs only have a right to damages actually suffered. If defamation is only published to one person the plaintiff can prove little or no injury.]

Sample Answer 18-7: Crime/Tort Crossover, Murder, Strict Liability

STATE v. LYDIA

1. *Can Lydia be charged with MURDER?*

Under criminal law murder is an unlawful homicide, the killing of one human being by another, with malice aforethought. Malice for murder may be 1) express intent to kill or implied by 2) an intent to cause great bodily injury, 3) an act with an awareness of and conscious disregard for the unreasonable risk posed to human life, the depraved heart murder theory, or 4) commission of an inherently dangerous felony, the felony murder rule.

At common law there were no degrees of murder but modernly a murder is in the first degree if it is willful, deliberate and premeditated, caused by commission of an enumerated felony or done by an enumerated method. All other murders are in the second degree.

Here Bevis was killed by a dog, and not a human being, so there was no homicide unless Lydia, a human being, caused the dog to kill Bevis. There is no evidence that she intended to kill Bevis or to cause him great bodily injury. And Bevis was not killed as a result of any felony committed by Lydia. Therefore, the only basis upon which Lydia could possibly be charged with murder is the depraved heart murder theory.

The depraved heart theory requires proof Lydia deliberately created unreasonable risks to human life, was aware of it, and consciously disregarded it. But Lydia had no knowledge that the dog was a risk to anyone's life because it had only "bit" her child "once." And she did not deliberately create unreasonable and extreme risks to others, which she was aware of, because she needed protection and because she chained up the dog behind an "eight foot chain link fence" topped with barbed wire.

Therefore, Lydia cannot be charged with murder based on the depraved heart theory.

2. *Can Lydia be charged with involuntary manslaughter?*

Under criminal law involuntary manslaughter is an unintentional, unlawful homicide as a result of criminal negligence or during the commission of a crime insufficient for application of the felony murder rule.

Criminal negligence generally means deliberate creation of extreme and unreasonable risks to others, even if there is no awareness or conscious disregard of the risks.

Here there was no crime committed by Lydia because there were "no statutes against watchdogs." So Lydia could only be charged with involuntary manslaughter if Bevis was killed because of her criminal negligence.

Lydia's act in keeping the dog as a watchdog was not a deliberate act done to create unreasonable and extreme risks to others because she needed the dog for protection and kept it chained up and fenced in a manner that made the risks negligible to innocent parties.

Further, Lydia's keeping of the dog did not necessarily cause Bevis' death. Bevis was fully aware of the dog and caused his own death by his own recklessness in entering the yard and trying to drug the dog.

Therefore, Bevis' own recklessness was the cause of his death, and Lydia cannot be charged with involuntary manslaughter.

3. *Can Lydia claim SELF DEFENSE?*

Under criminal law one is privileged to use reasonable force as necessary to protect one's self.

Here Lydia claims she kept the dog to protect herself from being "raped and murdered." Keeping a watchdog is a reasonable use of force for self protection, and by chaining the dog to a tree behind a large fence, her use of force appears even more reasonable. Although Lydia was not home at the time of the burglary, the manner in which the dog was used was not unreasonable since it was clearly visible behind the "chain link" fence and the burglars were fully aware of the presence of the dog.

Therefore, the use of the watchdog for self defense was not an unreasonable use of force, and the defense of self protection can be raised.

DOOFUS v. LYDIA

4. *Is Lydia liable for NEGLIGENCE based on PREMISES LIABILITY?*

Under the common law of torts an occupier of property has no duty to warn or act to protect unknown trespassers from hidden dangers on the land, other than the duty to children under the attractive nuisance doctrine.

Modernly the distinction between trespassers and other has been reduced and occupiers of land are generally held to a more general standard to act reasonably to protect others from dangers on the land.

Here Bevis was a trespasser because he entered the land without Lydia's permission. And he was an unknown trespasser because Lydia was gone and did not know he had entered her land. He was injured by the dog, and that was not a "hidden danger" because he could see it and was well aware of the danger. Bevis was not a child so the attractive nuisance doctrine does not apply.

Therefore, Lydia had no duty to warn or act to protect Bevis based on premises liability under the common law. Further, his injury was not caused by hidden dangers on her land. Even under the more modern view, it would appear that by chaining the dog within a fence Lydia had acted in a reasonable manner to protect Bevis and others from the dog

5. *Is Lydia liable for NEGLIGENCE in Bevis' death based on STRICT LIABILITY?*

Under tort law a defendant is strictly liable for injuries caused by the keeping of a dangerous dog that is known to bite. The only defense to a strict liability tort is assumption of the risk.

Here Lydia knew the dog was dangerous because it had "bitten" her child. Therefore, she would be strictly liable for injuries suffered by Doofus as a result of Bevis' death, unless she can prove Bevis assumed the risk.

6. *Can Lydia claim ASSUMPTION OF THE RISK?*

Under tort law assumption of the risk is the defense that the plaintiff was aware of a danger and acted to voluntarily assume the risks posed by the danger.

Here Bevis saw the dog and was aware it could hurt him. Nevertheless he assumed the risk by attempting to burglarize the house with intent to "poison" the dog. Bevis might not have fully realized that the dog might kill him, but that is not relevant. All that is relevant is that he knew the dog was dangerous and might bite him. Yet he assumed that risk when he entered the enclosed area.

Therefore, Lydia can claim Bevis assumed the risk of the injury he suffered.

[ANSWER EXPLANATION: This is a cross-over question because the CALL asks about both criminal and civil liability. Murder requires proof of malice and involuntary manslaughter requires some extremely unreasonable act by the defendant.

A defendant is strictly liable for any injury caused by keeping a dog known to bite. But, the causality may be cut off where there is an assumption of the risk. Contributory negligence is no defense, but assumption of the risk means the plaintiff's own intentional act caused the injury.]

Sample Answer 18-8: Invasion of Privacy Torts

JODY v. DAILY RAG

1. *Can Daily Rag be liable for portraying Jody in a FALSE LIGHT?*

Under tort law FALSE LIGHT is the intentional act of publishing a false portrayal of the plaintiff in a manner causing ridicule or embarrassment.

Here Daily Rag published a portrayal about Jody because it reported he "loved children." This was a false portrayal because he viewed them as "pests." And this caused him embarrassment because he was "besieged with requests" for autographs and could not very easily tell the children to "get lost".

Therefore, Daily Rag may be liable for invasion of privacy under a false light theory.

2. *Can Daily Rag be liable for INTRUSION?*

Under tort law INTRUSION is an unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the value of lost solitude to the plaintiff.

Here there was an unreasonable intrusion because the Daily Rag sent photographers to "stake out" Jody's apartment "24 hours" a day and used a "powerful telephoto lens" to take pictures of him naked inside his apartment.

The Daily Rag might argue that Jody had no reasonable expectation of privacy because he was visible through the windows of his apartment. Jody would counter that he had a reasonable expectation of privacy from being viewed by "powerful telephoto lenses" inside his home.

Therefore, Daily Rag may be liable for intrusion.

3. *Can Daily Rag be liable for PUBLIC DISCLOSURE OF PRIVATE FACTS?*

Under tort law PUBLIC DISCLOSURE is the unreasonable public disclosure of private facts that a reasonable person would find embarrassing.

Here there was a public disclosure because Daily Rag "published" that Jody had been "secretly treated for alcoholism". And the facts were private facts because they were "secret" and about medical treatment. These were embarrassing facts because they concerned a personal problem that would reasonably be expected to cause public disdain and ridicule. Jody would argue Daily Rag acted in an unreasonable manner.

Daily Rag would argue that it acted reasonably because these facts were a matter of legitimate public concern since Jody had injected him into the public arena as a "sports figure." And, Daily Rag would argue that Jody's alcohol problems were a public fact because he had been "arrested for driving while intoxicated."

Jody would counter that the facts revealed were not the arrest, but his effort to obtain medical treatment for a personal problem that was not directly related to his position as a "sports figure."

Therefore, Jody could show the Daily Rag acted unreasonably in an action for public disclosure of private facts.

4. *Can Daily Rag be liable for APPROPRIATION OF LIKENESS?*

Under tort law APPROPRIATION is the unauthorized use of the name or likeness of a person to make a profit, except for the publication of names and photos as news articles. Damages are measured by the profit to the defendant.

Here there was a use of Jody's photo and name because billboards with his "picture" said "Jody Magio" reads the paper. And the use was not authorized because he did not give permission. The purpose of the billboards was to profit by selling the paper.

Daily Rag may claim the billboards were a news article. This would be transparently false because the obvious purpose was to imply that Jody endorsed or approved of their paper.

Jody's damages would be measured by the profits Daily Rag made from using his likeness.

Therefore, Daily Rag could be liable for appropriation.

[ANSWER EXPLANATION: This question calls for discussion of each of the four Invasion of Privacy torts -- False Light, Appropriation of Likeness, Intrusion and Disclosure of Private Facts (LAID).

Note that the "public figure" concept developed in *New York Times v. Sullivan* is not a specific limitation on an invasion of privacy action. If a statement is both false and damaging to reputation the proper cause of action is defamation and *New York Times* applies. In that case there is no real basis for bringing an action for false light. If the statement is false but not directly damaging to reputation there is no basis for an action for defamation, and the only possible cause of action is for false light. Then *New York Times* does not directly apply.

The focus in intrusion and disclosure is on the unreasonableness of the acts of the defendant. It is not unreasonable to take a picture of a naked person walking down the street, or even through the window of their home if they are standing at the window in a manner that openly exposes them to public view. But it is unreasonable to use extraordinary means to intrude within the interior of the home.

The "unreasonableness" of a defendant's acts must be assessed relative to the identity of the plaintiff. When a plaintiff injects him or herself into the public eye it is not unreasonable to expect the news media to thereafter focus on the plaintiff.

Money judgments are generally measured by the loss to the plaintiff (damages suffered), except in the case of appropriation where they are generally measured by the profit to the defendant (restitution). But the plaintiff in a tort action always has a right to request a judgment based on restitution instead of actual damages suffered.]

Sample Answer 19-9: Jurisdiction, Notice, Choice of Law, Collateral Attack

Tom v. Harry

1. *Did the court have SUBJECT MATTER JURISDICTION?*

Under the FRCP a federal court has SUBJECT MATTER JURISDICTION either because there is a FEDERAL QUESTION arising under 1) the U.S. Constitution, 2) U.S. Treaties, or 3) Federal statutes, OR because there is DIVERSITY. Diversity requires 1) that all plaintiffs be from different states from all defendants and 2) the controversy be over a good faith claim of over $75,000.

One is from the State where they have DOMICILE, the place where one intends to return and reside indefinitely.

Here Tom is domiciled in California because he "lived in Sacramento", and Harry is domiciled in Nevada because "his permanent residence" is in Las Vegas. Therefore the parties are from different states.

And the amount is more than $75,000, because it is for "$80,000".

Therefore, subject matter jurisdiction exists based on DIVERSITY.

2. *Did the court have PERSONAL JURISDICTION?*

Under PENNOYER v. NEFF personal jurisdiction was based on 1) PRESENCE, 2) DOMICILE and 3) CONSENT. Under INTERNATIONAL SHOE personal jurisdiction was also held to exist based on MINIMUM CONTACTS because of CONTINUOUS AND SYSTEMATIC ACTIVITIES or where there was a FORUM RELATED CAUSE OF ACTION and the defendant had availed himself of the benefits and protections of forum-State law such that exercise of jurisdiction did not offend traditional notions of fair play and substantial justice.

Harry did not have presence or domicile in California at the time he was served because he was served at his residence in Nevada. And he did not consent to the court's jurisdiction because he did not answer.

But Harry had sufficient minimum contacts with California because he "advertised" and did regular business with California residents. This would be continuous and systematic activity.

Tom may also argue this is a forum related cause of action because the debt arose from him playing the internet game while IN CALIFORNIA. Harry would argue that his activities were all in NEVADA and that the plaintiff was communicating into Nevada to play the game.

Harry also "spent most of the year in California". That would probably be sufficient so that it would not offend traditional notions of fair play for a California court to exercise jurisdiction over him.

Therefore, the court would probably hold there was adequate personal jurisdiction over Harry.

3. *Was there sufficient NOTICE?*

Under MULLANE for any judgment to be accorded FINALITY notice must REASONABLY CALCULATED to apprise the party of the pending matter and afford them opportunity to voice objection. Otherwise the court lacks jurisdiction over the person.

Here Harry would say he was not given reasonable notice because "Dick taped the notice to the gate". But Harry also "found the notice" and "decided to ignore it."

Therefore, the court may hold that even though the method by which Harry was given notice was not reasonable, Harry did actually get notice, was therefore apprised of the pendant action and that the default judgment was valid.

4. *If Harry answered, and did not object to venue, what should the outcome have been?*

Under the ERIE DOCTRINE the substantive law of the forum State applies in an action based on diversity unless venue is challenged by the defendant and found to be improper. In that case the matter will generally be transferred to the proper venue and the law of the State of transfer would be applied.

Here the forum State was California because the suit was filed in California. If Harry had answered, and had not challenged venue, California law should have been applied. In that event Tom should have been barred from recovery, because gambling was illegal in California.

5. *Is Harry's challenge an impermissible COLLATERAL ATTACK?*

Under the FEDERAL RULES OF CIVIL PROCEDURE a COLLATERAL ATTACK is a challenge to a final court judgment in a second litigation. Generally it will not be permitted. However, one may always challenge that the original court lacked JURISDICTION, if that challenge was never addressed by the first court. Where jurisdiction is actually challenged in the first proceeding, the denial of the objection must be taken up on appeal and not on collateral attack.

Here Harry could challenge the first court's jurisdiction because he never appeared in the first court and the judgment was by default.

Therefore, this is not an impermissible collateral attack.

Sample Answer 19-10: Jurisdiction, Preclusion, Choice of Law

Paul v. Dick

1. *Did the first court have PERSONAL JURISDICTION and can Paul challenge that holding again in a second action?*

Under PENNOYER V. NEFF personal jurisdiction can be based on PRESENCE, DOMICILE or CONSENT. DOMICILE is that place a person intends to return to and reside indefinitely. Under INTERNATIONAL SHOE personal jurisdiction can extend under LONG-ARM STATUTES to those who have MINIMUM CONTACTS with a State based on CONTINUOUS AND SYSTEMATIC ACTIVITIES or where there is a FORUM RELATED CAUSE OF ACTION and the defendant has AVAILED HIMSELF of form State laws and benefits such that jurisdiction does not offend traditional notions of fair play and substantive justice.

Under the rules of federal procedure, a party generally may not challenge a finding of personal jurisdiction in a COLLATERAL ATTACK. However, a person may challenge personal jurisdiction in any new matter unless the issue has been waived.

Here there was no CONSENT because Dick moved for dismissal over lack of personal jurisdiction. His special appearance in court for this purpose did not establish jurisdiction based on consent. Further, there was no DOMICILE or PRESENCE because Dick "lived in State Y".

The court probably found personal jurisdiction based on MINIMUM CONTACTS because Dick "spent every summer" and had an interest in a "cabin" in State X.

However, Dick can challenge personal jurisdiction in a new action by Paul because Dick did not waive the issue of personal jurisdiction in the first case. In fact, Dick may have appealed the finding of jurisdiction in the first case. The facts are silent.

2. *Would State X district court have SUBJECT MATTER jurisdiction?*

Under the federal rules of civil procedure a court can have subject matter jurisdiction if there is a FEDERAL QUESTION arising under the U.S. CONSTITUTION, FEDERAL LAW or a FEDERAL TREATY. And a court may have DIVERSITY jurisdiction if the plaintiffs are all from different states from all of the defendants and there is a good faith claim for over $75,000.

Diversity is based on DOMICILE, defined above, and here there is diversity because Dick "lived in State Y" and Paul "was from State X".

Therefore, there will be subject matter jurisdiction for Paul's action if he has a claim for over $75,000.

3. *Is Paul's CLAIM PRECLUDED because Pliny brought an action?*

Under the FRCP a party is PRECLUDED from bringing a CLAIM by the principal of RES JUDICATA where 1) the SAME CLAIM was brought or should have been brought by 3) the SAME PARTIES or those in PRIVITY with them and 3) it was accorded a FINAL JUDGMENT based on the MERITS.

Here Paul was not one of the same parties in the prior litigation because "he did not join as a plaintiff".

Further, Paul was NOT IN PRIVITY with Pliny because she sued for her own injuries and not for Paul's.

For the same reason, Paul's claim is NOT THE SAME CLAIM as Pliny's, and Pliny had no obligation to bring a claim on the behalf of Paul.

Under the FRCP Dick could have used COMPULSORY JOINDER to try to force Paul to participate in the first suit because Paul's injury arose out of the same nucleus of operative fact. But Dick failed to force Paul to join.

Therefore, Paul is not barred from bringing his own claim against Dick.

4. *Can Paul move for SUMMARY JUDGMENT that Dick was already proven negligent?*

Under the FRCP SUMMARY JUDGMENT may be issued where there are no issues of material fact in dispute. Dick cannot dispute the issue of his negligence if he is barred by ISSUE PRECLUSION, the principal of COLLATERAL ESTOPPEL, because 1) the SAME ISSUE was 2) ACTUALLY FULLY LITIGATED, 3) by the SAME PARTY to be bound, or a party in PRIVITY with them, and 4) it's determination was ESSENTIAL to the prior judgment.

Courts generally allow "defensive" issue preclusion to be used by defendants to bar plaintiffs from re-litigating claims that the same plaintiffs have already failed to prove in other actions. But Courts often will not allow a plaintiff to use "offensive" issue preclusion as an offensive strategy to prevent a defendant from raising a defense that the defendant failed to prove in a prior action. This is especially true if the defendant had less incentive or ability to fully litigate the same issue in the prior action.

Here Dick's negligence was actually and fully litigated and essential to the determination of Pliny's case against Dick, and Dick was found to have been negligent. Further, Dick was a party, the defendant, in Pliny's action.

Therefore, Paul can move for summary judgment based on issue preclusion that Dick was negligent, but Courts often will not allow the offensive use of issue preclusion under these circumstances.

5. *Can Dick move for summary judgment that his negligence was no more than 50% based on DEFENSIVE ISSUE PRECLUSION?*

Under the FRCP, in order to apply the principal of ISSUE PRECLUSION, defined above, against Paul, Dick must show that Paul was a party, or in privity with a party, to the prior action.

Here Dick was found to have only been 50% at fault in the prior litigation. But Paul was not a party, or in privity to a party in the prior action, because there are no facts to show Pliny had an incentive to represent Paul's position.

Therefore, Dick cannot use issue preclusion to stop Paul from arguing he was completely responsible for the accident.

6. *What should Paul do if contributory negligence is a complete bar in State X?*

Under the ERIE DOCTRINE the substantive law of the forum State applies when a case is litigated in federal court based on diversity jurisdiction. Substantive law is that which determines the outcome and is not merely procedural in nature. The forum State is the state where a plaintiff files

Here the recognition of CONTRIBUTORY NEGLIGENCE is a substantive law. Contributory negligence is a minority rule that means that if the plaintiff in a tort negligence action was also negligent, they are barred from recovery from the defendant.

If Dick and Paul were both partly at fault for the accident, as was the finding in the first action litigated between Dick and Pliny, Paul cannot recover in an action filed in State X district court. Therefore, Paul would be advised to file his action in State Y district court. He would be able to do that because Dick lives in State Y and the accident occurred in State Y.

Sample Answer 19-11: Jurisdiction, Venue, Erie Doctrine, Claim Preclusion

Barbara v. Cal & Reno

1. *Did the first federal court have PERSONAL JURISDICTION over Reno?*

Under Pennoyer v. Neff the due process guarantees of the 5th and 14th Amendments require a federal district court to have personal jurisdiction over a defendant. Personal jurisdiction may be based on CONSENT, DOMICILE or PRESENCE of the defendant within the state where the action is filed. Domicile means that place to which the defendant intends to return and reside indefinitely.

Later International Shoe held that personal jurisdiction may also be found where the defendant has had the minimum necessary contacts with the forum state based on continuing and systematic activities or where there is a forum related cause of action such that exercise of jurisdiction would not offend traditional notions of fair play and substantive justice.

Here Reno objected to jurisdiction and did not consent. That objection was denied. Also, Reno is not domiciled in California because he "lives in Nevada." And Reno was not present in California because he was "served in Nevada." Therefore, personal jurisdiction over Reno can only be based on "minimum contacts."

And Reno was not engaged in continuous and systematic activities in California, but was just going to Disneyland. But this is a FORUM RELATED CAUSE OF ACTION because it concerned a traffic accident that occurred in California. Since the cause of action concerns an injury that was allegedly caused by Reno while in California it is not "contrary to traditional notions of fair play" for a California court to exercise personal jurisdiction over Reno in the matter.

Therefore, the California district court has personal jurisdiction over Reno.

2. *Did the court lack SUBJECT MATTER JURISIDICTION?*

Under federal law the subject matter jurisdiction of a federal district court is limited to federal questions arising under the Constitution or federal laws or treaties, and diversity cases. A diversity case requires that all defendants be domiciled in different states than all plaintiffs and a good faith claim for over $75,000? Domicile is defined above.

Here there is no federal question because the case concerns a traffic accident. Therefore federal subject matter jurisdiction must be based on diversity. There appears to be a good faith claim for more than $75,000 because the claim is for $1 million. But there appears to be a lack of diversity because Cal is domiciled in California and Barbara appears to be domiciled in California too.

Therefore, the federal court appears to lack subject matter jurisdiction over this case.

3. *Can Barbara COLLATERALLY ATTACK the first judgment based on a lack of SUBJECT MATTER JURISIDICTION?*

Under federal law subject matter jurisdiction of a federal district court is determined by Congress and cannot be established by an express or implied "waiver" of the parties. Generally a collateral

attack of subject matter is permitted if the issue has not actually been litigated in the trial court. But if any party objects to a lack of subject matter jurisdiction at the trial level, and the objection is denied, the issue can only be raised again on appeal, not in a collateral attack.

Here Barbara did not object when the Court held it had subject matter jurisdiction, but that did not waive her right to object to the Court's jurisdiction later. But she can only attack subject matter jurisdiction on appeal and not by a collateral attack because the issue was actually litigated when Cal objected and his objection was denied.

Therefore, Barbara did not waive he right to challenge subject matter jurisdiction, but she must raise the issue on appeal and not in a collateral attack.

4. *Was the VENUE WRONG?*

Under federal rules of civil procedure venue is correct in any district where any defendant resides, if all defendants reside in the same state, or else where the cause of action arose or where the property in dispute is located. If venue cannot be established under either of those criteria, venue is proper in a diversity action in any place where a court can exercise personal jurisdiction over the defendants.

Here the defendants resided in different states, but venue was correct in the district that included Santa Barbara County because that is where the accident occurred.

Therefore the venue was correct where the action was filed.

5. *Did Nevada District Court apply the WRONG LAW?*

Under the Erie Doctrine state substantive law and federal procedural law apply to a diversity action. If the venue of the action is transferred to a different state the substantive law of the original state applies if venue was proper. If the original venue was not correct the substantive law of the second state applies.

Here the action is based on diversity and the original venue in California was correct. Therefore, California law should have been applied. Since California "did not recognize contributory negligence" as a bar, any negligence by Barbara should not have barred her suit.

But the Nevada court applied Nevada law and barred the suit based on the application of the wrong law.

Therefore, the Nevada court applied the wrong law.

6. *Does RES JUDICATA prevent a second suit?*

Under the doctrine of res judicata a plaintiff is generally precluded from bringing a claim that has been previously litigated between the same parties over the same injury or an injury that could have been raised in the prior litigation if a final judgment was issued by the prior court based on the merits of the claim.

Res judicata appears to apply here because the new claim by Barbara is over the same injury and concerns the same accident previously litigated. And, this is the same parties because Barbara bringing a second action against Cal and Reno. This claim was previously litigated and a final judgment appears to have been issued in the Nevada court. That judgment was issued on the merits because the court held for the defendants under application of the contributory negligence statute.

Therefore, Barbara is generally precluded from litigating the claim again unless the Nevada district court judgment is reversed on appeal for lack of subject matter jurisdiction.

[ANSWER EXPLANATION: This answer starts with the issue of personal jurisdiction but subject matter jurisdiction could be raised first since the facts raise that issue in the second paragraph. But SMJ is expressly cited as an issue in the fourth paragraph so it can also be discussed after the discussion of personal jurisdiction if that seems a better approach.

Personal jurisdiction over the defendant is a Constitutional due process issue that can be waived by a defendant. If an action arises out of events within a forum state personal jurisdiction can be found based on a forum related cause of action. There is no offense to traditional notions of fair play to hold a defendant accountable in the forum state for his or her actions there.

State courts have general jurisdiction, and the subject matter jurisdiction of federal courts is limited by Congress and not defined by the court or the actions or agreements of the parties. Article I of the Constitution gives Congress the power to define the jurisdiction of the "inferior" federal courts, and Congress has done that by 28 USC 1331-1332. The court here cannot exercise diversity jurisdiction over Reno and Cal because Cal appears to live in the same state as Barbara (Note that the facts never expressly say where Barbara was from.) The federal court cannot exercise jurisdiction over Reno alone because Barbara named Cal as a party.

Venue is set by 28 USC 1391. It determines the applicable law, and here the court applied the wrong law. That mistake and the lack of SMJ should be raised by Barbara as issues on APPEAL, not in a COLLATERAL ATTACK in State court.

The basic fact is the original federal district court had no jurisdiction over the case, and the transfer to Nevada did not change that. So Barbara can challenge the Nevada judgment, get it voided and sue all over again. The facts said she "did not respond" to the original SMJ challenge in order to deter you from arguing she might be estopped by arguments she might have made in claiming that SMJ was correct. But even if she had made such an argument earlier it would not bar her from challenging SMJ later because actions by the parties cannot give a federal court powers that Congress has denied it.

Barbara must attack the first judgment on appeal and void the judgment rather than challenge it in a collateral attack. In *Louisville & Nashville Railroad v. Mottley,* 211 U.S. 149 (1908) it was held that subject matter jurisdiction can never be waived expressly or impliedly by the parties. And in *Bank of Montreal v. Olafsson,* 648 F.2d 1078 (6th Cir. 1981) a judgment based on diversity was voided over a year after it was entered when it was determined the court lacked subject matter jurisdiction. Therefore, failure to object to SMJ at the time of litigation does not bar a challenge on appeal.

But in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940) the Court held that subject matter jurisdiction cannot be challenged in a collateral attack by a party that has litigated a matter on its merits (rather than defaulting) without raising the issue of jurisdiction. This principal probably does not apply if the matter litigated is one that falls under the exclusive jurisdiction of a different court (e.g. bankruptcy.)]

Sample Answer 19-12: Joinder, Venue, Minimum Contacts

Paula v. CEI

1. *Would the court have SUBJECT MATTER JURISDICTION?*

Under federal rules of CIVIL PROCEDURE, federal courts have limited SUBJECT MATTER jurisdiction based on 1) DIVERSITY or 2) a FEDERAL QUESTION while state courts have general jurisdiction.

Federal SUBJECT MATTER JURISDICTION based on DIVERSITY requires that all plaintiffs be DOMICILED in different states than all defendants and a good faith claim for over $75,000.

DOMICILE means the place a person intends to return to and reside indefinitely.

Here jurisdiction would have to be claimed based on diversity because there is no federal question arising under federal law, a federal treaty or the U.S. Constitution.

There is diversity of parties because CEI is "headquartered" in Alabama and Paula is from Wisconsin. And there is a dispute over more than $75,000 because Paula claims damages of $80,000.

Therefore, the court would have subject matter jurisdiction.

2. *Does court have PERSONAL JURISDICTION over defendant?*

Under PENNOYER v. NEFF federal courts had PERSONAL JURISDICTION over a defendant where there was 1) CONSENT, 2) PRESENCE or 3) DOMICILE. DOMICILE means the place a person intends to return to and reside indefinitely.

Under INTERNATIONAL SHOE, jurisdiction may be exercised based on forum state "long arm statutes" if there are sufficient MINIMUM CONTACTS. Minimum contacts exist if there is a FORUM RELATED CAUSE OF ACTION. Minimum contacts may also exist if CONTINUOUS AND SYSTEMATIC ACTIVITIES by the defendant in the forum state are such that jurisdiction would "not offend traditional notions of fair play and substantial justice" because the defendant "availed himself of the protections of forum state laws".

Here CEI has no domicile, no presence and gives no consent to the jurisdiction of the Wisconsin district court because it is "headquartered in Alabama" and has "no employees or presence" in any other state. But there were sufficient minimum contacts between CEI and Wisconsin because it advertised and sold its services there over "the internet". It accepted orders from Wisconsin by phone on its "800" number, and had "independent contractor" Andy in Wisconsin to handle the calls. It appears that if Paula had not paid CEI as promised, CEI would have availed itself of the protections of Wisconsin laws to collect.

Therefore, the Wisconsin court would find that it had personal jurisdiction over CEI.

3. *Can Computer Experts, Inc. (CEI) force Andy to be joined as a party or, in the alternative, require the suit to be dismissed?*

Under federal rules of CIVIL PROCEDURE both claims and parties can be joined in an action. Joinder of parties means more than one plaintiff or more than one defendant is involved in litigation.

COMPULSORY JOINDER of parties means either that 1) defendants file cross-complaints against third parties (third-party defendants), bringing them into the on-going litigation, or 2) defendants seek to force third parties to join and participate in litigation as plaintiffs against them so they will not face potential duplicative, inconsistent or conflicting litigation and judgments in the future.

Compulsory joinder requires claims arising out of the same "incident" (an event or series of related events or transactions) as the original action, and a showing that participation by the party to be joined is necessary to 1) assure the existing parties an adequate remedy or else because 2) the party to be joined claims an interest in the subject matter or outcome of the existing litigation.

*Compulsory joinder of parties **against whom** claims exist (defendants) is not allowed unless the court has independent subject matter jurisdiction over those claims. But compulsory joinder of parties **by whom** claims may exist (potential plaintiffs) is allowed regardless of diversity, and those claims are covered by supplemental jurisdiction.*

If a potential defendant to be joined cannot be joined for lack of diversity, and the Court determines participation of that defendant is indispensable to a just result, the entire case must be dismissed.

Here Paula had claims against both Andy and CEI, but she only sued CEI. She had a claim against Andy because "Andy charged $80,000 on Paula's account." But if she had named Andy as a defendant it would have destroyed diversity jurisdiction since both Paula and Andy are from Wisconsin. That was Paula's prerogative.

CEI also has an indemnification claim against Andy for losses they might suffer as a result of his wrongdoing. The claim of CEI against Andy arises out of the same nucleus of operative fact as the claim of Paula against CEI because they both arise from the single event or series of events at issue. But CEI if Andy is joined he would come in as a defendant to Paula's claim, and the Court would have no diversity jurisdiction over Paula's claims against him since both Andy and Paula are from Wisconsin.

Therefore, CEI cannot join Andy because the Court would have no diversity jurisdiction over the claims of Paula against Andy.

CEI may try to argue that joining Andy is indispensable to a just result, but there is no evidence to suggest that.

Therefore, the Court would not joint Andy and it also would not dismiss Paula's complaint simply because Andy cannot be joined.

4. *Where is PROPER VENUE and what EFFECT?*

Under the federal rules of CIVIL PROCEDURE the proper VENUE for bringing an action is where any defendant resides, if all defendants reside in the same state; or where the cause of action arose. BUT if there is no other district where the action can be brought, in a DIVERSITY action, venue would be proper where PERSONAL JURISDICTION can be found over the defendants.

