taft law

baby bar e class

9/27/16 6:00 pm

INSTRUCTOR: You are not responsible for criminal procedure so it's not a question we are going to go over we are going to focus on what you're going to be tested on to the bar examiners do make mistakes, don't they.

 Remember these sessions are recorded for your convenience so if you ever have any questions please feel free to put them in the question/ answer box and I will be more than happy to help you in any way I can.

We will take the essays right in order starting up with question number one. Again if you want to go back and listen to the lectures go to the Taft website student section and pick the baby bar miniseries and pick whatever lecture you would like to hear if you missed it or one that you want to hear it again.

You will find hopefully to take a chance to look at the questions, they are not that horrific. I would say question number two which is a contract question is the worst out of them all. But actually they are pretty straightforward.

 The key thing there is to make sure you understand the facts and read them, break them apart. I find what happens with students is the time factor, we get in such a hurry because we are worried about the time. But start budgeting your time obviously taking timed exams and you can write this in the hour, but if you do not break apart properly and understand what the examiners are asking based on the facts you're going to miss issues and obviously if you miss issues that will result in a not good score and you are not going to be happy.

 Remember, redundancy, what is the first thing we always do upon an essay question is, we read the call of the question. Remember on the baby bar exam you are not going to know the subject matter in regards to headnote, torts. No. You have to read the examination to determine if it is torts, contracts/UCC or con law. So if you start off with the call a lot of times it will give an indication to the subject matter and when it does that is when you want to write your checklist on your scratch paper so it will help you identify issues as well as how to set up issues so that is important.

 On question number one, let's look at the call, call one. It says here on what theory or theories might tenant reasonably Sue landlord discussed. Notice that it says theory or theories. So I always put 2+, so you read the exam and you see there is another theory negligence is a theory product liability is a theory nuisance is a theory something the examiners are telling you is to go into the theory which happens to be a negligence exam here and see alternate ways we can try to find duty in regards to finding liability. So that is where I felt the examiners were trying to tell you based on the verbiage they used was theories. So a lot of people had noted the one duty and went through it and obviously they lost points because you will look for multiples once we get there.

 Call number one, the tenant is suing landlord do we have a good idea? Obviously in the bard you my thinking this is a property question but since it is not something that they test on the baby bar you know it is torts at this point I would write out my torts checklist.

 Call number two says what damages if any might tenant recover from landlord, discuss. Damages obviously singular versus plural. I know I have general damages and most likely punitives or excuse me special damages to talk about although I will look to the facts to see if there are punitives or anything else based on the facts. But again the facts are going to dictate. So again, the facts will tell you what they want.

 Let's go ahead and read it. Remember you always read it the first time through once, get a good understanding of the background of the facts and what's going on and then you are ready to start issue spotting, because remember you have not read this before. This is new to you, so the client is basically telling a story and are you going to interrupt the client every story and say there's battery, there's negligence? No, you listen to the whole story and make your steps. So you're really doing the same thing on the essay. Read the whole fact pattern no matter how much you want to pick up the pen or pencil and get a good concept of what is going on because that is going to help you see sub issues. Your brain is going to start working on the facts and you can see we have a problem here, here's another problem based on this element. But if you do not give yourself a chance to really think about it again, that is where you are going to miss issues. So it is important to assess and reflect on the actual facts.

 So we will rip pretend we read it one time through so we have an understanding what transpired in these facts. Now we are ready to issue spot. Remember the rule of thumb is what? One sentence at a time. Stop and reflect for sentence as to what is the sentence trying to tell you. If you don't reflect there's a possibility you are going to miss an issue or sub issue or even an argument you could be bringing up in the examination. Let's go through the facts.

 Tenant rents space in a city office building from landlord. I stop right there, tenant is renting the space I'm already thinking there's a landlord-tenant relationship. Remember that is a type of duty. I already see the first issue in regards to duty that most likely I will address in this exam. It says six months ago, so we are going back in time, a fire broke out at night in the office building and the tenant, who is working late was overcome by smoke in the building. So couple of things. His injury. He's overcome by smoke. Right? That is important because when you see what comes down later on these are facts you need to show what occurred while the fire broke out. So he was overcome by smoke so obviously that is what caused his injury. Second paragraph. A responding firefighter found the tenant unconscious, so you know his injury. Smoke basically overcame his breathing, he is unconscious and while carrying the tenant out of the building dropped him, breaking the tenant’s leg. Remember the landlord is the one renting the building, we know the building caught fire and here comes the firefighter to rescue and drops him. Obviously you see that is probably a proximate cause issue at this point. And argue is that something relatively foreseeable or would that be an intervening act.

 The reason we know this is an issue is based on the call. We know that tenant is suing landlord, not firefighter. So I know it has to go to an argument under proximate cause as to whether or not it is an intervening act. Now it says the building and all of its contents were destroyed, so there are you damages. All the contents, anything the tenant had in his little rental building there. As well as, he has to deal with a substitute rental building so you get the difference in regard to rent amount and what he was previously paying versus for the same type of space what he might have to pay now. That would be all of your general damages.

