

## MBE Lecture:

What subjects are covered for the California Bar multiple choice questions (MBE)?

Torts, Contracts, Property, Constitutional Law, Criminal Law and Procedure, Evidence, Property, and effective with the February 2015 bar examination, Civil Procedure. There are 10 pre-test questions that are unscored. The remaining 190 scored questions on the MBE are distributed as follows: Civil Procedure (27), Constitutional Law (27), Contracts (28), Criminal Law and Procedure (27), Evidence (27), Real Property (27), and Torts (27).

First we will review how you should attack a multiple choice question and then I will break it apart based upon the subject matter.

The MBE exam is an objective multiple choice exam with four answer choice options. The questions are mixed and not given in order of the subject matter. All of the MBE questions are worth the same point value. The score is based on the number correct and converted to a 2000 point scale and is worth a total of 35% of the exam.

A MBE question is comprised of three parts; the root (fact pattern), stem (call of the question) and the options (answer choices)

**When reading an MBE question you need to read the facts carefully. The examiners know students do not read in detail and that is why they test the way they do. When reading an MBE question, look to the operative language. The fact pattern often turns on the details in the facts. You need to determine what facts are relevant and those facts that are irrelevant.**

### **\*How to read an MBE**

When taking a MBE question always start with the stem of the question (call). This will narrow down the specific topic/area that is being tested. Once you have read the call of the question (stem), than read the fact pattern carefully. Mark up the fact pattern based on what you see from the facts. Once you have determined what is being tested and have narrowed your answer to one choice, make sure that you are answering the call of the question before you commit.

### **General rules concerning the MBE**

#### **Do not assume facts.**

Don't make the problem harder than what it is. Keep it simple. If there are multiple ways to interpret a question, one making the problem straight forward and the other making it complex, choose the straight forward interpretation.

Look for triggering facts while reading the question. If you see a statute on the exam, break the statute apart by the elements. Read the statute carefully. Most students will not apply the given statute in the fact pattern and the bar examiners know this.

With questions asking for the best argument you need to look for the only option that will provide a successful claim or defense.

If a question is specific, for example if the call states “which is the best defense”, “which claim will succeed”, you need to re-write the call of the question.

**Example:** Which is the best defense – rewrite to - Based on the facts what will support the Defendant not being guilty.

**Example:** Which claim will succeed- rewrite to - Which is the only claim that will succeed based on the facts.

## **Modifiers:**

If you see an MBE question with because or since, these are conclusions. Therefore, everything after the since or because will have to be true.

For example:

### **Scenario #1:**

In the State of X, an assault is defined as an attempt to commit a battery. As Pete was walking down Main Street, he dropped his cell phone. As he went to grab the phone, while in the process of dropping to the ground, he hit Mary, who was jogging down Main Street, in the butt. Mary thought Pete was being fresh and pushed Pete away. If Pete is charged with assault, he will be found:

- A. Guilty, because he caused apprehension in Mary.
- B. Guilty, because he should have been aware of others around him.
- C. Not guilty, because he had no intent to touch Mary.
- D. Not guilty, because he did not intend to touch Mary.

Looking at all the answer choices, can you eliminate two? No? If not, you need to apply the process of elimination. If you believe the answer is he is not guilty you can illuminate answers A and B since they have because as a modifier. If an answer choice uses because or since, you can illuminate immediately 2 answer choices when you know whether Pete will be found guilty or not guilty. Since I believe he will not be guilty, that only leaves answer choices C and D.

However let’s look at all the answer choices in order to understand why the answer is incorrect and why the correct answer is the best answer:

- A. Answer A states - Guilty, because he caused apprehension in Mary.  
In looking at the statute, it states .... An assault is defined as an attempt to commit a battery.  
Answer A only requires a showing that Pete caused apprehension. The answer choice leaves out the mens rea element. Thus, incorrect

\*\* Attempt – you need to show specific intent

- B. Guilty, because he should have been aware of others around him.  
The mens rea based on the statute is specific intent. Answer B suggests he should have been aware. This is a negligent standard. Thus, B is incorrect.

C. Not guilty, because he had no intent to touch Mary.

Answer choice C correctly states the mens rea in the statute. Hence, looks like a good answer.

D. Not guilty, because he did not intend to touch Mary.

Answer choice D sounds good however, the language did not intend is not specific enough compared to answer choice C. Therefore, answer choice C is the best answer and is correct.

Remember you are to choose the **best answer**. As in the example above, there are 2 correct answers but one is better than the other. This is how the MBE are tested. You need to beware of this for your preparation.

### Scenario #2:

Tillie Taylor was a member of the Children of the Earth. During one of the organization's group encounter sessions, Raj Reel, the groups leader who knew that Tillie was a paranoid schizophrenic, accused Tillie of being disloyal to her fellow "brothers and sisters". Tillie's disloyalty stemmed from the fact that she had telephoned her parents in disobedience of the group's code of conduct. Ostracized from the group, Tillie fled the commune and returned to her parent's home that evening.