Under ERIE, in a DIVERSITY CASE a change of venue for FORUM NON CONVENIENS (convenience) requires the use of the substantive law of first state where the action was filed with proper venue.

Here Paula filed suit in Wisconsin, and defendant CEI would object that venue is improper in Wisconsin because it resides in Alabama where it is "headquartered."

Paula would argue venue is proper in Wisconsin because the cause of action arose in Wisconsin where she lived when she entered into her contract with CEI. CEI would argue that her cause of action is actually based on a claim that CEI was negligent prior to that when it decided to contract with Andy. If that is so, the cause of action must have arisen in Alabama because if CEI was negligent in selecting Andy that negligence occurred in Alabama as it was "headquartered" there and it had "no employees or presence in any other State". But Paula may counter that there was ongoing negligence by CEI in the supervision and monitoring of Andy's activities in Wisconsin after he was originally hired, regardless of when or where that occurred.

Therefore, if the Court holds that any negligence by CEI must have occurred in Alabama that would the proper venue.

The EFFECT of a change of proper venue to Alabama is that Alabama law must be applied. And since Alabama law "completely indemnifies" CEI from any claims arising from criminal acts by Andy it might bar Paula's claim against CEI.

Therefore, if venue is improper in Wisconsin, Paula may lose her case.

[ANSWER EXPLANATION: This answer follows the call of the question and simply uses prepared responses for the commonly raised issues.

Law school professors often ignore venue and joinder in favor of asking jurisdiction questions. But this question shows that venue and joinder can be very complicated and critical issues.

The concepts of compulsory joinder and the application of the case of *Stromberg Metal Works, Inc. v. Press Mechanica, Inc.*, (7th Cir. 1996) 77 F.3d 928 regarding supplemental jurisdiction can be especially complex.

If a business accepts orders from any state that will probably be enough to satisfy the minimum contact requirement because the business would pursue collection of debts in the state courts.]

Sample Answer 20-13: Crimes, Vicarious Liability

STATE V. TOM

1. *CONSPIRACY?*

Under common law a CONSPIRACY is an agreement between two or more people to work toward an illegal goal. Modernly an overt step toward the criminal goal is often required.

Here there was an implied agreement between Tom and Dick, two people, for an illegal goal, because they "burst" into the store together and "wanted to rob" the store. They committed an overt step toward their goal because of this.

Therefore Tom can be charged with conspiracy to commit robbery.

2. *ATTEMPTED ROBBERY?*

Under criminal law an ATTEMPTED ROBBERY is committed with there is a SUBSTANTIAL STEP taken toward committing a robbery. A robbery is a LARCENY, a trespassory taking of personal property with an intent to permanently deprive, from a person by force or fear overcoming the will of the victim to resist.

Here Tom took a SUBSTANTIAL STEP toward completing the robbery because he went to the store "with a gun" and "burst" through the door. And his goal was the crime of robbery because he "wanted to rob" the store.

Therefore, Tom can be charged with attempted robbery.

3. *DEFENSE OF MISTAKE OF FACT?*

Under criminal law a mistake of fact is a valid defense if it NEGATES IMPLIED CRIMINAL INTENT. Attempt is a SPECIFIC INTENT crime, so any mistake of fact that negates criminal intent is a valid defense.

Here Tom made a mistake because he thought the store was open for business, but that mistake does not negate intent because he "wanted to rob" the store.

Therefore, Tom's mistake of fact does not negate his criminal intent, and his defense argument fails.

4. *BURGLARY?*

Under the common law a burglary was a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony. Further, a CONSTRUCTIVE BREAKING would be found if an entry was made by trick, threat of violence or with the help of a conspirator.

MODERNLY burglary has been extended to almost any structure and all times of the day. If a larceny is not a felony, it still supports a charge of burglary. And modernly a constructive

breaking will be found if there is any TRESPASSORY ENTRY, an entry without permission, express or implied.

Courts are often split on what constitutes a "trespassory entry". Generally it is held that an entry is trespassory if it is accomplished at a TIME or by a MEANS for which no consent has been granted. Some Courts hold that entry for an unauthorized PURPOSE is trespassory and sufficient to charge burglary, but that does not appear to be the general view.

Here there was no entry to a dwelling, and the entry was through an "open" door. Therefore, no common law burglary occurred.

But Tom entered a structure because they entered a "store" and it was with intent to commit a felony because they "wanted to rob" the store. Finally, a CONSTRUCTIVE BREAKING would be found modernly because their entry was trespassory because the store was not open for business, and they had no permission to enter it, either expressly or impliedly, at this time, by this means, or in any other manner.

Therefore they could be charged with burglary modernly but could not have been charged at common law.

5. *LARCENY?*

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Modernly it is codified as "theft".

At common law some Courts held that property attached to the land could not be the subject of a larceny because it was real property and not personal property. Other courts disagreed, and modernly all courts would hold that when property is severed from the land to be stolen it is transformed from real property to personal property and can then be the subject of a larceny.

Here Tom took and carried personal property of another because he "ripped the security camera" from the wall and took it to the "river", and he intended to permanently deprive because he threw it in the river.

Therefore Tom can be charged with larceny.

6. *MURDER OF THE BABY?*

MURDER is an unlawful HOMICIDE, the killing of one human being by another with MALICE AFORETHOUGHT. MALICE for murder can be 1) an express INTENT TO KILL, or implied by 2) intent to commit GREAT BODILY INJURY, 3) a homicide caused by commission of an INHERENTLY DANGEROUS FELONY, the "FELONY MURDER RULE" or 3) DELIBERATE CREATION OF EXTREME RISKS to human life with AWARENESS of the risks and a CONSCIOUS DISREGARD for them, the "DEPRAVED HEART" murder.

Under the common law and broadly adopted modern law a HUMAN BEING is a person that has been born alive and has not yet died. About half the States have adopted FETAL-MURDER statutes which define the killing of a fetus with malice aforethought punishable as a murder, but they vary widely. The death of a fetus cannot qualify as manslaughter.

Murder may be charged under the FELONY-MURDER RULE if a death is caused by the commission of an inherently dangerous felony, but only if the death is caused by acts done during the RES GESTAE of the underlying felony. The RES GESTAE of a crime is the sequence of events from the first substantial step to committing the crime and ending when the defendants leave the scene of the crime and reach a place of relative safety.

Here there was no homicide because the baby was "born dead" and not born alive. But this may be defined as a murder under a fetal-murder statute in some States because the fetus was "full term."

Even if this State had a fetal-murder statute, malice for murder could not be based on intent to kill, intent to cause great bodily injury or depraved heart because the collision was by "accident" and at a reasonable speed of "75".

Further, malice could not be based on the felony-murder rule because the death occurred after the res gestae the attempted robbery had ended. It ended when they at a place of "relative safety" and were able to watch "TV".

Therefore, Tom cannot be charged with murder because there is no basis for finding malice, even if there was a fetal-murder statute.

7. *INVOLUNTARY MANSLAUGHTER.*

Under criminal law INVOLUNTARY MANSLAUGHTER is an UNINTENTIONAL homicide without malice aforethought resulting from GROSS NEGLIGENCE or during commission of a MALUM IN SE CRIME that is not inherently dangerous enough for application of the felony murder rule.

As discussed above, the death of a fetus does not qualify as a manslaughter.

Therefore, Tom's act was not sufficient to charge him with involuntary manslaughter.

8. *MURDER of Victor?*

Murder, defined above, can be based on the DEPRAVED HEART doctrine where one acts unreasonably to DELIBERATELY CREATE EXTREME RISKS TO OTHERS, the actus reus, with AWARENESS of the risks and a CONSCIOUS DISREGARD for the risks, the mens rea.

Here Tom caused a homicide because he killed Victor, a human being. And he deliberately created extreme risks because he drove down the "crowded surface streets" at "80 mph". Further, he was aware of the risks because he was in full control of his faculties. And he consciously disregarded the risks because he continued to do this without any compelling reason.

Therefore, Tom can be charged with the murder of Victor.

STATE V. DICK.

9. CONSPIRACY, ATTEMPTED ROBBERY, BURGLARY and LARCENY?

Dick was an equal participant in the crimes of conspiracy, attempted robbery, burglary and larceny, and did all of the same things as Tom relative to these acts.

Therefore Dick was DIRECTLY LIABLE and could be charged with each of these crimes on the same facts and legal theories as explained for Tom above.

10. MURDER of Victor?

Tom killed Victor and not Dick, and since "Dick was silent" and not urging Tom to run over Victor or do anything criminal, Dick could only be charged with this murder based on a vicarious liability theory. There are two vicarious liability theories: conspiracy theory and accomplice theory.

CONSPIRACY THEORY? A person may be charged with vicarious liability for a crime based on CONSPIRACY THEORY if while they are a member of a conspiracy a co-conspirator commits the crime within the scope of the conspiracy. But a conspiracy ends when the criminal goal is ATTAINED or ABANDONED.

Here Dick was a member of a conspiracy to rob the store, but that conspiracy goal was abandoned when they found the store closed. Since the conspiracy had ended, Tom did not kill Victor the next day "within the scope" of the conspiracy.

Therefore Dick cannot be charged on this basis.

ACCOMPLICE THEORY? A person who commits or helps commit a crime is liable for all subsequent crimes by co-felons that are a direct and natural result of the prior crimes.

Here Dick helped Tom try to rob the store the prior day, so he would be liable for any crimes by Tom that are a direct and natural result of the attempted robbery. But the murder of Victor was not a direct, natural or foreseeable result of the prior robbery attempt.

Therefore Dick cannot be charged with Victor's death based on accomplice liability.

Since Dick had no direct liability or vicarious liability he cannot be charged with Murder.

[EXPLANATION: The main points here are that:

1) Modernly a burglary generally requires a trespassory entry, an entry without permission to enter, and does not necessarily require a physical breaking.

2) A fetus is not generally considered a human being.

3) There are fetal-murder statutes you might need to discuss, but there are no "fetal-manslaughter" statutes (or if there are it is so unusual it is not worth mention).

4) The felony-murder rule cannot be applied to a death that results from acts done so long after the robbery that they were not part of the res gestae of the crime.

5) There is no conspiracy liability for crimes committed by co-conspirators after the conspiracy has ended.

6) Accomplices in one crime are not automatically liable for all subsequent crimes committed by other accomplices, even if they are committed in their presence unless there is some direct and natural causality linking the second crime back to the first crime.]

Sample Answer 20-14: Felony-Murder Rule, Redline Rule

STATE V. TOM

1. *Can Tom be charged with CONSPIRACY?*

Under criminal law a CONSPIRACY is an agreement between two or more people to commit an illegal act, and an overt step is taken toward the criminal goal. Conspiracy does not merge into the criminal goal. A conspirator may be charged with all crimes by co-conspirators during the term of the conspiracy that are foreseeable and in furtherance of the conspiracy goal.

Here Tom agreed to an act with another person because he "agreed" with "Dick". The act was an illegal act because it was to "kidnap Sally." And they took an overt step because they did kidnap her.

Therefore, Tom can be charged with conspiracy to commit kidnapping.

2. *Did Tom EFFECTIVELY WITHDRAW from the conspiracy?*

Under criminal law a member of a conspiracy is not vicariously liable (based on conspiracy theory) for the crimes committed by co-conspirators after an effective withdrawal has taken place. EFFECTIVE WITHDRAWAL from a conspiracy requires the defendant to give notice to the other conspirators and generally some effort by the withdrawing defendant to act to thwart the conspiracy from attaining its goal is required.

Moreover, withdrawal is not always an effective defense to vicarious liability for crimes that were the direct and natural consequences of the defendant's own criminal acts.

Here Tom gave notice because he told Dick "I quit." And he later acted to thwart the conspiracy because he "told the police."

However, Tom did not announce his withdrawal until after Dick had raped Sally, and it was the rape that caused the death. And he did not act to thwart the conspiracy until after the kidnapping, rape and death of Sally.

Therefore, Tom effectively withdrew from the conspiracy when he told the police everything, but that did not absolve him from crimes that occurred before that time.

3. *Can Tom be charged with KIDNAPPING?*

Under criminal law a KIDNAPPING is the unlawful taking or confining of a person against their will.

Here Tom took and confined Sally against her will demanding ransom.

Therefore, Tom can be charged with kidnapping.

4. *Can Tom be charged with RAPE under a theory of ACCOMPLICE LIABILITY?*

Under criminal law RAPE is unlawful intercourse with a person without consent. And there are two ways Tom might be vicariously liable for Dick's rape of Sally, conspiracy liability and accomplice liability.

A conspirator is generally vicariously liable for all crimes committed by co-conspirators within the scope of the conspiracy agreement.

And accomplices, people that are not present at the commission of a crime but encourage, aid or assist the commission of the crime before or afterward, are vicariously liable for all crimes committed by other accomplices that are the direct, natural and foreseeable consequences of the defendants' own crimes.

Here Dick had intercourse with Sally without consent. Although Tom might argue Sally consented, she was being held against her will and her apparent consent to intercourse was the result of duress and not effective. Therefore, Dick raped Sally.

Tom would successfully argue that he is not liable for the rape of Sally based on conspiracy theory because he and Dick specifically agreed this rape had nothing to do with their criminal goal.

But the rape of Sally by Dick was a direct, natural and foreseeable result of Tom's act of kidnapping Sally and leaving her with Dick. Tom knew "Dick was a convicted rapist", and he had anticipated trouble of this sort, so even if the rape was outside the scope of their conspiracy agreement, it was still a direct and natural consequence of Tom's own crime of kidnapping Sally and leaving her with Dick.

Therefore, Tom may be charged with vicarious liability for the rape of Sally under accomplice liability.

5. *Can Tom be charged with MURDER of Sally?*

Under criminal law murder is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY-MURDER RULE, 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY, or 5) resisting lawful arrest. At common law there were no degrees of murder but modernly first degree murder is one that is 1) willful, deliberate and premeditated, 2) by an enumerated means, or 3) caused by the commission of an enumerated dangerous felony. All other murders are in the second degree.

Here there was a homicide because Sally was a human being and she died as a result of the acts of Dick. Tom would argue that Sally committed suicide and not homicide. But her death by her own hand was caused by the acts of Tom and Dick. Tom and Dick were the instrumentalities of Sally's death.

Further, Tom acted to place Sally at peril so he had an affirmative duty to protect her from both Dick and her own suicidal impulses. He failed to protect her from the peril he created, so he is

responsible for her death. If she had not been kidnapped and raped, she would not have killed herself.

Sally died during and because of the commission of an inherently dangerous crime, rape, so the FELONY-MURDER RULE applies.

Sally also died because Tom kidnapped her with an awareness of and conscious disregard for the risk to human life, the DEPRAVED HEART THEORY. Tom knew that kidnapping Sally and putting her with Dick carried great risks, but he continued with the plot.

Therefore, Tom could be charged with murder on a FELONY-MURDER or DEPRAVED HEART theory.

And RAPE is almost always one of the "enumerated felonies" for first degree murder.

Therefore, Tom could be charged with FIRST DEGREE MURDER.

6. *Can Tom be charged with MURDER of Dick?*

Under the REDLINE RULE the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony is not chargeable as murder against the surviving felons.

Therefore, Tom cannot be charged with FELONY-MURDER because the police killed Dick.

[ANSWER EXPLANATION: This question focuses on two issues. First, conspiracy liability alone only extends to crimes within the scope of the conspiracy. This is generally foreseeable acts in furtherance of the conspiracy goal. But accomplices are liable for all crimes that directly and foreseeably result from crimes the accomplice helped commit.

Secondly, Tom failed to act to thwart the conspiracy, so he would be liable for crimes that occurred after he said, "I quit" in one view.

However, Tom would not be charged with the death of Dick under the Felony Murder Rule because of the Redline Rule.

NOTE: When it comes to murder, over half of all law students have a very poor understanding of what 1st Degree Murder is, and how it relates to the Felony-Murder Rule.

The Felony-Murder Rule is a common law rule that modernly only applies to the "inherently dangerous felonies" of rape, robbery, burglary and arson. Not kidnapping and not any other felonies unless the Legislature creates some other specific statute.

In contrast 1st Degree Murder is a statutory rule that applies to whatever the Legislature wants. Virtually all States have a 1st Degree Murder rule, but they vary widely. They usually apply to "enumerated felonies" that almost always include the "inherently dangerous felonies" of rape, robbery, burglary and arson. But it also is often applied to kidnapping for ransom and anything else the Legislature wants to enumerate.]

Sample Answer 20-15: Murder

STATE v. KATHY LEE

1. *Can Kathy Lee be charged with the MURDER of Regis?*

Under criminal law MURDER is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY-MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY.

At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated dangerous felonies. All other murders are in the second degree.

Here there was a homicide because Regis was a human being and he was killed by Kathy Lee, another human being. And it was unlawful because it Kathy Lee had no right to kill Regis.

The homicide was during the commission of a ROBBERY, a larceny from the person by force or fear. There was a larceny because Kathy Lee was trespassorily (without consent) taking and carrying away the personal property of another because she was taking dynamite from Regis' "store". Kathy Lee intended to permanently deprive because she was going to "blow up" the dynamite. She used force or fear because she used a "gun". The homicide was during and caused by the robbery because the death occurred at the scene of the robbery as Kathy Lee was "putting away the gun."

Therefore, Kathy Lee can be charged with murder for killing Regis during the robbery. It would be FIRST DEGREE MURDER because robbery is a typically enumerated felony for first degree murder.

The fact it was an "accident" is irrelevant. This is one of the "inherent dangers" of robbery and a reason the Felony-Murder Rule was created.

2. *Can Kathy Lee be charged with the MURDER of Ruby Dee?*

MURDER is defined above.

There was an unlawful homicide because Ruby Dee was a human being killed by Kathy Lee, another human being, without legal justification.

Kathy Lee appears to have acted with an express intent to kill because she shot Ruby Dee in the "head" with a "gun". These facts imply an intent to kill. If there was no intent to kill, Kathy Lee intended great bodily injury because the homicide was caused by a "firearm". Use of a firearm implies intent to cause serious bodily harm.

Kathy Lee also could be charged under the depraved heart theory because she acted with a awareness and conscious disregard for danger to human life by shooting Ruby Dee in the head.

Based on any of the above theories, Kathy Lee could be charged with the murder of Ruby Dee. If the murder was found by the jury to be willful, deliberate and premeditated, it would be FIRST DEGREE. Otherwise it would be SECOND DEGREE murder.

Kathy Lee would argue that she acted on impulse. But the facts appear to indicate a willful, premeditated and deliberate act of murder.

If the jury finds Kathy Lee acted willfully, deliberately and with premeditation this would be FIRST DEGREE MURDER. Otherwise it would be SECOND DEGREE murder.

3. *Can Kathy Lee argue ADEQUATE PROVOCATION for VOLUNTARY MANSLAUGHTER of Ruby?*

Under criminal law VOLUNTARY MANSLAUGHTER is an unlawful, intentional homicide without malice aforethought because of adequate provocation sufficient to raise a reasonable person to a fit of rage which could and actually did cause the homicide.

Here there was a lack of adequate provocation because a "hard look" would not be sufficient raise a reasonable person to a fit of rage.

Therefore, Kathy Lee would not succeed in reducing the murder charge to voluntary manslaughter.

4. *Can Kathy Lee be charged with the MURDER OF MARY KAY?*

Murder is defined above.

Here there was a homicide because Mary Kay was a human being killed by Kathy Lee, another human being.

Kathy Lee had an express intent to kill because she "decided to kill Mary Kay". And the act was willful, deliberate and premeditated because she planned and carried out the murder.

Therefore, Kathy Lee can be charged with murder.

Here the murder would be charged in the FIRST DEGREE for two reasons. First the murder was done with premeditation in a willful and deliberate manner. Secondly, it was done with "explosives" and deaths caused by explosives are often among the "enumerated means" for first degree murder.

5. *Can Kathy Lee be charged with the MURDER OF BILLY BOB?*

Murder is defined above.

Here there was a homicide because Billy Bob was a human being killed by Kathy Lee, another human being.

Kathy Lee may have had an express intent to kill because she knew the blast "would probably kill Billy Bob." Kathy Lee would argue that she did not want to kill Billy Bob.

Even if there was no express intent to kill, Kathy Lee clearly acted with an awareness of and conscious disregard for risk to human life because she "knew the blast would probably kill Billy Bob." So, Kathy Lee could be charged with murder under the Depraved Heart murder rule.

Therefore, Kathy Lee can be charged with murder of Billy Bob.

Here again the murder would be charged as FIRST DEGREE. She might be found to have had a premeditated and deliberate intent to kill. But even if she is not, murder by explosives is often one of the enumerated means defined as first degree murder as stated above.

Therefore, this would be FIRST DEGREE MURDER in many States.

[ANSWER EXPLANATION: This question illustrates the four types of malice for murder. The question says Kathy Lee "decided to kill" and asks about "first degree." You should always discuss degrees of murder, but here it is the express call of the question and must be discussed.

What issue is raised by the "accidental" shooting of Regis? Robbery is always a basis for application of the Felony-Murder Rule, and it is almost always going to be an enumerated felony for a first-degree murder.

What issue is being raised by the use of dynamite? A murder by explosion (along with poison, lying in wait and torture) is usually an "enumerated means" for first degree murder.]

Sample Answer 21-16: Searches, Warrants, Double Jeopardy

STATE V. DICK

1. *Was Dick subjected to DOUBLE JEOPARDY?*

Under the 5th Amendment, extended to the states by the 14th Amendment, a person cannot be tried twice by the same sovereign for the same crime.

Here Dick was tried by the same sovereign because the "DA" filed charges against him in both cases. Here it was NOT the same crime because the first prosecution was for "sale" of drugs and the second was for "possession".

Since the crime of "sale" has elements that are not elements in the crime of "possession", Dick was not subjected to double jeopardy.

2. *Was the seizure of plants A and B under a VALID WARRANT?*

Under the 4th Amendment, extended to the states by the 14th Amendment, the government is prohibited from unreasonable search and seizure, and searches and arrest require a WARRANT issued by a NEUTRAL MAGISTRATE based on PROBABLE CAUSE. Probable cause means that the police have a REASONABLE BASIS to believe a crime has been committed and that the defendant is the person who did it. If warrants are FACIALLY VALID and executed by police in GOOD FAITH RELIANCE, the courts will find that the search was not unreasonable.

Here the warrant was not issued based on PROBABLE CAUSE because the affidavit upon which it was issued "falsely stated" the facts. Although the warrant "appeared" facially valid and officer Oscar "acted in good faith", officer Paul did not act in good faith, and he was a participant to the search.

Therefore, the search was not conducted under a valid warrant. However, the seizure of the plants may be legal anyway under an exception to the general rule requiring a search warrant.

3. *Was plant A properly seized?*

Under the law of criminal procedure, a search is reasonable if it is with the actual CONSENT of a person who has AUTHORITY to give consent. And if officers are in a location where they have a right to be, they can seize any contraband they see in PLAIN VIEW.

Here Granny freely gave CONSENT because she "warmly invited" the officers in. She had AUTHORITY to consent to a search of her own part of the house and the common areas because "she shared" the house. When they were in the living room, the officers could seize plant A because it was in PLAIN VIEW.

Therefore, the officers had a right to be in the living room and seize plant A.

4. *Was plant B properly seized?*

Under the rules of criminal procedure, a person can be searched INCIDENT TO A LAWFUL ARREST. A lawful arrest requires PROBABLE CAUSE based on an articulable and reasonable belief that a crime has been committed and the defendant is the person who did it. Once a lawful arrest has been made, the person can be searched along with the LURCH AREA around them.

Further, a PROTECTIVE SWEEP of the premises is justified where officers have reason to believe they might be in danger. Finally, search without a warrant may be justified by EXIGENT CIRCUMSTANCES.

Here police had PROBABLE CAUSE that a crime had been committed because they saw plant A growing. They had reason to believe Dick had committed the crime because Granny said it was his "marigold". Therefore, the arrest was lawful.

But a protective sweep through Dick's bedroom was NOT justified because the police had been "sitting" for some time having "tea and cookies", and there are no facts to indicate any possible reason the police would need to do a "protective sweep" to protect themselves from hidden dangers from the "unlocked" bedroom. Dick's bedroom was not part of the "lurch area" around him, and no facts indicate "exigent circumstances" that would have prevented police from getting a warrant to search the bedroom.

Therefore, the seizure of plant B without a warrant was not justified, and the warrant was improperly obtained as discussed above.

5. *Would plant B be subject to EXCLUSION?*

Under the EXCLUSIONARY RULE the court has discretion to exclude illegally obtained evidence if it would deter improper police activities. The court may also exclude legally obtained evidence that is considered FRUIT OF THE POISONOUS TREE because it was obtained as a result of illegal police acts.

Whether the court will exclude evidence or not depends on a BALANCE TEST considering the deterrent effect against the negative impact on administration of justice. Courts may not exclude evidence that would have been inevitably discovered anyway. Further, even if improperly obtained evidence is admitted at trial, it may be considered HARMLESS ERROR on appeal if the defendant would have been convicted anyway based on other legally obtained evidence.

Here admission of plant B should be barred because the police entered the bedroom without a valid warrant, and there was no valid exception under which they could enter without a warrant.

STATE V. GRANNY:

6. *Is Granny subject to DOUBLE JEOPARDY?*

The analysis here is the same as for Dick. Granny is not being subjected to double jeopardy.

7. *Does Granny have STANDING to object to MIRANDA VIOLATIONS?*

Under MIRANDA police in CUSTODIAL INTERROGATIONS must inform defendants of their right to SILENCE and COUNSEL. Where evidence is seized in violation of MIRANDA rights, the individual may object to the admission of the evidence. However, the rights are personal and a person cannot object to the admission of evidence on the basis that some other person's rights were violated.

Here Granny has NO STANDING to object to violations of Dick's rights because she was not the one who was being interrogated improperly.

8. *Was seizure of the cocaine proper?*

Under the 4th Amendment, extended to the states by the 14th Amendment, a warrant is necessary to conduct a search of a home. Since the warrant used by the police was invalid here, the seizure of the cocaine requires an exception.

Here there was TIME to obtain a valid warrant, and none was obtained. The CONSENT by granny did not extend to her room because it was locked and the facts imply she did not consent for them to enter that part of the house. The search was NOT INCIDENT TO ARREST because the room was beyond Granny's LURCH area. The arrest of Granny was proper, based on PROBABLE CAUSE because of Dick's accusation, but the room was locked so the search cannot be justified as a PROTECTIVE SWEEP.

Therefore, the cocaine was not properly seized.

9. *Should the cocaine be excluded?*

As with plant B above, the seizure of the cocaine is tainted by the perjury of Officer Paul. That invalidated the warrant. Officer Oscar may have been acting in good faith, but the fact that Paul was present at the search taints the results. Therefore, the cocaine evidence should probably be excluded from admission.

[It is important to follow the CALL here as much as possible.

Probably the most important point to pick up here is that illegally obtained evidence is NOT automatically excluded. The Court (judge) has discretion to exclude or not exclude. The court applies a balancing test, and you MUST understand and explain that.

Sometimes Courts (judges) that admit illegally obtained evidence are overturned for abuse of discretion. But that does not mean Courts have no discretion at all.]

Sample Answer 21-17: Searches, Warrant Exceptions, Defenses

State v. Tom

1. *Can Tom be charged with MURDER?*

Under criminal law a MURDER is an unlawful HOMICIDE, the killing of one human being by another, with MALICE aforethought. Malice for murder can be 1) express intent to kill or implied by 2) intent to cause great bodily injury, 3) intent to commit an inherently dangerous felony, the FELONY MURDER RULE or 4) intentional creation of unreasonably high risks to human life with awareness of and conscious disregard for the risks, the DEPRAVED HEART theory.

Under common law there were no degrees of murder, but modernly FIRST DEGREE murder is 1) a willful, deliberate and premeditated killing, 2) a killing done by enumerated means or 3) a killing caused by commission of an enumerated felony. All other murder is second degree.

The Felony-Murder Rule (FMR) only applies to deaths caused by acts done within the res gestae of the crime, from the moment of the first substantial step until the defendants leave the scene of the crime and reach a place of relative safety. Further the FMR only applies to deaths caused by the "inherent dangers" of the inherently dangerous felony. And under the REDLINE RULE the FMR does not apply to the killing of a co-conspirator by police, bystanders or victims

Here there was a homicide because Dick was a person and he was "killed" by the police, other human beings.

There is no evidence that Tom intended to kill or hurt Dick because they were "lovers". Therefore, there was no express intent to kill, and no intent to cause great bodily injury.

Also Dick was killed by "police". Therefore, the REDLINE RULE applies and murder cannot be based on the Felony-Murder Rule, even if Tom were engaged in an inherently dangerous felony.

Further, it is questionable whether Tom intentionally created extreme risks to Dick that he was aware of. While there was a "police chase" for "20 miles", but Tom was driving "carefully," only going "55 mph", and it is doubtful he could anticipate police would start shooting at them.

Therefore, Tom probably could not be charged with murder under the DEPRAVED HEART theory.

If Tom is charged with murder, in would be second degree because the murder was not premeditated, caused by commission of any enumerated felony or by any typically enumerated means.

2. *Can Tom plead INSANITY?*

Under criminal law INSANITY is a defense that negates intent. Under the M'NAUGHTEN RULE a person is insane if a disease of the mind so impairs their reasoning that they are unable to appreciate the nature and quality of their acts or to know that they are wrong. Under the IRRESISTIBLE IMPULSE theory a person may raise the defense of insanity if they are unable to control their acts, even if they know the act is wrong.

Here Tom could not plead M'Naughten because "he knew it was wrong". But Tom could plead an irresistible impulse because "he had an overwhelming phobia" and "he could not help himself".

Therefore, depending on statute, Tom might succeed with an insanity defense.

3. *Can Tom plead SELF-DEFENSE against an unlawful arrest?*

Under criminal law the defense of SELF-DEFENSE may be raised where one acts reasonably to defend themselves from harm by an "aggressor". An aggressor is a person who illegally starts a confrontation or who unreasonably continues a confrontation or escalates the level of violence.

Here Tom acted to defend himself from harm because he had "overwhelming phobias" about body cavity searches, and he acted reasonably because he "drove at 55 mph".

He would argue the attempt of police to "pull him over" was illegal and justified his flight because he was singled out for a stop without probable cause. He would say that under the 4th Amendment he had a right to defend himself from unreasonable search and seizure.

Under the law of criminal procedure, police may stop and search any person crossing a "border". But here they were "ten miles" beyond the border, and Tom would argue the border was far away.

Also, under laws of criminal procedure, police may stop and search a vehicle based on PROBABLE CAUSE, a reasonable suspicion that a crime has been committed and that the person searched did the crime. Here the police might claim their arrest was based on probable cause because Tom fit a "profile". However, Tom would say the profile is arbitrary and not reasonable. He would argue there was no probable cause.

If there were no probable cause for a stop, Tom was not resisting a "lawful" arrest. Therefore, Tom had a right to resist an "unlawful" arrest.

Therefore, Tom might succeed in his defense that he acted in reasonable self-defense.

4. *Can Tom be charged with INVOLUNTARY MANSLAUGHTER?*

Involuntary manslaughter is an unintentional homicide caused by CRIMINAL NEGLIGENCE or commission of a MALUM PER SE crime insufficient to support the Felony-Murder Rule.

CRIMINAL NEGLIGENCE is either a deliberate act done to create extreme and unreasonable risks to others, typically called recklessness, or else a deliberate breach of a duty to protect others from extreme and unreasonable risks.