Third paragraph, city fire Marshall wrote investigative report staying... Any time you see a quote you should pay attention to it. And remember I told you in the past if you see basically quotation marks that is their gift saying there is an issue here go look for it. What are we trying to get you to argue? It says the fire apparently originated in the basement. The apparent cause is faulty wiring. So at that point did the landlord really cause the fire? How is he supposed in about faulty wiring? The wiring is most likely in the walls and he cannot see it so it looks like to this point he hasn't fallen below the standard of care. Newspapers in the basement was a principal source of fuel. And probably result in the rapid spread of the fire to the remainder of the building.

Now remember, tenant was overcome by the smoke. What probably caused that is the fuel source which was the newspapers that were left in the basement.

It says the old newspapers mention the fire marshals report had been left by a previous tenant three years ago. So again, previous tenant. Is that something the landlord knew or should have been aware about the existence of the paper. Some of the basement hallways were nearly impassable. The landlord was aware of this. But had not gotten around to cleaning them up. So he had notice. So he's aware the newspaper is there and failed to take any steps or measures to remove them. So does that really support that he fell below the standard of care owed? And that is an argument.

One of city Vale’s ordinances provides… pay attention, I look at the quotes, and I say well... I say wow this is a big statute. The rule is the longer the statute the most likely it does not violate. Make sure it applies or not. People fail on the exam because they didn't talk about landlord/ tenant relationship for a duty because they found negligence per se. Remember when you have a statute on the exam and it is complied with that does it establish negligence per se which would establish a duty and breach. But if it is not absolute, meaning there is no only one way to find a violation or if there is a gray area [inaudible] you use two other points from the regular duty from the regular tenant as well as the breach because you found negligence per se worked and you want to break that apart the statute that says any person that allows an article to remain in a stairway or hallway such as to impede entering or leaving the building or any area within it shall be punished by a fine of not more than $500. Okay, what is the statue really saying?

The landlord should not leave any newspapers in the stairway or hallway that actually prohibits any tenant from getting in or out of the building. That's what it says in a nutshell. So that is what you're actually going to break apart and go through.

 The first thing, the call says what theory, so I see negligence. Everybody agree? Only cause of action really here in regard to negligence. Negligence or member you need the duty, breach, causation and damages and of course look for pluggable defenses which, based on these facts I do not see any. Also it's not in the call of the question so I know I am pretty safe if I don't see true defenses such as contributory negligence, comparative etc.

 When you see a special duty at issue in this case I do have what is called negligence per se. Right, I am going to start the special duty. If that special duty fails then you go to the general duty. Remember that special duty first, then if it fails go to the general duty.

 So again, start off first thing here with a violation of statute for negligence per se. Remember is negligence per se what do we look at? We look at the intent of the legislature, right, we look to the member or the class that the statute is designed to protect. And did the person which in this case it would be the tenant suffer any injury that the legislation is trying to prevent. Those are the three elements. I use ICI, “icky”. Intent, classify, being a member and injury. All three of those need to exist. Based on the facts in order to establish what we call negligence per se. If you do show negligence per se what does that mean you have established a duty and a breach. Remember negligence per se is a sub issue under negligence for duty and breach. It is not its own theory. So some students actually will have negligence per se and causation damages defenses and start another headnote of negligence and go duty, breach…, No it is really within it. So it establishes the duty in the breach.

 Let's really look at the statute and break it apart. If you look at it, it says any person who permits any article to remain in the stairway or hallway so as to impede entering or leaving the building or any area within it that is going to be punished by fine. When the fire broke out the Marshall’s report said that faulty wiring, the old newspapers basically fueled the fire. So, since the newspapers are located in the basement, not in the hallway. The tenant argues landlord violated the safety ordinance. The landlord will argue what is the intent. Look at the language most likely it is to allow people to get in and out not to move things in the hallway or stairway... Plus if there is an emergency situation such as a fire as here they don't want the blockage to prevent you from getting out and is there any fact here to support that is what the newspaper did? The only thing the newspaper did is provide full which caused tenant to inhale smoke in the building. But nothing in the facts shows that it prohibited him from coming or going, impeding him from leaving. So that is what you are actually going to argue. Focus on the length of the actual statute and see if the intent of the legislation is really supportive and I think you have a good argument unfortunately for the landlord thing that is not the intent. Again, the intent is to allow people to get in and out of the building, not the fact that it fueled the fire.

 Now, don't just stop there, look to all the elements. Was he a member of the class? There was a fire obviously he was trying to evacuate based upon the fire being started. So, would he be a member of the class in which the statute is designed to protect? What is the purpose? Again I feel the purpose is if there is an emergency or just coming or going, that there shouldn't be any blockage of the hallways to prevent you getting in and out especially when we are trying to evacuate the building based on the circumstances of the fire.

 You can argue the fact that he did get overcome by the actual smoke he was unconscious evident by the firefighter fighting him there on the floor, he did suffer a type of injury. Arguably what they are trying to prevent, that can go either way, but again I'm trying to say there is a way you can escape is this really are you the type of member that you are trying to prevent, you are a tenant so give the argument and conclude.