After unsuccessfully trying to lure Tillie back to the group's movement, Raj decided to employ a "last ditch" effort to secure her return. Raj leased a billboard located across the street from Tillie's house. Raj had the billboard printed to read:

"TILLIE, THE CHILDREN OF THE EARTH COMMAND YOUR RETURN"

As a result of the billboard, Tillie suffered a nervous shock and refused to leave her house, fearful that she would be abducted by her former "brothers and sisters."

In an action for false imprisonment against Raj and Children of the Earth, Tillie will most likely

A. Recover, since Tillie's confinement resulted from the implicit threat on the billboard.

B. Recover, since Tillie confinement was psychological and Raj knew that Tillie was a paranoid schizophrenic.

C. Not recover, since the defendants did not intend for her to be confined in her home.

D. Not recover, since Tillie was under no constraint to remain in her house.

C is the best answer. For false imprisonment, you need a showing of intentional physical or psychological confinement of another. – This is an example of how you need to break apart the elements of false imprisonment. There is psychological confinement present; however, there is no intent. A prime example of how you need to break apart the elements and make sure that facts support the elements.

**Now let's look at other modifiers** - "if" and "unless"

When you see an answer choice that is using “**if**” as the modifier, everything after the “**if**” must be true. As for the answer choices, using “**Unless**” as a modifier, the best way to attack this kind of answer choice is to re-write the answer choice: To No, if or Yes if...

### Scenario # 3:

Tammy is a chemical engineer. She has no interest or connection with Chemco. Tammy noticed that Chemco’s most recent publicly issued financial statement listed as part of the assets a large inventory of a special chemical compound. The asset was listed at a cost of \$100,000, but Tammy knew that the ingredients of the compound were in short supply and that the current market value was 1,000,000. Chemco’s stock is currently selling for \$5.00. However, if the true value of the chemical was known, then the stock would sell for \$30. Tammy approaches Sam and offers him \$6 a share for his 1,000 shares of Chemco stock. If Sam asserts a claim based on misrepresentation against Tammy, will Sam prevail?

- A. Yes, because Tammy knew of the true value of the inventory.
- B. Yes, if Tammy did not inform Sam of the true value of the inventory.
- C. No unless, Tammy told Sam that the stock was not worth more than \$6 a share.
- D. No, if Chemco’s financial statement was available to Sam.

How would we review these answer choices in order to determine which is the best answer?

A. Yes, because Tammy knew of the true value of the inventory. Because as the modifier: Based on misrepresentation, is Sam going to prevail. You need to go through and find the elements of misrepresentation are satisfied. In going through the elements of misrepresentation, Tammy did not make any representation to Sam. Hence, A is incorrect.

B. If, as a modifier. Everything after - If must be absolutely true. Yes, if Tammy did not inform Sam of the true value of the inventory. Now go through the elements. Did Tammy make a false statement? No. B is incorrect.

C. No, unless, re-write to Yes, if and everything after the if must true. Yes, if Tammy told Sam that the stock was not worth more than \$6 a share.

Now the facts support a false representation of facts, which satisfies misrepresentation. C looks correct.

D. No if, Now everything after the if must be true. No, If Chemco’s financial statement was available to Sam. The facts of the financial statement do not support a misrepresentation. Do we have a false statement? No, thus, D is incorrect.

### Scenario # 4:

Chuck had obtained a permit from the national forest service to cut some firewood in the national forest, and had driven his pickup to the designated area and had begun to cut down a marked tree with his *axe* when Chloe, a member of the Hug the Trees movement, approached him and began beating him for cutting the tree. (Hug the Tree members believed that trees were a higher form of life than animals, and advocated a total ban on the

cutting down of any tree.) Chuck told her that he had a permit to cut and to leave him alone. Chloe persisted, however, shouting that Chuck was "a moronic, murdering tree killer." Intending to frighten Chloe away, Chuck said, "Get away or I'll start cutting on people!" and swung his axe as if to strike her. The manufacturer of the axe had neglected to insert a metal pin that secured the axe handle to the blade, and Chuck's previous chopping had so loosened the head that it flew off the handle and struck Chloe in the head injuring her. If Chloe brings an action for battery against Chuck, will she recover?

A. No, because a reasonable person would have been angered by Chloe's remarks.

B. No, because the defective axe was the cause in fact of Chloe's injuries.

C. No, unless Chuck intended to frighten her.

D. Yes, unless she intended to provoke Chuck.

C is the correct answer. A battery is a volitional act, done with the requisite intent, which causes Plaintiff to suffer a harmful or offensive contact. The intent to cause Plaintiff to apprehend such a contact (i.e., intent to commit an assault) is a sufficient intent to support a finding of battery if the plaintiff actually suffers the harmful or offensive contact. The facts state that Chuck intended to frighten Chloe away, indicating that he wished her to fear being struck with the ax. Under these circumstances, Chuck is guilty of battery when the ax head actually struck Chloe.

