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LAW PREVIEW ONLINE COURSEBOOK

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INTRODUCTION

It is not easy to distinguish yourself during the first year of law school – almost everyone in your class will be smart, diligent, and determined to do well – but one of the best ways to secure an edge is to be more prepared than the rest. The ability to anticipate major events before they unfold will enable you to channel your efforts efficiently and to position yourself to capitalize on the many opportunities that will inevitably present themselves.

That is Law Preview's mission – to empower you, the incoming law student, to realize your full potential by preparing you to handle law school's various challenges. We do this in a number of ways: by familiarizing you with the law school experience, by exposing you to general legal concepts that you will see repeatedly throughout law school, by teaching you how to effectively allocate your time and energy, by identifying the numerous career-defining opportunities that await you, and by instructing you on the winning strategies for academic success.

This coursebook is an important part of our mission. It is designed specifically for Law Preview students and is intended to supplement Law Preview's live, one-week law school preparatory course. The substantive chapters are drafted in close consultation with our professors and are tailored to work in unison with the live lectures. Accordingly, they can only be fully understood when read in conjunction with the corresponding lectures.

We implore you to take these readings and lectures seriously. They contain an abundance of valuable advice. Moreover, Law Preview presents the perfect opportunity for you to establish the solid study habits that will carry you to success in law school. Law school requires a massive amount of work packed into a relatively short period of time, and, eventually, all of your fellow students will learn that the study habits that worked in college are insufficient to ensure law school success. Some will learn this lesson early and others will learn it too late. You must capitalize on this tremendous opportunity to get ahead. If you embrace sound study habits from the beginning, you will gain a significant advantage over those students – often some of the most capable in your class – who will waste precious time at the beginning of the semester.

Finally, never forget that the purpose of law school is twofold: to teach you the basic legal rules, and, more importantly, to teach you how to apply them. Too many students focus solely on learning the rules and fail to develop the legal skills that will be tested during final exams. Certainly, you must know the rules in order to apply them, but it is the demonstration of strong application skills that will elevate you to the top of your class.

We hope you have an enjoyable week, and we wish you the best in your new career.

Law Preview

LAW SCHOOL: A PRACTICAL OVERVIEW

For many incoming students, the law school experience is a complete mystery. Most correctly assume that law school will not be like college, and although some have a more comprehensive understanding obtained from friends or relatives who are lawyers or law students, almost all beginning students lack answers to some of the most basic and important questions about law school. For instance: What exactly occurs during the first, second, and third years of school? What is the Socratic Method? What experiences or qualifications are particularly helpful for gaining meaningful employment after school? What is Law Review and how does a student become a member? What are the values of other law journals or moot court? How do first-year students obtain summer jobs? How about second-year students? When do third-year students look for full-time employment? When and how do students study for the bar exam? The following law school overview answers these and other questions.

THE FIRST YEAR

ORIENTATION

The law school experience generally begins at the end of August with a formal orientation session organized by the law school. At these one-day to one-week affairs, students attend get-to-know-the-professor sessions and hear speeches from administrators such as the dean of the law school, and associate deans for financial aid, academic affairs, and job placement. Students often receive tours of the law school facilities, and they may meet representatives from organizations like the Law Review (a scholarly publication and honor society in most schools) and other journals, the Moot Court Board, various ethnic, racial, religious, and gender organizations (*e.g.*, Black Law Students Association, Catholic Law Students Association), The Federalist Society, the student bar association (law school's student government), the local chapter of the American Civil Liberties Union (ACLU), and other organizations.

During orientation, many law schools introduce students to peer advisers or organize peer adviser groups where incoming students are teamed up with second- or third-year students who volunteer to answer any questions that new students may have. Peer adviser groups are usually informal and frequently function as little more than an excuse to meet with other students over dinner or drinks. Such groups can be quite useful, but generally the utility of a particular group depends on the students using it.

Also during orientation, many law schools offer a Legal Process or Legal Analysis class in which students are taught to read, analyze, and brief cases. The class may meet for two to three hours every day during the week, and often a practice final exam is administered at the end of the course. Exam and class grades are usually pass/fail, and some schools even afford students credit for taking the class.

BUYING BOOKS

Prior to orientation, students receive their class schedules, professor assignments, and reading lists for the first week, or even the full semester. The reading lists will refer to casebooks and other materials that the professors will rely upon during the semester. Casebooks are large, expensive texts that contain edited versions of the most instructive cases in a particular subject matter. Casebooks are required in most classes (including almost all first-year classes) and can exceed one thousand pages in length. Because it is common at many schools for professors to give homework assignments before classes begin, it is important for all students to visit the school bookstore early to purchase their casebooks and other necessary materials with enough time to prepare for the first day of classes.

At the bookstore, students generally have the option of purchasing new casebooks or used books at a discount. If it is financially possible, students should purchase new books. Used books almost always contain the margin notes and highlighting of the prior owner, a first-year student who, like you, was just learning the class material. These markings can be distracting and, even worse, they can be misleading. If new casebooks are not within your means, then you should sort through the selection of used books to find those with the fewest margin notes and highlighting. In any event, it is imperative to mentally "block out" any margin notes or highlighting that appear in the text.

First-year students should also invest in a law dictionary. Because precise language is vital to the practice of law, lawyers use many specialized terms – often in Latin – that are unfamiliar to nonlawyers. Law students encounter these terms on a daily basis. Even though many of these seemingly cryptic terms represent familiar concepts, the definitions are not always evident from the context. A law dictionary will prove to be indispensable for decoding the terminology, and it will serve as a valuable resource for years to come.

CLASSES: THE "TYPICAL" WEEKLY SCHEDULE

To help you get acquainted with law school life, we list below a class schedule for a "typical" first-year law student. Although the length and frequency of classes may vary at different law schools, the subjects generally do not. All first-year law students study the same core subjects: Civil Procedure, Contracts, Criminal Law, Property, Torts, and usually Constitutional Law. Additionally, most law schools offer some form of Legal Research & Writing or Lawyering Skills. These classes offer practical instruction in research, writing, and oral argument. A few law schools also offer Ethics & Professional Responsibility during the first year. In this class, students learn about the ethical rules that govern attorney conduct. The number of hours and credits assigned to particular classes varies from law school to law school.

In general, law schools require full-time students to take 14-16 hours of in-class instruction per week for about 13 weeks per semester. Most classes last for a single semester with a final exam at the end, but some classes – typically the most substantial subjects, such as Contracts or Torts – may last for the entire year. This means that, instead of requiring four or five hours of classroom instruction per week for a particular class, the class may meet less frequently over the full 26 weeks. Full-year classes may have a mid-term exam in December in addition to a final exam in May.

A few schools permit first-year students to take elective courses during their second semester, but most fill the entire first year with required courses. When electives are available, first-year students usually opt for advanced versions of the classes they have already taken, such as Civil Procedure II, or they take Professional Responsibility, Criminal Procedure, Corporations, or Evidence. In some schools, a few of these latter courses must be taken prior to graduation, although generally they need not be taken during the first year. The following sample class schedule reflects a "typical" full-time schedule for a first-year student:

FALL SEMESTER				SPRING SEMESTER		
Monday				**Monday**		
	9:00 - 9:50	Torts			10:10 - 11:00	Elective
	10:10 - 11:00	Criminal Law			1:50 - 2:40	Property
	1:50 - 2:40	Contracts			3:00 - 5:00	Legal Research & Writing
Tuesday				**Tuesday**		
	9:00 - 9:50	Torts			9:00 - 9:50	Contracts
	10:10 - 11:00	Criminal Law			10:10 - 11:00	Elective
	1:50 - 2:40	Contracts			11:30 - 12:20	Constitutional Law
	3:00 - 3:50	Civil Procedure			1:50 - 2:40	Property
Wednesday				**Wednesday**		
	9:00 - 9:50	Torts			9:00 - 9:50	Contracts
	10:10 - 11:00	Criminal Law			10:10 - 11:00	Elective
	3:00 - 3:50	Civil Procedure			11:30 - 12:20	Constitutional Law
					1:50 - 2:40	Property
Thursday				**Thursday**		
	9:00 - 9:50	Torts			9:00 - 9:50	Contracts
	10:10 - 11:00	Criminal Law			11:30 - 12:20	Constitutional Law
	3:00 - 3:50	Civil Procedure			1:50 - 2:40	Property
Friday				**Friday**		
	12:30 - 2:30	Legal Research & Writing				No classes
	3:00 - 3:50	Civil Procedure				

PART-TIME EVENING PROGRAMS

Many law schools offer part-time evening programs for working students who wish to pursue law degrees but for a variety of reasons cannot, or do not wish to, leave their jobs. In general, part-time students are required to take 10 hours of in-class instruction per week for about 13 weeks per semester. Classes are usually offered between 6 p.m. and 9 p.m. from Monday to Thursday, but in some instances, students are permitted to take classes during the day.

Part-time evening programs are generally four-year programs, but in many schools the full course of study can be completed in three years if classes are taken during the summer. For students who have the option, early graduation may be desirable, but great care must be taken to avoid serious burnout. During the regular school year, part-time students are often stretched to the limit between their competing responsibilities of family, employment, and education. For this reason, it is generally advisable to take the full four years to complete the degree and to spend summers relaxing or focusing on obligations that have been neglected during the regular school year.

In certain circumstances, some law schools allow students to transfer between part-time evening programs and full-time programs. In this way, a law student can work and attend school on a part-time basis during the first year, make up the needed credits during the following summer, and then switch to full-time study for the second and third years. This ensures graduation in three years and, more importantly, leaves the student free to pursue legal employment during the second summer of law school when many employers do the bulk of their recruiting.

For the part-time student, effective time management is crucial. Most often, those part-time students who are most efficient in allocating their time will end up at the top of their classes. Accordingly, it is imperative for part-time students to scrutinize their daily schedules for every reasonable opportunity to study. Generally, part-time students can find quality study time in the late evening and on the weekends, but the most committed students regularly squeeze in study time during lunch breaks and immediately before classes.