And then of course we talked about the intent, the member of the class, type of injury. What type of injury are we trying to prevent here? So, can based on the facts the tenant suffered from the smoke. We did have a firefighter that went in there, dropped him obviously and broke his leg but that is the intent of the legislature and what they are trying to prevent? Again, they're trying to prevent you from being injured because you cannot get out. That was not the cause to why the tenant couldn't get out of the building. It was basically he was overcome by smoke. So, arguably he didn't suffer in regards to the type of injury they are trying to prevent.

 There are two arguments that falter here so if you are looking at negligence per se you need to determine what of the elements o and the type of injury. And you did need to argue both sides you cannot shortchange it and say the intent is to prevent someone from getting out of the building and move on. That's not really what happened here based on the facts. So that is a problem. So I do want you to argue that and let you show the reader I understand what you are testing. And that is why again I told you I believe in the call why they use the terminology theories. Because the first theory is negligence but we are dealing with the issue of negligence per se and it is a gray area. They don't care how you conclude because I find that it doesn't work but I will fall back on the general duty with the landlord and tenant. Everybody with me? With the landlord he owes a duty to the tenant to keep the office building in good conditions and not cause dangerous conditions and maintain the property in a reasonable manner. That is his duty. He needs to act reasonably as a landlord and prevent any dangerous situation existing on the premises. That is it.

How did he breach? This is where you come in regard to the argument. Because six months ago there was a fire that broke out and the tenant was a tenant of the building which he rented from landlord. The landlord will argue the fire was not the basis of the negligent action. As me leaving the newspapers there. They didn't cause you to fall and not be able to get out before you became overcome by smoke.

 What can the tenant say? Why did the fire spread so rapidly? It’s the newspapers you left in the basement. And that I've created what we call a dangerous condition. So if those newspapers were not there there's a good probability the tenant could argue I could've gotten out. So the landlord failed to remove old newspapers which graded the situation in the first place. Maybe he did not know or create the faulty wiring but the fuel that fanned the fire so to speak that obviously was so rapid that it is overcome by smoke or I could not get out,, you created the danger.. So you fell below the standard of care which is failed to be reasonable under the circumstances so there we breached the duty, look at the facts he had three years. That's a long time. He knew for three years and yet he took never steps, he never took steps or measures to prevent a hazardous situation from existing. Someone to find the landlord not only owed to general duty, but he'd breach the duty by failure because he allowed a dangerous condition that did exist because that I've easily resulted in causing fuel for the actual fire.

Now you go to causation, here we have successive tortfeasors. You have the landlord contact to left the newspapers there and you have the firefighter that dropped and broke his leg. So I have two wrongdoers, so the successive negligent act of leaving a dangerous position with the newspapers which is an added fuel to the flame but for the firefighter not being careful and dropping the tenant which caused a broken leg but for the successive negligent conduct the tenant would not even enter there for the landlord is the actual cause.

 Remember in the facts here, what? The landlord is being sued so you know you cannot bring up anything against the firefighter because he is not in the lawsuit. Cities are issues, sub issues that you will bring up in regard to the analysis. Proximate cause. I told you they like to test it.

 So in regard to the landlord and looking at the tenant, the tenant is basically suing not only from injuries for being overcome by the smoke but the broken leg. Is the broken leg a direct or indirect. It's indirect isn't it. Is it dependent upon the landlord. Yes, you're the one that basically had the building that fueled the fire with those newspapers. So I will argue it's dependent. And is it foreseeable?

 because the tenant lost consciousness, and went in there and broke his leg, and the intervening act. Cutting off liability. However the landlord's act of not removing the papers were indirect, independent but is it foreseeable that somebody tries to attempt rescue even a firefighter that they could be negligent, and the answer is yes.

 The negligence of the third party is always foreseeable so therefore guess what? Landlord is to the proximate cause of tenant's injuries.

Then what is after proximate cause, damages. But that is, number two so we know that we cannot address it there. You want to go back to the outline and make sure address every thing possible based on the facts. But there are theories or a sub issues with negligence per se and in regard to intent as well as injury. In regard to Leonard intent regards to the relationship actual breach obviously had causation issues and I feel like have answered the call so I feel comfortable to go on.

 Well, negligence, you don't have to use the terminology special duty. Negligence per se is a special duty. Remember I use the mnemonic is sold. The statute which is negligence per se, admission, landowner occupier and duties owed to lessors of land. You don't have to use the word special duty. You know in your mind said it is a special duty.

 In regards to your general damages, obviously tenant suffered and property loss and the difference between what he will rent the space for now say it was compatible to what he was paying for it. Special damages he would be medical expenses and of course if he can plead and prove in regard to lost income during the time period. But I have no facts. I told you a lot of times they test damages and there are no facts but there they are. So you've got to say something about them. But the baby bar loves to do this. They test damages all the time and there are no facts. But you need to address it. On this question the exams I did see, I did see an 80 actually, I did notice they talked about negligence per se and argued both sides, they did get the landlord-tenant relationship for the general duty as well and they did have the proximate cause argument in there so that tells me that something the examiners were definitely looking for so it is something to do [inaudible] have to have in the actual examination.