When taking multiple choice questions, make sure you apply the rules/elements of the concept that are being tested.

## **Specific Subject**

### **\*Torts**

The testing in Torts is directed towards the elements, and the black letter law. You will see a lot of questions dealing with Negligence. The common type of question will ask you – “What is the Plaintiff’s best claim?” Or “What is the Defendant’s best defense?”, or “Will the Plaintiff prevail?” The problem with these types of questions is you are not told the cause of action that the Plaintiff is suing under. You need to read the facts and determine the cause that the Plaintiff is suing under in order to understand what the question is asking. In order to do well, you will need to know various causes of actions, for example Negligence, Defamation, Invasion of privacy, and what kind of facts these claims apply to. This knowledge will help you quickly eliminate the wrong answer choices. Make sure once you decide what legal concept is being tested, to run the facts through the elements in order to determine what element of the cause is being tested, what element is not present, or is a defense being tested. An example would be:

Michael was rowing his boat on a lake when a severe rain storm suddenly arose. Fearful his boat might sink, Michael rowed his boat to a nearby dock and tied his boat up to the dock. Ricky, the owner of the private dock came from his neighboring home and ordered Michael to remove his boat because the waves were causing the boat to rub against the bumper on the dock. When Michael refused, Ricky untied Michael’s boat and set it adrift. Michael’s boat sank. The heavy rains continued and Michael asked if Ricky would take him to his cabin, about one mile up the road and Ricky told Michael “No, you can walk.”

After several hours of seeking shelter under a tree on Ricky's property, the rain stopped. A necessary element to determine if Michael is liable for his trespass is whether:

A. Michael had reasonable grounds to believe the property belonged to a private person.

B. Michael had reasonable grounds to believe his boat might be swamped and sink.

C. Ricky had clearly posted no trespassing signs on his property.

D. Michael knew that the property belonged to another person.

What is the best answer?

In this question, you can see a defense is at issue.

### **\*Contracts**

Contracts questions are more demanding in reading comprehension. The fact patterns tend to be long and lengthy. There is a wide of variety of how the examiner can ask the question. What is the best argument? Has a contract been formed? What additional facts will strengthen Bill's claim? Can Joe's oral promise be admitted? You do need to remember the distinctions between common law and UCC. For an example, the issue of modification, option versus firm offers, addition terms creating a counter offer or an acceptance. You will see many UCC questions since the examiners know that students can't tell the distinctions. For example, when is the sending of non-conforming goods an accommodation versus an acceptance and breach of contract? Once you determine that, the questions is dealing with contracts immediately look to see if the question deals with a transaction in goods. Then you know the UCC applies. You need to read the facts carefully, and diagram the facts to determine what each fact does, legally. For an example, if you are diagramming and then you get to the call which states what was the effect of the May 12<sup>th</sup> letter? You will be able to reflect to your diagramming and now the affect. If you find that the facts supports a contract, offer, acceptance, and consideration, then look to see what the duties are and what relieves or excuses those duties. Generally, in a contract questions you are only told of the parties names. However, if the facts indicate something about one or both parties, take note. For an example: Tracee, an unemployed law student, called Timothy and said, "I will sell you my car for \$5,000 cash. I will hold my offer open for five days, as I need to money to pay my rent." The next day, Tracee was offered a law clerk job. She then call Timothy and told him the deal is off since she sold her car to Daniel. The following day, Timothy learned that Tracee did not sale her car. He then called Tracee and said her would bring the \$5,000 over to her apartment tonight, as he decided to buy her car. Tracee refused the money and will not sale her car to Timothy. If Timothy brings an action, who will prevail.

In the facts, they told you Tracee was an unemployed law student. Based on telling you about Tracee, we know she is not a merchant. Therefore, no firm offer, making the offer revocable prior to timely acceptance. Further, we know that an option was not creates since there was no consideration.

In some questions, you will be given two two three alternatives for answers. You then need to decide which combinations of these answers are correct. You need to apply the process of elimination.

### **Example:**

Reggie offered Harriet \$200 for a 30-day option to buy Harriet's land, Grandvale, for \$10,000. As Harriet knew, Reggie, if granted the option, intended to resell Grandvale at a profit.

Harriet declined, believing that she could find a desirable purchaser herself. Reggie thereupon said to Harriet, "Make me a written 30-day offer, revocable at your pleasure, to sell me Grandvale at a sale price of \$10,000, and tomorrow I will pay you \$200 for so doing." Harriet agreed and gave Reggie the following document:

For 30 days I offer my land known as Grandvale to Reggie for \$10,000, this offer to be revocable at my pleasure at any time before acceptance.

