

**NAILING**



**THE BAR**

**RULES and**  
**DEFINITIONS**  
**for**  
**LAW STUDENTS**

**(As Tested on the Multistate Bar Exam and California Bar Exam)**

***WHAT to Say and HOW to Say It!***

**Tim Tyler Ph.D.**  
**Attorney at Law**

# **NAILING THE BAR RULES AND DEFINITIONS FOR LAW STUDENTS**

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**Tim Tyler, Ph.D.  
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# What to Say and How to Say It

**Nailing the Bar's Rules and Definitions for Law Students** provides every important rule and definition a law student needs to know to succeed in 14 subject areas tested on many Bar exams.<sup>1</sup> References to law tested on the **California Bar Exam** are included in **bold font**. This book explains what terms of law mean and shows how to state the rules and definitions on examinations.

The rules and definitions presented are organized by the following areas of law:

1. **Contracts / UCC (Articles 1, 2)**<sup>2</sup>
2. **Torts**
3. **Criminal Law**
4. **Civil Procedure**
5. **Criminal Procedure**
6. **Constitutional Law**
7. **Real Property**<sup>3</sup>
8. **Wills**<sup>4</sup>
9. **Trusts**<sup>5</sup>
10. **California Community Property**
11. **Evidence**<sup>6</sup>
12. **Remedies**
13. **Business Organization**
14. **Professional Responsibility**<sup>7</sup>

In the rules the **ELEMENTS** that the student should focus on and prove in examinations by reference to facts are underlined. The way to do this is by "Nailing the Elements" as explained in detail in other publications in the Nailing the Bar series. Those publications are referenced at the back of this book.

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<sup>1</sup> These 14 areas are tested on the Multi-State Bar Exam (MBE), the **California State Bar Exam**, and the Bar Exams of many other States.

<sup>2</sup> In addition to UCC Articles 1 and 2, UCC Article 3-311 concerning accord and satisfaction is also referenced.

<sup>3</sup> The provisions of UCC sections 3-933, et seq. which concern fixtures are also referenced because they are tested on the **California Bar Exam**.

<sup>4</sup> Primarily based on **California Probate Code**.

<sup>5</sup> Primarily based on **California Probate Code**.

<sup>6</sup> Primarily based on Federal Rules of Evidence **with comparison to California law**.

<sup>7</sup> With some reference to **California rules**.

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## Section 1: Rules and Definitions for CONTRACTS/UCC

The following rules are the law tested on the **Multistate Bar Exam**.

1. **ACCEPTANCE (CONTRACTS-COMMON LAW):** Under the common law MIRROR IMAGE RULE an acceptance is an unequivocal assent to an offer, communicated to the offeror and it can be implied by silent commencement of performance known to the offeror. A response that is equivocal or contains varying terms is a REJECTION AND COUNTER-OFFER and not an effective acceptance. An offer must be accepted within a reasonable period. (see OFFER, LAPSE.)
2. **ACCEPTANCE (CONTRACTS-UCC):** Under UCC 2-206 an acceptance of an offer not other wise 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. UCC 2-207 allows an acceptance containing varying terms to be effective.
3. **ACCORD AND SATISFACTION (CONTRACTS/UCC 3-311):** An ACCORD AND SATISFACTION is a binding agreement settling a reasonable, good faith dispute over the terms and/or performance of a contract. Further, under UCC 3-311 the good faith tender and acceptance of an instrument as “full satisfaction” of any claim that is unliquidated or the subject of a bona fide dispute is generally binding, subject to certain statutory limitations and exceptions.
4. **ADHESION CONTRACT (CONTRACTS):** An adhesion contract is a "take it or leave it" offer that courts will not enforce if there is a lack of reasonable contractual intent on the part of the offeree. (see UNCONSCIONABLE CONTRACT.)
5. **ANTICIPATORY BREACH (CONTRACTS):** An anticipatory breach is a clear statement of intent by a party to a contract, prior to the time performance is due, that they will not perform when performance is due. An anticipatory breach is a MAJOR breach (see BREACH) that excuses the non-breaching party from performance and accelerates the breaching party's duty of performance to the immediate unless the non-breaching party WAIVES the breach by letting the breaching party continue performance. (compare to REASONABLE ASSURANCES.)
6. **ASSIGNMENT (CONTRACTS):** An assignment is the transfer of contractual rights from the promisee/assignor to the assignee based on a clear statement of intent by the promisee. The assignment becomes effective when the promisor is given notice of the assignment. Once the assignment is effective the promisor has a duty to deliver the benefits of the contract (pay) directly to the assignee and the rights of the original promisee/assignor are extinguished. The promisee/assignor has secondary liability to the assignee if the assignment is in exchange for consideration. (see DELEGATION.)
7. **BATTLE OF THE FORMS (CONTRACTS):** The term “battle of the forms” is used to describe a situation in which a buyer and seller haggle over which party’s written contract forms are to be used because each is trying to position themselves as the OFFEROR to get favorable contract terms.

8. **BREACH (CONTRACTS-COMMON LAW):** A contract breach is a failure to perform a contractual duty that is currently due to be performed. It can be MAJOR or MINOR. A MAJOR breach is one that substantially deprives the non-breaching party of the EXPECTED BENEFIT OF THE BARGAIN (which see). A major breach excuses the non-breaching party from all contractual duties and waives conditions on other contractual duties of the breaching party accelerating them to become present duties. A breach is MINOR if the breaching party has SUBSTANTIALLY PERFORMED (which see). A minor breach entitles the non-breaching party to compensation in the form of an OFFSET FOR DAMAGES suffered, but it does not excuse the non-breaching party from performance or accelerate performance by the breaching party. Under the PERFECT TENDER RULE of the UCC any non-conforming shipment is a breach, and there is no distinction between “major” and “minor” breaches.
9. **CASE-IN-CHIEF (CONTRACTS/TORTS/CRIMES):** The “case-in-chief” is the evidence and legal argument presented to the finder of fact (judge or jury) by a moving party (prosecutor or plaintiffs bringing actions in court). The moving parties have the burden of presenting admissible evidence to prove each and every required legal element their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. After the moving parties have presented their case-in-chief they “rest” and the defendants are given an opportunity to present their “defense case-in-chief”. That is the only time the defendant can claim and present evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).
10. **CAUSE OF ACTION (CONTRACTS/TORTS/CRIMES):** A cause of action is a complaint cited by a moving party bringing an action in court against a defendant (e.g. allegations of breach of contract, murder, negligence, etc.).
11. **CONDITION CONCURRENT (CONTRACTS):** A condition concurrent is a condition that must be satisfied at the same time a contractual duty to perform ripens. This is rare and effectively means both parties to a contract must perform contractual duties at the same time and neither has any duty to perform unless the other party simultaneously tenders performance. (see CONDITION PRECEDENT, CONDITION SUBSEQUENT).
12. **CONDITION PRECEDENT (CONTRACTS):** A condition precedent is a condition that must be satisfied before a contractual duty to perform ripens. This is very common and means that there is no contractual to perform until the condition is satisfied. (see CONDITION CONCURRENT, CONDITION SUBSEQUENT).
13. **CONDITION SUBSEQUENT (CONTRACTS):** A condition subsequent is a condition that must be satisfied while a contractual duty to perform exists, and if the condition fails the ripened duty to perform is excused. (see CONDITION CONCURRENT, CONDITION PRECEDENT).
14. **CONSEQUENTIAL DAMAGES (CONTRACTS):** Consequential damages are lost profits expected from collateral contracts that fail because a contract is breached. Under *Hadley v. Baxendale* consequential damages will only be awarded, absent express contract provisions otherwise, if the damages 1) were CONTEMPLATED by (known to) the breaching party at the time the contract was executed, 2) can be measured with CERTAINTY, 3) were

CLEARLY CAUSED by the breach and 4) COULD NOT BE AVOIDED by the non-breaching party.

15. **CONSIDERATION (CONTRACTS):** Under contract law consideration is a bargained for exchange of value posing sufficient legal detriment that the law will enforce an agreement. Separate consideration is required to support a modification of an existing contract except under the UCC where no additional consideration is required to support contract modification.
16. **CONSTRUCTIVE CONDITIONS (CONTRACTS):** Constructive conditions are implied conditions that must be satisfied before contractual promise ripen into duties to perform. They are implied by the nature of a contract and the express covenants within it. If a contract party promises to perform in exchange for payment by the other party, the promise to pay is subject to an implied CONSTRUCTIVE CONDITION PRECEDENT that it will not ripen into a duty to pay until the other party has completed performance as promised. (see CONDITION PRECEDENT).
17. **CONTRACT (CONTRACTS):** 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.
18. **DECEIT (CONTRACTS):** Deceit is a defense to enforcement of a contract which is also called FRAUD (which see.)
19. **DEFENSE of DURESS (CONTRACTS/CRIMES):** See DURESS.
20. **DEFENSE OF MISTAKE (CONTRACTS):** See either MUTUAL MISTAKE or UNILATERAL MISTAKE.
21. **DELEGATION (CONTRACTS):** A delegation is a transfer of contractual duties from the promisor/delegator to a delegatee based on a clear statement of intent by the delegator and acceptance of the duty by the delegatee. The promisor/delegator retains primary liability to the promisee. If the delegatee accepts contractual duties in exchange for consideration, a contract between the promisor and delegatee forms, and the promisee is an intended third-party beneficiary of that contract with standing to enforce it at law against both parties. If the delegatee gratuitously accepts contractual duties the promisee can only enforce the promisor-delegatee agreement at equity based on an argument of detrimental reliance. The delegation of a contract is void if the contract requires the unique personal services or attributes of the original party, the delegator. (see ASSIGNMENT, THIRD-PARTY BENEFICIARY.)
22. **DIVISIBLE CONTRACT (CONTRACTS-UCC):** Under the UCC a divisible contract is one that schedules more than one shipment of goods in a manner that payment can be made for individual shipments. Any shipment of non-conforming goods can be rejected, but a breach as to any shipment does not constitute a breach of the entire contract and does not allow the buyer to repudiate the entire contract with respect to future scheduled shipments.
23. **DURESS (CONTRACTS):** Contracts are always unenforceable against parties that enter into the agreements because of threats of physical harm, and they are generally unenforceable against parties who enter into the agreements because of threats of economic harm that were deliberately created by the party seeking to enforce the contract.



24. **EQUITABLE RESTITUTION (CONTRACTS/TORTS):** Equitable restitution is a money judgment or other remedy awarded by a Court of EQUITY when the parties have no adequate legal remedies. The purpose may be to compensate parties for injuries, restore the status quo, prevent frustration of reasonable expectations or prevent unjust enrichment
25. **ESTOPPEL (CONTRACTS):** Estoppel means that a party may be equitably barred from making a legal claim if they previously made an opposite or contradicting claim intending to induce reliance by the opposing party, and the opposing party did change position in reliance on that earlier representation. (see PROMISSORY ESTOPPEL.)
26. **EXPECTED BENEFIT OF THE BARGAIN (CONTRACTS):** The expected benefit of the bargain is the advantage or benefit that a party reasonably expects to derive from entering into a contract. (see BREACH).
27. **EXPRESS MATERIAL CONDITIONS (CONTRACTS):** An express material condition is one that the parties to a contract expressly agreed upon, and the failure of which completely excuses a party from performance, subject to equitable considerations. (see MATERIAL CONDITIONS).
28. **FRAUD (CONTRACTS):** Fraud is a complete defense to enforcement of a contract when 1) a party seeking to enforce the contract MISREPRESENTED material facts with 2) an INTENT to DECEIVE, 3) the party seeking to void the contract REASONABLY RELIED on the misrepresented facts, and 4) the party seeking to void the contract WOULD NOT HAVE ENTERED THE CONTRACT if they had known the true facts. (Also called DECEIT; see NONDISCLOSURE as an alternative theory. For CRIMES see FALSE PRETENSES.)
29. **FRUSTRATION OF PURPOSE (CONTRACTS):** If a party enters into a contract knowing the specific benefit the other party seeks to gain from entering into the agreement, the continued feasibility of attaining that benefit is an IMPLIED MATERIAL CONDITION of the contract, unless the parties expressly agree otherwise. If subsequent events beyond the control of the parties render that benefit impossible to attain, frustration of purpose causes failure of that implied material condition and the contract becomes unenforceable. (see IMPLIED MATERIAL CONDITION).
30. **GOODS (CONTRACTS-UCC):** Under the UCC goods are anything movable at the time of identification to the contract, including specially manufactured goods, unborn animals, growing crops and minerals to be removed from the land by the seller. “Goods” does not include personal property rights like copyrights, patents, stocks, bonds, or currency.
31. **ILLEGAL CONTRACT (CONTRACTS):** The court will not generally enforce a contract for a party that knowingly entered into the contract for an illegal purpose because it would impugn the integrity of the court. However, if the party seeking enforcement was not equally guilty (not IN PARI DELICTO, which see) then the court may order restitution.
32. **IMPLIED-IN-FACT CONTRACT (CONTRACTS):** If a party acts to bestow benefits on another party reasonably expecting to be paid and the other party knowingly accepts those benefits an implied-in-fact contract forms which is enforceable at law.

33. **IMPLIED-IN-LAW CONTRACT (CONTRACTS/REMEDIES):** If a party acts to bestow benefits on another party reasonably expecting to be paid a Court of equity may hold that an implied-in-law contract has formed in order to prevent unjust enrichment to the defendant, prevent unjust detriment to the plaintiff or to protect the public interest.
34. **IMPLIED MATERIAL CONDITION (CONTRACTS):** An IMPLIED MATERIAL CONDITION is one implied by the nature of the contract and the circumstances in which it formed. (see MATERIAL CONDITIONS).
35. **IMPOSSIBILITY (CONTRACTS):** A court will generally find there has been a failure of an IMPLIED MATERIAL CONDITION that excuses the parties from performance if performance is impossible (not just expensive or difficult) because of events that were beyond the control of the party in default. The UCC has specific provisions for situations when events make delivery of goods impossible. (see IMPLIED MATERIAL CONDITION).
36. **INCAPACITY (CONTRACTS):** A contract generally cannot be enforced at law against a party who lacked contractual capacity at the time of execution. If the incapacity later ends the contract will become enforceable if the party to be bound expressly RATIFIES (affirms) the contract or otherwise impliedly ratifies it by FAILING TO REPUDIATE it within a reasonable time period (often set by statute). For example, a minor may repudiate a contract at any time before reaching adulthood. If the contract is not repudiated within a reasonable time after attaining adulthood, the contract is impliedly ratified. A contract otherwise unenforceable at law based on lack of capacity may often be enforced at equity if it is for provision of necessities of life. For example, a contract for food, shelter or clothing may be enforceable against a minor at equity. (see RATIFICATION, REPUDIATION.)
37. **IN PARI DELICTO (CONTRACTS):** A court will not enforce an illegal contract or provide any restitution if the party seeking restitution is equally guilty (in pari delicto) compared to the party from whom restitution is sought.
38. **INVITATION TO NEGOTIATE (CONTRACTS):** An invitation to negotiate is any communication that fails to qualify as a contract OFFER because there is no manifestation of present contractual intent or else the terms are so vaguely stated no reasonable person would believe assent would form a bargain.
39. **LAPSE (CONTRACTS):** An offer lapses if not accepted in the time stated, or if no time is stated within a reasonable period as indicated by the means by which the offer is transmitted. An oral offer lapses at the end of the conversation. A written offer lapses at the end of the time established by the means of dispatch. An offer that is irrevocable under the terms of an option contract lapses at the end of the option period unless otherwise agreed.
40. **LEGAL RESTITUTION (CONTRACTS/TORTS):** Legal restitution is a money judgment awarded by a Court of LAW as a matter of right to a non-breaching party or tort plaintiff to prevent unjust enrichment by the wrongfully acting party instead of an award based on DAMAGES suffered.

41. **LIQUIDATED DAMAGES (CONTRACTS):** A liquidated damages clause is an agreement that in the event of breach the remedy of the non-breaching party will be limited to a specified quantity of money damages. Liquidated damages clauses are unenforceable unless 1) at the time of execution the potential damages from breach were uncertain, 2) the liquidated damages specified were reasonable at the time of execution, and 3) the liquidated damages specified are reasonable at the time of breach. If a contract is for sale of UNIQUE PROPERTY money damages are inadequate and SPECIFIC PERFORMANCE is appropriate. Therefore a liquidated damages clause is unreasonable and unenforceable in such cases.
42. **LOST PROFITS (CONTRACTS):** See CONSEQUENTIAL DAMAGES.
43. **MAILBOX RULES (CONTRACTS):** Under the broadly adopted common law all contract communications are effective upon receipt by the offeror with the exception that ACCEPTANCES are generally effective upon dispatch by the offeree if they are sent by the means specified in the offer or by the same or faster means than the offer if the offer does not specify a means of communication. HOWEVER, if an offeree dispatches both an acceptance and a rejection the rejection will be effective, not the acceptance, if the rejection is received first and the offeror changes position in reliance upon it.
44. **MAJOR BREACH (CONTRACTS-COMMON LAW):** Under the common law of contracts a major breach of contract is one that substantially deprives the non-breaching party of the EXPECTED BENEFIT OF THE BARGAIN. The non-breaching party is excused from all contract duties, remaining conditions on the duties of the breaching party are excused, and the duty of the breaching party is accelerated. (see BREACH).
45. **MATERIAL CONDITION (CONTRACTS):** A MATERIAL CONDITION is one that must be satisfied for the parties to a contract to have any duty to perform. A material condition may be expressly stated by the parties or implied by the nature of the agreement. The failure of a material condition generally denies one or both parties the EXPECTED BENEFIT OF THE BARGAIN, excusing them from the contract. (see EXPECTED BENEFIT OF THE BARGAIN).
46. **MERCHANT (CONTRACTS-UCC):** Under the UCC a merchant is one who deals in or otherwise holds himself out by occupation as knowledgeable about the goods of the contract. A hobbyist can be a merchant but an occasional purchaser of goods or buyer for personal use is generally not a merchant.
47. **MINOR BREACH (CONTRACTS-COMMON LAW):** Under the common law of contracts a minor breach is a failure by a party to perform exactly as promised, but in a way that SUBSTANTIALLY PERFORMS so that the non-breaching party is not denied the BENEFIT OF THE BARGAIN. The non-breaching party is not excused from performance, but is entitled to an OFFSET FOR DAMAGES.
48. **MUTUAL MISTAKE (CONTRACTS):** Under the common law doctrine of *Peerless*, if both parties enter into a contract because each suffers a misunderstanding of material fact the contract is void because there was no “meeting of the minds” and no valid contractual intent. (see UNILATERAL MISTAKE.)
49. **NONDISCLOSURE (CONTRACTS):** See CONCEALMENT.

50. **OFFER (CONTRACTS):** A contract offer is a manifestation of present contractual intent communicated to the offeree so certain in terms that an objective person would reasonably believe assent would form a bargain. Under common law an offer must generally specify the parties, subject matter, quantity, price, and time of performance. Under the UCC an offer must only specify the parties and quantity and the UCC “GAP FILLERS” may be used to determine additional terms. An offer LAPSES if not accepted within a reasonable period of time. (see LAPSE, ACCEPTANCE.)
51. **OFFSET FOR DAMAGES (CONTRACTS):** If a contract party commits a minor breach the non-breaching party is not excused from performance but is entitled to an offset for damages, to the extent they can be proven.
52. **OPTION (CONTRACTS/UCC 2-205):** An option at common law is a contractual agreement under which an offeree exchanges consideration for a contract offer and a promise from the offeror that the offer will not be revoked for an agreed period of time. UCC 2-205 a firm offer in a signed writing by a merchant offeror that by its terms assures it will be held open for the stated time, or if no time is stated then for a reasonable time not to exceed three months, does not require consideration from the offeree.
53. **ORAL CONDITION PRECEDENT (CONTRACTS):** An oral condition precedent is an oral agreement that a condition precedent must be satisfied or else a contractual duty to perform under the terms of a separate contract agreement will not be binding. It is an exception to the PAROL EVIDENCE RULE. (see PAROL EVIDENCE RULE, CONDITION PRECEDENT.)
54. **PAROL EVIDENCE RULE (CONTRACTS):** Under the parol evidence rule, evidence of PRIOR or CONTEMPORANEOUS agreements can not be introduced to VARY or CONTRADICT the terms of a FULLY INTEGRATED WRITING unless they are offered to show evidence of [DAM FOIL] Duress, Ambiguity, Mistake, Fraud, Oral condition precedent, Illegality, or Lack of consideration.
55. **PERFECT TENDER RULE (CONTRACTS):** Under the UCC goods must be delivered in complete conformity with the contractual agreement and any NON-CONFORMING delivery can be rejected by the buyer. In effect, every breach is treated as a major breach.
56. **PROMISSORY ESTOPPEL (CONTRACTS):** Promissory estoppel is an equitable doctrine barring a party from revoking a promise if 1) the party made a promise, 2) intending to induce or reasonably knowing that it would induce reliance, 3) there was reasonable reliance by the other party seeking enforcement of the promise, and 4) injustice would result otherwise. (see ESTOPPEL).
57. **QUANTUM MERUIT (CONTRACTS):** Quantum meruit is a term used by different people to mean different things. Generally it is used to mean RESTITUTION or the award of damages in restitution to prevent UNJUST ENRICHMENT (which see). But this term is also used at times to mean an implied-in-law contract or even implied contracts in general.

58. **RATIFICATION (CONTRACTS):** Ratification is the act of contract parties who lack contractual capacity at the time of execution (e.g. minors) affirming otherwise voidable contracts after attaining contractual capacity. (see INCAPACITY, REPUDIATION.)
59. **REASONABLE ASSURANCES (CONTRACTS):** A contract party that has reasonable doubts about the other party's ability or willingness to perform future duties under a contract may demand REASONABLE ASSURANCES from the other party in the form of a financial guarantee or payment to escrow. A failure to provide reasonable assurances may be treated as an anticipatory repudiation of the contract.
60. **REMEDY OF NON-BREACHING BUYER (CONTRACTS):** A non-breaching party has a right to award of a money judgment for damages caused by the breach or for legal restitution to prevent the breaching party from reaping an unjust enrichment. A non-breaching buyer of unique property may also ask for SPECIFIC PERFORMANCE to obtain possession and title. Under the UCC a non-breaching buyer may also ACCEPT or REJECT non-conforming goods, REPUDIATE the contract and COVER by purchase of conforming goods or AFFIRM the contract and DEMAND DELIVERY of conforming goods.
61. **REMEDY OF NON-BREACHING SELLER (CONTRACTS):** A non-breaching seller may generally demand damages equal to the EXPECTED BENEFIT OF THE BARGAIN (which see). Under the UCC the non-breaching seller has four remedies: 1) If the goods can be sold at market price the seller may demand the excess of the CONTRACT PRICE over the MARKET PRICE. 2) Otherwise, the goods may be sold at a SALVAGE sale after NOTICE to the breaching buyer, and the seller can demand the excess of the CONTRACT PRICE over the SALVAGE PRICE. 3) In a LOST VOLUME situation where the seller cannot easily resell the goods to other customers the seller can demand LOST PROFITS. 4) If the goods are special made or otherwise unsuitable for sale to other customers the seller can demand a money judgment for the CONTRACT PRICE.
62. **REMEDY OF BREACHING BUYER (CONTRACTS):** A breaching buyer may obtain RETURN OF DEPOSITS paid to the non-breaching seller in RESTITUTION to the extent they exceed the seller's damages.
63. **REMEDY OF BREACHING SELLER (CONTRACTS):** At common law a seller that substantially performs has a right to be paid the contract price less an offset for damages. A seller that has committed a major breach may still obtain EQUITABLE RESTITUTION (quantum meruit reimbursement) to prevent unjust enrichment to the extent their performance conferred benefits on the non-breaching buyer. Under the UCC the breaching seller can give notice of intent to cure and has a right to cure during the contract period. The breaching seller also has a REASONABLE RIGHT FOR EXTRA TIME TO CURE their shipment of non-conforming goods if they shipped them with a reasonable belief they were suitable for the buyer's needs.
64. **REPUDIATION (CONTRACTS):** Repudiation is the act of a party declaring the contract is void or otherwise that they will not perform it. If the party has no legal right to repudiate the contract, their act is a BREACH. If the party has a right to repudiate or void the contract, their act is a LEGAL RESCISSION. A party who lacks legal capacity at the time a contract forms has a right to declare the contract void. (see INCAPACITY, RATIFICATION.)

65. **RESCISSION (CONTRACTS):** A rescission is a cancellation or voiding of a contract after it has formed. The contract may be rescinded by one party alone, by right (not as a repudiation in breach), or both parties by agreement, which in either case is a **LEGAL RESCISSION**. Or the contract may be voided by a court, which is an **EQUITABLE RESCISSION**. A
66. **RESTITUTION (CONTRACTS/TORTS):** Restitution is a general term for any remedy awarded by the Court other than a money judgment by a Court of LAW for DAMAGES suffered. See **LEGAL RESTITUTION** and **EQUITABLE RESTITUTION**.
67. **REVOCATION (CONTRACTS):** A revocation is a withdrawal or cancellation of an offer by the offeror, and it is effective if received by the offeree before the offer has been effectively accepted. An offeror cannot revoke an option contract for the time agreed as long as the option contract is properly supported by consideration. Under modern **SAVING DOCTRINES** a **UNILATERAL CONTRACT OFFER** may not be revocable if the offeror is aware the offeree has commenced performance of the requested act (see **SAVING DOCTRINES**)..
68. **SAVING DOCTRINES (CONTRACTS):** Under the modern view a **UNILATERAL CONTRACT OFFER** generally cannot be revoked if the offeror is aware the offeree has commenced performance of the requested act necessary for acceptance until the offeree has been given a reasonable time to complete performance. Some States allow revocation but require restitution to prevent unjust enrichment.
69. **SPECIFIC PERFORMANCE (CONTRACTS):** Money damages are generally an inadequate legal remedy for a non-breaching buyer of unique property (land, art objects, etc.) and in that case a Court of equity may order the breaching seller to deliver possession and title to the buyer.
70. **STANDING (CONTRACTS/TORTS):** Standing means that a plaintiff has a right to pursue a legal remedy because they have suffered actual damages.
71. **STATUS QUO (CONTRACTS):** The status quo means the positions of the parties prior to entering into a contract agreement.
72. **STATUTE OF FRAUDS (CONTRACTS):** Under the Statute of Frauds certain contracts, otherwise valid, cannot be enforced unless supported by a writing. The contracts affected are those for MARRIAGE, those that would necessarily take more than a YEAR to complete, those for the conveyance of an interest in LAND, those by an EXECUTOR of an estate, those for the GUARANTEE of a debt. **[MYLEG]** The rule on the sale of goods is modernly superseded by the UCC. See UCC 2-201.
73. **SUBSTANTIAL PERFORMANCE (CONTRACTS):** Substantial performance means that a breaching contract party substantially provided the non-breaching party with the **EXPECTED BENEFIT OF THE BARGAIN** (which see.)
74. **THIRD-PARTY BENEFICIARY (CONTRACTS):** A person who is intended to receive benefits under a contract between two other parties has **STANDING** to enforce the contract and seek damages for breach if they are vested. Modernly it does not matter if the original contract parties acted to extinguish a debt to the third party (**CREDITOR** beneficiaries) or acted out of gratuitous motives (**DONEE** beneficiaries). The third-party beneficiary may

enforce the contract after they vest by becoming aware of and relying on the existence of the contract. A party that benefits from a contract that was not established for their benefit is an INCIDENTAL beneficiary with no standing to enforce, even if they have relied on the contract's existence.

75. **UCC (CONTRACTS):** Article 2 of the Uniform Commercial Code controls contracts for the sale of GOODS.
76. **UCC 2-201 (CONTRACTS):** A contract for goods worth \$500 or more must be in writing, signed by the party against whom the contract is to be enforced. This limit has been raised in the UCC to \$5,000 but many States still use the \$500 limit. But between merchants a SALES CONFIRMATION by one listing quantity will bind both parties if the receiving party does not object within 10 days. Further, the rule does not apply to SPECIAL MADE GOODS, where there is an ADMISSION by the party to be bound in a legal setting that there had been an agreement, or where there has been PARTIAL PERFORMANCE of the contract by acceptance of payment or goods.
77. **UCC 2-205 (CONTRACTS):** A firm offer in a signed writing by a merchant that by its terms assures it will be held open creates an OPTION that does not require consideration for the stated time, or, if no time is stated in the contract, for a reasonable time not to exceed three months. (see OPTION.)
78. **UCC 2-206 (CONTRACTS):** An acceptance 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.
79. **UCC 2-207 (CONTRACTS):** An acceptance containing varying terms is an effective acceptance, but the varying terms will NOT be included in the contract if 1) the offer expressly limited acceptance and the offeror does not agree to the new terms, OR 2) the parties are not both merchants, OR 3) the varying terms materially alter the contract OR 4) the party to be bound objects within a reasonable period of time.
80. **UCC 2-209 (CONTRACTS):** A contract for the sale of goods may be modified without additional consideration. But if the contract, as modified, requires a writing under UCC 2-201 the modification must be in writing to be enforceable. An oral modification that is not legally enforceable is treated as a waiver of condition that can be retracted. Retraction may be estopped by the Court if it would cause injustice.
81. **UCC 3-311 (CONTRACTS):** A good faith tender and acceptance of an instrument as “full satisfaction” of any claim that is unliquidated or the subject of a bona fide dispute is generally binding, subject to certain statutory limitations and exceptions.
82. **UNCONSCIONABLE CONTRACT (CONTRACTS):** A Court will not enforce a contract that is so one-sided that it implies a lack of reasonable intent to be bound on the part of the offeree. (see ADHESION contract.)
83. **UNIFORM COMMERCIAL CODE (CONTRACTS):** see UCC.

84. **UNILATERAL CONTRACT (CONTRACTS):** A unilateral contract offer is one that by its own terms unequivocally restricts the means of acceptance to the act of complete performance only. (See SAVING DOCTRINES).
85. **UNILATERAL MISTAKE (CONTRACTS):** Under contract law if a party enters into a contract suffering from a misunderstanding of fact that the other party knew or should have known about, the contract is voidable by the mistaken party. But if the other party did not know or have reason to know of the mistake the contract is legally binding and not voidable in most States. In a minority of States the mistaken party may rescind the contract if 1) the error is discovered before the other party has irrevocably acted in reliance, 2) prompt notice of the error is given, and 3) the other party is reimbursed for all expenses caused by the error and rescission. (see MUTUAL MISTAKE.)
86. **UNJUST ENRICHMENT (CONTRACTS/TORTS):** A Court may award damages in RESTITUTION to prevent an unjust enrichment. (see RESTITUTION).
87. **WAIVER OF BREACH (CONTRACTS):** A “waiver of a breach” is an ELECTION by a non-breaching party to treat a major breach as a minor breach, allowing the breaching party to continue performing under the contract. Following the waiver of a breach the non-breaching party cannot retract the waiver to claim a major breach.
88. **WAIVER OF CONDITION (CONTRACTS):** A waiver of condition means that a contract party performs a contractual duty that was not due to be performed because it was subject to a CONDITION PRECEDENT that was not satisfied. Following a waiver of a condition the performing party may retract the waiver and refuse to perform the duty in the future unless the condition is satisfied.



## Section 2: Rules and Definitions for TORTS

The following rules are the law tested on the **Multistate Bar Exam**.

89. **ABUSE OF PROCESS (TORTS):** Abuse of process is the tort of bringing or instituting a civil or criminal action against the plaintiff without legitimate basis out of malice or for an improper purpose. (see MALICIOUS PROSECUTION.)
90. **ACTUAL CAUSE (TORTS/CRIMES):** An act is an actual cause of injury if injury would not have occurred but for that act. Actual causation is referred to as "sine qua non."
91. **ACTUAL MALICE (TORTS):** For DEFAMATION a false statement is made with actual malice if it is made with knowledge the statement is false or with reckless disregard for whether it is false or not. (see RECKLESS, DEFAMATION.)
92. **AFFIRMATIVE DEFENSES (CRIMES/TORTS):** Affirmative defenses are claims by criminal or tort defendants that even if the opposing parties (prosecutors or plaintiffs) can prove each required element of their causes of action (e.g. that the defendant committed battery) they were privileged by law to commit the acts complained of anyway (e.g. that they acted in self-defense). Affirmative defenses can only be raised by the defendant after the opposing parties have completed presentation of their case-in-chief. The burden is on the defendants to prove each required element of affirmative defenses. (see PASSIVE DEFENSES.)
93. **APPROPRIATION OF LIKENESS (TORTS):** Appropriation of likeness is the tort of unauthorized use of the name or likeness of a person in a manner that implies endorsement of a product or support of a cause. It does not include the publication of names and photographs in news articles and matters of legitimate public interest. Plaintiffs are often awarded LEGAL RESTITUTION to prevent unjust enrichment by the defendant rather than the plaintiff's DAMAGES. (see INVASION OF PRIVACY.)
94. **ASSAULT (TORTS):** Assault is the tort of intentionally acting to cause the plaintiff reasonable apprehension of a battery. The plaintiff must be apprehensive.
95. **ASSUMPTION OF THE RISK (TORTS):** Assumption of the risk is a defense to negligence that acts as a complete bar to recovery if plaintiffs 1) put themselves at risk, 2) with full awareness of the risks, and 3) consciously accepted the risks.
96. **AUTHORITY OF LAW (TORTS):** Authority of law is a tort defense that any person has a right to act reasonably, including to perform an arrest, to prevent a felony in their presence, and that police may arrest to prevent misdemeanors in their presence or based on reasonable suspicion of felonies. (Defense to intentional torts of battery and false imprisonment.)
97. **AVOIDABLE INJURY (TORTS):** Under the Avoidable Injury doctrine some Courts in jurisdictions that recognized CONTRIBUTORY NEGLIGENCE (which see) as a complete bar to recovery often held that if a plaintiff's negligence did not help cause an accident and only contributed to the degree of injury, the Court would consider the plaintiff's acts in allocating damages but would not consider it a total bar to recovery.

98. **BATTERY (TORTS):** Battery is the tort of intentionally acting to cause a harmful or offensive touching of the plaintiff or his person.
99. **BREACH (TORTS):** A breach in negligence is a failure by defendant with an existing duty to meet the applicable STANDARD OF CARE by acting as a reasonable person like the defendant would normally use in the same circumstance. (see STANDARD OF CARE, RES IPSA LOQUITUR.)
100. **BREACH OF EXPRESS WARRANTY (TORTS):** Breach of express warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while falsely stating the goods are suitable for a specific use and 3) the recipient of the goods reasonably relies on the statements, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.
101. **BREACH OF IMPLIED WARRANTY (TORTS):** Breach of implied warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while impliedly representing the goods to be safe for ordinary use or else for the recipient's stated, intended use and 3) the recipient of the goods reasonably relies on the defendant's statements because of the defendant's stated or implied expertise regarding the suitable use of the goods, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.
102. **CASE-IN-CHIEF (CONTRACTS/TORTS/CRIMES):** The "case-in-chief" is the evidence and legal argument presented to the finder of fact (judge or jury) by a moving party (prosecutor or plaintiffs bringing actions in court). The moving parties have the burden of presenting admissible evidence to prove each and every required legal element their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. After the moving parties have presented their case-in-chief they "rest" and the defendants are given an opportunity to present their "defense case-in-chief". That is the only time the defendant can claim and present evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).
103. **CAUSATION, ACTUAL (TORTS/CRIMES):** See ACTUAL CAUSE.
104. **CAUSATION, PROXIMATE (TORTS/CRIMES):** see PROXIMATE CAUSE.
105. **CAUSE OF ACTION (CONTRACTS/TORTS/CRIMES):** A cause of action is a complaint cited by a moving party bringing an action in court against a defendant (e.g. allegations of breach of contract, murder, negligence, etc.).
106. **COMING TO THE NUISANCE (TORTS):** If plaintiffs in actions for nuisance have "come to the nuisance" by physically moving to the location where a condition already exists, a MINORITY of Courts find them totally barred from recovering damages. Under the MAJORITY view coming to the nuisance is only considered a factor in determining damages and is not a total bar to recovering damages. (see PRIVATE NUISANCE.)