Frequently the finder of fact will return a conviction for involuntary manslaughter rather than murder when the defendant raises an "imperfect defense", an honest but incorrect belief that he was acting legally to protect himself or others from a perceived threat.

Here there was an unintentional homicide because Dick died and Tom did not intend for him to die.

Tom would argue there was no criminal negligence because he drove "carefully" at "55 mph" so he did not deliberately create extreme risks to others.

The State would argue it was criminally negligent to resist arrest. Tom would argue the arrest was illegal and resistance was justified as discussed above.

Resisting a lawful arrest may be a crime that would support a charge of unintentional manslaughter. But if the arrest is not lawful, resistance is not a crime at all.

Also the smuggling of Viagra was not illegal, and would not be the basis for an involuntary manslaughter charge.

Therefore, Tom may be charged with involuntary manslaughter if he was resisting a lawful arrest in a manner that was criminal, or in a manner that constituted criminal negligence.

Tom would raise the defenses of INSANITY and SELF-DEFENSE discussed above. But Tom's actions may be found to have constituted criminal negligence, and his claim of self-defense or defense of others may be an "imperfect defense" that fails.

[The answer above addresses murder, a cause of action, and then switches to discussion of two applicable defenses before returning to discussion of manslaughter, another cause of action.

Some 'bar exam gurus' insist that students should never mention any defenses until after they have discussed <u>all</u> causes of action (crimes that might be charged, torts that might be claimed, etc.) And I have even been told that some claim the Bar will penalize students for mentioning defenses toward the beginning of an essay.

I see no sense at all to such 'linear thinking'. It makes no sense at all, and I have seen many failed Bar students whose essays suffer from this rigid approach.

An intelligent attorney must consider obvious defenses early in the case, whether the attorney represents the defense, the prosecution or the plaintiff. Certainly a cause of action must be discussed first. But once a cause of action is proven, it is logical to discuss the applicable defenses to that particular cause of action.

And frequently the availability of an effective defense (e.g. violation of the Statute of Frauds) totally controls the structure of the essay because it limits the possible causes of action for the moving party.]

Sample Answer 21-18: Standing, Fruit of Poisonous Tree

State v. Mark

1. *Was the STOP subject to an AUTO EXCEPTION that did not require a WARRANT?*

Under the 4th Amendment, extended to the states by the 14th Amendment, government may not subject the people to unreasonable search and seizure, and arrests and searches require a warrant issued by a neutral magistrate based on a showing of probable cause. But under the AUTO EXCEPTION no warrant is required to search an AUTO, including all compartments and containers within it, if the car is stopped at a border or based on probable cause. A car may also be stopped at a traffic safety or immigration checkpoint where cars are stopped on a uniform or systematic basis.

Probable cause means that there is reasonable evidence a crime has been committed and that the defendant is the one that did it.

Here Paul had a reasonable suspicion that Mark was carrying illegal drugs because of the statements of John and his own observations of Mark's movements and activities. Therefore this evidence, if not tainted by police misconduct, would have given Paul sufficient probable cause to stop Mark's car.

Mark would argue the FRUIT OF THE POISONOUS TREE doctrine that his car was stopped improperly because it was based on evidence that resulted from improper police conduct. This will be discussed below.

Therefore, Mark's car was stopped based on probable cause that he was carrying illegal drugs.

2. *Was the search subject to the PLAIN VIEW exception so it did not require a WARRANT?*

Under the OPEN FIELDS DOCTRINE no warrant is required for police to seize evidence that is in PLAIN VIEW and lawfully observed by reasonable means.

Here Paul was lawfully observing by reasonable means because the gun was visible "under the seat" from outside the car when viewed with a "flashlight." This evidence resulted from a stop based on probable cause. Therefore, if not tainted by police misconduct, the evidence would have been properly seized.

Therefore, discovery and seizure of the gun would normally be proper under these circumstances.

3. *Was the search INCIDENT TO A LAWFUL ARREST so it did not require a WARRANT?*

Under Criminal Procedure law no warrant is required for a non-intrusive search of a person, the immediate "lurch area" around them, and their immediate belongings if it is INCIDENT TO A LAWFUL ARREST.

An arrest is lawful if based on probable cause, reasonable evidence a crime was committed and the defendant did it. If a person is lawfully arrested with a car, the car can be completely searched without a warrant.

Here there was probable cause because Paul could see the "gun", carrying a "concealed weapon" was a crime, and it appeared Mark was committing the crime. Mark was arrested with a car, so the car could be searched.

Therefore, if the evidence is not otherwise tainted by police misconduct, then the discovery of the cocaine would be proper evidence discovered incident to a lawful arrest.

4. *Should the evidence be EXCLUDED to deter police misconduct?*

Under the EXCLUSIONARY RULE the Court may deny the prosecution the use of evidence that is the product of police misconduct if the deterrent effect of exclusion outweighs the negative effects it would have on law enforcement.

The defendant that invokes the exclusionary rule must usually prove STANDING because police misconduct violated the defendant's reasonable expectation of privacy. But under the FRUIT OF THE POISONOUS TREE doctrine exclusion may extend to evidence that results from prior police misconduct.

Evidence may not be excluded from use to impeach the defendant, where the sovereign offering the evidence to the Court acted in good faith, or where the error is harmless because the evidence at issue would have been inevitably discovered in any case.

Here the evidence used to stop and arrest Mark was clearly the product of serious police misconduct because Paul stopped Mark based on the information he got from "severely beating" John. Paul would not have suspected Mark and followed him around otherwise. Therefore, the evidence here is all tainted fruit of poisonous tree that resulted from prior police misconduct.

There would be a strong deterrent effect that outweighs the negative impact on law enforcement because Paul's beating of suspects is outrageous police misconduct calls for deterrence.

And the police here would directly profit from their own misconduct if the evidence is not excluded.

Therefore, the evidence is tainted by police misconduct and should be excluded.

[ANSWER EXPLANATION: This FRUIT OF POISONOUS TREE question creates a dilemma because the initial police misconduct does not directly produce the evidence that later comes into dispute. Rather, it lets the police know where to look to discover evidence that otherwise would be perfectly legal and admissible.

Generally a defendant must show standing based on a reasonable expectation of privacy to invoke the exclusionary rule. Police violations of the rights of other parties often can not be used by a defendant as a reason to exclude evidence. But exclusion of evidence obtained through particularly outrageous police misconduct may still be argued.

Analyze whether evidence would <u>normally</u> be admissible under some exception. Even if evidence is legally obtained it may still be tainted by prior police misconduct. But don't just say conclude evidence is illegal, either. Instead, analyze whether the evidence would have been legal if not <u>tainted</u> by prior police misconduct. Then discuss the Exclusionary Rule at the end of the answer. Is police misconduct so outrageous and so directly linked to the discovery of the evidence that the evidence should be excluded to deter further police misconduct?]

Sample Answer 21-19: Searches, Exceptions, Right to Counsel

State v. Dan

1. *Was Dan stopped under an AUTO EXCEPTION that did not require a WARRANT?*

Under the 4th Amendment, extended to the states by the 14th Amendment, government is prohibited from unreasonable search and seizure and must properly execute a search warrant particularizing the place to be searched and the evidence sought upon issue by a neutral magistrate based on a showing of probable cause. Probable cause means there is a REASONABLE SUSPICION that a crime has been committed and the defendant committed it.

Under the AUTO EXCEPTION no warrant is required to search an AUTO, including all compartments and containers within it, if the car is stopped at a border or based on probable cause, and a car may be stopped at a traffic safety or immigration checkpoint on a uniform or systematic basis.

Here the car was stopped with probable cause because Dan was "driving erratically."

Therefore, the car was properly stopped.

2. *Was Dan's right to a MIRANDA warning violated?*

Under the 5th and 6th Amendments, extended to the states by the 14th Amendment, forced self-incrimination is prohibited and the right to counsel guaranteed. The MIRANDA rule requires police to advise a suspect he has a right to remain silent and a right to counsel in a CUSTODIAL INTERROGATION. A defendant may expressly, knowingly and voluntarily waive her rights but police may not interrogate or elicit statements from the defendant without assistance of counsel after the rights are asserted.

Here the defendant was not subject to a custodial interrogation because there is no evidence he was ever asked any questions when stopped by Omar.

Therefore, Dan's rights were not violated by the failure to give a Miranda warning.

3. *Was evidence collected INCIDENT TO A LAWFUL ARREST so it did not require a WARRANT?*

Under Criminal Procedure law no warrant is required for a non-intrusive search of a person, the immediate "lurch area" around them, and their immediate belongings if it is INCIDENT TO A LAWFUL ARREST.

An arrest by police is lawful if there is probable cause that the defendant has committed a misdemeanor or breach of peace in the presence of the police or if police have reasonable evidence a felony has been committed. Probable cause means there is a reasonable belief a crime has been committed and the defendant committed it.

Here there was probable cause because Dan was "driving erratically." This was sufficient to arrest for drunk driving.

The evidence of the "fingernail scrapings, finger prints, a voice sample, and a handwriting sample" were legally obtained because they were all taken by a non-intrusive search of the defendant's person.

Therefore, this evidence was legally obtained without a warrant.

4. *Was the collection of the blood sample justified because of EXIGENT CIRCUMSTANCES?*

Under the EXIGENT CIRCUMSTANCES exception no warrant is required for police to search a person if delay to obtain a warrant would pose a risk of loss of evanescent evidence.

Here there would have been loss of evidence if the police had waited to obtain a warrant because the suspected alcohol in Dan's blood would have disappeared.

Therefore, the collection of a blood sample from Dan without a warrant for this purpose is justified as an EXIGENT CIRCUMSTANCE.

5. *Was the physical evidence obtained in violation of Dan's RIGHT TO COUNSEL?*

Under the 6th Amendment, extended to the states by the 14th Amendment, an accused is guaranteed a right to counsel, and the MASSIAH DOCTRINE prohibits police interrogation of an accused about the accused crime without legal counsel present after the right to counsel attaches.

An accused has a right to counsel during custodial interrogation, at arraignment, preliminary hearing, physical lineup and entry of plea.

Here when "fingernail scrapings, finger prints, voice sample, and handwriting sample" were taken and when there was a "photo lineup" there was no right to presence of counsel because these are not situations where right to counsel attaches.

But when the Dan was in a physical (corporeal) lineup he had a right to counsel. He "asked" for and was denied counsel. This was not harmless error because he was lined up with "six paraplegics," and this prejudiced the victim against him.

Therefore, Dan's right to counsel was violated.

6. *Was the use of blood for DNA testing without a warrant an UNREASONABLE SEARCH?*

The 4th Amendment is explained above.

Normally a blood test for DNA testing would require a warrant because DNA is not evanescent evidence, and a blood test is an intrusive search that violates one's reasonable expectation of privacy.

However, here the blood test was taken properly to test for alcohol, evanescent evidence.

Since the blood sample had already been legally collected, Dan no longer had a reasonable expectation of privacy with respect to that sample. So the subsequent DNA test on the blood sample could not violate Dan's expectation of privacy.

Therefore, the DNA test was not an unreasonable search.

7. *Should the evidence be EXCLUDED to deter police misconduct?*

Under the EXCLUSIONARY RULE the Court may deny the prosecution the use of evidence that is the product of police misconduct if the deterrent effect of exclusion outweighs the negative effects it would have on law enforcement.

Here the only evidence that was the product of police misconduct was the identification of Dan in the lineup. This was improper because he was lined up with "six paraplegics" and denied presence of counsel. That was clearly prejudicial and unreasonable.

There would be a strong deterrent effect that outweighs the negative impact on law enforcement because the police have the DNA evidence and the photo lineup evidence. The case against Dan would not be seriously damaged by excluding the physical lineup identification.

The police misconduct in this case is not harmless to the defendant because the victim became "hysterical" at the lineup, and that fact may be used against Dan.

Therefore, the lineup identification should be excluded.

[ANSWER EXPLANATION: This answer illustrates the approach that the propriety of the stop is first analyzed. Then the propriety of each item of evidence that results from that is looked at individually. Was the stop good? Yes. That sets the stage for a proper arrest. Then, since the arrest is legal, the collection of evidence incident to the arrest is proper.

There is no need for a Miranda warning if the suspect is not questioned. Remember, the purpose of the Miranda requirement is to prevent improper police questioning. Even if Dan were improperly questioned, that illegality would only cloud the evidence that results. The stain does not spread backwards in time, and it does not spread to other, unrelated evidence.

The question lists items of evidence that were collected incident to the arrest, and each must be considered. Items of evidence can be grouped for analysis.

The question mentions lack of counsel four separate times. Obviously the question intends for you to address the defendant's right to counsel. There is normally no right to presence of counsel at a photo lineup, but there is at a physical lineup. This must be expressly addressed.

Finally, if police collect evidence legally, they can use the evidence for any purpose, even if that purpose might have required a warrant otherwise.]

Sample Answer 22-20: Adverse Possession, Rule Against Perpetuities

1. *What interest to Bob in 1970?*

Under real property law a LIFE ESTATE is a possessory interest measured by the life of a person.

Here Bob got a possessory interest because it was given to him immediately, and it was measured by a life because it was for "Bob's life".

Therefore, Bob got a life estate.

2. *What interest to Bob's descendant in 1970?*

Under real property law a CONTINGENT REMAINDER is a future interest to an unascertainable person following a life estate.

Here Algore's interest was a future interest because it did not become possessory until Bob died. It was following a life estate because Bob had a life estate. It was to an unascertainable person because it depended on a male surviving Bob.

Therefore, Algore got a contingent remainder.

3. *What interest in Blackacre to Bill and Hillary in 1970?*

A POSSIBILITY OF REVERTER is a FUTURE interest of the GRANTOR and his heirs following the AUTOMATIC termination of a prior estate because of an express condition precedent. A condition precedent in real property law is a condition stated in a clause conveying an interest in land which must be satisfied for the interest to become vested.

A JOINT TENANCY is an interest vested jointly in two or more people at the SAME TIME, by the SAME INSTRUMENT (deed or will), with the SAME (equal) SHARES and each having EQUAL POSSESSION of the property. Establishment of a joint tenancy requires express intent. Otherwise a tenancy in common is formed.

Here there was a conveyance of all of Tom's estate except for the life estate and contingent remainder in Blackacre to Bob and his living male descendent. Since the contingent remainder was subject to the condition that Bob be survived at death by a male descendent, Tom's estate retained a POSSIBILITY OF REVERTER in Blackacre. Since Bill and Hillary received all of the remaining interest of Tom's estate in Blackacre, they received this possibility of reverter.

Therefore, Bill and Hillary have a possibility of reverter in joint tenancy.

4. *Who got legal title to Blackacre upon Bob's death in 1970 and in what form?*

Under the RULE AGAINST PERPETUITIES an interest must vest, if at all, within 21 years after a life in being at the creation of the interest. At both common law and modernly, the period of "21 years" is extended by a period of gestation for unborn children.

If the conveyance of an interest is contingent upon a condition precedent, and the condition fails, then the interest REVERTS to the estate of the grantor.

Here Bob's life was a life in being at the creation of the instrument because he was identified by name in the instrument. And the interest had to vest within 21 years of Bob's death because the interest went to his "oldest surviving male descendant, if any", and for the descendant to be "surviving", he had to be alive, or at least in gestation, at Bob's death.

Therefore, the interest had to vest within 21 years of a life in being, Bob's life, and it thereby satisfied the Rule Against Perpetuities.

But the contingent remainder interest was contingent because it could only go to "Bob's oldest living male descendent". Here Bob had no male descendents alive at his death. And no child of Bob's was in gestation at his death either because Elizabeth Algore was not born until two years after Bob's death.

Therefore, Algore was not alive or in gestation at Bob's death and the contingency failed. That caused the contingent remainder to fail and Blackacre reverted to Bill and Hillary as holders of the possibility of reverter.

5. *Who got Blackacre at Bill's death?*

Under real property law a joint tenancy interest automatically goes to the surviving joint tenants upon the death of a joint tenant.

Here Blackacre went to Hillary upon Bill's death. It was no longer in his estate, so it did not go to Charity by his will. The fact that Bill and Hillary were separated is irrelevant.

Therefore, Hillary got Blackacre.

6. *Did Harry have a valid claim based on adverse possession?*

Under the doctrine of ADVERSE POSSESSION, a person can gain an interest in land by [HELUVA] *HOSTILE, EXCLUSIVE, LONG, UNINTERRUPTED, VISIBLE and ACTUAL possession of land.*

Here Harry's possession was hostile and exclusive because he was there in exclusive possession as a marijuana grower and rancher against the interest of Hillary (and Bill) from 1972 to 1991. By 1982 he had been there the required length of time because it was "10 years". His occupancy was uninterrupted and visible because he never left and anyone who went there would have seen him. He was in actual possession because he grew crops and animals on the land.

It could be argued that since he hid on the back side of the property from 1972 to 1977, his possession during that time was not "visible" and could not qualify for adverse possession. But certainly he was openly and visibly living on the land after 1977.

Therefore, Harry may have perfected his claim by 1982, but certainly did perfect it by 1987, and that was long before Bill died in 1990.

7. *Could Algore evict Harry?*

Under the doctrine of ADVERSE POSSESSION an effort to evict must take place before the interest is perfected. Here Harry perfected his claim no later than 1987 and Algore did not attempt to evict him until 1992. Further, Algore had no interest, so he had no standing to bring an action. Therefore, Algore could not evict Harry.

8. *Could Charity evict Harry?*

For the same reasons Algore could not evict Harry, Charity could not evict Harry.

9. *Who owns Blackacre?*

Since Harry gained an interest to Blackacre by adverse possession, he now has legal possession and can claim title to Blackacre. He is the "Man Who Gets it All."

[This question has a 'structured call' so that establishes the issues and order of the answer. You don't have to follow the structure word-for-word, but you MUST follow the structure to some extent.

It is not uncommon for a man to die leaving a pregnant wife or girlfriend. The unborn child is considered to be "alive" and after the child is born the father is 'survived' by the child. But to 'survive' the father, the child must be in gestation (in utero) at the time of the father's death.

The whole point of the Rule Against Perpetuities (RAP) is that interests in land must vest in someone with certainty within a given time frame or else the interest lapses.

Here the interest did not violate the RAP. Rather, the condition precedent failed.]

Sample Answer 22-21: Real Property / Community Property Crossover

1. *What interest did Betty originally receive in 1987?*

Under real property law a fee simple is a possessory freehold interest in perpetuity. In early common law the phrase "and his heirs" was required to show a fee simple interest, but modernly a fee simple interest is presumed unless facts indicate otherwise. A fee simple interest that automatically terminates upon the occurrence of a condition precedent is a "fee simple determinable."

Here the text of the language giving Betty an interest is not quoted, so it would be presumed to be a fee simple interest. Adam could not give Betty a greater interest than he possessed himself. But Adam apparently held the land in fee simple because he granted "Ralph Nader and his heirs" a conditional interest. The term "and his heirs" clearly indicates that Adam could grant a fee simple interest, so it would be presumed that Betty received a fee simple absent other facts..

But the fee simple interest that Adam gave Betty was subject to a condition that title would automatically transfer to Ralph if tobacco is smoked on the land. This is a condition "precedent" because the phrase "as long as" indicates automatic termination. So Betty's interest was a fee simple subject to a condition that would automatically terminate her interest. Such an interest would be called a "fee simple defeasible" or a "fee simple determinable".

Therefore, Betty's interest was fee simple determinable.

2. *What interest did Ralph get in 1987?*

Under real property law an executory interest is a future interest that vests automatically upon the termination of the prior estate due to the occurrence (or failure) of an express condition precedent.

Here Ralph's interest would become possessory only when tobacco was smoked on the land. In that case Ralph's interest would vest automatically and he would take the land in fee simple because that is implied by the phrase "and his heirs."

Therefore, Ralph's interest was an executory interest in fee simple.

3. *Was the interest of Ralph invalid under RULE AGAINST PERPETUITIES?*

Under the common law Rule Against Perpetuities no interest is good unless it must vest, if at all, within 21 years of a life in being at the time of the creation of the interest.

Here the interest of Ralph was created upon the death of Adam. At that time Betty and Ralph were named in Adam's will and they could be measuring lives.

The interest of Ralph would vest only when tobacco was smoked on the land. Since the interest went to Ralph "and his heirs" the interest could vest in Ralph's heirs after both Ralph and Betty died. Since the interest might vest in Ralph's heirs over 21 years after both Ralph and Betty died, it violates the Rule Against Perpetuities and is void at its creation.

Therefore, the executory interest of Ralph is void from the beginning, and Betty actually received the land in fee simple, free of the condition.

4. *Was Blackacre Betty's SEPARATE property or was it COMMUNITY property?*

Under California Community Property Law all property acquired during marriage is presumed to be community property regardless of form unless it is otherwise classified by law. All property acquired before marriage, after separation or during marriage by gift, bequest or devise is presumed to be separate property.

Here Betty acquired the land during marriage but by a bequest because it was by Adam's will.

Therefore, the land was Betty's separate property.

5. *Does Howie have an interest by adverse possession?*

Under certain adverse possession statutes a person may gain an interest in land by holding it in a hostile, exclusive, visible manner for an uninterrupted period of time set by statute. Here the statute stated that no ejectment action could be brought against a person that had openly and continuously possessed the land for "the prior five years."

Howie had "openly and continuously" occupied Blackacre from 1986 to 1996, so he could not have been forced off the land at the end of that period. But then he left the land voluntarily in 1996 and established a domicile in Reno without perfecting his claim to the land.

Since Howie voluntarily left the land, he no longer has possession and no "ejectment" is necessary. And if Howie returns to Blackacre, he cannot claim "continuous" occupation of the land for the prior five years because he changed his domicile to Reno.

Therefore, Howie had no right to claim Blackacre based on adverse possession.

6. *What was effect of Betty's reconveyance into joint tenancy in 1989?*

Under real property law a joint tenancy is a joint title interest in land. It requires the four unities that each interest be created at the same time, in the same instrument and each title holder has an equal and undivided interest in the whole.

Joint tenancy generally gives each title holder the right of survivorship so that the interest of any title holder that dies is automatically redistributed equally to the surviving title holders. When a joint tenant "takes" by the right of survivorship the interest is transferred directly at the time of the death and does not pass through the estate of the decedent.

An interest held in joint title may be freely transferred, and that converts the interest transferred to an interest as a tenant in common.

Under California Community Property Law property acquired during marriage in joint title is generally treated as community property in a dissolution under FC §2581. But this land was not acquired during marriage in joint title. Betty initially acquired the land as separate property. And after 1984 any transmutation of the character of property requires an express, written declaration

of intent. Here "Betty never intended to give up her separate interest" and there was no written declaration of an intent to transmute the property to community property. So if Betty had not died this would have been deemed to have been her separate property.

But Betty did intend to give Carl an interest as a joint tenant that would give him a right of survivorship, and under California law (Estate of Bibb (2001) 87 Cal.App.4th 461), Carl would take the property at Betty's death.

Therefore, the reconveyance into joint tenancy did not convert Betty's separate interest to community property during her life, and she would have recovered her interest in a divorce. But it did give Carl the property by right of survivorship at her death.

7. *Effect of Betty's death?*

The right of survivorship is defined above. Upon Betty's death Carl took Blackacre by his right of survivorship given him by Betty's reconveyance to joint tenancy, and Blackacre did not pass through Betty's estate.

Since the land was never part of Betty's estate, SPAM has no claim under her will.

Therefore, Carl is the owner of Blackacre.

[ANSWER EXPLANATION: This answer shows the recommended real property question approach of tracing the ownership of the land chronologically. Determine and state each interest as fee simple, executory interest, etc. Always consider the Rule Against Perpetuities if there is an executory interest, contingent remainder or vested remainder subject to open.

Pay close attention to the law you are supposed to apply, and if a statute is given, apply it exactly as it is presented. Remember "adverse possession" is statutory.

Family Code §2581 treats property acquired during marriage in joint form as community property, subject to certain exceptions. But it does not clearly apply to property acquired by one of the spouses alone that is later transferred into joint title during the marriage.

Where there is a reconveyance of separate property into joint tenancy without an express, written declaration of intent to transmute to community property, there is no effective transmutation at all. But the other party does receive a right of survivorship.]

Sample Answer 22-22: Priority of Claims, Recording Statutes

1. *Who gets title under COMMON LAW?*

Under the common law the first grantee conveyed an interest generally obtained title with the exception that the interest of a subsequent bone fide purchaser for value without notice was superior to a prior donee. Modernly recording statutes determine priority of title.

Here Tom was the first person given an interest in the house, and he was a donee because the house was given as a gift. But, Dick was a bone fide purchaser for value because Able "sold" the house to him. And, Dick was without notice because he "did not know Able had given a deed to Tom."

Therefore, under the common law, Dick was a bone fide purchaser for value without notice and his right was superior to Tom's right as a donee.

But Harry was also a bone fide purchaser for value because Able also "sold" him the house. And Harry was also without notice because "Harry did not know about Tom and Dick." But under the common law, Dick's right is superior to Harry's because it was created first, and under the general common law "first in time is first in right."

Therefore, Dick would take title to the house under common law.

2. *Who gets title under a RACE STATUTE?*

Under a RACE STATUTE the first grantee to record an interest in land obtains a valid interest whether or not they purchase for value or are aware of prior transfers.

Here Tom was a grantee because Able gave him the house and the deed thereto as a "gift" and he was the first grantee to record because "Harry never recorded" and Dick recorded "an hour later" after Tom recorded.

Therefore, under a pure race statute, Tom would get title to the house.

3. *Who gets title under a NOTICE STATUTE?*

Under a NOTICE STATUTE the last bone fide purchaser for value without notice obtains a valid interest in land whether it is recorded or not.

Here there were only two purchasers for value, Dick and Harry, because Tom was given the house as a gift. Both Dick and Harry were bone fide purchasers for value, but Harry was the last purchaser because he was "sold" the house after it was first sold to Dick. And Harry was without notice because he "had no knowledge" about Tom and Dick. Further, there could be no claim that Harry had constructive notice of the prior transfers to Tom and Dick because Harry bought the house before Tom and Dick recorded their interests.

Therefore, Harry was the last purchaser for value without notice who would take title under a notice statute.

4. *Who gets title under a RACE-NOTICE STATUTE?*

Under a RACE-NOTICE STATUTE the first bone fide purchaser for value without notice to record an interest in land obtains a valid interest.

Here both Dick and Harry were purchasers for value because they were both "sold" the house by Able. Tom was not a purchaser because he was given the house.

And both Dick and Harry were without notice because they had "no idea" Able had made prior conveyances, and there was no constructive notice because Tom and Dick did not record their deeds until after Harry had purchased the house.

But Dick recorded his deed first while Harry "never recorded".

Therefore, Dick was the only purchaser for value to record and that makes him the first purchaser for value without notice to record. As a result, Dick would take title to the house under a race-notice statute.

[ANSWER EXPLANATION: This is very simple question with a simple answer IF you know the rules. Remembering the rules may be difficult. The following comparison may help you.

Common Law. The common law was the first rule in history, before there was any recording mechanism. Sot it favors the FIRST PERSON TO PAY over donees. And between two or more donees, it gave title to the FIRST PERSON GIVEN the deed.

Race. Think of the pure race statute second as the first recording approach. It favors the FIRST person to record, even if they are a crook. This is like the Oklahoma land rush with a bunch of outlaws racing to the county recorder. It could be unfair and it allows a donee to take title over people who paid money for the deed.

Race-Notice. Think of this as the third approach that was developed to eliminate unfairness. It gives title to the first person to record, but only if he/she is a purchaser for value without knowledge. It protects donees too, IF they promptly record their interests because that creates "constructive notice".

Notice. Finally, consider pure notice statutes last because they give title to the LAST purchaser for value without notice, AND THEY DON'T EVEN HAVE TO RECORD at all. But to prevent subsequent purchasers from filing superior claims they must give notice somehow, and the surest way of doing that is by recording their claim.]

Sample Answer 22-23: Adverse Possession, Rule Against Perpetuities

1. *What was Able's interest before death?*

Under real property law a FEE SIMPLE interest is a possessory estate in perpetuity and freely alienable.

Here A conveyed possession because he gave the property immediately to "Sam for life", and he was able to convey in perpetuity in "fee simple".

Therefore, A must have had a fee simple interest.

2. *Sam's interest from 1970 to 1990?*

Under real property law a LIFE ESTATE is a possessory estate measured by the life of a person.

Here Sam was given possession because he immediately "lived" on the land, and it was for his life because the will said "for life".

Therefore, Sam had a life estate.

3. *What was M's enforceable interest because of Sam's announcement in 1974?*

Under the STATUTE OF FRAUDS conveyance of an interest in land requires a writing to be enforceable at law.

Here it appears Sam attempted to give Monica an interest in land because he "announced" she could live on the estate for life, which would effectively be a life estate. But that gift would not be enforceable at law because he just "announced" the conveyance.

Therefore, M is just a licensee or tenant at will with no legally enforceable interest in the land.

4. *What was H's interest from 1970 to 1990?*

Under real property law a CONTINGENT REMAINDER is a future interest to an unascertainable party that would only become possessory at the natural termination of a life estate.

Here the interest was in the future because it was only to be effective "upon Sam's death". It was to an unascertainable person because it was to an "oldest surviving child" that was uncertain at the time to be H who was "unborn" at the time. It was to become possessory following a life estate because Sam had a "life estate" Even after Howard was born, it was unknown if he would be Sam's "oldest surviving child" until Sam died in 1990.

Therefore, the interest of H was a contingent remainder as long as Sam was alive.

5. *What was H's interest from 1990 to 1995?*

Under real property law a FEE SIMPLE is as defined above. Here H's interest became possessory upon Sam's death, and he had a fee simple interest because A's will said Sam's oldest surviving child would get the land in "fee simple". Therefore, H had a fee simple interest.

6. *H's interest from 1995 to 1999?*

Under real property law a JOINT TENANCY is a joint ownership created in 1) the SAME INSTRUMENT at the 2) SAME TIME with 3) EQUAL INTERESTS and 4) EQUAL POSSESSION of the entirety of the land. Joint tenancy gives RIGHT OF SURVIVORSHIP which means that upon the death of any one joint tenant the remaining joint tenants assume the interest of the deceased. Creation of a joint tenancy requires an expression of intent.

Here there was express intent because H filed a "new deed" that said "Joint Tenants with Right of Survivorship". The interests were created in the same instrument, the "new deed", at same time in 1991, with equal interests and equal possession because the deed said "Joint Tenants".

Therefore, H had a joint tenancy. The joint tenancy was in a fee simple estate, because H held in fee simple and did not indicate contrary intent.

7. *W's interest from 1995?*

Under real property law a person who owns land in fee simple can convey any interest to any other party – even a stranger. The owner can convey a joint tenancy in which they remain a joint tenant.

Under the JOINT TITLE PRESUMPTION assets held in joint tenancy are presumed to be jointly held separate property interests. But after 1984 the TRANSMUTATION of a separate interest of one spouse to community property or separate property of the other spouse requires an express written declaration of intent to be effective.

Nevertheless, the right of survivorship becomes effective even if there is no express statement of intent. The death of a joint tenant immediately transfers the interest of the deceased in equal shares to the other joint tenants under the right of survivorship.

Here W received a joint tenant interest because H filed a deed converting his interest to a "joint tenancy" with W in "1995". H did not expressly declare his intent to transmute his separate ownership to separate property of W because there was "no other writing". But the right of survivorship would still take effect in 1999 because "H died".