 That is question number one, anybody have questions? In looking at it is not that bad. It's a doable examined actually you could write it easily in an hour or maybe 50 minutes if you're using the checklist and your issues. So it's not relatively hard, difficult exam. All right, let's go to the difficult exam question number two. This was contracts I really feel they are playing with you and they have done it several time in the baby bar or bar exam where you can go multiple directions. The goal is to take aside and run with it. If you vacillate back and forth and back and forth and don't know which way to go you're killing your time. I think they do that to you so you kill your time. Take a position and run with it and assuming that or inference that or what have you to come back to an issue that you feel is there but you have to take but take a position and go.

 Let's go to number one, read the call of the question. Generic, doesn't tell you much, look at call number two, so what damages 2+ [inaudible]

I know this is a civil action. So it would be contracts because we just had torts. I doubt they would give to back to back but I would read the facts and fine-tune to make sure and correct before read the checklist. After I read it one time through than I'm ready to write my checklist and go through and start issue spotting exam.

Please go through the facts. Sarah is a doctor who collects buys and sells and trades baseball cards for profit. Averaging 15 transactions per week. They are telling you she is a merchant. She trades baseball card she is a recognized expert in the 1930-50s era she's a doctor holds herself that with special knowledge and skills. So she is a merchant so I know that it's contracts.

 Bill operates a store, second paragraph, that regularly sells baseball cards. He is a merchant. Bill claims, see the word claims, this is what the case is built on did this happen or not. This is where you have to see for yourself. He claims he phoned and offered to buy a 1959 Vinnie Wilson card for 550 and she accepted we have UCC, the sale of goods, Sarah is a merchant, she holders about as a recognized expert from 1939 to 1950 era. So we have merchants and he owns a store, Bill. The fact that it is at a preliminary negotiation when he offered to buy or is that an actual offer. You have to bring about. You have to make an argument I don't care how you supported as long as you bring up the facts of both sites. The issue was their preliminary negotiation versus offer. And of course if she accepted there is acceptance.

 It says immediately after the phone conversation [inaudible] the contract. And identifying the Vinny Wilson card and the price. These seem to have the definite and certain terms. Bill's letter had a letterhead and identifying the name of the business, buyers of baseball cards and collectibles, the letter included the following term. Seller shall have a certificate of authenticity from the baseball trading card association. A certificate of authenticity. Typically increases a card's value. Sarah's card was noncertified and the parties cannot discuss this before. So is he adding a term?

Right, so did he had a term. That is something you have to address. It says Sarah received and read the letter but did not respond to it. You know obviously under the UCC or statute of frauds if you have a letter that goes to you and you are a merchant you should have knowledge that you have dealings with each other that you failed to object what did you do? You wave the statute of frauds. When Bill called later Sarah said she sold the card to another party for $575. She sold it so she repudiated, she voluntarily disables herself, she does not have a card anymore. Bill sued Sarah for breach of contract teaching $250 in damages based on $800 for the fair market value of the certified card. Sarah denies the existence of a contract alleging that Bill only ask, so she is saying it is plenary. Would you consider taking 550 for the card, and [inaudible] send me something in writing, alternatives she claims the phone agreement was unenforceable so they are telling you right there statute of frauds. In the so-called letter of confirmation had no legal effect. They gave it to you, so statute of frauds is a good issue here. She also contends Bill's calculation of damages. And most likely in the call they are telling you damages are at issue. So how do you set this up? Follow your checklist.

We talked about UCC, selling of the baseball card [inaudible] holds herself out as an expert from the 1939 to the 1950 era of baseball card so she has knowledge and skill and honestly Bill operates a baseball card store and sell things, so he holds himself out with skill, knowledge, so he is a merchant. They have UCC, merchants, preliminary negotiation. We have to conflict between the stories because Bill claimed he phoned and Sarah is having the opposite. Now what you do, remember in real life the jury based upon the testimony, credibility of the witness. But you don't have to bring that up in an exam. This is Bill's version this is her version. You cannot ignore it. So Sarah will argue that when Bill called and offered the $500 for the baseball card in writing which is a per luminary. We are merely asking for an invitation to deal. Bill is going to ask where I told you I will buy your card for $550. Evident by my verbiage, that shows an outward manifestation of intent that I want to be bound by contract. Further during the conversation I said that I'd buy the Vinny Wilson card which is a quantity. In regards to the price was the 550. We have got Sarah and Bill being the identity of the parties. In baseball card number one being the quantity. So the terms are spell that with specificity so we do have definite and certain terms. And he's on the phone to her so it shows he's committed getting the offer.

 If you look at Bill's argument, we have good strong facts to support what? An offer. Versus her argument is no no no. It was just a preliminary negotiation. But you're going to have to bring up both sides. So look to both sides. Now your acceptance, I went with Bill, he said basically Sarah said okay. So, that language shows an unequivocal assent. If you feel Bill made a preliminary negotiation then you're going to go a different direction and basically point out the letter he sent to be an offer which I feel is a viable answer. So you have to pick which way you are going to jump. So to speak.