NON-TRADITIONAL LAW SCHOOL CURRICULA

There is a small but growing trend among law schools to break away from the traditional curriculum or to offer advanced substantive legal concentrations. For example, at Georgetown University, students have the option of selecting a first-year curriculum that focuses on history, philosophy, political theory, and economics as driving forces in the evolution of the law. The University of Montana and the College of William and Mary opt for a more hands-on approach to learning, requiring first-year students to handle simulated legal problems within the framework of an operating law firm. At Chicago-Kent, the first-year curriculum centers on developing legal writing skills through the extensive use of computers.

Other schools offer study concentrations that do not affect the first-year curriculum. For example, Fordham University School of Law offers the Stein Scholars Program, which focuses on ethics and public interest law, and the Crowley Program, which focuses on international human rights. Students who participate in these programs must take certain advanced electives, but the bulk of their courses during the first year are the same as those of other students.

STATE BAR APPROVAL CRITERIA

Law schools often exhibit some inflexibility in scheduling classes for students who seek certain exemptions or dispensations because, in many states, law schools must adhere to specific requirements delineated by the highest court of the state in order to maintain state accreditation. State approval enables a law school to certify students who have completed the required course of study to sit for the Bar Examination of the resident state. Many of the requirements imposed by the various states deal with scheduling, attendance, examination, and employment. For instance, in New York, an approved law school must – among other things – require its full-time students to:

- Complete a minimum of 80 semester hours of credit;
- Complete a total of 1,120 hours of study;
- Spend at least 75 calendar weeks in residence;
- Sit for at least 10 classroom periods per week;
- Take classes principally between the hours of 8 a.m. and 6 p.m.;
- Schedule four days of classes per calendar week; and
- Take written examinations, except where such examination is inappropriate.

The American Bar Association (ABA) also imposes stringent requirements upon law schools in order to achieve and maintain their ABA accreditation. For example, the ABA requires all accredited law schools to prohibit their full-time students from working more than 20 hours per week. The ABA also requires schools to enforce "regular and punctual" class attendance. As a result, law schools sometimes cannot permit seemingly reasonable requests for scheduling accommodations.

OVERVIEW OF FIRST-YEAR COURSES

In almost all law schools, students are required to take the same substantive first-year subjects: Civil Procedure, Contracts, Criminal Law, Property, Torts, and usually Constitutional Law. The following are general descriptions of the subject matter in these core courses.

A. Civil Procedure

Civil Procedure introduces law students to the language, structure, and complex rules governing the procedure and operation of the American Federal Civil Justice System. In most Civil Procedure classes, particular emphasis is placed upon the Federal Rules of Civil Procedure and other pertinent federal statutes governing the operation of the federal courts.[1] Civil Procedure also explores the complex interplay between the laws and courts of the several states and the one federal system. Although this course focuses almost exclusively on federal civil procedure, the federal rules serve as a model for the rules of civil procedure in most states. Thus, by studying federal civil procedure, you will be learning principles that also apply to many state judicial systems.

In addition to discussing procedural rules and examining the historical, social, economic, and political context in which legal decisions are made, Civil Procedure addresses the form and rhetoric of American argument and legal reasoning. In sum, Civil Procedure reveals the brilliance and eminence, as well as the fallibility and limitation, of the adversarial system in the United States.

This course examines cases, hypothetical fact patterns, and problems that reveal the issues attorneys must confront in deciding when, where, and whether to bring a lawsuit; against whom to bring it; how to bring it; and what procedural options are available to respond strategically to the changing circumstances as the lawsuit proceeds. Specifically, the course explores the conflicting dual objectives of the civil justice system: fairness and judicial economy.

In Civil Procedure, you will also study a defense attorney's vast array of procedural options and maneuvers in defending the lawsuit. As an attorney in a defensive posture, a mastery of Civil Procedure is important because it sometimes allows a party to dispose of a lawsuit without ever reaching any of the substantive issues of the case (*e.g.*, Torts, Contracts, Property, or Constitutional Law issues). Outsiders to the legal system are often incensed by the ability of attorneys to win lawsuits through procedural means, but they are equally troubled by the backlog of civil cases that prevents parties from achieving justice in a timely manner. The only solution: build more courtrooms and employ more judges – all at the expense of the taxpayers. Faced with the high-priced reality of this solution, society has opted to temper justice with procedural rules that honor fairness in a limited way. Inevitably, no system is perfect, and changes must be made as lawyers and courts continually attempt to perfect the system.

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[1] *See, infra, Organization of the Federal Judiciary* for a comprehensive discussion of the structure of the federal judicial system.

It may appear that the focus of Civil Procedure is more about learning how to manipulate a complex interconnected rule system than about "truth" or "justice." This is not the intention of the course. You must remember that before any future lawyer can begin to pursue "justice," he or she must first analyze, scrutinize, and internalize the vast, complex system of procedural rules that embody the American legal system and make the pursuit of justice itself possible. Accordingly, as the course proceeds, you will begin to appreciate that mastering Civil Procedure is important because it can, and often does, affect substantive legal outcomes.

B. Constitutional Law

Although many law schools still require students to take Constitutional Law during the first year, some have opted for students to take the class during their second. No matter when you encounter it, your introductory Constitutional Law course will probably be very different from what you expect or may have even experienced in a high school or college course on Constitutional Law. In fact, many students are often disappointed to discover that the typical introductory Constitutional Law course they encounter in law school does not explore the controversial Supreme Court decisions defining individual rights (*e.g.,* right to privacy, abortion, etc.) – those "hot topics" are often covered in an upper-level elective course called Constitutional Law II (individual rights). Instead, the introductory "Constitutional Law I" course asks students to interpret the often ambiguous and sweeping (but critical) phrases and concepts embodied in the U.S. Constitution that establish our system of government.

Constitutional Law I (government structure) first examines how the U.S. Constitution establishes the three (co-equal) branches of the federal government: the judiciary, the legislative, and the executive. You will undoubtedly read provisions contained within the U.S. Constitution that enumerate (expressly grant) powers to each of these branches and, perhaps a little more interesting, you will read U.S. Supreme Court decisions that interpret the breadth and reach of those powers in circumstances where the language of the Constitution itself is either unclear or overbroad. Inherent in your survey of the "separation of powers" by and between the three branches of the federal government is how each of those branches acts to limit one another from overreaching and assuming powers that are either not enumerated or cannot be fairly interpreted from a reading of the text.

In addition to examining the structure of the federal government, Constitutional Law I also explores the concept of "federalism" – how the federal government interacts and coexists with the various (sovereign) states in our Union. The debate over federalism (state sovereignty) often hinges on the language contained in two separate sections of the U.S. Constitution: the Interstate Commerce Clause and the Tenth Amendment. Because the Interstate Commerce Clause provides, in part, that Congress has the "Power . . . to regulate Commerce with foreign Nations, and among the several States," over the years the U.S. Supreme Court interpreted this provision to afford Congress very broad power to impose its will by regulating activities that occur within states in the name of "commerce." Juxtaposed against the seemingly endless power afforded to Congress under the Interstate Commerce Clause is the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While discussing the concepts of federalism and how state sovereignty limits the reach of the federal government, you may find that the debate in your Constitutional Law class will begin to heat up. It is here that people who advocate for states' rights (conservatives) often demand a narrow reading of Congress's power to regulate commerce and a broad reading of the Tenth Amendment; conversely, those in favor of expanding the reach of the federal government's authority (liberals) urge for a broad reading of the Interstate Commerce Clause and a narrow reading of the Tenth Amendment. In recent years, the concept of federalism has been a central debate in high-profile cases ranging from healthcare, to nuclear waste disposal, to the right to possess handguns in school zones, to statutes addressing violence against women, and even to the definition of marriage – long thought to be an area of traditional state concern.

C. Contracts

Contract Law embodies the legal principles that govern enforceable bargains. Each day, human beings, business enterprises, public entities, nonprofit groups, and other organizations enter into a countless number of agreements with others. Such parties may agree, for instance, to buy or sell goods, to hire or provide services, to lease property, to settle disputes, or to enter into some other transaction. Those agreements all involve promises – to do something or to forbear from doing something. The law of Contracts is applied by courts to determine whether such promises are enforceable and, if so, what recourse is appropriate if a contractual promise has not been fulfilled. Contract Law also guides the parties, lawyers, and others who enter into such agreements, both before and after the contract's formation.

Contract Law, like other legal disciplines, has a number of doctrinal facets. The formation of a contract rests on the notion of objective mutual assent (a manifestation of intent by the parties to do or refrain from doing some specific act), usually characterized by one party making an offer to enter into an agreement and another party's acceptance of that offer. In addition, the law requires that each party to the contract have bargained for consideration (something of value). At times, these basic contract elements must also be accompanied by certain formalities – for example, some types of contracts (*e.g.*, those involving the sale of land) must be in writing to be legally enforceable.

Contract Law also has canons of construction (written rules and maxims governing the interpretation of written instruments) that guide courts in interpreting the terms used by the parties in their agreements and in resolving disputes over the meaning of such contract language. In this context, the law strives, as much as possible, to carry out the apparent intentions of the contracting parties. The course also examines the law of conditions (events, facts, etc., that are necessary to trigger a party's performance or nonperformance under a contract), sorts out the sequence of performance by each party, and addresses when timely performance may be suspended or excused because certain predicates to that performance have not been fulfilled.

Finally, Contract Law includes various doctrines that may negate or temper what otherwise appears to be an enforceable agreement. These doctrines – often described as defenses to contract formation – include, among others, fraud, unconscionability, duress, mutual mistake, impossibility of performance, frustration of purpose, and illegality.