Therefore, upon death of H in 1999, Wanda received complete ownership of the land in fee simple.

8. *Pete's interest?*

Since the land passed to W by survivorship, it did not pass into H's estate. Pete has no interest.

9. *Charles' interest?*

Under the doctrine of ADVERSE POSSESSION a person can obtain an interest in land by HOSTILE, EXCLUSIVE, LENGTHY, UNINTERRUPTED, VISIBLE and ACTUAL possession of land. Here Charles did not have exclusive possession because he lived there "with Howard, Wanda, Pete and Monica".

Therefore, since Charles did not have exclusive possession, he did not gain an interest through adverse possession. Charles has no interest.

[If a married couple acquires property in joint title form during marriage, then in a dissolution it will generally be treated as community property absent written evidence of a contrary agreement. (FC §2581.)

If a spouse holding separate property files a deed during marriage to convey some or all of it to the community or to the other spouse, the property remains separate property, and is not transmuted, absent some combination or commingling of that property with separate property of the other spouse or of the community, unless there is also an express written statement of intent to transmute. (FC §852.)

But even if there is no effective transmutation of property, the act of creating a joint tenancy effectively gives the other spouse a right of survivorship. (*Estate of Bibb* (2001) 87 Cal.App.4th 461.)

Therefore, after a joint tenancy is created, the surviving spouse takes the decedent's interest regardless of whether the character of the property was effectively transmuted or not.]

Sample Answer 23-24: Federal Preemption, Reimbursement

Under CALIFORNIA COMMUNITY PROPERTY LAW the rights and remedies of the parties will depend on the characterization of their property. All EARNINGS during marriage in California are presumed to be COMMUNITY PROPERTY, regardless of form, unless otherwise classified by law. Property acquired before marriage, during marriage by gift, bequest or devise, or acquired after separation is presumed to be SEPARATE PROPERTY. Property acquired during marriage while living outside California which would have been community property if living in California is defined as QUASI-COMMUNITY property.

In dissolution community property is generally divided equally subject to certain exceptions.

1. *What is the character of the STOCK?*

Under community property law, separate property remains separate, and any interest, rent, dividends or other income that accrues to separate property is part of the separate interest as well.

Here the stock was bought before H & W married because "he had 100 shares." Even though the stock split from 100 to 10,000 shares during marriage, it remained his separate interest.

Therefore the stock remained H's separate property.

2. *What is the character of the MILITARY LIFE INSURANCE POLICY?*

Under the constitution, federal law preempts State law. Community property law is State law and federal law related to military insurance may preempt it.

Here the insurance policy appears to be a military policy governed by federal law. The policy was bought during marriage and paid for out of community funds because H "kept paying." Therefore, it would normally be a community asset, and W would get half. However, federal law may preempt State law, and H may be allocated the entire value.

Therefore this is community property unless federal law preempts state law.

3. *What is the character of the HOME?*

Under community property law, a gift to a spouse is separate property. Here the house was a gift because H's mother "gave" it to him. Therefore, the asset was received by H as his SEPARATE PROPERTY.

After 1984 TRANSMUTATION of property character requires an EXPRESS declaration of intent to transmute in a WRITTEN INSTRUMENT, absent some combination or commingling of separate property and community property. Here the change of title to joint tenancy was after 1984, because it was in "1985." Therefore, transmutation required an express declaration in writing. There was no express written declaration because none is mentioned in the facts. Therefore, H did not transmute the separate interest to a community interest by recording a new deed, and the house remained his separate property.

Under the TITLE PRESUMPTION property held or acquired by a married couple in JOINT TITLE is presumed to be community property. Here the property was held in joint title, because H granted the house to himself and W as "joint tenants." Therefore, there is a presumption that the house was community property. But this presumption can be rebutted by tracing the source of the asset to separate property. Here H could overcome the title presumption by tracing.

Under the MARRIED WOMAN'S PRESUMPTION property acquired by a married woman by a written instrument under her own name before 1975 is presumed to be a separate property interest. Here W did acquire the property under her own name, because it was to "Wanda Smith", and it was by written instrument because it was by a "new deed". But here it was after 1975 because it was in 1985 that H filed the new deed. Therefore, the married woman's presumption does not apply.

Finally, in a dissolution property acquired during marriage in joint title is treated as community property under FC §2581. But here the property was not acquired in joint title since H originally acquired it in his name alone.

Therefore, this house was H's separate property, it was not effectively transmuted, and it remains H's separate property.

4. *What was the character of the PERSONAL INJURY AWARD?*

Under community property law a personal injury award is separate property if the injury occurred before marriage, and it is community property if the injury occurred during marriage.

If an injury award is separate property it will be allocated in dissolution to the injured spouse, but the community may have a right of reimbursement.

If the injury award is community property it will still be allocated in dissolution to the injured spouse in most cases, but the court may allocate a portion to the community if justice requires it, given the length of time since the injury occurred and other considerations.

In any event the injured spouse cannot be allocated less than half of the award.

Here the injury was before marriage because it occurred "on the way to the church".

Therefore, the personal injury award was Wanda's separate property.

5. *Does Wanda have a RIGHT OF REIMBURSEMENT for remodeling the house?*

Under community property law a spouse that contributes separate property to acquire, improve or pay down the loan debts against a community property asset has a right to reimbursement in dissolution. (FC §2640.) Further, under FC §2640(c) a spouse who uses her separate property funds to improve the separate property of the other spouse also has a right to be reimbursed in a divorce unless there has been a transmutation in writing or written waiver of the right to reimbursement. The amount to be reimbursed does not include interest or capital appreciation.

Therefore, since the house is the separate property of H, W has a statutory right to reimbursement for the $50,000 she spent from her separate property to improve the house.

6. *What is character of 401K plan?*

Earnings after marriage are generally community property. All of the money that went into the 401K plan was from earnings after marriage because it was money that came from the "successful" law practice.

Therefore this was money earned after marriage, and it would be community property

7. *Does Howard have to REIMBURSE the community for education expense?*

Under community property law a person who receives education must reimburse the community upon dissolution, if the community has not already received full benefit. It is presumed the community did not receive full benefit if the education is less than 10 years prior to dissolution.

Here the community would be presumed to have received full benefit because the education was "11 years" before dissolution.

Therefore, H does not have to reimburse the community.

8. *What is the character of the student loans?*

Under community property law a party who receives education will be allocated the student loan debts upon dissolution. Here H received the education because he "went to law school."

Therefore, he will be allocated the student loan debt.

9. *What is the character of the legal practice?*

Earnings after marriage are community property. The goodwill of a legal practice has been developed during marriage because H went to law school during marriage and developed the practice afterward.

Therefore, the GOODWILL value of the legal practice will be allocated to the community.

Sample Answer 23-25: Reimbursement to Separate Property

Under CALIFORNIA COMMUNITY PROPERTY LAW the rights and remedies of the parties will depend on the characterization of their property.

All assets acquired during marriage in California are characterized as COMMUNITY PROPERTY, regardless of form, unless otherwise classified by law.

Property acquired during marriage while living outside California which would have been community property if living in California is defined as QUASI-COMMUNITY property.

Property acquired before marriage, during marriage by gift, bequest or devise, or acquired after separation is presumed to be SEPARATE PROPERTY. And all rents, issues and profits of separate property are also separate property.

In dissolution community property is generally divided equally subject to certain exceptions

1. *What was the character of the INHERITANCE?*

Under community property law property acquired by bequest or devise is presumed to be separate property even if it is acquired during marriage.

Here Wendy received an inheritance because it was a gift received "when her grandfather died."

Therefore the $20,000 received by Wendy was her separate property.

2. *What is the character of the HOUSE?*

Under community property law property purchased during marriage is community property unless otherwise classified. And in dissolution all assets acquired in joint title during marriage are treated as community property, regardless of title form unless there is an express statement of contrary intent in the deed or some other written agreement.

Here the HOUSE was purchased during marriage because the couple "had nothing" when married and then bought the house. There is no statement as to title form, but generally this would be community property or else treated as community property in dissolution.

Therefore the house is community property.

3. *Can Wendy claim REIMBURSEMENT for the payments on the HOUSE?*

Under COMMUNITY PROPERTY LAW for purposes of dissolution after 1983 a spouse that uses separate property funds to acquire, improve or pay down loan balances on jointly held community property has a right to reimbursement from the community if the payments are 1) traceable to separate property sources and 2) there was no written waiver of the right to reimbursement by the party seeking reimbursement. (FC §2640.)

Here Wendy's inheritance was her separate property as discussed above, and she used it to acquire joint property because the house was community property. Her contributions toward the

"$10,000" down payment and "$5,000" in improvements are traceable and she did not execute a written waiver.

Therefore, Wendy has a right to reimbursement of the $15,000 she spent on the house.

4. *What is the character of the BANK ACCOUNT?*

Under COMMUNITY PROPERTY LAW when separate and community funds have been commingled, the funds are presumed to be community property, and the burden is on the spouse claiming a separate interest to identify the separate portion through DIRECT TRACING.

Where DIRECT tracing is impossible, FAMILY EXPENSE TRACING can be used to show the LOWEST INTERMEDIATE BALANCE of separate property during the marriage.

Here the BANK ACCOUNT first received "$5,000" from Wendy's inheritance. As discussed above this was her separate property. Then the couple put "their paychecks" into the account. This was community property because it was money earned during marriage. As a result, the funds were commingled in the account.

But Wendy "took $5,000 out of the bank" to pay for beauty college, and she said it was "from her grandfather's bequest."

Therefore, direct tracing would show that Wendy no longer had any separate property interest in the bank account. As a result the remaining "$3,000" in the account is all community property.

5. *Does the community have a right to reimbursement for EDUCATION EXPENSE?*

Under COMMUNITY PROPERTY LAW the community has a right to reimbursement in dissolution for community funds spent for the education of one of the spouses unless the community has already benefited. There is a presumption that if the education took place more than 10 years before the dissolution the community has fully benefited.

Here no community funds were spent on Wendy's education because she used her inherited funds to pay for it.

Therefore the community has no right to reimbursement.

6. *Does Wendy have any claim against Hank's PENSION RIGHTS?*

Under COMMUNITY PROPERTY LAW future PENSION or RETIREMENT PAY is community property in the proportion that the right to receive the future pension income arose during marriage. The community may have an interest in a future pension even if the working spouse's pension rights have not yet vested.

Here Hank worked "8 years" during the marriage, but he had to work two more years to be vested in the pension plan. This means that 8/10 of the potential future pension benefits were earned during the marriage, and the community interest is 80% of the pension, if Hank actually receives one. Hank says he "is never going to go back to work for the government," but he possibly could change his mind. If he went back to work he might qualify for the pension.

Therefore, even if Hank is not yet vested in the pension plan, the community has a claim against any pension he might possibly receive as a result of work done during the marriage.

7. *What is the character of the LOTTERY PRIZE?*

Under COMMUNITY PROPERTY LAW earnings after separation are separate property. Separation occurs when the spouses are living separate and intend to remain separate from the other spouse, or else upon filing for dissolution or legal separation.

Here Hank was living separate at the time he won the lottery because he was "still living apart," but he did not intend to remain separate because he had "agreed to marriage counseling."

Therefore, Hank was not "separated", the lottery prize was acquired "during marriage" and it is community property.

[ANSWER EXPLANATION: By stating the inheritance was separate property in the beginning, this answer saves time later. When in doubt, define the character of each asset in the order presented.

There is no need to discuss education expense because the person benefited paid for it herself, but I had time and threw in a brief discussion hoping to pick up a few extra points. If you see "education expense" on a community property question they usually expect you to state the rule and say whether the community has a right to reimbursement. When there really is no 'issue' the decision whether to discuss or not discuss revolves around how much time you have.

The answer emphasizes that a person is only "separated" if both living apart and intending to remain apart permanently or at least indefinitely, or else after a spouse has filed for divorce or legal separation. If that happens they are "separated" at that moment even if they are still living together.]

Sample Answer 23-26: Reimbursement, Van Camp

1. *Did Howard have a right to sell the house?*

Under CALIFORNIA COMMUNITY PROPERTY LAW the rights and remedies of the parties will depend on the characterization of their property. All property acquired during marriage in California is presumed to be COMMUNITY PROPERTY, regardless of form, unless it is otherwise classified by law.

In dissolution community property is generally divided equally subject to certain exceptions

Property acquired before marriage, during marriage by gift, bequest or devise, or acquired after separation is SEPARATE PROPERTY, and all rents, issues, and profits of separate property are also separate property. During marriage each spouse has total control over his or her own separate property.

Here the house was owned by Howard before he married Winnie so it is his separate property.

Therefore Howard had a legal right to sell his house to Bubba if he wanted to, whether Winnie liked it or not.

2. *Does the community have a $100,000 interest in the house?*

The character of an asset acquired during marriage depends on the source of the funds. So whether the community gained an interest in the house or not depends whether the funds spent on it from the "joint account" were community property.

A. The CHARACTER OF THE JOINT ACCOUNT

Under community property law wage income during marriage is community property, and if it is deposited into a jointly held bank account the account is characterized as community property.

If separate property funds are commingled in a community property account it is considered a gift to the community. If parties claim a separate property interest in the community property account the burden is on them to prove by DIRECT TRACING that a portion of the funds remaining in the account is their own separate property.

Here the joint account held community property funds because Howard "worked at a factory" and "deposited his paychecks" into the account. That gave the account a community property character.

Whether either Winnie or Howard commingled their separate funds into the account is irrelevant because at the time of their dissolution the "joint bank account was empty".

Therefore the bank account was community property at the time the expenditures were made, and expenditures from it on Howard's separate property house gave the community an interest in the house.

B. The COMMUNITY INTEREST IN THE HOUSE

Under COMMUNITY PROPERTY LAW, the community acquires an interest in separate property to the extent community funds are used to pay off the loans or make improvements to the separate property asset.

Under the MOORE approach the community has a right to be reimbursed the amount of community funds spent on the separate property asset PLUS property appreciation in proportion to the community funds spent versus the original cost of the asset. If the amount of community property funds spent is "P", the value of the asset is "V" and the original cost is "C" the Community Interest is calculated as = P + (P/C)(V-C).*

Here the joint bank account was used to reduce the mortgage on the house by $25,000 because Howard had a loan balance of $50,000 when he got married and the loan balance is only $25,000 at the time of dissolution. And an additional $20,000 was spent to renovate the kitchen. Therefore a total of $45,000 in community funds was spent on the house during the marriage. This is the amount "P".

The house originally cost $100,000, but an additional $20,000 was invested in it, so the total "cost" of the house is $120,000, and that is the amount "C". At dissolution the house is worth $200,000, and that is the amount "V".

Therefore the community interest in the house is

P + (P/C)(V-C)*
*$45,000 + ($45,000/$120,000) * ($200,000-$120,000)*
*$45,000 + ((3/8) * $80,000*
$45,000 + $30,000 = $75,000.

The house is worth $200,000 at dissolution, but it has a remaining mortgage of $25,000. So of the total equity of $175,000, the community interest is $75,000 and the remaining $100,000 is Howard's separate property interest.

3. *Does the community have an interest in the apartments because of the loan payments?*

As stated above, whether the community gained an interest in the apartments because of the loan payments depends on whether community funds were used.

Here Winnie owned the apartments before marriage. Therefore, they are her separate property. And as stated above, rents received from separate property are also separate property.

And here all the loan payments were paid from the rents. Therefore, no community funds were used to pay down the loan balance. As a result the community gained no interest in the apartments as a result of the loan payments.

4. *Does the community have an interest in the apartments because Winnie managed them?*

Under COMMUNITY PROPERTY LAW when a SEPARATE PROPERTY asset of one spouse is increased in value by COMMUNITY EFFORT during the marriage the resulting value must be allocated between separate and community estates.

When the separate property asset is the main factor giving the asset value, as would be the case with real property, the VAN CAMP approach is used to give the community a representative wage, with the balance of appreciation allocated to the community.

Here the apartments were owned by Winnie before marriage, so they would be her separate property.

Winnie did expend some effort managing the apartments because she "rented them out" when there was a vacancy. But she did not expend much effort to increase the value of the apartments because she did not do much but "hang out at the country club." But she also put $30,000 of the rents she received into the joint bank account.

Therefore, under the Van Camp approach the community would be given a "representative wage", but the $30,000 Winnie already donated to the community would be offset against that.

On balance it would appear the community has little or no interest in the apartments as a result of Winnie's efforts.

5. *Winnie's separate property claim against the house.*

After 1984 transmutations in the character of property are not valid unless there is an express written statement of intent to transmute. However, this rule does not apply to situations where separate property and community property interests are commingled or otherwise combined. In those cases prior law applies.

Therefore, the fact Winnie did not sign such an express statement of intent is irrelevant, and prior law concerning commingled funds applies.

As stated above, the prior law on commingled funds is that once a separate property is put into a community property account it is deemed to be a gift to the community absent some contrary agreement. After that the burden is on the party claiming a separate property interest in the account to show by tracing that some of the remaining funds are their own separate property. But funds already spent from the account are deemed to be expenditures of community funds.

Here the "joint bank account is empty," so all the money Winnie placed in the account was spent by the community.

Therefore, whatever interest Winnie might have proven in the account is gone, and the issue is moot.

[ANSWER EXPLANATION: This question has a structured call. It is often best to insert community property definitions into the first issue discussion. You can also state the general rules of characterization at the beginning as an introductory statement.

It is critical to know the Moore formula and to apply it correctly. This has been tested many times by the bar exam. If the arithmetic is difficult, and you are not good at division or multiplication, show the numbers plugged into the formula, and give it your best shot. Again the formula is:

Community Interest = P + [(P/C) * (V-C)]

where

P = the amount of community funds used to PAY for improvements or to reduce mortgage balances (not for taxes, interest, insurance or maintenance);
C = the COST of the property (not the value at the date of the marriage) including all subsequent expenses on improvements; and
V = the VALUE of the property at the time of dissolution.]

Sample Answer 24-27: Equal Protection, Due Process

Did Homer present an ACTUAL CASE or controversy?

Under Article III of the Constitution federal courts only have jurisdiction over actual controversies that concern ACTUAL INJURIES that can be REMEDIED, that are RIPE and not MOOT, not POLITICAL and where the court need not ABSTAIN.

Here there is an actual injury that can be remedied because the district threatens to "enter property" and "charge" the plaintiff. The case is ripe because the plaintiff has been given a "final determination" and faces immediate injury. No facts indicate the issue is moot, political or that abstention is called for.

Therefore, the case is justiciable.

Is the ordinance unconstitutional AS WRITTEN?

Under the Constitution, Congress is delegated certain enumerated powers and all other powers are reserved to the states. Under the 10th Amendment powers not otherwise given to the federal government are reserved to the States or the people. Traditionally the states have been delegated the power to protect the health, safety and welfare of the people.

Here the ordinance is a State law because the water district (SLCWD) is a "county" water district, and counties are subdivisions of states. And the ordinance deals with traditional State authority because it is to protect "health, safety and welfare". Nothing on the face of the ordinance appears to discriminate because it seems to apply to all "property owners". And the ordinance does not clearly violate procedural due process because nothing in the ordinance prevents the SLCWD from giving homeowners adequate notice and an opportunity to be heard.

Therefore, the ordinance does not appear unconstitutional as written.

Is there a violation of EQUAL PROTECTION?

Under the 14th Amendment states are prohibited form denying people equal protection under the law by deliberately treating similarly situated people differently without proper justification. Equal protection may be violated where a classification is so over-inclusive or under-inclusive as to be arbitrary and capricious.

Where there is a classification based on a suspect class that has been traditionally subjected to oppression, such as race, nationality and alienage the government must show the law is necessary to attain a compelling State interest.

Where classification is based on a quasi-suspect class that has often been subjected to oppression, such as sex and legitimacy, the government must show the law is substantially related to a significant State interest.

In other cases the plaintiff must show the classification is not rationally related to a legitimate State interest.

Here no suspect or quasi-suspect class is involved because the classification was "random" and based on home "ownership". Therefore the burden is on Homer to show a lack of rational relationship to a legitimate State interest.

And there is a legitimate State interest because the purpose of the law is to "locate and repair" sewer breaks, a "legitimate public concern".

But there is no rational relationship between the selection of Homer and the goal of the law because there was "no evidence there were any leaks" in his sewer lateral. If there is no evidence his sewer lateral has a leak, there is no relationship between the public goal – improved sewer service – and the selection of Homer as opposed to other homeowners that had exactly the same characteristics but were not selected for the same demands. Homer was, in fact, selected arbitrarily and the selection criteria were fatally under-inclusive.

Therefore, Homer would show a violation of equal protection because there was no relationship between his selection and the goal of the ordinance, and the selection criteria was arbitrarily under-inclusive.

Violation of SUBSTANTIVE DUE PROCESS?

Under the 14th Amendment a State cannot deny life, liberty or property without due process of law. This guarantee is broadly applied and requires all laws to be rationally related to a legitimate State interest. Further, if a FUNDAMENTAL RIGHT is being infringed, the State must show the law is necessary to attain a compelling State interest. A fundamental right is one rooted in our nation's history and implied in the concept of ordered liberty.

Here there is no fundamental right involved because ownership of property is not a "fundamental" right. And the ordinance is rationally related to a legitimate public interest because "locating and repairing" sewer leaks is a "legitimate public purpose". If there is an actual factual "determination" that sewer repairs are needed, then the repairs would serve to benefit the public.

There is a property interest at stake because Homer would be "charged for the work". But the application of the ordinance to Homer is not rational because he was arbitrarily selected and there was "no evidence there were any leaks" in his sewer line. It is not rational to force someone to change a sewer line when there is no factual evidence the sewer line is defective.

Therefore, the ordinance as applied to Homer would deny him a property interest without any rational reason to believe his sewer line is, in fact, a threat to the public. This would constitute a denial of substantive due process.

Is there a denial of PROCEDURAL DUE PROCESS?

Under MULLANE the due process guarantee of the 14th Amendment requires "notice calculated to apprise one of the pendency of any action to be accorded finality". Further, under MATTHEWS V. ELDRIDGE the person has a right to some kind of a hearing. The nature of the hearing depends on the balance of government and private interests and the likelihood of erroneous deprivation.

Here Homer was not given notice prior to the final determination by the SLCWD because the letter said, "The District has determined". The SLCWD did not tell Homer prior to this that any such determination was being considered. Homer was not given any opportunity to present his own evidence regarding his sewer line.

Therefore, Homer was not given notice or a hearing and he was thereby denied procedural due process.

[The fact pattern of this question is based on actual events. Sierra Lakes County Water District really did the acts described here. And I am the person they tried to do this to. Curiously, the Directors of SLCWD established a selection criteria that somehow managed to exclude all of their own properties from the same rule they were enforcing on the rest of us through this piece-meal approach. Imagine the odds of that.

Many law students that have confronted this question conclude that it is within the power of government to arbitrarily and randomly single out individuals for discriminatory treatment as long as it is all for a "good reason". WRONG. There is almost never any good reason for government to treat similarly situated people differently.

So, why do politicians discriminate against a few people at a time instead of treating everyone the same? Primarily to avoid political backlash. If the government makes harsh demands of everyone at the same time it suggests an emergency situation. That gets in the press and generates a lot of embarrassing questions like, "Why did you conceal this public health problem so long, why did you let it get so bad, and is this how my little girl got infected with the Norwalk virus last winter and had to be in the hospital for a week?"

But in addition if they treat everyone equally they would have to obey their own rules, and that would cost them a few dollars of their own. Horrors. But by selecting a few people at a time for oppression they can claim the selected properties are the known cause of the problem. And that way they can also avoid the expense of improving their own properties to the level they demand of others.

So what happened? I sued them in pro per in federal court based on the causes of action listed above. It cost me $80. They hired a very expensive lawyer who told them they didn't have a prayer. So they folded like a tent, reimbursed me the $80, promised to never bother me again, went away, left me alone and I was happy forever after.]

Sample Answer 24-28: Federal Powers, Equal Protection, Due Process

Abdul v. US

1. *Does ABDUL present an ACTUAL CASE or controversy?*

Under Article III of the Constitution federal courts may only address actual controversies over ACTUAL INJURIES that can be REMEDIED, that are RIPE and not MOOT, not POLITICAL and where the court need not ABSTAIN. If a case does not meet these requirements it is NOT JUSTICIABLE.

Here there is no actual injury to Abdul because "he never tried to buy a gun". Therefore, Abdul does not have a justiciable case.

Mohammed v. US

2. *Does MOHAMMED present an ACTUAL CASE or controversy?*

The requirements of Article III are presented above.

Here there is actual injury to Mohammed because he tried to buy a gun and "was turned away". Mohammed's injury can be remedied by the court issuing an order. His case is ripe because the action taken against him is final.

However, Mohammed's case is moot because he "became a U.S. citizen" and can now buy a gun. The court may not deny a case for mootness where the injury complained of could be repeated and continue to escape review. Here the court has discretion to hear the case because other immigrants from Kashmir would continue to be impacted under similar circumstances.

Therefore, the court might hear the case despite the fact it is moot with respect to Mohammed.

3. *Does Congress have the ENUMERATED POWERS to pass this law?*

Under the Constitution, Congress is delegated certain enumerated powers and all other powers are reserved to the states. Under Article I Congress has plenary power over immigration and naturalization, the power to regulate interstate commerce, and the power to provide for the national defense.

Under the AFFECTATION DOCTRINE, the power of Congress to control commerce extends to all activities that would, in the aggregate, impact interstate commerce.

But under Lopez and its progeny the Supreme Court has begun to more narrowly circumscribe the application of the affectation doctrine to those Congressional acts that are actually intended to control commerce rather than to exert powers traditionally reserved to the States.

Here the law does not regulate immigration, because it attempts to regulate purchasing behavior of resident aliens after they have been allowed to lawfully immigrate. The law does not restrict the visas or resident status of the people affected. Further, the law here does not regulate

naturalization because it does not have any relationship to whether or not the people affected could become citizens.

Therefore, Congress' power over immigration and naturalization are unrelated this law.

Here the activity affected, the purchase of guns, does fall under the commerce clause because the buying and selling of guns is commerce, and in the aggregate these purchases would have an effect on interstate commerce. But the intent of this law seems more to provide for national defense than to control commerce.

Therefore, Congress may have the power to pass this law as an application of the Commerce Clause, but the more likely basis to support Congress' authority is national defense.

4. *Is there a violation of EQUAL PROTECTION?*

Under the 14th Amendment states are prohibited form denying people equal protection under the law by deliberately treating similarly situated people differently without proper justification.

The courts have found the same protections implied in the 5th Amendment, which applies to the federal government. Equal protection may be violated where a classification is so over-inclusive or under-inclusive as to be arbitrary.

Where there is a classification based on a suspect class, one that has been traditionally subjected to oppression such as race or nationality, the government must show the law is necessary to attain a compelling government interest.

Here there is a suspect class because the law targets "Kashmir immigrants" based on nationality. Therefore, the government must show the law is necessary to attain a compelling government interest.

The government interest here may be very important, and even compelling, but the law is not necessary because other reasonable means are available to prevent terrorism. Terrorism may still be pursued by Kashmir immigrants by other means, and terrorism by other immigrant groups would not be reduced.

Therefore, the government could not meet its burden to show that this law is necessary to attain a compelling government interest, and the court would find the law violates the equal protection guarantees implied in the 5th Amendment.

5. *Violation of SUBSTANTIVE DUE PROCESS?*

Under the 5th Amendment the federal government cannot deny life, liberty or property without due process of law. This guarantee is broadly applied and requires all laws to be rationally related to a legitimate State interest. Further, if a FUNDAMENTAL RIGHT is being infringed, the State must show the law is necessary to attain a compelling State interest. A fundamental right is one rooted in our nation's history and implied in the concept of ordered liberty.

Here there is no fundamental right involved because the 2nd Amendment right to bear arms has never been held to be fundamental.

And there is a legitimate government interest, national defense and the prevention of terrorism. Protection of the safety of the people is always a legitimate government concern.

Further, there is a rational relationship between the law and goal of the law because guns could be used by terrorists, and terrorism could be reduced if guns are kept away from people who are likely to use them for terrorist acts.

Therefore, the law itself is rationally related to a legitimate interest and not a violation of substantive due process.

6. *Is there a denial of PROCEDURAL DUE PROCESS?*

Under MULLANE the due process guarantee of the 5th Amendment requires "notice calculated to apprise one of the pendency of any action to be accorded finality". Further, under MATTHEWS V. ELDRIDGE the person has a right to some kind of a hearing. These guarantees apply to administrative acts, the administration of laws to specific cases, not to legislative acts.

Here the establishment of the law was a legislative act. Therefore, procedural due process did not demand that Abdul and Mohammed be given notice or a hearing prior to enactment.

[Be sensitive to the fact that one of the suspect classes is nationality. And not without reason. There is a long history of oppression based on nationality as much as on race, religion and color.

Often nationality is almost synonymous with race, religion and color. For example most Japanese people (a nationality) are almost always of the same race and color. But when government packs all those of Japanese descent off to prison camps, leaving all of the Chinese and Koreans behind the selection criteria is obviously nationality.

It is common to view the history of American bigotry as Southern Whites lynching Southern Blacks. But did you know Montana sentenced many German-American citizens to prison for up to 20 years in prison for the crime of "not being patriotic Americans" during WWI? And California, which is often portrayed in the media as liberal, committed organized genocide against the indigenous Indians, established "Chinaman" taxes, forbid legal Mexican immigrants from owning land, and arrested hundreds of Mexican-American citizens in the 1940s, trucked them to Mexico, and left them there. History is viewed as it is because Hollywood is in California, not Alabama.

Moslems are the current target group. In the current climate Moslems probably don't have a very good chance of being treated fairly in a U.S. courtroom today.]

Sample Answer 24-29: Justiciability, Commerce Clause

PG&E v. California

1. *Does PG&E have a JUSTICIABLE CASE regarding the CPA?*

Under Article III of the CONSTITUTION the federal courts may only address "actual cases and controversies" presenting actual personal injuries that can be redressed by the court. To be JUSTICIABLE in federal court a matter must present an actual case or controversy brought by a person with standing (facing personal injury), ripe for review (denial would result in immediate and permanent harm) and not moot (not already resolved with finality by other means). The matter must not be purely political (conflicting with the separation of powers), or requiring abstention (because it would conflict with pending state or criminal proceedings or interfere with state determination of state law).

Here there is an actual controversy because the CPA has been enacted and PG&E has lost $1 billion as result of inability to sell its power to California agencies. Further, PG&E faces the threat of further losses.

Therefore, PG&E presents an actual controversy and the case is justiciable.

2. *Does the CPA violate the COMMERCE CLAUSE?*

Under Article I of the CONSTITUTION the authority of Congress is limited to specific powers ENUMERATED in the Constitution. Under the COMMERCE CLAUSE of Article I, interpreted through the AFFECTATION DOCTRINE, Congress' power to regulate interstate commerce is broadly applied to include any activity that has an aggregate effect on interstate commerce.

Under the COOLEY DOCTRINE States have concurrent power to regulate commerce within their borders, unless PREEMPTED expressly by Congress or implicitly where Congress has established a comprehensive federal regulatory scheme or where the subject requires uniformity of national laws.

State attempts to intentionally discriminate against out-of-state business in favor of private businesses within the state are per se invalid. Likewise, other state regulations which are an unreasonable burden on commerce are invalid.

The court will determine the propriety of such regulations by balancing the legitimate interests of the state against the burden on commerce. State regulation that would otherwise would be illegal may be upheld it the State is a market participant, under application of the 21st Amendment regulation of alcoholic beverages, and otherwise where the regulation is narrowly tailored and rationally related to a legitimate state purpose.