107. **COMPARATIVE NEGLIGENCE (TORTS):** In the MAJORITY of States plaintiffs in negligence actions will have damage awards proportionately reduced by the amount of their own COMPARATIVE NEGLIGENCE. Some States completely bar plaintiffs from recovery if they cause over 50 percent of their own injury. Some States also bar plaintiffs from recovery against any defendant less at fault than the plaintiffs.
108. **CONCEALMENT (TORTS):** Concealment is the tort of 1) INTENTIONALLY CONCEALING FACTS with 2) an INTENT TO DECEIVE when there is 3) a DUTY to reveal the facts, and the 4) plaintiff REASONABLY RELIES on the facts as they appear and 5) is caused DAMAGES. The difference between CONCEALMENT and FRAUD is only that the latter requires an intentional misrepresentation while the former requires an intentional breach of the duty to disclose material facts. (see **FRAUD** as alternative theory.)
109. **CONSENT (TORTS):** Consent is a defense to most intentional torts if there is informed, voluntary consent by a person with legal capacity. Consent is not a valid defense to an act intended to cause serious bodily injury and often is not a defense to injury suffered from “mutual combat”.
110. **CONTRIBUTORY NEGLIGENCE (TORTS):** In a MINORITY of States plaintiffs in negligence actions are completely barred from any recovery if their own CONTRIBUTORY NEGLIGENCE caused any part of their injury. But many States following this approach will not bar plaintiffs from recovery if the defendant had the LAST CLEAR CHANCE (which see) to avoid the accident. And under the AVOIDABLE INJURY DOCTRINE (which see) some Courts have allocated damages on comparative negligence principals when the plaintiffs’ negligence did not cause the accident but only caused their injuries to be more severe.
111. **CONVERSION (TORTS):** Conversion is the tort of substantial interference with personal property (chattel) causing deprivation of possession. The remedy and measure of damages for conversion is the forced sale of the chattel to the defendant.
112. **DAMAGES (TORTS):** Under tort law “damages” means a monetary award to a plaintiff that is generally, but not always, measured by the injury suffered by the plaintiff. Damages may be special (measured by out of pocket expenses) or general (to compensate for pain, suffering.) Damages may also be claimed for interference with possessory rights in the case of trespass to land and conversion. If a prima facie case is proven, damages are presumed for the torts of ASSAULT, BATTERY, CONVERSION, FALSE IMPRISONMENT, TRESPASS TO LAND and LIBEL PER SE. Damages must be proven in some manner for the torts of INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, TRESPASS TO CHATTELS, NEGLIGENCE, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, SLANDER, and LIBEL PER QUOD. (which see.) An award of PUNITIVE damages is intended to punish and deter further misconduct by the defendant is not strictly measured by the actual injury to the plaintiff. LEGAL RESTITUTION may be awarded to prevent unjust enrichment by the defendant rather than DAMAGES suffered by the plaintiff.
113. **DECEIT (TORTS):** Deceit is a tort also called FRAUD (which see.)

114. **DEFAMATION (TORTS):** A defamation is an unprivileged, false statement of material fact about the plaintiff published to another person causing damage to her reputation. Statements made in a reasonable manner, without malice to defend a legitimate personal, group, or public interest are PRIVILEGED. An oral defamation is SLANDER and a written defamation is LIBEL. If the defamatory statement involves INNUENDO, depends on interpretation (COLLOQUIUM) or requires the listener to know extrinsic facts (INDUCEMENT) it is defamation PER QUOD. If the false statement is clearly defamatory on its face as to the plaintiff and 1) about criminal acts, 2) about loathsome disease, 3) about unchaste behavior, 4) about business practices of the plaintiff (CLUB), or 5) LIBEL (written or otherwise permanently recorded), it is defamation PER SE (CLUB). General damages can be awarded without proving special damages only in the case of a defamation per se. Under *New York Times v. Sullivan* a public figure plaintiff must prove the defendant acted with actual malice because they acted with knowledge or with reckless disregard of the falsity of their statements. Further, negligence or actual malice must be proven if the false statements concern a matter of legitimate public interest. (see ACTUAL MALICE, LIBEL, PUBLIC FIGURE, RECKLESS, SLANDER.)
115. **DEFENSE of AUTHORITY OF LAW (TORTS/CRIMES):** See AUTHORITY OF LAW.
116. **DEFENSE of COMPARATIVE NEGLIGENCE (TORTS):** See COMPARATIVE NEGLIGENCE.
117. **DEFENSE of CONSENT (TORTS/CRIMES):** See CONSENT.
118. **DEFENSE of CONTRIBUTORY NEGLIGENCE (TORTS):** See CONTRIBUTORY NEGLIGENCE.
119. **DEFENSE of DISCIPLINE (TORTS):** See DISCIPLINE.
120. **DEFENSE of INFANCY, INSANITY AND INCOMPETENCE (TORTS):** See INFANCY, INSANITY AND INCOMPETENCE.
121. **DEFENSE of NECESSITY (TORTS):** See NECESSITY.
122. **DEFENSE of OTHERS (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect the safety of others. Jurisdictions are split when a defendant mistakenly acts to protect an aggressor in a fight. Under the STEPS-INTO-THE-SHOES view the defendant steps into the shoes of the aggressor and is not privileged to act to defend the aggressor in a fracas. Under the REASONABLE APPEARANCES view the defendant is privileged to act based on reasonable appearances, even if he acts to protect the aggressor in a fracas mistakenly believing he is aiding the victim of aggression. (See AGGRESSOR.)
123. **DEFENSE of PROPERTY (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect his own property or the property of others. But deadly force can never be used to protect property because it is NOT reasonable. Defense of property is never a defense to murder, but a MISTAKE OF FACT may be a reasonable alternative. (see NECESSITY, MISTAKE OF FACT.)

124. **DEFENSE of RECAPTURE (TORTS):** See RECAPTURE OF CHATTELS.
125. **DEFENSE of SELF-DEFENSE (TORTS/CRIMES):** See SELF-DEFENSE.
126. **DISCIPLINE (TORTS):** A person of recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) is privileged to act reasonably to control others (Defense to intentional torts of battery and false imprisonment.)
127. **DUTY (TORTS):** Generally a person has NO DUTY to act to protect others. But a DUTY may be established by STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or creation of PERIL [**SCRAP**]. Violation of a duty created by STATUTE usually gives rise to a claim of NEGLIGENCE PER SE. The duties of occupiers of land are governed by the principles of PREMISES LIABILITY, a form of duty based on RELATIONSHIP. And any person who creates PERIL to others has a duty as discussed by Cardozo and Andrews in PALS GRAF. (See NEGLIGENCE PER SE, PREMISES LIABILITY, PALS GRAF.)
128. **EQUITABLE RESTITUTION (CONTRACTS/TORTS):** Equitable restitution is a money judgment or other remedy awarded by a Court of EQUITY when the parties have no adequate legal remedies. The purpose may be to compensate parties for injuries, restore the status quo, prevent frustration of reasonable expectations or prevent unjust enrichment
129. **FALSE IMPRISONMENT (TORTS):** False imprisonment is the tort of intentionally acting to cause the plaintiff to be confined to an enclosed area with no reasonably apparent means of reasonable escape. The plaintiff must be aware of the confinement.
130. **FALSE LIGHT (TORTS):** False light is the tort publishing a false portrayal of the plaintiff causing inconvenience or embarrassment. Damages are generally measured by the injury to the plaintiff. The distinction between False Light and Defamation is that in the former case the false portrayal may not cause damage to reputation while in the later case false statements of fact cause injury to reputation and standing. (see INVASION OF PRIVACY.)
131. **FRAUD (TORTS):** Fraud is the tort of 1) FALSELY STATING or MISREPRESENTING material facts with 2) an INTENT TO DECEIVE, causing 3) REASONABLE RELIANCE by the plaintiff 4) resulting in INJURY to the plaintiff. (Also called DECEIT; See CONCEALMENT as alternative theory.)
132. **GROSS NEGLIGENCE: (TORTS/CRIMES):** Gross negligence is the deliberate breach of a pre-existing duty. If it causes others to be exposed to extreme risks resulting in harm it may be called criminal negligence.
133. **INFANCY, INSANITY AND INCOMPETENCE (TORTS):** There is NO DEFENSE of infancy, insanity or incompetence in TORT! Child defendants (who were not engaged in adult activities) are held to a modified standard of care in negligence actions, but child defendants are not held to a different standard as to intentional tort actions.
134. **INTENTIONAL ACT (TORTS/CRIMES):** An intentional act is one done for the purpose or with knowledge with reasonable certainty that a result will occur. For a GENERAL INTENT crime the prosecution must prove the defendant intended to commit a criminal act but does not have to prove that a criminal result was intended. For a SPECIFIC INTENT crime

the prosecution must prove the defendant acted intending to produce a criminal result. (see GENERAL INTENT, SPECIFIC INTENT.)

135. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (TORTS):** Intentional Infliction of Emotional Distress is an intentional, outrageous act which causes the plaintiff severe emotional distress beyond mere embarrassment and humiliation.
136. **INTERFERENCE (TORTS):** Interference is the tort of unreasonably interfering with the known business relationships of the plaintiff causing injury. This may be called interference with a "CONTRACT" where the defendant knows the plaintiff has an existing contract, or it may otherwise be called interference with "PROSPECTIVE ECONOMIC RELATIONSHIPS".
137. **INTRUSION (TORTS):** Intrusion is an action for INVASION OF PRIVACY caused by unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)
138. **INVASION OF PRIVACY (TORTS):** Invasion of privacy is a general term for four specific causes of action: FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION into solitude and DISCLOSURE of private facts (LAID). (see FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION of solitude and PUBLIC DISCLOSURE OF PRIVATE FACTS.)
139. **LAST CLEAR CHANCE (TORTS):** The last clear chance concept is a SAVING DOCTRINE in jurisdictions that recognize CONTRIBUTORY NEGLIGENCE (which see) which holds that even if plaintiffs were negligent they are not completely barred from recovery if the defendants had the LAST CLEAR CHANCE to avoid an accident.
140. **LEGAL RESTITUTION (CONTRACTS/TORTS):** Legal restitution is a money judgment awarded by a Court of LAW as a matter of right to a non-breaching party or tort plaintiff to prevent unjust enrichment by the wrongfully acting party instead of an award based on DAMAGES suffered.
141. **LIBEL (TORTS):** Libel is a written defamation or one recorded in some manner giving the false statement permanence. Libel is a DEFAMATION PER SE if it is clearly, on its face, defamatory and about the plaintiff. Otherwise it is a DEFAMATION PER QUOD. (see DEFAMATION.)
142. **MALICE (TORTS):** Malice in tort is the requisite mental state or wrongful intent required for a defendant to be liable for certain torts such as DEFAMATION, ABUSE OF PROCESS and MALICIOUS PROSECUTION (which see.)
143. **MALICIOUS PROSECUTION (TORTS):** Malicious prosecution is the tort of instituting and/or continuing a criminal prosecution of the plaintiff out of malice. The plaintiff must show the prosecution lacked probable cause and was terminated based on its merits. (see ABUSE OF PROCESS.)

144. **NECESSITY (TORTS):** A person is privileged to act as reasonably necessary to protect people and property from harm. If the act is to protect the safety of any person, it is a complete defense. If it is to protect the property of any person besides the defendant, it is a PUBLIC NECESSITY and a complete defense. If it is only to protect the property of the defendant it is a PRIVATE NECESSITY and the defendant remains liable for any damage actually caused.
145. **NEGLIGENCE (TORTS):** Negligence is the failure to exercise the degree of care that a reasonably prudent person would use in the same situation. But to prevail in an action for negligence the plaintiff must show the defendant had a DUTY, BREACHED the duty, and that the breach was the ACTUAL and PROXIMATE CAUSE of DAMAGES suffered by the plaintiff (which see).
146. **NEGLIGENCE PER SE (TORTS):** If a duty is created by a statute, a defendant who violates the statute is negligent per se and liable to all plaintiffs who are actually and proximately caused injury as a result if the plaintiffs are in the CLASS of people the statute was intended to protect and they are caused the TYPE of injury the statute was intended to prevent. (see DUTY.)
147. **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (TORTS):** A bystander, witness or other person who was not directly involved in an accident or other tortious event may bring an action for Negligent Infliction of Emotional Distress (NIED) if they can prove they have suffered severe emotional distress because they were closely connected in time, place or relationship to the event. Some jurisdictions require that the plaintiff suffer some physical contact during the event and others require a physical manifestation of emotional distress as evidence of injury.
148. **NUISANCE, PRIVATE (TORTS):** See PRIVATE NUISANCE.
149. **NUISANCE, PUBLIC (TORTS):** See PUBLIC NUISANCE.
150. **PALSGRAF (TORTS):** Under *Palsgraf* a duty based on PERIL is created whenever the defendant acts in a manner that creates reasonably foreseeable harm to others. Cardozo argued that a duty was only owed to those in the ZONE OF DANGER where the acts of the defendant caused reasonably foreseeable harm, and that liability should be limited to only those to which the defendant owed a duty. Andrews argued that if a duty was owed to anyone, the defendant should be liable to all that were actually and proximately caused harm by a breach of that duty.
151. **PASSIVE DEFENSES (TORTS/CRIMES):** Passive defenses are arguments by criminal or tort defendants that the opposing parties (prosecutors or plaintiffs) have failed to meet their burden to prove each required legal element of their stated causes of action (e.g. that the defendant committed battery). (see AFFIRMATIVE DEFENSES.)
152. **PREMISES LIABILITY (TORT):** Premises liability is a form of duty based on RELATIONSHIP. Under the common law an occupier of land had no duty to unknown trespassers, a duty to protect people off the land from hazardous activities on the land, a duty to warn and protect both known trespassers and licensees from known, hidden hazards and activities on the land, and a duty to inspect, warn and protect invitees from hidden hazards and activities on the land. Modernly these categorical distinctions have generally been replaced by

a general duty to protect all parties from unreasonably hazardous conditions and activities on the land. (See DUTY.)

153. **PRIVATE NECESSITY (TORTS):** See NECESSITY.

154. **PRIVATE NUISANCE (TORTS):** A private nuisance is an unreasonable interference with the plaintiff's use and enjoyment of her own land in a manner that does not constitute a TRESPASS TO LAND (which see.) Nuisance may involve smoke, fumes, odors, noise, light, obstruction or aircraft. In the MAJORITY view the plaintiffs COMING TO THE NUISANCE (which see) is NOT a complete bar to bringing a nuisance action. (see COMING TO THE NUISANCE, PUBLIC NUISANCE, TRESPASS TO LAND.)

155. **PRODUCTS LIABILITY (TORTS):** Every person who releases an unreasonably dangerous product into the stream of commerce may be liable for personal injury, property damage and other harm caused. Liability may be based on four theories: BREACH OF EXPRESS WARRANTY, BREACH OF IMPLIED WARRANTY, NEGLIGENCE or STRICT LIABILITY IN TORT (which see.)

156. **PROXIMATE CAUSE (TORTS/CRIMES):** Proximate cause means that a defendant's act actually caused injury that was so direct and natural, close in time and place, by a chain of causation unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability. (see UNFORESEEABLE INTERVENING EVENTS.)

157. **PUBLIC DISCLOSURE OF PRIVATE FACTS (TORTS):** Public disclosure of private facts is the INVASION OF PRIVACY tort of unreasonably disclosing private facts, about the plaintiff that a reasonable person would find embarrassing. Damages are usually measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)

158. **PUBLIC FIGURE (TORTS):** Under *New York Times v. Sullivan* a public figure for purposes of a defamation action is a person who injects themselves into the public arena. Once a person becomes a public figure they probably remain a public figure until they fade from memory. (see DEFAMATION.)

159. **PUBLIC NECESSITY (TORTS):** See NECESSITY.

160. **PUBLIC NUISANCE (TORTS):** A public nuisance is an unreasonable interference with the plaintiff's use of public resources. To bring an action plaintiffs must prove STANDING (which see) by showing they suffer a particular injury from the acts of the defendant that is different from or greater than the injury suffered by the general public. (see PRIVATE NUISANCE.)

161. **RECAPTURE OF CHATTELS (TORTS):** Property owners attempting to recover chattel while in fresh pursuit or seeking recovery of chattel lost through no fault of their own may enter land of others and use reasonable force if they first request and are refused return of their chattel by the parties in possession. (Defense to trespass to land and battery.)

162. **RECKLESSNESS (TORTS/CRIMES):** Recklessness is the deliberate creation of extreme risks to others. (See RECKLESS HOMICIDE, ACTUAL MALICE.)



163. **RES IPSA LOQUITUR (TORTS):** Under RES IPSA LOQUITUR a plaintiff may establish a presumption of breach if 1) negligence by someone is implied by the facts, 2) the defendant had substantial control over the situation that caused injury, and 3) the plaintiff had no control over the situation that caused them injury. By proving the elements of RIL the plaintiff may shift the burden of proof to the defendant to prove she did not breach her duty of due care.
164. **RESTITUTION (CONTRACTS/TORTS):** Restitution is a general term for any remedy awarded by the Court other than a money judgment by a Court of LAW for DAMAGES suffered. See LEGAL RESTITUTION and EQUITABLE RESTITUTION.
165. **SELF-DEFENSE (TORTS/CRIMES):** A person who is not the aggressor in a fracas is privileged to act as reasonably necessary to protect his or her own safety. This is NOT a defense if the party was the aggressor unless they are no longer the aggressor because they attempted withdrawal from the fracas or the other party escalated the level of violence. (see AGGRESSOR, NECESSITY.)
166. **SLANDER (TORTS):** Slander is an oral defamation or one made in some manner that it is transitory and not permanent. May be SLANDER PER SE or SLANDER PER QUOD. (see DEFAMATION.)
167. **STANDARD OF CARE (TORTS):** Normally the standard of due care is the level of care a reasonably prudent person would use. If the defendant is a CHILD engaged in childlike activities the standard is the level of care a reasonable child of the same age and experience would use. A child engaged in adult activities is held to an adult standard. For defendants that are HIGHLY TRAINED or PROFESSIONAL (or claim to be) the standard of care is higher. The standard of MEDICAL CARE is the standard in the community (or nation in some jurisdictions). There is not a lowered standard of care for INCOMPETENTS. (see BREACH.)
168. **STANDING (CONTRACTS/TORTS):** Standing means that a plaintiff has a right to pursue a legal remedy because they have suffered actual damages.
169. **STRICT LIABILITY (TORTS):** Defendants are strictly liable for negligence if plaintiffs are caused injury by 1) the keeping of a known dangerous animal (other than normally domesticated farm animals), 2) the keeping of exotic animals (if the injury is of a reasonably foreseeable type), 3) excavating by the defendant that causes a subsidence of the plaintiff's land, or 4) ultra-hazardous activities, activities so dangerous they are subject to strict regulation and licensing requirements.
170. **STRICT PRODUCT LIABILITY (TORTS):** Strict product liability is a products liability theory when 1) a commercial supplier of goods 2) releases unreasonably dangerous goods into the stream of commerce, resulting in 3) personal injury or property damage (not economic losses) to the plaintiff.
171. **TRANSFERRED INTENT (TORTS):** Under the doctrine of transferred intent a defendant that intentionally acts to cause any tort injury to anyone is liable for every injury suffered by everyone, even if the resulting victim or injury is different from that intended.

172. **TRESPASS TO LAND (TORTS):** Trespass to land is an intentional act to cause unauthorized entry onto the land of the plaintiff. Trespass may be by physical entry of the defendant herself, or by the defendant causing other people, objects or any particulate matter to enter onto, under or pass over the land of the plaintiff at low altitude. A continuing trespass occurs if the defendant leaves objects on the plaintiff's land. No damage to the land is necessary, but the defendant is liable for any damage caused. It is not a trespass to land for the defendant to cause smoke, fumes, odors, sounds, light, obstruction or objects at high altitude to pass over the land of the plaintiff, but such acts may constitute a PRIVATE NUISANCE (which see.)
173. **TRESPASS TO CHATTELS (TORTS):** A trespass to chattels is an intentional unauthorized interference with the chattel of another causing damage.
174. **TRESPASSORY (TORTS/CRIMES):** “Trespassory” means an act done “without permission”.
175. **UNFORESEEABLE INTERVENING EVENTS (TORTS/CRIMES):** If a subsequent act by a third party, or natural event (“act of God”) is also an actual cause of the injury suffered by a plaintiff or victim, it will generally be viewed as an “unforeseeable intervening event” that terminates proximate cause and ends the liability of defendants that acted earlier. But negligence by a third party is presumed to be foreseeable and will not terminate proximate causation or liability. Criminal acts and intentional torts by third parties are presumed to be unforeseeable and will terminate all liability of defendants that acted earlier UNLESS the defendant knew the subsequent criminal act or intentional tort by the third party was likely to occur. (see PROXIMATE CAUSE.)
176. **UNJUST ENRICHMENT (CONTRACTS/TORTS):** A Court may award damages in RESTITUTION to prevent an unjust enrichment. (see RESTITUTION).
177. **ZONE OF DANGER (TORTS):** The zone of danger is the area where the acts of a defendant cause reasonably foreseeable harm. (see PALS GRAF.)

## Section 3: Rules and Definitions for CRIMES

The following rules are the law tested on the **Multistate Bar Exam**.

178. **ACCOMPLICE (CRIMES):** An accomplice is a person who urges the commission of a crime or knowingly helps others plan, execute, profit from or escape capture after a crime. At common law accomplices were classified as accessories before the fact, principals, and accessories after the fact. (see ACCOMPLICE LIABILITY.)
179. **ACCOMPLICE LIABILITY (CRIMES):** Accomplice liability is a form of vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable acts) from the defendant's own criminal acts. Many Courts do not recognize Withdrawal as a defense to accomplice liability. (see ACCOMPLICE, CONSPIRACY, CONSPIRACY LIABILITY, WITHDRAWAL.)
180. **ACTUAL CAUSE (TORTS/CRIMES):** An act is an actual cause of injury if injury would not have occurred but for that act. Actual causation is referred to as "sine qua non."
181. **AFFIRMATIVE DEFENSES (CRIMES/TORTS):** Affirmative defenses are claims by criminal or tort defendants that even if the opposing parties (prosecutors or plaintiffs) can prove each required element of their causes of action (e.g. that the defendant committed battery) they were privileged by law to commit the acts complained of anyway (e.g. that they acted in self-defense). Affirmative defenses can only be raised by the defendant after the opposing parties have completed presentation of their case-in-chief. The burden is on the defendants to prove each required element of affirmative defenses. (see PASSIVE DEFENSES.)
182. **AGGRESSOR (CRIMES):** The initial aggressor in a fracas is the person who attacks a victim or otherwise starts a fracas. Once a fracas has begun the role of aggressor will switch to any party who unnecessarily escalates the level of violence or unreasonably continues the violence after the other party has attempted to withdraw and escape.
183. **ARSON (CRIMES):** Arson is the common law felony of maliciously burning the dwelling of another. Modernly arson has been extended to the malicious burning of almost any structure. Malice for arson requires an act with a wrongful intent to cause a burning, but it is a GENERAL INTENT crime, meaning that MISTAKE OF FACT is not a defense unless it is a reasonable mistake.
184. **ASSAULT (CRIMES):** Assault is the crime of intentionally acting to cause a battery or cause apprehension of a battery. The victim does not have to be apprehensive. Assault is a SPECIFIC INTENT crime. (see SPECIFIC INTENT.)
185. **ATTEMPT (CRIMES):** A criminal attempt is a substantial step taken with the specific intent of committing a criminal act. Attempt is a SPECIFIC INTENT crime, meaning that there can be no crime of ATTEMPT unless there was an act taken with the specific intent of committing some other specific crime. Therefore, there can be no "attempted attempt", "attempted second degree murder" or "attempted manslaughter." Further, ASSAULT is specifically defined as an "attempted battery" so "attempted battery" is simply not a correct term under the common law.

186. **AUTHORITY OF LAW (CRIMES):** Authority of law is a criminal law defense that otherwise criminal acts, such as battery and larceny, were authorized by law.
187. **BATTERY (CRIMES):** Battery is the crime of intentionally acting to cause a harmful or offensive touching of a victim. Battery is a GENERAL INTENT crime. (see GENERAL INTENT.)
188. **BURGLARY (CRIMES):** At common law burglary was the felony of breaking and entering the dwelling of another in the night with an intent to commit a FELONY. At common law a CONSTRUCTIVE BREAKING was found when entry was made by trick, threat of violence or through the help of a conspirator. The entry of a structure near a dwelling constituted a burglary if it was within the CURTILAGE of the dwelling. Modernly burglary has generally been extended to any trespassory entry of almost any structure at any time of day or night with intent to commit a felony or larceny. A trespassory entry is any entry made without consent, express or implied. Courts are split as to whether there is a trespassory entry when the defendant has express or implied consent to enter the structure for other purposes, and some State statutes classify any entry with intent to commit a felony or larceny as a burglary (see CONSTRUCTIVE BREAKING, CURTILAGE, LARCENY.)
189. **CASE-IN-CHIEF (CONTRACTS/TORTS/CRIMES):** The “case-in-chief” is the evidence and legal argument presented to the finder of fact (judge or jury) by a moving party (prosecutor or plaintiffs bringing actions in court). The moving parties have the burden of presenting admissible evidence to prove each and every required legal element their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. After the moving parties have presented their case-in-chief they “rest” and the defendants are given an opportunity to present their “defense case-in-chief”. That is the only time the defendant can claim and present evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).
190. **CAUSATION, ACTUAL (TORTS/CRIMES):** See ACTUAL CAUSE.
191. **CAUSATION, PROXIMATE (TORTS/CRIMES):** see PROXIMATE CAUSE.
192. **CAUSE OF ACTION (CONTRACTS/TORTS/CRIMES):** A cause of action is a complaint cited by a moving party bringing an action in court against a defendant (e.g. allegations of breach of contract, murder, negligence, etc.).
193. **COMPOUNDING (CRIMES):** Compounding is the crime of taking money or something of value from criminals in exchange for agreeing to not report their crimes to the police.
194. **CONSENT (CRIMES):** Consent is a defense to some crimes [rape, larceny, battery – consent to a touching] if there is informed, voluntary consent by a person with legal capacity. Consent is never a defense to murder, an act intended to cause serious bodily injury or crimes such as dueling.

195. **CONSPIRACY (CRIMES):** A conspiracy is the crime of agreement between two or more people to work toward an illegal goal. Agreement may be express or implied by acts. Modernly an overt act in furtherance of the conspiracy goal is often required. The WHARTON RULE (which see) requires more participants than are necessary to accomplish the illegal goal (no conspiracy for RECEIVING STOLEN PROPERTY, sale of illegal drugs, etc. unless three or more defendants participate.) Conspiracy does not merge with the illegal goal allowing conviction for conspiracy as a separate crime. (see ACCOMPLICE LIABILITY, MERGER, WITHDRAWAL.)
196. **CONSPIRACY LIABILITY (CRIMES):** Under the *Pinkerton Rule* each member of a conspiracy is vicariously liable for the criminal acts of co-conspirators within the scope (foreseeable and in furtherance) of the conspiracy agreement. Each member of the conspiracy may be charged with all crimes committed by other conspirators if they occur after they join the conspiracy, before the conspiracy ends, and before the defendant WITHDRAWS. A defendant that joins a conspiracy in progress is generally not liable for prior crimes committed by co-conspirators unless the defendant has sought to profit from those prior crimes. Most Courts recognize WITHDRAWAL as a defense against liability for crimes of co-conspirators after the withdrawal is effective, and some Courts recognize withdrawal as a defense to the charge of conspiracy itself. (see ACCOMPLICE, ACCOMPLICE LIABILITY, CONSPIRACY, WITHDRAWAL.)
197. **CONSTRUCTIVE BREAKING (CRIMES):** Under the common law a “breaking” for BURGLARY was deemed to have occurred if the defendants made entry by trick, threats of violence or the help of a co-conspirator. Modernly a sufficient “breaking” is deemed to have occurred if the defendants make a TRESPASSORY ENTRY to a structure. A trespassory entry is one without consent, express or implied. (see BURGLARY).
198. **CRIMINAL NEGLIGENCE (CRIMES):** Criminal negligence is the deliberate breach of a pre-existing duty to act which causes extreme risks to others. For example, a parent deliberately failing to feed an infant. “Deliberateness” of the breach distinguishes criminal negligence (also called GROSS NEGLIGENCE) from “ordinary” negligence. (Compare to RECKLESS, RECKLESS HOMICIDE. INVOLUNTARY MANSLAUGHTER.)
199. **CURTLAGE (CRIMES):** The curtilage is the area sufficiently close to a dwelling that a breaking and entry of any structure within the curtilage constituted a burglary under the common law. (see BURGLARY.)
200. **DEFENSE of AUTHORITY OF LAW (TORTS/CRIMES):** See AUTHORITY OF LAW.
201. **DEFENSE of CONSENT (TORTS/CRIMES):** See CONSENT.
202. **DEFENSE of DURESS (CONTRACTS/CRIMES):** See DURESS.
203. **DEFENSE of ENTRAPMENT (CRIMES):** See ENTRAPMENT.
204. **DEFENSE of INFANCY (CRIMES):** See INFANCY
205. **DEFENSE of MISTAKE OF FACT (CRIMES):** See MISTAKE OF FACT.

206. **DEFENSE of MISTAKE OF LAW (CRIMES):** See MISTAKE OF LAW.
207. **DEFENSE of OTHERS (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect the safety of others. Jurisdictions are split when a defendant mistakenly acts to protect an aggressor in a fight. Under the STEPS-INTO-THE-SHOES view the defendant steps into the shoes of the aggressor and is not privileged to act to defend the aggressor in a fracas. Under the REASONABLE APPEARANCES view the defendant is privileged to act based on reasonable appearances, even if he acts to protect the aggressor in a fracas mistakenly believing he is aiding the victim of aggression. (See AGGRESSOR.)
208. **DEFENSE of PREVENTION OF CRIME (CRIMES):** See PREVENTION OF CRIME.
209. **DEFENSE of PROPERTY (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect his own property or the property of others. But deadly force can never be used to protect property because it is NOT reasonable. Defense of property is never a defense to murder, but a MISTAKE OF FACT may be a reasonable alternative. (see NECESSITY, MISTAKE OF FACT.)
210. **DEFENSE of SELF-DEFENSE (TORTS/CRIMES):** See SELF-DEFENSE.
211. **DEPRAVED HEART MURDER (CRIMES):** Depaved Heart Theory is a form of malice aforethought for murder where the defendant 1) deliberately created extreme risks to human life OR deliberately breached a pre-existing duty to protect others from extreme risks with 2) awareness of the risks and 3) a conscious disregard for the risks.
212. **DURESS (CRIMES):** Duress is the criminal defense that the defendant was forced to commit the crime charged for purposes of self-defense, defense of others or defense of property. It is a possible defense claim for any crime except murder.
213. **EMBEZZLEMENT (CRIMES):** Embezzlement is the crime of intentional trespassory conversion of personal property of another by one entrusted with lawful possession. Modernly defined by statute as THEFT. (see ROBBERY, LARCENY, FALSE PRETENSES.)
214. **ENTRAPMENT (CRIMES):** Entrapment is a defense claim that the defendant's criminal intent was the product of improper police behavior. Jurisdictions are split. Under the MAJORITY VIEW entrapment is not a valid defense if the defendant was predisposed to commit the crime charged. Under a MINORITY view entrapment is a valid defense if outrageous police conduct instigated the crime.
215. **FACTUAL IMPOSSIBILITY (CRIMES):** An act is not a “substantial step” sufficient to charge an attempted crime, regardless of criminal intent, if the act done could never result in a criminal result under any reasonable circumstance (e.g. it is not to stick pins in a voodoo doll even if the defendant sincerely believes it will work). (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY and MISTAKE OF LAW.)

216. **FALSE PRETENSES (CRIMES):** False pretenses is the crime of obtaining title to the property of another with an intent to permanently deprive by means of intentionally misrepresenting facts. Modernly defined by statute as THEFT. (see ROBBERY, EMBEZZLEMENT, LARCENY.)
217. **FELONY (CRIMES):** A felony is a crime for which the maximum possible penalty could exceed one year in prison. Under the common law the recognized felonies were murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary [MR & MRS LAMB].
218. **FELONY MURDER RULE (CRIMES):** The Felony Murder Rule holds that the intent to commit an inherently dangerous felony is sufficient malice aforethought that any unlawful homicide that occurs as a result may be charged as a MURDER. Under the REDLINE RULE many States hold that the killing of a criminal accomplice by any party other than another criminal accomplice is not chargeable as murder under the Felony Murder Rule. For the Felony Murder Rule to apply a death must result from acts done within the RES GESTAE of the inherently dangerous felony, the sequence of events beginning with the first substantial step toward commission and ending when the defendants have left the scene of the crime and reached a place of relative safety. (see MURDER, REDLINE RULE.)
219. **GENERAL INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. General intent crimes require the prosecution to prove the defendant intentionally committed an act that caused a criminal result. There must be an intentional act producing a criminal result but there is no requirement to prove the defendant intended to cause that criminal result. VOLUNTARY INTOXICATION is never a defense to a general intent crime, and for MISTAKE OF FACT to be a defense, it must be a reasonable mistake. The general intent crimes are BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS other than those based solely on intent to kill. All others are specific intent crimes. (See VOLUNTARY INTOXICATION, MISTAKE OF FACT, SPECIFIC INTENT.)
220. **GROSS NEGLIGENCE: (TORTS/CRIMES):** Gross negligence is the deliberate breach of a pre-existing duty. If it causes others to be exposed to extreme risks resulting in harm it may be called criminal negligence.
221. **HOMICIDE (CRIMES):** Homicide is the killing of a human being by another human being. A human being is generally a person that has been born alive and has not yet died.
222. **INFANCY (CRIMES):** Under the common law there was a CONCLUSIVE PRESUMPTION that a child under seven years of age could not form criminal intent, a REBUTTABLE PRESUMPTION that a child between seven and fourteen could not form criminal intent, and that a child over fourteen was able to form criminal intent.
223. **INHERENTLY DANGEROUS FELONY (CRIMES):** At common law the recognized felonies were Murder, Rape, Manslaughter, Robbery, Sodomy, Larceny, Arson, Mayhem and Burglary [MR & MRS LAMB]. All of these except manslaughter and larceny were considered to be “deliberate and inherently dangerous felonies”, and under the FELONY-MURDER RULE a homicide caused by deliberate commission of an inherently dangerous felony could be charged as a murder. Modernly the old common law crime of “mayhem” has been totally replaced by a very different crime, and the crime of “sodomy” has been absorbed

into the crime of “rape”. Consequently, the only remaining “inherently dangerous felonies” recognized modernly (other than what might be set forth by statute) are Burglary, Arson, Rape, and Robbery [BARR].

224. **INSANITY (CRIMES):** Under the M'NAUGHTEN RULE it is a complete defense if a defendant suffered from a disease of the mind such that at the time of the crime he was unable to know the nature and quality of his acts (didn't know what he was doing) or else that they were wrong (didn't know he was doing a wrongful thing.) Subsequently, under the IRRESISTIBLE IMPULSE RULE the insanity defense was extended to those that knew what they were doing, and that it was wrong, but could not control themselves.
225. **INTENT TO KILL (CRIMES):** Intent to kill means a willful, deliberate intent to kill a human being. Only two crimes require the prosecution to prove intent to kill, ATTEMPTED MURDER and VOLUNTARY MANSLAUGHTER. No other crimes require proof of intent to kill.
226. **INTENTIONAL ACT (TORTS/CRIMES):** An intentional act is one done for the purpose or with knowledge with reasonable certainty that a result will occur. For a GENERAL INTENT crime the prosecution must prove the defendant intended to commit a criminal act but does not have to prove that a criminal result was intended. For a SPECIFIC INTENT crime the prosecution must prove the defendant acted intending to produce a criminal result. (see GENERAL INTENT, SPECIFIC INTENT.)
227. **INTOXICATION DEFENSE (CRIMES):** Involuntary intoxication can ALWAYS be raised as a criminal defense. Voluntary intoxication can only be raised as a defense to SPECIFIC INTENT crimes, and cannot be raised as a defense to GENERAL INTENT crimes.
228. **INVOLUNTARY MANSLAUGHTER (CRIMES):** Involuntary manslaughter is the crime of unintentional homicide caused by criminal negligence, recklessness (a.k.a. RECKLESS HOMICIDE) or the commission of a malum in se crime which is insufficient to support a charge of murder under the FELONY MURDER RULE (a.k.a. MISDEMEANOR HOMICIDE or MISDEMEANOR MANSLAUGHTER). Often this is said to be “without malice aforethought” but the crime does imply malice aforethought, but in a different form from malice for murder. Involuntary manslaughter is a GENERAL INTENT crime. (See RECKLESS HOMICIDE, MISDEMEANOR HOMICIDE, MURDER, HOMICIDE, FELONY MURDER RULE.)
229. **KIDNAPPING (CRIMES):** 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.
230. **LARCENY (CRIMES):** Larceny is the trespassory taking and carrying away the personal property of another with an intent to permanently deprive. Where possession is gained by misrepresentation it is LARCENY BY TRICK. Modernly larceny is defined by statute under the label of THEFT. (see ROBBERY, EMBEZZLEMENT, FALSE PRETENSES.)