Many cases in your Contracts casebook will concern remedies – that is, what relief is appropriate if a contractual promise has been breached. The law generally seeks to give the non-breaching party the benefit of her bargain, either through specific performance (a court order compelling the other party to do its part) or through expectancy damages (a monetary award that calculates the value of the unfulfilled promise). Alternatively, there are other remedies, such as restitution (a monetary damage award that simply returns to the non-breaching party the value of what she already gave to the breaching party) or reliance damages (the value of what she expended in attempting to carry out her end of the bargain). Sometimes the law allows, for reasons of fairness, a party who has justifiably and detrimentally relied on another's promises to recover reliance damages even where no formal contract was ever formed.

These and other doctrines of Contract Law have evolved through several means. Most of the concepts originated in the "common law" in England and the United States, through cases decided by judges that serve as legal precedents for future cases. Many of those generally recognized principles (and the various exceptions to them) have been compiled in the Restatement of Contracts (a modern advisory guide to Contract Law prepared by legal scholars and other experts). In addition, legislatures have enacted statutes that cover some (but not all) aspects of commercial transactions (*i.e.*, the sale of goods), most notably the Uniform Commercial Code, a model statute that is in effect, with slight variations, in 49 of the 50 states.

D. Criminal Law

The initial Criminal Law course in most law schools involves what is known as the substantive Criminal Law, as distinguished from the law of Criminal Procedure. Criminal Law, in the broadest sense, concerns the definition of the criminal act. Criminal Procedure deals with the constitutional and statutory rules that apply during the investigation and prosecution of persons charged with violating the substantive Criminal Law.

As with all law school courses, the concepts covered in substantive Criminal Law vary to some degree from professor to professor and casebook to casebook. All courses, however, will focus on the same fundamental themes.

One theme is the principles of inculpation. This part of Criminal Law identifies the meaning of the "essential elements" of all criminal statutes—that is, the things that the government must prove in order to convict a person of committing a crime. All criminal statutes contain some kind of *actus reus* element (a conduct element requiring the person to have done something more than simply think about committing a crime (although perhaps less than one would imagine)). Almost all criminal statutes also contain a *mens rea* element (requiring that the defendant acted or refrained from acting with some level of mental awareness or intent). Many statutes also contain additional elements, requiring proof of specific conditions existing at the time of the act (*i.e.*, attendant circumstance elements, such as requiring that the property stolen exceed a certain dollar value for the defendant to be convicted of felony larceny) or requiring proof that the act produced some specified consequence (*i.e.*, result elements, such as that the victim actually die in order for a defendant to be convicted of murder). The initial focus of the principles of inculpation concerns the responsibility of the primary actor. Special rules are involved in defining the responsibility of secondary actors, those who aid and abet or conspire with the primary actor.

The principles of exculpation focus on statutory defenses to criminal charges. There are two categories in these defenses: justification and excuse. Justification defenses involve an action that would otherwise be criminal but is legitimized because it serves a social purpose that has been determined to be greater than the harm it causes. An example is self-defense, which permits a person to use force to prevent the unlawful use of force by another. An excuse defense, on the other hand, does ***not*** make legal and proper conduct that ordinarily would result in criminal liability; instead, an excuse defense recognizes the criminality of the actor's conduct but ***excuses*** it because the actor believed that circumstances actually existed that would justify his conduct when, in fact, they would not. So, once again, in the context of self-defense, a person who reasonably but ***incorrectly*** believes that the force he uses is necessary to protect himself against imminent harm may have an ***excuse*** defense but not a ***justification*** defense. In other words, had the facts been as the actor supposed them to be, the actor's conduct would have been ***justified*** rather than ***excused***.

A third Criminal Law theme is the rationale for punishment. Most courses contain materials that cover various theories that have been advocated to justify punishment: retribution, rehabilitation, incapacitation, and deterrence. Special attention is often given to the death penalty, as well as to various sentencing systems in general.

A fourth theme concerns specific crimes. Criminal Law professors often will consider one or more specific provisions of a penal law in order to illustrate one of the above ideas. Materials on property crimes also may be included.

A final theme is criminal law legislation. Because Criminal Law is, at this point in our history, almost completely defined by statute (as opposed to other first-year substantive law courses, where courts still exercise considerable "common law" powers), many Criminal Law courses also devote some time to the limits of the power of the legislature to enact criminal statutes. This not only focuses the student's attention on the difficult problems involved in drafting legislation, but it also provides an early introduction into Constitutional Law.

E. Property

The Property course focuses on the broad body of laws concerned with the distribution of resources, wealth, and power. It covers both personal property (tangible property) and real property (land). Its scope includes the acquisition of interests in property based on finding, capture, adverse possession, theft, or conversion. It is also concerned with a system of land allocation known as estates in land and future interests, including concurrent estates and leasehold interests, the latter being the foundation of landlord-tenant law.

Property also pertains to matters relating to the purchase and sale of land, whether residential dwellings, commercial real estate, condominiums, or cooperatives. It encompasses contracts for the sale of land, deeds, title insurance, the recording system, mortgages, and mechanic's liens. The study of Property includes an examination of the laws pertaining to easements, licenses, and other interests and entitlements that allow a person to enter land owned by someone else.

In your Property class you may also examine the ability of local government to acquire and control the use of real property owned by private citizens through eminent domain and zoning laws. Eminent domain is the power of the government to take private property when it furthers a public good (*e.g.*, purchasing a citizen's backyard to extend a superhighway). Zoning, on the other hand, refers to the power of local government to control, restrict, and, in some cases, prohibit certain uses of privately owned land (*e.g.*, prohibiting the establishment of adult bookstores in areas zoned for residential use). These two concepts are closely tied to a person's constitutional right to own property free from government interference, since a zoning ordinance that unreasonably restricts all economically viable uses for a person's real property will be deemed a "taking" (*i.e.*, implied eminent domain) for which a person is entitled to just compensation.

The study of Property is unique because a number of its modern-day rules have their roots in antiquated, if not arcane, precepts. These rules must be understood and memorized because they cannot be deduced by logic alone. Accordingly, in this area of the law, an ounce of history is sometimes worth a pound of logic.

F. Torts

Tort Law is the most difficult body of law to define. Even Black's Law Dictionary provides a definition that is, at best, of little use. Formally, a tort is any civil wrong other than a breach of contract for which the remedy is typically, but not always, monetary compensation. This is helpful to the extent that it contrasts Tort Law with both Criminal and Contract Law. Crimes are typically thought of as wrongs against the public as a whole, its institutions, or its public rules. Breaches of contract and torts, on the other hand, are wrongs against individuals; they are private wrongs. A breach of contract is a violation of an arrangement between parties that was entered into voluntarily. A tort, by contrast, is a violation of non-negotiated, societal rules that dictate how people are to treat others. Tort Law arises from society's expectation that people, in their actions, will take into account the interests of others and will avoid subjecting them to unreasonable risk. Thus, Tort Law forces individuals to balance their own interests in acting in ways that impose risk against the interests of others in being free from risk.

Tort Law requires people to act reasonably, that is, to impose on others only reasonable risks. Accordingly, an individual's main duty under Tort Law is to exercise ordinary care in choosing and executing actions. Failure to do so will result in a breach of that individual's duty to another, and when such a failure causes harm, the injured party can pursue an action in tort to secure compensation.

Tort Law has several dimensions. It sets out the nature and scope of the duties of care that individuals owe to one another. It tells us what interests we have that can be protected by Tort Law. Some injuries are clearly compensable, such as when one person causes bodily harm to another or causes another to lose employment. Other injuries are not clearly compensable, such as when one person causes another to suffer emotional distress. In all cases, Tort Law defines who can sue, for what, and what the victim must establish to prevail in a lawsuit.

By contrast, the central themes in Tort theory are: What explains the rules of Tort Law? Should we keep them or change them? Should we abandon Tort Law altogether?

WHAT TO EXPECT IN CLASS

At most law schools, the first-year class is divided into multiple sections of between 20 and 30 students per section. Although most first-year classes are taught in large lecture halls accommodating three to four sections at a time, there are always some classes – like Legal Research & Writing – that are limited to a single section. These smaller classes afford students greater access to their professors and the opportunity to develop closer working relationships with other students.

The specific teaching style of each of your individual professors will dictate what you can expect in class and, in turn, what is expected of you. Specific teaching styles are as diverse as individuals, but there are two general methods of introducing and reinforcing new legal concepts and theories that your professors will typically rely on: the Socratic Method and the Black Letter Law approach.

A. The Socratic Method

The Socratic Method derives its name from Socrates (470-399 B.C.) who, as you may recall from Philosophy 101 in college, walked the streets of ancient Athens questioning citizens about democratic principles, the obligations of citizenship, public morality, and the role of government. He pretended not to know the correct answers, and instead sought to elicit the truth from the subjects of his interrogation. This is the approach used by professors who employ the Socratic Method. They engage in limited lecturing, and, instead, question their students incessantly, forcing them to evaluate an argument or a rule of law under a barrage of factual variations. Ultimately, the professor may lead the student to the truth through logic and common sense, but, most often, the professor will not confirm the wisdom of the student's answers.

Socratic classes usually begin with an in-depth discussion of a particular case. Typically, a student is called upon to recite the relevant facts of the case in question and, more importantly, to state its rule. If the student fails to state the facts or the rule accurately, the professor will quiz the student to elicit the correct information. Even if the student states the facts and the rule correctly, the professor may continue to grill the student on details overlooked or issues unresolved. The professor also may question the relevance of certain facts to force the student to distinguish between those facts that are critical to the ultimate resolution of the case and those that are not. This ensures that, as a preliminary matter, the class has a proper understanding of both the legal dispute involved in the case and its ultimate resolution.

Once the relevant facts and the rule of the case are properly defined, the discourse begins. The professor will question the validity and propriety of the rule with a series of "what if" hypothetical questions that are designed to show students how the case under discussion might be used as legal precedent in subsequent cases. (It is a very good idea to take notes on the hypotheticals posed by your professors because they frequently show up on final examinations.)