The "market participant" exception means that a State can discriminate in its own purchases and sales of goods and services. It does not allow States to discriminate against out-of-state businesses in other matters.

Here the State is a market participant in power generation because it and its political subdivisions buy electricity. It is allowed to favor in-state electricity producers in these purchases. Further, it is

building its own "nuclear power plant", and when it becomes a producer of electricity it could favor in-state electricity customers in the sale of electricity as well.

Since the state can discriminate as market participant, it can decide not to buy electricity from outside the state. All cities and counties in the state are subdivisions of the state. So state can tell cities and counties where to buy power.

Therefore, the state has not violated the commerce clause.

3. *Is NSA complaint a JUSTICIABLE claim?*

Justiciability is defined above.

Here PG&E has not yet built a power plant, but it faces an actual injury because the NSA is prohibitive in effect. PG&E (and other parties) probably never would build a nuclear plant in the state if the NSA cannot be overturned, and the injury caused by NSA would always escape court scrutiny if court demanded the plants to be built and injury suffered before it would review the law.

Therefore, the PG&E claim regarding the NSA is justiciable even though PG&E otherwise has not been harmed.

4. *Does NSA violate COMMERCE CLAUSE?*

The commerce clause is defined above.

Here NSA violates commerce clause because Congress has established "comprehensive regulations" for nuclear power plants through the Nuclear Regulatory Commission. Since Congress has "taken the field" the states are preempted from regulating that same field under application of the Supremacy Clause. This preempts California from establishing "newer, stricter" regulations. The fact that the state rules are "stricter" is irrelevant.

Therefore the NSA violates the commerce clause.

5. *Is PGA complaint JUSTICIABLE?*

Justiciability is defined above.

Here the PGA has not yet been passed by the Legislature. As a result PG&E has suffered no injury, and it is a political question whether the law will be enacted by the state.

Therefore this is not a justiciable claim.

6. *Does PGA violate COMMERCE CLAUSE as proposed?*

Commerce clause is defined above.

Although a challenge of the PGA is premature, the law as proposed would violate the commerce clause because California would be intentionally discriminating against out of state businesses that want to buy natural gas within the State. This would be a burden on interstate commerce.

California could not claim the market participant exception because it is not a seller of natural gas.

And California could not justify this law by claiming it is a conservation measure. Whether natural gas needs to be conserved or not does not justify deliberate discrimination against citizens of other States.

Therefore the PGA would violate the commerce clause if enacted as proposed.

[ANSWER EXPLANATION: There must be an actual case or controversy based on actual or probable injury to the plaintiff before an action can be brought in federal court.

The SUPREMACY CLAUSE gives Congress preemptive power over interstate commerce, and Congress impliedly preempts states when it establishes a comprehensive regulatory scheme. Also the nature of an industry may imply federal preemption. Sometimes uniform national rules are needed because of the nature of the industry in question, and when that is true States cannot regulate the activity, even if Congress has not acted. This is the concept called the "dormant commerce clause" which means that even if Congress is dormant (asleep) States still may be barred from regulating certain activities (e.g. the internet).

Where there is no preemption states may regulate interstate commerce. But no deliberate discrimination against out-of-state business is allowed unless by 21st Amendment (alcoholic beverages) or where state is a MARKET PARTICIPANT. Otherwise state regulation cannot be unreasonable burden -- must be narrowly tailored to meet an important state need.

Both the market participant and 21st Amendment exceptions are very narrow. A State can only discriminate in its own purchases and sales of goods and services under the market participant exception. And under the 21st Amendment exception the 'discrimination' must be fore regulation and control of the distribution of alcoholic beverages, not for the purpose of favoring businesses within the State.

A plaintiff may challenge a law that is prohibitive because otherwise the injury caused by such a law would always escape court scrutiny. But a proposed law is no law at all and is not justiciable in a federal court.]

Sample Answer 24-30: Justiciability, Privacy Rights

1. *What is the argument against the court hearing the case?*

The State would argue the case is not justiciable.

Under Article III of the CONSTITUTION the federal courts may only address "actual cases and controversies." This means the court can only address cases that present ACTUAL PERSONAL INJURIES that can be REDRESSED by the court. To be JUSTICIABLE in federal court a matter must present an actual case or controversy brought by a person with STANDING (facing personal injury), RIPE for review (denial would result in immediate and permanent harm) and not MOOT (not already resolved with finality by other means). However the Court has discretion to hear a case that has become moot if the matter may occur repeatedly, and by the nature of the circumstances the law might always escape review.

Here the State would argue that Ann has no STANDING and no longer faces actual PERSONAL INJURY because she is an adult and no longer pregnant. The State would argue the matter is MOOT so the court cannot redress Ann's injury.

Therefore, the State would argue that the court has no jurisdiction to hear the case.

2. *Upon what reasoning did the Court decide to HEAR THE CASE?*

The federal court's jurisdiction over "actual cases and controversies" may extend to those controversies that by their very nature would always escape review through the passage of time while awaiting trial. In such a case the court cannot provide redress to the original plaintiff, but by its decision redress will be provided to similarly situated parties.

Here the issue involves abortion. In the natural course of affairs in every case of this type the pregnant plaintiff would either have given birth or would have gotten an illegal abortion by the time the case could reach the Supreme Court. Given this reality, no challenge of this particular law could ever be redressed by the court with respect to the injury of the original plaintiff.

Therefore, the court may here agree to hear Ann's case for the purpose of providing redress to other and future plaintiffs facing similar injury.

Because of this the case is, in fact, justiciable despite its mootness with respect to Ann, and the Court has discretion to rule that the matter presents a JUSTICIABLE CASE.

3. *Upon what part of the 14th AMENDMENT did the Center for Public Law rely?*

Under the 14th Amendment EQUAL PROTECTION and DUE PROCESS are guaranteed against state action. These guarantees are broadly applied and given substantive meaning to prevent arbitrary government conduct. EQUAL PROTECTION means a State cannot deliberately treat a class different from similarly situated people without proper justification. DUE PROCESS means that a State cannot arbitrarily deprive people from their interests in live, liberty and property.

The State has the burden to show a compelling interest when discrimination is against a suspect class or where a fundamental right is infringed. Fundamental rights are those ROOTED IN OUR NATION'S TRADITIONS AND IMPLIED IN THE CONCEPT OF ORDERED LIBERTY.

Here the class of individuals targeted by the law is "minors". This is not a suspect or quasi-suspect class traditionally subject to oppression. In fact, States have traditionally protected minors, and in this case the intent of the law was apparently to protect minors and strengthen parental controls. Therefore, the Center would not rely on an equal protection argument.

But the right that is being infringed is personal autonomy over procreation and contraception. Contraceptive rights are fundamental, and this law would be held to infringe on the fundamental right to privacy and personal autonomy. Therefore, the State would have a burden to show that the law was necessary and narrowly tailored to attain a compelling State interest.

The State here would have to argue there was a compelling State interest in protecting children. But the law was not narrowly tailored because it did not provide any exceptions.

Therefore, the Center probably relied on a due process argument.

4. *What was the BASIS FOR COURT'S DECISION?*

Under Roe v. Wade and associated case law, the court has attempted to balance the legitimate privacy concerns of the individual against the legitimate concerns of government. Where a State law infringes a fundamental right, the government has the burden of proving the law is necessary and narrowly tailored to further a compelling State interest.

Here the legitimate concerns of government would be protection of children and the parental control over their activities. This is a compelling State interest. Since abortion would pose some health risk to a child, parents have a legitimate interest in protecting them. Further, the control of parents over the activities of their children is a fundamental right, rooted in our nation's traditions. The State would argue the law is necessary to protect those rights.

The legitimate privacy concern of the individual is the ability to control contraception and to maintain confidentiality concerning private sexual matters. Here Ann was "17 years old" and a "college student." Although Ann was a legal minor she was old enough to bear children and no longer a "child" needing parental protection. The right to personal autonomy concerning sexual matters is a fundamental right, implied by the concept of ordered liberty.

The Center would argue on behalf of Ann that the law was not narrowly tailored because "the law did not provide for any exceptions."

In balancing these conflicting interests, the court would hold that the law infringed the fundamental right of privacy. Although intended to further a compelling State interest, the court probably held that the law was not narrowly tailored because it did not recognize and provide exceptions for individuals in Ann's position.

[ANSWER EXPLANATION: This is an oddly phrased question because it asks you to speculate on what the court "probably said."

The last part of the question is the hardest. As the answer shows, and this is always true, your task is made easier if you state a rule and underline elements of that rule.

The one clear rule you can always depend on in Constitutional Law exams is that there are no clear rules. Don't be afraid to draft your own rule. Phrase your own statement of the law in a manner that best suits your needs. Then in your analysis pull up quoted facts that illustrate the elements of that rule.

Citation of authority and analysis of the facts the Court would use in its effort to balance the interests of the parties is the bulk of the battle.]

Sample Answer 25-31: Promoter Liability, Rule 10b, Rule 16b

BANK v. BOB

1. *PROMOTER LIABILITY?*

Under corporate law a PROMOTER is anyone who helps organize, finance or start a new corporation has a fiduciary duty to the corporation, cannot make secret profits and is PERSONALLY LIABLE for financial commitments made before the Articles of Incorporation are filed, unless they make it clear they are acting on behalf of a corporation to be formed.

Here Bob helped start a new corporation because he "agreed" to work to that goal with Alice and Carol. Bob helped finance the corporation because he "secured a line of credit". Therefore, Bob was a promoter.

Bob made a financial commitment before the corporation existed because he opened a "line of credit" before the articles of incorporation were filed on "2/1/2000". And he did not make it clear that he was acting on behalf of a corporation "yet to be formed" because the bank thought the corporation "existed."

Therefore, Bob would be liable to Bank for the $100,000.

BANK v. ALICE

2. *Did Alice have PROMOTER LIABILITY?*

Promoter liability is defined above.

Alice also helped start the corporation because she "filed the articles of incorporation". Therefore, Alice is also a promoter.

But Alice did not make any financial commitments to Bank because it was "Bob" and not Alice that secured the line of credit.

Therefore, she has no liability to the Bank.

3. *Can the Bank PIERCE THE CORPORATE VEIL?*

Under corporate law the financial liability of a shareholder is limited to the amount of their investment unless the court is convinced piercing of the corporate veil is NECESSARY to PREVENT FRAUD and ACHIEVE EQUITY. UNDERCAPITALIZATION is a factor the Court will consider when determining if the corporation was created to perpetrate a fraud. Another factor is whether the corporation was run in a manner that made it merely an ALTER EGO of the shareholder.

Here there is no evidence that Alice created the corporation as part of a scheme to defraud the Bank. She promised to work full-time for the corporation, and she did what she promised. There is no evidence that her actions caused the Bank's loss.

Therefore, Alice would not be liable to the Bank.

BANK v. CAROL

4. *Is Carol liable to the Bank?*

Carol's relationship to the Bank is the same as Alice's. Carol was a promoter, but has no promoter liability to the Bank. Similarly, she did nothing that defrauded the Bank.

BANK v. CORPORATON

5. *Did the Corp become liable to Bank because of IMPLIED RATIFICATION?*

Under corporate law a newly formed corporation is not liable for the financial commitments of the promoters prior to filing of the articles of incorporation unless the corporation expressly or impliedly ratifies the contracts after it is formed.

Here the corporation impliedly ratified the commitments made by Bob because the Corp "borrowed money under the line of credit".

Therefore, the Corp impliedly ratified the line of credit contract by its behavior, and it would be liable to the Bank for the $100,000.

PUTZ v. ALICE

6. *Did Alice breach her DUTY OF LOYALTY?*

Promoters, officers and directors have a duty of loyalty to the corporation. That prohibits them from using their positions to gain personal reward at injury to the corporation.

Under corporate law a shareholder can bring a suit on behalf of the corporation in a shareholder derivative suit. Generally the shareholder must first demand action by the Directors. Then, if the Directors fail to act upon the demand, the shareholder can then file the suit on behalf of the corporation. And the requirement of making a preliminary demand of the Directors may not be required where it would obviously be futile.

As discussed above, Alice was a promoter because she helped form the corporation. As a promoter she had a duty not to make secret profits from her position as a promoter at the expense of the corporation.

Alice's initial contribution to the corporation was only a promise to work in the future, insufficient consideration for the shares she received. And Alice received stock worth $10,000 because she got 10,000 shares with a par value of $1 per share. But in exchange she gave only a promise of future services. That left the corporation with "WATERED STOCK" that had been issued in exchange for nothing but an unsecured promise.

Therefore, since Alice used her position as a promoter to reap personal gain at the expense of the corporation, she breached her fiduciary duty of loyalty at that time.

But after that initial breach Alice did work for the corporation "as promised". If the value of her services were sufficient to compensate the corporation for the stock she received, she effectively "cured her breach".

Therefore, Putz, might bring a suit against Alice on behalf of the corporation, but he could not prove the corporation suffered any damages.

PUTZ v. BOB

7. *Is Bob liable for a RULE 10b – 10b-5 VIOLATION?*

Under the SECURITIES EXCHANGE ACT a person is liable under Rule 10(B) and10(b)-5 if they knowingly use any MARKET MANIPULATION, DECEIT or ARTIFICE TO DEFRAUD, or trade based on INSIDE INFORMATION that has been obtained as a result of a breach of fiduciary duty.

A 10b-5 action may be brought by the SEC or an individual with STANDING. To have standing, a person must show that they bought or sold the corporation stock during the period in which the market manipulation was taking place. The defendants engaged in a scheme of market manipulation are liable for all losses suffered by stock traders as a result.

Here Putz would only have standing to bring a 10b-5 action if he traded stock. Here he did not trade stock because he bought his stock on "5/1/2000, and that was before Bob made the false announcement on "5/15/2000. Since Putz neither bought nor sold during after Bob's misrepresentation, he did not suffer a direct injury.

Therefore, Putz lacks standing to bring a 10b-5 action.

But Bob would still be liable to the SEC and other individuals that traded stock during the period after he said "sales were up" if he did not reasonably believe the statement to be true. And Bob probably knew his statement was not true because he owned "one third" of the corporate shares, was a controlling shareholder and was a founder of the corporation.

Therefore, Bob would be liable to the corporation for losses it incurred.

PUTZ v. CAROL

8. *Is Carol liable for a RULE 10(B) VIOLATION?*

Rule 10(b) is defined above. Officers, directors, and corporate attorneys have a fiduciary duty to not trade corporate stock, or derivative securities, based on their knowledge of inside information.

Here Carol traded on inside information because she "knew it was not true" that profits were up like Bob claimed, and she "sold her interest" knowing that the stock was overvalued.

Therefore, Carol would be liable to both the SEC and all individuals who suffered losses trading the corporation stock the same as was explained for Bob above.

9. *Is Carol liable for a RULE 16(b) VIOLATION?*

Under the SECURITIES EXCHANGE Rule 16(b) OFFICERS, DIRECTORS and MAJOR SHAREHOLDERS must disgorge all profits made on short-swing trades, the purchase and sale of the corporate stock within a six month period. A major shareholder is one who owns over 10% of the corporation at both the purchase and sale of stock.

Here Carol was both a "director" and a major stockholder because she owned more than 10% of the stock. And Carol conducted a short-swing trade because she bought the stock on 1/1/2000 for "$10,000" and sold it five and a half months later on 5/15/2000 for a "big profit".

Therefore, Carol qualified for application of Rule 16(b). She would have to disgorge the profits she made to the corporation.

[Corporation questions most frequently involve four issues:

1) SEC rules 10b-5 and 16b;
2) Promoter liability for contracts entered into before incorporation;
3) Breach of the fiduciary duty of loyalty; and
4) Piercing the corporate veil.]

Sample Answer 25-32: Securities Exchange Rules

1. *Did Sandy trade UNREGISTERED SECURITIES?*

Under the SECURITIES EXCHANGE ACT a SECURITY is a financial interest in profits generated by the efforts of others.

All securities must be registered with SEC if they are 1) publicly traded or 2) sold by an issuing company, a securities underwriter or by a securities dealer. An underwriter is a party that buys a security with intent to resell it rather than hold it for investment. A security does not have to be registered if it is a private placement, a sale to fewer buyers and for smaller amounts than certain limits specified under the Act

Here these were securities because they were "shares" of stock that gave financial interests in the profits of Sandy's company. And they were sold by the issuing company because they were sold by "MuyCaliente.com" over the "web."

And these shares apparently needed to be registered with the SEC and were not because Sandy was charged with selling "unregistered" securities.

Therefore, it appears that Sandy traded unregistered securities in violation of law.

2. *Is Sandy LIABLE as a PROMOTER for giving herself 100,000 shares of stock?*

Under state corporation laws a PROMOTER is anyone who helps organize, finance or form a new corporation. Promoters have a FIDUCIARY DUTY to the new corporation and are liable to the corporation if they obtain secret or unjustified profits from their position.

Here Sandy was a promoter because she "incorporated" the company, and she gave herself $100,000 worth of stock. At the time she could not be liable to the corporation or anyone else because she was the sole owner of the corporation. But as soon as she began to sell stock in the corporation to others the issue arises whether she had given herself an unjustified profit. And if she did not fully disclose what she had done to all who might buy the stock in the future this would also constitute a "secret profit".

Therefore, Sandy would be liable to the corporation, and perhaps to all future purchasers of the stock, if the compensation she had paid herself was unreasonable given the services she had performed in forming the corporation.

3. *Is Sandy LIABLE under RULE 10b for MISLEADING STATEMENTS or INSIDER TRADING?*

Under SECURITIES EXCHANGE rules 10b and 10b-5 a person is liable for the losses suffered by other investors if the defendant knowingly trades using inside information obtained through a breach of fiduciary duty or makes misleading statements affecting stock values.

Here Sandy made a misleading statement because she said "sales were increasing 100% a month" and it was "not true." This caused other investors to suffer losses because "stock prices soared," and Yang offered to buy at a price based on the "distorted earnings report."

Further, Sandy knowingly traded with inside information because she sold out to Yang knowing that the price was "very attractive" because the earnings report was "distorted." Sandy's information came from a breach of fiduciary duty because she was the "President" of the company. As President she had a duty not to use her access to inside information to her personal advantage.

Therefore Sandy is liable under Rule 10b for the losses traders suffered in this stock.

4. *Is Sandy LIABLE for TRADING on INSIDE TENDER OFFER INFORMATION?*

Under SECURITIES EXCHANGE rule 14e-3 any person is liable for losses suffered by other traders caused when the defendant trades on non-public information concerning a tender offer, whether or not the information resulted from a breach of fiduciary duty.

Here Sandy had inside information concerning a tender offer because Yang sent her a "confidential e-mail" that he was going to make a "public offer" to buy shares. And Sandy traded on the information because she "bought shares" to "take advantage of Yang's offer."

Therefore, Sandy is liable for insider trading on the information about the tender offer.

5. *Is Sandy LIABLE for SHORT SWING TRADING?*

Under SECURITIES EXCHANGE rule 16b an officer, director or significant shareholder must disgorge profits made on short swing trades in registered securities. A short swing trade is a buy and sell or sell and repurchase within a 6 month period. Rule 16b applies to any person who is either an officer or director at the time of any purchase or sale of securities, or to any shareholder who owns at least 10% of the outstanding corporation common stock at the commencement of both the purchase and the sale of the securities.

The profit to be disgorged is calculated as the highest amount that could have been made by the individual. If the last trade is a sale it is the difference between the sale price and the lowest price the stock sold at any time it was held by the individual.

Here Sandy was an officer because she was "President". And the securities were not registered but apparently were supposed to be registered.

Sandy bought 100,000 shares on June 14 and she sold them on June 16. Since Sandy was an officer and bought and sold the 100,000 shares within six months, she must disgorge all profit from that trade.

Sandy paid $10 million for the 100,000 shares because she paid $100 a share. And she sold them for $110. So she made a net profit of $1 million. But while she was holding the stock the market price dropped to $90 a share and under SEC 16b her "profits" will be calculated from that lower amount.

Therefore, Sandy will be required to disgorge $11 million to the corporation for the sale of the 100,000 shares she bought on June 14.

[ANSWER EXPLANATION: This answer illustrates the four important SEC rules and elaborates on the concept of Promoter Liability.

The first rule is only important in cases when it is not clear if something is a "security" or not. Is the title and registration for a car a "security" for purpose of the SEC? No, because it does not give you an interest in profits. Rather, it gives you an interest in an existing asset – a car.

Promoter liability is not an SEC rule, and it applies to all stocks whether they are registered or not.

For 10b violations, consider both misleading statements and trading on inside information. And the source of the inside information must be someone with a fiduciary duty to the corporation (officer, director or controlling shareholder.) For 14e-3 violations look only for trading, and the information only has to be "non-public" information about a tender offer. It can come from any source. In both cases the liability is the amount of "loss" the violation caused market traders.

For 16b violations, be prepared to calculate how much profit the defendant must disgorge. If the numbers are given to you, give a number back. And remember the profits go back to the corporation. If the defendant gets securities for free all sales proceeds are profits.]

Sample Answer 25-33: Promoter Liability, Piercing Corporate Veil

1. *Does Ann have PROMOTER LIABILITY?*

Under corporation law a PROMOTER is anyone who helps organize, finance or form a new corporation. Promoters have a FIDUCIARY DUTY to the new corporation and are liable to the corporation if they obtain unjustified profits from their position at the corporation's expense.

Here Ann helped form a new corporation because she was "hired to help form" TheCorp, "typed" the Articles of Incorporation and "filed" them. Those acts are probably sufficient to make Ann a "promoter".

And Ann received unjustified profits because she received "large blocks of stock" in TheCorp that made her a "millionaire." Certainly she earned some of the stock she received because it was given to her in lieu of being paid wages. But her services as a secretary did not justify being given millions of dollars worth of stock.

Therefore Ann is a promoter and could be liable for using her position to obtain unjustified profits.

2. *Is Betty liable to Big Bank?*

Promoters are PERSONALLY LIABLE to third parties for the financial commitments they make prior to the filing of Articles of Incorporation unless they expressly state they are acting on the behalf of a corporation that does not yet exist and is to be formed.

Promoters are liable under four possible theories based on breach of warranty and misrepresentation depending on the situation that they 1) will act to form a corporation, 2) that they have acted to form a corporation, 3) that a corporation exists, or 4) that they are authorized to act on the behalf of an existing corporation.

Here Betty helped finance a new corporation and made a financial commitment because she "secured a line of credit" for TheCorp. Therefore she is a promoter.

And Betty did this prior to filing of the Articles of Incorporation because she did it while Ann was "typing them out". There are no facts to show Betty expressly stated she was acting on behalf of a corporation that did not exist and was to be formed.

Therefore, Betty may be personally liable to Big Bank as a promoter.

3. *Can the ULTRA VIRES DOCTRINE void the purchase of the refinery and oil contracts?*

Under the ULTRA VIRES DOCTRINE a shareholder can have a corporation action declared VOID if it is outside the scope of the declared corporate purpose.

Here the declared purpose of the corporation is "real estate development," and the purchase of the "refinery" and "oil contracts" are not within the scope of that corporate purpose.

Therefore, the ultra vires doctrine could be used to declare these acts void.

4. *Does the BUSINESS JUDGMENT RULE apply to these facts?*

Under the BUSINESS JUDGMENT RULE, good faith decisions by disinterested directors are not void, and will not be voided by the Court if they are the result of ordinary negligence. Corporate decisions that are the result of director gross negligence are VOIDABLE by the board of directors, and a shareholder derivative action may be brought to ask the Court to void such decisions. But a corporate act that is the result of gross negligence may be ratified by the fully informed shareholders or other disinterested directors. And if that occurs, it cannot be voided by the Court.

Here Betty was the sole director and she acted with gross negligence because she "agreed to commitments without any investigation." This was a breach of her duty of due care because a reasonably informed, prudent person would not make a $200 million decision in this manner.

But this was not a good faith decision by a disinterested director because Betty expected "her family" to get a "huge profit" from its interest in the oil refinery. So, although this breach was ratified by fully informed shareholders when "Betty and Ann voted as a block," there was a breach of loyalty involved and the business judgment rule does not apply

Therefore, the business judgment rule does not apply in this case.

5. *Is the refinery purchase void as a BREACH OF LOYALTY?*

Under state corporation laws a shareholder may file a DERIVATIVE SHAREHOLDER ACTION on behalf a corporation for breach of fiduciary duty by directors, officers or controlling shareholders.

There is a breach of loyalty if there is a failure to disclose a personal interest in a corporate action. The corporate transaction is VOID FROM THE BEGINNING if there is clear abuse because of unfairness to the corporation or personal advantage or improper motive by the breaching party. The corporate transaction is VOIDABLE if there is no clear abuse but the transaction has not been ratified by the informed and disinterested directors and/or shareholders.

A breach of loyalty that is clearly abusive to the corporation cannot be ratified because any effort to ratify it is also a breach of loyalty.

Here there was clear abuse and improper motive because Betty approved a $200 million corporate decision because it would "benefit her family" through the "huge profit" it would gain from the purchase of the refinery. The attempt by Betty and Ann to ratify the decision to buy the refinery is also a void act because it is also clearly abusive to the corporation.

Therefore, the refinery purchase was void from the beginning and could not be ratified.

6. *Can Lenny PIERCE THE CORPORATE VEIL to attack Betty's personal assets?*

Under state corporation laws a shareholder may be personally liable for corporate obligations if a court finds it is necessary to prevent fraud and achieve equity. Evidence of fraud would be if the corporation is 1) deliberately undercapitalized or 2) run like a proprietorship without corporate formalities, commingled funds, and no payment of dividends.

Here the corporation was undercapitalized "from the beginning" and staff and creditors were often "paid with stock" because "Betty could not pay cash." But there is no evidence that was done deliberately to perpetrate a fraud. But the corporation was also run like a proprietorship because "formalities" were ignored, "no dividends" were paid, and Betty often "commingled" her funds with the corporate funds.

There was evidence of fraud because Betty entered contracts to "benefit her family" instead of the corporation. But piercing the corporate veil is not necessary to achieve equity because the purchase of the refinery is void and Betty is already fully personally liable to the corporation for her breach of loyalty.

Therefore, Lenny will probably not be able to pierce the corporate veil.

[ANSWER EXPLANATION: The most important part of this answer is that a good faith failure by a director to exercise good judgment can be ratified by the shareholders. This "fiduciary duty of due care" applies only to directors and not to officers such as presidents, etc. A president may be negligent in making a decision (e.g. making the Edsel), but all the corporation can do is fire him. It can't sue him for having bad judgment too. But a director that is grossly negligent may he held personally liable to the corporation.

But the duty of loyalty is different. Officers have a fiduciary duty of loyalty to the corporation the same as a director or controlling shareholder. A corporate act that involves a breach of loyalty can be ratified by the disinterested directors or shareholders, but NOT if it is clear abusive to the corporation.

A breach of loyalty that is clearly abusive to the corporation cannot be ratified because any such act would also be a breach of loyalty to the corporation.]

Sample Answer 26-34: Experts, Character Evidence, Offers in Compromise

1. *"…you heard… didn't you?"*

OBJECTION: LEADING QUESTION.

Under the Rules of Evidence a party generally may not ask his OWN WITNESS questions which SUGGEST AN ANSWER. Leading questions can be asked of hostile witnesses, about preliminary matters, or to refresh memory of prior testimony. And they can also be asked on cross examination.

Here the question is leading because it is being asked on direct examination because this is "Pete's attorney" asking "his witness" the question. And the question suggests the answer sought by inclusion of the phrase "didn't you?"

RESPONSE: None of the general exceptions apply here.

RULING: Therefore the objection will be SUSTAINED because the question is leading and none of the exceptions apply here.

2. *"Winston was crying hysterically."*

OBJECTION #1: IRRELEVANT. Only relevant evidence is admissible. Evidence is relevant if it TENDS TO PROVE a MATERIAL FACT.

Here Dick would argue that whether Winston was crying or not crying is irrelevant to the question of who caused the accident or what injury Pete suffered.

RESPONSE: Pete may argue that his injuries include the "pain and suffering" he experienced, and part of that is the distress he suffered from hearing his son, Winston, cry "hysterically". However that could be proven directly by Pete's own testimony better than by implication.

OBJECTION #2: CONFUSING AND UNFAIRLY PREJUDICIAL. The Court has discretion to exclude even relevant evidence if it is cumulative, would delay trial, confuse the jury or present a risk of unfair prejudice that exceeds the probative value.

Dick would argue that it would be confusing to the jury to hear about distress suffered by Winston because Winston was not injured and is not a plaintiff in the lawsuit. And further, he would argue that the jury would be unfairly prejudiced against him out of sympathy for the child.

RESPONSE: Pete may argue that any confusion or prejudice the evidence might present could be offset by instructions to the jury.

RULING: The objections would probably be SUSTAINED because the evidence has little probative value as to the issues in dispute, and it would probably confuse the jury and inflame emotion when the real issue is the distress claimed by Pete. That issue would be better proven by Pete's own testimony than by implication concerning the hysteria suffered by Winston.

3. *"Winston excitedly exclaimed…"*

OBJECTION: INCOMPETENT WITNESS. No testimony or statements by a witness can be admitted into evidence if the witness lacks personal knowledge, the ability to remember events, or the ability to relate those events to the finder of fact. If the parties stipulate that a witness is incompetent to testify no statements by that witness have any evidentiary value.

Here the parties have stipulated that Winston is incompetent to testify "because of his young age" and if he is too young to testify at trial, he was too young at the time of the accident to make any credible statement. Therefore, by agreement, nothing Winston said in or out of court is relevant.

RESPONSE: Pete may try to claim the evidence is an EXCITED UTTERANCE, a statement made at or near the TIME of an event, while the declarant was still under the STRESS caused by the event. But that is totally irrelevant to the objection raised.

RULING: The objection would definitely be SUSTAINED. Once the parties stipulated that Winston was incompetent because of his age it barred introduction of any and all statements by him whether offered in court as testimony or out of court as hearsay.

4. *"Wally's testimony that Pete is a good driver."*

OBJECTION: IMPROPER CHARACTER EVIDENCE. Evidence of a person's character cannot generally be admitted to prove that they acted in conformity with their character traits on a particular occasion. There are certain exceptions but none of them are applicable here.

Here Pete is offering character evidence to prove conduct in conformity with character because he is asking Wally to testify to that he is a "good driver" and that implies he did not cause the accident on the day in question.

RESPONSE: None. There is no other rational argument why this testimony is being offered.

SUSTAINED. It clearly is inadmissible because it is intended to show conduct in conformity with character.

5. *"Pete's offer to settle and Dick's response."*

OBJECTION: EVIDENCE OF SETTLEMENT OFFER. Under the rules of evidence offers to settle a disputed claim cannot be admitted to prove liability or the validity or invalidity of a disputed claim.

Here Pete is offering evidence of an offer to settle a claim because he is offering evidence that Dick offered to pay him "$10,000" to settle his claim. The only relevant purpose of this evidence is to prove that Dick is liable or else to prove that Pete's claim is valid.

RESPONSE: None. There is no other rational argument why this testimony is being offered.

SUSTAINED. It clearly is inadmissible because it is intended to prove Dick was negligent and admits Pete's claim is partially valid.

6. *"Photos of the truck."*

OBJECTION: LACK OF FOUNDATION. Photographs must be authenticated by a person who can testify with personal knowledge that the photos accurately depict the scene they are presented to represent.

Here Wally has only said that he took photos. But he has not been asked if the photos being offered as evidence accurately depict the scene of the accident

RESPONSE: None.