231. **LEGAL IMPOSSIBILITY (CRIMES):** Legal impossibility means an act taken or attempted by the defendant intending to harm some other person or thing is not a particular crime because the actual physical or legal status, condition or state of that other person or thing at the time the defendant acted fails to meet a requirement of law as to that particular crime. On law exam questions this usually involves an attempt to kill a person who is already dead, but it can also involve attempts to steal property that has been abandoned, attempts to steal property that actually belongs to the defendant, etc.
232. **MALICE (CRIMES):** Malice in criminal law is the requisite “mens rea” or “criminal intent” required to be found for a defendant to be guilty of a crime. Malice for murder may be shown by express intent to kill, intent to commit great bodily injury, intent to commit an inherently dangerous felony (see FELONY MURDER RULE) or intent to commit an act with an awareness of and conscious disregard for unreasonable risks to life (see DEPRAVED HEART MURDER.) Malice for arson requires intent to cause a burning for any unlawful or wrongful purpose.
233. **MANSLAUGHTER (CRIMES):** Manslaughter is the crime of unlawful homicide either with intent to kill but without malice aforethought (VOLUNTARY MANSLAUGHTER) or without intent to kill but with malice aforethought insufficient to find MURDER (INVOLUNTARY MANSLAUGHTER.)
234. **MERGER (CRIMES):** A defendant can be CHARGED with and tried for crimes and the LESSER INCLUDED OFFENSES implied by that same crime. But the defendant cannot be CONVICTED and sentenced for both a crime and the lesser included offenses implied by that same crime because the lesser included offenses MERGE into the conviction for the larger crime.
235. **MISDEMEANOR HOMICIDE (CRIMES):** Misdemeanor homicide is a term for INVOLUNTARY MANSLAUGHTER resulting from the commission of a crime insufficient to support a charge of murder under the FELONY MURDER RULE. This is a misnomer because the crime itself is a felony and the crime which causes the death may be a felony. Involuntary manslaughter is a GENERAL INTENT crime. (see FELONY MURDER RULE, MURDER, MANSLAUGHTER, INVOLUNTARY MANSLAUGHTER.)
236. **MISPRISION (CRIMES):** Under very old common law MISPRISION was the crime of knowingly failing to report a crime committed by another person to the police. Modernly there is no generally duty to report crimes to the police and misprision is no longer recognized as a crime.
237. **MISTAKE OF FACT (CRIMES):** A mistake of fact is a valid defense if it negates implied criminal intent. It is a possible defense to both GENERAL and SPECIFIC INTENT crimes unless criminal intent is expressly shown. Any MISTAKE OF FACT is a valid defense if it negates the implied intent to either commit the criminal act charged (GENERAL INTENT crimes) or to cause the criminal result charged (SPECIFIC INTENT crimes). For a GENERAL INTENT crime the mistake must be reasonable, but for SPECIFIC INTENT crimes the mistake must only be actual. A reasonable mistake is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never justifies an otherwise unreasonable mistake. Mistake of fact is never a defense to ATTEMPT if criminal intent is

expressly shown. (see SPECIFIC INTENT, GENERAL INTENT, FACTUAL IMPOSSIBILITY, LEGAL IMPOSSIBILITY, MISTAKE OF LAW.)

238. **MISTAKE OF LAW (CRIMES):** A defendant's mistaken belief about the legality of an intended or completed act does not alter the legality of the act attempted or committed. If the defendant commits or attempts to commit an act believing it to be legal, and it is illegal at the time committed, it is still illegal despite his intent. If the defendant intends an act believing it to be illegal, and it is not illegal at the time committed, it is legal despite his criminal intentions. (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY, FACTUAL IMPOSSIBILITY.)
239. **MURDER (CRIMES):** 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) deliberately creating extreme risks to human life or deliberately breaching a pre-existing duty to protect others from extreme risks with an awareness of and conscious disregard for the risks, 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. Murder is a SPECIFIC INTENT crime when it is based solely on intent to kill. Murder otherwise is a GENERAL INTENT crime.
240. **NECESSITY (CRIMES):** see DEFENSE of OTHERS, DEFENSE of PROPERTY, SELF-DEFENSE.
241. **PASSIVE DEFENSES (TORTS/CRIMES):** Passive defenses are arguments by criminal or tort defendants that the opposing parties (prosecutors or plaintiffs) have failed to meet their burden to prove each required legal element of their stated causes of action (e.g. that the defendant committed battery). (see AFFIRMATIVE DEFENSES.)
242. **PREVENTION OF CRIME (CRIMES):** A person is privileged to act as reasonably necessary to prevent a serious crime from being committed.
243. **PROXIMATE CAUSE (TORTS/CRIMES):** Proximate cause means that a defendant's act actually caused injury that was so direct and natural, close in time and place, by a chain of causation unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability. (see UNFORESEEABLE INTERVENING EVENTS.)
244. **RAPE (CRIMES):** Rape is the crime of intentional sexual intercourse with the slightest penetration without consent. Under the common law RAPE required the victim to be a female and not the wife of the defendant. Modernly RAPE is defined by statute. Rape is a GENERAL INTENT crime, meaning that VOLUNTARY INTOXICATION is never a defense and MISTAKE OF FACT is only a defense if it was reasonable. (see GENERAL INTENT, VOLUNTARY INTOXICATION, MISTAKE OF FACT.)

245. **RECKLESS HOMICIDE (CRIMES):** The crime of INVOLUNTARY MANSLAUGHTER, an unintended homicide caused by deliberate acts that created extreme risks to others, but insufficient to charge murder on depraved heart theory, perhaps because of a lack of awareness or lack of conscious disregard of the risks to human life. “Deliberateness” in creating extreme and obvious dangers distinguishes recklessness from risks created by “ordinary” negligence. For example, street racing is reckless behavior while the inadvertent running of a red light is not. (See INVOLUNTARY MANSLAUGHTER, CRIMINAL NEGLIGENCE, MURDER.)
246. **RECKLESSNESS (TORTS/CRIMES):** Recklessness is the deliberate creation of extreme risks to others. (See RECKLESS HOMICIDE, ACTUAL MALICE.)
247. **REDLINE RULE (CRIMES):** In many States the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony cannot be used as a basis for charging the surviving accomplice with murder under the FELONY MURDER RULE. (see MURDER, FELONY MURDER RULE.)
248. **RES GESTAE (CRIMES):** The res gestae of a crime is the sequence of criminal acts committed by defendants beginning with the first substantial step to commit the crime (at which point the crime has been attempted), and ending when they have left the scene of the crime and reached a place or condition of relative safety. Application of the concept of res gestae is most relevant to the FELONY-MURDER RULE. For defendants to be convicted of murder based on the common law FELONY-MURDER RULE they must commit homicide within the res gestae of an inherently dangerous felony. Modernly the remaining common law inherently dangerous felonies (other than what might be enumerated in a statute) are Burglary, Arson, Rape and Robbery [**BARR**]. (see FELONY-MURDER RULE, INHERENTLY DANGEROUS FELONY.)
249. **ROBBERY (CRIMES):** Robber is a larceny, the trespassory taking and carrying away of personal property of another with intent to permanently deprive, from the person by use of force or fear. (see LARCENY.)
250. **SELF-DEFENSE (TORTS/CRIMES):** A person who is not the aggressor in a fracas is privileged to act as reasonably necessary to protect his or her own safety. This is NOT a defense if the party was the aggressor unless they are no longer the aggressor because they attempted withdrawal from the fracas or the other party escalated the level of violence. (see AGGRESSOR, NECESSITY.)
251. **SOLICITATION (CRIMES):** Solicitation is the crime of urging another person to commit a crime. If the person urged commits the crime, the solicitation merges into the criminal result and cannot be convicted as a separate crime (see CONSPIRACY.)
252. **SPECIFIC INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. Specific intent means that the defendant must act with the intent of producing a SPECIFIC criminal result. VOLUNTARY INTOXICATION and any MISTAKE OF FACT is a possible defense to a specific intent crime if it negates the intent to cause the specific criminal result. All crimes are specific intent except for BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS which do not involve

allegations of intent to kill. All other crimes are specific intent crimes. (see GENERAL INTENT, MISTAKE OF FACT, VOLUNTARY INTOXICATION.)

253. **STATUTORY RAPE (CRIMES):** Statutory rape is the crime of having sexual intercourse with a minor below the statutory ‘age of consent’. It is a strict liability crime and a MISTAKE OF FACT, whether reasonable or unreasonable, is generally not a defense. (see MISTAKE OF FACT.)
254. **TRANSFERRED INTENT (CRIMES):** There is NO transferred intent in criminal law. Crimes are offenses against society and not just individuals. If a person acts with intent to cause a criminal result, and does cause a criminal result, they can be charged with the crime that resulted, even if it was a different crime or criminal result from what they originally intended.
255. **TRESPASSORY (TORTS/CRIMES):** “Trespassory” means an act done “without permission”.
256. **UNFORESEEABLE INTERVENING EVENTS (TORTS/CRIMES):** If a subsequent act by a third party, or natural event (“act of God”) is also an actual cause of the injury suffered by a plaintiff or victim, it will generally be viewed as an “unforeseeable intervening event” that terminates proximate cause and ends the liability of defendants that acted earlier. But negligence by a third party is presumed to be foreseeable and will not terminate proximate causation or liability. Criminal acts and intentional torts by third parties are presumed to be unforeseeable and will terminate all liability of defendants that acted earlier UNLESS the defendant knew the subsequent criminal act or intentional tort by the third party was likely to occur. (see PROXIMATE CAUSE.)
257. **VOLUNTARY INTOXICATION (CRIMES):** Defendants may claim a lack of criminal intent if they were so intoxicated they were unable to form the SPECIFIC INTENT necessary for a specific intent crime charged. But voluntary intoxication is never a defense to a GENERAL INTENT crime (see SPECIFIC INTENT, GENERAL INTENT.)
258. **VOLUNTARY MANSLAUGHTER (CRIMES):** The crime of 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. Intent to kill must be proven. Voluntary manslaughter is a SPECIFIC INTENT crime. (See MURDER, HOMICIDE.)
259. **WITHDRAWAL (CRIMES):** Members of CONSPIRACIES who WITHDRAW from the conspiracy by 1) giving notice that they will no longer help to further the conspiracy goal and 2) acting to thwart the remaining conspirators from attaining the conspiracy goal generally cannot be charged with subsequent crimes committed by other conspirators based on CONSPIRACY LIABILITY. Courts vary widely with regard to the requirements and extent of this defense. Some cases have allowed withdrawal to be a defense to both conspiracy liability and ACCOMPLICE LIABILITY. In some Courts the defense of withdrawal requires the defendant to report the conspiracy to the police. And some Courts view withdrawal as a defense to the crime of conspiracy itself rather than just a defense to subsequent crimes by co-conspirators. (see CONSPIRACY LIABILITY, ACCOMPLICE LIABILITY.)

## **Section 4: Rules and Definitions for CIVIL PROCEDURE**

The following rules are the **Federal Rules of Civil Procedure** with limited comparison to State rules. This material is NOT tested on the **Multistate Bar Exam**.

260. **AFFIRMATIVE DEFENSE (CIVIL PROCEDURE):** An affirmative defense is a claim by DEFENDANTS that even if everything PLAINTIFFS claim in COMPLAINTS is true, the court should still find in favor of the DEFENDANTS because their acts were legally justified. For example, the defendants may claim they acted out of public necessity. When defendants raise affirmative defenses they have the burden of providing the evidence necessary to prove them.
261. **ANSWER (CIVIL PROCEDURE):** An answer is a legal pleading filed by a DEFENDANT in response to a COMPLAINT. Under the Federal Rules of Civil Procedure (FRCP) it must be served within 20 DAYS from the date a complaint is served, and it must state all AFFIRMATIVE DEFENSES. Allegations of a complaint that are not DENIED are DEEMED ADMITTED. No evidence may be presented at trial to challenge such an admission, but admissions made in discovery may be later contradicted by evidence at trial. See COMPLAINT, PLAINTIFF.
262. **CAUSE OF ACTION (CIVIL PROCEDURE):** A cause of action is an allegation made by a PLAINTIFF or PETITIONER upon filing a COMPLAINT or PETITION (“initial moving papers”) asking the Court to act to award a judgment or provide other relief.
263. **CLAIM PRECLUSION (CIVIL PROCEDURE):** 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.
264. **COLLATERAL ATTACK (CIVIL PROCEDURE):** The propriety of a court judgment will not generally be allowed other than by appeal. An exception is an objection that the original court lacked jurisdiction. A challenge of SUBJECT MATTER JURISDICTION can always be raised. A challenge of PERSONAL JURISDICTION cannot be raised if the party raising the issue has submitted to or prevailed upon the power of the prior court. (See PERSONAL JURISDICTION, SUBJECT MATTER JURISDICTION.)
265. **COLLATERAL ESTOPPEL (CIVIL PROCEDURE):** See ISSUE PRECLUSION.
266. **COMPLAINT (CIVIL PROCEDURE):** Litigation is initiated by a party (a MOVANT) filing either a complaint or a PETITION. Both are legal pleadings (“initial moving papers”). Complaints are filed by PLAINTIFFS alleging wrongful acts by DEFENDANTS which either give the plaintiffs a right to be awarded LEGAL REMEDIES or else justify a Court of equity in crafting EQUITABLE REMEDIES for them. Under the WELL-PLED COMPLAINT rules of federal courts complaints must specifically state why the court has SUBJECT MATTER JURISDICTION but only has to allege general facts that would put defendants on notice of the plaintiff’s complaint. This is called NOTICE PLEADING. In State courts complaints do not have to show why the court has subject matter jurisdiction because State courts have general jurisdiction. But State courts often require complaints to state specific facts and reference to statutes and laws which would support the plaintiff’s position. This is called STATUTE

PLEADING. A complaint that fails to meet court requirements will be dismissed by the Court if the defendant files a MOTION TO DISMISS FOR FAILURE TO STATE A CASE (called a DEMURRER in some State Courts). Many proceedings (e.g. family law actions, probate actions) are initiated by the filing of PETITIONS rather than complaints. See ANSWER, DEFENDANT, MOVANT, PETITION, SUBJECT MATTER JURISDICTION, NOTICE PLEADING, STATUTE PLEADING, MOTION TO DISMISS FOR FAILURE TO STATE A CASE, DEMURRER, WELL-PLED COMPLAINT.

267. **COMPULSORY JOINDER (CIVIL PROCEDURE):** Joinder of claims is required where they arise out of a “common nucleus of operative fact”. Joinder of parties is only required when their participation is necessary for a just resolution of the dispute. And if joinder of a necessary party would destroy diversity jurisdiction in federal court, the matter must be dismissed. See PERMISSIVE JOINDER.

268. **CONTINUOUS AND SYSTEMATIC ACTIVITIES (CIVIL PROCEDURE):** Continuous and systematic activities (CASA) within a State by DEFENDANTS may constitute sufficient MINIMUM CONTACTS for a federal court in that State to establish proper PERSONAL JURISDICTION over them. See PERSONAL JURISDICTION, MINIMUM CONTACTS.

269. **DEFENDANT (CIVIL PROCEDURE):** A defendant is a person a PLAINTIFF accuses of wrongdoing in a COMPLAINT. Defendants respond to complaints by filing an ANSWER or a DEMURRER.

270. **DEMURRER (CIVIL PROCEDURE):** a demurrer is a response filed in a State court by a DEFENDANT in response to a COMPLAINT as an alternative to filing an ANSWER. A demurrer is a claim by the defendant that the complaint should be dismissed by the Court because it fails to meet the requirements for a proper complaint. If a demurrer is granted by the Court the complaint will be dismissed without PREJUDICE. In federal court defendants may file a MOTION TO DISMISS FOR FAILURE TO STATE A CASE, which see.

271. **DIVERSITY JURISDICTION (CIVIL PROCEDURE):** A federal court has SUBJECT MATTER JURISDICTION if each and every plaintiff is DOMICILED in a different State from each and every defendant and the plaintiffs present a good faith claim for over \$75,000. State courts have general jurisdiction over all matters.

272. **DOMICILE (CIVIL PROCEDURE):** A person’s domicile is the place the person intends to return to and reside indefinitely.

273. **ERIE DOCTRINE (CIVIL PROCEDURE):** Under the Erie Doctrine which developed in the federal courts in the aftermath of *Erie Railroad v. Tompkins*, the SUBSTANTIVE LAW of the proper forum State is now applied in DIVERSITY actions, including statutes of limitation, but procedural matters, including the right to a jury trial, are governed by the Federal Rules of Civil Procedure and the 7<sup>th</sup> Amendment. (See SUBSTANTIVE LAW.)

274. **FEDERAL QUESTION JURISDICTION (CIVIL PROCEDURE):** A federal court has SUBJECT MATTER JURISDICTION if the plaintiff states an issue arising under the U.S. Constitution, a federal law or a federal treaty.

275. **FORUM NON CONVENIENS (CIVIL PROCEDURE):** A motion for change of venue for convenience purposes is referred to as a claim of “forum non conveniens”. Under the ERIE DOCTRINE (which see) an action in federal court based on DIVERSITY JURISDICTION which has a change of VENUE for forum non conveniens may be moved to a different State, but the SUBSTANTIVE LAW of the first State where the action was filed will still apply. In contrast, an action based on diversity jurisdiction which is moved to a different State because it was originally filed in an improper venue will be determined by the substantive law of the second State to which it was moved. See ERIE DOCTRINE, DIVERSITY JURISDICTION, VENUE.
276. **FORUM RELATED CAUSE OF ACTION (CIVIL PROCEDURE):** A forum related cause of action (FRCA) establishes sufficient MINIMUM CONTACTS over DEFENDANTS for a federal court to have proper PERSONAL JURISDICTION over them. See MINIMUM CONTACTS, PERSONAL JURISDICTION.
277. **ISSUE PRECLUSION (CIVIL PROCEDURE):** A party is precluded (barred) from arguing an issue that has been actually, fully, and fairly litigated in a prior action if it was essential to the prior judgment, and the party (raising the issue the second time) was a party or in PRIVITY with a party to the prior litigation. This is called the COLLATERAL ESTOPPEL.
278. **JURY TRIAL (CIVIL PROCEDURE):** The 7th Amendment provides for the right to a jury trial in suits at law and it has been held to be a fundamental right in federal court. 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.
279. **MINIMUM CONTACTS (CIVIL PROCEDURE):** Under *International Shoe* a federal court has proper PERSONAL JURISDICTION over DEFENDANTS who have sufficient minimum contacts with the State within which the federal court is located even if they are not present or domiciled in the State and do not consent to the court’s jurisdiction. The required level of minimum contacts may be established by CONTINUOUS AND SYSTEMATIC ACTIVITIES by the defendants within the State or because the PLAINTIFF brings a FORUM RELATED CAUSE OF ACTION.
280. **MOTION TO COMPEL (CIVIL PROCEDURE):** A motion to compel is usually a motion seeking a court order compelling a party to provide evidence. All relevant, non-privileged evidence is discoverable, whether it would be admissible or not. Evidence that 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.
281. **MOTION FOR DIRECTED VERDICT (Judgment as Matter of Law): (CIVIL PROCEDURE):** A motion for directed verdict asks the Court (judge) to find in favor of the movant before the jury deliberates the matter. It must be made before the jury retires to deliberate. The movant must argue that the Court should rule in favor of the movant (as to the entire matter or some issues raised) because the respondent failed to present any evidence to prove an essential element of the COMPLAINT or AFFIRMATIVE DEFENSE.

282. **MOTION TO DISMISS FOR FAILURE TO STATE CAUSE OF ACTION (CIVIL PROCEDURE):** Under the WELL-PLED COMPLAINT RULE the complaint must argue SUBJECT MATTER JURISDICTION, PERSONAL JURISDICTION and a proper CAUSE OF ACTION. A motion for dismissal asks the Court to dismiss the complaint because it fails to meet the legal requirements. In some State courts this is referred to as a DEMURRER.
283. **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) (CIVIL PROCEDURE):** A JNOV motion asks the Court to issue a judgment in favor of the movant after the jury has found against them. It 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.
284. **MOTION FOR NEW TRIAL (CIVIL PROCEDURE):** A motion for new trial must be made within 10 days after trial and requires that the trial verdict be against the manifest weight of the evidence.
285. **MOTION FOR SUMMARY JUDGMENT (CIVIL PROCEDURE):** A motion for summary judgment presents a claim that no genuine issue of material fact is in dispute and the movant is entitled to judgment as a matter of law.
286. **MOVANT (CIVIL PROCEDURE):** Movants are parties that have asked the court to act on their behalf. Their requests may be to award them remedies, grant them motions, or find in their favor on issues. When litigation is started by the filing of a COMPLAINT or PETITION the PLAINTIFFS or petitioners are the initial movants (initial moving parties filing the “moving papers”). But after that DEFENDANTS or RESPONDENTS (to those petitions) may ask the Court for affirmative relief and in that case they become the movants with respect to their own requests. In almost all matters movants have the burden of producing the evidence and argument that supports their request of the Court.
287. **NOTICE (CIVIL PROCEDURE/CONSTITUTIONAL LAW):** The due process guarantees of the 5<sup>th</sup> and 14<sup>th</sup> Amendments require that a party be given notice of the pendency of an action. *Mullane* established a jurisdictional requirement that notice be reasonably calculate to apprise interested parties of the pendency of the action and afford them a hearing to present objections. (See DUE PROCESS, PROCEDURAL DUE PROCESS, PERSONAL JURISDICTION.)
288. **NOTICE PLEADING (CIVIL PROCEDURE):** The term “notice pleading” means that in federal courts a COMPLAINT only has to allege general facts that would put defendants on notice of the plaintiff’s complaint. Compare to STATUTE PLEADING.
289. **OUTCOME DETERMINATION TEST (CIVIL PROCEDURE):** The “outcome determination test” was created by the federal courts following the case of *Erie Railroad v. Tompkins*. Under this concept SUBSTANTIVE LAW, law that determined the outcome of the case, was used in federal courts in diversity actions, and that included State procedural rules. But after the Federal Rules of Civil Procedure were established this approach was abandoned. Today Federal Rules of Civil Procedure are used in federal courts in diversity actions. See ERIE DOCTRINE.



290. **PENDENT JURISDICTION (CIVIL PROCEDURE):** The term “pendent jurisdiction” means a federal court with proper subject matter jurisdiction based on DIVERSITY or FEDERAL QUESTION also has jurisdiction over associated State-law claims arising from the same nucleus of common fact or which reasonable would be expected to be heard at the same time, even if the Court otherwise would not have jurisdiction.
291. **PERMISSIVE JOINDER (CIVIL PROCEDURE):** Permissive joinder of claims means claims can be joined together if it is reasonable to expect them to be litigated at the same time. Joinder of PARTIES is generally allowed only when the claims against them arise out of the same “common nucleus of operative fact” as the original claim giving rise to litigation. That term generally means the “same event, sequence of events, transactions or other activities” that the central litigation is based on.
292. **PERSONAL JURISDICTION (CIVIL PROCEDURE):** Personal jurisdiction means that it does not violate the due process guarantees of the 5<sup>th</sup> Amendment for a federal court to exercise jurisdiction over a defendant. Under *Pennoyer v. Neff* and *International Shoe* federal courts have proper personal jurisdiction (also called TERRITORIAL JURISDICTION) over a defendant if 1) the defendant consents, 2) is present in the State at the time they are served with notice of the litigation, 3) is domiciled in the State or 4) has sufficient MINIMUM CONTACTS with the State that jurisdiction would “not offend traditional notions of fair play and substantial justice.” Minimum contacts exist if there is a FORUM RELATED CAUSE OF ACTION [Mnemonic = FRCA], if the defendant has had CONTINUOUS AND SYSTEMATIC ACTIVITIES [Mnemonic = CASA] in the State, or has “availed himself of the protections of forum State laws”. See DOMICILE, MINIMUM CONTACTS, FORUM RELATED CAUSE OF ACTION, CONTINUOUS AND SYSTEMATIC ACTIVITIES.
293. **PETITION (CIVIL PROCEDURE):** A petition is an initial moving paper (a legal pleading) asking the Court to grant the PETITIONER relief in litigation which does not necessarily accuse a DEFENDANT of wrongdoing. While tort and breach of contract actions generally begin with a COMPLAINT filed by a PLAINTIFF accusing DEFENDANTS of wrongful acts, the moving papers in family law actions, probate actions, and requests for injunctive relief are generally called petitions filed by PETITIONERS. If petitions accuse some other party of wrongdoing those people are generally called RESPONDENTS rather than defendants. Often in these matters there is no right to a jury trial and all matters are pled before a judge alone. See COMPLAINT, PLAINTIFF.
294. **PETITIONER (CIVIL PROCEDURE):** A petitioner is a person who files a PETITION with the Court.
295. **PLAINTIFF (CIVIL PROCEDURE):** A plaintiff is a person who files a COMPLAINT with the Court, usually in a tort or breach of contract action, accusing a DEFENDANT of wrongdoing.
296. **PREJUDICE (CIVIL PROCEDURE):** The term “prejudice” refers to whether or not a Court will allow a MOVANT to request affirmative relief based on the same facts a second time after the request has been dismissed or denied by the Court. If a complaint, motion, defense, etc. is dismissed “without prejudice” the MOVANT is free to file the same moving papers again (assuming the matter is not time-barred). If the complaint, motion, defense, etc. is dismissed “with prejudice” the movant can never ask for relief based on the same facts again.

297. **PRIVITY (CIVIL PROCEDURE):** Parties are said to be “in privity” if the actions of one are legally binding on the other. For example, business partners represent the partnership, trustees represent a trust, agents represent principals, etc. See ISSUE PRECLUSION.
298. **RES JUDICATA (CIVIL PROCEDURE):** The term “res judicata” means “a matter that has been decided” by the courts. If any legal claim raised by a party as a result of an “event” has been fully litigated by the courts and a judgment issued, that makes it “a matter that has been decided” and that claim or any other claim arising out of that same “event” is usually barred from further litigation under the principal of CLAIM PRECLUSION.
299. **RESPONDENT (CIVIL PROCEDURE):** A respondent is a person who files a RESPONSE with the Court to a PETITION filed by a PETITIONER. Responses often oppose the relief asked for by the petitioner. In that case the response is also called an “opposition”. Another use of the term “respondent” is simply to refer to a person who responds to any other request of the Court by a MOVANT.
300. **RESPONSE (CIVIL PROCEDURE):** A response is a legal pleading filed with the Court in response to, and usually in opposition to, a PETITION filed with the Court by a petitioner.
301. **STATUTE PLEADING (CIVIL PROCEDURE):** The term “statute pleading” means that in State courts a COMPLAINT often must state specific facts and reference to statutes and laws which would support the plaintiff’s position. Compare to NOTICE PLEADING.
302. **SUBJECT MATTER JURISDICTION (CIVIL PROCEDURE):** The term “subject matter jurisdiction” means a federal court is limited to cases that fall into two situations: 1) DIVERSITY jurisdiction and 2) FEDERAL QUESTION jurisdiction. (See DIVERSITY JURISDICTION, FEDERAL QUESTION.) Under the WELL-PLED COMPLAINT RULE a plaintiff in federal court must plead and present facts showing why the federal court has subject matter jurisdiction.
303. **SUBSTANTIVE LAW (CIVIL PROCEDURE):** Under the original OUTCOME DETERMINATION TEST a law was held to be substantive if it determined the outcome of the case. But following the adoption of the Federal Rules of Civil Procedure it is 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. See ERIE DOCTRINE.
304. **TERRITORIAL JURISDICTION (CIVIL PROCEDURE):** See PERSONAL JURISDICTION.

305. **VENUE (CIVIL PROCEDURE):** The proper VENUE for an action is anyplace one defendant resides if all defendants reside in the same State or else where the cause of action arose. But if there is no district in which an action can otherwise be brought, then in a DIVERSITY action venue is proper in any State where PERSONAL JURISDICTION can be found over any defendant, and in a FEDERAL QUESTION action, venue is proper in any State where any defendant can be found. If venue is changed to a different State because the original venue was improper the SUBSTANTIVE LAW of the second State is applied. Under ERIE, if venue is changed to a different State for purposes of FORUM NON CONVENIENS the SUBSTANTIVE LAW of the first State continues to be applied to the action. (See ERIE DOCTRINE, SUBSTANTIVE LAW, FORUM NON CONVENIENS.)
306. **WELL-PLED COMPLAINT RULE (CIVIL PROCEDURE):** A COMPLAINT filed in federal court must plead facts showing the court has subject matter jurisdiction and raise a cause of action for which the law will provide relief. (See FEDERAL QUESTION JURISDICTION.)

## Section 5: Rules and Definitions for CRIMINAL PROCEDURE

The following rules are the law tested on the **Multistate Bar Exam**.

307. **4<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** The 4<sup>th</sup> Amendment protects the people from unreasonable search and seizure by the government and requires a search warrant particularizing the place to be searched and the evidence sought issued by a neutral magistrate and based on a showing of probable cause (which see): Extended to the States by the 14<sup>th</sup> Amendment. A fundamental right.
308. **5<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** Extended to the States by the 14<sup>th</sup> Amendment, the 5<sup>th</sup> Amendment prohibits forced self-incrimination and DOUBLE JEOPARDY (which see): A fundamental right. See MIRANDA.
309. **6<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** The 6<sup>th</sup> Amendment, extended to the States by the 14<sup>th</sup> Amendment, guarantees an accused the right to counsel. See MIRANDA, MASSIAH, RIGHT TO COUNSEL.
310. **8<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE):** The 8<sup>th</sup> Amendment prohibits excessive bail, excessive fines, or cruel and unusual punishment. It is partially extended to the States by the 14<sup>th</sup> Amendment.
311. **AUTO EXCEPTIONS (CRIMINAL PROCEDURE):** Police may search an automobile, including all compartments and containers within it, without a warrant if the car is LEGALLY STOPPED (which see.) A warrant exception.
312. **BORDER (CRIMINAL PROCEDURE):** Police may stop and search cars and people at a border without PROBABLE CAUSE and without a warrant because of national security considerations. A border includes any entry point into the nation, including airports, docks and desert areas inland from the border that can only be reached by a border crossing. A warrant exception.
313. **CHECKPOINT (CRIMINAL PROCEDURE):** Autos may be LEGALLY STOPPED at a checkpoint which is established for purposes of auto safety, immigration control, or to search for suspects or witnesses to a crime that has been recently committed in the same area.
314. **CONSENSUAL SEARCH (CRIMINAL PROCEDURE):** Police may search without a warrant if CONSENT is willingly given for the search by someone with legal capacity and authority to give consent. A warrant exception.
315. **CUSTODIAL INTERROGATION (CRIMINAL PROCEDURE):** A custodial interrogation is a police questioning of a person in a setting where the person reasonably does not feel free to leave or to tell the police to leave. In this setting the police are obligated to give the person a MIRANDA WARNING.

316. **DOUBLE JEOPARDY (CRIMINAL PROCEDURE):** The 5<sup>th</sup> Amendment prohibits the same sovereign from trying 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.
317. **ENTRY WITHOUT WARRANT TO ARREST (CRIMINAL PROCEDURE):** Police may enter the home of an accused without a warrant to make an otherwise lawful arrest, but a warrant is needed to enter the home of a third party to make an arrest absent some other justification. A warrant exception.
318. **EXCLUSIONARY RULE (CRIMINAL PROCEDURE):** 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. Even if the exclusionary rule is applied, there are certain EXCLUSIONARY RULE EXCEPTIONS (which see.)
319. **EXCLUSIONARY RULE EXCEPTIONS (CRIMINAL PROCEDURE):** The EXCLUSIONARY RULE will not bar admission of improperly obtained evidence 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. See EXCLUSIONARY RULE.
320. **EXIGENT CIRCUMSTANCES (CRIMINAL PROCEDURE):** Police can search without a warrant if the delay necessary to obtain a warrant would pose a substantial risk of injury or the loss of evidence. A warrant exception.
321. **FRUIT OF THE POISONOUS TREE (CRIMINAL PROCEDURE):** The exclusionary rule may be applied to deny admission of evidence, even though obtained by proper means, if existence and location were determined by improper means.
322. **HOT PURSUIT (CRIMINAL PROCEDURE):** Police can enter property without a warrant if they are in immediate and rapid pursuit of a fleeing suspect. A warrant exception.
323. **LAWFUL ARREST (CRIMINAL PROCEDURE):** An arrest of a person by police is lawful if for a misdemeanor or breach of peace in the presence of the police or for a felony police have reasonable evidence to believe was committed by the person. (See ENTRY FOR ARREST.)
324. **LEGALLY STOPPED AUTOS (CRIMINAL PROCEDURE):** Police may legally stop an automobile and afterward search it in its entirety under the AUTO EXCEPTIONS (which see) if they have PROBABLE CAUSE, if it is at a BORDER, or at a CHECKPOINT where cars are stopped on a uniform or systematic basis. (See PROBABLE CAUSE, BORDER.)

325. **MASSIAH (CRIMINAL PROCEDURE):** Police are prohibited from further interrogation of an accused about the accused crime without legal counsel present after the accused exercises her right to counsel (See RIGHT TO COUNSEL.) Further, police cannot elicit incriminating statements or secretly record the statements of the accused when he is outside of custody pending trial after the right to counsel has been exercised. However police can use testimony of independent witnesses about any incriminating statements by the accused that were not elicited by police action.
326. **MIRANDA (CRIMINAL PROCEDURE):** Under the 5<sup>th</sup> and 6<sup>th</sup> Amendments, extended to the States by the 14<sup>th</sup> Amendment, forced self-incrimination is prohibited and the right to counsel guaranteed. As a prophylactic measure 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.
327. **OPEN FIELDS DOCTRINE (CRIMINAL PROCEDURE):** It is not an unreasonable search for police to simply observe evidence in "open fields" or any place where the accused has no reasonable expectation of privacy. A warrant exception. (See PLAIN VIEW.)
328. **PLAIN VIEW (CRIMINAL PROCEDURE):** Police can seize evidence without a warrant under the OPEN FIELDS DOCTRINE (which see) if it is observed by reasonable means from a legal vantage point. A means of observation is reasonable if it does not violate reasonable expectations of privacy. A means of observation is reasonable if it is commonly used for observation by private citizens such that the accused should have reasonably anticipated she might be observed in such a manner. A vantage point is legal if police reached it to observe the accused in a legal manner, including by consent. Often considered a "warrant exception" it is arguable evidence seen in plain view is not even the result of a "search" under the 4<sup>th</sup> Amendment.
329. **PROBABLE CAUSE (CRIMINAL PROCEDURE):** Probable cause means there is a REASONABLE SUSPICION that a crime has been committed and (for an arrest) that the defendant committed it or (for a search warrant) evidence of the crime will be found in a place to be searched.
330. **PROTECTIVE SWEEP (CRIMINAL PROCEDURE):** Police may do a cursory search of the immediate area around them without a warrant if there is an articulable reason to believe it is necessary for safety. A major warrant exception.
331. **PUBLIC PROTECTION EXCEPTION (CRIMINAL PROCEDURE):** Spontaneous questions concerning the location of weapons, hazards, or the nature of injuries suffered by victims of a crime posed to a criminal suspect immediately upon confrontation by police in a situation that poses possible harm to officers, victims or members of the general public, are not "unreasonable" and not violations of the general Miranda Rule that suspects held in custodial interrogation must be given the Miranda warning before being questioned.

332. **REASONABLE EXPECTATION OF PRIVACY (CRIMINAL PROCEDURE):** A defendant lacks STANDING to invoke the EXCLUSIONARY RULE unless the police conduct violated his own reasonable expectations the evidence in question would not be discovered by others. For example, if the defendant disavowed ownership of some property (e.g. a car) he thereafter cannot object to the police searching that same property because his disavowal left him without any reasonable expectation the police would not search the property. (See STANDING.)
333. **RIGHT TO COUNSEL (CRIMINAL PROCEDURE):** The 6th Amendment, extended to the States by the 14<sup>th</sup> Amendment, guarantees an accused the right to request counsel. An accused has a right to request counsel during custodial interrogation, at arraignment, at a preliminary hearing, when in a physical lineup and at the entry of a plea. See 6<sup>th</sup> AMENDMENT, MASSIAH.
334. **SEARCH INCIDENT TO A LAWFUL ARREST (CRIMINAL PROCEDURE):** Police may conduct a non-intrusive search of a lawfully arrested (which see) person, the immediate "lurch area" around the person, and the person's immediate belongings without a warrant. A warrant exception.
335. **SEARCH WARRANTS (CRIMINAL PROCEDURE):** Under the 4<sup>th</sup> Amendment, extended to the States by the 14<sup>th</sup> 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 (which see):
336. **STANDING (CRIMINAL PROCEDURE):** Under the rules of criminal procedure a defendant can only request exclusion of evidence (See EXCLUSIONARY RULE) improperly obtained by the police if the police misconduct violated the defendant's own REASONABLE EXPECTATION OF PRIVACY (which see): Therefore, a defendant cannot protest police conduct that violated the rights of others. However see FRUIT OF THE POISONOUS TREE as a possible counter-argument.
337. **TERRY STOP (CRIMINAL PROCEDURE):** Police may pat and frisk a person without a warrant if searching for WEAPONS based on an articulable reason to believe it is necessary for safety. A warrant exception.