For example, in a Torts class, a student may be asked questions related to the tort of battery. If the rule of a case states: "A person is liable for battery where the person intentionally causes a harmful or offensive contact with another," the professor may question the application of the rule by asking: "What if an individual causes injury to another by contact that under normal circumstances would ***not*** be harmful or offensive?" "What if the individual had permission to cause contact with another but injury results?" "What if the individual causes contact solely with an object another is holding?" "What if the individual intends to cause contact with another but accidentally injures a third person?" This type of examination may last for an extended period of time, often ending without the professor explaining anything or telling the class whether a right or wrong answer exists. In any event, when you are called upon in class you will be asked to defend or criticize the rule, and, in some cases, to consider exceptions to the rule.

The Socratic Method is intended to teach students to consider the broader implications of a case by forcing them to analyze and apply particular points of law in a variety of related circumstances. At the same time, the approach maintains order in the classroom, focuses student attention, and develops general oral advocacy skills by forcing students to think critically and to perform under pressure.

B. The Black Letter Law Approach

Increasingly, law schools and law professors are abandoning the Socratic Method in favor of a less confrontational method of instruction, often referred to as the Black Letter Law approach. Under this method, a professor will lecture on a particular area of the course, and then the students will discuss illustrative cases that apply the relevant rules of law. At the conclusion, the professor moves on to a new substantive area. Most students prefer the Black Letter Law approach to the Socratic Method because it is straightforward and causes less anxiety. Whether it results in more effective learning is a question professors and students alike continually ponder.

This method is typically used in classes that rely heavily on statutes for guidance, such as Administrative Law or portions of Corporations. In these rule-based classes, the concepts are usually more finite and inflexible and, therefore, are not subject to the intense hypothetical scrutiny that may be available in theory-based classes (*e.g.*, Torts, Constitutional Law). For example, if a state corporate statute requires that any corporation registered under the laws of a given state must provide an agent for service of process, then it would be a waste of time for the professor to spend an entire class asking how that statute is implemented.

WHAT IS EXPECTED FROM YOU IN CLASS?

Once again, what will be expected from you in class depends on your professors. Some professors think it is their duty to prepare each student to become the next Clarence Darrow, making students actually stand during class when answering questions or analyzing cases. Other professors conduct classes in a less formal manner. Regardless of the teaching style of your professor, if you wish to succeed in any course, then you must prepare for class every day by reading and briefing all of the assigned cases and other materials. This will ensure that you can provide an analysis of the readings on a moment's notice, and it will help you to understand the material and remain focused during class discussion. Nowhere more than in your first year of law school should you abide by the old adage: "Prepare for the worst but hope for the best."

EXTRACURRICULAR ACTIVITIES

During the first year, many of your fellow students will engage in nonacademic law school activities, such as volunteering at a soup kitchen or participating in social or academic events sponsored by one of the various ethnic, racial, gender, or religious organizations at your school. These types of activities offer a welcome and valuable break from the often mundane rigors of the first year, but they can also lead to difficulties if they become obligations that force you to compromise your dedication to scholarly pursuits. If you choose to engage in such activities, make sure you use them to relax and free your mind of the anxieties of law school, but discontinue them if you find that you are using them merely as an excuse to avoid your academic obligations.

FALL SEMESTER EXAMS

Like college, most law schools have two semesters during the regular school year, with Fall Semester classes ending at Thanksgiving Break or during the first week of December. Although some classes last the full year, the majority last only a single semester, and as a result, most law students will have at least one final exam at the end of the Fall Semester. Additionally, some students may have mid-term exams for their full-year courses. After classes end, students usually get a three- to 10-day "Reading Period" to study for exams. Exams usually begin during the first or second week of December and continue for approximately two weeks. At least one prominent law school, however, holds classes until the third week of December with exams beginning after January 1. For the first-year law student, Fall Semester exams set the tone for the remainder of the year. As such, they present a critical opportunity for you to get ahead in your quest for academic success.

WINTER BREAK

After Fall Semester exams, law students have a winter holiday break usually starting around the third week of December and lasting for three to four weeks. Most first-year students spend this time recounting for family and friends the joys and horrors of law school life, and all students should use this time to unwind and to gather strength for the upcoming semester. The one exception is that students should begin the process of finding a summer job. This includes exploring the types of employment that are available, drafting resumes and cover letters, and devising a plan for obtaining interviews and employment. The Job Placement Office at your law school will assist you with all these tasks, but the initiative is yours, and that initiative should include getting a start on the job search during winter break.

SUMMER EMPLOYMENT AFTER THE FIRST YEAR

Many first-year students begin looking for summer jobs immediately following Fall exams. The job search starts at this time for two reasons: (1) the National Association for Legal Placement (NALP) has issued guidelines that discourage contact between legal employers and first-year students before December 1st; and (2) between December 1st and December 20th, students are far too busy studying for exams to be concerned with summer employment.

LEGAL EMPLOYMENT GUIDELINES	NOVEMBER 1	DECEMBER 1
Law Schools Start Offering Job Placement Services to Students	√	
Legal Employers and First-Year Students Contact Each Other		√

Source: NALP website

Prior to Winter Break, first-year students should focus exclusively on studying for Fall exams. Although there may be some small benefit to starting the job search on December 1st, we do not recommend doing so. You should turn to the job search once exams are completed, rather than studying and job-searching simultaneously during early December.

Any benefit that results from an early start to the job search is offset by the benefits that can be achieved by focusing your efforts exclusively on your first-semester exams. No grades will have a greater impact on your life than those earned during the first year of law school. Furthermore, most law schools reinforce this approach by forbidding employers from conducting on-campus interviews with first-year students before January 1st.

While it is important to obtain a meaningful summer job that will afford a quality experience, the reality is that the summer jobs after the first year are not nearly as important as jobs during the following summer. Only a small number of law students will obtain competitive, career-track jobs after their first year. Few major law firms in the Northeast have organized summer programs for first-year law students, and summer work in private law firms is generally limited to medium- and small-sized law firms. Most first-year students will spend the summer working as research assistants to professors, as low-paid or unpaid interns for governmental or nonprofit agencies, including working for judges, prosecutors, or public defenders, or as interns for companies. These jobs rarely come with a promise of consideration for full-time employment because the employers have too little information to make informed hiring decisions. After all, when the summer begins, students have not even received their final first-year grades.

A. Interviewing

After Fall exams are completed, students should begin actively seeking summer jobs. By this time, your school's Job Placement Office may have coordinated on-campus job interviews for which you must, at some point, submit resumes and cover letters. Generally, Job Placement Offices will share student resumes and cover letters with employers; the employers will review the information; and students and employers will mutually "self-select" with whom they will interview. Typically, students are guaranteed interviews with a small number of employers, and past this number, employers unilaterally determine whom they will interview. Each law school has different guidelines on this process. Early in the Spring Semester, you should consult the Job Placement Office at your law school for information and assistance on employment after the first year.

B. Student-Funded Fellowships

Law students who want to work in the public or nonprofit sectors during their summer should not be dissuaded from doing so simply because such jobs pay little. Many law schools offer competitive scholarships, known as Student-Funded Fellowships (SFFs), that supplement the incomes of students who work in public sector jobs. They are usually provided by student-run groups that host various fund-raising events, like law school-centered auctions where faculty and members of the legal community donate creative gifts to raise money for scholarships. Typically, students, faculty, and alumni bid on these gifts, thereby funding the scholarships. Additionally, at some schools, students who are working at high-paying summer jobs may pledge a portion of their salary to the fellowship.

Applications for SFFs must be completed by a set Spring deadline and require law students to detail their upcoming summer jobs. Generally only low- or non-paying public interest jobs are considered, but the definition of "public interest" varies among schools. The governing board of the SFF organization will evaluate these applications based on need and merit and may make awards to fellowship recipients of up to several thousand dollars. Through SFF programs, students gain invaluable work experience without falling further into debt, and both the legal community and the public at large receive a summer of assistance from talented students in a wide variety of public jobs.

GETTING FALL SEMESTER GRADES

Students usually receive their Fall Semester grades by the end of January. Depending on your results, this can be the most encouraging or discouraging event in your academic life. If you do well, you must endeavor to stay focused and avoid becoming overconfident. In the Spring Semester, keep doing the things that worked for you the first time around. If you do not do well, you must learn from your mistakes, and you must avoid losing your drive to succeed. This latter task may be one of the biggest challenges of your life. You should know, however, that every year at every school students recover from poor Fall Semester exams to claim a spot at the top of the class. At the same time, there are always the smug few who run out of steam during the Spring Semester and ruin the standings achieved by their excellent Fall grades.

SPRING SEMESTER

Spring Semester classes typically start in mid-January and continue through to the beginning of May. For the first-year law student, the Spring Semester experience is a virtual repeat of the Fall Semester, but there are a few important differences. To begin with, all students have the benefit of a full semester of experience and are familiar with the stresses of law school exams. This is a tremendous advantage for those students who are able to learn from their mistakes and adjust their behavior, but it can be a disadvantage for stubborn students who cling to ineffective methods.

Additionally, students with full-year classes face a substantially heavier workload in preparing for Spring Semester exams. Full-year classes generally require a cumulative exam in the Spring, and even though the burden of some single-semester courses is lifted after the Fall Semester, those courses are most often replaced by new single-semester courses. As a result, in the Spring, students are tested on a complement of single-semester classes equal to that of the Fall Semester ***plus*** the added burden of full-year courses which require the mastery of material covered over the previous eight months. Logically, those students who develop the most proficient organizational skills from the beginning of the year will reap substantial rewards.