 I feel you need to address what's called the battle of the forms at least for the exams that I saw. People who did well had the issue two – 207 for the battle of the forms. Remember with the battle of the forms you have between merchants additional terms the issues do they become part of the contract? And since both are merchants two – 207 would apply. Now you need to argue the term in regard to authenticating the baseball card. Is that material? And authentication sometimes people think know it is not, but it will cost 100 bucks. To get it authenticated. I don't care how you conclude as long as you argue both sides. Right, but you have to get out so what am I going to do? If you find it is material that's fine. But is she really acting in good faith because she did get the letter. So if you go back and look at the facts he sent her a letter, which she is the one that said put it in writing. And she did not read the letter. She did not respond to it. So it's that she received and read the letter but did not respond.

 Remember between merchants we have to act in good faith with each other. So is she really acting in good faith because if she really felt she should not have gotten it authenticated you think she would've responded to the letter or at least given him a phone call?

 That is my argument here that again she is not acting pursuant to faith [inaudible] good faith in her conduct. So we go to consideration... Which would be $550 in exchange for the Vinny Wilson baseball card. So they previously weren't obligated to exchange with each other and have a benefit as well as detriment. So they do have a viable contract.

 Again, you could've taken a different route. If you did, you're not wrong. So actually we find to go over your version, that Bill did make a per luminary negotiation. He would find that the letter actually was the offer and with that term of authentication become part of the offer. You probably would have to argue in regard to acceptance based on the conduct based on her verbiage. And then of course could even argue that he did rely for your consideration? If you went that route then, in regards to the fact that he won certification you have to address the issue as to whether or not being a basis of the bargain or was their mistake between the parties.

 Either waysince we don't have a contract embodied with both parties, right, so we have either oral contract because of the telephone call or what we call an incomplete writing you have to get to the statute of frauds. It does not matter which way you went. You have to get to the statute of frauds. Also if you look to the facts it says she claims the phone agreement was unenforceable. They use the word phone agreement. They are telling you, and the so-called letter of confirmation has no legal effect. They just flagged you the statute of frauds so it's something I have to address. Obviously you have to get into the statute of frauds first and show me how you're going to get out.

 Pursuant to the statute of frauds if we have a contract for the sale of goods over $500needs to be in writing and what is the contract for? Vinny Wilson baseball card for fine seven $50. So, pursuant to the statute of frauds it needs to be in writing.

Remember I told you during the lecture when you see UCC triggered you talk about common law first and then bring up, if it fails then bring up the UCC aspect. So first we will talk about the sufficient memorandum, which is common law. Member with the memorandum you have to have central terms and it has to be signed by the party to be charged. Who is the party to be charged question Bill is trying to enforce the agreements of the parting to be charged is Sarah so you have to show that Sarah signed the agreement. Well after offering it to pay the 550 he did send her an unsigned type letter confirming the agreement. It didn't have his letterhead on it and remove her the letterhead can act as a form of signature. But the problem here, he's not the party to be charged.

So you want to bring up the dissension between them and let them know that his white falters because generally it would but he's not the party in this case to be charged.

 The certificate of authenticity, also he has in regard to the 550 so you want to make the argument that we do have the central terms. The other thing I would bring up is there a mistake? in regards to between the parties, or one or both should have known, and if they had we could've avoided the actual transaction which, is the grounds really that either should be aware, Sarah should be aware of, but... To build is not sufficient facts you find sufficient amount fails you go to written confirmation under the UCC. Member what the UCC says if you send a written confirmation between merchants and that merchant should have knowledge that we have some dealings or some relationship. And they failed to comply or read or whether you read the letter, right, or failed to object to it within a reasonable period of time not 18 days, you wave the statute of frauds as a defense, so Bill did send a confirming letter she read it but did not respond to it so guess what she did? And she did not respond she waived the statute of frauds is a valid defense. She should have objected to it. Therefore obviously the written confirmation will take it outside the purview of the statute of frauds so we do have a contract.

Remember you are taking it right down the checklist. What I see next is conditions. Sarah must deliver obviously the baseball card before Bill's duty arises to pay. And she will argue impossibility I sold it to something else but is not objectively impossible. Somebody else could tell me the card so that's not going to get her off liability. She obviously repudiated. Why? She basically denies the existence of the contract and told Bill she sold it to somebody else. So she repudiated as well as voluntarily disabled herself because by her conduct she repudiated because obviously she only has one baseball card. That is the Wilson baseball card. My selling it to another person obviously she doesn't have it anymore. And so she repudiated by her conduct.

So we talk about trying to excuse her performance with impossibility which is not going to work. Then point out Bill why didn't you pay? She repudiated. She also voluntarily disabled herself so she could not perform. So his obligation, his condition to pay her has not arisen. Because again she must give me the card first before my application arises to pay. S He will say his performance of paying was excused by anticipatory repudiation as well as her conduct of disabling herself.