SUSTAINED. The photos cannot be admitted until and unless Wally testifies that they accurately depict what he saw at the accident scene.

7. *"…acts by Wally … senile and needs glasses."*

OBJECTION: IMPROPER CHARACTER EVIDENCE. As stated above, character evidence cannot be used to show conduct in conformity. Further, NO SPECIFIC EVIDENCE OF DISHONESTY can be introduced to attack the honesty of a witness on direct examination. Rather, only evidence of OPINION and REPUTATION can be introduced to IMPEACH the honesty of a witness.

Here the defense is attempting introduce SPECIFIC EVENT EVIDENCE to impeach Wally's testimony.

RESPONSE: The question is not offered to prove that Wally ACTED IN CONFORMITY with his character at any time in dispute, and it is not offered to attack his HONESTY. Rather it is offered to prove that he was UNABLE to accurately SEE and UNDERSTAND events in dispute, and unable to REMEMBER and RELATE the events as they actually occurred.

OVERRULED. Evidence offered to prove or disprove the ability of a witness to see, under and, remember and relate events in dispute is not improper character evidence.

8. *"Wally lied…."*

OBJECTION: IMPROPER IMPEACHMENT. As stated above, NO SPECIFIC EVIDENCE OF DISHONEST acts can be introduced to attack the honesty of a witness on direct examination. The honesty of the witness can only be attacked by evidence of opinion and reputation.

Here the witness is being questioned on direct examination because Dick presented the witness. And he is trying to attack Wally's honesty because the evidence concerns past lies by Wally.

RESPONSE: None. There is no other rational argument why this testimony is being offered.

SUSTAINED. This is specific act evidence presented to attack the honesty of a witness, not reputation or opinion evidence, so it is inadmissible.

9. *"… Pete's car had new brakes…."*

OBJECTION: IMPROPER EXPERT OPINION. An expert opinion is admissible if the witness is qualified by SPECIAL TRAINING, EXPERIENCE or SKILL and their opinion would be HELPFUL TO THE JURY to understand the facts.

Here the witness may be an expert, but the expert's testimony is not anything about an "opinion" based on his expertise. The "expert" is trying to testify about what he was told or saw, not about conclusions he reached based on the evidence. The jury does not need an "expert" to tell them that the brakes were repaired. That evidence should come from employees of the repair shop, not from an "auto safety expert".

RESPONSE: The expert is helpful to the jury because the repair records are difficult to understand without experience in this particular area. The fact someone else could explain it is irrelevant. The important issue is that the repair records are not easy for a lay person to understand and it is helpful for someone experienced with this type of record to explain the notations.

SUSTAINED. An expert is not needed to explain billings when the people who did the work are available.

[Evidence questions commonly list the items of evidence and ask what objections would be raised, the response and the Court ruling. Sometimes they say the evidence was all admitted, but did the Court err.

Often evidence is presented that has two or more problems, such as privilege, form (leading), foundation (reliability), relevance (purpose) and some other problem like hearsay or character evidence. Be very careful to consider these factors in this order:

1. If the offered evidence is privileged (e.g. asking the plaintiff's wife what her husband told her about his injury in confidence), it is not admissible regardless of any other consideration.

2. Next, leading questions asked on direct examination are usually objectionable regardless of other considerations.

3. Evidence lacking a foundation (e.g. photos that are not authenticated) are not admissible regardless of other considerations.

4. Irrelevant evidence is inadmissible regardless of whether it is hearsay or character evidence.

So only leap over these four considerations to discussion of hearsay and similar objections when the facts do not suggest the evidence is privileged, in improper form, does not lack foundation and is relevant.

Sometimes the reader expects you to say something about each issue, so it is often smart to dismiss the other considerations in passing. But when time is short go to the one objection that will decide the issue completely and avoid wasting time on irrelevant discussion.]

Sample Answer 26-35: Admissions, Witness Character, Character Evidence

1. *"You told neighbors…didn't you?"*

OBJECTION: Hearsay. Hearsay is an out of court assertion offered to prove the truth of the assertion. Generally hearsay is not admissible evidence. Under the FEDERAL RULES OF EVIDENCE an admission of a party opponent is not hearsay. Under State rules an admission of a party opponent is admissible as an exception to the general hearsay rule.

RESPONSE: Here Bevis is offering an admission by Lydia, the opposing party, that is to her disadvantage because if she knew the dog was dangerous she was negligent in not preventing it from biting him.

RULING: Therefore the Court ruled PROPERLY because the evidence was NOT HEARSAY under the federal rules, and if this is in State Court it would qualify as an exception to the general rule.

POSSIBLE OBJECTION #2: Leading. Generally a party is not allowed to ask his own witnesses leading questions on direct examination. A leading question is one that suggests the answer sought. An exception to the general rule is when the witness is an opposing party or otherwise "hostile" to the party calling the witness.

RESPONSE: Here Bevis would ask for permission to ask leading witnesses because Lydia is the opposing party.

RULING: OVERRULLED. The Court would allow Bevis to ask Lydia leading questions because she is the opposing party.

2. *"Nolo contendere plea"*

OBJECTION: Hearsay. Hearsay is defined above.

Here the evidence offered is an out of court assertion because it is Lydia's prior assertion that she would not contest a charge against her. Therefore it facially appears to be hearsay, or perhaps an admission of a party opponent.

RESPONSE: The evidence is not being offered to prove the truth of the assertion that Lydia would not contest the charges against her in some other case. Rather it is being offered to attack her honesty as a witness. And since it is not offered to prove the truth of the assertion (of the plea) it is not hearsay at all.

RULING: The Court PROPERLY overruled the objection because it was not hearsay.

POSSIBLE OBJECTION #2: Improper use of character evidence to impeach. Under the federal rules only evidence of opinion and reputation is generally allowed on direct to attack the honesty of a witness. An exception is that convictions for crimes of dishonesty within ten years must be admitted into evidence under the federal rules. Further, the Court has discretion to admit evidence of convictions for other felonies within ten years if the probative value outweighs the risk of unfair

prejudice. And the Court has discretion to admit evidence of conviction for felonies over ten years before if the probative value substantially outweighs the risk of unfair prejudice.

Under the federal rules a "nolo contendere" plea is not a conviction, but under State rules it often is considered a conviction.

Here the question is being asked on direct, not on cross. And this is specific-act evidence being presented to attack the honesty of the witness. It is not evidence based on opinion or reputation.

And no conviction is being offered into evidence here.

RESPONSE: If this objection had been raised there would be no effective response.

RULING: SUSTAINED. If this objection had been raised it would be sustained.

3. *"Single mother on welfare…"*

OBJECTION: Leading. Part of the rule for leading questions is given above. Generally leading questions are allowed on cross-examination. But that is not always true. If the witness being cross-examined is the party represented by the attorney doing the cross-examination, or if they are aligned with or favoring that party, then leading questions will often not be allowed on cross-examination. There is no specific rule of evidence to that effect, but this is the position taken by many Courts.

RESPONSE: This is cross-examination and leading questions are allowed.

RULING: The Court ruling was PROPER in the view of many Courts because although this is cross-examination, Lydia is being questioned by her own attorney and a leading question is improper.

POSSIBLE OBJECTION #2: Irrelevant and unfairly prejudicial. Only relevant evidence is admissible. Evidence is relevant if it tends to prove a material fact. Even relevant evidence may be excluded if it is cumulative or the probative value is outweighed by the risk of unfair prejudice or confusion to the jury.

Here the evidence offered appears irrelevant because it does not tend to prove any material fact. The complaint is for personal injury for "dog bite". The prior questioning raised the issue whether she knew her dog was dangerous. This raises a strict liability issue, and the question about her welfare and family status does not go to any substantive issue.

Further, it raises a risk of unfair prejudice in favor of Lydia because it appears intended to elicit sympathy for her.

RESPONSE: If this objection had been raised there would be no effective response.

RULING: SUSTAINED. If this objection had been raised the Court would not allow the question.

4. *"Photographs of dog."*

OBJECTION: Irrelevant and prejudicial. The rule for relevance and unfair prejudice is given above. Evidence is "unfairly" prejudicial if it would tend to cause the finder of fact to favor one of the parties for reasons that are not material to the issue in dispute. Further, cumulative evidence may be excluded to avoid wasting time, and because it can raise the risk of unfair prejudice simply by the volume of repetitive evidence.

RESPONSE: Here one of the facts in dispute is whether the dog is vicious, and another fact in dispute is whether Lydia should have known the dog was dangerous. The evidence offered suggests that the dog is vicious, and obviously so. Since the evidence goes directly to the matters in dispute, it is not "unfairly" prejudicial.

RULING: The Court ruling was PROPER because the evidence was relevant and tended to show the violent nature of the dog. That would tend to prove the dog was dangerous and that Lydia was aware of the danger. And three photos is not an excessive number so the evidence is not cumulative.

POSSIBLE OBJECTION #2: Lack of foundation. Photographs lack foundation until they have been authenticated by a witness that testifies they are an accurate depiction of the scene they are offered to prove.

RESPONSE: If this objection had been raised there would have been no effective response. There are no facts to show that the photographer or anyone else testified that the photos accurately show the character of the dog.

RULING: SUSTAINED. If the photos were not authenticated the objection would have been sustained.

5. *"Habit evidence"*

OBJECTION: Character evidence of habit. The character evidence rules are given above. One exception to the general character evidence rule is that if a person or organization rigidly adheres to a set routine, evidence of that may be admitted to prove conduct in conformity with character.

Here the evidence that the dog bit three people in seven years is not evidence of "rigid adherence" to a set routine, so this is not sufficient evidence of "habit" to overcome the general rule.

RESPONSE: The general character evidence rule only applies to "people" and has no application to animals.

RULING: The Court PROPERLY admitted the evidence because the character evidence rule and the "habit" exception thereto only apply to "persons".

POSSIBLE OBJECTION #2: Hearsay. Hearsay is defined above.

Here the declarations are out-of-court assertions that the dog bit others, and they are offered to prove that fact. As such they are clearly hearsay unless some hearsay exception applies.

RESPONSE: No exception to the hearsay rule is suggested.

RULING: SUSTAINED. If a hearsay objection had been raised it would have been sustained.

6. *"Character of dog."*

OBJECTION: Character evidence. Evidence of the character of a person cannot generally be offered to prove the person acted in conformity with that character on a certain occasion. There are certain exceptions that do not apply here.

RESPONSE: This evidence is offered to prove that a dog, not a person, acted in conformity with their character. The character evidence rule applies only to "persons" and not to animals.

RULING: The Court PROPERLY overruled the objection.

POSSIBLE OBJECTION #2: Hearsay. Hearsay is defined above.

Here Bevis is trying to present an out of court assertion because he is asking the witness what the defendant's son said to her. The assertion was that the dog is dangerous, and it is being presented to prove that same fact. Therefore this appears to be hearsay.

RESPONSE: Bevis may argue that this is an ADMISSION OF A PARTY OPPONENT because the statement was made by the defendant's son. A statement by a person other than a party may be deemed to be an admission if the declarant is authorized to speak for the party. But here there is no evidence that the son was authorized to make statements for Lydia.

RULING: SUSTAINED. If this objection had been raised it would have been sustained.

7. *"Evidence of honesty."*

OBJECTION: Leading. The rules for leading questions are given above.

Here the question is leading because the phrasing suggests the answer being sought. But it is being asked on cross-examination, and generally leading questions are allowed on cross.

RESPONSE: Bevis may argue that since Juanita is Lydia's housekeeper she is so closely aligned with Lydia that Lydia's attorney should not be allowed to ask her leading questions.

RULING: The Court's ruling is PROPER because although this is a leading question it is not improper because it is on "cross". And since Juanita was called as a witness by Bevis, and has testified against Lydia, there is no evidence Juanita clearly favors Lydia's position. Therefore the question is not generally improper on cross-examination.

POSSIBLE OBJECTION #2: Improper character evidence. Under the rules of evidence the truthful character of a witness may not be offered until after the truthfulness of a witness has been attacked.

Here there has been no prior attack on Lydia's honesty. Therefore, it is improper for her attorney to present evidence that she is an "honest woman."

RESPONSE: There is no rational basis to argue that the question is proper.

RULING: SUSTAINED. If this objection had been raised, it would have been sustained.

8. *"Nolo contendere…"*

OBJECTION: Specific act evidence. The rules for admission of character evidence to attack the honesty of witnesses and the exceptions for convictions were given above.

Once a witness has testified about the honesty or dishonesty of another witness, the witness can be cross-examined about specific incidences of honesty or dishonest at the discretion of the Court. Those specific instances of honesty or dishonesty cannot be proven by extrinsic evidence.

Further, once a witness testifies concerning the character of another person, the witness can be questioned about acts by that person to show that they did not know the person as well as claimed.

RESPONSE: Lydia's attorney first questioned Juanita about her belief Lydia was honest and that evidence was admitted over Bevis' objection. That gave the Court discretion to allow Bevis to cross-examine Juanita about specific acts of honesty and dishonesty by Lydia.

Further, after Juanita gave an opinion about Lydia's character Bevis could question her about her knowledge of specific acts by Lydia to show that Juanita does not know her as well as represented.

RULING: It was PROPER for the Court to allow Bevis to question Juanita about specific acts of honesty and dishonesty because Lydia first raised the issue and opened the door for Bevis to cross-examine on that issue. Further, Bevis can question Juanita to prove that she did not Lydia's character as well as claimed.

[ANSWER EXPLANATION: On evidence questions always frame the answer as the call of the question demands. Here the call asks for the propriety of the ruling and why followed by what other objection could have been raised. As shown it often is helpful to present the objection, response and ruling in labeled paragraphs.

One item of evidence may raise several possible objections. The answer given here is overly long and might not be possible in an hour setting.

Note that objectionable evidence is almost never excluded unless an objection is raised by the opposing party. Here the question says what objections were raised, and what the Court ruled on those objections. The Court ruled properly each time because the objections were wrong each time. As shown, if the objections had been correct the Court would have ruled differently in most of the cases.]

Sample Answer 26-36: Hearsay, Hillmon Doctrine, Excited Utterance

1. *HEARSAY admissible under the HILLMON DOCTRINE?*

Under Federal Rule of Evidence 801 hearsay is an assertion, outside of court, offered to prove the truth of the assertion. An assertion is any conduct intended to convey an express or implied statement that something is so, exists or has happened. However, admissions of party opponents and certain other out-of-court assertions are non-hearsay under the federal rules.

Under Rule 803 HEARSAY can be admitted as a statement of current MENTAL, EMOTIONAL or PHYSICAL CONDITION if it is a statement of the declarant's present state of mind, health, pain, feelings, intent, plan or motive at the time of the statement. Under the HILLMON DOCTRINE a declarant's statement of future plans is admissible circumstantial evidence where subsequent acts by the declarant are a material issue that could be naturally inferred from the statement.

Here the statement was an assertion made out of court because it was a statement made in a "bar" that Devon was going to "rob someone." And it is being offered to prove that was true because it is being offered to prove Devon did rob Granny. Therefore, this is hearsay.

But the statement is about Devon's future plans because it is about his intent to "rob someone" after leaving the bar. This conveys relevant information about Devon's state of mind at the time the statement was made.

Therefore the statement is hearsay about a "state of mind" and admissible under the HILLMON DOCTRINE.

2. *HEARSAY admissible as an EXCITED UTTERANCE?*

Under Federal Rule of Evidence 803 HEARSAY can be admitted as an EXCITED UTTERANCE if it is a statement by a declarant about a startling event while still under the stress of excitement of the event. Hearsay is defined above.

Here there was an assertion made out of court because Granny said something had happened, that the robber "took her Bible." And it is being introduced to prove her assertion that the Bible actually was stolen. This is relevant evidence because the Bible was found in "Devon's house". Therefore, this is hearsay.

But there also was a startling event because Granny was "knocked to the ground and her purse snatched." And Granny made her statement under the stress of excitement because she "shouted" the statement immediately after being "knocked to the ground."

Therefore, this would qualify as admissible hearsay under the excited utterance rule.

3. *STATEMENT OF IDENTIFICATION?*

Under Federal Rule of Evidence 801 an assertion is not hearsay if it is a statement of identification of a person after perceiving the person if the declarant is available to testify about the statement.

Here Granny's statement was an identification because she said, "That's the man who robbed me," and she made the identification after perceiving Devon. And Granny was available to testify because she "testified that "she could not remember who robbed her."

Therefore, Granny's statement is not hearsay under the Federal Rules.

4. *HEARSAY or INCONSISTENT PRIOR STATEMENT?*

Hearsay is defined above, and under Federal Rule of Evidence 801 an assertion is not hearsay if it is an inconsistent prior statement under oath and the declarant is available to explain or rebut the statement. If the statement was not made under oath it can still be introduced to impeach the credibility of a witness.

Here Devon's statement involves an out of court assertion because he said something was so in that he was in "Chicago the day of the robbery."

Devon's statement about being in Chicago on the day of the crime was not under oath because it was made when the police "confronted" him. Therefore, the statement is not admissible as non-hearsay to prove the truth of the matter asserted as a prior inconsistent statement.

But the assertion is not offered to prove the matter asserted because the prosecution is not trying to prove Devon was in Chicago. Instead they are trying to prove he lied about being in Chicago. Therefore, this is not hearsay anyway.

Since the assertion is not hearsay it is admissible to show that Devon lied about being in Chicago when he was arrested, should he chose to testify. That suggests he is guilty of the robbery and was lying to try to establish an alibi.

Therefore, the evidence is neither hearsay nor an inconsistent prior statement.

5. *HEARSAY or PAST RECOLLECTION RECORDED?*

Under Federal Rule of Evidence 803 HEARSAY can be admitted as a PAST RECOLLECTION RECORDED if it is an accurate record of an event made or adopted by the declarant soon after an event while facts were fresh that can no longer be clearly remembered by the declarant. The declarant must testify to the original accuracy of the record, and the proponent may only read the record into evidence.

Here the evidence is an out of court assertion that something is so because it is Granny's "statement" to police just after the robbery. And it is being offered to prove the truth of the assertion because it is to show Devon matches the robber's description. Therefore, it is hearsay.

Here Granny made the statement soon after the event when the facts were fresh in her mind because it was right after the robbery, and she can no longer remember the facts. But Granny cannot testify to the accuracy of the statement because she "cannot remember the statement."

Therefore, since Granny cannot remember the statement or testify to its accuracy, the statement is not admissible as a past recollection recorded.

6. *HEARSAY or ADMISSION OF A PARTY OPPONENT?*

Under Federal Rule of Evidence 801 an assertion is not hearsay if it is an admission of a party opponent.

Here Snitchy would relate an admission by a party opponent because the declarant is Devon, the defendant. And Snitchy this is an admission because Devon admitted to "taking Granny's purse."

Therefore, the evidence is an admission of a party opponent and not hearsay.

7. *Double HEARSAY or ADMISSION and CONSISTENT PRIOR STATEMENT?*

Under Federal Rule of Evidence 801 an admission of a party opponent is not hearsay. Further an assertion is not hearsay if the declarant is available to testify about a consistent prior statement offered to rebut a charge or implication that their testimony in court is a fabrication or result of improper influence or motive. The evidence is only relevant if the prior statement was made before the improper motive is alleged to have arisen.

Here the statement by Devon to Snitchy was an admission of a party opponent as discussed above. The defense has insinuated that Snitchy fabricated his testimony because he wanted a "reduced sentence." Since that has occurred, the statement by Itchy relates a prior consistent statement because it presents a statement by Snitchy on "June 5" that "Devon robbed Granny". And that took place before Snitchy tried to get a reduced sentence from police on "June 10".

Therefore, this is admissible as a prior consistent statement.

[ANSWER EXPLANATION: This question is all about hearsay. The CALL just says "discuss" so you can structure the answer as "issues" or "objections" and "responses". But is says discuss based on federal rules so there should be no discussion of State rules when they vary from federal rules.

Carefully address whether evidence is hearsay first. The "admission of a party opponent" is not hearsay under the FRE, and that is heavily tested. Never conclude that it is hearsay. Do not leap to discussing whether a hearsay exception applies until you have proven with certainty that the evidence is hearsay in the first place!

For the "state of mind" exception, it is the intention or mental state of the declarant that matters, not the effect the statement has on the listeners. The Hillmon doctrine arose from *Mutual Life Insurance Co. of New York v. Hillmon,* (1892) 145 U.S. 285.]

Sample Answer 27-37: Solicitation, Failure to Communicate, Withdrawal

STATE BAR v. BIGDOG

1. *FALSE OR MISLEADING ADVERTISING?*

Under the rules of PROFESSIONAL CONDUCT a lawyer is prohibited from soliciting clients with advertising that is false or misleading.

Here Bigdog advertised because he had a "TV advertisement" and it was false because it said he had "never lost" when he actually had "lost many cases".

Therefore, Bigdog can be disciplined by the State Bar for false advertising.

2. *EXCESSIVE FEE?*

Under the rules of professional conduct, a lawyer may not charge an excessive fee. Whether a fee is excessive or not depends on many factors but usually contingency fees are about 30% for cases that settle before trial, about 40% for cases that go to trial, and about 50% for cases settled on appeal.

Here Bigdog seems to have clearly charged excessive fees because he charged Ahmed a "60% contingency fee", an amount in excess of any normal contingency fee.

Therefore, Bigdog can be disciplined by the State Bar for charging excessive fees.

AHMED v. BIGDOG

3. *TAKING THE CASE WITHOUT NECESSARY ABILITY TO REPRESENT?*

Under the rules of professional conduct, an attorney is prohibited from taking a case where he lacks the necessary ability to represent the client unless he associates counsel with the required ability or obtains the necessary knowledge.

Here Bigdog took a case which he did not have the ability to pursue because he "had never seen a case like this one." And he failed to obtain the necessary knowledge because he "did not bother to look up the law".

As a result of his failures, Ahmed lost his case.

Therefore, Bigdog is liable for malpractice and can also be sanctioned by the State Bar.

4. *FAILURE TO RESPONSIBLY MANAGE CASE?*

Under the rules of professional conduct an attorney must defend his client zealously within the requirements of the law and responsibly protect his client's interests.

Here Bigdog did not pursue the case responsibly because he negotiated for "two years", and he did not protect his client's interests because he "did not file suit" within the statutory time.

As a result of his failures, Ahmed's case is time-barred.

Therefore, Bigdog is liable for malpractice for failing to responsibly manage the case and can also be sanctioned by the State Bar.

5. *FAILURE TO INFORM CLIENT AND COMMUNICATE SETTLEMENT OFFER?*

Under the rules of professional conduct an attorney must keep the client reasonably informed of all important developments in the case. In addition, there is a specific requirement that attorneys must communicate of all written settlement offers to the client.

Here Bigdog received a settlement offer for $2,000. It is not clear if it was written or not, but it clearly was an important development that should be communicated to the client.

As a result of his failures, Ahmed was denied an opportunity to accept the offer.

Therefore, Bigdog is liable for malpractice and can also be sanctioned by the State Bar.

ABC v. BIGDOG

6. *Is Bigdog liable for FILING A FRIVOLOUS SUIT?*

Under the rules of professional conduct, a lawyer may not pursue a frivolous action or abuse discovery. Further, the pursuit of a frivolous suit may be the basis for the tort of ABUSE OF PROCESS.

Here Bigdog pursued a frivolous action because he "filed" a suit and made "a lot" of discovery demands when he "knew time for filing the suit had run out".

Therefore, Bigdog violated rules of conduct and abused civil process. ABC could bring an action against him for their legal expenses incurred as a result of his acts. In addition he can be sanctioned by the State Bar.

[This is a shorter answer than you would want to actually write on an exam. Generally your "competition" is going to be frantically scribbling about three and a half typed pages (single spaced), seven typed pages (double spaced) or thirteen pages handwritten (blue-book pages). So the "reader" expects you to say more and may mark you down for simply being more concise.

So you would have to "pad" this with some extra blather.

For the California Bar Exam you are expected to base your answer on the ABA Model Rules, the ABA Model Code, The California Rules of Professional Conduct, and the California Business and Professions Code. So you might want to cite those.

And you can explain the rules in more detail or say some more about what a jerk Big Dog was. Every attorney as a duty to "uphold the integrity of the profession", so you can always add something about that. But in reality, these are the main issues raised and this is how simple the underlying rules really are.]

Sample Answer 27-38: Improper Acceptance, Conflict of Interest

PETE v. LARRY

1. *IMPROPER ACCEPTANCE OF CASE because attorney may be a WITNESS?*

Under the rules of PROFESSIONAL CONDUCT an attorney may not accept a case where he is likely to be a material witness.

Here Larry took the case without revealing he was likely to be a material witness because he "also witnessed the accident".

Therefore, Larry violated his ethical duties to Pete and may be liable to Pete on that basis.

2. *CONFLICT OF INTEREST?*

It is a violation of the rules of professional conduct for an attorney to take a case where he has a conflict of interest unless 1) he reasonably believes the conflict will not affect his ability to represent and 2) the fully informed client consents to representation.

Here Larry had a conflict because he "did not think the other vehicle was Dick's". He could not have reasonably believed this knowledge would not affect his performance. He did not inform Pete because "Larry did not tell Pete".

Therefore, Larry is liable to Pete for taking the case with a hidden conflict of interest.

3. *Failure to properly INFORM and REPRESENT Pete?*

Under the rules of professional conduct an attorney must keep the client reasonably informed of all significant case developments and to represent them zealously within the limits of the law.

Here Larry did not inform Pete that he was a witness and did not inform Pete about the statute of limitations. Larry did not file suit or pursue recovery because he was "too busy". Larry's failures injured Pete because the statute of limitations ran "after one year."

Therefore, Larry is liable to Pete for failure to properly inform and represent him.

4. *Violation of ATTORNEY-CLIENT PRIVILEGE?*

Under the rules of professional conduct all confidential communications between a client and attorney are privileged. In addition secret information that would serve to the client's disadvantage must be kept secret by the attorney even if they are not confidential communications. The client holds these privileges.

Here Pete told Larry the photos were fake, and this was told to him in confidence because Pete "confided" it. Larry assured the fact would remain secret and Pete never said it could be revealed. Here Larry revealed the confidence because he "told Atlee".

Therefore, Larry is liable to Pete for revealing privileged client information.

DICK v. LARRY

5. *FRIVOLOUS CASE?*

Under the rules of professional conduct an attorney is prohibited from filing a case for an IMPROPER PURPOSE, for purposes of HARASSMENT or where there is a FRIVOLOUS BASIS. An attorney that knowingly files a frivolous claim may be liable to the opposing party for ABUSE OF PROCESS.

Here Larry knew the photos were fake because "Pete told him". Larry wanted the fact kept secret because he had the improper purpose of "pursuing a big recovery." And Larry filed the suit frivolously knowing that the statute of limitations "barred any action".

Therefore, Larry pursued the case with an improper purpose, filed a frivolous action and may be civilly liable to Dick.

DICK v. ATLEE

6. *CONFLICT of INTEREST?*

Under the rules of professional conduct an attorney is prohibited from taking a case where he has a conflict of interest unless he believes it will not affect his ability to represent the client and the fully informed client consents.

Here Atlee and Larry were "old chums" so he had a potential conflict because their friendship might interfere with their performance. It might not have affected his performance, but even so he had a duty to inform the client and "he did not tell Dick".

Therefore, Atlee violated his duty to Dick and may be liable to him for malpractice.

7. *FAILURE TO INFORM?*

Under the rules of professional conduct an attorney is required to inform clients of important facts concerning the client's case and legal position.

Here Atlee found out the photos were fake because Larry "told" him. This was an important fact because it gave Dick a cause of action. Atlee did not tell his client because he and Larry made a "secret agreement".

Therefore, Atlee is liable because he did not tell Dick the photos were fake.

8. *BREACH OF LOYALTY?*

Under the rules of professional conduct an attorney has a fiduciary duty to the client.

Here Atlee agreed to "keep secret" from his client the fact the photos were fake and also to urge Dick not to file a counter claim that would have been a valid action. These acts prevented his client from bringing a valid cause of action.

Therefore, Atlee breached his duty of loyalty to Dick.

[This answer is too short, the same as the prior sample answer for Question 27-37. So the comments given there about "padding" the answer also apply here.]

Sample Answer 27-39: Limitation of Liability, Incompetence

JIM - Ethical Issues

1. *IMPROPER SOLICITATION OF CLIENTS?*

Under the rules of professional responsibility it is generally unethical for an attorney to seek clients by the use of false or misleading advertising or by any means other than general advertising.

Here Jim was writing directly to potential clients, but he was also looking for "corroborating witnesses" to support Marty's case. Although he knew he might "turn up additional plaintiffs" that was not the sole purpose of his actions. Attorneys are limited to seeking clients through general advertising but they are not prohibited from seeking witnesses by other means, even if there is a potential that those witnesses could ask to become clients.

Therefore, Jim did not improperly solicit clients.

2. *IMPROPERLY ACCEPTANCE OF case where attorney is a WITNESS?*

Under the rules of professional responsibility an attorney must avoid accepting a case if he cannot adequately represent the client because he is likely to be a percipient witness.

Here Jim accepted the case because he became "Marty's attorney." And he did witness some of the construction because he "saw for himself" the construction situation. But he had no previous knowledge of the construction before meeting Marty. And, it is unlikely Jim would be called upon to testify about the construction situation because it had been underway for some time prior to Marty coming to Jim to complain.

Therefore, Jim did not improperly accept a case where he is likely to be a witness.

3. *IMPROPER ACCEPTANCE of case where attorney LACKS ABILITY?*

Under the rules of professional responsibility an attorney must not accept a case if he cannot adequately represent the client because he lacks expertise, unless he either acquires expertise or associates with an attorney with proper experience.

Here Jim lacked expertise because he had "never handled a case like this" and "knew nothing about the law in the area." But he acquired expertise because he "read up on landlord-tenant law." And there is no evidence he could not adequately represent the tenants. Further, Jim could still associate with a more experienced attorney.

Therefore, it does not appear that Jim improperly accepted the case.

4. *Improper ATTEMPT TO AVOID MALPRACTICE LIABILITY?*

Under the rules of professional responsibility an attorney may not attempt to exonerate himself from or limit his liability to the client for his personal malpractice.

Here Jim did attempt to limit his liability for malpractice by asking the clients to sign an agreement that "indemnified him" from malpractice claims.

Therefore, Jim did improperly attempt to avoid malpractice liability and may be sanctioned by the State Bar for doing that.

5. *IMPROPER payment of client expenses?*

Under the rules of professional responsibility an attorney must avoid a case where he has a financial interest or conflict of interest because he has made loans to the client other than advancements for litigation costs. Contingency fee agreements that are otherwise proper do not violate this rule.

Here Jim made a loan to the clients because he "paid the filing fees" for the suit. This was a loan because he expected to be paid back from "any resulting settlement." But these were advancements for litigation costs because they were "filing fees."

Therefore, Jim did not improperly accept a case where he has a conflict of interest.

GEORGE - Ethical Issues

6. *THREATENING ADMINISTRATIVE OR DISCIPLINARY ACTION TO GAIN ADVANTAGE?*

It is a violation of the rules of professional conduct for an attorney to threaten to bring an administrative, disciplinary or criminal action to gain advantage in a civil matter.

Here George is threatening an administrative or disciplinary action (reporting to the State Bar) against Jim to gain advantage in the dispute between Marty and her landlord.

Therefore, George has violated the rules of professional conduct and may be sanctioned by the State Bar.