[Signed] Harriet

Later that day Harriet's neighbor, Norma, said to Harriet, "I know someone who would probably buy Grandvale for \$15,000." Harriet asked, "Who?" and Norma replied, "My cousin Portia." Harriet thanked Norma. Several hours later, Norma telephoned Harriet and said, "Of course, if you sell to Portia, I will expect the usual 5 percent brokerage fee for finding a buyer." Harriet made no reply. The next day Harriet telephoned Reggie, declared that her written offer to him was revoked, and demanded payment of \$200. Reggie refused to pay. Harriet subsequently sold Grandvale to Portia for \$15,000, but refused to pay Norma anything.

In a lawsuit by Harriet against Reggie to recover \$200, which of the following arguments would plausibly support Reggie's position?

- i. Any promise implied by Harriet in making her offer was illusory because of the revocability provision.
- ii. Since Harriet's offer, if any, was in writing and involved realty, it could not be revoked by telephone.
- iii. Enforced payment of \$200 by Reggie to Harriet would defeat Reggie's reasonable expectation if Harriet's offer was legally open for only one day.

- A. i and ii only
- B. i and iii only
- C. ii and iii only
- D. i, ii, and iii

### \* Property

Property questions on the MBE are very tough. Property questions require a careful analysis based on your knowledge of the law. The questions tend to be very long and complicated fact patterns. Because they are difficult, it is hard to apply the process of elimination of the wrong answer. I would follow these steps:

1. Eliminate the answers that are factually wrong.
2. Eliminate the answers that are legally wrong.
3. Eliminate the answers that are irrelevant.

I would recommend charting out the facts and make sure you are marking up the question. One difficult area that is tested is future interest. If you are like most you do not like future interest. Unfortunately you will have questions on the MBE in this area. Future interest questions are difficult. The examiner tests the difficult aspects in future interest. For an example, many MBE questions deal with the issue of the Rule Against Perpetuities and class gifts. If you do not understand future interest I would recommend you make up the point value in another area. You can have up to nine MBE questions dealing with future interest on the bar exam.

A hint for the Rule Against Perpetuities that you can remember is if the condition attaches to the person it generally does not violate the Rule Against Perpetuities. However, if the condition attaches to the land it does violate the Rule Against Perpetuities.

**Example:**

O conveyed Camino Pines to “Charles, his heirs and assigns, so long as the premises are used for farming purposes, then to Scott and his heirs and assigns. The jurisdiction in which Camino Pines is located had adopted the common law Rule Against Perpetuities. What is O’s interest?

- A. Nothing since he conveyed all he had.
- B. A possibility of reverter
- C. A right of re-entry
- D. A reversion in fee simple

Charles’ interest is a fee simple determinable. The future interest created is an executory interest. When applying the Rule Against Perpetuities you need to determine within Charles life time plus 21 years if the land will be used for other purposes than a farm. The answer is no, you will not know. Therefore, it violates the Rule Against Perpetuities. Since the executor interest is destroyed a possibility of reverter is created in O.

With class gifts, you need to remember that if a class gift is in a will, then the class gift will be valid and invalid if the class gift is in a conveyance. Why?

**Example:**

By his will O transfer Blackacre to his grandchildren who reach the age of 21. At the time of the conveyance, O had two grandchildren, Tim, age 5 and Tommy, age 2. This is a class gift. Now apply the Rule Against Perpetuities. In O’s children’s like time, plus 21 years, will you know with an absolute certainty, if all his grandchildren reach the age of 21? The answer is yes. You will know with an absolute certainty which children are within the class and the class will close at the time of O’s death. Thus, the gift does not violate the Rule Against Perpetuities.

What if O’s conveyance of Camino Pines was an inter vivos conveyance? Would anything change?

Other areas I would recommend you know well is the rule on splitting mortgage payments between the remainderman and the Life Estate holder. Remember the Life Estate holder is responsible for the interest payments and the remainderman is liable for the principle.

Conveyances and the recording act, marketable title, mortgages, zoning, and covenants.

In addition effective with the February 2017 CA Bar Exam, there will be changes to the Real Property scope of coverage for the MBE. New topics will include conflicts of law, property owners’ associations, and common interest ownership communities; drafting, review, and negotiation of closing documents; and persons authorized to execute real estate documents.



## \* Constitutional Law

Constitutional law MBE questions are theory oriented. You should be familiar with the case law. Also you need to apply the test/approach in order obtain the correct answer. Over one half of the questions asked will be form the following areas:

Individual rights (Substantive due process, procedural due process, equal protection, takings, privileges and immunities clauses, the contracts clause, bills of attainder, and ex post facto laws, First Amendment freedoms and Freedom of religion.) The remaining will be on judicial review, separation of powers, and intergovernmental immunities

### **Example:**

A state law prohibits any barbershop licensed by the state from displaying posters in support of any current candidate for public office or displaying or distributing any campaign literature in support of such a candidate. No other kinds of posters or literature are subject to this prohibition, nor are any other types of commercial establishments in the state subject to similar prohibitions.

Is this law constitutional?