## Section 6: Rules and Definitions for CONSTITUTIONAL LAW

The following rules are the law tested on the **Multistate Bar Exam**.

338. **1<sup>ST</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 1<sup>st</sup> Amendment, extended to the States by the 14<sup>th</sup> Amendment, prohibits the government from passing laws that 1) respect an establishment of religion (the ESTABLISHMENT CLAUSE) or infringing on the free exercise of religion (the FREE EXERCISE CLAUSE), 2) restraining the freedom of speech, press, or expression, or 3) restraining freedom of assembly and petition of the government. By interpretation this has been held to encompass freedom of association and travel. These are fundamental rights. (See RELIGION, SPEECH, ASSEMBLY.)
339. **2<sup>ND</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 2<sup>nd</sup> Amendment guarantees the right of the people to keep and bear arms. Not extended to the States by the 14<sup>th</sup> Amendment and not a fundamental right.
340. **4<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** The 4<sup>th</sup> Amendment protects the people from unreasonable search and seizure by the government and requires a search warrant particularizing the place to be searched and the evidence sought issued by a neutral magistrate and based on a showing of probable cause (which see): Extended to the States by the 14<sup>th</sup> Amendment. A fundamental right.
341. **5<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** Extended to the States by the 14<sup>th</sup> Amendment, the 5<sup>th</sup> Amendment prohibits forced self-incrimination and DOUBLE JEOPARDY (which see): A fundamental right. See MIRANDA.
342. **6<sup>TH</sup> AMENDMENT (CRIMINAL PROCEDURE/CONSTITUTIONAL LAW):** The 6<sup>th</sup> Amendment, extended to the States by the 14<sup>th</sup> Amendment, guarantees an accused the right to counsel. See MIRANDA, MASSIAH, RIGHT TO COUNSEL.
343. **7<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 7<sup>th</sup> Amendment guarantees the right to a jury trial in suits "at law". This has been held to be a fundamental right in federal court only, but the right does not extend to suits at equity and has not been extended to the States by the 14<sup>th</sup> Amendment.
344. **9<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** The enumeration of rights in the Constitution does not deny or disparage the other rights retained by the people in the adoption of the Constitution.
345. **10<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** Under the 10<sup>th</sup> Amendment all powers not delegated to the federal government as ENUMERATED POWERS and not prohibited to the States are reserved to the States or to the people. (See ENUMERATED POWERS.)



346. **11<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** Under the 11<sup>th</sup> Amendment no individual can sue a State in federal court, but suits for injunctive relief will be allowed against State officials and suits against subdivisions of a State (counties, cities, etc.) are allowed. Further, a person can always sue a State over violation of the 14<sup>th</sup> Amendment since it followed and superseded the 11<sup>th</sup> Amendment.
347. **13<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 13<sup>th</sup> Amendment prohibits involuntary servitude (slavery) except as punishment for a crime.
348. **14<sup>TH</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 14<sup>th</sup> Amendment prohibits a State from denying EQUAL PROTECTION or DUE PROCESS. (See DUE PROCESS, EQUAL PROTECTION.)
349. **21<sup>ST</sup> AMENDMENT (CONSTITUTIONAL LAW):** The 21<sup>st</sup> Amendment prohibits the transportation or sale of "intoxicating liquors" in violation of State law, thereby delegating control of commerce in alcoholic beverages to the States. (See COMMERCE CLAUSE.)
350. **ADVERTISING (CONSTITUTIONAL LAW):** Under *Central Hudson* lawful, truthful advertising (commercial speech) is PROTECTED EXPRESSION and can only be restricted by a narrowly drawn law that advances a substantial governmental interest. Commercial speech that is not lawful and truthful is UNPROTECTED EXPRESSION. (See SPEECH, UNPROTECTED EXPRESSION.)
351. **AGGREGATION DOCTRINE (CONSTITUTIONAL LAW):** Under the aggregation doctrine Congress has broad powers under the COMMERCE CLAUSE to regulate any activity that in the aggregate has an effect on interstate commerce, international commerce, and commerce with Indian tribes. (See COMMERCE CLAUSE.)
352. **ASSEMBLY, FREEDOM OF (CONSTITUTIONAL LAW):** The 1<sup>st</sup> Amendment, extended to the States by the 14<sup>th</sup> Amendment, guarantees freedom of assembly and petition of the government. By interpretation this has been held to encompass freedom of association and travel. These are fundamental rights. (See 1<sup>ST</sup> AMENDMENT.)
353. **ASSOCIATION, FREEDOM OF (CONSTITUTIONAL LAW):** See ASSEMBLY.
354. **BRANDENBURG TEST (CONSTITUTIONAL LAW):** See INCITEMENT, UNPROTECTED EXPRESSION.
355. **CENTRAL HUDSON (CONSTITUTIONAL LAW):** See ADVERTISING.
356. **COMMERCE CLAUSE (CONSTITUTIONAL LAW):** Under Article I of the Constitution the authority of Congress is limited to specific ENUMERATED POWERS. The COMMERCE CLAUSE interpreted under the AGGREGATION DOCTRINE gives Congress broad powers to regulate any activity that in the aggregate has an effect on interstate commerce.

Under the COOLEY DOCTRINE States have concurrent power to regulate commerce within their borders, unless PREEMPTED 1) expressly by Congress or implicitly where Congress has

2) established a comprehensive federal regulatory scheme or where 3) 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.

Except for regulation of commerce in alcoholic beverages by States under the 21<sup>ST</sup> AMENDMENT regulations that burden interstate commerce are invalid unless narrowly tailored and RATIONALLY RELATED to a legitimate State purpose. The court will balance the legitimate interests of the State against the burden on commerce. (See 21<sup>ST</sup> AMENDMENT, AGGREGATION DOCTRINE, COOLEY DOCTRINE, ENUMERATED POWERS, MARKET PARTICIPANT, RATIONAL RELATIONSHIP.)

357. **COOLEY DOCTRINE (CONSTITUTIONAL LAW):** Under the Cooley Doctrine States have concurrent power to regulate commerce within their borders, unless preempted 1) expressly by Congress or implicitly where Congress has 2) established a comprehensive federal regulatory scheme or where 3) the subject requires uniformity of national laws. (See COMMERCE CLAUSE.)
358. **DEFAMATION (CONSTITUTIONAL LAW):** Defamation, false statements about others causing injury to their reputations is UNPROTECTED EXPRESSION. (See SPEECH, UNPROTECTED EXPRESSION.)
359. **DUE PROCESS (CONSTITUTIONAL LAW):** Under the 5<sup>th</sup> and 14<sup>th</sup> Amendments SUBSTANTIVE and PROCEDURAL due process guarantees are broadly applied to prevent arbitrary government conduct. Government cannot deny an individual an interest in life, liberty or property unless given NOTICE and an opportunity for a HEARING. Further, if a FUNDAMENTAL RIGHT is infringed, the government has a burden to prove the law is narrowly tailored to further a compelling government interest. Otherwise the burden is on the plaintiffs to show the government act is not RATIONALLY RELATED to a legitimate public interest. (See SUBSTANTIVE DUE PROCESS, PROCEDURAL DUE PROCESS, FUNDAMENTAL RIGHT, RATIONAL RELATIONSHIP.)
360. **ENUMERATED POWERS (CONSTITUTIONAL LAW):** Under Article I 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. The States have the power to protect the health, safety and welfare of the people. (See 10<sup>th</sup> AMENDMENT.) But Congress has plenary (absolute) power over certain activities such as coining money, the postal service, international commerce, etc.
361. **EQUAL PROTECTION (CONSTITUTIONAL LAW):** Under The 14<sup>th</sup> AMENDMENT States are expressly prohibited from denying equal protection to all people by deliberately treating a class different from similarly situated people without proper justification or by arbitrary use of an over or under inclusive classification. Under the 5<sup>th</sup> AMENDMENT equal protection is implied in federal law by the guarantee of due process.

If a law burdens a SUSPECT CLASS or a FUNDAMENTAL RIGHT, the government must prove the law is necessary to attain a compelling public interest. If a law burdens a QUASI-SUSPECT class the government must prove the law is substantially related to an important

public interest. Otherwise, the plaintiff must prove the government act has no RATIONAL RELATIONSHIP to a legitimate public interest. (See 5<sup>TH</sup> AMENDMENT, 14<sup>TH</sup> AMENDMENT, FUNDAMENTAL RIGHT, QUASI-SUSPECT CLASS, RATIONAL RELATIONSHIP, SUSPECT CLASS.)

362. **ESTABLISHMENT CLAUSE (CONSTITUTIONAL LAW):** See 1<sup>ST</sup> AMENDMENT.

363. **EXPRESSION, FREEDOM OF (CONSTITUTIONAL LAW):** See SPEECH, FREEDOM OF.

364. **FIGHTING WORDS (CONSTITUTIONAL LAW):** Fighting words are statements made with the purpose and intent of starting a fight or otherwise inciting violence. It is UNPROTECTED EXPRESSION. (See SPEECH, UNPROTECTED EXPRESSION.)

365. **FUNDAMENTAL RIGHTS (CONSTITUTIONAL LAW):** Fundamental rights are those that are "rooted in our nation's traditions and implied in the concept of ordered liberty." These are the 1<sup>ST</sup> AMENDMENT rights (expression, assembly, association, religion), the criminal protections (4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Amendments), the right to vote, the 7<sup>TH</sup> AMENDMENT right to jury trial and the rights within the penumbra of the Constitution as recognized in 9<sup>th</sup> Amendment (e.g. privacy, right to travel, family matters). (See 1<sup>ST</sup>, 5<sup>TH</sup>, 6<sup>TH</sup>, 7<sup>TH</sup>, 8<sup>TH</sup> and 9<sup>TH</sup> AMENDMENTS.) Rights that have never been determined to be "fundamental" are still rights, but not fundamental rights.

366. **HEARING (CONSTITUTIONAL LAW):** The DUE PROCESS guarantees of the 5<sup>th</sup> and 14<sup>th</sup> Amendments require that a party be given a hearing to present objections to a government action affecting their interests. Under *Mathews v. Eldridge* a full hearing is required to protect a FUNDAMENTAL RIGHT, and otherwise the nature of the required hearing depends on a balance of the private and public interests considering the risk of erroneous deprivation. (See DUE PROCESS, PROCEDURAL DUE PROCESS, PERSONAL JURISDICTION.)

367. **INCITEMENT (CONSTITUTIONAL LAW):** Under the BRANDENBURG TEST words clearly likely to cause immediate crime or violence is UNPROTECTED EXPRESSION. (See UNPROTECTED EXPRESSION.)

368. **JUSTICIABILITY (CONSTITUTIONAL LAW):** 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). [Mnemonic = "Standing on an Absolutely Ripe Smooth Polpaya."]

369. **MARKET PARTICIPANT (CONSTITUTIONAL LAW):** The COMMERCE CLAUSE does not prevent a State from intentionally acting to burden or discriminate in the commerce of a good or service it produces and/or sells. For example, sales of power produced by a hydroelectric facility built and owned by a State can be legally restricted to customers located within the State or sold to State residents at a lower rate. But this exception is narrow and does not justify discrimination against businesses located in other States with respect to goods or services that are not being produced or sold by the State government itself. (See COMMERCE CLAUSE.)
370. **MILLER TEST (CONSTITUTIONAL LAW):** See OBSCENITY.
371. **NON-FUNDAMENTAL RIGHTS (CONSTITUTIONAL LAW):** The rights to keep and bear arms, to education, to employment, to housing, to make profit, to receive rent, to have and use property and to receive welfare have not been held to be fundamental.
372. **NOTICE (CIVIL PROCEDURE/CONSTITUTIONAL LAW):** The DUE PROCESS guarantees of the 5<sup>th</sup> and 14<sup>th</sup> Amendments require that a party be given notice of the pendency of an action. *Mullane* established a jurisdictional requirement that notice be reasonably calculated to apprise interested parties of the pendency of the action and afford them a HEARING to present objections. (See DUE PROCESS, PROCEDURAL DUE PROCESS, PERSONAL JURISDICTION.)
373. **OBSCENITY (CONSTITUTIONAL LAW):** Obscenity, as defined by the *Miller* test is speech that appeals to the prurient interest in sex or excretory functions and is totally devoid of redeeming scientific, literary, artistic, political or social value. It is UNPROTECTED EXPRESSION. [Mnemonic = SLAPS.] (See MILLER TEST, UNPROTECTED EXPRESSION.)
374. **PENUMBRA (CONSTITUTIONAL LAW):** Rights that the framers of the Constitution considered so obvious and beyond infringement by the federal government were not expressly enumerated and are those rights referred to in the 9<sup>th</sup> Amendment as being “retained by the people” and/or in the 10<sup>th</sup> Amendment as being “reserved to the States respectively, or to the people”. These rights were considered so obvious and so numerous that they were never “enumerated”. They are not often referred to as being “within the penumbra” (in the shadows) of the Constitution, and some of them such as the right to privacy, the right to marry, not marry, to have, not have, educate and raise children, and the right to simply be “left alone by the government” have been held to be fundamental rights.
375. **POLITICAL QUESTION (CONSTITUTIONAL LAW):** A matter is generally not JUSTICIABLE in federal court if it brings Congress into conflict with the Presidency except as specifically provided for in the Constitution. (See JUSTICIABILITY.)
376. **PRIOR RESTRAINT (CONSTITUTIONAL LAW):** Advance restraint on expression in anticipation that it will be a form of UNPROTECTED EXPRESSION.

377. **PRIVACY (CONSTITUTIONAL LAW):** The right to privacy (also personal autonomy, right to travel within the country) has been held to be a FUNDAMENTAL RIGHT within the penumbra of the Constitution. The right to privacy restricts government restraint on marriage, travel, contraception, procreation, abortion and the raising and education of children. This finding has been based on the protections against unreasonable search and seizure in the 4<sup>th</sup> Amendment as well as the provisions of the 5<sup>th</sup> and 14<sup>th</sup> Amendment prohibiting denial of "liberty" without due process of law. (See FUNDAMENTAL RIGHT, 4<sup>TH</sup> AMENDMENT, 9<sup>TH</sup> AMENDMENT, 14<sup>TH</sup> AMENDMENT.)
378. **PRIVILEGES AND IMMUNITIES (CONSTITUTIONAL LAW):** Under Article IV of the Constitution the citizens of each State are guaranteed the privileges and immunities of the citizens of the "several States." This has NOT been held to be a fundamental right, and a State may discriminate against the citizens of other States if it is substantially related to an important State interest. Under the 14<sup>th</sup> Amendment there is a second "privileges and immunities" clause, but it has been held to have little or no application or effect. On exams reference to this clause is always a "red herring".
379. **PROCEDURAL DUE PROCESS (CONSTITUTIONAL LAW):** Under the 5<sup>th</sup> and 14<sup>th</sup> Amendments due process guarantees are broadly applied to prevent arbitrary government conduct. PROCEDURAL DUE PROCESS protects an individual from deprivation of an interest in life, liberty or property unless provided NOTICE and a HEARING. Under *Mullane* notice must be "reasonably calculated to apprise the individual a final determination of rights is pending." Under *Mathews v. Eldridge* a full hearing is required to protect a FUNDAMENTAL RIGHT, and otherwise the nature of the required hearing depends on a balance of the private and public interests considering the risk of erroneous deprivation. (See DUE PROCESS, SUBSTANTIVE DUE PROCESS, FUNDAMENTAL RIGHT.)
380. **PROTECTED EXPRESSION (CONSTITUTIONAL LAW):** All expression is protected by the 1<sup>st</sup> AMENDMENT except for UNPROTECTED EXPRESSION (whice see.)
381. **PUBLIC FORUM (CONSTITUTIONAL LAW):** A public forum is a public place traditionally used as a forum for PROTECTED EXPRESSION. (See SPEECH.)
382. **QUASI-SUSPECT CLASS (CONSTITUTIONAL LAW):** A quasi-suspect class is a group of people that has been historically subjected to unequal treatment if not injustice. This has been recognized as classes based on sex and legitimacy. (See EQUAL PROTECTION, SUSPECT CLASS.)
383. **RATIONAL RELATIONSHIP (CONSTITUTIONAL LAW):** A rational relationship is credible evidence that a government act is logically related to the attainment of a legitimate public goal. For an EQUAL PROTECTION challenge, a rational relationship requires evidence that the government action against the class (defining, targeting, restraining, punishing) will promote a legitimate public goal better than equal treatment. For a DUE PROCESS challenge, a rational relationship requires evidence that the government action against the person (restraining, punishing) will promote a legitimate public goal better than doing nothing. Thus a law may be rational enough to satisfy due process yet still violate equal protection.

**For example**, a law prohibiting "convicted felons from owning guns" has a rational relationship to crime prevention, a legitimate public goal, for two reasons. First as punishment that might deter potential criminals. Secondly to help prevent past criminals from committing new crimes. But a law prohibiting "convicted felons between 30 and 33 from owning guns" does not appear to have a rational relationship. There would have to be convincing evidence that application of the law to that age group alone produces a better result than an equal or broader application of the law. (See DUE PROCESS, EQUAL PROTECTION.)

**384. RELIGION, FREEDOM OF (CONSTITUTIONAL LAW):** Under the 1<sup>st</sup> Amendment, extended to the States by the 14<sup>th</sup> Amendment, the government is prohibited from making any law "respecting an establishment of religion (the ESTABLISHMENT CLAUSE) or preventing the free exercise thereof (the FREE EXERCISE CLAUSE)," and it is the government's burden to justify infringement by showing it is necessary to attain a compelling interest. A fundamental right.

Under *Lemon*, the ESTABLISHMENT CLAUSE is not violated if 1) the primary purpose of a law is secular, 2) the primary effect does not promote religion, and 3) excessive entanglement between church and State is not fostered.

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 practice of the religion itself. (See 1<sup>ST</sup> AMENDMENT.)

**385. SEPARATION OF POWERS (CONSTITUTIONAL LAW):** The concept of separation of powers is embodied in Articles I, II and III of the Constitution which enumerate the powers of the Congress, Presidency and Supreme Court, and the 10<sup>TH</sup> AMENDMENT which reserves to the States all powers not delegated to the federal government or expressly denied the States. This express scheme is the SEPARATION OF POWERS.

**386. SPEECH, FREEDOM OF (CONSTITUTIONAL LAW):** Under the 1<sup>ST</sup> AMENDMENT, extended to the States by the 14<sup>TH</sup> AMENDMENT, freedom of speech (including press and expression) is a FUNDAMENTAL RIGHT, and the government is prohibited from infringing on the freedom of PROTECTED EXPRESSION in a PUBLIC FORUM unless the GOVERNMENT proves its act is narrowly tailored and necessary for a compelling governmental interest. Further, no government regulation of speech is valid if it is substantially vague, overbroad or constitutes a PRIOR RESTRAINT. Reasonable TIME/PLACE/ MANNER restraints can be placed on PROTECTED EXPRESSION in the public forum. UNPROTECTED EXPRESSION may be restricted unless plaintiffs prove there is no RATIONAL RELATIONSHIP to a legitimate government interest. (See 1<sup>ST</sup> AMENDMENT, FUNDAMENTAL RIGHT, PRIOR RESTRAINT, PROTECTED EXPRESSION, PUBLIC FORUM, RATIONAL RELATIONSHIP, TIME/PLACE/MANNER, UNPROTECTED EXPRESSION.)

**387. STANDING (CONSTITUTIONAL LAW):** A person does not have a JUSTICIABLE case in federal court unless they can show they have "standing", generally because they face personal injury. (See JUSTICIABILITY.)

388. **SUBSTANTIVE DUE PROCESS (CONSTITUTIONAL LAW):** Under the 5<sup>th</sup> and 14<sup>th</sup> Amendments due process is guaranteed, and this guarantee is broadly applied to prevent arbitrary government conduct. SUBSTANTIVE DUE PROCESS requires that if a FUNDAMENTAL RIGHT is infringed, the burden is on GOVERNMENT to prove the law is narrowly tailored to further a compelling government interest. Otherwise the burden is on the plaintiffs to show the government act is not RATIONALLY RELATED to a legitimate public interest. (See DUE PROCESS, FUNDAMENTAL RIGHT, RATIONAL RELATIONSHIP.)
389. **SUPREMACY CLAUSE (CONSTITUTIONAL LAW):** Under Article VI of the Constitution federal law is the "supreme law of the land." A federal law, if valid, takes precedence over any conflicting State law.
390. **SUSPECT CLASS (CONSTITUTIONAL LAW):** A suspect class is a group of people that has been historically subjected to injustice. This has been recognized as classes based on race, color, nationality, and alienage. (See EQUAL PROTECTION, QUASI-SUSPECT CLASS.)
391. **TIME/PLACE/MANNER (CONSTITUTIONAL LAW):** Reasonable TIME/PLACE/MANNER restraints can be placed on even PROTECTED EXPRESSION in the public forum if they are 1) content neutral, 2) narrowly drawn, 3) reasonable, 4) to serve a significant government interest and 5) alternative avenues of communication are available. (See SPEECH, FREEDOM OF.)
392. **TRAVEL, FREEDOM OF (CONSTITUTIONAL LAW):** The right to travel has been held to be a FUNDAMENTAL RIGHT within the penumbra of the Constitution. (See FUNDAMENTAL RIGHT, 9<sup>TH</sup> AMENDMENT.)
393. **UNPROTECTED EXPRESSION (CONSTITUTIONAL LAW):** Forms of speech unprotected by the 1<sup>st</sup> AMENDMENT are DEFAMATION, OBSCENITY, FIGHTING WORDS, INCITEMENT of violence, and misleading ADVERTISING. [Mnemonic = DO FICA] (See DEFAMATION, OBSCENITY, FIGHTING WORDS, INCITEMENT, ADVERTISING, 1<sup>st</sup> AMENDMENT.)

## Section 7: Rules and Definitions for REAL PROPERTY

The following rules are the law tested on the **Multistate Bar Exam** with limited comparison to **California** rules.

394. **ABANDONMENT (REAL PROPERTY):** An abandonment is an express statement or clear demonstration of intent to abandon an easement, and it extinguishes the easement. See EASEMENT.
395. **ACCRETION (REAL PROPERTY):** Accretion means that a parcel boundary defined by a stream changes if there is a gradual change in the course of the stream. See AVULSION, RIVERS CHANGING COURSE.
396. **ADVERSE POSSESSION (REAL PROPERTY):** Adverse possession is a statutory process by which a person may gain title to land through hostile, exclusive, uninterrupted, open 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 PRIVACY OF ESTATE between the subsequent parties. [HELIVA **possession! Hostile, Exclusive, Long enough, Uninterrupted, Visible, Actual**]
397. **AFFIRMATIVE WASTE (REAL PROPERTY):** Affirmative waste is damage to real property of a landlord caused by the acts of a tenant. A tenant has an affirmative duty to not damage the property of the landlord. See AMELIORATIVE WASTE, AVOIDABLE WASTE, and WASTE.
398. **ALIENATION (REAL PROPERTY):** Alienation is a conveyance of an INTEREST in property. Property held as TENANTS IN COMMON or JOINT TENANTS is freely alienable. Property held as TENANTS BY THE ENTIRETY is not. Alienation of an interest held as JOINT TENANTS destroys one of the FOUR UNITIES and converts the form of the interest to TENANT IN COMMON. See FOUR UNITIES, JOINT ESTATES, JOINT TENANTS, TENANTS IN COMMON.
399. **AMELIORATIVE WASTE (REAL PROPERTY):** Ameliorative waste is a material alteration of real property of a landlord by a tenant without consent of the owner even if it does not reduce the value of the property. A tenant has an affirmative duty to avoid ameliorative waste. See AFFIRMATIVE WASTE, WASTE.
400. **APPURTENANT (REAL PROPERTY):** An appurtenant EASEMENT is one associated to a DOMINANT ESTATE granting the holder of that estate the right to enter, maintain, repair and improve the land on a SERVIENT ESTATE. See DOMINANT ESTATE, EASEMENT, SERVIENT ESTATE.
401. **ASSIGNMENT (REAL PROPERTY):** An assignment in real property is a conveyance of a lease by a leaseholder (tenant) to a third party for the entire remaining term of the lease. The assignor retains secondary liability for the remaining lease payments and the assignee becomes primarily liable to the landlord for all covenants because there is PRIVACY OF ESTATE. The restrictions on assignment and sublease are narrowly construed.



402. **AT-WILL TENANCIES (REAL PROPERTY):** An at-will tenancy is created when a tenant enters real property with the permission of the landlord and may stay until either party decides to terminate. See ESTATE FOR YEARS, PERIODIC TENANCY, TENANT AT SUFFERANCE.
403. **AVERAGE RECIPROCITY OF ADVANTAGE (REAL PROPERTY):** The term “average reciprocity of advantage” means the degree to which a use restriction (such as zoning) provides land owners with benefits as well as burdens. The concept is used to justify many administrative actions. If zoning provides owners with benefits as well as burdens (the reciprocity of advantage) there is some compensation given to the owner, so the administrative restriction is not clearly a taking. See TAKING.
404. **AVOIDABLE WASTE (REAL PROPERTY):** Avoidable waste is damage to real property of a landlord caused by the failure of the tenant to warn the landlord about conditions the landlord is probably not aware of. See AFFIRMATIVE WASTE, AMELIORATIVE WASTE, and WASTE.
405. **AVULSION (REAL PROPERTY):** A parcel boundary defined by a stream stays where it is and does not change if there is an AVULSION, a sudden change in the course of the stream. The old streambed becomes the boundary. See ACCRETION, RIVERS CHANGING COURSE.
406. **BENEFIT OF THE BARGAIN (REAL PROPERTY):** The benefit of the bargain in real property is what a non-breaching buyer would have expected to gain in a real property purchase had the seller delivered marketable title, measured by the excess of market value over the contract price at the time of the breach. See LIABILITY FOR FAILURE TO DELIVER MARKETABLE TITLE.
407. **BONA FIDE PURCHASER FOR VALUE (REAL PROPERTY):** A bona fide purchaser for value (BFP or BFPV) is a person who buys property (real or personal property) in an arm’s length transaction for fair market value. Their title to the property is superior to anyone else’s prior claim against the property if they bought without actual or constructive knowledge of the prior claim. See RECORDING.
408. **CLASS (REAL PROPERTY):** A class in real property is a group of persons promised a CLASS GIFT, which see.
409. **CLASS GIFT (REAL PROPERTY/WILLS):** A class gift is an aggregate sum given to a group of persons (CLASS) that is uncertain in number at the time of the gift and all in the class are promised an equal share of the sum. See CLASS, CLASS CLOSURE, VESTED SUBJECT TO COMPLETE DIVESTMENT, VESTED SUBJECT TO OPEN.
410. **COMMON ENEMY DOCTRINE (REAL PROPERTY):** See SURFACE WATER DIVERSION.
411. **COMMON PLAN OR SCHEME (REAL PROPERTY):** In real property a “common plan” is a development plan to divide a parcel of land into a tract of separate parcels according to a common scheme of improvement. Typically these are called “tract developments” or “subdivisions”. See IMPLIED RECIPROCAL SERVITUDE.

412. **COMMUNITY PROPERTY (REAL PROPERTY):** On the Multistate Bar Exam (MBE) “real property” questions are only supposed to be answered using “common law” so the existence of community property laws in some States should be completely disregarded on the MBE. But in community property States married couples cannot hold jointly-owned property as TENANTS BY THE ENTIRETY and instead can hold property as “community property” (as an alternative to TENANTS IN COMMON or JOINT TENANCY). Property held as “community property” is NOT alienable unless both spouses agree in writing to the conveyance. **California** allows spouses to give away their interests in community property at death by the terms of a Will or Trust. But **California** also allows spouses to hold property in another form, “community property with right of survivorship” which establishes a right of survivorship, and in that case spouses cannot give away their community property interest at death at all, and the interests always go to the surviving spouse. Holding property as community property (or as TENANTS BY THE ENTIRETY) can provide surviving spouses with significant tax benefits under the Internal Revenue Code because it can be sold after the death of the first spouse free from all taxes on capital gains. (See TENANTS BY THE ENTIRETY.)
413. **COMPLETE DIVESTMENT (REAL PROPERTY):** A complete divestment is a total termination of an INTEREST in property. If a person is given an interest in land that is subject to a condition which could completely eliminate their interest they are said to hold the land “subject to complete divestment”. See DIVESTMENT, GRANTEE, INTEREST.
414. **CONDITION (REAL PROPERTY):** A condition in real property law is a title condition that must hold for an interest in land to be created and/or continue to exist or else the interest will not be created or will be extinguished. (“if any children of C survive him”). The titleholder is said to “hold title subject to a condition”. Conditions can be a CONDITION PRECEDENT or a CONDITION SUBSEQUENT, which see.
415. **CONDITION PRECEDENT (REAL PROPERTY):** A condition precedent in real property law is a title condition that, if it fails, will prevent an interest in land from being created or extinguish it automatically. The distinction between a condition precedent and a condition subsequent in real property law is based on the syntax used. Conditions precedent are distinguished by the use of the words “if”, “as long as”, and “until” (“For as long as the water flows and the grass grows”). The holder of an estate subject to a condition precedent may be said to be “vested subject to a POSSIBILITY OF REVERTER”. This is a totally different concept from a condition precedent in contract law. See CONDITION, EXECUTORY INTEREST, POSSIBILITY OF REVERTER.
416. **CONDITION SUBSEQUENT (REAL PROPERTY):** A condition subsequent in real property law is a title condition that, if it fails, will give another party (GRANTOR or GRANTEE or their HEIRS) the power to claim a RIGHT OF ENTRY by which they can take title to an estate. The burden is on the parties holding a right of entry to exercise it. The distinction between a condition precedent and a condition subsequent in real property law is based on the syntax used. Conditions subsequent are distinguished by the use of the words “but”, “may”, and “reclaim” (“To B and his heirs, but if there is ever any alcohol sold on the property, to my heirs.”). The holder of an estate subject to a condition subsequent may be said to be “vested subject to a right of entry”. This is a totally different concept from a condition

subsequent in contract law. See CONDITION, RIGHT OF ENTRY, VESTED SUBJECT TO COMPLETE DIVESTMENT.

417. **CONTINGENT REMAINDER (REAL PROPERTY):** A contingent remainder is a REMAINDER conveyed to a GRANTEE subject to a CONDITION. (“From A to B for LIFE, then to C and his HEIRS if CONDITION is true”.) All contingent remainders are subject to the RULE AGAINST PERPETUITIES. See CONDITION, FEE SIMPLE, GRANTEE, HEIRS, REMAINDER, RULE AGAINST PERPETUITIES.
418. **COVENANTS (REAL PROPERTY):** A covenant is a promise concerning land that runs with the land to bind and benefit new land owners if 1) touches and concerns the land, 2) the promise was intended to “run with the land”, 3) there is PRIVITY OF ESTATE between the current owner and past owners that incurred the obligation, and 4) the statute of frauds is satisfied [TIPS].
419. **CO-TENANTS (REAL PROPERTY):** Co-tenants are joint holders of a JOINT ESTATE. They may be JOINT TENANTS in a joint tenancy, TENANTS-IN-COMMON, or even “roommates” in a NON-FREEHOLD ESTATE.
420. **DEED (REAL PROPERTY):** A deed is a document conveying title to land. Effective transfer of title requires an express manifestation of present intent that satisfies the Statute of Frauds. Intent may be manifested by physical delivery, RECORDING or acknowledging the terms of a DEED to the land. Conditional delivery of a deed as a “Will substitute” is not effective, but a Court may liberally interpret conditional delivery of a deed between family members to be an effective delivery of title with the retention of a life estate or the conveyance of an executory interest. See RECORDING.
421. **DESTRUCTIBILITY OF CONTINGENT REMAINDERS (REAL PROPERTY):** At common law a remainder subject to a vesting condition would lapse if the condition was not satisfied by the time the preceding life estate terminated. For example, if a gift was “To Adam for life and then to Adam’s children who have reached the age of 21,” the gift would lapse (be destroyed) if none of Adam’s children had reached the age of 21 by the time Adam died.
422. **DIVESTMENT (REAL PROPERTY):** In real property law a divestment is a termination of an ESTATE due to a CONDITION. See COMPLETE DIVESTMENT, CONDITION, PARTIAL DIVESTMENT.
423. **DOCTRINE OF WORTHIER TITLE (REAL PROPERTY):** 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.
424. **DOMINANT ESTATE (REAL PROPERTY):** A dominant estate is a parcel of land associated with an appurtenant EASEMENT giving the holder of the estate the right to enter, maintain, repair and improve the land on the adjacent SERVIENT ESTATE. See EASEMENT, SERVIENT ESTATE.
425. **DOWER (REAL PROPERTY):** Under the common law a wife or widow has a LIFE ESTATE right in one-third of all inheritable land owned at any time by her husband during the marriage. **California does not recognize Dower Interests.**

426. **EASEMENTS (REAL PROPERTY):** An easement is a non-possessory INTEREST in land that gives the holder a right to enter, maintain, repair and improve the land that is referred to as the SERVIENT ESTATE. Easements may be APPURTENANT easements associated with DOMINANT ESTATES which are land adjacent to the servient estate, or they may be IN GROSS easements that are not associated with any particular land parcel. An associated concept is the right to enter the servient estate to remove minerals, timber, etc. which is called a PROFIT, which see. Easements may be created by RESERVATION, by EXPRESS grant, IMPLIED BY USE, IMPLIED BY NECESSITY, or by PRESCRIPTION. They can be extinguished by stated CONDITIONS, UNITY of ownership, RELEASE, ESTOPPEL, NECESSITY (or lack of), ABANDONMENT, or PRESCRIPTION. See ABANDONMENT, APPURTENANT, CONDITIONS, DOMINANT ESTATE, ESTOPPEL, GRANT, IMPLIED BY USE EASEMENTS, IMPLIED BY NECESSITY EASEMENTS, IN GROSS, PRESCRIPTION, RELEASE, RESERVATION, UNITY.
427. **EQUITABLE CONVERSION (REAL PROPERTY):** Under the common law equitable title to land was conveyed from the seller to the buyer at the moment of sale and thereafter the buyer bore the risk of loss even if the property remained in the possession of the seller. Modernly, a strong minority of states reduce the risk on the buyer, and some hold the party in possession at risk.
428. **EQUITABLE SERVITUDE (REAL PROPERTY):** An equitable servitude is a restriction on land use that runs with the land to bind and benefit new owners if it 1) touches and concerns the use of the land, 2) was created with an intent the burden should run with the land, 3) there was actual or implied notice to the party to be bound and 4) the statute of frauds is satisfied [TINS]. See IMPLIED RECIPROCAL SERVITUDE.
429. **EQUITY OF REDEMPTION (REAL PROPERTY):** Equity of redemption is a statutory process which gives a prior holder of equitable title (e.g. a foreclosed upon homeowner) the right to recover title to the land within a specific time period following a foreclosure sale. See SECURITY INTERESTS.
430. **ESTATES (REAL PROPERTY):** An estate is the right to exclusive possession of real property. It may be held by one party alone or jointly by two or more parties (a JOINT ESTATE.) Estates are classified by the immediacy with which possession begins and by the means by which possession terminates. POSSESSORY ESTATES give immediate possession and FUTURE ESTATES give a right to possession in the future. FREEHOLD ESTATES are either in perpetuity or terminate by “natural” means or the occurrence of a CONDITION. NON-FREEHOLD ESTATES terminate after a fixed period of time or at will of the landlord, the holder of a SUPERIOR ESTATE. Non-freehold estates are often LEASEHOLDS. See JOINT ESTATES, POSSESSORY ESTATES, FUTURE ESTATES, FREEHOLD ESTATES, NON-FREEHOLD ESTATES, LEASEHOLDS, SUPERIOR ESTATE.
431. **ESTATE FOR YEARS (REAL PROPERTY):** An estate for years is a non-freehold estate (lease) for a fixed period of time such as for "two years" or "until July 1." An estate for years may also be called a LEASEHOLD or a TENANCY FOR YEARS. The estate automatically terminates at the end of the stated period without notice, as opposed to a PERIODIC TENANCY which automatically renews for another period of time. Under the majority view a HOLDOVER following termination of an estate for years creates a PERIODIC TENANCY. If

the estate for years was for a period of one year or more, the periodic tenancy that results from a HOLDOVER is a "year to year" periodic tenancy that requires at least six month's notice to terminate. See HOLDOVER, LEASEHOLD, NON-FREEHOLD, PERIODIC TENANCY.