 Sarah refuses to deliver a put her in breach and conclude that she is in breach.

Now I go to call number two. Everybody understand what we are talking but in regard to contracts. Again the issues are complex but but you can go into different directions and frustrate people to do that on the exam because they don't know which way to go. They see multiple things I could go this way and this is I can argue versus this way argue something different. Under pressure of the exam we like surety. We don't like when we feel unsure of ourselves. And they do test that way so this is a good example for you to understand because it has happened before but go in there confident and know sometimes there's more than one way to write the exam. It's not married to a particular perfect model. Want to make sure you understand.

Were to is what damages is Bill entitled to recover. Obviously you go to damages. Remember I told you, you need to know the language in regards to damages and remedies under the UCC so he has a right to cover. What that means is he can go purchase a substituted good. So she would have to pay the difference in regard to the different between the contract price which is 550 versus a substituted good that he can acquire.

 The problem is here you're going to have to argue he contracted for 550.The facts do say the baseball card is valued at 800. Under what circumstances? If it was authenticated if it had the certificate, so that caused $100 so is the damages $200 or should he only could the difference which would be 150. Because again she will argue I never agreed to have it authenticated. You put that in regards to the letter you sent me after the fact. That is arguable and you would have to argue both sides in regards to what you're going to give him.

 And of course the cost is damages. Are there any facts that show special damages? No. So you have to make an inference that he is in the business of selling baseball cards. Obviously he wanted to resell it to another buyer. So, since Sarah knew that is what he's in the business for she can perceive that she did not perform he would lose profit. So based on his pleading and proving and it would be relatively foreseeable he should be able to get his loss of profit.

 But again here's another example where you can see they didn't give it to you factually. It is not there.

The other issue I did bring up his Reformation to bring up in regard to the mistake because he did have a term in regard to the certificate of authenticity and of course was it a mistake or not, she didn't respond, and I will argue since obviously it was in there she didn't respond to it she's not acting in good faith so obviously it will look to both sides of the actual testimony and see if obviously through clear and convincing evidence there was a mistake to perform to reflect the parties intent or not. So I don't feel you had to have the issue in there but whenever I see a mistake I deal with the issue of reformation because that is where the court goes back and forms a contract to reflect the parties’ intent.

Good contract exam question. So it is something you should look at o of the two different ways that you can write it. And feel comfortable with it.

You had formation issues... For point value, you had statute of frauds as well as your conditions and excuses. And again, this is a second exam. We saw question number one in question number two as to damages being in the call of the question but there are no facts. And again that is done quite a bit on the baby bar.

 Before we go to question number four, any cushions on this?

All right. Question number three was criminal procedure and you are not responsible for it so we are not going to go over it so don't even look at it because I don't want to obviously make you panic and look at it when you are in criminal procedure and we will help you at that point.

Question before was a tort exam so obviously they had to torts, should have had a criminal law but they didn't have a contract, so the likelihood on your way is most likely to contracts. A tort and a criminal law exam. If that is the case most likely you see one common law contract exam and one that is testing into the UCC so you want to be prepared.

 This particular question in the call is very specific. Remember I told you the more that they narrow it down and give you specific calls what does that mean? You got to go in there looking for the illness. There's got to be on, element, element, and/or defenses at issue. You have got to go in there and break it apart. Looking at the question number one says what is the likely outcome of Cindy's defamation claim against Debbie. Very specific. What is the tort? Defamation. There's no hiding of it and who are the parties question Cindy versus Debbie. They gave it to you. Cindy's defamation claim against the newspaper. What is the likely outcome. Specifically, what is the defamation call Cindy versus newspaper. They gave it to you. I don't want to see fault lines or intentional infection of emotional distress. The call indicates defamation. Defamation is what I’m going to address so I'm going to move to a narrow area of the checklist and let's go through the facts.

Cindy and Shelley Smith are Identical twins who exactly alike. Cindy was a straight A student in high school and went to college and then law school. She is presently campaigning for the election to the state Senate. So, she is a public figure.

 Shelley got into the wrong crowd in high school, became [inaudible] and moved to Europe without graduating high school. So the twin is the opposite. Cindy and Shelley have not spoken for years and very few people know that Cindy has a twin. That is important obviously because if I say something about you and you are a twin and people think it's you or it yes they did not even know you had a 20 most likely is understood that the as being you.

A classmate dislikes Indian does not want her to win the election. That shows her intent. She's acting malicious as to her intent. Debbie obtained an old photograph of Shelley snorting a line of cocaine and sent it to the newspaper the day before the election. So remember who is snorting? Shelley, which is the bad twin. And she sends us to the newspaper. With an anonymous note that reads Mrs. Smith is a coke head. The photograph was very clear and looked exactly like Cindy. I see two issues here that you could incorporate together. I see the statement Mrs. Smith is a coke head on an anonymous note as one statement and the other is the actual photograph. That looked exactly like Cindy.