A. No, because it treats barbershops differently from other commercial establishments.

B. No, because it imposes a restriction on the content or subject matter of speech in the absence of any evidence that such a restriction is necessary to serve a compelling state interest.

C. Yes, because it leaves political candidates free to communicate their campaign messages to voters by other means.

D. Yes, because the operation of a licensed barbershop is a privilege and therefore is subject to any reasonable restriction imposed by the state.

## \* Criminal Law and Procedure

In Criminal Law, the questions are not difficult. The examiners test on the black letter law. You do want to always pay attention to the call. Many students have a tendency not to pay attention to the call and answer the question based on Tort law. Generally you will be asked if the Defendant is guilty, or what is the prosecutions best argument, or what is the most serious crime Defendant can be convicted. Area of importance is homicide, inchoate crimes, theft crimes, and do not forget your defenses.

### **Example:**

Biff goes to Jackson's house at 3:30 p.m. intending to break in and take Jackson's TV. When he arrives, he finds the door wide open and no one home. He walks in and takes the TV. The most serious crime that Biff could be convicted of is:

A. Larceny

B. Robbery

C. Burglary

D. Embezzlement

## **A is the correct answer. Why larceny vs. burglary?**

In criminal procedure, you will see that almost every question will be asking you about the admissibility of evidence. The call will ask you whether the evidence should be admissible or what is the best argument to exclude its admission? Many of the questions will resemble actual cases. You do need to remember the different types of exceptions to a warrantless search. Make sure you understand how the qualification/elements need to be supported with the facts in order to find that the exception will work as an exception to a warrantless search. With a question dealing with the issue of search determine the purpose of the search. The issue of Miranda determines whether there needs to be a warning given to the Defendant. Highly testable. Determine based on the facts if the Defendant is in custody, and/or being interrogated.

### **Example:**

Morris Morgan was arrested one morning by a police officer for the attempted murder of Harry Hamilton. Morris and his brother Mike had allegedly fired three shots at Harry, a physical education teacher, on the schoolyard of Eleanor Elementary School.

Immediately after the arrest, the arresting officer advised Morris of his Miranda rights. Morris responded that he would not make any statement until he consulted with his attorney.

Within minutes, a patrol car arrived, and Morris was taken into the car to be transported to the police station. The arresting officer sat in the front, next to the driver, and Morris sat alone in the back seat, with his hands cuffed.

On the way to the station, the driver stated to the arresting officer, "I hope that the shotgun involved in this crime doesn't get into the hands of those small children, because one of them could be seriously injured, to say the least." Morris interrupted the officers and told them where to look in the schoolyard for the abandoned shotgun. As a result of this information, the police found the gun where Morris said it was. At the police station, Morris was placed in a line-up. Harry observed the line-up, and after each of the six participants stated, "I'm going to get you," the same phrase that the shooter allegedly said to Harry before he fired, Harry identified Morris as the perpetrator.

Subsequently, Mike was also arrested, and Mike and Morris were tried together. Both were represented by their family's trusted attorney, Janis Purclon. At trial, Mike's defense was that Morris forced him to go to the schoolyard on the day of the crime and that he did not know that Morris was armed with a shotgun until he saw Morris take it out of a bag that day.

Morris attorney files a motion to exclude her client's statement to the police officers due to the violation of her clients Miranda rights. The court will

A. grant the motion, because there was no opportunity to cross-examine the Defendant at the time the statement was made at.

**B. grant the motion, because the officers conversation was a form of interrogation.**

C. deny the motion, because the Defendant is available and there is adequate opportunity for cross-examination at the hearing.

D. deny the motion, because the statement was not obtained in violation of Miranda

### **\* Evidence**

Evidence questions on the MBE are very mechanical questions. You need to analyze logically and theoretically. The questions are intricate and you need to be familiar with them in order to answer the question successfully. The questions are generally short. You do need to read the questions carefully. A careful reading of the facts can lead you to the correct answer. The question will deal with a piece of evidence or an item of testimony and you will be asked to identify the basis on which the evidence will be admissible or inadmissible. You need to know not only that the evidence is admissible or inadmissible, but you need to know the why and for what purpose that it is being offered. Although you should be prepared for virtually, any aspect of Evidence the questions are going to focus on concepts that are tricky. Like hearsay, hearsay exclusions and exceptions, Impeachment. Be aware of prior inconsistent statement, or prior consistent statement.

### **Example:**

Lyons was on trial for the murder of his wife. The prosecution claimed that Lyons committed the murder by poisoning his wife with rat poison. Lyons's defense was that his wife committed suicide. Friend was called by the prosecution to testify that Lyons told him that he poisoned his wife. The trial judge should rule Friend's testimony:

A. Admissible, because it was an admission.

B. Admissible, because it was a declaration against interest.

C. Inadmissible, because it was hearsay.

D. Inadmissible, because it was a prior inconsistent statement which can only be used for impeachment purposes.

A is correct because Lyons's statement was an admission. B is wrong because it was an out-of-court statement made by a party who is available to testify. A declaration against interest must be made by a declarant who is unavailable to testify at trial. C is incorrect since there is an exception to the hearsay rule. D is incorrect because an admission is admissible as substantive proof.