SPRING SEMESTER EXAMS

Spring Semester exams, like Fall exams, start with a three- to 10-day reading period that usually begins at the end of April or in early May. The actual exam period follows immediately thereafter, ending sometime in mid- to late May. Spring Semester exams, together with Fall exams, determine the most important set of grades that you will ever receive. For those students with full-year courses, Spring exams are even more important than Fall exams because a greater number of credits are subject to testing and grading. Regardless, your first-year grades are decidedly critical. All employers review first-year grades when making permanent hiring decisions, and, at most schools, the Law Review and other honor societies use these grades to select new members. Accordingly, you must consider your first-year grades the foundation upon which your academic and professional career will be built.

THE SECOND YEAR

For many law students, the second year of law school is the busiest year. This often comes as a surprise to those who assume that, because the first year is so intense, the remaining time must be significantly easier. Although many of the unique pressures of the first year are gone, second-year students often find themselves with ***less*** free time than they had the year before. Together with taking a full complement of classes, most second-year students are occupied by job interviews, involvement in student-run organizations, and participation in externship programs with judges, prosecutor's offices, or other governmental agencies. While all of these activities are worthwhile, second-year students must be careful to strike an appropriate balance between these competing endeavors. That balance differs for each student depending on individual objectives and circumstances.

When allocating time and effort during the second year, law students must never forget that they are in law school for one principal reason: to advance their careers. The career objectives of many law students are clear from the beginning – some want to practice law; others want to teach or promote careers in public service; and still others are interested in applying their legal knowledge in nonlegal business careers. These students should focus their activities on moving toward their particular career objectives. Many other students, however, have less defined career objectives. These students should focus on strengthening their academic credentials while avoiding any unnecessary limitations on their career options.

ELECTIVE COURSES

At almost every law school, students take the bulk of their required courses during the first year and the remaining years are spent taking elective courses. Typically, however, there are at least one or two additional required courses that must be taken by upper-class students prior to graduation. For example, Professional Responsibility is customarily a required course but ordinarily cannot be taken during the first year, and most schools require at least one upper-class paper course. In some schools, Constitutional Law – usually a first-year course – is not offered until the second year, and, occasionally, a law school will require students to take other courses, such as Corporations or Evidence, prior to graduation.

When choosing elective courses, it is important to take courses like Corporations or Evidence as early as possible. These courses are often prerequisites for more advanced electives and have wide applicability to almost any professional legal career. It is particularly helpful to take Evidence during your second year if you will be working in a litigation practice the following summer. Likewise, it is helpful to take Corporations before working in a corporate practice.

At most law schools, a wide variety of elective courses are available. Aside from courses such as Corporations or Evidence, there is no recommended list of elective courses to take. Many students take the conservative approach, opting for courses that will help them prepare for the Bar Exam, such as Trusts and Estates, Tax, and Domestic Relations. Other students simply take the courses they think they will enjoy, such as International Human Rights or Poverty Law, or the courses that will help prepare them for "big firm" practice, such as Securities Regulation or Antitrust Law. Although there is value in taking courses that will prepare you for the Bar Exam, students tend to get the best grades in the courses they enjoy.

FINDING THE SECOND-YEAR SUMMER JOB

One of the most important factors contributing to a successful post-law school career is a student's first full-time job following law school. The first job often puts a new lawyer on a certain career path – one that becomes more difficult to redirect as the lawyer's career matures. With the passing of time, it becomes harder for small-firm lawyers to move to big firms, for businesspeople to begin the practice of law, for defense attorneys to switch to the plaintiffs' bar and vice versa, and for private practitioners to work for public interest organizations. Accordingly, it is important for a new lawyer to find a quality job in her field of choice as early as possible. Because the most established and reliable path to permanent employment is through summer employers, the search for a post-second year summer job takes on critical significance. As a result, second-year law students must learn to divide their time and efforts between law school itself and the job search.

It is during the second-year job search that the benefits of good first-year grades truly become evident. As fate would have it, life gets easier for those who do well at the outset of law school and harder for those who do not do so well. In general, the better a student did during the first year, the less trouble that student will have getting the job she desires, leaving more time to focus on keeping up good grades and engaging in law school activities. Thus, the student who achieves top grades and has been selected for the Law Review will probably receive a slew of desirable job interviews and will have an easier time coping with the academic challenges of the second year. Conversely, the student who does poorly during the first year will have to spend more time and effort trying to get a job and will have less time to improve his grades. As a general rule, we recommend that – to the extent that good grades are not compromised – second-year students should focus their efforts on the job search.

ON-CAMPUS INTERVIEWING

All law schools coordinate on-campus job interviews during the Fall Semester of the second year where they match up students with potential employers. To facilitate the interviewing process, second-year students are required to submit their resumes after first-year grades are received, generally sometime in late July or early August. Employers who participate in these interviews are mostly private law firms and corporations, but some public interest organizations or government agencies also may conduct on-campus interviews at your school. Generally, law schools require participating employers to interview a certain number of students, who are identified by the schools; this is the price employers pay for the ability to conduct interviews on campus. The schools then distribute the designated interview spots to students, often on a lottery basis, thereby preventing the very best students from grabbing the vast majority of the interview spots. After that, employers are permitted to review resumes and select additional students to interview.

Initial interviews last approximately 30 minutes and are normally held on campus or at a hotel close to campus. Shortly after conducting interviews, employers choose certain students to call back to visit their offices for a more complete round of interviews – generally four half-hour interviews with an assortment of partners and associates – and possibly a lunch interview. Thereafter, employers are usually prepared to make summer job offers to the interviewees they like, but the speed of a given employer's response to interviewees can vary greatly. Some employers move fast, hoping to lock up the students they like before the students commit elsewhere, and other employers move slowly, fearing that if they extend too many offers too fast they will lose control of the process and risk receiving too many acceptances. Many large employers have a target number of summer jobs that they are looking to fill, and as a result, do what they can to control the numbers. Accordingly, it is not uncommon for an employer to reserve deciding on a number of interviewees who are on the "cusp" while waiting for responses from those who have already received offers. Thus, the interviewing process can be agonizing as some students get call backs, offers, or rejections quickly, while others wait for weeks or even months without hearing a word. Employers generally extend offers in October and November and are required to keep them "open" for either 28 days or until December 30th, whichever is shorter. This recruiting schedule is mandated by the hiring guidelines promulgated by the National Association of Law Placement.[2]

Employers generally refer to their unlicensed summer lawyers as either Summer Associates or Summer Clerks, depending on the area of the country in which they reside. Summer Associate is the label of choice in the Northeast, while Summer Clerk is preferred in the South. The process of finding a summer job can take the better part of the Fall Semester for many second-year students, even for those who find early success. If you decide to seek employment with a private law firm, it is possible that you will miss class often to attend interviews, especially if you are looking for a job in a city that is far from your school. Finding the time to pursue your job search and maintain your grades while keeping up with law school activities is difficult. However, if you are able to get the job that you want, the sacrifice is worthwhile.

[2] For a full list of the recruiting deadlines and guidelines, visit www.nalp.org.

<u>OTHER EMPLOYMENT OPPORTUNITIES</u>

Not all students have the desire – or the opportunity – to interview with large, private law firms. Students focusing on medium or small law firms, public interest organizations, or government agencies may find the timing of the interview process different than the timing of the large firm process. Some small- and medium-size firms do not begin their search for Summer Associates until the Spring Semester, after they have had time to assess their needs. Your school's Job Placement Office should be able to help you organize your job search among employers with less predictable hiring practices regardless of your career objectives.

<u>PRIVATE LAW FIRM SALARIES</u>

One of the most attractive features of private law firms is the salaries that they offer. The following table contains median national salary information for associates in private law firms, including the large global law firms, which tend to be the highest paying legal employers in the market:

Median Base Salaries by Associate Year and Firm Size (as of April 1, 2013)

Associate Year	FIRM SIZE — Number of Lawyers															
	2-25		26-50		51-100		101-250		251-500		501-700		701+		All Sizes	
	Median	# Rept	Median	# Rept	Median	# Rept	Median	# Rept	Median	# Rept	Median	# Rept	Median	# Rep	Median	# Rept
First	$78,000	17	$110,000	25	$100,000	55	$110,000	73	$160,000	65	$125,000	105	$160,000	90	$125,000	430
Second	84,100	14	110,000	23	102,500	46	112,500	70	162,500	70	129,000	99	164,675	92	130,000	414
Third	85,000	12	122,150	22	108,000	52	119,900	66	175,000	62	130,000	97	175,000	95	136,000	406
Fourth	85,500	10	115,000	23	110,000	51	121,625	72	190,000	66	140,000	101	190,000	96	141,050	419
Fifth	100,000	13	120,000	25	120,000	51	129,450	67	205,000	72	144,425	102	201,975	94	148,450	424
Sixth	92,000	9	125,000	23	120,000	56	132,500	64	215,000	71	152,000	103	210,000	97	155,000	423
Seventh	95,000	9	140,000	19	128,500	45	135,500	69	240,000	66	160,000	94	226,875	95	165,000	397
Eighth	101,000	10	138,925	15	129,375	42	142,250	58	255,000	57	169,125	100	225,000	83	170,000	365
Summer Associates ($/week)																
1st year	—	—	2,000	14	1,800	19	1,800	48	2,600	77	1,900	101	3,075	70	2,100	333
2nd year	1,800	6	1,800	25	1,725	41	1,900	60	2,650	90	2,300	125	3,075	109	2,300	456
3rd year	—	—	1,750	6	2,500	9	2,025	13	3,075	41	2,500	53	2,700	36	2,500	160

The "# Rept." column indicates the number of offices reporting. For purposes of this summary report, medians have been rounded to the nearest $25.