[ANSWER EXPLANATION: This answer illustrates the principle "Use the facts, but don't argue with the facts." That means that if the fact is stated accept and use it as a given. Here the facts indicate the main reason Jim contacted other tenants was to get corroborating evidence to bolster his case. There is nothing unethical about this. The fact that he realized and hoped he might pick up other clients in the process is totally irrelevant.

The last part of this question is based on my own personal experience with a case. The opposing counsel made these very threats to me – that if I did not drop my client's case he would report me to the State Bar and his client would sue me for defamation. It was so ridiculous I laughed out loud. What an idiot.]

Sample Answer 27-40: Failure to Communicate, Inadequate Representation

1. *IMPROPER SOLICITATION OF CLIENTS?*

Under the rules of professional responsibility an attorney cannot seek clients by the use of false or misleading advertising.

Here Frank sought clients through a misleading advertisement because his "late-night TV ad" said he had "never lost a case." Although this was technically true, it was intentionally misleading because he had "never taken a case to trial" and he always "dumped" the cases that could not be easily settled.

Therefore, Frank improperly solicited clients and may be sanctioned by the State Bar.

2. *IMPROPER CONTINGENCY FEE in a FAMILY LAW matter?*

Under the rules of professional responsibility it is usually unethical for an attorney to charge a contingency fee for representation in a family law matter. Under the ABA rules it is generally considered unethical. Under the California rules it is only allowed if it serves to benefit the client.

Here Frank was charging a contingency fee because it was a percentage of the "property settlement." And this was a family law matter because it was a "divorce." There is no apparent reason why a contingency fee arrangement here would benefit the client, and the facts imply that it would disserve the client.

Therefore, Frank improperly charged a contingency fee in a family law matter and may be sanctioned by the State Bar.

3. *EXCESSIVE FEE?*

Under the rules of professional responsibility an attorney may not charge an excessive fee. Whether an attorney fee is reasonable or not depends on the difficulty of the case and a number of other factors.

Here Frank tried to show his fee as being reasonable because it was "only 10%" but it was to be charged against a "property settlement" and not against an injury award as would be the case in a personal injury case. The fact that Frank did this to obtain a "windfall" implies the resulting fee would be excessive since Paco was "wealthy."

Therefore, Frank was charging an excessive fee and may be sanctioned by the State Bar.

4. *FAILURE TO ADEQUATELY REPRESENT the client?*

Under the rules of professional responsibility an attorney must keep the client reasonably informed, responsibly supervise the case, zealously represent the client's interests and communicate settlement offers to the client.

Here Frank did not keep the client informed because he would "reject her calls." He did not supervise the case because he "did nothing." And he did not communicate settlement offers because "Murphy's settlement offers never received a response."

Therefore Frank failed to adequately represent Maria and may be sanctioned by the State Bar.

5. *IGNORING A COURT ORDER?*

Under the rules of professional responsibility an attorney cannot ignore or willfully disobey an order of the court. And if an attorney is sanctioned by a Court, the California rules require the attorney to report the event to the State Bar.

Here Frank received an order of the court because he was served with an "Order to Show Cause." And he ignored or disobeyed the order because he "failed to respond" and was "sanctioned" for it by the Court.

Therefore, Frank improperly ignored an order of the court. He is required to report the sanctions to the State Bar. He may be sanctioned by the State Bar for violating the Court order, and if he does not report the sanctions to the State Bar he can also be sanctioned for that failure if they find out later.

[ANSWER EXPLANATION: This is one of the most common scenarios for a professional responsibility question – the case of the lying, lazy, incompetent attorney.

Remember that contingency fees are always improper for criminal law cases and usually improper for family law cases.

In the prior four sample answers the same issues tend to repeat themselves. The common scenarios are IMPROPER SOLICITATION, taking cases with a CONFLICT OF INTEREST, taking cases without ADEQUATE SKILL AND KNOWLEDGE of the law, pursuing FRIVOLOUS ACTIONS, FAILURE TO COMMUNICATE with the client, FAILURE TO INFORM the client, BREACH OF LOYALTY, VIOLATING CLIENT CONFIDENCES, a general FAILURE TO MANAGE the case, and the proper steps for both mandatory and permissive WITHDRAWAL.

If you see a corporate attorney mentioned in a BUSINESS ORGANIZATION question it almost always raises the issue of conflict of interest. The corporate attorney works for the corporation and cannot represent the officers or directors without a serious conflict. The attorney who represents a LIMITED PARTNERSHIP represents the partnership as an entity and also the general partner as an individual. But she does not represent any of the individual limited partners.

It is also improper for an attorney to have SEX with clients. This has been tested recently.

If you have extra time and need to pad your answer you can always add discussion of the DUTY TO UPHOLD THE INTEGRITY OF THE PROFESSION. Every ethical violation automatically raises that as a second ethical breach because any other violation impugns the integrity of the profession as a whole.]

Sample Answer 28-41 Integration

1. *Is the 1/1/90 Will FACIALLY VALID?*

Under the CALIFORNIA PROBATE CODE a Will is only valid if written showing testamentary intent. That means intent to distribute property upon the death of the testator. An attested Will must be officially witnessed by two or more competent adult witnesses who were present at the same time when the testator signed or acknowledged the Will. A Will is valid even if one or both witnesses have a financial interest in the estate, but special rules apply.

A signed Will is presumed valid. And a Will can incorporate other documents by reference if they are clearly identified and exist at the time the Will is drafted.

A HOLOGRAPHIC Will is one with substantial portions in the handwriting of the testator. The "substantial portions" are the parts that distribute the decedent's property. It does not have to be dated or witnessed, but other dated documents with conflicting provisions will be given preferential interpretation.

Here the document dated 1/1/90 was signed because it was "signed by Terri", but it was not handwritten because it was "typed". Therefore, the document dated 1/1/90 is not a valid holographic Will.

Further, the document was not witnessed, so it was not a valid attested Will either.

These deficiencies cannot be remedied by incorporation of the other two documents into the 1/1/90 document because the other documents were not in existence when the 1/1/90 document was created.

Therefore, the 1/1/90 document was not valid as either a holographic or attested Will by itself.

2. *Was the 1/1/95 writing a CODICIL that REPUBLISHED the 1/1/90Will?*

Under the INTEGRATION DOCTRINE separate papers may compose a Will where they are connected physically, sequentially or by continuity of thought.

Further a Will may INCORPORATE OTHER DOCUMENTS BY REFERENCE if they exist at the time the Will is executed and are clearly identified in the Will.

And, a subsequent CODICIL may incorporate a prior Will if the codicil would stand alone as a valid Will after it is integrated with the Will. This means that the codicil must be signed and properly witnessed, or handwritten in the case of a holographic codicil. Where a codicil incorporates a prior Will, it REPUBLISHES the prior Will.

Here the document dated 1/1/95 would not stand alone as a valid Will because a Will must be signed and this document was "unsigned." And it does not incorporate the prior signed document dated 1/1/90 because there is no reference to the 1/1/90 document in the 1/1/95 document.

Therefore, the document dated 1/1/95 does not republish or incorporate the Will dated 1/1/90.

3. *Did the undated writing REPUBLISH the prior documents and create a VALID WILL?*

As stated above, a holographic Will is valid if it is in handwriting of a testator and signed. Also documents can be incorporated into a Will by reference if they exist at the time a Will is executed and are clearly identified in the Will.

Here the undated document was in the testator's handwriting and signed because it was "handwritten and signed by Terri."

Further, this document indicated a testamentary intent because it said "Ruby" was to be given the "begonias".

And this document clearly incorporated the prior documents dated 1/1/90 and 1/1/95, identifying them by their dates and as a "Will" and a "codicil". Although the document was undated, it clearly was created after 1/1/95 because it references the prior documents. The lack of a date creates no uncertainty. And, there is continuity between the three documents both by continuity of thought and by the three documents being kept together in the "Bible."

Therefore, this undated document would stand alone as a valid holographic Will and it incorporates, integrates and republishes by reference the provisions of the other dated documents.

4. *Is the gift to Tom FATALLY AMBIGUOUS?*

Under probate law a Will must clearly IDENTIFY the property or amount intended to be given, and must clearly show an intent to give. But gifts of unstated amounts, such as the balance of a bank account, will not fail for uncertainty where the asset has independent legal significance.

Here the gift is identified as "money" but it is ambiguous because it refers to an unidentified "kitchen drawer". The gift is an unstated amount because there is no clarification of the amount in the "drawer."

There is no independent legal significance for keeping money in a kitchen drawer.

Therefore, this gift is fatally ambiguous in amount and would fail.

5. *Is he gift to Harry FATALLY AMBIGUOUS?*

As stated above, a Will must clearly IDENTIFY the property or amount intended to be given, but gifts of unstated amounts will not fail for uncertainty where the asset has independent legal significance.

There is independent legal significance for keeping money in a checking account because the account would be used to pay daily expenses. At the time of Will execution the testator could not know or predict the balance that would exist in the account at death. But at death the balance in the account can be accurately determined with certainty.

Therefore, this gift is not fatally ambiguous and would not fail.

[ANSWER EXPLANATION: This answer follows the chronological sequence of documents searching for a valid Will.

Once it is determined that a valid Will was created, the ambiguities and mistakes in that valid Will can be addressed in the order suggested by the answer.

If the facts say a Will is "valid" accept that as a given fact and don't waste time discussing it.

An unstated amount of money (or some other asset) has "independent legal significance" if it is a fund (or asset) used by the testator for other personal or business purposes and not just an amount set aside as the gift stated in the Will.]

Sample Answer 28-42 Advancements, Ademption, Disclaimer, Exoneration

1. *Was the transfer of $1,000,000 to Don an ADVANCEMENT or a GIFT?*

Under California Probate Code section 21135 property given to a person who is also named as a beneficiary in the donor's will or trust is presumed to be a GIFT and NOT AN ADVANCEMENT against the gift provided for in the instrument UNLESS 1) the decedent declared the conveyance to be an advancement in a contemporaneous writing, 2) the recipient acknowledged in writing that the conveyance was an advancement, 3) the will or trust instrument provides for deduction of lifetime gifts, or 4) the gift given is the same property the subject of a specific gif in the will or trust instrument.

If the recipient of an advancement dies before the donor and gifts to the recipient provided for in the will or trust of the donor do not lapse because of the anti-lapse statute, distributions that otherwise would have been made to the issue of the deceased beneficiary are reduced by the amount of the advancement before distribution to the issue of the deceased beneficiary.

Here Don did acknowledge in writing that the conveyance of the $1 million was an "advancement" on his interest in the "will dated 1/1/95" because he wrote a statement to that effect.

Therefore the conveyance was an advancement, Don received everything from Tom that he was supposed to get, and Diane gets nothing at Tom's death.

2. *Did the testamentary gift of $1 million to Don LAPSE with his death?*

Generally a gift to a person who dies before the testator lapses and reverts to the testator's estate. But under the CALIFORNIA ANTI-LAPSE STATUTE (PC §21110) gifts to beneficiaries who die before the testator will not lapse if they are 1) blood kin of the testator or blood kin of a surviving, deceased or former wife of the testator, 2) no alternative beneficiary is specified, and 3) no clear survival requirement is stated in the Will. Where the anti-lapse statute is applied, the gift goes to the issue of the deceased beneficiary.

Here Don died before the testator, Tom, because he died on "1/1/98" while Tom died on "1/1/99". And Don was not blood kin because he was Tom's "friend".

Therefore, the anti-lapse statute does not apply, and the gift to Don would have lapsed if Don had not already received it as an advancement. But since Don did receive it as an advancement, he would have received nothing more at Tod's death anyway.

3. *Was there an ADEMPTION of the Yahoo! stock given to Bill?*

Under the MAJORITY VIEW a specific gift lapses by ADEMPTION if the named asset is no longer in the estate in its stated form at the time of death. Under CALIFORNIA'S liberal minority view a specific gift is still valid, even if the gift is gone from the estate, as long as the value of the stated form of the gift can be traced to a different form.

Here the Yahoo! stock was no longer in the estate because it was "sold in 1996." And the value received from sale of the gift cannot be traced because "the proceeds had long been spent."

Therefore, this gift to Bill lapses by ademption.

4. *Can Cliff DISCLAIM his interest in Whiteacre in favor of Charles?*

Under the CALIFORNIA PROBATE CODE an heir, either testate or intestate, can disclaim an interest in an estate, in whole or part, by a written disclaimer within a reasonable time after becoming aware of the interest, and the disclaimer is binding. The disclaimed interest is treated as if the disclaiming party predeceased the testator.

Here Cliff signed a written disclaimer because he sent a "letter" disclaiming his interest. This apparently occurred after becoming aware of the interest. Therefore the disclaimer is binding.

Cliff's interest would be treated as if he predeceased Tom. The anti-lapse statute is described above. Cliff is blood kin to Tom because he is Tom's "son." And Tom's Will did not provide an alternative beneficiary or state a clear survival requirement. Therefore, the anti-lapse statute would apply and Cliff's interest would go to his "only heir", Charles.

Therefore, Cliff can disclaim his interest in Whiteacre and the gift will go to Charles.

5. *Was the gift of Whiteacre subject to EXONERATION?*

Under the COMMON LAW the gift of a specific asset was with EXONERATION -- made free of all debts. MODERNLY specific gifts are made subject to existing liens unless there is an express showing of contrary intent. A statement of general intent is insufficient.

Here Whiteacre was given subject to a mortgage of "$900,000." There was no express showing of intent to convey Whiteacre free of this debt.

Therefore, Whiteacre would be conveyed subject to the existing mortgage.

6. *What is the order and amount of DISTRIBUTION?*

Under probate law gifts are distributed from an estate to grantees in the order of 1) SPECIFIC, 2) DEMONSTRATIVE, 3) GENERAL, 4) RESIDUAL and 5) INTESTATE. Intestate distribution is divided PER STIRPES into as many shares as there are living members and dead members with living issue in the nearest generation with any living members.

Here the total estate had a value of $1.1 million because Whiteacre had an equity value of $100,000 and the Compaq stock was worth $1 million. Tom's Will said to give $10,000 to Allen, the Yahoo! stock to Bill and Whiteacre to Cliff. Then the rest of the estate was to be distributed among them so that they all got an equal amount overall. That means that, if possible, they should each receive about $366,667 in the end.

Here the gift of Whiteacre is specific because it is identifiable property, and it would be distributed to Charles subject to the mortgage as discussed above. This would give Charles a value of $100,000.

Next the $10,000 in cash would be distributed to Allen because it is a general gift.

The residual of the estate, $990,000, would then be distributed to Allen, Bill and Charles to provide each equal benefit under the Will. This means that from this residual amount Allen would receive about $356,667 (giving him a total of $366,667), Bill would receive $366,667 from the residual (a total of $366,667), and Charles would receive $266,667 (for a total of $366,667).

[ANSWER EXPLANATION: Don't address validity of the Will because the facts say it is "valid".

Since Don signed a statement that the $1 million he got was an advancement, that gave him everything he was supposed to get under the Will at Tom's death (full satisfaction). The fact Don died before Tom has no import. Therefore neither Don nor his issue would have received a second $1 million or any other amount from the estate at Tom's death even if he were "blood kin" and the anti-lapse statute applied to him.

Note that under the California Probate Code advance payments acknowledged or declared to be gifts to be deducted from future <u>intestate shares</u> of the recipients are called "advancements" (at PC §6409), but advance payments acknowledged or declared to be gifts to be deducted from future <u>testamentary</u> transfers (e.g. via Wills or Trusts) are not actually labeled that.]

Sample Answer 29-43: Will/Trust Crossover, Pretermitted Child

1. *Will facially INVALID?*

Under CALIFORNIA PROBATE LAW a Will is valid if executed by a competent adult in writing showing testamentary intent. A Will is only valid at the death of the testator, and to be valid, Wills must be SIGNED by the testator. A SIGNED Will is PRESUMED VALID. A HOLOGRAPHIC Will is valid if SUBSTANTIAL portions are in the HANDWRITING of the testator.

Here the Will was written, signed and in the handwriting of the testator because the facts state it was a "signed, handwritten Will". Tilly was a competent adult because the facts describe her as a "competent adult". The Will shows testamentary intent because she clearly intended to give property away at her death, and she died.

Therefore, it was a facially valid will.

2. *Is Trust A facially INVALID?*

Under the probate code a trust is a legal entity in which a TRUSTEE holds legal title to PROPERTY for a BENEFICIARY who holds equitable title. A valid private trust requires 1) EXPRESS INTENT, 2) an identifiable BENEFICIARY, 3) PROPERTY, and 4) a PURPOSE. If a private trust is invalid, the property reverts to the estate of the settlor.

Here there was express intent by Tilly to create a trust because she clearly stated a trust would be created. There were beneficiaries, because she named "Larry" and "Benny". There was property because she gave "$100,000". And there was purpose of providing for "Larry" and "Benny".

Therefore, the trust was facially valid.

3. *Is the SPENDTHRIFT clause effective?*

Under the probate code, a SPENDTHRIFT TRUST states that the interest of the beneficiary cannot be assigned, anticipated or seized by legal process. A spendthrift trust cannot be self-settled.

Here the Will had a spendthrift clause because the facts say "spendthrift clause". But the trust was self-settled because whether the trust would be created or not was actually at the decision of Larry because he could "forgive" the loan or not. Also, Larry set the trust up for himself when he "helped" Tilly design her Will. Larry effectively created a spendthrift trust for himself the same as if he had received the money first and then put it in the trust.

Therefore, this trust was self-settled by the acts of Larry and the spendthrift clause is ineffective.

4. *Is Trust B a valid HONORARY TRUST?*

Under the probate code, an HONORARY trust may be established for the benefit of a pet as long as there is a clear expression of intent, property, a beneficiary and a purpose.

Here there is a pet and beneficiary because "Fifi" is a "dog". There is a purpose because it is to care for Fifi. There is property because there is about $900,000 being allocated.

However, there is no clear expression of intent to create a trust because the wording is PRECATORY LANGUAGE that does not show clear intent. The language is precatory because the Will says the property is to go to "Larry" only because she believed he "would take care of Fifi". It does not say the property goes to Larry to be held in trust for Fifi or that Larry has a duty to take care of Fifi.

Therefore, Trust B is invalid because there is no clear expression of intent to create a trust.

Since the trust is invalid, the property would revert to Tilly's estate.

5. *Can the Will be attacked for UNDUE INFLUENCE?*

Under the probate code a Will provision is invalid if clear or strong evidence shows UNDUE INFLUENCE. Undue influence is PRESUMED where an ATTORNEY or someone with a CONFIDENTIAL RELATIONSHIP helps draft the Will and thereby receives a benefit. If a Will provision is invalid, the gift lapses and the beneficiary retains only an intestate share up to the amount provided in the Will.

Here Larry is presumed to have benefited from undue influence because he is an "attorney" who "helped draft" the Will. He benefited from the Will because he is the income beneficiary of Trust A, his son is the principal beneficiary of Trust A, and he is the trustee and presumably the principal beneficiary of Trust B.

Therefore it would be presumed that Larry used undue influence to benefit from both Trust A and Trust B under the Will, and the provisions benefiting Larry would be held invalid.

Even if Larry's benefits under the Will are invalid, he would still receive an intestate share. Also, Larry had an otherwise valid $100,000 claim against Tilly's estate because of his loan.

Therefore, if the Will provision creating Trust A is held invalid, Larry could still assert his claim as a creditor. And if both Trust A and Trust B are invalid because of undue influence, Larry still retains an intestate share.

6. *If Trust B is valid can Princess keep Greenacre?*

Under the probate code a trustee has a DUTY OF LOYALTY not to engage in self-dealing. If a trustee improperly transfers assets the trust may recover the asset. However, where the property has been transferred to a bone fide purchaser for value, title to real property often cannot be recovered.

Here, if the trust was valid, Larry was the trustee because Tilly gave the property to Larry only to hold it as a trustee "to care for Fifi". Therefore, he breached his duty of loyalty and self-dealt because he transferred the property "below market" to pay his private debt to Bill. Therefore, Greenacre would normally be recoverable.

Bill was not a bone fide purchaser for value because he got Greenacre for "$100,000 less" than market value.

And Princess was NOT a bone fide purchaser because Bill "gave" her the property, and she did not purchase it for value.

Therefore, neither Bill nor Princess are bone fide purchasers for value and title to Greenacre would be returned to Trust B.

7. *What portion of the estate can Sammy claim?*

Under the CALIFORNIA probate code a PRETERMITTED CHILD is one who was born after a Will was executed or was omitted from a Will because he was unknown or thought dead and this fact is apparent on the face of the Will. There are certain exceptions to this general rule. A pretermitted child gets an intestate share.

The portion of an intestate share of an estate that is not given to the surviving spouse is divided into as many shares as there are living members and dead members with living issue in the nearest generation with any living members. By statute, property goes first to issue, then to parents, then to issue of parents, then to grandparents and issue of grandparents.

Here Sammy was thought dead and omitted on that basis because Tilly said, "because Sammy is dead" Tilly stated her belief and intent on the face of the Will. Therefore, Sammy is a pretermitted child and gets an intestate share.

Sammy's intestate share would be the entire estate because he is the sole member of the nearest generation of issue of Tilly. Therefore, he would receive her entire estate and there would be no other property in the estate to be put into Trust A and Trust B.

[This is a structured CALL so the structure must follow the order given. But you might want to make your "issues" more indicative of the actual controlling legal concepts.]

Sample Answer 29-44: Charitable Trusts, Cy Pres, Reversion

1. *Was TRUST "X" VALID if Tom had discretion?*

Under the California Probate Code a TRUST is a legal entity in which a TRUSTEE holds legal title to PROPERTY for a BENEFICIARY who holds equitable title. A valid private trust must be created by 1) express intent, 2) have an identifiable beneficiary, 3) property, and 4) a purpose.

A SPENDTHRIFT TRUST is one created by a trust instrument that states that the interest of the beneficiary cannot be assigned, anticipated or seized by legal process.

Trustees have a duty to obey the terms of the Trust and the Probate Code. If the Trust instrument gives them "total discretion" they do have total discretion, but they must exercise that discretion in a manner that will accomplish the purposes of the Trust. This has no effect on Trust validity.

Here the settlor of Trust X was "Joe", the trustee was "Tom" and the beneficiary was "Mollie." And Trust X was created with express intent, property and an identifiable beneficiary because Joe put "$10,000 into an irrevocable trust for his daughter, Mollie." The purpose is implied by the facts to be the care and support of Mollie.

Trust X is a spendthrift trust because the "trust instrument said the trust could not be assigned, anticipated or seized by legal process."

The fact that Tom was given discretion has no effect on the validity of the Trust.

Therefore, Trust X is valid.

2. *Was the TRUST "Y" VALID if there is no identifiable living beneficiary?*

The elements of a valid trust are given above. A SUPPORT TRUST is one that makes the trustee responsible for the support or education of the beneficiaries.

Under trust law a beneficiary or class of beneficiaries must be ascertainable with reasonable certainty.

Here the settlor of Trust Y was "Joe", the trustee was "Tom" and the beneficiary was "the son of Joe."

Trust Y was created with express intent, property and an identifiable beneficiary because Joe put "$1million into an irrevocable trust" for the benefit of "the son of Joe." And the purpose of the trust was "to provide for the support and education of Joe's son."

It can be ascertained with reasonable certainty whether any particular person is a beneficiary because it can be determined if they are a "son of Joe". The fact that there was no "living" beneficiary at the time the trust was created is irrelevant because Joe was still alive and could and did have a son after the trust was established.

Therefore, Trust Y was a valid support trust.

3. *Was TRUST "Z" VALID as a charitable trust?*

Under the probate code, a CHARITABLE TRUST is a trust established for charitable purposes, with unascertainable beneficiaries. The allowable purposes are defined by statute and generally include charitable purposes, scientific research, religious studies and public policy research.

Here the purpose of the trust was charitable, scientific and/or public policy research because the grant was "to support research work." The fact that Dr. Kookie was considered a "nut" is irrelevant because the trust is to support the research work, and not specifically to support the Doctor.

And the beneficiary is unascertainable because the trust is to support the "work" and not a particular person doing the work.

Therefore, this is a valid charitable trust.

4. *Can Joe petition the court to MODIFY Trust Z?*

Under the probate code, a revocable trust can always be MODIFIED by the settlor, but an irrevocable trust can be modified only at the request of the trustee or a beneficiary.

Here Trust Z was irrevocable because Joe had put the money into an "irrevocable trust." And Joe was the settlor because he created the trust.

Therefore, since Joe was not a trustee or beneficiary of Trust Z, he lacked standing to petition for modification.

5. *Can the court REFORM Trust Z to the purpose proposed by Shanana?*

Under the CY PRES DOCTRINE a general purpose charitable trust may be REFORMED when the original charitable purpose becomes impossible. The CY PRES DOCTRINE does not apply to a specific purpose charitable trust.

Here the purpose of the trust was specific because the purpose was to "support research work at Alien Nation School." The intent was to support specific research at a specific location. The continuation of this work was impossible because "the Alien Nation School" no longer existed and "Doctor Kookie" was discredited and in hiding.

Therefore, Cy Pres would not apply to reform the trust.

6. *Where does the money in Trust Y go upon Ronnie's death?*

Under trust law, if a trust is invalid the property of the trust reverts to the settlor. A trust is invalid if it has no beneficiary or purpose.

Here there was no beneficiary because the trust was established to "support" the "son of Joe" and Ronnie, Joe's only son, "died intestate." Upon Ronnie's death the trust had no beneficiary or purpose, and no further "sons of Joe" were possible because Joe was dead.

Therefore, the trust lapsed when Ronnie died, and the assets of the trust reverted to Joe's estate.

Since Joe's "Will" left his entire estate to "Mollie", Mollie would receive the property of Trust Y.

7. *Where does the money in Trust Z go if the purpose is impossible?*

Under trust law, if a trust is invalid the property of the trust reverts to the settlor. A trust is invalid if it has no beneficiary or purpose.

Here Trust Z has no purpose because the Alien Nation School no longer exists and research into the work of Dr. Kookie can no longer be pursued there. Therefore, this trust property would revert to the estate of Joe.

Since Joe's "Will" left his entire estate to "Mollie", Mollie would receive the property of Trust Z.

[ANSWER EXPLANATION: This question has a structured call. The reason questions are written with structured calls is to make YOU address the issues that the grader wants to hear about, and to make grading easy. YOUR answers should always follow the structure of the call.

The first three issues of this question illustrate a conundrum that arises in many law-school exams in all subject areas. It raises a totally irrelevant fact (e.g. trustee discretion) as if it were relevant. Sometimes an irrelevant fact can just be ignored. But where the irrelevant fact is stressed in the fact pattern, some discussion on your part is intended.]

Sample Answer 29-45: Trustee's Duties, Impartiality, Attachment

1. *Did Daisy violate her DUTY OF IMPARTIALITY by not treating the nephews equally?*

Under the California Probate Code, a trustee of a trust with multiple beneficiaries has a duty to be impartial between the beneficiaries. However, this duty does not apply to the comparative treatment of beneficiaries of separate trusts.

Here Daisy was the trustee of "three separate trusts" and each of the trusts was different.

A DISCRETIONARY TRUST is one where the trustee has discretion to chose when to pay a beneficiary and how much to pay them. However, the trustee still has a duty to act in accordance with the purposes for which the trust was created. Huey's trust was a simple discretionary trust because Daisy had "complete discretion" and there was no other stated restriction.

A SPENDTHRIFT TRUST is one that states in the trust instrument that the property cannot be anticipated, assigned or seized by legal process. Dewey's trust was a spendthrift trust because the trust instrument contained that language.

A SUPPORT TRUST is one that states the funds can only be used for education or support. Louie's trust was a support trust because the funds were restricted to those purposes.

The intent of Donald, the settlor, appears to have been to treat each of the three nephews differently because the different trusts had different provisions. And, it was within Daisy's power to treat the nephews differently because she was given "complete discretion."

Therefore, Daisy did not violate her duty by treating the nephews differently.

2. *Did Daisy violate her due of DUE CARE by paying Huey more than the trust was earning?*

Under the probate code, a trustee's DUTY is to obey the trust instrument and the probate code. Further, the trustee has a DUTY OF LOYALTY to administer the trust solely for the beneficiary, to be impartial between beneficiaries, to avoid conflicts of interest, to manage trust property, and to use reasonable care.

Here there is no evidence that the trust instrument or probate code restricted the amounts or purposes for which Daisy could pay from the trust for Huey. And Daisy was given "complete discretion." The only facts given are that Donald put "$1 million in trust for Huey."

Therefore, Daisy did not violate her duty by paying Huey more than the trust was earning.

3. *Did Daisy violate her duty by REFUSING TO INVEST in HLD Corp?*

Under trust law, a trustee has a duty to administer the trust with reasonable care. Under the PRUDENT INVESTOR RULE, the trustee has a duty to invest as a prudent investor would with reasonable care and diversification considering the purpose of the trust.

Here a prudent investor would not invest half of a portfolio in a newly-formed `. So the investment requested by Huey, Louie and Dewey was not prudent.

Further, it would frustrate the purpose of the trusts if Daisy invested in HLD Corp. The apparent purpose of the trust was to assure the nephews did not have direct control over the trust funds. Huey, Louie and Dewey could gain access to the trust funds if Daisy invested in HLD Corp.

Therefore, Daisy's refusal was not a violation of her duty to invest prudently.

4. *Did Daisy violate a duty to BUY LOUIE A CAR?*

Under the probate code, funds from a SUPPORT TRUST must be used for support or education and cannot be used to pay for luxuries. As discussed above, Louie's trust was a support trust.

Here Louie asked for money to buy luxuries because his request was for a "luxury car." Daisy had "complete discretion" and she could properly refuse to pay for a car if she reasonably found it was not necessary for Louie's "support and education."

Therefore, Daisy did not violate a duty to buy Louie a car.

5. *Did Daisy violate her duty to PAY LOUIE AND DEWEY'S DEBTS?*

Under the probate code, Daisy had a duty to administer the trust with reasonable care. This would mean to protect the trusts from unnecessary expenses.

As discussed above, Louie's trust is a support trust. Daisy had a duty to not pay "gambling debts" from this trust because they are not necessary for education and support. Therefore, Daisy had a duty to not pay for gambling debts from Louie's trust.

And Dewey's trust was a spendthrift trust. The funds in this trust could not be reached by Daffy by legal process, so Daisy was wise to refuse to pay Daffy.

Therefore, Daisy acted in prudently and in accordance with her duty.

6. *Can Daffy force Daisy to PAY FROM THE TRUSTS?*

Under the probate code, a DISCRETIONARY TRUST is one where the trustee has discretion to chose which of several potential beneficiaries to pay, when to pay them and how much to pay them. If the trust is not a support or spendthrift trust the assets of a discretionary trust can be GARNISHED, but the trustee CANNOT BE FORCED to make distributions to beneficiaries.

A support or spendthrift trust cannot be attached or garnished normally except for 1) child and spouse support, 2) felony restitution PAYMENTS, 3) public assistance, and 4) where excessive amounts are held in trust and attachment is in the interest of equity.

Here there is no equitable argument because Daffy's demand is for payment of "gambling debts."

Therefore, Daffy cannot force Daisy to pay any amounts to satisfy the gambling debts.

[ANSWER EXPLANATION: This question has a structured call, BUT it really helps you if you can define the three trusts at the beginning. Discussion of validity is not called for here.

So in the first issue we take the opportunity to define the three separate trusts. One as a spendthrift trust, another a support trust and all as discretionary trusts. This makes everything smooth.]