432. **ESTOPPEL (REAL PROPERTY):** Estoppel is a basis for extinguishing an EASEMENT when there has been 1) a representation of fact by the holder of the easement, 2) with intent to cause reliance by the owner of the servient estate (the person to be burdened by the easement), 3) which induces reasonable reliance by the owner of the servient estate such that 4) enforcement of the easement would cause injustice. See EASEMENT.

433. **EXECUTORY INTERESTS (REAL PROPERTY):** An executory interest is a FUTURE ESTATE given by a GRANTOR to a GRANTEE that would become a POSSESSORY ESTATE upon the occurrence of either a CONDITION PRECEDENT or a CONDITION SUBSEQUENT. ("From A to B and his HEIRS (or for life) as long as the land is used for farming and then to C and his HEIRS" gives an executory interest to C based on a condition precedent. And, "From A to B and his HEIRS (or for life), but if the land is not used for farming then to C and his HEIRS" would give C an executory interest based on a condition subsequent) All executory interests are subject to the RULE AGAINST PERPETUITIES. Compare to POSSIBILITY OF REVERTER (reservation of a future estate by the grantor based on a CONDITION PRECEDENT) and RIGHT OF REENTRY (reservation of a future estate by the grantor based on a CONDITION SUBSEQUENT).

434. **FEE SIMPLE (REAL PROPERTY):** The term fee simple means a POSSESSORY ESTATE that gives a right to possess real property in perpetuity or until occurrence of a stated CONDITION, if any. Characterized by the term "and his HEIRS" as in the phrases, "to B and his HEIRS" and "to B and his HEIRS as long as..." See CONDITION, HEIRS, POSSESSORY ESTATE.

435. **FEE TAIL (REAL PROPERTY):** The term fee tail means a POSSESSORY ESTATE that gives a right to possess real property in perpetuity subject to the CONDITION that the estate may only pass to ISSUE of the original GRANTEE. Characterized by the term "and his ISSUE" as in the phrase, "to B and his ISSUE." The grant of a fee tail automatically creates a POSSIBILITY OF REVERTER should it come to pass that no living issue of the original grantee exist. See CONDITION, HEIRS, ISSUE, POSSESSORY ESTATE, POSSIBILITY OF REVERTER.

436. **FIXTURES (REAL PROPERTY/UCC 9-334 et seq. ):** Fixtures are improvements attached to the land generally become part of the land, but trade fixtures, equipment used in the conduct of a business, 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. Further, under UCC 9-334, which is broadly adopted law, **tested on the California Bar Exam**, people with perfected security interests in fixtures (based on a "fixture filing", usually filed in a Secretary of State's office) may have superior rights over other parties and a right to remove the fixtures.

437. **FOUR UNITIES (REAL PROPERTY):** The term four unities means four characteristics of a JOINT TENANCY: Interests in the land created 1) equal in size 2) at the same time 3) in the same instrument (Will or Deed) with 4) equal possession rights. ALIENATION of an interest held as JOINT TENANT creates a TENANCY IN COMMON because the interest has no longer been created at the same time and in the same instrument as the remaining interests. See JOINT TENANT.
438. **FREEHOLD ESTATES (REAL PROPERTY):** Freehold estates are those ESTATES that are “owned” in the sense title is either vested in perpetuity or vested for an indefinite period of time that will be terminated by occurrence of a natural condition, other than the passage of time or at the will of the parties. “Natural condition” usually means by death of a person. The alternative to a freehold estate is a non-freehold estate which is property that is rented, leased or otherwise vested for either a defined period of time or else until the parties decide to terminate it (an AT-WILL TENANCY). Freehold See ESTATES, CONDITION, NON-FREEHOLD ESTATES.
439. **FUTURE ESTATES (REAL PROPERTY):** A future estate is the right to exclusive possession of real property in the future (as opposed to immediately, a POSSESSORY ESTATE) by one party or multiple parties jointly. There are seven types: 1) REVERSION, 2) REMAINDER, 3) CONTINGENT REMAINDER, 4) VESTED REMAINDER SUBJECT TO OPEN, 5) POSSIBILITY OF REVERTER, 6) RIGHT OF ENTRY, 7) EXECUTORY INTEREST, which see. The alternative to a future estate is a POSSESSORY ESTATE.
440. **GRANT (REAL PROPERTY):** A grant is an expression of intent to convey an INTEREST in land. It usually creates a FREEHOLD ESTATE, a NON-FREEHOLD ESTATE, or an EASEMENT, which see.
441. **GRANTEE (REAL PROPERTY):** A grantee in real property law is a person who is conveyed an INTEREST in land by someone else, the GRANTOR, which see.
442. **GRANTOR (REAL PROPERTY):** A grantor in real property law is a person who conveys an INTEREST in land to someone else, the GRANTEE, which see.
443. **HEIRS (REAL PROPERTY/WILLS):** Heirs are people with a right to inherit the property of a decedent. Technically an “heir” is only a person with a right to inherit under the rules of INTTESTATE SUCCESSION, but generally people with a right to receive property under the terms of a Will are also called “heirs”. However those who receive by a Will may also be called DEVISEES. See INTTESTATE SUCCESSION, DEVISEES.
444. **HOLDOVER (REAL PROPERTY):** A holdover tenant is one that does not vacate the property following the automatic termination of an ESTATE FOR YEARS. A TENANT AT SUFFERANCE. See ESTATE FOR YEARS, TENANT AT SUFFERANCE.
445. **IMPLIED BY NECESSITY EASEMENT (REAL PROPERTY):** Implied by necessity easements are created if a single parcel of land is split into two parcels by the GRANTOR who then conveys one of the parcels to a GRANTEE without expressly reserving or granting an easement that is strictly necessary to cross one parcel (the SERVIENT ESTATE) to reach the other parcel (the DOMINANT ESTATE). The owner of the servient estate has the right to define the location of the easement (tell the owner of the dominant estate where to cross the

servient estate). An implied by necessity easement is automatically extinguished if it is no longer necessarily required to reach the dominant estate. The easement is APPURTENANT to the DOMINANT ESTATE.

446. **IMPLIED BY USE EASEMENT (REAL PROPERTY):** Implied by use easements are created in many jurisdictions if a single parcel is split into two parcels by the GRANTOR who then conveys one of the parcels to a GRANTEE without expressly reserving or granting an easement, and one of the parcels (the “quasi-servient” parcel) has been openly and continuously used to reach, and is somewhat necessary to reach the other parcel (the “quasi-dominant” parcel). If the GRANTOR retains the “quasi-dominant” parcel some jurisdictions hold that the grantor should have retained an easement and will not recognize an implied by use easement at all, and other jurisdictions will only recognize it if it is reasonably necessary (as opposed to “somewhat” necessary). The location of the easement is determined by the prior use. The easement is APPURTENANT to the DOMINANT ESTATE.

447. **IMPLIED COVENANT OF HABITABILITY (REAL PROPERTY):** Under the implied covenant of habitability landlords have a duty to act as necessary to make residential property habitable. Some courts hold the Tenant can withhold rent if the duty is breached. See LANDLORD'S DUTIES.

448. **IMPLIED COVENANT OF QUIET ENJOYMENT (REAL PROPERTY):** Under the implied covenant of quiet enjoyment landlords have a duty to assure that no one with paramount title, unbeknownst to the tenant at the time a non-freehold estate is created, substantially interferes with the tenant's enjoyment of the property. If the landlord substantially interferes the tenant can remain and stop paying all rent. If a third party substantially interferes the tenant may remain and pay pro-rata rent. A tenant may also abandon and claim CONSTRUCTIVE EVICTION. See CONSTRUCTIVE EVICTION, LANDLORD'S DUTIES.

449. **IMPLIED RECIPROCAL SERVITUDE (REAL PROPERTY):** An implied reciprocal servitude is a restriction on land use created when a COMMON PLAN OR SCHEME of tract development establishes an EQUITABLE SERVITUDE on some portions of the development such that equity demands extension of the same restriction to the other portions of the development. See COMMON PLAN OR SCHEME, EQUITABLE SERVITUDE.

450. **IN GROSS (REAL PROPERTY):** An EASEMENT in gross is one personal to the GRANTEE rather than APPURTENANT to a DOMINANT ESTATE. For example, a GRANTOR may convey land to a GRANTEE yet retain for himself and his heirs the right to enter the land to hunt deer. An easement in gross is not dependant on the grantor's ownership of an adjacent parcel. Easements in gross are often not alienable. An associated concept is a PROFIT which is the right to enter land to remove minerals, timber, etc. Profits are generally alienable. (See PROFIT.)

451. **INTEREST (REAL PROPERTY):** An interest in land is a right to possess, enter, use or control real property. Interests in land can be 1) estates, 2) easements, 3) covenants, 4) equitable servitudes, 5) options or 6) security interests. See ESTATES, EASEMENTS, COVENANTS, EQUITABLE SERVITUDE, OPTION, SECURITY INTERESTS.

452. **ISSUE (REAL PROPERTY):** The term “issue” means the biological descendants of a person. Compare to HEIRS.
453. **JOINT ESTATES (REAL PROPERTY):** Joint estates are ESTATES held by two or more people jointly as 1) JOINT TENANTS, 2) TENANTS IN COMMON, or 3) TENANTS BY THE ENTIRETY. The holders of joint estates are CO-TENANTS. In community property States married couples cannot hold property as tenants by the entirety but can hold it as COMMUNITY PROPERTY, which see. A joint estate gives each individual an undivided right to present or future possession. Freehold and non-freehold estates, possessory and future estates, or estates subject to conditions may all be joint estates. See JOINT ESTATE, JOINT TENANTS, TENANTS IN COMMON, TENANTS BY THE ENTIRETY, COMMUNITY PROPERTY.
454. **JOINT TENANTS (REAL PROPERTY):** Joint tenancy is a form of JOINT ESTATE which must 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 instrument (Will or Deed) with 4) equal possession rights. Each interest is freely alienable, and there is a right of survivorship. In many States creation of a joint tenancy requires use of the express term “joint tenancy with right of survivorship” but in other States the phrase “with right of survivorship” is unnecessary. The interest of each joint tenant is freely alienable by the holder of the interest during life, but it cannot be given away by a Will because it automatically goes to the surviving joint tenants. A joint tenancy is terminated by ALIENATION, death, PARTITION or MORTGAGE in a TITLE THEORY STATE, which see.
455. **LANDLORD'S DUTIES (REAL PROPERTY):** The landlord's duties are the IMPLIED COVENANT OF QUIET ENJOYMENT and, in the case of residential property, the IMPLIED COVENANT OF HABITABILITY.
456. **LATERAL SUPPORT (REAL PROPERTY):** Under common law a property owner was absolutely liable for causing any subsidence of neighboring unimproved land in its natural state, but negligence must be shown to prove liability for causing subsidence of neighboring structures. Modernly some states (**including California**) require property owners to give advance notice to adjacent landowners so they can protect neighboring structures before beginning excavation. Further, property owners may be absolutely liable if excavations go below certain depths (**Nine feet below grade in California**).
457. **LEASEHOLDS (REAL PROPERTY):** Leaseholds are NON-FREEHOLD ESTATES that automatically terminate after a fixed period of time, often called a ESTATE FOR YEARS as opposed to PERIODIC TENANCIES which periodically renew automatically unless the tenants give a termination notice. See NON-FREEHOLD ESTATES, ESTATE FOR YEARS.
458. **LIABILITY FOR FAILURE TO DELIVER MARKETABLE TITLE (REAL PROPERTY):** Under the common law a seller that willfully 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. A non-willful breach only obligated return of deposit by the breaching seller. Modernly about half the states (**including California**) require the breaching seller to give the buyer the benefit of the bargain, and about half follow the common law rule. See BENEFIT OF THE BARGAIN, MARKETABLE TITLE.



459. **LIEN THEORY STATE (REAL PROPERTY):** A “lien theory State” is one that views the granting of a MORTGAGE as the granting of a lien that does NOT convert a JOINT TENANCY into a TENANCY IN COMMON, as opposed to a “title theory State”. See MORTGAGE, JOINT TENANTS, TENANTS IN COMMON, TITLE THEORY STATE.
460. **LIFE ESTATE (REAL PROPERTY):** A life estate is a POSSESSORY ESTATE giving GRANTEES the right to possess real property until their death or the death of some other person. The grantees are LIFE TENANTS. A grant of a life estate is characterized by the term “for the life of...” The grant of a life estate automatically creates either a REMAINDER or a REVERSION. A remainder is a CONDITIONAL REMAINDER if it is subject to a CONDITION. A life estate may also be subject to other CONDITIONS so that it might be a LIFE ESTATE subject to COMPLETE or PARTIAL DIVESTMENT. If the life estate is terminated by the death of a person other than the grantee, the life estate is called PER AUTRE VIE. . See COMPLETE DIVESTMENT, CONDITION, CONDITIONAL REMAINDER, GRANTEE, PARTIAL DIVESTMENT, PER AUTRE VIE, POSSESSORY ESTATE, REMAINDER.
461. **LIFE TENANT (REAL PROPERTY):** A life tenant is a GRANTEE of a LIFE ESTATE.
462. **LIQUIDATED DAMAGES (REAL PROPERTY):** A non-breaching seller may keep the breaching buyer's deposit as LIQUIDATED DAMAGES if it is reasonable in amount because 1) at the time of contract the parties anticipated damages would be caused by a breach, 2) the amount of damages was hard to predict and 3) the amount in dispute is reasonable compensation. But a non-breaching buyer is almost never limited to “liquidated damages” stated in a real estate sales contract because real estate is generally considered to be unique, and as a result monetary damages are generally an inadequate remedy.
463. **MARKETABLE TITLE (REAL PROPERTY):** A seller has an affirmative duty to deliver marketable title by the closing date. Title is marketable if it is free from reasonable doubt in fact and law. A title is not marketable if it is subject to 1) liens, 2) violations of existing zoning, 3) servitudes, 4) rights of reverter, 5) easements, 6) dower rights or 7) restrictive covenants. The existence of land use restrictions at the time of the contract to sell is not a title defect. See LIABILITY FOR FAILURE TO DELIVER MARKETABLE TITLE.
464. **MERGER DOCTRINE (REAL PROPERTY):** If two or more consecutive estates in the same property vest in the same person they MERGE into the greater estate and the lesser one is destroyed. For example, suppose Mother deeds Blackacre to Son in fee simple while retaining a life estate for herself. If Son then dies and Mother inherits his estate, she then holds both a life estate and a remainder in fee simple in the same property. That would give her Blackacre in fee simple and her life estate would be extinguished.
465. **MITIGATION (REAL PROPERTY):** In some States a landlord has a duty to attempt to re-lease or re-rent real property abandoned by a tenant to mitigate damages. To the extent a landlord fails to mitigate damages the tenant is not held liable.
466. **MORTGAGE (REAL PROPERTY):** A mortgage is a SECURITY INTEREST against real property granted as security for a loan. In some States a “mortgage” is called a “Deed of Trust”. Mortgages are seen as conveyances of title in TITLE THEORY STATES and ALIENATIONS that destroy JOINT TENANCIES and convert them into TENANCIES IN

COMMON. In LIEN THEORY STATES mortgages are seen as liens that do not destroy tenancies in common. See ALIENATION, JOINT TENANTS, LIEN THEORY STATES, SECURITY INTEREST, TENANTS IN COMMON, TITLE THEORY STATES.

467. **MORTGAGE LIABILITY (REAL PROPERTY):** A holder of a LIFE ESTATE 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 will always remain subject to the mortgage, in rem. However the GRANTEE only becomes personally liable if he or she expressly assumes liability for the mortgage.
468. **NECESSITY (REAL PROPERTY):** A situation of necessity may create an IMPLIED EASEMENT BY NECESSITY, which see.
469. **NON-FREEHOLD ESTATES (REAL PROPERTY):** Non-freehold estates are property that is rented, leased or other vested for either a defined period of time or else until the parties decide to terminate it (an AT-WILL TENANCY).
470. **NOTICE (REAL PROPERTY):** The term “notice” in real property law concerns whether buyers were given adequate disclosure of property conditions and title defects such as prior claims against the property. ACTUAL NOTICE means buyers were given actual mental awareness of conditions and title defects. CONSTRUCTIVE NOTICE means legal notice of conditions and title defects was given to buyers by the recording documents with a County Recorder’s Office). And INQUIRY NOTICE means conditions and title defects were so apparent buyers are deemed to have been aware of them..
471. **NOTICE STATUTE (REAL PROPERTY):** A “notice statute” is a type of RECORDING statute that gives superior title to the last BONA FIDE PURCHASER FOR VALUE (BFP) to obtain an INTEREST in property without NOTICE of prior claims, whether they record their INTERESTS or not. See RECORDING.
472. **OPTION (REAL PROPERTY):** An option is an INTEREST in real property in the form of an offer to sell the property on specific terms that cannot be revoked by the offeror for a specific period because the offeree has paid legal consideration to keep the offer open. See INTEREST.
473. **OUSTER (REAL PROPERTY):** An ouster is the act of preventing a tenant or co-tenant from having access to land by means of force or threat.
474. **PART PERFORMANCE DOCTRINE (REAL PROPERTY):** An oral agreement for the sale of land is generally not enforceable at law because it violates the STATUTE OF FRAUDS (which see). But under the PART PERFORMANCE DOCTRINE it may be enforceable in its entirety at equity, or at law under the statutory provisions of many States, when the buyer of the land has 1) taken possession of the land, and 2) paid the full purchase price or most of it and/or 3) made valuable improvements, or otherwise acted in a manner that can only be reasonably explained by the existence of an oral contract for sale.
475. **PARTIAL DIVESTMENT (REAL PROPERTY):** A partial divestment is a partial termination of a GRANTEE’S INTEREST in land. Class gifts to an open class are often said to be “vested subject to partial divestment”. See DIVESTMENT, GRANTEE, INTEREST.

476. **PARTITION (REAL PROPERTY):** A “partition” is the legal division of a JOINT ESTATE into separate estates. Usually real property cannot be physically divided in a feasible manner so it must be sold and the money divided. If some of the co-tenants refuse to participate in a sale of real property a petition can be filed with the court seeking a court order forcing the co-tenants to sell the property. Those are called “partition actions”. See JOINT ESTATES.
477. **PER AUTRE VIE (REAL PROPERTY):** A life estate per autre vie is one measured by the life of a person other than the GRANTEE. For example, Mother (the grantor) may grant her Son (the grantee) a life estate per autre vie in Blackacre for as long as Mother remains alive. The “measuring life” of the interest is the Mother’s life, not the grantee’s life. See GRANTEE, LIFE ESTATE.
478. **PERIODIC TENANCY (REAL PROPERTY):** A periodic tenancy is a lease or rental of real property for a period of fixed duration (such as a month) that repeats for succeeding periods of the same length until the landlord or tenant gives notice of termination. They are typically called “month-to-month” or “year-to-year” leases. They are different from an ESTATE FOR YEARS (also called a TENANCY FOR YEARS) which automatically terminates after a given period of time. A periodic tenancy may also be called a PERIODIC ESTATE. Under common law six-month’s notice was required to terminate a year-to-year tenancy, and for any periodic tenancy of less than a year, notice of termination had to be given at least one period in advance, but not more than six months in advance. Also the notice had to terminate the tenancy on the final day of a regular period.
479. **PERSONAL PROPERTY (REAL PROPERTY):** All PROPERTY that is not REAL PROPERTY (land and things firmly attached to it) is personal property. Personal property can either be tangible (movable things) or intangible (generally rights such as copyrights, patents, drilling rights, etc.)
480. **POSSESSORY ESTATES (REAL PROPERTY):** A possessor estate is an INTEREST in real property that gives a party or two or more parties jointly the right to immediate, exclusive possession. There are three types: 1) FEE SIMPLE, 2) FEE TAIL or 3) LIFE ESTATE, which see.
481. **POSSIBILITY OF REVERTER (REAL PROPERTY):** A possibility of reverter is a FUTURE ESTATE that becomes a POSSESSORY ESTATE of the GRANTORS or their HEIRS (not in grantees) upon failure of a CONDITION PRECEDENT (not a condition precedent). (“To B and his HEIRS (or for life) as long as the land is used for farming”.) A right of entry operates automatically. Compare to RIGHT OF ENTRY (if a CONDITION SUBSEQUENT) and EXECUTORY INTERESTS (conveyed to grantees).
482. **PRESCRIPTION (REAL PROPERTY):** The term “by prescription” means that an EASEMENT has been either created or extinguished on a SERVIENT ESTATE by hostile acts taken in a manner parallel to those that would support a claim of ADVERSE POSSESSION. Easements “by prescription” are created when outsiders openly and hostilely enter the servient estate for a period of time prescribed by law. And existing easements are extinguished “by prescription” when easement holders are openly and hostilely prevented from

entering the servient estate (OUSTED) for a period of time prescribed by law. See EASEMENT, ADVERSE POSSESSION.

483. **PRIVITY OF ESTATE (REAL PROPERTY):** The term “privity of estate” means that title and/or adverse possession of real property has been conveyed directly from one party to another in an unbroken chain as opposed to situations in which property might be abandoned, condemned or seized and sold to new owners at a sheriff’s sale, foreclosure sale, or tax sale.
484. **PROFIT (REAL PROPERTY):** Under real property law a “profit” is the right to enter land to remove minerals, timber, etc. A profit is treated the same as an EASEMENT IN GROSS except that it is usually freely alienable while an easement in gross is often not.
485. **PROPERTY (REAL PROPERTY):** Property is anything to which a person has a right of exclusive possession and control. Property is either REAL PROPERTY or else it is PERSONAL PROPERTY.
486. **RACE STATUTE (REAL PROPERTY):** A “race statute” is a type of RECORDING statute that gives superior title to the first grantees to record an INTEREST in property (with a County Recorder’s Office) regardless of whether it was purchased for value or whether or not they had NOTICE of prior claims against the property at the time they received their INTERESTS. See RECORDING.
487. **RACE-NOTICE STATUTE (REAL PROPERTY):** A “race-notice statute” is a type of RECORDING statute that gives superior title to the first grantees to record their INTERESTS if they are BONA FIDE PURCHASERS FOR VALUE (BFP) who obtained their INTERESTS without NOTICE of prior claims. See RECORDING.
488. **REAL PROPERTY (REAL PROPERTY):** Real property is land and those things firmly attached to it over which a person has a legal right to possession and exclusive use.
489. **RECORDING (REAL PROPERTY):** Under the common law superior title to REAL PROPERTY was based on first in time. The first GRANTEEES had superior title except against claims by BONA FIDE PURCHASERS FOR VALUE (BFP) who purchased without NOTICE of their prior claims. Consequently, the first BFP to buy had superior title over everyone else except prior claims of which they had NOTICE at the time of purchase. Modernly recording statutes determine priority of title. See NOTICE, BONA FIDE PURCHASERS FOR VALUE, RACE STATUTES, NOTICE STATUTES, and RACE-NOTICE STATUTES.
490. **RELEASE (REAL PROPERTY):** A release is an expression of intent by the holder of an easement to release and extinguish the EASEMENT. See EASEMENT.
491. **REMAINDER (REAL PROPERTY):** A remainder is a FUTURE ESTATE conveyed to a GRANTEE which will become a POSSESSORY ESTATE upon the death of a GRANTEE of a LIFE ESTATE. (“From A to B for LIFE, then to C and his HEIRS” gives a LIFE ESTATE to B and a REMAINDER in FEE SIMPLE to C.) See FEE SIMPLE, GRANTOR, GRANTEE, HEIRS.

492. **RESERVATION (REAL PROPERTY):** The term “reservation” in real property law means a GRANTOR holds back or “reserves” some INTEREST in real property such as an EASEMENT or LIFE ESTATE for themselves while conveying some other INTEREST in the same property to a GRANTEE. See EASEMENT, GRANTEE, GRANTOR.

493. **REVERSION (REAL PROPERTY):** A reversion is a FUTURE ESTATE reserved by a GRANTOR when granting a LIFE ESTATE to a GRANTEE who will become a LIFE TENANT. A reversion becomes a POSSESSORY ESTATE upon the death of the life tenant. (“From A to B for LIFE” gives a REVERSION to A.) See GRANTOR, GRANTEE, HEIRS.

494. **REVERTER (REAL PROPERTY):** See POSSIBILITY OF REVERTER.

495. **RIGHT OF ENTRY (REAL PROPERTY):** A right of entry is a FUTURE ESTATE that becomes a POSSESSORY ESTATE of the GRANTORS or their HEIRS (not in grantees) upon failure of a CONDITION SUBSEQUENT (not a condition precedent). (“To B and his heirs, but if there is ever any alcohol sold on the property the property to my heirs...”) A right of entry is not automatic and must be exercised with reasonable promptness by grantors or their heirs. Compare to POSSIBILITY OF REVERTER (if a CONDITION PRECEDENT) and EXECUTORY INTERESTS (conveyed to grantees).

496. **RIPARIAN RIGHTS (REAL PROPERTY):** See WATER USE RIGHTS.

497. **RISK OF LOSS (REAL PROPERTY):** See EQUITABLE CONVERSION.

498. **RIVERS CHANGING COURSE (REAL PROPERTY):** A parcel boundary defined by a stream stays where it is and does not change if there is an AVULSION, a sudden change in the course of the stream, but the boundary does change if there is an ACCRETION, a gradual change in the course of the stream. See ACCRETION, AVULSION.

499. **RULE AGAINST PERPETUITIES (REAL PROPERTY):** Under the common law rule against perpetuities “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.” In real property law it applies to 1) Contingent Remainders, 2) Executory Interests and 3) Vested Remainders Subject to Open. It requires that at the time any of these INTERESTS are first created, it must be certain that they will vest in specific GRANTEES no later than 21 years (plus a 9 month gestation period) after the death of everyone identified in or otherwise existing by implication at the time the creating document or statement was issued.

500. **RULE OF CONVENIENCE (REAL PROPERTY):** The rule of convenience is:

1) If a gift is to be given to a class when the class is first defined the class CLOSES when the gift is given. In the case of a gift stated in a Will this would be at the time the testator dies;

2) If a gift is to be given in the future after the class is defined, and there are identifiable members at the time it is defined (it is not an empty class), the class CLOSES when the first class member qualifies to receive their share and their share is available to be given to them;

3) Otherwise, if a gift is to be given in the future after the class is defined, and there are NO identifiable members at the time it is defined (it is an empty class), the class DOES NOT CLOSE until it is impossible for any more class members to come into existence (the class must close naturally).

501. **RULE OF SHELLEY'S CASE (REAL PROPERTY):** Under the Rule of Shelley's Case, if a single document grants a life estate to a GRANTEE and the remainder following the life estate to the heirs of the same GRANTEE, the two interests merge into a fee simple estate in the grantee. Compare to the MERGER DOCTRINE.

502. **SECURITY INTERESTS (REAL PROPERTY):** A security interest is an INTEREST in real property held by a mortgage lender to secure a loan. Possession of the property can only be had through the foreclosure process. Statutory EQUITY OF REDEMPTION rules allow debtors to recover equitable title for a set period of time after a foreclosure sale. See EQUITY OF REDEMPTION. Also see UCC 9-334 et seq. regarding security interests in FIXTURES.

503. **SERVIENT ESTATE (REAL PROPERTY):** A servient estate is a parcel of land subject to an EASEMENT that grants the holder of the easement the right to enter, maintain, repair and improve the land on the servient estate. The easement may be APPURTENANT to an adjacent estate, the DOMINANT ESTATE, or it may be IN GROSS. See APPURTENANT, DOMINANT ESTATE, EASEMENT, IN GROSS.

504. **STATUTE OF FRAUDS (REAL PROPERTY):** Under the Statute of Frauds, an early English statute that is now considered to be part of common law, any unwritten contract transferring an interest in real property is unenforceable at law. However, under the PART PERFORMANCE DOCTRINE an unwritten contract may be enforceable in equity or perhaps at law by statute in some States, if the buyer has delivered performance by providing all or most of the agreed consideration, take possession and/or made valuable improvements to the land that can hardly be explained by any other reason than the existence of an oral agreement. The requirements vary substantially between States.

505. **SUBLEASE (REAL PROPERTY):** A sublease is the conveyance of a lease by a leaseholder (tenant) to a third party for less than the entire remaining term of the lease. The holder of the sublease does not have PRIVACY OF ESTATE with the landlord or any liability to the landlord for the remaining lease payments. Restraints on assignments and subleases are narrowly construed.

506. **SUPERIOR ESTATE (REAL PROPERTY):** A superior estate is an INTEREST in real property that is more durable than another, concurrent estate. For example, the holder of a life estate may enter into a five-year lease, an estate for years. The leaseholder, in turn, may rent the property to a tenant on a month-to-month basis, a periodic tenancy. The life estate is a superior estate to the estate for years, and the estate for years is a superior estate to the periodic tenancy. See INTEREST.

507. **SURFACE WATER DIVERSION (REAL PROPERTY):** Under the common law COMMON ENEMY DOCTRINE there was no liability for DIVERSION of surface waters. Modernly a person who diverts surface waters has a duty to act reasonably to prevent injury to others.

508. **SURRENDER AND ACCEPTANCE (REAL PROPERTY):** Under the common law a leaseholder had no liability for unpaid rent if he abandoned the land and the landlord then reentered and retook possession. Modernly, some states absolve the leaseholder of liability unless the landlord reenters with notice of intent to continue holding the leaseholder liable. Other states do not absolve the tenant of liability. Some require landlords to reenter and release the land to MITIGATE DAMAGES. See MITIGATION.
509. **TACKING (REAL PROPERTY):** The term “tacking” means that if related parties commit an unbroken sequence of continuing trespasses to the same land, the separate periods of occupation may be cumulated or “tacked together” to support a claim of ADVERSE POSSESSION even though no one individual alone occupied the land for the period of time required by statute. See ADVERSE POSSESSION..
510. **TAKING (REAL PROPERTY):** A “taking” is an illegal seizure of land by the government in violation of the 5<sup>th</sup> Amendment and/or 14<sup>th</sup> Amendment guarantees of due process. Legislation is presumed valid. If a legitimate purpose and a rational relation can be shown for use (zoning) restrictions, they will be upheld. Under Penn Central the court will look at three factors: 1) the economic impact of the use restriction, 2) the interest of the state and 3) the nature of the governmental action. See AVERAGE RECIPROCITY OF ADVANTAGE.
511. **TENANCY FOR YEARS (REAL PROPERTY):** See ESTATE FOR YEARS.
512. **TENANT AT SUFFERANCE (REAL PROPERTY):** A tenant at sufferance is a HOLDOVER tenant that originally entered real property with permission to remain for an agreed upon period of time but remained without permission after the agreed period of time expired. See HOLDOVER.
513. **TENANTS BY THE ENTIRETY (REAL PROPERTY):** Tenants by the entirety is a form of title created by implication when title is held by "Husband and Wife" in many States. In the alternative married couples can hold title as TENANTS IN COMMON or JOINT TENANCY. Tenants by the entirety is not recognized in States with COMMUNITY PROPERTY law. Interests held as tenants by the entireties are NOT freely alienable unless the spouses agree to the conveyances. And there is a right of survivorship. **California recognizes community property as an ownership form but does not recognize tenancy by the entirety**. Holding property as tenants by the entirety (or as COMMUNITY PROPERTY in States that follow that approach) can provide surviving spouses with significant tax benefits under the Internal Revenue Code because it can be sold after the death of the first spouse free from all taxes on capital gains. See COMMUNITY PROPERTY.
514. **TENANTS IN COMMON (REAL PROPERTY):** Tenants in common is the default form of JOINT ESTATE in which each CO-TENANT has an equal right to possession, but the interests may be unequal in size. Each interest is freely alienable, and there is NO right of survivorship.
515. **TITLE THEORY STATE (REAL PROPERTY):** A title theory State is one that views the granting of a MORTGAGE as a conveyance of title that terminates a JOINT TENANCY and converts it into a TENANCY IN COMMON. See MORTGAGE, JOINT TENANTS, TENANTS IN COMMON.

516. **UCC 9-334, et seq. (REAL PROPERTY):** Under UCC 9-334, et seq., which is broadly adopted law, **tested on the California Bar Exam**, people with perfected security interests in fixtures (based on a “fixture filing”, usually filed in a Secretary of State’s office) may have superior rights over other parties and a right to remove those fixtures.
517. **UNITY (REAL PROPERTY):** Unity is a situation in which an EASEMENT is extinguished because the SERVIENT ESTATE and the EASEMENT are both owned by the same party. Most easements are APPURTINENT to a DOMINANT ESTATE so extinguishment of easements by unity usually occurs because the same party owns both the SERVIENT ESTATE and the DOMINANT ESTATE at the same time. See APPURTENANT, EASEMENT, DOMINANT ESTATE, MERGER RULE, SERVIENT ESTATE.
518. **VESTED (REAL PROPERTY):** The term “vested” means that a named or identifiable grantee has acquired legal title to a POSSESSORY or FUTURE ESTATE. An interest may be VESTED SUBJECT TO OPEN (or “partial divestment”) or VESTED SUBJECT TO COMPLETE DIVESTMENT, which see.
519. **VESTED SUBJECT TO COMPLETE DIVESTMENT (REAL PROPERTY/WILLS):**  
An interest is vested subject to complete divestment if it is subject to a CONDITION which, should it fail, would completely divest the grantee from any interest in the estate..
520. **VESTED SUBJECT TO OPEN (REAL PROPERTY/WILLS):** An interest is vested subject to open (or “subject to partial divestment”) if it is a share in a FUTURE ESTATE or gift to an OPEN CLASS so that as more members enter the class the share of each member in the class is reduced in size.. If the interest is a vested share of a REMAINDER given to an open class it may be called a VESTED REMAINDER SUBJECT TO OPEN.
521. **VESTED REMAINDER SUBJECT TO OPEN (REAL PROPERTY):** A vested remainder subject to open is a share of a remainder that has vested in an identifiable GRANTEE who is a member of an OPEN CLASS of GRANTEES such that the share of the vested grantee will be reduced in size as more members enter the class before it closes..
522. **WASTE (REAL PROPERTY):** A tenant’s two duties are to pay rent and avoid waste. Waste is damage to the landlord’s property. The tenant has a duty to avoid AFFIRMATIVE WASTE, AVOIDABLE WASTE and AMELIORATIVE WASTE, which see.
523. **WATER USE RIGHTS (REAL PROPERTY):** Water use rights are also called RIPARIAN rights. Under common law domestic use of surface water had priority over agricultural or industrial use. Modernly, some States follow the PRIOR APPROPRIATION doctrine that the first party to use surface water acquired superior rights over later users. Except where statute controls, there are no recognized rights to underground water.



## Section 8: Rules and Definitions for WILLS

The following rules are primarily based on the **California Probate Code** as tested on the **California Bar Exam**. However, the same rules and definitions are applicable to most States. This area of law is NOT tested on the **Multistate Bar Exam**.

524. **ABATEMENT (WILLS):** Abatements are failures to distribute gifts stated in a Will or Trust to beneficiaries because the probate or Trust estate of a decedent has insufficient assets. Under **California Probate Code (CPC) section 21402** at-death transfers are allocated in the following order:

- 1) SPECIFIC gifts to the decedent's relatives;
- 2) SPECIFIC gifts to those who are not the decedent's relatives;
- 3) GENERAL gifts to the decedent's relatives;
- 4) GENERAL gifts to those who are not the decedent's relatives;
- 5) RESIDUARY gifts;
- 6) Property not disposed of by the Will (INTESTATE distributions).

The term “relatives” means people who would have been the decedent's intestate heirs in an intestate distribution.

525. **ADEMPTION (WILLS):** Ademption is a failure to distribute a specific gift (a gift of specific personal property) stated in a Will or Trust to beneficiaries because the item is no longer in the probate or Trust estate of the decedent at the time of death. The majority view is that a specific gift lapses if it is not in the estate at the time of death. **Under California law, a minority view**, gifts do not lapse if the testator sold the property during life, the sales proceeds can be traced to a different form held in the estate at death, and the evidence shows the testator did not intend for ademption to occur. See *Estate of Newsome* (1967) 248 Cal.App.2d 712

526. **ADVANCEMENT (WILLS):** An advancement is a pre-death distribution of a future inheritance. **Under California Probate Code §§ 6409 (intestate distribution) and 21135 (testamentary gifts)** an inter vivos gift to a future heir or BENEFICIARY is not an advancement unless 1) the donor (transferor) declares in a contemporaneous writing that the gift is to be an advancement, 2) the donee (recipient) acknowledged in writing at any time that the gift was an advancement to be deducted from their share of the donor's estate, or 3) the donor's Will or Trust (if any) states that inter vivos gifts are to be deducted from testamentary gifts to the recipient at the donor's death. All advancements require a writing.