<u>LAW SCHOOL ACTIVITIES</u>

Law school offers a wide variety of fun, interesting, and educational activities designed to complement the often tedious academic side of the law student's experience. Activities such as journal membership, Moot Court, and live-client clinics provide unique opportunities for students to put to practical use the abstract principles they learned during the first year, and some of these activities can be instrumental in advancing students toward their career objectives. Nevertheless, participation in law school activities rarely, if ever, rivals the value of good grades as an ingredient for law school success. In fact, membership in some of the most prominent law school organizations is often predicated upon academic achievement. The available experiences, however, can be extremely worthwhile, and as a result, most second-year students engage in at least one of the following:

A. Law Journals

One of the most prominent and valuable law school experiences is membership on a law journal or law review (the terms are generally interchangeable). Law journals are student-run publications that publish scholarly articles on a wide variety of legal subjects. Staff members are responsible for selecting and editing articles, and preparing them for publication. Most law schools have a variety of journals, some of which are dedicated to particular subject matters such as Civil Rights, International Law, Tax, Intellectual Property, Law and Politics, or Environmental Law. Legal employers consider membership on any law journal to be an extremely attractive credential because journal members generally develop solid editing and writing skills, and learn to pay close attention to detail.

B. The Law Review

Every law school has a most prestigious law journal, and in most schools it is referred to as the "Law Review." There are some notable exceptions, however, such as Yale Law School where the most prestigious journal is named the Yale Law Journal. At most schools, the Law Review doubles as a scholarly publication and an honor society. Generally, one of the leading qualifiers for membership on the Law Review is earning top grades during the first year of law school. Unlike other journals, the Law Review at most schools is not dedicated to publishing articles on a limited subject matter, but instead accepts for publication any article deemed by the staff to be of sufficient scholarly quality or interest. Legal employers consider membership on the Law Review one of the most attractive academic credentials that a student can possess – not only because of the prestige that membership carries, but also because of the writing and editing skills you will develop.

C. Law Journal Board Selection

The editorial boards of the various law journals generally select "board members" from the ranks of the first-year class based on first-year grades, a writing competition, or a combination of the two. Writing competitions (sometimes known as "tryouts") are most often held shortly after final exams at the end of the first year and usually consist of a standardized competition during which candidates complete a mock legal writing assignment, such as drafting a legal opinion or an article. Current journal members evaluate the assignments to identify desirable board candidates and offers of membership are given based on those evaluations. Board members generally commit to a year of service as a staff member, and then have the opportunity to run for an editorial position the following year.

At Fordham Law School, for example, an annual writing competition is used – at least in part – by all of the school's law journals to select members. This writing competition consists of a "canned" writing assignment where candidates are provided with a common set of cases and other research materials and given a limited period of time to write a mock journal article or court decision. Junior editors then grade submissions on substance, style, and bluebooking.[3] At Fordham, all of the journals except the Law Review use the writing competition as the litmus test for membership. The Law Review offers automatic membership to first-year students whose grades place them in the top 5% of their class, and it accepts a limited number of students – from among those who finish in the top 25% of their class – based on their writing competition submissions.

D. Moot Court

Another experience sought after by many law students is membership on the Moot Court Board. The Moot Court Board is a student-run body that organizes, judges, and participates in student intramural and extramural oral argument competitions. Membership on the Moot Court Board is generally

3 Bluebooking is the term used to describe the process of properly citing legal authority. The Bluebook is a reference book containing standard citation formats for citing legal authorities. The Bluebook is so ubiquitous that lawyers have taken the noun and "verbified" it into terms like "to bluebook" and "bluebooking." First-year students learn proper bluebooking skills early during their Legal Research & Writing, or Lawyering Skills classes.

determined by successful participation in an intramural moot court competition. Membership entitles students to compete against teams from other schools in extramural competitions.

At most schools, the Moot Court Board holds competitions for membership during the Summer after the first year and during the Fall of the second year. Students are usually ineligible to compete for positions on the Moot Court Board until after completion of their first year of law school. Participants in the competitions are usually organized into teams of two students and assigned to represent either the appellant or the respondent on the appeal of a mock lawsuit. The various teams are given a common set of facts that form the basis of the suit, and each team must research the legal issues, draft a legal brief, and argue their position before a panel of judges. Students usually begin their oral arguments with prepared statements, but inevitably every student is interrupted and subjected to active questioning by one or more of the judges on the panel.

Members of the Moot Court Board, together with professors and practitioners, judge each participant based on the strength of their legal brief and on their oral arguments. Competitions after the first round are usually single elimination, with winning teams advancing on to the final round. It is an honor to make it to the finals of a moot court competition, and the final argument of most competitions is a well-attended law school event. Moot Court Boards are often able to attract distinguished judges and justices to preside over the final round of competition. It is not uncommon, for instance, for a Supreme Court justice to attend the final round of a Moot Court competition at a law school such as New York University or Harvard.

Moot Court Boards generally choose their members based on performance in one of the law school's intramural competitions. Candidates need not make the late rounds to qualify for membership, but it certainly helps. Most schools also host a national extramural competition that attracts teams from other schools and focuses on a specific substantive area of the law, such as International Law, Tax, or Criminal Law.

E. Live-Client Law Clinics

One of the most rewarding and educational law school activities is participation in a live-client law clinic. Law clinics offer students the opportunity to represent real clients and to handle actual legal disputes prior to obtaining licenses to practice law. Students who participate in law clinics counsel clients, brief and argue motions, represent their clients in arbitration or mediation, and sometimes even try real cases. Law clinics are generally organized and operated as divisions of affiliated law schools and are supervised by full-time faculty members or seasoned legal practitioners.

Law clinics are a relatively new component of the modern legal education – the first clinic was developed at the University of California Los Angeles little more than four decades ago – but today almost every law school offers some form of clinical legal education. Law clinics are usually available only to third-year students, although in some cases they are available to second-year students. Many law schools have stringent course prerequisites to participation in law clinics. For instance, most schools require students to take Evidence, Trial Advocacy, and some form of a simulated interviewing, counseling, and negotiation training prior to participating in any litigation-based law clinic.

Some law clinics are general, involving cases in a variety of substantive areas, and others are more focused, concentrating on cases in one specific substantive area, such as Criminal Law or Family Law. Common substantive clinic themes include homelessness projects; criminal defense or prosecution clinics; advocacy for children, the elderly, or battered women; nonprofit organizations; and securities arbitration. Most often, however, law clinics – either general or focused – center on representing indigent clients who otherwise might not have access to legal representation. In this way, clinics provide a valuable service to the community while creating educational opportunities for students.

F. Additional Activities and Organizations

Law journals, Moot Court, and live-client clinics are perhaps the most visible law school activities, but they are by no means the only important ones. There are activities and organizations to fulfill just about every interest common to law students. Typical law school activities and organizations include: student-teacher fellowships; public interest advocacy groups, such as Amnesty International or the American Civil Liberties Union (ACLU); philosophical and political organizations, including The Federalist Society, Law Democrats, and Law Republicans; minority, ethnic, religious, and women's law societies; student newspapers; and student government associations, among others. These groups help students develop their particular interests while offering excellent opportunities to contribute to the local community.

JUDICIAL CLERKSHIPS

One of the most rewarding and prestigious positions a young lawyer can occupy after law school is serving as a law clerk to a federal or high-level state court judge. Judicial clerkships at both the trial and appellate levels offer valuable practical experience, particularly to lawyers who are interested in becoming litigators. Law clerks at either level assist judges in researching and writing legal opinions, and they often handle administrative matters such as arranging conferences with attorneys and scheduling court appearances. Most judicial clerkships last for one or two years, although some judges hire career clerks. Trial court clerkships are considered to be more exciting because they involve spending substantial time in court. Appellate court clerkships, on the other hand, are considered to be more scholarly because law clerks spend more time writing and researching legal issues. The level of prestige associated with a particular clerkship depends on a variety of factors, including the identity and activity level of the individual judge, and the level of review and location of the particular court.

Students who are interested in serving as judicial law clerks must begin the job search in the Fall Semester of their second year because many judges begin interviewing prospective law clerks for post-graduation employment as early as February or March. As with most things that are coveted, obtaining a judicial clerkship is difficult and the job does not come without sacrifice. Law clerks are usually paid far less than lawyers in the private sector. Nevertheless, many lawyers consider the professional benefits of a clerkship to outweigh the financial sacrifice. In addition, many major law firms pay a substantial bonus to those who have completed a clerkship and credit the time they spent as a clerk toward seniority in the firm.

THE THIRD YEAR

For most students, the third year of law school is a fun and enjoyable experience, although the degree of enjoyment can vary significantly from student to student depending on individual circumstances. For almost all law students, it is the most gratifying academic year because by this time students have earned the right to fill their schedules with electives, enabling them to choose solely the courses and professors that truly interest them. It can also be the most carefree year for those who have secured desirable permanent post-law school employment and thus feel liberated from the burdens of academic achievement. On the other hand, the third year can be a futile and seemingly useless year for those students who are eager to begin the practice of law but must suffer through another year of classes. And, it can be the most frustrating and desperate year for those students who have difficulty securing permanent employment. Nevertheless, most students look back on the third year of law school as a time when their social calendar was jammed and the pressure was off. For all third-year students, however, one black cloud casts a shadow over the final year – the Bar Exam.

COURSE SELECTION

With a few exceptions, the courses available to third-year law students are usually the same as the course options available to second-year students. A small number of particularly advanced classes – including most law clinics – are available only to students who have completed their second year. When such course limitations exist, it is often because students must complete certain prerequisites before they can truly benefit from the more advanced course and make meaningful contributions to class discussions. In some cases, such limitations are also intended to curb demand for the class among the student population and to ensure a higher level of overall experience among the students taking the particular class. At virtually every law school, however, third-year students enjoy a preference over second-year students in selecting classes. This preference increases the likelihood that third-year students will get the classes that they want to take before graduation – often effectively eliminating second-year students from consideration for some of the more popular classes.

Once again, there is no recommended list of elective courses for the third-year law student. In fact, students employ a wide variety of meritorious strategies in selecting classes. Some students take courses that will help them prepare for the Bar Exam. Others take only the courses they think they will enjoy. Still others take courses to help them prepare for future permanent jobs. And, many students mix these approaches. It is always wise, however, for those third-year law students who have lined up permanent jobs in specific substantive practice areas to consider taking any available electives that have direct applicability to that particular area. Lawyers in every specialty find that they draw frequently on the fundamentals they first learned in law school.