### **\*Civil Procedure**

Civil procedure questions require a careful analysis based on your knowledge of the law. The questions tend to be complicated fact patterns. You are responsible to know the Federal Rules of Civil Procedure for the multiple choice. Although you do need to know all of your Civil Procedure, the areas that are highly tested are jurisdiction, Venue, pretrial procedures (pleadings, joinder of parties and claims, discovery summary judgments motion) and motions (Pretrial motions, including motions addressed to face of pleadings, motions to dismiss, and summary judgment motions, Motions for judgments as a matter of law (directed verdicts and judgments notwithstanding the verdict) Post trial motions, including motions for relief from judgment and for new trial.

### **Example:**

A man brought a federal diversity action against his insurance company, alleging that the company had breached its duty under his insurance policy by refusing to pay for his medical expenses resulting from a mountain-biking accident. At the jury trial, the man presented evidence that he had paid all premiums on the insurance policy and that the policy covered personal-injury-related medical expenses arising from accidents. After he rested his case, the company presented evidence that a provision of the policy excluded payment for injury-related expenses resulting from an insured's "unduly risky" behavior. The company also presented a witness who testified that the accident had occurred in an area where posted signs warned bikers not to enter. The man did not cross-examine the witness.

After resting its case, the company moved for judgment as a matter of law.

Should the court grant the motion?

A. No, because a motion for judgment as a matter of law must first be made at the close of the plaintiff's case-in-chief.

**B. No, because whether the man's behavior was unduly risky is a question of fact for the jury to resolve.**

C. Yes, because the company's uncontradicted evidence of the man's unduly risky behavior means that no reasonable jury could find that the policy covers his injuries.

D. Yes, because the man waived his right to rebut the company's evidence by not addressing the "unduly risky" policy provision in his case-in-chief.

\*\*Did these few MBE questions give you an understanding of how to process and eliminate the wrong answer choice?

When you miss a MBE question you need to figure out the why. Look to the answer you chose and determine why you chose that answer versus the correct answer. Merely reading the answer choice is not enough. If time allows, you can write a flashcard on the missed questions

**Now that you are experience let's look at a few and see how you do.**

### **Questions:**

1. The state of Hermosa has recently released medical statistics showing that the number of new AIDS cases within the state has quadrupled from the preceding year. In 1986, Hermosa reported that 2,250 people were diagnosed as being stricken with the AIDS virus. However, in 1987 the state confirmed that over 9,000 new persons contracted the deadly virus. In an effort to improve the health care of AIDS, for patients in the state, the Hermosa state legislature has enacted a law providing public funds to assist hospitals.

According to the law, every hospital in the state would receive \$5,000 annually for each AIDS patient who was admitted at that hospital, and whose period of hospitalization exceeded one week. Although this bill was initially opposed by several churches and other organizations, the Hermosa legislature re-drafted the bill in a compromise effort to appease the opposition.

In its final re-draft, the bill provided that the \$5,000 annual subsidy “would not be paid to any hospital performing abortions.”

Which of the following is the strongest argument against the constitutionality of the Hermosa statute?

A. The statute violates the establishment clause of the First Amendment as incorporated into the Fourteenth Amendment, by adopting the controversial views of particular churches on abortion

B. The statute violates the Fourteenth Amendment by conditioning the availability of public funds upon the recipient’s agreement to act in a way that makes more difficult the exercise by others of their fundamental constitutional rights.

C. The statute violates the equal protection clause of the Fourteenth Amendment by denying non-AIDS patients the same subsidy benefits as those received by AIDS patients.

D. The legitimate importance of the state interest that this statute seeks to advance is insufficient to justify the statute as a lawful exercise of state police power.

1. B is correct. This fact pattern is extremely representative of both the difficulty of Constitutional Law questions on the Bar and of the closeness between long, and often similar, answer choices. The substantive guarantees of due process under the Fourteenth Amendment require that legislation, to be constitutional, have a rational relationship to a legitimate end of government. In the area of fundamental rights, such as privacy (and including abortion), governmental power is limited to the extent that individuals may be afforded freedom of choice in matters relating to their personal life. The Hermosa statute limits the availability of funds for AIDS patients only to hospitals refusing to perform abortions.

While the statute does not preclude individuals from having abortions performed, it does make more difficult the exercise of that right. Since legislation restricting fundamental rights is viewed under the strict scrutiny standard of review, the *state* then has a heavy burden to show that the measure is necessary to further a compelling interest. Choice (B) is the strongest argument presented and is therefore correct.