The major difference between intestate and testate distribution regarding advancements arises when a donee (recipient) dies before the donor (transferor):

Inter vivos gifts to donees who die before the donor will not be deducted from intestate shares that would descend to the issue of those predeceased donees by the rules of intestate succession UNLESS a contemporaneous written declaration by the donor or acknowledgement by the donee provides otherwise.

In contrast, inter vivos gifts made to donees who die before the donor will be deducted from gifts provided for in a Will or Trust that would otherwise descend to the issue of the predeceased donees by the terms of the Will or Trust or as a result of **the California anti-**

**lapse statute** UNLESS a contemporaneous written declaration by the donor or acknowledgement by the donee provides otherwise.

527. **AMBIGUITY (WILLS):** A Will may fail because of fatal ambiguity. The Will must show 1) intent to give property, 2) identify the property intended to be given, and 3) identify the person intended to receive the property. If intent to give is shown ambiguity is called a MISTAKE OF DESCRIPTION and extrinsic evidence can be introduced to help identify the property and the person intended. POUR OVER TRUSTS, conditional gifts, and gifts of unstated amounts with INDEPENDENT LEGAL SIGNIFICANCE, such as the balance of a bank account, will not fail for uncertainty. See MISTAKES OF DESCRIPTION, INDEPENDENT LEGAL SIGNIFICANCE, POUR OVER TRUSTS.
528. **ANNUITIES (WILLS):** An “annuity” is a GENERAL PECUNIARY GIFT that is payable periodically. For example, “To my daughter, \$10,000 a year.” CPC §§ 21117, 21118.
529. **ANTI-LAPSE STATUTE (WILLS):** The California anti-lapse statute, Probate Code § 21110, prevents lapse of a gift via a Will or Trust to a BENEFICIARY (donee) who dies before the decedent if the gift is 1) to blood kin, a wife or former wife of the donor, 2) no alternative beneficiary is specified in the instrument, and 3) no clear survival requirement is stated in the instrument. When the anti-lapse statute applies, the gifts to predeceased donees are distributed to their issue (not their heirs). But if the anti-lapse statute does not apply the gift to a predeceased beneficiary (donee) lapses.
530. **ATTESTED WILL (WILLS):** An attested Will in California is one that is NOT a HOLOGRAPHIC WILL (such as a typed Will). It must be signed by two or more competent adult witnesses who must be present at the same time when they perceive the testators indicate awareness the document in question is their testamentary Will and sign or acknowledge the Will.. See VALID WILLS, CONSCIOUS PRESENCE DOCTRINE, HOLOGRAPHIC WILL.
531. **BENEFICIARY (WILLS):** A beneficiary is a person who is to receive a gift from a decedent’s estate under the terms of the decedent’s Will.
532. **CLASS CLOSURE (WILLS):** A gift to a class of people is not distributed until the class closes. The class closes on a current gift created by a Will or Trust at the death of the testator. The class closes on a future gift to a non-empty class when the first member is qualified to take the gift, and the gift is available to be taken. But a future gift to an empty class at the time of creation will not close until the class closes naturally. For example, "To my grandchildren upon becoming adults," creates a class gift that will close when the first child becomes an adult, if there are any grandchildren alive at the death of the testator. But if the testator dies without any living grandchildren, the gift to the empty class will not close until all of the children of the testator have died, eliminating any possibility of additional grandchildren coming into the class. See CLASS GIFTS, OPEN CLASS, RULE OF CONVENIENCE.
533. **CLASS GIFT (REAL PROPERTY/WILLS):** A class gift is one of an aggregate sum to a group of persons uncertain in number at the time of the gift such that all are promised an equal share of the sum. See CLASS, CLASS CLOSURE, VESTED SUBJECT TO COMPLETE DIVESTMENT, VESTED SUBJECT TO OPEN.

534. **CONSCIOUS PRESENCE DOCTRINE (WILLS):** For an ATTESTED WILL to be valid, the witnesses must be physically present and consciously aware of the testator's signing or acknowledging the Will at the same time, but they do not have to actually see the testator sign the Will. See ATTESTED WILL.
535. **DEMONSTRATIVE GIFTS (WILLS):** A demonstrative gift is a GENERAL GIFT (a gift of money rather than specifically identifiable property) provided for in a Will or Trust which specifies the fund or property from which the gift is primarily to be made. (CPC § 21117.)
536. **DEWISEE (WILLS):** Technically, a DEWISEE is a BENEFICIARY of interests in real property under the terms of a Will. But all beneficiaries of both Wills and Trusts are often called "devisees". And they may also be called "heirs", although that term technically should only refer to intestate heirs.
537. **DISCLAIMER (WILLS):** A disclaimer is a waiver or refusal to accept a gift under the terms of a Will or Trust. **Under California Probate Code §275 et seq.** a BENEFICIARY of a Will or Trust can disclaim an interest in whole or part by a written disclaimer within a reasonable time after becoming aware of the existence of the interest. Such a disclaimer is binding and non-fraudulent. The disclaimer cannot be made in anticipation of the interest before it exists. The disclaimed interest is distributed according to the rules of intestate succession as if the disclaiming party predeceased the testator.
538. **DISCRETIONARY POWER OF APPOINTMENT (WILLS):** See POWER OF APPOINTMENT.
539. **DOCTRINE OF DEPENDENT RELATIVE REVOCATION (WILLS):** The Doctrine of Dependent Relative Revocation is a "salvage doctrine" that allows a Court (judge) to revive a revoked Will if the Will is not completely physically destroyed, the intent of the testator in revoking the Will was based on a mistaken belief that a subsequent Will was valid, and reviving the Will would give effect to the testator's expressed testamentary intent. EXTRINSIC EVIDENCE may be introduced to prove what the testator's expressed testamentary intent was, or would have been, if the testator had known a subsequently drafted Will was not valid. See CPC § 6123.
540. **ELECTIVE SHARE (WILLS):** In common law States, an elective share is a statutory share of deceased spouses' estates that surviving spouses can elect to receive rather than take the gifts (if any) provided for in the Wills of the deceased spouses. The elective share is intended to protect surviving spouses from being impoverished by deceased spouses deliberately giving them little or nothing of their estates. **Under California law there is no provision for an elective share**, and surviving spouses who are deliberately not provided for in the Wills of deceased spouses are only entitled to retain their own separate property and separate half of community property. However, **California law does provide relief for surviving spouses who may be accidentally omitted** from the Wills (or Trusts) of deceased spouses. See OMITTED SPOUSE.
541. **EXONERATION (WILLS):** The term "exoneration" means that a specific gift of property in a Will (or Trust) is to be distributed to the BENEFICIARY free of any liens or mortgage debt. Under common law all gifts from an estate were made free of liens and mortgages.

**Under California law** specific gifts are made subject to existing liens unless there is an express showing of contrary intent. A statement of general intent is insufficient.

542. **EXTRINSIC EVIDENCE (WILLS):** The term “extrinsic evidence” means evidence that is not apparent on the face of a Will or Trust instrument such as witness testimony or other outside documents. If the terms of a testamentary document are ambiguous on its face, extrinsic evidence may be introduced to identify the property a testator intended to distribute or the person to whom they intended to give it. These are called MISTAKES OF DESCRIPTION. **Under California law**, extrinsic evidence is NOT allowed to prove intent to make gifts that are entirely omitted from a Will. Those are called MISTAKES OF OMISSION.
543. **FOREIGN WILL (WILL):** A “foreign Will” is one that was not executed in the same State where it is presented for probate of a decedent’s estate. **They are valid under California law** if they were executed in accordance with the laws of the place where they were executed and would have been valid there.
544. **FRAUD (WILLS/TRUSTS):** Fraud is a cause of action for challenging the validity of a Will or Trust, although the issue seems to be tested on exams mostly in the context of Wills. Portions of Wills or Trusts are invalid if they are shown to be the result of FRAUD. Fraud requires a showing that a 1) false statement of 2) material fact, was 3) made knowingly with an 4) intent to deceive and caused the testator to 5) act in reliance in writing the Will. **But under California law if only two witnesses sign a Will**, fraud will be presumed as to any who has a financial interest in the instrument. If two or more disinterested witnesses sign a Will fraud will not be presumed even if other interested witnesses also sign the Will. **There is no witnessing requirement for Trusts under California law at all.** If an attorney or other person participating in the drafting of a Will or Trust has a financial interest in the instrument fraud and/or undue influence will also be presumed. When fraud or undue influence is presumed the interested party is limited to receiving no more than an INTESTATE SHARE of the estate.
545. **GARNISHMENT (WILLS/TRUSTS)** GARNISHMENT is a legal attachment or placement of a lien against a BENEFICIARY’s income from or assets in a GENERAL POWER OF APPOINTMENT or a TRUST. Usually the issue is tested on exams within the context of a TRUST. Income from a DISCRETIONARY TRUST can be garnished when it is distributed to beneficiaries, but the trustee cannot be forced to distribute assets. Income and assets of SUPPORT or SPENDTHRIFT TRUSTS cannot normally be garnished. **An exception under the California Probate Code** is that they can be garnished and attached to recover 1) child and spousal support, 2) felony restitution payments, 3) public assistance payments, and 4) where excessive amounts are held in trust and equity demands attachment. See DISCRETIONARY TRUST, GENERAL POWER OF APPOINTMENT, SPENDTHRIFT TRUST, SUPPORT TRUST.
546. **GENERAL GIFTS (WILLS):** A general gift is a gift from the general assets of the transferor as opposed to a gift of specifically identified property (which would be a SPECIFIC GIFT). For example, “To my daughter I give one-third of my remaining estate.”

547. **GENERAL PECUNIARY GIFTS (WILLS):** A general pecuniary gift is a gift expressly stated as a dollar amount or else a dollar amount determinable from the terms of a Will or Trust. For example, “To my daughter I give \$10,000.” If a Will or Trust authorizes is, general pecuniary gifts can be distributed as property other than money if it is of equal value. See CPC §§ 21117,21118.
548. **GENERAL POWER OF APPOINTMENT (WILLS):** A general power of appointment is a POWER OF APPOINTMENT that allows the donee to distribute the property of the donor to any person, or to keep it for themselves. A creditor of the donee may GARNISH the property held under a general power of appointment. See GARNISH, POWER OF APPOINTMENT.
549. **GIFTS, CLASSIFICATION (WILLS):** Gifts made in Wills are classified in California Probate Code § 21117 as SPECIFIC gifts, GENERAL gifts, DEMONSTRATIVE gifts, GENERAL PECUNIARY gifts, ANNUITIES, and RESIDUARY gifts, which see.
550. **HEIRS (REAL PROPERTY/WILLS):** Heirs are people with a right to inherit the property of a decedent. Technically an “heir” is only a person with a right to inherit under the rules of INTESTATE SUCCESSION, but generally people with a right to receive property under the terms of a Will are also called “heirs”. However those who receive by a Will may also be called DEVISEES. See INTESTATE SUCCESSION, DEVISEES.
551. **HOLOGRAPHIC (WILLS):** A holographic Will is one with the substantial portions written in the handwriting of the testator. The “substantial portions” of the Will are the parts that say who the testator is giving property of the probate estate. For example, “To my daughter, Mary, I give my automobile.” A holographic Will must be signed, but does not have to be dated or witnessed. But if a holographic Will is not dated other dated documents with conflicting provisions, such as other Wills of the testator, will be given preferential interpretation.
552. **IMPERATIVE POWER OF APPOINTMENT (WILLS):** See POWER OF APPOINTMENT.
553. **INCOMPETENCE (WILLS):** Incompetence is a basis for challenging the validity of a Will. Wills are invalid in their entirety if the testators are of such unsound mind at the time the Wills are executed that they can not understand the testamentary act. That means they cannot understand what they are doing, what property they are giving away or who their relatives are. Even if testators understand what they are doing, their Wills may also be invalid if they are acting as the result of a serious delusion. But incompetence is narrowly interpreted. Wills are NOT invalid simply because the testator is mentally ill or has diminished mental capacity.
554. **INDEPENDENT LEGAL SIGNIFICANCE (WILLS):** Wills must be specific as to what assets the testator intends to distribute, and to whom they are to be given. Consequently, gifts of unspecified or unquantified amounts are generally invalid because they are ambiguous and any effort to prove them effectively creates an “oral Will”. For example, “To my daughter, Mary, I give the money I promised her,” would be invalid. However, gifts of accounts or bodies of property that have independent legal significance are valid. The term “independent legal significance” means accounts or bodies of property that the decedent has maintained for purposes other than distribution under a Will. For example, “To my daughter, Mary, I give the money in my bank account,” would be a valid gift.. See AMBIGUITY.

555. **INTEGRATION DOCTRINE (WILLS):** Under the integration doctrine separate papers comprise an integrated Will if they are connected physically, sequentially or by continuity of thought. Further a Will may INCORPORATE other documents by reference if the exist at the time the Will is executed and are clearly identified in the Will. Further, a subsequent CODICIL may incorporate a prior Will into the codicil, if the codicil would stand alone as a valid Will. This means that the codicil must be signed and properly witnessed, or handwritten in the case of a holographic codicil and show evidence of testamentary intent (intent to give property at death). If a codicil properly incorporates a prior Will by reference, it REPUBLISHES the prior Will.
556. **INTERESTED WITNESSES (WILLS):** An interested witness is one that would receive a benefit under the terms of the witnessed Will. Fraud is presumed if any of the witnesses has a financial interest in the Will. The mere fact a Will nominates a witness to be an executor does NOT give the witness a financial interest in the Will. But if a Will gives a gift to a close relative of a witness, that DOES give the witness a financial interest in the Will. If witnesses are interested, it does not invalidate the Will and does not prevent the witnesses (or their close relatives) from receiving a benefit under the Will. But instead interested witnesses (and their close relatives) are limited to receive no more than INTESTATE SHARES, which see.
557. **IN TERROREM CLAUSE (WILLS):** An “in terrorem” clause is a “no contest clause” in a Will or Trust that threatens to completely disinherit any heir that challenges the validity of the Will. **Under California Probate Code §21310 et seq.** no contest clauses are theoretically valid but narrowly construed and do not apply if the challenger acts based on probable cause, a “reasonable belief there is a reasonable likelihood the challenge will be upheld” given the facts available to the challenger at the time of the challenge.
558. **INTESTATE GIFTS (WILLS):** Intestate gifts are distributions from an estate to intestate heirs based on the rules of INTESTATE SUCCESSION.
559. **INTESTATE SHARE (WILLS):** Intestate shares are the amounts an heir receives or would receive had a decedent died intestate (without a Will) under the rules of INTESTATE SUCCESSION. An intestate share may be allocated to a PRETERMITTED CHILD or where an heir is barred from taking a larger gift under a Will because of FRAUD, as an INTERESTED WITNESS, or because of UNDUE INFLUENCE.
560. **INTESTATE SUCCESSION (WILLS):** Intestate succession means the statutory distribution of probate estate assets rather than by the terms of a Will. Many state statutes allocate a STATUTORY SHARE to the surviving spouse. **California law gives the surviving spouse of an intestate decedent** the deceased spouse’s share of community property and a share of the deceased spouse’s separate property. The remaining separate property is distributed to other relatives of the decedent PER STIRPES. The term “community property” in this context means assets in the probate estate that were acquired during the marriage that are not otherwise classified as separate property under community property law. See PER STIRPES.

561. **ISSUE (WILLS):** Under term “issue” means the lineal descendants of a person. **But under the California Probate Code** the relationship of parent and child at each generation is determined by the definition of the terms of “parent and child”. See RELATIONSHIP, CALIFORNIA.
562. **JOINT WILL (WILLS):** A joint Will is one written and signed by two or more people, usually a husband and wife. An express agreement between the parties that a no new Will can be executed after the death of the first spouse is a valid contract that cannot be revoked after the death of the first party. However, joint wills do not restrict the distribution of assets acquired by the survivors after the death of the first party. And if a surviving spouse remarries, the prior joint Will cannot reduce the statutory rights of the new spouse to an ELECTIVE SHARE of the surviving spouse’s estate. [**Note: California relies on community property law rather than the elective share approach.**]
563. **LAPSE (WILLS):** A lapse is the failure of a gift specified in a Will. A SPECIFIC GIFT may lapse if it is not in the estate at the time of death, and that is called an ADEPTION. A GENERAL or GENERAL PECUNIARY gift may lapse if there are insufficient funds in the estate to fund it, and that is called an ABATEMENT. And a gift may lapse if the intended beneficiary dies before the testator. This may be prevented by an ANTI-LAPSE STATUTE. See ABATEMENT, ADEPTION, ANTI-LAPSE STATUTE, SPECIFIC GIFT.
564. **MISTAKES OF DESCRIPTION (WILLS):** A mistake of description is AMBIGUITY in a Will caused by a mistake in description of either the specific property to be given or the specific person intended to receive it. Mistakes of description may be corrected by the Court if the mistake is apparent on the face of the Will (given the facts) and the testator's intent can be proven by EXTRINSIC EVIDENCE. In contrast, MISTAKES OF OMISSION of evidence of intent to give can not be corrected by the Court. See AMBIGUITY, EXTRINSIC EVIDENCE, MISTAKES OF OMISSION.
565. **MISTAKES OF OMISSION (WILLS):** A mistake of omission is a failure to state any intent to give a particular gift to a particular person. They cannot be corrected by the Court.. In contrast, MISTAKES OF DESCRIPTION may be corrected by the Court. See MISTAKES OF DESCRIPTION.
566. **OMITTED CHILD (WILLS):** See PRETERMITTED CHILD.
567. **OMITTED SPOUSE (WILLS):** Under California law a surviving spouse who was accidentally omitted from a deceased spouse’s testamentary instruments (Will and/or Trust) has a right to receive an INTESTATE SHARE of the deceased spouse’s estate if they qualify to be an “omitted spouse” (which may also be called a “pretermitted spouse”). An “omitted spouse” is one who was not provided for in the deceased spouse’s testamentary devices (Will and/or Trust) AND 1) the testamentary instruments do not show on their face the decedent deliberately failed to provide for the omitted spouse, 2) the decedent did not intentionally provide for the surviving spouse “outside of probate”, and 3) the omitted spouse did not sign a valid agreement waiving rights to a share of the deceased spouse’s estate. The rights of an omitted spouse are not comparable to ELECTIVE SHARE statutes in other States which are more applicable to situations in which deceased spouses deliberately do not provide for surviving spouses.

568. **OPEN CLASS (WILLS):** An open class is a described group of people who have been given a CLASS GIFT. If the gift is subject to terms such that no members of the class are currently entitled to take possession, it is a future gift and the class remains open. As more people qualify to be vested members of the class, the share of each existing member of the class is reduced in size. Those interests are said to be VESTED SUBJECT TO OPEN. For example, a Will that says, "I give \$100,000 to my grandchildren when they reach the age of 18," creates an open class if none of the testator's grandchildren have reached the age of 18 by the time the testator dies. See VESTED SUBJECT TO OPEN.
569. **PER STIRPES (WILLS):** The term "per stirpes" means the method of division of property of an intestate decedent to the people other than a surviving spouse. **In California the division is into as many shares as there are living members and dead members with living issue in the nearest generation with any living members.** Property goes first to issue of the decedent, then to parents of the decedent, then to issue of parents, then to grandparents and then to issue of grandparents.
570. **POUR OVER WILLS/TRUSTS (WILLS/TRUSTS):** The terms "pour over Will" and "pour over Trust" mean that the Will gives all of the residual property of a decedent to the Trust. At one time pour over Trusts were subject to dispute because they were not funded at the time they were created but rather at the time the decedent died.. But they are specifically valid under the CPC.
571. **POWER OF APPOINTMENT (WILLS):** A power of appointment means a person called the "donor" authorizes another person called the "donee" to distribute the donor's property to a group of people called the "appointees". For example, "I give my daughter, Mary, a power of appointment authorizing her to distribute all of my estate in the manner she thinks best." The power may be granted by the donor in life (inter vivos) or at death via a Will or Trust. A power of appointment may be general or special, imperative or discretionary, and a TESTAMENTARY power of appointment restricts the donee to distribute the property only through the donee's own Will. A GENERAL POWER OF APPOINTMENT allows the donee to distribute the property to anyone, including themselves. A SPECIAL POWER OF APPOINTMENT limits the donee to distributing the property to a specific class of people called "permissible appointees." An IMPERATIVE POWER OF APPOINTMENT mandates that the donee distribute the property. A DISCRETIONARY POWER OF APPOINTMENT gives the grantee discretion whether to distribute property or not. A TESTAMENTARY POWER OF APPOINTMENT restricts donees to distribute the property they receive from the donor only through their own Wills. See GENERAL POWER OF APPOINTMENT.
572. **POWER OF APPOINTMENT, EXERCISE UNDER CONTRACT (WILLS):** A contract between a donee and an appointee to exercise a power of appointment in favor of the appointee is valid, but only if the donee was authorized to give the property of the donor to that appointee at the time the contract was entered into.
573. **POWER OF APPOINTMENT, FAILURE TO EXERCISE (WILLS):** If a donor gives a power of appointment to a donee with an express requirement that the power be expressly exercised, the donee must exercise the power with an express statement of intent. **Under the California Probate Code** a donee must make an express declaration of intent to exercise of the power of appointment or else there is a failure to exercise. This is a MINORITY VIEW. Under the MAJORITY VIEW exercise of the power of appointment is implied if the donee



distributes "all" of his/her own estate by a Will, even if the power of appointment is not mentioned in the donee's Will. If a donee fails to exercise a GENERAL power the property reverts to the donee's estate. If a donee fails to exercise a SPECIAL, IMPERATIVE power the property is distributed equally among the permissible appointees in the special class. If a donee fails to exercise a SPECIAL, DISCRETIONARY power the property reverts to the donor or his/her estate.

574. **PRETERMITTED CHILD (WILLS):** A pretermitted child is an “omitted” child of the decedent that is not provided for in the decedent's Will. **Under the California Probate Code a child omitted** from a Will (or a Trust) gets no share of the estate if they were 1) born before the Will (or Trust) was executed, 2) known to the testator, 3) not mistakenly believed dead or 4) otherwise clearly and intentionally omitted from mention by the decedent. Otherwise the child is a pretermitted who receives an INTESTATE SHARE of the estate.

575. **RECOVERY OF ASSETS (WILLS):** States are split on whether a surviving spouse can recover assets transferred from the estate by a deceased spouse before death. Some States allow recovery if fraudulent intent by the deceased spouse is shown. Some States allow recovery only in the case of recent transfers. **California law allows recovery of conveyances of community property.**

576. **RELATIONSHIP, CALIFORNIA (WILLS):** **Under the California Probate Code** a half-blood children are treated the same as whole-blood, and non-marital children are treated the same as marital children. Adopted children are treated the same as natural children of the adoptive parents in most cases. This has a direct effect on the definition of ISSUE (which see).

577. **RESIDUARY GIFTS (WILLS):** A residuary gift is a gift of the residual amount of an estate after the distribution of all specific and general gifts. For example, “To my daughter I give the remainder of my estate.” See CPC § 21117.

578. **REVOCATION (WILLS):** A Will can be revoked 1) expressly by declaration or by a physical act of destruction, 2) by implication where the Will disappears while in the possession of the testator or 3) by operation of law if there is a divorce. The destruction of any one copy of a Will with intent to revoke is sufficient, even if other copies are not destroyed.

579. **RULES OF CONSTRUCTION, CALIFORNIA (WILLS):** **Under the California Probate Code** a Will is to be interpreted according to the express intent of the testator based on the plain meaning of the words of the instrument with an effort to avoid intestacy and give effect to all stated terms. The law favors blood relatives and early vesting. A gift is presumed to vest at the time of the testator's death. If the Will shows an intent to give, extrinsic evidence may be introduced to clarify a MISTAKE OF DESCRIPTION concerning what the intended gift was and who the intended recipient was.

580. **SPECIAL POWER OF APPOINTMENT (WILLS):** See POWER OF APPOINTMENT.

581. **SPECIFIC GIFTS (WILLS):** A specific gift is a transfer of specifically identifiable property in a Will as opposed to the gift of an amount of money. For example, “To my daughter I give my mother's diamond ring.”

582. **STATUTORY SHARE (WILLS):** A “statutory share” is a minimum amount many States entitle a surviving spouse to take from the estate of a deceased spouse even if the Will of the deceased spouse provides for less. **California law does not provide for a statutory share** because the surviving spouse is entitled to half of all community property.
583. **SURVIVAL (WILLS):** Survival means a BENEFICIARY has outlived a decedent or has lived for a specified or defined period of time. Gifts provided for in Wills generally LAPSE if beneficiaries fail to survive the testator. However, if an ANTI-LAPSE STATUTE applies the gift will not lapse. **In the case of simultaneous, or near simultaneous death California Probate Code § 6211** requires an heir to survive a decedent for 120 hours (5 days) or more. If a beneficiary fails to meet this requirement, the beneficiary is treated as if he or she predeceased the deceased party. See ANTI-LAPSE STATUTE, LAPSE.
584. **TESTAMENTARY POWER OF APPOINTMENT (WILLS):** See POWER OF APPOINTMENT.
585. **UNDUE INFLUENCE (WILLS/TRUSTS):** Undue influence is a basis for challenging the validity of a Will or Trust. Portions of a Will or Trust are invalid if clear or strong evidence shows they are the result of the testator’s free will being overcome. Undue influence is presumed where an attorney or someone with a confidential relationship helps draft a Will or Trust giving them a benefit. **In California** a Will or Trust is valid even if a beneficiary substantially assists in drafting it if an independent attorney provides a Certificate of Independent Review. Where undue influence is shown, the Will or Trust as a whole remains valid but the party benefiting from the undue influence may receive no more than an INTESTATE SHARE, which see.
586. **VALID WILLS (WILLS):** The validity of a Will written with testamentary intent and signed by the testator is determined at the death of the testator. A HOLOGRAPHIC Will must have substantial portions in the handwriting of the testator, and two or more witnesses who were in the CONSCIOUS PRESENCE of the testator must witness the testator's signature or acknowledgement of an ATTESTED Will. See ATTESTED, CONSCIOUS PRESENCE DOCTRINE, HOLOGRAPHIC.
587. **VESTED (WILLS):** The term “vested” in probate law means that an identifiable BENEFICIARY has an established legal right to receive a GIFT provided by the terms of a Will or else under the rules of INTESTATE SUCCESSION. Possessory gifts vest at the time of the testator’s death. Future gifts vest when beneficiaries become identifiable. A future gift to a class vests in each member of the class as they become identifiable up until the class closes. For example, "To my grandchildren when they become adults," creates the class of "grandchildren" and all grandchildren would be VESTED SUBJECT TO OPEN at birth. If the class is not empty when created it would close, and the first portion distributed, when the first grandchild became an adult. In contrast, if the Will stated, "To my grandchildren if they become adults," each grandchild born would be VESTED SUBJECT TO COMPLETE DIVESTMENT should they die before becoming an adult. See CLASS GIFT, CLASS CLOSURE, OPEN CLASS, VESTED SUBJECT TO COMPLETE DIVESTMENT, VESTED SUBJECT TO OPEN.

**588. VESTED SUBJECT TO COMPLETE DIVESTMENT (REAL PROPERTY/WILLS):**

A BENEFICIARY is vested subject to complete divestment if they have an established right to receive a gift immediately or in the future but subject to a CONDITION that may completely deny them the gift. For example, “To John I give \$10,000 if he graduates from college within 10 years from my death,” creates an interest that is vested subject to complete divestment.

**589. VESTED SUBJECT TO OPEN (REAL PROPERTY/WILLS):** A BENEFICIARY is vested subject to open if they have an established right to receive a share of a CLASS GIFT to an OPEN CLASS that remains open. If the interest is a REMAINDER the interest is a VESTED REMAINDER SUBJECT TO OPEN. See CLASS, CLASS CLOSURE, OPEN CLASS, INTEREST, REMAINDER, VESTED REMAINDER SUBJECT TO OPEN.

## Section 9: Rules and Definitions for TRUSTS

The following rules are primarily based on the **California Probate Code** as tested on the **California Bar Exam**. However, the same rules and definitions are applicable to most States. This area of law is NOT tested on the **Multistate Bar Exam**.

590. **BENEFICIARY (TRUSTS)** A beneficiary of a Trust is person the Trust is intended to benefit. An **INCOME BENEFICIARY** is a party with a right to receive the income from trust property. A **PRINCIPAL BENEFICIARY** is a party with a right to receive the trust corpus upon the termination of the income beneficiary's interest.
591. **CHARITABLE TRUST (TRUSTS):** A charitable Trust is one established for 1) charitable purposes, with 2) unascertainable beneficiaries. It is monitored by the Attorney General in most States. A charitable Trust may be a **GENERAL PURPOSE CHARITABLE TRUST** to improve the general welfare of the general public, or it may be a **SPECIFIC PURPOSE CHARITABLE TRUST** to provide a specific benefit for a specific group. For example, a Trust to promote "Music at Wayne University" would be more of a general purpose charitable Trust, while a Trust to provide "scholarships for World War II veterans" would be more of a specific purpose charitable trust. See **CY PRES DOCTRINE**.
592. **CY PRES DOCTRINE (TRUSTS):** Under the "cy pres doctrine" (sigh – pray) a court may modify and reform a **GENERAL PURPOSE CHARITABLE TRUST** charitable Trust if the original charitable purpose becomes impossible. The **CY PRES DOCTRINE** does not apply to a **SPECIFIC PURPOSE CHARITABLE TRUST**, so if the charitable purpose becomes impossible the Trust terminates and the Trust property is distributed to the principal beneficiary, if any, or reverts to the settlor's estate. See **CHARITABLE TRUSTS**.
593. **DISCRETIONARY TRUST (TRUSTS):** A discretionary Trust is one that gives the trustee discretion to chose when to distribute property of the Trust, how much to distribute, and which of the named beneficiaries to pay. The assets of a discretionary Trust can be **GARNISHED**, but the trustee cannot be forced to make distributions. See **GARNISH**.
594. **DUTY OF DUE CARE (TRUSTS):** A trustee has a duty to manage Trust property in a responsible manner, to properly allocate income and expenses between the beneficiaries and to be impartial between beneficiaries. See **TRUSTEE DUTIES**.
595. **DUTY OF IMPARTIALITY (TRUSTS):** A trustee has a duty to be impartial between beneficiaries and 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 of the **SETTLOR**. **California Probate Code** §16304 provides that if a Trust receives property because of a party's death, it becomes subject to the Trust as of the date of the party's death, and an income beneficiary is entitled to all income from the property following that date. See **TRUSTEE DUTIES**.
596. **DUTY TO INFORM (TRUSTS):** A trustee has a duty to keep the beneficiary reasonably informed and to provide an accounting of the Trust property. See **TRUSTEE DUTIES**.

597. **DUTY OF LOYALTY (TRUSTS):** A trustee has a duty to avoid conflicts of interest, to administer the Trust property solely for the benefit of the beneficiary, and not to engage in self-dealing. See TRUSTEE DUTIES.
598. **FRAUD (WILLS/TRUSTS):** Fraud is a cause of action for challenging the validity of a Will or Trust, although the issue seems to be tested on exams mostly in the context of Wills. Portions of Wills or Trusts are invalid if they are shown to be the result of FRAUD. Fraud requires a showing that a 1) false statement of 2) material fact, was 3) made knowingly with an 4) intent to deceive and caused the testator to 5) act in reliance in writing the Will. **But under California law if only two witnesses sign a Will**, fraud will be presumed as to any who has a financial interest in the instrument. If two or more disinterested witnesses sign a Will fraud will not be presumed even if other interested witnesses also sign the Will. **There is no witnessing requirement for Trusts under California law at all.** If an attorney or other person participating in the drafting of a Will or Trust has a financial interest in the instrument fraud and/or undue influence will also be presumed. When fraud or undue influence is presumed the interested party is limited to receiving no more than an INTESTATE SHARE of the estate.
599. **GARNISHMENT (WILLS/TRUSTS)** Garnishment is a legal attachment or placement of a lien against a beneficiary's income from or assets in a GENERAL POWER OF APPOINTMENT or a Trust. Usually the issue of garnishment or attachment concerns a beneficiary's interest in a Trust. Income from a DISCRETIONARY TRUST can be garnished when it is distributed to beneficiaries, but the trustee cannot be forced to distribute assets. Income and assets of SUPPORT or SPENDTHRIFT TRUSTS cannot normally be garnished. **An exception under the California Probate Code is** that they can be garnished and attached to recover 1) child and spousal support, 2) felony restitution payments, 3) public assistance payments, and 4) where excessive amounts are held in trust and equity demands attachment. See DISCRETIONARY TRUST, GENERAL POWER OF APPOINTMENT, SPENDTHRIFT TRUST, SUPPORT TRUST.
600. **GENERAL PURPOSE CHARITABLE TRUST (TRUSTS):** A general purpose charitable Trust is one established to improve the welfare of the general public or the general welfare of a given group as opposed to a SPECIFIC PURPOSE CHARITABLE TRUST which is intended to give specific benefits to a specific group. If the stated purposes of a General Purpose Trust become impossible the court may use the CY PRES DOCTRINE to modify or reform the purposes of the Trust. See CHARITABLE TRUST, CY PRES DOCTRINE, SPECIFIC PURPOSE CHARITABLE TRUST.
601. **INCOME BENEFICIARY (TRUSTS):** An income beneficiary is one with a present right to all income from Trust property. See PRINCIPAL BENEFICIARY.
602. **INCOME DATE (TRUSTS):** The term "income date" means the date before which separates Trust receipts and expenses that should be allocated to INCOME BENEFICIARIES from those that should be allocated to PRINCIPAL BENEFICIARIES. See DUTY OF IMPARTIALITY.
603. **INTER VIVOS TRUSTS (TRUSTS):** See LIVING TRUST.

604. **IRREVOCABLE TRUST (TRUSTS):** An irrevocable Trust is one expressly declared irrevocable in the trust instrument or else presumed irrevocable by law because it is silent as to revocability in a State that presumes Trusts to be irrevocable. REVOCABLE TRUSTS become irrevocable upon the death of the SETTLOR or otherwise as stated in the Trust instrument.
605. **LIVING TRUST (TRUSTS):** A “living Trust” is one created by a living SETTLOR. Also called “inter vivos” Trusts. See REVOCABLE TRUST.
606. **MERGER RULE (TRUSTS):** Under the Merger Rule, if a single individual is both the sole BENEFICIARY and the sole TRUSTEE the trust will terminate automatically.
607. **MODIFICATION (TRUSTS):** A revocable Trust may always be modified by the settlor. An IRREVOCABLE TRUST can be modified at the request of the TRUSTEE or a BENEFICIARY if 1) all BENEFICIARIES and the SETTLOR agree, 2) some BENEFICIARIES and the SETTLOR agree and it will not substantially impair the rights of the remaining beneficiaries or 3) the BENEFICIARIES alone agree the Trust is no longer necessary and it is NOT a SUPPORT or SPENDTHRIFT TRUST.
608. **POUR OVER WILLS/TRUSTS (WILLS/TRUSTS):** A pour over Trust is one that receives all of the residual property in a testator's estate after disbursement of amounts specifically bequeathed in a Will. And a pour over Will is one that gives all of the residual of an estate to a Trust. The validity of pour over Trusts was disputed in the past because they are unfunded when created. **But they are specifically valid under the California Probate Code.**
609. **PRINCIPAL BENEFICIARY (TRUSTS):** A principal beneficiary is one with a future right to the principal (corpus) of the Trust property upon the termination of the Trust. See INCOME BENEFICIARY.
610. **PRUDENT INVESTOR RULE (TRUSTS):** Under the Prudent Investor Rule a trustee has a duty to invest and manage Trust property in the manner that a prudent investor would use with reasonable care and diversification of investments considering the purposes of the Trust. See TRUSTEE DUTIES.
611. **REVOCABILITY (TRUSTS):** A Trust is revocable if so stated in the trust instrument. Where the trust instrument is silent, States are split. **A Trust is presumed revocable under California law** unless the trust instrument states a contrary intent. Revocation must be done exactly as specified in the trust instrument, if there is any provision. Otherwise a Trust is revoked by the settlor's delivery of a writing to the trustee during the life of the revoking settlor. See IRREVOCABLE TRUST, REVOCABLE TRUST.
612. **REVOCABLE TRUST (TRUSTS):** A revocable Trust is one created during the life of the SETTLOR and expressly declared revocable in the trust instrument or presumed revocable by law because it is silent as to revocability in a State that presumes Trusts to be revocable. All REVOCABLE TRUSTS are “living Trusts” (also called “inter vivos Trusts”) because the settlor has to be alive to revoke the Trust. But some living Trusts, by their terms, are IRREVOCABLE TRUSTS. **In California living Trusts are presumed to be revocable** unless the Trust terms state otherwise. But in some States living Trusts are presumed to be irrevocable unless otherwise indicated. Revocable Trusts provide beneficiaries with significant tax advantages as to capital gains treatment. See REVOCABILITY.