PART-TIME EMPLOYMENT

Some private law firms offer students the chance to work part-time during their third year at handsome hourly rates of compensation. For instance, large New York City firms have been known to pay up to $50 per hour to part-time, third-year students. Usually, such profitable opportunities are available only to those students who have accepted offers of permanent employment after serving successful terms as Summer Associates, and quite often, the promise of part-time employment is a consideration for students when choosing a full-time position. Students who work during their third year can make a lot of money and, consequently, can minimize any future debt they may accumulate by limiting the amount of money they have to borrow during their final year of school. Also, they can start early, developing important working relationships that they can build off of when they return as full-time Associates.

Nevertheless, such part-time employment opportunities are not without risks. Inevitably, some students, after suffering a few years of relative impoverishment, get carried away by the opportunity to make money. If they are not careful, they may end up skipping classes, suffering from declining grades, and missing out on the fun of the last year of law school. It is important for those students to remember that there is plenty of time to work hard and make money, but it is impossible to go back and revise grades or relive the fun that most third-year students have. Additionally, all students should be aware that the ABA requires all accredited law schools to prohibit full-time students from working more than 20 hours per week outside of law school.

MAINTAINING GRADES

Most third-year students feel some inclination to neglect their studies. After all, the final year of law school is full of nonacademic distractions, including social events, extracurricular activities, and the opportunity for part-time employment, and the temptation to disregard school work is compounded by the fact that many other students are neglecting their studies as well. Few third-year students prepare for class as thoroughly as they did during the first and second years. Students rarely brief the cases they read, preferring instead to "book brief" their assignments – a process by which important case information is highlighted and noted in the casebook margins. Such indifference is a luxury that some students can afford, especially those who have secured permanent jobs, but it is not the recommended disposition for those who have yet to secure permanent employment or for those who may need to rely on their academic record at some future time. For those who are uncertain where their careers may take them, it is advisable to maintain good grades or even to capitalize on a relatively easy opportunity to improve their grades and class rank. A solid academic record is always beneficial when a career change is at hand.

ADMISSION TO THE BAR

In almost every state, a lawyer must be admitted to the Bar of that state in order to practice law there. To be admitted to the Bar, each state has certain minimum requirements that must be met. These requirements almost always include: a law degree from an accredited law school, good moral character (not ***great*** moral character), and a passing grade on the state Bar Examination. The Bar Examination in most states includes four components: the Multistate Professional Responsibility Examination, the

Multistate Bar Examination, the Multistate Performance Test, and the essay portion of the exam which may be the Multistate Essay Exam or essay questions created by the state examiners.

MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

Almost all states require candidates for admission to the Bar to pass the Multistate Professional Responsibility Examination (MPRE). The MPRE tests a lawyer's knowledge of legal ethics and the rules of professional responsibility as embodied in the ABA Model Rules of Professional Conduct and the ABA Code of Judicial Conduct, and controlling constitutional decisions and generally accepted principles from leading federal and state cases and procedural and evidentiary rules. The MPRE is a three-hour, standardized, multiple-choice examination that is administered in March, August, and November. In most states, it can be taken either before or after the principal Bar Examination.

THE BAR EXAMINATION

In every state except Louisiana, the bar examination includes the standardized, one-day Multistate Bar Examination (MBE). All states include an essay portion of the exam, and almost all states also include a Performance Test section as well. A few states have short-answer or multiple-choice sections that test their state law. In most states, the Bar Exam is given every February and July, over a consecutive two- or three-day period. Usually it is administered in one or two locations within a state. For example, in New York, the test is given over a two-day period in both New York City and Albany. Essay and multiple-choice questions and a performance test section are administered on the first day of the exam; the MBE is on the second day.

THE MBE

The MBE consists of 200 multiple-choice questions that cover general legal concepts applicable in most states. It lasts six hours (two sessions of three hours each). It is required for the District of Columbia and every state except Louisiana. The topics are the same subjects that generally are covered during the first year of law school: Constitutional Law, Contracts, Criminal Law, Property, and Torts. Evidence and Criminal Procedure are also covered by the MBE, and starting with the February 2015 Bar Exam, Federal Civil Procedure will also be tested.

THE PERFORMANCE TEST

Almost every state has a Performance Test section. Most states use the standardized Multistate Performance Test (MPT), which is created by the same people who create the MBE, but a few states (California and Pennsylvania) draft their own performance test sections. Each MPT is 90 minutes long. Many state exams include two MPTs, but some state exams include only one. The MPT is designed to test your ability to use basic lawyering skills in a "realistic" situation to accomplish a task that a beginning lawyer should be able to do. The test includes a file of documents that assign the task and provide the facts of the case. The law needed to do the task is provided in the library, so substantive knowledge of the law is not required for this portion of the exam. The assigned task is often to write a memo or brief (persuasive or informational), but other documents may be required. You may be writing to a judge, senior attorney, or a layperson. The MPT requires you to sort facts as to relevance, analyze statutes or case law, apply relevant law to the facts of your case, identify and resolve any ethical issues, and communicate effectively. Time management is essential for this portion of the exam.

THE ESSAY EXAMINATION

The essay portion of the bar examination varies from state to state. Many states now use the Multistate Essay Examination (MEE), which presents standardized questions written by the authors of the MBE and MPT. Nine questions are offered for each bar exam administration, and most states use six of the questions to create a three-hour exam. General knowledge of majority law is sufficient for answering MEE questions, but some states require their local law to be used. Subjects tested on the MEE include the MBE subjects (*see* above) and Agency and Partnership, Corporations and Limited Liability Companies, Conflict of Laws, Family Law, Federal Civil Procedure, Trusts and Estates, and Negotiable Instruments and Secured Transactions. States that do not use the MEE may test on these and/or other subjects, and they usually require answers based on their local law. For any essay exam, it is not sufficient to merely state legal principles; a candidate must also apply those principles to the facts of the questions and come to a well-reasoned conclusion.

Studying for the Bar Exam is a difficult process because the exam covers a veritable mountain of material. For all lawyers, this is one of the most intense, stressful, and exhausting experiences of their lives. Fortunately, there are private organizations that help students prepare for this exam. For students taking the exam in July, bar review classes begin shortly after graduation in May and continue up until days before the exam. You will learn about your options for Bar Exam preparation after you begin law school.

OTHER BAR ADMISSION REQUIREMENTS

Candidates for admission to the Bar of any state must also complete a character and fitness review to demonstrate that they possess sufficient moral character to be worthy of a license to practice law. The review process begins with a standard application that must be completed by all candidates. Bar applications usually require disclosure of any information that may have a bearing on an individual's fitness to practice law, such as prior arrests and convictions, problems with drugs or alcohol, financial difficulties, and mental illness. Additionally, Bar applications usually require affidavits of moral character from individuals who are well acquainted with the candidate, and sometimes they require sponsorship from an active member of the state's Bar. After the application is filed, a representative of the Bar usually conducts a follow-up interview to examine the candidate's commitment to, and understanding of, the obligations of Bar membership.

Once a candidate has completed the review process and received a passing grade on the Bar Exam, the candidate is ready to be admitted to the Bar. Most states hold an admission ceremony at which all new attorneys swear an oath to uphold their duties to the court, state, and country as officers of the court. New attorneys must then sign the state's attorney registry, and they receive certificates confirming their licenses to practice law in that state.

ACADEMIC SUCCESS

There is perhaps no other professional field where academic success is more important than in the practice of law. Your initial employment opportunities after law school will be determined in large part by your grades, and those grades will continue to influence your career for many years. Although some talented lawyers may ultimately succeed in overcoming poor academic performances, the leadership ranks of the Bar in most jurisdictions are principally populated by lawyers who received high grades in law school. Accordingly, every ambitious law student must make academic success his or her leading objective.

Academic success means primarily one thing in law school: exam success. As unfair as it may seem, in most classes your final exam score will determine your final grade. Although some professors add a few points for class participation, and in every school, some upper-class elective courses are graded based on written term papers, the majority of your grades will be determined by final exams. That puts a tremendous amount of pressure on you to perform when it counts: during those few short, two- or three-hour exam periods.

Your preoccupation with exams must begin during your first year because academic success during that year alone is often sufficient to secure a top job out of law school. Summer employers usually award Summer Associate positions with knowledge of first-year grades alone, and thereafter they generally award permanent jobs based on summer performance. As a result, many of the top jobs are awarded without any consideration being given to a candidate's upper-class grades. This is a huge windfall for the fortunate students who score well during the first year, land the summer jobs that they want, and ultimately get offers of permanent employment. It is a huge bane, however, for those who score poorly during the first year but perform well in later years; they risk ending up with high grades but limited job prospects. Although seemingly unfair, the clear lesson is that your first-year grades are more important than the rest, and the clear implication is that your preparation for final exams must begin the day you start law school.

That is not to say that upper-class grades are not important; they certainly are. If you score poorly during the first year, the later years offer you an important second chance to prove your abilities. Although many top jobs are already allocated after the second year, there are always additional jobs out there, and the students who substantially improve their grades greatly increase their chances of obtaining one of those jobs.

Even for those who land top jobs early, upper-class grades remain important. For a variety of reasons, it is common for lawyers to find themselves out in the job market after only a few short years of practice. First, there is no guarantee that any job will last forever. The legal industry is one that has gone through many periods of expansion and contraction, and it is entirely conceivable at any time for any lawyer to end up unemployed. Second, no employer can guarantee professional satisfaction. The legal field is one of high attrition, and it is common for lawyers in many areas to become dissatisfied with their job situations after only a few years. Finally, excellent grades through all years of law school are essential for students with high academic and public service ambitions, including obtaining judicial clerkships, teaching positions, and various government appointments. Regardless of the reasons, any new lawyer who finds himself in the job market will benefit tremendously from superior academic credentials.