2. The target of the search, "BigRed," was also suspected of being implicated in the recent violent death of BigRed's mid-level supplier, Ruby. Ruby's nickname came about because of the five-carat ruby ring he always wore. Ruby was not wearing the ring when his body was found. The search party dispatched to search BigRed's apartment for drugs was advised to keep their eyes open for the large ruby. Although they did not find drugs, they did find the large five-carat ring in BigRed's medicine cabinet, which led to BigRed being charged for the murder of Ruby. BigRed's attorney moved to suppress the ruby. The motion to suppress should be

A. granted because the ruby was not listed in the search warrant and cannot be sought by police during the search for drugs.

B. granted because the discovery was not inadvertent.

C. denied because the ruby was discovered during the search for drugs.

D. denied because a search warrant regulates entry into the house and does not limit the search of the premises.

2. Answer C is correct. Provided the ruby was found while police were searching for drugs, and they had probable cause to believe that the object was evidence of a crime, the police were entitled to seize the ring even though it was not listed in the search warrant. *Horton v. California*, 496 U.S. 128 (1990).

Answer A is incorrect. It is well understood that during the course of a lawful search police may discover evidence of crime not listed in the warrant. When finding such evidence, there are two choices: seize the evidence immediately or leave the evidence alone and seek a second search warrant. Since a search warrant is not just an admission ticket, there would be good reason to require an additional search warrant. However, there are two drawbacks to such a requirement. If the police simply withdraw, the object may be destroyed or hidden before police are able to return with a new warrant. On the other hand, if police secure the premises while awaiting a new warrant, the freedom of movement of the occupants may be limited for an extended time. The approach adopted by the Supreme Court allows police to seize an item not listed in the search warrant, provided that police find the object in plain view.

Answer B is incorrect. Police may seize an item in plain view if (1) they are lawfully present when they observed the object (that the warrant was valid, and they were looking in a place they had authority to look for the objects listed in the warrant), and (2) it was readily apparent to the police that the object is evidence of a crime. The "readily apparent" element is satisfied by probable cause. *Arizona v. Hicks*, 480 U.S. 321 (1987). The "inadvertence" requirement for plain view searches was rejected by the Supreme Court. As illustrated by the facts of this question, the elimination of the inadvertence element allows police to look for many more objects than those listed in the warrant.

Answer D is incorrect. The purpose of a search warrant is to protect the privacy of the residents and business invitees or social visitors to the place where the search takes place as well as to limit the discretion of police conducting the search. One way a search warrant limits police discretion is by limiting the scope of a search by describing the items for which police are authorized to search, and limiting the search to places where the items listed in the search warrant may be hidden. As drugs may have been in the medicine cabinet, police could look in the cabinet where the ring was found.

3. Proctor and Gamble owned large adjoining tracts of land. The boundary line between the two properties was never properly determined or clearly known. In 1957, Proctor installed a gas-powered generator on land he thought he owned, but which, was in fact, owned by Gamble.

Proctor ran electrical wires from the generator across land he knew belonged to Gamble. Gamble orally consented to the wiring crossing his land. Proctor kept a herd of cattle on his land.

During certain months of the year, Proctor let his cattle graze on part of Gamble's land which was suitable for no other purpose. Gamble was unaware that this took place.

In 1970, Gamble was found to be mentally incompetent. He died in 1981, and his executor filed suit to eject Proctor and quiet title. With respect to the land over which the electrical wires were laid:

A. Proctor has acquired title by adverse possession.

B. Proctor has acquired a prescriptive easement.

C. Proctor has acquired both title by adverse possession and a prescriptive easement.

D. Proctor has acquired neither title by adverse possession nor prescriptive easement.

3. D is the best answer choice. The creation of an easement by prescription follows many of the same principles as does obtaining title to land by adverse possession, but because of the difference between "use" and

"possession," the rules governing the two doctrines are not identical, since easements are nonpossessory interests in land; adverse use may result in obtaining a right-of-way easement over land. In this question, analysis turns on whether Proctor's use of Gamble's land to run electrical wires was "hostile."

Title to real property may be acquired by adverse possession if the physical, mental, and time elements are established. The mental element requires that the claimant's possession be "hostile"; he must assert a claim to the property, which is in derogation of the true owner's rights. An easement is an affirmative right to use land owned by another. The easement holder is entitled to make a reasonable use of the easement. The servient estate holder (owner of the parcel burdened by the easement) may use her property, but cannot unreasonably interfere with the proper use of the easement by the easement holder.

Proctor used Gamble's land to run electrical wires from the generator with Gamble's oral consent, and there were no facts to indicate that Proctor in any way manifested an intention to claim the land as his own. Therefore, the "hostile" requirement of adverse possession is not met, so Proctor has acquired title neither by adverse possession nor prescriptive easement. Therefore, (A), (B), and (C) are incorrect.

4. A man went into a high school and took an unattended backpack. As he was slowly driving his car out of the school parking lot, he accidentally hit and killed a student who ran out from behind a parked car. Is the man guilty of murder?