613. **SETTLOR (TRUSTS):** A settlor is a person who establishes a Trust and conveys property into it. They may also be called “Grantors”.
614. **SPECIFIC PURPOSE CHARITABLE TRUST (TRUSTS):** A specific purpose charitable Trust is one established to improve the welfare of a rather narrow segment of the public in a rather specific manner, as opposed to a GENERAL PURPOSE CHARITABLE TRUST. If the purposes of the Trust become impossible the CY PRES DOCTRINE does not apply, the Trust lapses and the TRUST ESTATE is returned to the SETTLOR or the settlor’s estate.
615. **SPENDTHRIFT TRUST (TRUSTS):** A spendthrift Trust is one that states in the trust instrument that the interest of the beneficiary in the Trust 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. However there are certain exceptions. See GARNISH.
616. **SUPPORT TRUST (TRUSTS):** 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 the beneficiaries of the availability of funds and to act to support the beneficiary. No luxuries can be paid for from trust property. A support Trust cannot be GARNISHED, normally. However there are certain exceptions. See GARNISH.
617. **TERMINATION (TRUSTS):** A Trust terminates 1) as specified in the trust instrument, 2) if revoked by the settlor, 3) under the MERGER RULE if the sole trustee is also the sole beneficiary, 4) if it has no purpose, 5) if it has no property, 6) if there is no beneficiary, or 7) by statute when it has too little property to be practical. The property of a terminated Trust is distributed to the principal beneficiary, if any, or reverts to the settlor's estate.
618. **TRUST ESTATE (TRUSTS):** The Trust Estate is the body of assets owned by a Trust.
619. **TRUSTEE (TRUSTS):** A trustee is a person who agrees to manage a Trust for the benefit of the beneficiaries.
620. **TRUSTEE DUTIES (TRUSTS):** A trustee has five basic duties: a 1) a DUTY OF DUE CARE in management of Trust property 2) a DUTY TO INFORM the beneficiary concerning the Trust, 3) a DUTY TO BE IMPARTIAL and properly allocate income and expenses between beneficiaries, 4) a DUTY OF LOYALTY to avoid conflicts of interest and administer the Trust solely for the benefit of the beneficiary, and 5) a DUTY TO OBEY the directives of the trust instrument and the probate code. A trustee can be exonerated from liability for breach of duty by the consent of a competent, fully informed beneficiary if the breach was not intentional, in bad faith, reckless or gross negligence.
621. **UNDUE INFLUENCE (WILLS/TRUSTS):** Undue influence is a basis for challenging the validity of a Will or Trust. Portions of a Will or Trust are invalid if clear or strong evidence shows they are the result of the testator’s free will being overcome. Undue influence is presumed where an attorney or someone with a confidential relationship helps draft a Will or Trust giving them a benefit. **In California** a Will or Trust is valid even if a beneficiary substantially assists in drafting it if an independent attorney provides a Certificate of Independent Review. Where undue influence is shown, the Will or Trust as a whole remains

valid but the party benefiting from the undue influence may receive no more than an INTESTATE SHARE, which see.

622. **VALID TRUST (TRUSTS):** A valid Trust is a legal entity legal entity created by a SETTLOR in which a TRUSTEE agrees to hold legal title to property for the benefit of a BENEFICIARY who holds equitable title. A valid private Trust must be created by 1) express intent, 2) with an identifiable beneficiary, 3) property, and 4) a purpose. No Trust fails for lack of a trustee. If a private Trust is invalid, the property reverts to the estate of the settlor. See BENEFICIARY, SETTLOR, TRUSTEE.



## Section 10: Rules and Definitions for CALIFORNIA COMMUNITY PROPERTY

The following rules are entirely based on the **California Family Code** as tested on the **California Bar Exam**. This area of law is NOT tested on the **Multistate Bar Exam**.

623. **COMMINGLED ASSET ALLOCATION (COMMUNITY PROPERTY):** Under California Community Property Law the spouse claiming a separate interest in an account with separate and community funds commingled has the burden of identifying the separate portion through DIRECT TRACING. This usually involves commingled funds in a bank or stock account. If direct tracing is impossible, FAMILY EXPENSE TRACING may be used to show the lowest intermediate separate property balance during marriage. A RECAPITULATION method may be used if tracing is impossible because the records have been lost through no fault of the party claiming the separate interest. See DIRECT TRACING, FAMILY EXPENSE TRACING, RECAPITULATION.
624. **COMMUNITY PROPERTY (COMMUNITY PROPERTY):** Under California Community Property Law all earnings during marriage are COMMUNITY PROPERTY, property of the community, regardless of form, unless they are otherwise classified by law (i.e. not classified as separate property).
625. **DIRECT TRACING (COMMUNITY PROPERTY):** Direct tracing is a method of identifying a separate property interest in a commingled account by tracing the continued existence of the separate property interest throughout the history of the account. This would be possible, for example, where a party kept a separate accounting despite the fact the funds were all placed in one account. See COMMINGLED ASSET ALLOCATION.
626. **DISABILITY INCOME PAYMENTS (COMMUNITY PROPERTY):** Disability income payments received during marriage are COMMUNITY PROPERTY and payments received before marriage or after separation are generally SEPARATE PROPERTY. However, disability payments received after separation are community property to the extent they are a substitute for retirement pay that was earned during the marriage and therefore community property.
627. **EDUCATION EXPENSE (COMMUNITY PROPERTY):** Under California Community Property Law the obligation for STUDENT LOANS will be allocated to the spouse benefited upon dissolution, and the benefited spouse must reimburse the community for education expenses in the form of tuition, books and student fees paid by the community, 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 10 years previous to dissolution.
628. **FAMILY EXPENSE TRACING (COMMUNITY PROPERTY):** Family expense tracing is a method of identifying a separate property interest in a commingled account by showing that the lowest intermediate balance of the account since the time commingling took place was sufficiently large to preserve the separate interest as separate property. This would be possible where the lowest intermediate balance of the account never fell completely to zero. See COMMINGLED ASSET ALLOCATION.

629. **FEDERAL PREEMPTION (COMMUNITY PROPERTY):** Federal law preempts State community property laws with respect to ERISA pensions, social security and military pay.
630. **GILMORE ELECTION (COMMUNITY PROPERTY):** If a pension is available to be taken by one divorced spouse, the other spouse may elect to immediately receive his or her community property portion, even if the spouse that earned the pension elects to continue working and postpone retirement.
631. **JOINT TITLE PRESUMPTION (COMMUNITY PROPERTY):** Under California Community Property law property held in joint title or acquired during marriage as “husband and wife” or as “Mr. and Mrs.” is generally presumed to be COMMUNITY PROPERTY unless some other contrary presumption applies. One other rule would be the MARRIED WOMAN'S PRESUMPTION and another would be the rule on TRANSMUTATION. See MARRIED WOMAN'S PRESUMPTION, TRANSMUTATION.
632. **MARRIED WOMAN'S PRESUMPTION (COMMUNITY PROPERTY):** Under California Community Property Law any property acquired by a married woman in her own name by a written instrument prior to 1975 is presumed to be SEPARATE PROPERTY, despite the form of title. In this cases the wife is deemed to hold an undivided  $\frac{1}{2}$  interest in the property as a TENANT IN COMMON with the community holding the other  $\frac{1}{2}$  interest. Thus the wife is deemed to own  $\frac{3}{4}$  of the property,  $\frac{1}{2}$  as separate property and  $\frac{1}{4}$  as a  $\frac{1}{2}$  interest in the  $\frac{1}{2}$  interest held by the community. Where this presumption applies (property acquired before 1975) it overrules the JOINT TITLE PRESUMPTION. This presumption could be overcome in turn by a TRANSMUTATION. See JOINT TITLE PRESUMPTION, TRANSMUTATION.
633. **MISAPPROPRIATION OF COMMUNITY PERSONAL PROPERTY (COMMUNITY PROPERTY):** Under California Community Property Law a conveyance of community personal property by one spouse without written consent from the other spouse can be set aside in total at any time.
634. **MISAPPROPRIATION OF COMMUNITY REAL PROPERTY (COMMUNITY PROPERTY):** Under California Community Property Law a conveyance of community real property by one spouse without written consent from the other spouse can be set aside in total at any time if the if the buyer knew of the marriage. If the buyer did not know of the marriage, the conveyance of real property can be set aside in total within one year if the conveying spouse is alive and one-half of the transaction can be set aside within one year if the spouse conveying the property is dead.
635. **MIXED ASSET ALLOCATION (COMMUNITY PROPERTY):** Under California Community Property Law an increase in the value of SEPARATE PROPERTY during marriage partially because of community effort contains a mix of separate and community components that must be determined by allocation. This may be an ongoing business, a stock portfolio or actively managed real property. Under the PEREIRA approach the separate property interest is credited with a representative rate of return, and under the VAN CAMP approach the community effort is credited with a representative wage. See PEREIRA, VAN CAMP.

636. **PENSION OR RETIREMENT PAY (COMMUNITY PROPERTY):** Pension or retirement pay received after marriage is COMMUNITY PROPERTY to the extent and in the proportion that the right to receive retirement income was earned during the marriage.
637. **PEREIRA (COMMUNITY PROPERTY):** The “Pereira approach” is an allocation formula for allocating increases in the value of SEPARATE PROPERTY during marriage when the community effort is the main factor causing the separate property to increase in value. This is usually an ongoing business or actively managed real property. The separate property is credited with a representative rate of return and the balance of value increase is credited to the community. See MIXED ASSET ALLOCATION, VAN CAMP.
638. **PERSONAL INJURY AWARD (COMMUNITY PROPERTY):** A personal injury award is COMMUNITY PROPERTY if the injury occurred during marriage and SEPARATE PROPERTY otherwise. But in the case of dissolution the entire award may be allocated to the injured spouse if justice requires, and in no event may the injured spouse be allocated less than 50% of the award.
639. **QUASI-COMMUNITY PROPERTY (COMMUNITY PROPERTY):** Under California Community Property Law all 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 a dissolution it is generally allocated in the same manner as community property.
640. **RECAPITULATION (COMMUNITY PROPERTY):** Recapitulation is a method of identifying a separate property interest in a commingled account by recapitulating or recreating accounting records that were lost through no fault of the party claiming a separate interest. See COMMINGLED ASSET ALLOCATION.
641. **REIMBURSEMENT FROM COMMUNITY FOR DOWN PAYMENTS (COMMUNITY PROPERTY):** After 1983 under California Community Property Law any contributions to the community from SEPARATE PROPERTY for down payments to acquire jointly held community property must be reimbursed from the community in the case of dissolution if they are 1) traceable and 2) there was no written waiver of the right to reimbursement by the party seeking reimbursement.
642. **REIMBURSEMENT FROM COMMUNITY FOR IMPROVEMENTS (COMMUNITY PROPERTY):** Under California Community Property Law (Family Code § 2640) spouses in a dissolution have a right to reimbursement for expenditures of SEPARATE PROPERTY made to acquire, improve or pay off loans against community property (e.g. the family home). There is no reimbursement for payments toward interest, maintenance, insurance or taxes on community property assets, and there is no separate property interest in capital appreciation. Payments of separate property funds for other community purposes (e.g. to go on a vacation) are presumed to be gifts to the community and there is no reimbursement right.
643. **REIMBURSEMENT TO COMMUNITY FOR GIFTS (COMMUNITY PROPERTY):** Under California Community Property Law gifts of COMMUNITY PROPERTY by one spouse without the written consent of the other spouse can be set aside in total as long as the gifting spouse is alive, and one-half of the gift can be set aside if the gifting spouse has died.

644. **REIMBURSEMENT TO COMMUNITY FOR LOAN PAYMENTS (COMMUNITY PROPERTY):** Under California Community Property Law payments by the community against loans secured by the SEPARATE PROPERTY of a spouse create a community interest in that property. This usually occurs when a spouse owns a home before marriage, and after marriage community funds are used to make loan payments. The community interest is the portion of total property equity equal to the ratio of the part of the loan balance paid from community funds compared to the total loan balance paid. For example, if Hal owned a home before marriage and upon dissolution it is found that \$100,000 of the original loan balance has been paid (no matter what the total loan was) and \$50,000 (half) of that amount was paid from community funds, the community has acquired a 50% interest in the equity of Hal's house (no matter what the equity is or when it accrued).
645. **RETIREMENT PAY (COMMUNITY PROPERTY):** See PENSION OR RETIREMENT PAY.
646. **SEPARATE PROPERTY (COMMUNITY PROPERTY):** Under California Community Property Law all property acquired before marriage, after separation, or during marriage by gift, bequest or devise is presumed to be SEPARATE PROPERTY, the property of the separate spouse.
647. **STUDENT LOANS (COMMUNITY PROPERTY):** See EDUCATION EXPENSE.
648. **TRANSMUTATION (COMMUNITY PROPERTY):** Transmutation means the conversion of property from COMMUNITY PROPERTY to SEPARATE PROPERTY or vice versa by agreement of the parties. Under California Community Property Law after 1984 any transmutation agreement must be an express declaration, in writing, by the spouse whose interest will be adversely affected, based on full disclosure. If there has been a TRANSMUTATION by express agreement, it will overcome the JOINT TITLE PRESUMPTION and the MARRIED WOMAN'S PRESUMPTION, if they should apply. See JOINT TITLE PRESUMPTION, MARRIED WOMAN'S PRESUMPTION.
649. **VAN CAMP (COMMUNITY PROPERTY):** The "Van Camp" approach is an allocation formula for allocating increases in the value of SEPARATE PROPERTY during marriage partially because of community effort. The VAN CAMP approach is used when appreciation of the separate property is the main factor causing the separate property to increase in value. This would usually be a stock portfolio or passive investments in real property. The community effort is credited with a representative wage and the balance of value increase is credited to the separate interest. See MIXED ASSET ALLOCATION, PEREIRA.

## Section 11: Rules and Definitions for EVIDENCE

The following rules are based on the **Federal Rules of Evidence** as tested on the **Multistate Bar Exam** with comparisons to California law as tested on the **California Bar Exam**.

650. **ADMISSION OF PARTY OPPONENT (EVIDENCE):** Under Federal Rule of Evidence 801(d) an assertion is not excluded as hearsay if it is an admission of a party opponent. 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 may also be a statement by another person that has been expressly or impliedly adopted by the declarant. Use of an admission by a co-conspirator requires proof that the conspiracy existed, that the party opponent was a member and that the admission was made in the course and furtherance of the conspiracy. Some districts also require proof that the party opponent was a member of the conspiracy before the admission by the co-conspirator. Under FRE 410 a plea of nolo contendere or a withdrawn plea is barred from use as an admission. **But the California Evidence Code does treat a nolo contendere plea as an admission.**
651. **AFFIRMATIVE DEFENSES (EVIDENCE):** Affirmative defenses are claims by defendants that even if the opposing parties (prosecutors or plaintiffs) can prove each required element of their causes of action (e.g. that the defendant committed battery) they were privileged by law to commit the acts complained of anyway (e.g. that they acted in self-defense). Affirmative defenses can only be raised by the defendant after the opposing parties have completed presentation of their case-in-chief. The burden is on the defendants to prove each required element of affirmative defenses. (see PASSIVE DEFENSES.)
652. **ATTORNEY-CLIENT PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. The ATTORNEY-CLIENT privilege is an absolute privilege in most 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.
653. **ATTORNEY WORK PRODUCT (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. The ATTORNEY WORK PRODUCT privilege is 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.
654. **AUTHENTICATION (EVIDENCE):** Authentication is testimony or certification that establishes the reliability of documentary evidence. Before photographs and other documents may be admitted they must be authenticated by testimony to prove they are accurate depictions of the scene they portray.

655. **BEST EVIDENCE RULE (EVIDENCE):** Under the Federal Rule of Evidence 1002 original documents must usually be presented to prove the contents of a writing. Originals do not have to be admitted into evidence in certain instances where they have been lost or destroyed, were offered for inspection, are beyond jurisdiction, are in the control of the other party, are part of voluminous records or are the type of document kept in the ordinary course of business.
656. **BUSINESS RECORDS (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be admitted as a business record if it is a written record made at or near the time of an event with information provided by a knowledgeable person as part of the regular practice of the business organization to keep such records as testified to by a custodian of records.
657. **CASE-IN-CHIEF (EVIDENCE):** The “case-in-chief” is the evidence and legal argument presented to the finder of fact (judge or jury) by a moving party (prosecutor or plaintiffs bringing actions in court). The moving parties have the burden of presenting admissible evidence to prove each and every required legal element their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. After the moving parties have presented their case-in-chief they “rest” and the defendants are given an opportunity to present their “defense case-in-chief”. That is the only time the defendant can claim and present evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).
658. **CERTIFIED PUBLIC RECORDS (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be admitted as a CERTIFIED PUBLIC RECORD, but police reports cannot be used by prosecution as evidence against a criminal defendant.
659. **CHARACTER EVIDENCE (EVIDENCE):** Under Federal Rule of Evidence 404(a) character evidence cannot generally be used to prove conduct of a person in conformity with character. But, a criminal defendant may present evidence of his own character or the alleged victim's character to prove conduct relevant to the charged offense or a claimed defense, and the prosecution may use similar evidence to rebut. And if a homicide defendant claims the alleged victim was the aggressor the prosecution can introduce evidence the alleged victim was a peaceable person.

Under FRE 404(b) evidence of other crimes or acts can be used to prove intent, motive, a common plan or scheme, identity, notice, or knowledge. And, FRE 405(b) allows admission of character evidence if it is a necessary element of an offense or defense. (See COMMON PLAN).

Under FRE 405 character evidence generally must be testimony of opinion or reputation, but specific acts may be asked about upon cross-examination. When a party presents character evidence the opposing party may present opposing character evidence of a similar nature.

FRE 406 allows use of evidence to show HABIT behavior (See HABIT).

FRE 412 excludes all evidence of an alleged victim's sexual behavior or predisposition except to show that the alleged victim of a sexual assault was consenting or that physical evidence of sexual assault had a different possible source.

But FRE Rules 413-415 allow admission of evidence of past acts of sexual assault and child molestation by a defendant to prove conduct in conformity with character in certain criminal and civil actions.

FRE 607-609 also allow the use of character evidence for IMPEACHMENT to question the credibility of witnesses. (See IMPEACHMENT.) And INCONSISTENT PRIOR STATEMENTS may be used to attack the accuracy of testimony under FRE 613 (See INCONSISTENT PRIOR STATEMENTS.)

**Under California rules evidence of past acts of sexual assault and child molestation cannot be admitted to prove conduct in civil actions. Further evidence of past domestic violence can be admitted to prove conduct in criminal actions. And in homicide prosecutions claims by a defendant that the alleged victim was the aggressor do not allow the prosecution to admit evidence of the alleged victim's peaceable character.**

660. **CIRCUMSTANTIAL EVIDENCE (EVIDENCE):** Circumstantial evidence is evidence of observed facts that tends to prove material facts by implication. For example, fingerprints found at the scene of a crime may prove by implication that a particular person was present when the crime took place. Circumstantial evidence is admissible if a reasonable inference naturally flows from it concerning an unobserved material fact, even if it is not the most probable inference that can be drawn.
661. **COLLATERAL EVIDENCE RULE (EVIDENCE):** Under Federal Rule of Evidence 608(b) evidence of specific instances of the conduct of a witness, other than conviction of crimes as specified in FRE 609, may not be introduced to attack or support the witness' credibility. This is called the "Collateral Evidence Rule". (See IMPEACHMENT.)
662. **COMMON PLAN (EVIDENCE):** Under Federal Rule 404(b) evidence of other similar crimes or acts by the same person may be used to prove intent, motive, a plan, identity, notice, knowledge or necessary elements of an offense or defense. The level of similarity does not need to be very high to prove that the opposing party acted with intent. A higher level of similarity is needed to prove that the opposing party acted in a similar manner. And the highest level of similarity is necessary to prove the identity of a perpetrator was the opposing party.
663. **COMPOUND (EVIDENCE):** Questions combining two or more queries are objectionable as VAGUE or CONFUSING.
664. **CONSISTENT PRIOR STATEMENTS (EVIDENCE):** Under Federal Rule of Evidence 801(d) an assertion is not hearsay if it is a consistent prior statement offered to rebut a charge or implication that the witness' testimony is a fabrication or result of improper influence or motive. A prior consistent statement can only be admitted if it was made before the time when the opposing party implies an incentive to give false testimony arose.

665. **DYING DECLARATION (EVIDENCE):** Under Federal Rule of Evidence 804 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 if the declarant is unavailable. **Under California law the declarant must actually be dying at the time the statement is made rather than merely “think” they are dying.**
666. **EXCITED UTTERANCE (EVIDENCE):** 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.
667. **EXPERT TESTIMONY (EVIDENCE):** Under Federal Rule of Evidence 702 EXPERT OPINION is admissible if the witness has special knowledge that would assist the trier of fact to determine a fact in issue. The opinion must be presented with reasonable certainty. Under FRE 703 an expert opinion may be based on inadmissible evidence if that type of evidence is typically used in the expert's field of knowledge. But expert opinions may not be based on facts that have not been perceived by or made known to the expert at or before the hearing. Under FRE 704 an expert witness cannot testify about whether criminal defendants had the necessary mental state for a charged crime or defense.
668. **FORMER TESTIMONY (EVIDENCE):** Under Federal Rule of Evidence 804 HEARSAY can be admitted as former testimony if the declarant is unavailable and the opposing party had a fair opportunity and motive to question the declarant at the time the statement was made.
669. **FOUNDATION (EVIDENCE):** Before any evidence can be admitted a “foundation” must be established, usually by preliminary testimony, to establish the reliability of the evidence. This usually means witnesses must be questioned to prove they were present at the scene of events in dispute, could observe the events, can remember the events, and can accurately and truthfully relate them to the Court.
670. **GOVERNMENTAL/POLICE PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. 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.
671. **HABIT (EVIDENCE):** Under Federal Rule of Evidence 404 character evidence cannot generally be used to prove conduct in conformity with character, but Rule 406 allows evidence of a strict adherence to a regimen to be admitted as proof of conduct by a person in conformity with that habit.
672. **HEARSAY (EVIDENCE):** 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, under FRE 801(d) an assertion is not hearsay if it is 1) an admission of a party opponent, or when a witness at the trial is available to be questioned about 2) inconsistent prior statements under oath, 3) consistent prior statements offered to rebut a charge or implication that their testimony is a fabrication or result of improper influence or motive, or 4) statements of identification of a person after perceiving the person.



673. **HILLMON DOCTRINE (EVIDENCE):** 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.

674. **IDENTIFICATION STATEMENT (EVIDENCE):** Under Federal Rule of Evidence 801(d) 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. **Under the California Evidence Code statements of identification are hearsay but admissible if declarants testify they honestly and accurately identified the person at the time.**

675. **IMPEACHMENT (EVIDENCE):** Under the Federal Rules evidence can always be used for the purpose of attacking a witness' ability to observe, remember and give an accurate, objective and unbiased account of events. And under Rule 613 INCONSISTENT PRIOR STATEMENTS can be admitted. But FRE 801(d) allows CONSISTENT PRIOR STATEMENTS to be introduced to rebut implications that testimony is fabricated. (See CONSISTENT PRIOR STATEMENTS, INCONSISTENT PRIOR STATEMENTS.)

The use of character evidence to impeach the truthfulness of a witness is limited by Federal Rule of Evidence 608. Only evidence of 1) certain criminal convictions, 2) opinion and 3) reputation are allowed. After a witness' honest has been attacked similar evidence be admitted to defend the witness's truthfulness.

Under the COLLATERAL EVIDENCE RULE of section 608(b) no other extrinsic evidence of specific acts related to honesty can be admitted to prove or attack the truthfulness of a witness. But, the court may allow questioning about specific instances of conduct on cross-examination if the evidence is probative of truthfulness.

Under FRE 609 the truthfulness of a witness can be attacked by introducing any convictions of the witness within 10 years that involved dishonesty, other felony convictions within 10 years if the probative value outweighs the prejudicial effect, and any convictions over 10 years prior if the probative value substantially outweighs the prejudicial effect. A nolo contendere pleas is not considered a conviction.

Under Rule 610 no evidence of religious beliefs can be admitted to either attack or defend a witness' credibility.

**Under California rules a nolo contendere plea is a conviction, and any conviction for any felony can be admitted to impeach a witness. But no evidence of convictions for any misdemeanors of any type can be admitted to impeach.**

676. **INCONSISTENT PRIOR STATEMENT (EVIDENCE):** Under Federal Rule of Evidence 801(d) 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. Under FRE 613 an inconsistent prior statement not made under oath may still be introduced to attack the reliability of testimony if the witness is given an opportunity to explain or deny the statement. A failure to remember at trial can be an implied denial such that all previous recollections of an event are inconsistent statements that can then be introduced. **Under California rules prior inconsistent statements are hearsay, but can be admitted even if not made under oath as long as the declarant is available to testify.**

677. **INDEPENDENT LEGAL SIGNIFICANCE (EVIDENCE):** An assertion is not excludable as hearsay if it carries independent legal significance relevant to an issue of fact. This means the making of the statement itself, and its nature, is the issue in dispute, and not that the assertion made in the statement was true. Examples include statements to prove contracts were entered into, that people entered into marriage, that a person made a defamatory statement, and that people made threats or committed fraud or extortion
678. **INHERENTLY TRUSTWORTHY STATEMENT (EVIDENCE):** Under Federal Rule of Evidence 804 hearsay may be admitted if the declarant is not available to testify, the statement was made in circumstances that indicate it is inherently trustworthy, it is offered to prove a material fact, it is more probative than any other reasonably available evidence, and admission serves the interests of justice. **There is no similar rule in the California Evidence Code.**
679. **JUDICIAL NOTICE (EVIDENCE):** Under Federal Rule 201 evidence may be established by JUDICIAL NOTICE if it is a fact generally known or capable of accurate and ready determination. A jury must accept facts subject to judicial notice as conclusive in civil cases and may accept them as conclusive in criminal cases.
680. **JURY PRIVILEGE (EVIDENCE):** Under Federal Rule 606 jury deliberations may not be revealed in testimony except for whether improper extraneous information or influences were brought to bear on the jury.
681. **LAY OPINION (EVIDENCE):** Under Federal Rule of Evidence 701 a lay opinion is limited to opinions or inferences that are rationally based on perceptions of the witness and helpful to understand the witness' testimony or determine a fact in issue.
682. **LEADING (EVIDENCE):** Leading questions are those that suggest the answer the witness is expected to state. Most typically they state a material fact to be true and then ask the witness to confirm or dispute it as in, "You were at the scene of the accident, weren't you?" They can only be asked on 1) cross-examination, 2) where the witness is hostile, 3) to assist a child or other person with weak memory or 4) about a preliminary matter.
683. **LEARNED TREATISE (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be read into the record as a learned treatise if it is mentioned by or relied upon by an expert witness.
684. **MARITAL COMMUNICATIONS PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. The marital communication privilege is held by each spouse in most States and shields confidential communications between spouses during marriage both during and after marriage. The privilege cannot be used to commit a crime or fraud. Compare to the SPOUSAL PRIVILEGE.
685. **MEDICAL DIAGNOSIS AND TREATMENT (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be admitted if it is a statement of past and present health, pain and feelings made by the declarant to obtain medical diagnosis or treatment.

686. **NARRATIVE QUESTIONS (EVIDENCE):** Questions that lack specificity are considered to call for a narrative answer. They are objectionable but may be allowed at the discretion of the Court.
687. **PASSIVE DEFENSES (EVIDENCE):** Passive defenses are arguments by defendants that the opposing parties (prosecutors or plaintiffs) have failed to meet their burden to prove each required legal element of their stated causes of action (e.g. that the defendant committed battery). (see AFFIRMATIVE DEFENSES.)
688. **PAST RECOLLECTION RECORDED (EVIDENCE):** 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 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.
689. **PAST RECOLLECTION REFRESHED (EVIDENCE):** Under Federal Rule of Evidence 612 a witness with some memory of an event may have their past recollection refreshed by being shown a writing or object after it is first presented to the court and opposing counsel as long as the witness is afterward able to testify without depending on the writing or object.
690. **PEDIGREE (EVIDENCE):** Under Federal Rule of Evidence 804 HEARSAY can be admitted as a statement of PEDIGREE of or by the declarant if the declarant is unavailable.
691. **PHYSICAL, MENTAL OR EMOTIONAL STATE (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be admitted as a evidence of the mental, emotional or physical condition of the declarant at a time in the past if it was a statement by the declarant at that time about what their state of mind, health, pain, feelings, intent, plan or motive then was. For example, if the declarant said, “I’m afraid,” it could be used as evidence to prove the declarant was “afraid” at the time the statement was made. This is sometimes referred to as the STATE OF MIND exception. (See HILLMON DOCTRINE.)
692. **PHYSICIAN-PATIENT PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. The PHYSICIAN-PATIENT privilege is held by patients in many States and allows them to shield confidential communications with physicians during medical diagnosis and treatment from discovery in civil actions.
693. **PREJUDICIAL EVIDENCE (EVIDENCE):** Under Federal Rule of Evidence 403 the Court has discretion to exclude relevant evidence if the probative value is substantially outweighed by undue prejudice, confusion, delay or it is cumulative.
694. **PRESENT SENSE IMPRESSION (EVIDENCE):** Under Federal Rule of Evidence 803 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.
695. **PRIEST-PENITENT PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. The CLERGY-PENITENT privilege is held by both clergy and penitents in many States and allows them to shield penitential communications from discovery.

696. **RECORDS (EVIDENCE):** Under Federal Rule of Evidence 803 HEARSAY can be admitted if it meets the description of certain RECORDS (besides BUSINESS RECORDS and CERTIFIED PUBLIC RECORDS) including land records, boundary records, ancient records over 20 years old, vital statistics, church records, family records, commercial listings, market and weather reports, records of felony convictions if presented to prove facts essential to the verdict. Further, the absence of such a record may be introduced as evidence that an event did not occur where it would normally be duly recorded.
697. **REDIRECT (EVIDENCE):** The testimony elicited by the plaintiff or prosecution following cross-examination.
698. **RELEVANCE (EVIDENCE):** Under Federal Rule of Evidence 401 evidence must be RELEVANT because it tends to prove a fact related to a material issue of the dispute is more or less probable. Relevant evidence is presumed admissible unless excluded by other rules. A material issue is one that is unsettled and important to establishing a necessary element of a legal issue. The credibility of witnesses is always a material issue.
- Under FRE 403 relevant evidence may be excluded by the court if the probative value is substantially outweighed by the danger of unfair prejudice, confusion, delay, or needless presentation of cumulative evidence. (See PREJUDICIAL EVIDENCE.)
699. **REMEDIAL MEASURES (EVIDENCE):** Under Federal Rule 407 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.
700. **SCIENTIFIC TESTS (EVIDENCE):** The results of a scientific test are admissible if it can be shown that it is relevant and reliable because it is usually accurate, it was done by a trained technician, and it was done in the correct manner.
701. **SETTLEMENT OFFERS (EVIDENCE):** Under Federal Rule 408 evidence of SETTLEMENT OFFERS IN COMPROMISE is not admissible to prove liability for or invalidity of a claim.
702. **SIMILAR HAPPENINGS (EVIDENCE):** Under the Federal Rules evidence of extremely similar happenings, or the lack thereof, may be admitted to prove, or disprove, existence, notice or knowledge of a condition or the occurrence of an event. This is to be distinguished from CHARACTER EVIDENCE and evidence of HABIT (which see) because those pertain to the character and habit of a person to prove the conduct of that person.
703. **SPOUSAL PRIVILEGE (EVIDENCE):** Under Federal Rule 501 State privilege rules are adopted in federal court. 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 regarding communications between the spouses both during and after marriage. The privilege cannot be used to commit a crime or fraud. Compare to the MARITAL COMMUNICATIONS PRIVILEGE.
704. **STATE OF MIND (EVIDENCE):** See PHYSICAL, MENTAL OR EMOTIONAL STATE.

705. **STATEMENTS AGAINST INTEREST (EVIDENCE):** Under Federal Rule of Evidence 804 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.

## Section 12: Rules and Definitions for REMEDIES

The following rules are based on generally accepted common law. This area of law is NOT tested on the **Multistate Bar Exam**.

706. **ADEQUACY OF LEGAL REMEDIES (REMEDIES):** To establish EQUITABLE JURISDICTION the movant must show legal remedies are inadequate. Legal remedies are inadequate 1) where unique property is in dispute, 2) where repetitive legal actions would otherwise be required, 3) where fundamental rights are at risk, or 4) where money judgments cannot be collected and have no preventative effect.
707. **AMERICAN RULE (REMEDIES):** Under the “American Rule” each party is generally responsible for its own attorney fees. Compare to ENGLISH RULE.
708. **ATTORNEY FEES (REMEDIES):** Under the AMERICAN RULE each party is generally responsible for its own attorney fees. However, a contract or statute may provide for an award of attorney fees to the prevailing party in specific cases. Under the federal and majority view attorney fees may only be awarded where a contract or statute provides for such an award. Some States allow fees to be awarded to a prevailing party under a PRIVATE ATTORNEY GENERAL RULE or a 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.
709. **BONA FIDE PURCHASER FOR VALUE (REMEDIES):** The term “bona fide purchaser for value” (BFP or BFPV) means a person who has purchased property from a seller in good faith and without knowledge that third-party claims existed against the property such as security interests, liens, etc. The term “good faith” generally means in an arm’s length transaction for fair market value, and the term “without knowledge” means without notice, actual or constructive. Generally a BFP receives clear title to the property as to those claims that are unknown, and the property or claims cannot be recovered against the BFP by the party with the pre-existing claim. However, a BFP can only receive title if the seller held title. A BFP cannot receive clear title to stolen goods because the seller does not have title to convey.
710. **COLLATERAL ATTACK (REMEDIES):** A collateral attack with respect to a finding of contempt for violation of an injunction or court order is a challenge that the original injunction was improper.
711. **COMMINGLED FUNDS (REMEDIES):** Under the law of remedies the existence of commingled funds in an asset may be raised as a defense to a claim against the whole of the property based on a theory of CONSTRUCTIVE TRUST.
712. **COMMON FUND THEORY (REMEDIES):** Attorney fees may be awarded to a prevailing party under a common fund theory where private legal action in the public interest benefited a number of parties and created a common fund out of which the fees can be paid.

**713. CONSEQUENTIAL DAMAGES (CONTRACTS/ REMEDIES/ TORTS):**

Consequential damages are an award of lost profits on collateral contracts because of the breach of contract. Under the common law doctrine established in *Hadley v. Baxendale* damages for lost profits will only be awarded under a contract, absent some express provision otherwise, where the damages were 1) CONTEMPLATED by the parties at the time of contract, 2) can be measured with CERTAINTY, 3) were CLEARLY CAUSED by the breach and 4) COULD NOT BE AVOIDED by the injured party. [Mnemonic = CCCC.] In **tort** law the majority view is that lost profits may be awarded in a tort action if there was privity between the parties based on a contract or some other relationship. In the minority view a tortfeasor will be liable for foreseeable lost profits even if there is no privity between the parties. (same as LOST PROFITS.)

**714. CONSTRUCTIVE TRUST (REMEDIES):** If EQUITABLE JURISDICTION exists, a constructive trust may be found if a tortfeasor wrongfully gains title to property. The property is then considered to have been held in trust for the true owner who can demand its return along with all profits and income that it has produced.

**715. CONTEMPT DEFENSES (REMEDIES):** Under the law of remedies a party that violates an injunction may be held liable for 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 of the court order, 3) that the order was impermissibly vague, or 4) that the defendant had no notice of the injunction.

A challenge of a contempt order by COLLATERAL ATTACK on the validity of 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. (See COLLATERAL ATTACK.)