 Remember the photograph depicts although it is Shelley snorting a line of cocaine need to know about her twin sister so it looks like Cindy is snorting a line of cocaine especially because of the anonymous note, Mrs. Smith is a coke head. And of course that could be Cindy or Shelley.

It says the newspaper unaware that Cindy had an identical twin sister publish the photograph of Shelley the same day with a caption that read coke head for state Senate. The newspaper reported that it had received the photograph of Cindy Smith anonymously earlier that day. Cindy was very distressed about newspapers publication and subsequently lost the election.

 The fact that she lost the election goes to damages. Did she suffer what we call special damages. What is the issue? Obviously it is defamation. You are going to have to break apart the elements to see if they are supported with the facts.

 Remember defamation you need false or defamatory statement told the [inaudible] negligently to a third party that knew or understood the defamatory meaning that causes damages to the plaintiff. So, break these apart and see what is being tested. So, Debbie is a high school classmate of Cindy and she dislikes her. And she didn't want Cindy to win so she obtained an old photograph of Shelley who was Cindy's twin sister who betrayed her snorting cocaine and sent it to the newspaper with the statement saying Mrs. Smith is a coke head. The fact that it is a picture of Shelley shows that at the falls defamatory statement which would Lois Cindy's self-esteem within the community. Debbie sent the photograph and because she didn't want Cindy to win the election.

 So the publication really was intentional wasn't it? She wants to harm her. And of course the fact that Mrs. Smith was a coke head was published with that caption. And the paper put coke head for state Senate. So was it understood that that was apparently Cindy snorting cocaine. It looks like it was. Because only Cindy is running for state Senate, not Shelley. So looks like even though it is the twin sister that it was understood and portrayed that it was Cindy. And not Shelley. Especially since they told you the facts that they look exactly alike but most people don't know that she has a twin.

Further the statement says Mrs. Smith is a coke head goes to moral character and her reputation but Debbie setting the photo out with an anonymous note but for that, she's going to argue the reputation will not be harmed which is foreseeable since she's trying to win the -that it would suffer or sustain some type of reputation in injury to my reputation. So in this case you would find that Debbie is the actual and proximate cause of the injury and that of course go through the damages.

 Now, is this slander or libel? Remember slander is spoken. We have got the note and we have the photograph. Those are written. We are going to point out that it's libel which is written forms are remember that it's general damages would be presumed which she does not have to prove general damages. But it does say that she subsequently lost the election. These are special damages. Obviously she wants to get special damages based upon Debbie's conduct. With special damages you need to show... If she had medical expenses she can get that but she's going to have to show she would have won the election. She's going to have a hard time doing this.

 So she's going to have to show that based on the defamatory publication of the photo saying that she is a coke head, that caused her to lose the election. It looks speculative because how will she show that she would have one otherwise? Most likely she's not going to recover special damages for the loss election. If she has medical expenses which would be what? A special damage she can plead and prove those and recover that. Now am I done with damages?

The facts told me that Debbie did this out of spite. She did not want her to win. So I'm going after punitive damages. I want to punish. Member punitive damages are based on willful intent. Even though this is negligence, if it is so unjust you are going to argue based on willful intent that I should be able to obtain punitive damages. Remember it's very rare in negligence you will get punitive but based on her conduct and what she did the court most likely would award the punitive damages based on her willful disregard and deliberate intentions of... Sabotaging Cindy in this case.

Now I have gone through damages. Am I done? Look for defenses. We can argue truth. Yes it is true about Shelley, not Cindy. So that is not going to work. We can argue qualified privilege. If you know something about some evening for state Senate, resident whatever and you know something about them doesn't the public have a right to hear? She can argue what is called up qualified privilege. Remember in order to protect the public interest if you reasonably believe it's necessary to disclose this to the public and you are acting in good faith you can do that. Right and you would be protected.

 What is the problem here the statement she is a coke head was made... To benefit the public she would say to know who you are electing and what she's doing she will come to the state Senate and she does coke. We've got a problem. But she knows that it was Shelley not Cindy. So she's not acting with reasonable belief that t And she is actually acting in bad faith. She's fully aware. So we are not going to allow her to use what we call the qualified privilege. Remember with a qualified privilege it is to protect the public interest and needs be based on good faith. Based on these facts what did they tell you? She made it clear in the fact that she did not want her to win. She disliked her. She wanted her to lose the election. Right, so these are the facts you are going to bring up and support for the qualified privilege and point out it's not going to apply. So that is your first lawsuit with Cindy going after Debbie for defamation.

 Very specific call, but you see [inaudible] that you did have to argue. Any questions on the first call?

All right, the second call is where you have Cindy going after the newspaper for defamation. Now remember I have told you, there's probably something different. So we are going to have to go in there and see what is the difference. Something different between them. Well it was a false inflammatory statement. Published in intentionally or negligently under the elements. What is the difference there was a publisher. Remember anybody who partakes in the republication of inflammatory statement is going to be liable for the defamation. As a publisher. And the newspaper published in the newspaper the photograph of Shelley who we all know is a twin of Cindy and had a caption that said coke head for state Senate. Since they took part in a republication they never checked out their source. So remember they knew or should have known, they should check out the actual source. They will be responsible is what we call a re-publisher.