- A. No, because the man did not intend to hit the student.
- B. No, because larceny of a backpack is not an inherently dangerous felony.
- C. Yes, because the man killed the student, while leaving a crime scene.
- D. Yes, because the man could not have hit a student without being grossly reckless.

B is the correct answer.

5. Deft is being prosecuted for first-degree murder of Vic. Deft admits shooting Vic, but claims she acted in self-defense when Vic attacked her. At trial, the prosecution calls Wit, a forensic pathologist who conducted the autopsy on Vic. Wit testifies that she found three entry wounds on the back of Vic's head. The prosecution then shows Wit a series of photographs, which Wit states were taken of Vic's upper body and head during the autopsy. The photographs clearly show the bullet wounds to the back of Vic's head that Wit had testified about. The prosecution offers the photographs into evidence. Deft objects. Which of the following statements is most likely correct?

- A. Because the photographs are cumulative, they are irrelevant and must be excluded.
- B. Although the photographs are relevant, the fact that they merely corroborate Wit's testimony deprives them of all but minimal probative value, and they must be excluded.
- C. Although the photographs are relevant, the court may exclude them if it finds that they are less reliable evidence of the condition of Vic's body than is Wit's oral testimony.
- D. Although the photographs are relevant, the court may exclude them if it finds that their probative value is substantially outweighed by the danger that the jury will convict Deft for the wrong reasons.

5. Answer (D) is correct. The photographs are relevant because they make it somewhat more likely than it would be without the evidence that Vic was retreating when shot. The court may exclude the photographs if it finds that their probative value is substantially outweighed by the danger of unfair prejudice or other dangers mentioned in FRE 403. Among those are the “needless presentation of cumulative evidence.” The evidence here is cumulative in the sense that it corroborates oral testimony, but the court is unlikely to find them “needlessly cumulative” because they add something to the oral story: they show the jury what the witness was talking about, making it easier to understand the oral testimony. The jurors might also be able to judge whether the witness accurately described the condition of the head. There is also the risk of unfair prejudice if the jury might react emotionally rather than logically to the evidence, and the court should weigh this danger as well. On balance, the court is likely to admit the evidence. Answer (A) is incorrect because cumulative evidence is relevant. Answer (B) is incorrect because, as explained above, the probative value of the photographs might be great depending on the circumstances. On the facts given, we cannot judge them to have minimal probative value. Answer (C) is incorrect because the judge should not be determining the reliability of the evidence. Reliability is a matter to be determined by the trier of fact. The judge should be deciding the probative value of the evidence if the jury decides it is reliable.

6. Liz and her boyfriend, Lucas, were having dinner at the Golden Dragon Chinese restaurant in Chinatown when she excused herself to go to the bathroom. The restaurant was owned and operated by Wong. As Liz was walking past a table where Elliot, another customer, was seated, she slipped and fell on an egg roll that was lying on the floor. When she fell, her head struck a serving tray, which was located in the aisle. The fall caused Liz to suffer a severe concussion. Elliot knew that the egg roll was on the floor and, although he could have done so, he did not warn Liz. If Liz asserts a claim against Wong for the injuries she suffered from the fall, she will most likely:

- A. Recover, because the egg roll on the floor constituted an unsafe condition of the premises
- B. Recover, if the egg roll was on the floor for a substantial period of time before the accident
- C. Not recover, unless Wong knew that the egg roll was on the floor
- D. Not recover, if Elliot was responsible for knocking the egg roll off his table

B is the correct answer.

7. On October 1, Arthur mailed to Madison an offer to sell a tract of land located in Summerville for \$13,000. Acceptance was to be not later than October 10. Madison posted his acceptance on the 3<sup>rd</sup> of October. The acceptance arrived on October 7. On October 4, Arthur sold the tract in question to Larson and mailed to Madison notice of the sale. That letter arrived on the 6<sup>th</sup> of October, but after Madison had dispatched his letter of acceptance. Which of the following is correct?

- A. There was a valid acceptance of the Arthur offer on the day Madison posted his acceptance.
- B. Arthur's offer was effectively revoked by the sale of the tract of land to Larson on the 4th of October.
- C. Arthur could not revoke the offer to sell the land until after October 10.
- D. Madison's acceptance was not valid since he was deemed to have notice of revocation prior to the acceptance.



A is the correct answer. Based on the mail box rule the acceptance is effective upon dispatch.

8. A motorcyclist was involved in a collision with a truck. The motorcyclist sued the truck driver in state court for damage to the motorcycle. The jury returned a verdict for the truck driver, and the court entered judgment. The motorcyclist then sued the company that employed the driver and owned the truck in federal court for personal-injury damages, and the company moved to dismiss based on the state-court judgment. If the court grants the company's motion, what is the likely explanation?

- A. Claim preclusion (res judicata) bars the motorcyclist's action against the company.
- B. Issue preclusion (collateral estoppel) establishes the company's lack of negligence.
- C. The motorcyclist violated the doctrine of election of remedies.
- D. The state-court judgment is the law of the case.

A is correct.