Sample Answer 30-46: Statute of Frauds, Implied-in-Law Contract

[Note: This is a "remedies" question arising from a contract situation. So the answer must start with some discussion of whether they had a contract at all, whether it was legally enforceable, and if not what equitable remedy would be available.]

The rights and remedies of the parties here depend on whether or not there was a valid contract. A contract is a promise or set of promises the performance of which the law recognizes as a duty and for the breach of which the law will provide a remedy.

1. *Was there an offer?*

Under the law of contracts an offer is a manifestation of present contractual intent communicated to the offeree sufficiently specific that an objective person would reasonably believe that assent would form a bargain. To be properly specified, a contract must state the subject matter, parties, time and price.

Offers that unequivocally require acceptance by performance are "unilateral offers". Otherwise contract offers are for bilateral contracts that can be accepted by a return promise of performance.

Here the subject matter was clear because the offer identified the "house" and that Boomer had to "make it habitable". The time period was clear because it was specified as "10 years". The parties were specified as "Homer" and "Boomer". And the offer was communicated to Boomer because "Homer told" Boomer.

Therefore, there was an offer sufficiently clear that an objective person would think assent would form a bargain.

2. *Was there an acceptance?*

Under common law an acceptance had to be unequivocal, a MIRROR IMAGE of the offer. An offer for a UNILATERAL CONTRACT requests acceptance by the performance of an ACT rather than by a return promise.

Here the offer seems to have sought a unilateral acceptance because it said Boomer had to "make the house habitable". However that is not unequivocally clear and many courts would deem this to be a bilateral contract offer. In any event Boomer did make the house habitable, because he moved in and "made it look good".

Therefore, there was an acceptance of Homer's offer whether it was unilateral or bilateral, and a legal contract formed.

3. *Is the STATUTE OF FRAUDS satisfied?*

Under the STATUTE OF FRAUDS contracts for the conveyance of an interest in land must be in writing to be enforceable. In many States leases for over one year must be in writing. Further, contracts that cannot be completed within a year from the time of execution must be written.

Here the question involves a long term lease because it involves Boomer's right to live in a "house" for "10 years". And it could not be completed in a year because it was a promise for "10 years". There is no evidence of any writing because the agreement was based on Homer "telling" Boomer.

Therefore, a writing was required, and there was no writing. Therefore, the Statute of Frauds was not satisfied, and even though a legal contract formed it might not be enforceable at law.

4. *Can Boomer enforce the contract based on COMPLETE PERFORMANCE?*

Under contract law a contract for land that is otherwise not enforceable because of the lack of a writing may often be enforceable at law in most Courts if one party has completely performed and the other party has accepted that performance.

Here Boomer took possession because he "moved in", he completely performed because he "worked months" and he made the house "habitable" as agreed.

Therefore, in most Courts Boomer could enforce the contract at law despite the lack of a writing because he completed performance.

5. *SPECIFIC PERFORMANCE?*

When there is a legally enforceable contract for land a money judgment is generally an inadequate remedy because land is unique. Therefore Courts will generally issue an order of SPECIFIC PERFORMANCE.

Here, if the Court concluded the lease agreement was legally enforceable because Boomer had completely performed, the Court would generally agree to issue an order of specific performance.

Therefore Boomer may be able to obtain an order of specific performance giving him possession of the house for the next ten years.

6. *Can Boomer enforce the contract based on IMPLIED-IN-LAW CONTRACT?*

A party that acts to confer benefits to another party with reasonable expectation of return compensation under a contract that cannot be enforced at law, perhaps because it fails to satisfy the Statute of Frauds, may seek a remedy in equity under a claim of IMPLIED-IN-LAW CONTRACT, and the Court of equity may award a remedy to the extent necessary to prevent unjust enrichment.

Here Boomer acted to confer benefits to Homer because he improved the house, and he had a reasonable expectation of compensation in return because he was told he could "live rent-free for 10 years." If the contract is unenforceable at law Boomer can turn to equity. If he is afforded no remedy at all Homer would receive an UNJUST ENRICHMENT from selling the house for a profit of "$150,000".

Therefore, Boomer may seek an equitable remedy even if the contract cannot be enforced at law.

7. *What DAMAGES can Boomer be awarded at equity?*

Even if there is no legally enforceable contract, a Court of equity can still award a judgment for damages suffered by a movant to prevent an injustice. Damages are calculated as the sum of RELIANCE damages, the amount the movant is "out of pocket" because of the wrongful acts of the respondent plus EXPECTATION damages, the expected benefits the movant reasonably expected to receive and has been denied because of the wrongful acts of the respondent.

Here Boomer has reliance damages of $5,000 because he spent that much of his own money in reliance on Homer's promise. And his expectation damages are $100,000 because that is the future rent he will have to spend if he loses the house.

Therefore, Boomer may seek an award of $105,000 in damages in equity even if he cannot enforce the contract.

8. *Can Boomer be awarded EQUITABLE RESTITUTION?*

A party that acts to convey benefits to another party with a reasonable expectation of compensation in return may request an award in RESTITUTION, a money judgment measured by the benefits the other party has enjoyed, rather than a money judgment measured by the amount of damages suffered.

If benefits are conveyed under a legally enforceable contract there is a right to LEGAL RESTITUTION, limited by the contract price.

If there is no legally enforceable contract a party may still be able to obtain EQUITABLE RESTITUTION limited to the amount necessary to prevent UNJUST ENRICHMENT.

Here Homer would be unjustly enriched because he would obtain a profit of $150,000 by breaking his agreement with Boomer. The Court may award some or all of this to Boomer because it reflects the value of the work he did to improve the house.

Therefore Boomer may be awarded up to $150,000 in restitution.

[This is a typical "remedies" question. First address whether there is a legal cause of action. There is a legal cause of action if there is a legally enforceable contract, etc.

If there is a legal cause of action, does it produce an adequate legal remedy (e.g. specific performance arising from contract actions; injunctions to prevent intentional torts)?

If there is no legal cause of action cite an equitable cause of action (i.e. promissory estoppel, detrimental reliance, implied-in-law contract). Here I discussed "implied-in-law contract", not promissory estoppel, because this was a contract situation, not a 'gift promise' situation.

Finally, discuss THE remedies the Court could provide (i.e. money judgments based on damages suffered, money judgments based on restitution, findings of constructive trust, issuance of equitable liens against specific property, and injunctive relief).]

Sample Answer 30-47: Injunctive Relief

1. *Can the TRO be APPEALED?*

Under the law of remedies a TEMPORARY RESTRAINING ORDER (TRO), is a form of provisional injunctive relief. A TRO can be obtained on an ex parte application and lasts for a period of time limited by statute, 15 days in many States. A TRO usually cannot be appealed. But it may be appealed if the order raises First Amendment issues or constitutes a de facto preliminary injunction.

Here the TRO granted does raise First Amendment issues because it prevents Bob and his followers from "coming within 200 yards" of Feelgood's office or "saying anything" to disturb Feelgood's patients. These provisions are restrictions on the First Amendment guarantees of freedom of assembly and freedom of speech.

Therefore, Bob has a right to appeal this TRO.

2. *Is the TRO OVERBROAD?*

Under the law of remedies injunctive restraints on First Amendment rights must be narrowly tailored and necessary to effect a compelling state interest.

Here there is a compelling state interest in protecting Feelgood from violence, nuisance, trespass and criminal acts by Bob and his followers. But the reviewing court would probably find the TRO reference to "200 yards" overbroad because it is not necessary to keep the protesters that far away from Feelgood's office to protect him. Further, the order not to "say anything that would disturb Feelgood's patients" is overbroad because it does not state with specificity the particular statements that must be avoided. The prohibition of saying "anything" is over-inclusive, and would unnecessarily prohibit many forms of protected speech.

Therefore, the TRO is overbroad and not narrowly tailored to a necessary scope.

3. *Does Feelgood have ADEQUATE LEGAL REMEDIES?*

Under the law of remedies a plaintiff seeking EQUITABLE RELIEF must show that EQUITABLE JURISDICTION exists. This requires showing that inadequate legal remedies exist, irreparable harm is threatened, and the balance of hardship and/or public interest favors the plaintiff and the movant would probably be successful in the underlying action. The requested relief must be feasible for the court.

Here Feelgood seeks equitable relief because he has sought a "restraining order". His legal remedies are inadequate because Bob has "all of his assets hidden", and the prior judgment against him is not collectable. Since a judgment could not be collected, it would neither compensate Feelgood nor deter further bad acts by Bob. Further, Feelgood is faced with the prospect of having to bring repeated legal actions because Bob is "continuing to picket."

Feelgood is threatened by irreparable harm because Bob and his followers have "interfered with his ability to treat patients", poured "foul-smelling liquids" in his office, "destroyed his sprinklers" and "set his office on fire."

Therefore, Feelgood does not have adequate legal remedies and injunctive relief is appropriate.

4. *Does the BALANCE OF PUBLIC INTEREST favor Bob?*

As stated above a plaintiff seeking EQUITABLE RELIEF must show that the balance of hardship and/or public interest favors the plaintiff. The public interest is strongly in favor of protecting first amendment guarantees of freedom of religion, speech and assembly. However, there is also a strong public interest in preventing nuisance, crime and violence.

The balance of hardship requires looking at the interest of each party. Bob has a guaranteed right to assembly and speech. But Feelgood has a right to be free from nuisance and trespass. And he also has a right to be safe from threats of vandalism. Bob does not have any right to trespass onto Feelgood's land, destroy his property or interfere with his ability to treat patients.

Freedom of religion is not involved here because the TRO sought by Feelgood does not interfere with Bob's free exercise of religion. To the extent that the picketing is religiously motivated conduct, the TRO does not significantly intrude on that conduct sufficiently to rise to a Constitutional issue.

Therefore, the balance of public interest is to provide adequate protection to Feelgood in the manner that least infringes upon the rights of Bob.

5. *Can Bob raise the defense of UNCLEAN HANDS?*

A Court of equity will deny equitable relief to a plaintiff shown to have acted wrongfully on the rationale that one who "seeks equity" must "do equity". However, the court will recognize "self help" as a legal remedy if it is reasonable and necessary.

Here Feelgood is seeking equitable relief because he seeks a "restraining order". Feelgood has acted wrongfully because he tried to make the "protesters get wet." This would have been wrong because it constitutes a tortious battery.

But the court may find Feelgood's act reasonable in comparison with the acts of Bob because Feelgood's only tried to get protesters "wet" while Bob's protesters "set fire" to his office, "poured foul-smelling liquid" in his office, "trampled" his flowers and "destroyed" his sprinklers. The court would also find Feelgood's actions were necessary as he had previously availed himself of all legal remedies and found them inadequate.

Therefore, the court would not deny Feelgood relief under a claim of unclean hands.

6. *Is Feelgood barred by LACHES because he first brought suit?*

Under the DOCTRINE OF LACHES, a plaintiff may be barred from relief if he has unreasonably delayed seeking relief, resulting in prejudice to the defendant.

Here Feelgood did not unreasonably delay seeking relief because he first sought relief through legal remedies. There is nothing unreasonable about seeking a legal remedy before turning to equity.

There was no prejudice to Bob because he still has all possible defenses available to him.

And Feelgood did not waive his right to seek equitable relief by first seeking legal remedies. It was the inadequacy of legal remedies that now prompts him to seek injunction.

Therefore, Feelgood is not barred by laches.

[ANSWER EXPLANATION: The first issue teaches the lesson that you must follow the CALL of the question. Many students will leap to the conclusion that the First Amendment does not protect Reverend Bob's behavior. But whether or not Bob will win his appeal is not the issue. The issue is whether or not he has a right to appeal at all. The answer to that is "yes" he does have the right to appeal and have his appeal heard, even if it seems clear the appeal will fail.

The last issue in this answer teaches perhaps the most important lesson. When writing this question I was trying to include the issue of laches somehow. I could not see any reasonable way to do it, so I just made up some nonsense. Your professors will do this too. So, if you face an illogical, twisted exam question, consider that your professor wanted to test your knowledge about some rule but couldn't devise any better way to work it into the facts. GIVE THEM WHAT THEY WANT.

This answer also illustrates that the "adequacy" of legal remedies depends on the ability of a plaintiff to actually collect on a judgment. If a defendant is "judgment proof" there is no adequate legal remedy against them.

Finally, this answer illustrates that reasonable acts of self defense, or self help, may not rise to the level required to support an "unclean hands" defense.]

Sample Answer 30-48: Implied-in-Law Contract, Constructive Trust

Doofus v. Butthead

1. *Breach of CONTRACT?*

Under contract law, in order to prevail against Butthead Doofus would have to prove that he had a "valid, enforceable contract" with either Butthead or with Butthead's agent.

Here Doofus only has a "valid, enforceable contract" with Bevis. If Bevis was acting as Butthead's agent, then Butthead would be bound by the contract and Doofus would have a legal cause of action that would support a money judgment, an adequate legal remedy. But Butthead denies knowing Bevis, and there is no contrary evidence.

Therefore, Doofus cannot prove Bevis was acting as Butthead's agent, and he cannot prevail in a breach of contract action against Butthead.

2. *IMPLIED-IN-FACT CONTRACT?*

If a party acts to convey benefits upon another party with a reasonable expectation of being compensated in return, and the other party knowingly accepts the benefits, the law will find that an IMPLIED-IN-FACT CONTRACT was formed between them, even if the party receiving the benefits never expressly agreed to the contract.

An implied-in-fact contract is a legally enforceable contract that binds the party receiving benefits to pay the party conferring benefits the amount they reasonably expected to receive as compensation.

Here Doofus acted to convey benefits with a reasonable expectation of being paid $5,000 because he entered into a "valid, enforceable contract" for that amount. Further, Butthead knowingly accepted the benefits of Doofus' efforts because he took back his fully repaired and restored car from the police.

But there is no evidence that Butthead knew that Doofus was working on his car at the time the work was being performed.

Therefore, no implied-in-fact would be found to have existed between Doofus and Butthead, and this approach does not give Doofus any legal remedy.

3. *FRAUD?*

Under tort law, fraud is an express or implied misrepresentation of fact to intentionally mislead others which causes the plaintiff to be reasonably misled, resulting in injury.

Here Bevis impliedly represented that he would return for the car and pay Doofus $5,000. If he had no intention of paying for the repair work at the time he entered into the contract he misrepresented his intentions. Doofus reasonably relied on Bevis' promise and he suffered injury because he has spent "$3,000" for labor and materials and also is deprived of the $2,000 in profits he expected to receive. Therefore, Doofus has a tort cause of action against Bevis.

But for Doofus to pursue this cause of action against Butthead, he would have to prove that Bevis and Butthead were working together to defraud him. There is no evidence to prove that.

Therefore, Doofus cannot prevail in a tort action against Butthead because he has no evidence he was working in concert with Bevis.

4. *IMPLIED-IN-LAW CONTRACT?*

Parties may plead in equity that the Court should hold an IMPLIED-IN-LAW CONTRACT existed between them and others if they have acted to convey benefits to other parties with reasonable expectations of being compensated and they have no adequate legal causes of action. An implied-in-law contract is an equitable cause of action. If the elements of an implied-in-law contract are proven, the Court may award both MONEY JUDGMENTS and EQUITABLE REMEDIES to the extent necessary to either prevent UNJUST ENRICHMENT or to protect the PUBLIC INTEREST from being harmed by frustration of reasonable expectations.

Here Doofus has no adequate legal cause of action as explained above because he cannot prove any legally enforceable contract existed between Butthead and him. Further, he cannot prove that Butthead helped defraud him.

Doofus can prove that he acted with REASONABLE EXPECTATIONS of being compensated because he had a "valid, legal contract". Further, he can prove his acts did confer a benefit on Butthead because he repaired and restored Butthead's car.

Butthead could successfully argue that while he received a windfall, it was not an "unjust" enrichment because there is no evidence that he did anything wrong. There is no evidence he helped or caused Bevis to cheat Doofus. So if there is no evidence Butthead acted to benefit at Doofus' expense, there is nothing to prove the benefit he has received is "unjust".

But Doofus can easily prove that the public interest would be seriously harmed if businesses could be so easily duped into providing services and not be paid. Whether Butthead was in concert with Bevis or not, if Butthead is not required to compensate Doofus it would open the door to widespread fraud and abuse that would HARM COMMERCE.

Further, the BALANCE OF EQUITIES favors Doofus because if Butthead is ordered to compensate him, both parties will be left in the position they expected to be in. And in contrast, if Butthead does not compensate Doofus, he would reap an unexpected windfall while Doofus would suffer an unexpected loss.

Therefore, the Court would find that Butthead is bound by an implied-in-law contract to compensate Doofus whether he did anything "wrong" or not.

Since Doofus had reasonably expected to be paid $5,000, and the purpose of the Court would be to prevent frustration of those reasonable expectations, the Court would generally award Doofus a money judgment against Butthead in the amount of $5,000.

Butthead has the funds to pay the judgment, but he is "deeply in debt" and threatening to declare bankruptcy. So even if Doofus gets a judgment against him for the $5,000 he owes, he may still not be able to recover any of the judgment against Butthead.

5. *CONSTRUCTIVE TRUST?*

A Court sitting in equity can make a finding of CONSTRUCTIVE TRUST if it can be shown that an asset possessed by one of the parties actually belongs to or can be directly traced from assets wrongfully taken from or withheld from the other party. If the Court does find that an asset is held in constructive trust it can issue an order of EQUITABLE REPLEVIN ordering the parties in possession to convey the asset to the rightful owner.

Here Doofus can show that when Butthead sold his car for $8,000, $5,000 of that amount rightfully belonged to Doofus. Doofus requested payment at that point, so Butthead was on notice of the claim against him. And instead of paying Doofus, or at least conserving the money in his possession, Butthead proceeded to lose "almost $18,000" gambling. By doing that he lost all his own money and he also lost $3,000 belonging to Doofus. The $2,000 he had left entirely belonged to Doofus, and the Court may find he held that sum, $2,000, in constructive trust for Doofus. So when Butthead won $3,000 using Doofus' money, all of the winnings belonged to Doofus and that just represented $2,000 of the total $5,000 Doofus was owed.

Therefore a Court of equity could rightfully conclude that the entire $5,000 in Butthead's possession belonged to Doofus, and that it only represents $2,000 of the money Doofus was originally owed. So the Court could issue an order of EQUITABLE REPLEVIN ordering the entire $5,000 to be turned over to Doofus, but that only compensates Doofus for $2,000 that was taken from him. So in addition, the Court could award a money judgment for the other $3,000 that Butthead lost gambling. Doofus could collect a total of $8,000. Whether he can ever collect on the money judgment at all is problematic, but at least he would get the $5,000 held in constructive trust.

Doofus v. Gomer

Doofus would generally lack legal causes of action against Gomer for the same reasons given above. Gomer did not enter into a contract with him and Gomer did not commit any tort against him. Further, Gomer can raise the defense of being a bone fide purchaser for value.

6. *BONE FIDE PURCHASER FOR VALUE?*

A party that purchases an asset for fair-market value without knowledge of third-party claims against the asset generally gains title to the asset free of any liability for the claims. It is an affirmative defense.

Here Gomer bought the car for $8,000, the "fair-market value." And there is no evidence that Gomer knew Doofus claimed an interest in the car.

Therefore if Gomer claims to be a bone fide purchaser for value without knowledge of Doofus' claim, Doofus would have no evidence to refute that claim. As a result Doofus could not recover anything from Gomer if asserts this defense.

[This is probably my favorite law exam question. It took me about five years to figure it out.

You can spend less time rejecting contract and tort causes of action than I have done here. But you MUST expressly state why Doofus cannot prevail against Butthead under either a contract or tort claim because otherwise he has not established equitable jurisdiction.

Since Doofus has no legal cause of action, he must claim an equitable cause of action. Which one? He acted to confer benefits with a reasonable belief he was going to be compensated. So IMPLIED-IN-LAW CONTRACT is the proper equitable cause of action to plead.

The trickiest point is that Butthead had $2,000 belonging to Doofus and turned it into $5,000 by gambling. But the entire $5,000 belongs to Doofus, not Butthead. And Butthead lost another $3,000 that also belonged to Doofus. So Doofus has a right to the $5,000 Butthead is holding in constructive trust for him PLUS a money judgment for the other $3,000 of his that Butthead lost gambling. He has a right to recover $8,000, not just the $5,000 he originally expected.

If the facts had simply said that Butthead took $5,000 that belonged to Doofus and used it to win $3,000 more, almost all law students would immediately see that all $8,000 Butthead was holding belonged to Doofus.

But students generally get lost after Butthead loses $3,000 and then wins it back. They start thinking that Doofus only has a right to receive that $5,000, and they don't recognize that he also has a right to get back the additional $3,000 of his money that Butthead already lost.

The award to Doofus might be called "restitution" instead of "replevin".

Finally, there are no facts to show whether Gomer knew or did not know that Doofus had a claim against the car. So if Gomer raises the defense Doofus cannot recover anything from him. Of course, if Gomer admitted he knew of Doofus' claim against the car he is not a bone fide purchaser for value without notice and then Doofus could argue that Gomer is holding the car in constructive trust for him.]

Index

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

Z

Case Briefs, Commercial Outlines, and Law School

Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

As part of your "law school education" you will gradually realize that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com**. Why not read what the justices really said instead of trying to decipher a hacked up version?

Note: Prices, ISBN numbers and details are subject to change as various volumes are updated.

NAILING THE BAR publications by Practical Step Press – www.PracticalStepPress.com

EXAM GUIDES:

These Exam Guides identify the most commonly tested legal issues and explain WHAT to Say and HOW to Say It on Law School and Bar Exams:

1. **How to Write Essays for Contracts, UCC, Torts and Crimes Law School and Bar Exams (ABC).** The 140 most commonly tested law school and bar exam issues, 217 rules & definitions to answer them, 160 issue spotting hints, how to NAIL THE ELEMENTS, and 20 practice questions with sample answers. $29.95. ISBN 978-1-936160-00-6. © 2009, 2012.

2. **How to Write Essays for Contracts & UCC Law School and Bar Exams (A).** The 51 most commonly tested law school and bar exam Contracts and UCC issues, 79 rules & definitions to answer them, 71 issue spotting tips, and 7 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-01-3. © 2009, 2012.

3. **How to Write Essays for Torts Law School and Bar Exams (B).** The 52 most commonly tested law school and bar exam Torts issues, 91 rules & definitions to answer them, 39 issue spotting tips, and 7 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-02-0. © 2009, 2012

4. **How to Write Essays for Crimes Law School and Bar Exams (C).** The 37 most commonly tested law school and bar exam Crimes issues, 76 rules & definitions to answer them, 50 issue spotting tips, and 6 practice questions with sample answers and explanations. $19.95. ISBN 978-1-936160-03-7. © 2009.

5. **Nailing the BABY Bar: How to Write Essays for the California First Year Law Student Exam (BB).** This book has the same materials as the book "How to Write Contracts, UCC, Torts and Crimes Law School and Bar Exams" PLUS explanation of the California First Year Law Student Exam format. $29.95. ISBN 978-1-936160-04-4. © 2010, 2011, 2012

6. **How to Write Essays for Constitutional Law, Criminal Procedure and Civil Procedure Law School Exams (DEF).** The top 33 issues, 104 rules & definitions, 111 issue spotting hints, and 18 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-09-9. © 2011, 2012.

7. **How to Write Essays for Criminal Procedure Law School and Bar Exams (D).** Issues, rules, questions and answers for Criminal Procedure. $19.95. ISBN 978-1-936160-10-5. © 2010., 2011, 2012

8. **How to Write Essays for Civil Procedure Law School and Bar Exams (E).** Issues, rules, issue spotting, questions and answers for Civil Procedure. $19.95. ISBN 978-1-936160-11-2. © 2010., 2012

9. **How to Write Essays for Constitutional Law Law School and Bar Exams (F).** Issues, rules, issue spotting, questions and answers for Constitutional Law. $19.95. ISBN 978-1-936160-12-9. © 2010, 2012, 2013.

10. **How to Write Essays for Real Property, Wills, Trusts and California Community Property Law School and Bar Exams (GHIJ).** The 93 top issues, 213 rules & definitions, 165 issue spotting hints, and 20 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-13-6. © 2010, 2011, 2013.

11. **How to Write Essays for Real Property Law School and Bar Exams (G).** Issues, rules, issue spotting, questions and answers for Real Property. $19.95. ISBN 978-1-936160-14-3. © 2010, 2013.

12. **How to Write Essays for Wills and Trusts Law School and Bar Exams (HI).** Issues, rules, issue spotting, questions and answers, Wills and Trusts. $19.95. ISBN 978-1-936160-15-0. © 2010.

13. **How to Write Essays for California Community Property Law School and Bar Exams (J).** Issues, rules, issue spotting, questions and answers for Community Property. $19.95. ISBN 978-1-936160-16-7. © 2010.

14. **How to Write Essays for Evidence, Remedies, Business Organization and Professional Responsibility Law School and Bar Exams (KLMN).** The top 103 issues, 142 rules & definitions, 223 issue spotting hints, and 20 practice questions with answers and explanations. $29.95. ISBN 978-1-936160-17-4. © 2011, 2012.

15. **How to Write Essays for Evidence Law School and Bar Exams (K).** Issues, rules, issue spotting hints, questions and answers for Evidence. $19.95. ISBN 978-1-936160-18-1. © 2010.

16. **How to Write Essays for Remedies Law School and Bar Exams (L).** Issues, rules, issue spotting hints, questions and answers for Remedies. $19.95. ISBN 978-1-936160-19-8. © 2011.

17. **How to Write Essays for Business Organization Law School and Bar Exams (M).** Issues, rules, issue spotting hints, questions and answers for Corporations and Business Organization. $19.95. ISBN 978-1-936160-20-4. © 2011.

18. **How to Write Essays for Professional Responsibility Law School and Bar Exams (N).** Issues, rules, issue spotting hints, questions and answers for Professional Responsibility. $19.95. ISBN 978-1-936160-21-1. © 2011.

19. **Rules and Definitions for Law Students (O).** Over 800 rules and definitions for Torts, Contracts, UCC, Criminal Law, Civil Procedure, Criminal Procedure, Constitutional Law, Real Property, Wills, Trusts, Community Property, Evidence, Remedies, Business Organization and Professional Responsibility. $24.95. ISBN 978-1-936160-22-8. © 2014

20. **How to Write Essay Answers for Law School and Bar Exams; The Essential Guide to California Bar Exam Preparation (PR).** The top 380 issues tested on law school and bar exams in these 14 areas of law tested on the California Bar Exam. 565 issue spotting hints, how to NAIL THE ELEMENTS, and 48 uniquely different practice questions with sample answers and explanations. $64.95. ISBN 978-1-936160-05-1. © 2014.

21. **How to Write Performance Tests for Bar Exams (Q).** A guide for writing Performance Tests for Bar Exams. Formatted specifically for the California State Bar Exam with examples of letters, memorandums, pleadings and other required documents. $19.95. ISBN 978-1-936160-23-5. © 2014.

22. **333 Multiple-Choice Questions for First-Year Law Students (MQ1).** 333 multiple-choice questions on contracts, UCC (Articles 1 & 2), torts, crimes, and criminal procedure arranged into 10 practice exams as tested on California's First-Year Law Student Exam ("Baby Bar") and the General Bar Exam (GBX). $29.95. ISBN 978-1-936160-34-1. © 2014.

23. **Nailing the MBE (MQ2).** 600 multiple-choice questions arranged in 6 practice exams as tested on the MBE with answers, explanations and proven exam strategies. $74.95. ISBN 978-1-936160-38-8. © 2014.

CONDENSED OUTLINES:

These condensed Simple Outlines give "90 Percent of the Law in 90 Pages" to quickly and easily explain the generally adopted Black Letter Law and Bright Line Rules without excessive discussion of historical development or odd holdings that have little or no modern application:

24. **SIMPLE CONTRACTS & UCC OUTLINE (O-1)** © 2010, 2011, 2013 ISBN 978-1-936160-06-8....$19.95

25. **SIMPLE TORTS OUTLINE (O-2)** © 2010, 2011, 2013 ISBN 978-1-936160-07-5....$19.95

26. **SIMPLE CRIMES OUTLINE (O-3)** © 2010, 2011, 2012 ISBN 978-1-936160-08-2....$19.95

27. **SIMPLE CRIMINAL PROCEDURE OUTLINE (O-4)** © 2011 ISBN 978-1-936160-24-2....$19.95

28. **SIMPLE CIVIL PROCEDURE OUTLINE (O-5)** © 2012 ISBN 978-1-936160-25-9....$19.95

29. **SIMPLE CONSTITUTIONAL LAW OUTLINE (O-6)** © 2012 ISBN 978-1-936160-26-6....$19.95

30. **SIMPLE EVIDENCE OUTLINE (Fed. & Cal. rules) (O-7)** © 2012 ISBN 978-1-936160-27-3....$19.95

31. **SIMPLE REAL PROPERTY OUTLINE (O-8)** © 2012 ISBN 978-1-936160--28-0. ..$19.95

32. **SIMPLE CALIFORNIA COMMUNITY PROPERTY (O-9)** © 2012 ISBN 978-1-936160-29-7....$19.95

33. **SIMPLE REMEDIES OUTLINE (O-10)** © 2010, 2012 ISBN 978-1-936160--30-3 ..$19.95

34. **SIMPLE CALIFORNIA WILLS & TRUSTS OUTLINE (O-11)** © 2012 ISBN 978-1-936160--31-0 ..$19.95

All of these books are available as "**eBooks**". For more information visit our website at

www.PracticalStepPress.com

2/14

WHAT to Say and HOW to Say it on Law School and Bar Exams in the areas of law tested on the California Bar Exam

- **The 382 MOST COMMONLY TESTED ISSUES with the RULES AND DEFINITIONS to Help Answer Them!**
- *** How to SPOT ISSUES; 661 Issue Spotting Hints!**
- *** How to BUDGET TIME on Exams!**
- *** CONCLUSIONARY Answers and How to Avoid Them!**
- *** 48 PRACTICE QUESTIONS with SAMPLE ANSWERS!**

This is what LAW STUDENTS are saying about NAILING THE BAR —

I did exactly what you said to do. And I passed! — Vijay D.

I was so broke when I finished law school Nailing the Bar was all I could afford to prepare for the July 2001 Bar along with borrowed materials for the MBE. I passed on my first attempt. — Thomas N., Deputy City Attorney

I didn't go to an ABA school and English is a second language for me. But I passed the Bar! Thanks — Shah P.

I passed! THANKS! Your approach taught me a LOT — Annie B.

"Nailing the Bar" gave me the edge I needed to pass the Bar the first time — Jay

I purchased your outline set :-) -- Great stuff! — Rueben B.

I used Nailing the Bar strategies on every essay! You're the reason I am a lawyer now. You're the BOMB! — Katie N.

Before, I didn't have a clue how to spot issues or IRAC! Now I FINALLY GET IT!! — Shirley S.

I passed! Your method pulled me through. I've never felt so humble and grateful. Thanks. — Dan G.

Spending thousands on a review course was NOT necessary. Your simple techniques and relevant material was enough! — Tony P.

I passed. In fact, Q4 of the Bar's Selected Answers was MY essay. Your method works!! — Steve D.

With Nailing the Bar I am able to understand IRAC and issue spotting for the first time — Beverly W.

I passed the Bar Exam (Feb. 2005)! You have a great method, especially because there is so much nonsense out there about the type of 'style' we students should use.—Desiree

Published by

Practical Step Press

www.PracticalStepPress.com

ISBN 978-1-936160-05-1

56495

9 781936 160051

PR