 It is their obligation to check the source of the story before they actually print it. Remember, this is what we call a media defendant. What does that mean? Whenever you see a media defendant you want to look to the New York Times. And see if I need to argue the constitutional privilege, do we need to show actual malice. If you have a private person you need to prove negligence. As to the truth or falsity of the actual statement. If it is a matter of public concern. If you have a public figure it rises to the level of malice. And she is campaigning for the state Senate. So she is a public person, isn't she? So, the newspaper's argument will say she has to show actual malice on their part and she's going to argue you were negligent because you never checked out your source, you never checked whether it was true or false. You actually published it so you fell below the standard of care owed. The newspaper will say wait a minute, you are in in the limelight. This is a matter of public concern and if you want to prevail you need to show we acted in actual malice which is a higher standard, higher burden to prove versus mere negligence based on their conduct. So they are going to have to show that they deliberately published this in order to harm her which again based on the facts… They receive this and did not check their sources and publicize this but there is nothing here in the facts to support malice.

 It even tells you if you read the fact that they were not aware that she had a twin sister. If they were, we might have more argument here in regard to maybe you were on the verge of malice because why didn't you check out the source. But based on these facts I don't feel we are going to be able to rise to the level of malice.

 Notice also in regard to the elements I pretty much supra everything back one probably because I'm running out of time but the main thing obviously is to hit the re-publisher and of course the constitutional privilege. And you want to argue in regard to negligence standard versus your actual malice. So again if we are just a private person we need to show the negligence versus if we are dealing with a public figure which we are going to argue that Cindy is you would have to rise it to the level of actual malice.

 Defamation hasn't been tested for a while on the baby bar so it is right for testing. And to look at this defamation question it is not that horrific. I mean trust me, I've seen some that are very difficult in this I think was pretty straightforward in regard to going to the elements. They gave you a specific call. But again remember what that means and this is where I think it makes it harder for students, and that means your analysis is where the grade points are coming from. So make sure you break apart the elements and look to see what the examiners are testing. Because if you don't you are not going to do well.

 How many in the baby bar saw defamation? I would hope, now what is at issue and that's where you make the distinctions based on the facts. Any questions on question number four?

I think you would agree that the Contracts question I think was the most difficult of these for students. This is something that you have got to watch your time because I know students run out of time when they got to question number four because they spent too much time on question number three because they didn't know what to do with it but you have to allocate your time and stick to the hour. If you're going over I would say the most I would go over his three minutes on the exam and get out. That means if you are way beyond time and barking up the tree, somehow it should not take you an hour and 15 or an hour and 20 to write an exam and practice it. Something is wrong so you need to watch your timing. Very important. So if you have got one that is taking so much time get the 6065 minute you get the other exam because you will not be able to recover from a 40 because you got there and did not get it finished or not at all completed that will be a problem. So something you need to work on.

Does anybody have any questions for me at this time?

Again as you can see I don't feel these are that bad. They are doable so you want to keep that in your mindset. They haven't published the student answers yet but when they do I'd look at them and see that that is something you can do. It's not that difficult. You just have to remain calm. And watch your time.

 The publication would be when Debbie sent the newspaper with the anonymous note. So she was actually publishing a defamatory statement. Doesn't have to be physically publishing a statement on the radio. The publication is when you take something else's defamatory statement and reproducing it without changing it.

No. Definitely not. I would be very surprised if you do defamation again.

Right. It's very rare. They tested negligence. Could negligence come back again. Sure. They test defamation twice I'd be surprised. Again you are most likely going to get to contract questions. So you need to be prepared for contract. Very important. With contract use the checklist. Very methodical. Go ABCD, take it in chronological order. To me it is a nice exam I can do well on because it has got structure so you want term member that.

 At this point what is going to happen next week we will have a multistate review so you will be sent at 100 multistate questions if there are any you don't understand please email them to me so I be short to go over those with you because sometimes we don't understand the concept that is being tested even others that explanation we don't fully understand what they are trying to tell you. Tell me and that is something I will make sure that I note and we'll go over it so you will be given basically 100 multistate questions. I would like you to take these so they will be sent out to I believe tomorrow. You have the weekend to take them. Please take them under timed conditions. You want to see where you are at right now and where you need to tighten up. If you sit down into the hundred multistate and it takes you five hours we've got a problem. That means you need to start working on your time. The issues are coming up fast enough. I need to train myself on how the issues are tested that's a weakness and we know and we have time to correct it. If you don't time yourself you find a weakness too close to the actual exam date and you will get hurt. Take them under time constraints so you can get a good understanding where you are at right now on the bar.

 Before I say good night does anyone have any questions for me?

All right if anything does come up please a free to always shoot me an e-mail at Jolly@Taftu.edu and I will be more than happy to help you in any way I can. Do that work on issue spotting, working on the timing. Again, the more you understand how the issue is tested that is going to make you successful. I cannot say that enough. So you do want to keep practicing. I wish you guys all a good night.