**716. DAMAGES (REMEDIES):** The term “damages” rightfully means the amount of injury suffered by a plaintiff as a result of wrongful acts by a defendant. Usually courts of both law and equity compensate plaintiffs by awarding a MONEY JUDGMENT as a remedy measured by the damages they have suffered. However, they may also award money judgments to punish defendants (PUNITIVES), to prevent UNJUST ENRICHMENT, or to prevent FRUSTRATION OF REASONABLE EXPECTATIONS. It is very common for law professors, judges and lawyers to use the term “damages” to mean BOTH the injuries suffered by plaintiffs AND the remedies awarded courts. But the remedies awarded by courts are not always measured by the damages suffered by plaintiffs, so this can cause law students tremendous confusion. Compare to RESTITUTION.

**717. DETRIMENTAL RELIANCE (REMEDIES):** A Court of equity has discretion to provide a remedy to a party who 1) reasonably relied on 2) express or implied representations by another party who 3) deliberately acted to induce reliance if 4) an injustice would result otherwise.

**718. ENGLISH RULE (REMEDIES):** Under the English Rule a prevailing party is generally entitled to an award of attorney fees. Compare to AMERICAN RULE.

**719. EQUITABLE DEFENSES (REMEDIES):** The two equitable defenses are LACHES, ESTOPPEL and UNCLEAN HANDS.

720. **EQUITABLE JURISDICTION (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.
721. **EQUITABLE LIEN (REMEDIES):** If EQUITABLE JURISDICTION exists, an equitable lien can be claimed against other property held by the tortfeasor to the extent the property was enhanced or improved with funds that rightfully belonged to the plaintiff.
722. **EQUITABLE REMEDIES (REMEDIES):** There are two basic equitable remedies, EQUITABLE RESTITUTION and INJUNCTION, which see.
723. **EQUITABLE REPLEVIN (REMEDIES):** If EQUITABLE JURISDICTION exists, equitable replevin may be used to recover possession and title to chattels. Equitable replevin is simply an order of SPECIFIC PERFORMANCE with respect to chattel rather than real property. The defendant can not prevent equitable replevin by posting a bond.
724. **EQUITABLE RESTITUTION (REMEDIES):** Equitable restitution means that a Court of equity has crafted a remedy intended to prevent UNJUST ENRICHMENT and/or FRUSTRATION OF REASONABLE EXPECTATIONS. Usually the remedy will be award of a MONEY JUDGMENT to one of the parties against the other, but it may also involve an award of SPECIFIC PERFORMANCE. The goal of the Court would be to restore parties that did not act wrongfully, to the extent possible, to the position they were originally in. In some cases neither party acted wrongfully.
725. **ESTOPPEL (REMEDIES):** The doctrine of estoppel is an EQUITABLE DEFENSE that enforces an agreement or bars a defense if the person to be estopped 1) made express or implied representations or concealed material facts, 2) with an intent to cause reliance by the other party, 3) and their behavior caused reasonable reliance, and 4) an injustice will result if the court allows assertion of a position contrary to the party's prior representations. The term “estoppel” can be confusing because it is a noun (“The defendant pled estoppel”) but “estopped” is a related verb (“The plaintiff was estopped”). See PROMISSORY ESTOPPEL.
726. **EXEMPLARY DAMAGES (REMEDIES):** See PUNATIVES.
727. **FRUSTRATION OF REASONABLE EXPECTATIONS (REMEDIES):** A Court of equity may fashion a remedy to prevent the frustration of reasonable commercial expectations. The reasoning is that the public interest would be harmed if the reasonable expectations of businesses, tradesmen, consumers, etc. were disappointed, leaving them without any legal remedies, even if the transaction in dispute did not provide anybody with an UNJUST ENRICHMENT. This is frequently the basis for remedies based on IMPLIED-IN-LAW CONTRACT theory.



**728. IMPLIED-IN-FACT CONTRACT (REMEDIES):** An implied-in-fact contract is an actual legal contract created when one party knowingly receives benefits from another party who reasonably believes a contract exists. For example, a homeowner may allow a painter to accidentally paint his house knowing that the painter has made a mistake and is not painting the house he intended. The performing party is entitled to a legal remedy as in the case of any other contract, even though the other party never expressly agreed to enter into the contract. Further, implied-in-fact contracts can be challenged for failure to meet the requirements of any legal contract including the Statute of Frauds and statutes of limitation.

**729. IMPLIED-IN-LAW CONTRACT (REMEDIES):** An implied-in-law contract is an equitable theory or cause of action which gives a Court of equity discretion to fashion a remedy when one party has performed services intending to confer benefits on the other party with a reasonable expectation of compensation in return, but there is no legal contract that can be enforced at law. This may occur when a legal contract existed but is unenforceable due to a major breach, failure of implied conditions, lack of capacity of a party, or other reasons. The court may award **EQUITABLE RESTITUTION** to prevent **FRUSTRATION OF REASONABLE EXPECTATIONS** or to prevent **UNJUST ENRICHMENT**. Since this is an equitable cause of action (theory) it is subject to the **EQUITABLE DEFENSES** of **LACHES**, **UNCLEAN HANDS** and **ESTOPPEL**. In addition, a common defense to a plea based on implied-in-contract theory is that the movant was a **VOLUNTEER** without any reasonable expectation of compensation. An implied-in-law contract theory may be referred to as **QUASI-CONTRACT**.

**730. INJUNCTION (REMEDIES):** Under the law of remedies a party that proves **EQUITABLE JURISDICTION** exists may request an injunction. An injunction may be a **TEMPORARY RESTRAINING ORDER (TRO)**, a **PRELIMINARY INJUNCTION** or a **PERMANENT INJUNCTION**.

**TEMPORARY RESTRAINING ORDERS** and **PRELIMINARY INJUNCTIONS** are provisional relief that normally require posting a **BOND** to compensate the enjoined party if the injunction is improperly obtained. A **TRO** can be obtained on an *ex parte* application and usually lasts for 15 days.

**PRELIMINARY** and **PERMANENT INJUNCTIONS** can be appealed, but **TROs** cannot be appealed unless the order raises first amendment issues or constitutes a **DE FACTO PRELIMINARY INJUNCTION**.

A **STAY** may be requested during the appeal of an injunction, and in **CALIFORNIA** a mandatory injunction is automatically stayed during the period of appeal.

An injunction is enforced by the threat of a **CONTEMPT ORDER**.

**731. LACHES (REMEDIES):** The doctrine of laches is an **EQUITABLE DEFENSE** that bars a plaintiff from bringing a claim after unreasonably delaying in seeking relief, thereby causing prejudice to the defendant's position.

732. **LEGAL REPLEVIN (REMEDIES):** Under the law of remedies legal replevin may be used to recover possession of chattels where legal title has not passed. For example, repossession of a vehicle by the lender because the buyer has failed to make payments would be “legal replevin”. The defendant can prevent LEGAL REPLEVIN by posting a bond.
733. **LEGAL RESTITUTION (REMEDIES):** Legal restitution is an award of a MONEY JUDGMENT by a court of law measured to prevent UNJUST ENRICHMENT by a defendant that has acted wrongfully (tortfeasor or breaching party) rather than being measured by DAMAGES actually suffered by the plaintiff. Plaintiffs who have proven a right to a judgment have a right to chose an award of legal restitution instead of an award of damages. See EQUITABLE RESTITUTION, DAMAGES.
734. **LODESTAR (REMEDIES):** Under the “lodestar” approach a federal court may award attorney fees based on a reasonable number of hours multiplied by a reasonable rate. The rate used may be adjusted to reflect the nature of the case.
735. **MONEY JUDGMENT (REMEDIES):** About the only remedy provided by a court of law is the award of a money judgment. Usually the purpose is to compensate one party for DAMAGES suffered as a result of a wrongful acts by the other party, or else LEGAL RESTITUTION measured to prevent UNJUST ENRICHMENT by one party or the other. Courts of equity also award money judgments to prevent unjust enrichment or FRUSTRATION OF REASONABLE EXPECTATIONS. In either case the remedy is generally referred to as EQUITABLE RESTITUTION. When a money judgment is awarded (by either a court of law or equity) the burden is on the prevailing party (the “judgment creditor”) to recover on it (to “execute the judgment”) against the losing party (the “judgment debtor”) and that is not always possible. The Court (judge) does not issue an “order” that the judgment debtor to pay the judgment, and many judgments are never paid at all.
736. **MUTUALITY OF REMEDIES (REMEDIES):** The term “mutuality of remedies” means that a Court of equity may refuse to award SPECIFIC PERFORMANCE to a non-breaching party in a contract dispute unless there is assurance the non-breaching party will perform in return under the contract. For example, suppose Seller agrees to sell Blackacre to Buyer for \$1 million, but then Seller repudiates the contract. A Court of equity may not order Seller to deliver the Deed to Buyer unless there is some assurance Buyer is actually going to pay Seller the \$1 million he has promised. Otherwise Buyer may take the Deed, fail to pay Seller, and the Court of equity would have been used by Buyer as a tool to cheat Seller of his property.
737. **OBJECTIVE SENTIMENTAL VALUE (REMEDIES):** In the vast majority of cases plaintiffs seeking an award based on DAMAGES for lost or destroyed property must prove its value based on fair market value at the time of the loss. But in some rare cases courts have allowed damages to be based on the value of the property to the plaintiff, rather than fair market value, and they have termed this “objective sentimental value”.
738. **PRIVATE ATTORNEY GENERAL RULE (REMEDIES):** Some States (e.g. California) allow attorney fees to be awarded to a prevailing party under a private attorney general theory where private legal action is necessary to protect important public interests, a large number of parties benefit and there is a substantial burden on the plaintiff.

739. **PROMISSORY ESTOPPEL (REMEDIES):** The term “promissory estoppel” means a Court of equity has discretion to estop a party from acting after 1) making express promises they would not act, 2) intending to cause or knowing the other party would rely on the promise, 3) and the other party did reasonably rely on the promise, and 4) an injustice will result if the party acts in the way they promised they would not. (See ESTOPPEL.)
740. **PUNITIVE DAMAGES (REMEDIES):** See PUNITIVES.
741. **PUNITIVES (REMEDIES):** The term “punitives” refers to an award of a MONEY JUDGMENT by a court of law intended to punish a defendant for deliberate, wrongful acts. They are also called PUNITIVE DAMAGES or EXEMPLARY DAMAGES but those terms are somewhat misleading because the award is not measured by any “damage” suffered by the plaintiffs.
742. **QUANTUM MERUIT (REMEDIES):** “Quantum meruit” is a general term for the amount a Court of equity may award in equitable restitution to either prevent unjust enrichment or else to prevent frustration of reasonable expectations. The term is often misused or used by different people to mean different things. See IMPLIED-IN-LAW CONTRACT.
743. **QUASI-CONTRACT (REMEDIES):** The term “quasi-contract” is sometimes used to mean IMPLIED-IN-LAW CONTRACT. Like QUANTUM MERUIT the term is often misused or used by different people to mean different things. See IMPLIED-IN-LAW CONTRACT.
744. **RESTITUTION (REMEDIES):** The term “restitution” means either LEGAL RESTITUTION, a remedy awarded by a court of law or EQUITABLE RESTITUTION, a remedy awarded by a Court of equity. Legal restitution is always an award of a MONEY JUDGMENT. Equitable restitution may be an award of a money judgment or an award of SPECIFIC PERFORMANCE. Under contract law, contracts may be LEGALLY RESCINDED (voided) by parties in some circumstances and legal restitution demanded by right. Under tort law plaintiffs may “waive the tort” and demand legal restitution by right. See LEGAL RESTITUTION, EQUITABLE RESTITUTION.
745. **SPECIFIC PERFORMANCE (REMEDIES):** Specific performance is an equitable remedy in the form of a court order that orders one party (usually the defendant) to deliver possession and/or title to property to the other party (usually the plaintiff) or else to perform certain services for the other party. Specific performance can only be ordered if the property or services in dispute are so unique award of a money judgment (as DAMAGES, LEGAL RESTITUTION or in EQUITABLE RESTITUTION) would be an inadequate remedy. Real property is generally presumed to be unique, and specific performance of a contract for the sale of land is generally granted. However, no specific performance of personal services by an individual (as opposed to a business organization) can be obtained because of the 13<sup>th</sup> Amendment prohibition of involuntary servitude. Specific performance of unique services by a business CAN be ordered. Specific performance may not be awarded unless there is MUTUALITY OF REMEDY. Specific performance is always a form of equitable restitution because it is always awarded in equity rather than in law.

746. **UNCLEAN HANDS (REMEDIES):** A claim of “unclean hands” is an **EQUITABLE DEFENSE** that bars a plaintiff from being awarded a remedy in equity if they have acted wrongfully on the rationale that one who “seeks equity” must “do equity”.
747. **UNJUST ENRICHMENT (REMEDIES):** A Court of equity may fashion a remedy to prevent unjust enrichment to discourage wrongful conduct by preventing the parties who engage in it from benefiting. Compare this to the alternative basis for an equitable remedy – preventing **FRUSTRATION OF REASONABLE EXPECTATIONS**.
748. **VOLUNTEER (REMEDIES):** A common defense to a claim based on **IMPLIED-IN-LAW CONTRACT** theory is that the plaintiff was a **VOLUNTEER** without any reasonable expectation of compensation.

## Section 13: Rules and Definitions for BUSINESS ORGANIZATION

The following rules are based on generally accepted common law. This area of law is NOT tested on the **Multistate Bar Exam**.

749. **ACTUAL AGENCY (BUSINESS ORGANIZATION):** An actual agency relationship is based on an express or implied agreement between the principal and agent. For example, an insurance company licenses an independent insurance agent to be their representative in a specified area.
750. **AGENCY (BUSINESS ORGANIZATION):** Under business law an agency relationship exists where one party, the agent, is authorized to act and agrees to act for another party, the principal. The principal is liable for all acts taken by the agent that are 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 ACTUAL AGENCY, INHERENT AGENCY or IMPLIED AGENCY. Once third parties rely upon the existence of an agency relationship, estoppel may prevent subsequent denial of the agency relationship.
751. **APPARENT AGENCY (BUSINESS ORGANIZATION):** And an apparent agency relationship is implied by the representations of the parties. For example, Swifty offers to sell a car to a customer at Joe's Used Cars in the presence of Joe the owner, who remains silent. Joe's silence implies that Swifty is authorized to sell his car to customer, even if Swifty is not his employee.
752. **APPRAISAL RIGHTS (BUSINESS ORGANIZATION):** Under State corporation laws appraisal rights are the rights of minority shareholders to be paid the appraised value of their stock holdings if there is a corporate MERGER. Some States recognize a DE FACTO MERGER if a corporation sells all assets to another business entity, even if there is no actual merger and the first corporation remains in existence as an empty shell.
753. **ARTICLES OF INCORPORATION (BUSINESS ORGANIZATION):** Under business law the formation of a legal "de jure" CORPORATION requires the filing of articles of incorporation that define the purpose and structure of the corporation and BYLAWS that determine how the corporation will conduct official business.
754. **CORPORATE BONDS (BUSINESS ORGANIZATION):** Under State corporation law a BOND is a negotiable corporation note or debt obligation that gives the holder the right to receive periodic payments defined by the terms of a document called the INDENTURE agreement. The dollar amount of the periodic payments is referred to as the "coupon rate." The directors of a corporation have no fiduciary duty to bond holders.
755. **BONDS (BUSINESS ORGANIZATION):** See CORPORATE BONDS.

756. **BREACH OF LOYALTY (BUSINESS ORGANIZATION):** Under State corporation laws DIRECTORS, OFFICERS and CONTROLLING SHAREHOLDERS have a fiduciary duty of loyalty to the corporation. Directors and officers breach their duty of loyalty if they participate in any corporate decision in which they have a personal or family interest or if they fail to disclose their personal interests to the remaining BOARD OF DIRECTORS before the corporate decision is made. Controlling shareholders breach their duty of loyalty if they use their power over the corporation to harm it. A corporate transaction is void if a breach of loyalty is clearly abusive because the transaction is unfair to the corporation, to the personal advantage of the breaching party, or the result of any other improper motive on the part of the breaching party. Corporate transactions are voidable if there is no clear abuse but the transactions are not ratified by the informed and disinterested directors and/or shareholders. (See RATIFICATION.) The corporation or shareholders acting on the corporation's behalf may bring a SHAREHOLDER DERIVATIVE ACTION against parties that breach their duty of loyalty.
757. **BUSINESS (BUSINESS ORGANIZATION):** A business is an activity engaged in by one or more people for the purpose of making profits. See PROPRIETORSHIP, GENERAL PARTNERSHIP, CORPORATION, LIMITED PARTNERSHIP.
758. **BUSINESS JUDGMENT RULE (BUSINESS ORGANIZATION):** Under the Business Judgment Rule good faith decisions by disinterested directors are voidable if the directors acted with gross negligence and breached their duty of due care to act as a reasonably informed, prudent person would do. Gross negligence is a deliberate breach of duty. Even if directors act negligently, the shareholders may ratify the directors' actions. (See RATIFICATION.)
759. **BYLAWS (BUSINESS ORGANIZATION):** The bylaws of a CORPORATION determine corporate functions such as the number of DIRECTORS, how the directors will be elected, when the annual meeting of shareholders will be held, the classes of stock and number of shares of stock the corporation will issue, restrictions on the transfer of stock, which shares of stock will be entitled to receive dividends, etc. Changes to the bylaws must be ratified by the SHAREHOLDERS.
760. **COMMON STOCK (BUSINESS ORGANIZATION):** Corporations generally issue two types of stock, common and preferred. Common stock gives the holder the right to vote for directors and the right to a share of corporation profits in excess of the amounts distributed to the preferred stockholders. (See PREFERRED STOCK.)
761. **CONTROLLING SHAREHOLDER (BUSINESS ORGANIZATION):** Controlling shareholders are those who own enough common stock in a corporation that they can significantly influence corporate decisions by the DIRECTORS. Under State corporation laws controlling shareholders have a fiduciary duty to act in the best interests of the corporation. It is also a breach of loyalty for shareholders to convey PROXY rights without selling the common stock itself. But a controlling stockholder may generally sell the controlling interest at a premium price. The buyers of controlling blocks can generally control the corporation immediately. Any premium paid for a controlling interest belongs to selling shareholder unless breach of fiduciary duty is shown.

762. **CORPORATION (BUSINESS ORGANIZATION):** A corporation is a BUSINESS defined by State laws. A corporation is formed by filing appropriate documents with State agencies, including the filing of ARTICLES OF INCORPORATION, and receiving required State approvals. The Internal Revenue Code recognizes two types of corporations for tax purposes: "C" and "S" corporations. State laws also recognize "closely held" corporations. Stock in "C" corporations is freely alienable, but stock in "S" and "closely held" corporations is subject to transfer restrictions involving the number of shareholders and the relationship between them. A "closely held" or "S" corporation may have a "right of first refusal" when shareholders wish to sell their interest.
763. **DE FACTO CORPORATION (BUSINESS ORGANIZATION):** A BUSINESS may be treated by a court as a "de facto" corporation if it is represented to be a corporation by its owners with a good faith belief that to be true, when it is not actually a DE JURE CORPORATION because of some unknown failure to file the proper documents with State authorities or receive the proper State approvals. The effect of this would be to give the owners limited liability.
764. **DE FACTO MERGER (BUSINESS ORGANIZATION):** A de facto merger is a sale of all or substantially all of a corporation's assets to another corporation leaving the first corporation an empty shell. In many States a de facto merger gives minority shareholders APPRAISAL RIGHTS as if there had been an actual MERGER.
765. **DE JURE CORPORATION (BUSINESS ORGANIZATION):** If all necessary filings and approvals have been completed, a DE JURE corporation is created. The essential feature of a de jure corporation is that its owners have limited liability.
766. **DIRECTOR (BUSINESS ORGANIZATION):** Under State corporation laws directors are selected by the vote of COMMON STOCK holders to set broad policy for the corporation and to select corporate OFFICERS who make top-level management decisions. Directors and officers owe the corporation a fiduciary duty to act for the best interests of the corporation.
767. **DERIVATIVE SHAREHOLDER ACTION (BUSINESS ORGANIZATION):** See SHAREHOLDER DERIVATIVE ACTION.
768. **DISSOLUTION (BUSINESS ORGANIZATION):** Under State corporation laws a corporation has perpetual life unless the board of directors decides to dissolve it and liquidate the assets. The shareholders of a corporation have no power to dissolve it.
769. **FREEZE OUT (BUSINESS ORGANIZATION):** Under State corporation laws mergers often give shareholders APPRAISAL RIGHTS. A "freeze out" is a claim by minority shareholders that they have been unfairly forced to sell their ownership interest in a corporation for an amount less than fair appraisal value. Minority shareholders have the burden to prove the transaction was inherently unfair.
770. **GENERAL PARTNERSHIP (BUSINESS ORGANIZATION):** Under common law, which has been codified into statute by the States, a general partnership is the default form of ownership whenever two or more people agree to actively work together in a BUSINESS. Each partner in a general partnership is an AGENT of the other, each has equal ownership, equal control over the assets of the general partnership, and each has unlimited personally

liability for both their own acts and the acts of other general partners done within the scope of business activities. Under common law each member of a general partnership can quit the enterprise at any time and the general partnership automatically terminates when any general partner quits or dies. See PROPRIETORSHIP, CORPORATION, LIMITED PARTNERSHIP, JOINT VENTURE.

771. **INDEMNIFICATION AGREEMENT (BUSINESS ORGANIZATION):** Under State corporation laws the corporation can generally indemnify its directors, officers and agents from liability for actions taken in good faith, and this can be broadened in the Articles of Incorporation. Unless set forth in the Articles of Incorporation, the corporation cannot indemnify its agents for breach of loyalty to the corporation or settlement of third party claims.
772. **INDENTURE (BUSINESS ORGANIZATION):** Under State corporation law the rights of corporate BOND holders are defined by the terms of a document called the indenture agreement.
773. **INHERENT AGENCY (BUSINESS ORGANIZATION):** An inherent agency relationship is implied by the position or title given to the agent by the principal. For example, if Pete is the president of the XYZ Corporation, he is inherently authorized to act as the corporation's agent in business transactions.
774. **INSIDE INFORMATION (BUSINESS ORGANIZATION):** Inside information is information affecting security values that is unavailable to the general public and known by INSIDERS who have a fiduciary duty to keep it confidential and not use it for personal advantage.
775. **INSIDER (BUSINESS ORGANIZATION):** An "insider" is a person who has access to INSIDE INFORMATION and a fiduciary duty to keep it confidential and not use it for personal advantage.
776. **INSIDER TRADING (BUSINESS ORGANIZATION):** Insider trading is security trading using INSIDE INFORMATION by either INSIDERS in breach of their fiduciary duty to not use the information for personal advantage or by TIPPEES who have obtained the information from TIPPERS with knowledge the information has been released by INSIDERS in violation of their fiduciary duty to keep it confidential. Securities Exchange rules 10b and 10b(5) prohibit insider trading. See SEC 10b/10b(5), INSIDER, TIPPEE, TIPPER, INSIDE INFORMATION.
777. **JOINT VENTURE (BUSINESS ORGANIZATION):** A joint venture is a GENERAL PARTNERSHIP formed for an expressly limited purpose. The members of a joint venture have equal ownership, equal control over assets of the joint venture, and unlimited personal liability for their own actions and the actions of the other members of the joint venture done within the scope of the expressly limited purpose for which the joint venture was formed. Members of a joint venture have no liability for actions done by the other members outside the limited purposes for which the joint venture was formed.



778. **LIMITED PARTNERSHIP (BUSINESS ORGANIZATION):** A limited partnership is a BUSINESS defined by State laws. A limited partnership is formed by filing appropriate documents with State agencies and receiving required State approvals. Each limited partnership consists of one or more GENERAL PARTNERS and one or more limited partners. The shares of the general and limited partners do not have to be equal. The general partners manage the business and have unlimited liability. The limited partners are prohibited from management beyond that reasonably necessary to protect their investment. The liability of limited partners is limited to the amounts they have invested. Limited partners can transfer their shares at any time subject to previously agreed upon transfer limitations, but general partners can only transfer their shares with the unanimous agreement of all partners. Profits and losses of limited partnerships pass through to the individual partners without taxation in proportion to their relative shares. A limited partnership automatically terminates with the death of a general partner, or by agreement, but is unaffected by the death of limited partners.
779. **MERGER (BUSINESS ORGANIZATION):** A corporate merger is a combination of two or more corporations into a single corporation. Many State corporation laws give shareholders APPRAISAL RIGHTS when there is a merger. If one corporation agrees to sell all assets to the other corporation, some States hold it to be a DE FACTO MERGER that gives stockholders appraisal rights. Other States hold there are no appraisal rights in these cases, or that there are no appraisal rights if the stock is publicly traded.
780. **OFFICER (BUSINESS ORGANIZATION):** Under State corporation laws the officers of a corporation are those people selected by the DIRECTORS to make top level management decisions. Officers usually include a president, vice presidents, treasurer, chief counsel and secretary. Directors and officers owe the corporation a fiduciary duty to act for the best interests of the corporation.
781. **PARAMOUNT COMMUNICATIONS RULE (BUSINESS ORGANIZATION):** Under the Paramount Communications Rule corporate directors may resist TENDER OFFERS, PROXY FIGHTS and other take over threats if they are a legitimate threat to corporate operations.
782. **PARTNERSHIP (BUSINESS ORGANIZATION):** See GENERAL PARTNERSHIP, JOINT VENTURE and LIMITED PARTNERSHIP.
783. **PIERCING THE CORPORATE VEIL (BUSINESS ORGANIZATION):** The term “piercing the corporate veil” means a Court finding that the owners of a corporation are personally liable for the debts of the corporation. Usually the owners of a corporation (the SHAREHOLDERS) are not personally liable beyond loss of the purchase price of their shares. But in very rare situations a Court of equity may find shareholders personally liable for corporate debts if it is necessary to prevent fraud and achieve equity. Evidence of fraud may be that the corporation is 1) deliberately undercapitalized or 2) run like a proprietorship. The Court may consider whether the business was run without corporate formalities, with commingling of the owner’s own funds with the corporate funds, and that all corporate profits were taken by the controlling owners so no dividends were paid to other shareholders.

784. **PREFERRED STOCK (BUSINESS ORGANIZATION):** Corporations generally issue two types of stock, common and preferred. Preferred stock gives the holder the right to receive a prescribed periodic dividend from corporate profits, if sufficient profits are realized. (See COMMON STOCK.)
785. **PROMOTER (BUSINESS ORGANIZATION):** Under State corporation laws a promoter is anyone who helps organize, finance or form a new corporation. See PROMOTER LIABILITY.
786. **PROMOTER LIABILITY (BUSINESS ORGANIZATION):** Under State corporation laws PROMOTERS have a fiduciary duty to the corporation and are personally liable to the corporation if they obtain secret or unjustified profits from misuse of their position. Promoters are personally liable to third parties for financial commitments they make on behalf of the corporation prior to the filing of Articles of Incorporation unless they expressly state they are acting on the behalf of a corporation to be formed. Promoters are liable under a breach of warranty theory to any parties injured by misrepresentations that they 1) will act or 2) 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.
787. **PROPRIETORSHIP (BUSINESS ORGANIZATION):** A proprietorship is the default form of ownership whenever a single individual enters into BUSINESS. Proprietors have unlimited personal liability for all debts of the business.
788. **PROXY FIGHT (BUSINESS ORGANIZATION):** A proxy is the right to vote the shares of common stock, and a proxy statement is a list of proposed directors and policies mailed annually to shareholders by a corporation for their consideration and vote. A proxy fight is a struggle for control of a corporation between two competing groups of shareholders. Under State corporation laws shareholders generally have the right to present policy proposals at the annual shareholders' meeting and to have legitimate policy proposals mailed to other shareholders with proxy statements. State law may also require a corporation to provide a list of shareholders to opposition shareholder groups if requested for a proper purpose. No federal law requires production of such lists. In the case of a proxy fight, a corporation may generally pay the expenses of one or both sides if the fight is over legitimate policy issues and not merely to retain control of the corporation.
789. **RATIFICATION (BUSINESS ORGANIZATION):** Fully informed shareholders may vote to ratify acts of gross negligence by directors and officers, and fully informed and disinterested directors and/or shareholders may ratify breaches of loyalty where there was no clear abuse of position.
790. **REGISTRATION (BUSINESS ORGANIZATION):** Under the Securities Exchange Act all securities must be registered with the Security Exchange Commission (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. 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.

791. **REVLON RULE (BUSINESS ORGANIZATION):** Under the Revlon Rule directors confronted with TENDER OFFERS, PROXY FIGHTS or other take-over threats have a duty to maximize shareholder return once it becomes obvious the corporation will be taken over in any event.
792. **SEC RULES 10b/10b-5 (BUSINESS ORGANIZATION):** Under Securities Exchange rules 10b and 10b-5 people are liable for the losses suffered by other investors if they 1) trade using INSIDE INFORMATION known to have been obtained as a result of a breach of fiduciary duty (INSIDERS and TIPPEES) 2) reveal INSIDE INFORMATION in breach of a fiduciary duty to TIPPEES who trade on it, or 3) knowingly make misleading statements intended to manipulate stock values.
793. **SEC RULE 14e-3 (BUSINESS ORGANIZATION).** Under Securities Exchange rule 14e-3 a person is liable for losses caused by trading on inside information concerning a TENDER OFFER, whether or not the information resulted from a breach of fiduciary duty.
794. **SEC RULE 16b (BUSINESS ORGANIZATION):** 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 that must be disgorged for “long” positions (the security was bought first and sold last) is the sale price at the end less the lowest market price for the stock during the holding period. The profit that must be disgorged on “short” positions (the stock was sold “short” and bought back later to “cover”) is the highest market price during the short position period less the purchase price at the end.
795. **SECURITY (BUSINESS ORGANIZATION):** Under the Securities Exchange Act a security is a financial interest in profits generated by the efforts of others.
796. **SHAREHOLDERS (BUSINESS ORGANIZATION):** A shareholder is a person who owns the shares of a CORPORATION. Shareholders have two rights: They have a right to vote for directors who control the corporation, and they have a right to have proposals related to corporate activities placed on the annual proxy statement. Other than that, shareholders have no direct control over corporate activities. Whether shareholder may freely transfer shares depends on the corporate form. The liability of shareholders is generally limited to the amount of their investment. A rare exception is when a Court of equity acts to PIERCE THE CORPORATE VEIL.
797. **SHAREHOLDER DERIVATIVE ACTION (BUSINESS ORGANIZATION):** Under State corporation laws a shareholder may file a DERIVATIVE SHAREHOLDER ACTION which is litigation brought on behalf a corporation. The cause of action may be 1) based on the ultra vires doctrine, 2) because of director gross negligence and/or 3) because of a breach of fiduciary duty by directors, officers or controlling shareholders.
798. **SHORT-SWING TRADE (BUSINESS ORGANIZATION):** A short-swing trade is a buy and sell or sell and repurchase within a 6 month period and subjects certain parties to the restrictions of SEC RULE 16b. (See SEC RULE 16b.)

799. **SIGNIFICANT SHAREHOLDER (BUSINESS ORGANIZATION):** Under Securities Exchange rule 16b a significant shareholder is any shareholder who owns at least 10% of the outstanding corporation common stock at the time they commence either the purchase or sale of the securities of the corporation.
800. **TENDER OFFER (BUSINESS ORGANIZATION):** A tender offer is an offer to purchase a the shares of a corporation from existing SHAREHOLDERS, usually at a price above the current market value, in an effort to obtain a controlling interest. Trading on INSIDE INFORMATION about a tender offer is a violation of SEC RULE 13e-3.
801. **TIPPEE (BUSINESS ORGANIZATION):** A “tippee” is a person who knowingly engages in INSIDER TRADING using INSIDE INFORMATION obtained from a TIPPER.
802. **TIPPER (BUSINESS ORGANIZATION):** A “tipper” is a person who knowingly reveals INSIDE INFORMATION to TIPPES who trade using it.
803. **ULTRA VIRES DOCTRINE (BUSINESS ORGANIZATION):** Under the ultra vires doctrine a shareholder can bring a DERIVATIVE SHAREHOLDER ACTION to have a corporation action declared void if it is outside the scope of the declared corporate purpose. The Ultra Vires Doctrine has no application if the Articles of Incorporation define the corporate purpose in general terms.

## Section 14: Rules and Definitions for PROFESSIONAL RESPONSIBILITY

The following rules are based on the **ABA Model Rules of Professional Conduct**, the **ABA Model Code of Professional Responsibility**, the **California Rules of Professional Conduct**, and relevant sections of the **California Business and Professions Code**. This area of law is tested on the **Multistate Professional Responsibility Exam (MPRE)**.

804. **ATTORNEY AS WITNESS (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney may not agree to accept a case if he is likely to be a percipient witness.
805. **ATTORNEY-CLIENT PRIVILEGE (PROFESSIONAL RESPONSIBILITY):** All confidential communications between attorneys and clients is strictly privileged and cannot be revealed by the attorney. The client holds the privilege. Attorneys have a duty to avoid discussing confidential matters with clients in the presence of any person who does not have a duty to keep the discussion confidential. People who may be present without violating this duty are employees of the attorney, other attorneys associated with the attorney (e.g. partners in the same firm), and the clients' spouses. The presence of anyone else (e.g. another attorney who is not representing the client) violates the client's confidentiality and is a breach of duty.
806. **ATTORNEY FEES (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney may not charge an excessive fee. Further, an attorney may not charge a contingency fee for representation in a criminal case or in a family law matter, usually. **California allows contingency fees in family law cases, but only if it is demonstrably in the client's best interest.** In many States attorneys are required to provide clients with written fee agreements that contain certain provisions. **California requires a written retainer agreement in all contingency fee cases and in all other cases in which the attorney fees are likely to exceed \$1,000.**
807. **CLIENT CONFIDENCES (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility 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.
808. **COMMUNICATION WITH REPRESENTED PARTY (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot directly contact opposing parties known to be represented by counsel. This rule is strictly enforced.
809. **CONCEALING FACTS FROM COURT (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot hide material facts, evidence or applicable legal precedent from the court. If attorneys possess evidence that may be damaging to their clients, it must be given to the court, but the attorneys cannot reveal where the evidence came from or how they acquired it if that would violate the ATTORNEY-CLIENT PRIVILEGE.

810. **CONFLICT OF INTEREST (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney must refuse to accept a case if he has a conflict of interest unless 1) he reasonably believes it will not affect his judgment and 2) the client gives written consent after being fully informed. To avoid conflicts of interest an attorney must avoid representation where 1) his close relatives represent 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.
811. **COURT ORDERS (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot ignore or willfully disobey an order of the court.
812. **FALSE BAR APPLICATION (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot lie on his own or anyone else's Bar application.
813. **INADEQUATE REPRESENTATION (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney must keep the client reasonably informed, responsibly supervise the case, zealously represent the client's interests within the law and communicate any reasonable settlement offer and all written settlement offers to the client.
814. **LACK OF EXPERTISE (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney may not agree to accept a case if lacks expertise, unless he either acquires experience through study or otherwise associates with an attorney with proper experience.
815. **MALPRACTICE LIABILITY (PROFESSIONAL RESPONSIBILITY):** 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.
816. **MANDATORY WITHDRAWAL (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney must withdraw from representation with the permission of the court if the matter is before the court, if they are dismissed by the client, the client's purpose is improper and without legal basis, where continued involvement would violate disciplinary rules or the attorney's physical and mental state makes representation ineffective. The attorney must make reasonable efforts to protect the client's position.
817. **PERMISSIVE WITHDRAWAL (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney may withdraw from representation with the permission of the court if the matter is before the court, when the client approves, the client's claim lacks a legal basis, where continued involvement might violate disciplinary rules, when friction with co-counsel hampers representation or when the attorney's physical and mental state makes representation difficult. The attorney must make reasonable efforts to protect the client's position.

818. **PROSECUTORS (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility a prosecutor may not press criminal charges without probable cause. Further the prosecutor has a duty to protect the defendant's rights to counsel and a hearing, access to favorable evidence, and to prevent prejudicial statements by police.
819. **SOLICITATION OF CLIENTS (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot seek clients by the use of misleading advertising or by any means other than general advertising. Further, it violates ethical standards (and usually State law) for an attorney to employ or reward “cappers” for directing potential clients to the attorney. **In California it is illegal for an attorney to employ cappers or to solicit clients in any manner in or near jails, police stations, hospitals, prisons or courts.**
820. **THREAT OF ADMINISTRATIVE OR CRIMINAL ACTION (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot threaten to institute administrative or criminal action in order to advance his position in a civil matter.
821. **TRIAL BEHAVIOR (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility 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. Further, it is unethical (and often illegal) for attorneys to make statements of fact in opening trial argument, during trial or in closing trial argument that are unsupported by any admissible evidence.
822. **UNLICENSED PRACTICE (PROFESSIONAL RESPONSIBILITY):** Under the rules of professional responsibility an attorney cannot assist an unlicensed person to practice law.

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