This chapter outlines the ingredients for academic success in law school.

A WINNING ATTITUDE

Law school success begins with the right attitude. Although it sounds obvious, it cannot be emphasized enough that law school success requires you to sustain a positive outlook throughout your law school experience. Aside from exams, there are very few gauges of success along the way to serve as sources of encouragement for the hard-working law student. Instead, students must toil away, day after day, with no guarantee or indication that success will be achieved in the end. In this environment, a sizable dose of self-doubt makes it easy to lose motivation and guarantees disappointment for even the most intelligent student. Conversely, a large degree of self-confidence contributes to success by enabling a law student to sustain enthusiasm for law school over a long period of time.

A SOLID WORK ETHIC

Law school success also requires stamina, efficiency, and the ability to apply yourself consistently when there are no pressing deadlines. Every law student will eventually learn that the amount of information in any one of the core classes simply dwarfs that of any undergraduate class they have taken in the past. Therefore, any hope of cramming a semester's worth of information into a one-week reading period is pure fantasy and one that will surely lead to disappointing grades. The successful law student never waits until the last minute. Instead, he works hard day in and day out, from August to May.

SELF-CENTERED AND SELF-SUFFICIENT

To be a successful law student, you must give total priority to your own needs first. This does not mean that you should be ruthless or deceitful in your relations with other law students – that is never a wise approach. It does mean, however, that you must regard law school success as an individual effort. Law school is not a team sport. Do not rely on others and do not allow others to rely on you. You alone will have to live for many years with the consequences of your efforts. Therefore, you must strive for self-sufficiency, and you must prevent other students from dragging you down. Do not split up your reading assignments with fellow students. If you do so, you will miss out on valuable lessons, and you will be forced to accept standards of quality that are not your own. Do not blindly accept someone else's study materials without making certain that they are reliable and contain all of the information that you need to know. Most importantly, do not allow study groups to dictate your study habits. Too many students use study groups as an excuse to procrastinate or to prompt other students to tutor them. You should study as much as you can on your own and use your group – should you join one – only to the extent you feel comfortable, such as to share practice exams or to discuss the concepts that you do not understand. In sum, you must trust yourself and do things your way. You are the person who knows yourself best, and you are the only person who can guide yourself to academic success.

PREPARING FOR CLASS

The act of achieving success begins with class preparation. Professors assign readings for a reason: They are important, both substantively and as an exercise. It is not enough to learn the main proposition for which a case stands. Anyone can get this information merely by asking a fellow student or consulting a commercial outline. Law students must also learn the art of rapidly and precisely distilling cases down to their essential elements.[4] This can be learned only through practice. Additionally, if you read and brief your cases every day, you will understand more from the lectures, and you will always be prepared to participate in class discussions. Even if you do not speak up in class, timely preparation ensures that you will follow class discussions, and it prevents you from falling behind.

All law students spend a substantial amount of time every day preparing for class. A typical law school course requires an average of 20 to 30 pages of total reading per class meeting, and, on average, this results in 50 to 75 pages of reading per night. Legal reading, however, is not like any other reading most students have done in the past. It is slow going because the materials are chock full of information and because students must carefully analyze and brief the cases they read. As a result, an average student can count on reading at a rate of 10 pages per hour, totaling approximately five to eight hours of reading per weekday night and leaving little more than weekends for outlining and review. The sheer size of this workload makes it easy to see that class preparation on a daily basis is essential and that the student who fails to prepare for even a handful of classes falls way behind.

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[4] *See, infra, Briefing Cases.*

ATTENDING CLASS

Although class attendance in law school, like college, is generally optional, a solid attendance record is mandatory for the serious student who intends to succeed, for several different reasons.

First, law school is expensive. If you want to discover exactly how expensive it is, divide one semester's tuition by the number of hours you spend in class. At some law schools, skipping one class is the financial equivalent of discarding a pair of front row seats to a Broadway show. Although the performances in law school may not be as entertaining, they are every bit as expensive. If you are financing your own education, you owe it to yourself to attend class so that you get your money's worth. If someone else is paying for law school, you owe it to them to confirm that they have spent their money wisely. And, on occasion, you just may witness a classroom performance worthy of Broadway.

Second, regular attendance makes a good impression on your professors. This may help you earn the class participation points that some professors offer, and it will help you develop a reputation among the faculty as a serious student. A good reputation often leads to valuable opportunities later in (and after) law school. Also, some professors treat students who regularly attend class with greater respect. If you have a reputation for being conscientious, a professor is more likely to be forgiving if you show up unprepared.

Third, if you attend class regularly, you assure yourself of hearing all of the course materials at least once and hearing them in the professor's own words. This can be a source of tremendous comfort when you begin studying for exams. Professors rarely test on subjects that were not covered in class, so if you have attended all of your classes, you can be confident that there will be no exam day surprises. Additionally, because hearing information is different from reading it, class lectures reinforce your memory at an entirely different level. Certain things that were read and forgotten may be remembered simply because of the way a professor expressed them.

Finally, the best reason for attending class is to avoid the consequences of skipping class. Class-skipping becomes habitual. Most often, students skip class because they have not read the assigned materials and are afraid of being called on in class. After missing class, however, a student will be even more out of touch with the current class discussion and will grow more anxious about being called on by the professor. The incentive to continue missing class only grows. In this way, it becomes a downward spiral of failure. If you attend class regularly, you will be better situated to keep up with – and understand – the course material.

TAKING NOTES

Effective note-taking is critical. It not only ensures that you retain the important points of each class lecture and discussion, but it also ensures that you create a complete set of class notes and a record of the issues that your professors repeatedly highlight. There is no correct way to take notes; you must discover what is comfortable for you. There are, however, a few fundamental rules to follow:

First, write your notes clearly enough and with enough elaboration so that you will be able to understand what they mean at the end of the semester. Everybody gets tired of taking notes in class, but you must remember that your notes are worthless if you cannot understand the point that was being conveyed. There is nothing more frustrating than reviewing notes prior to the exam and reading something like "Justice Harlan got it wrong in *Poe*" with no further explanation. Accordingly, it is an invaluable exercise to read your notes shortly after class to ensure that they are thorough and coherent.

Second, although it is important to be thorough, aim to be efficient in your note-taking. There is a distinct tension here, but mastery of this point is the key to writing good notes. Your notes must preserve all of the major points of the lectures and class discussions, but they should not be over-inclusive. If you write down too much superfluous information, the usefulness of your notes will be undermined. This will create a lot of work for you later in the semester because you will need to go back to weed out extraneous material. Your notes should be detailed where points are complex or examples are used, since examples often form the basis of exam questions, but you should try to avoid getting bogged down in the minutiae. You must learn to make decisions about what is important and what is not as you sit in class. Trust your judgment in separating the significant from the trivial. Your judgment will improve with practice.

Finally, you should try to tailor your notes to your professor's views on the course. Once the semester is a few weeks old, you will begin to observe recurring themes emphasized by your professors. After spotting these trends, you should pay close attention to things that are said on these subjects and record them in your class notes. On their exams, professors feature those topics that they view as important, and they telegraph their views in their lectures. If a professor spends a week on a topic that occupies only five pages in your casebook, you can bet it will be on the exam. If a professor assigns cases that are not in the casebook, study them carefully because they will be on the exam. Come test time, you will be performing for an audience of one: your professor. If you can accurately predict and prepare for some of the exam's key topics, then you will enjoy a substantial advantage over your fellow students.

For example, suppose you have a Constitutional Law professor who emphasizes civil rights and has argued in scholarly articles that the Supreme Court has wrongly interpreted the Equal Protection Clause of the Fourteenth Amendment. She emphasizes this topic in a variety of contexts throughout the year, tracking Supreme Court interpretations of the Equal Protection Clause from the Civil War to the Civil Rights movements of the middle 20th century and ending with the Court's present views on affirmative action. If this is the case, you can be certain that the Equal Protection Clause will be the subject of at least one sizeable question on the final exam. If you have taken clear and accurate notes, you should be able to discuss the historical nuances of the Clause's interpretation. The point is not to parrot back to the professor her viewpoint of the Equal Protection Clause, but rather to engage in a thorough discussion of the topic. This may distinguish your exam answers from those of the rest of your class.

OUTLINING

Possibly the most important activity you will perform in preparation for exams is effectively organizing and digesting your notes from each class into a basic outline. In so doing, you need not, and should not, rely solely on your own efforts. This is the only major exception to the requirement that the successful law student be self-sufficient. It is too much work, and infeasible, for one student to draft a thorough outline for every class. There are two ways that you can avoid taking on all of the work yourself: (1) you can obtain trustworthy class outlines from upper-class students; and (2) you can split the work with other students in your class.

For many professors, class outlines from previous years exist that have been perfected and tested over time. Generally, they get passed down from year to year. You can obtain these outlines from second- and third-year students who previously took your professor's class. All you have to do is ask. Most students who have worked on a class outline take tremendous pride in their materials and readily offer them to first-year students. You can evaluate the trustworthiness of an outline, in part, by finding out how well the students did who used the outline. In any case, you should continuously evaluate a passed-down outline against your understanding of the class materials as you progress throughout the semester. Once you have obtained a trustworthy class outline, you should personalize it with your own notes. This is particularly easy to do if you can get the outline emailed to you in an editable format. It is important, however, not to wait too long before seeking out these materials. You will want to know what resources are available early in the semester so you can budget your time accordingly.

If you cannot obtain trustworthy outlines from an upper-class student, you can get together with your classmates to divide the work. This, however, is potentially dangerous. An outline that you receive from a fellow student is only as thorough as its author. If you pick lazy classmates to share your workload, you could be left at the end of the semester with substandard study materials. Accordingly, if you choose to share your workload, make sure that your partners work hard and remain accountable. In addition, you can use widely available commercial outline materials to supplement your own work. These materials will provide you with an outline of the basic concepts, but remember that they will not be tailored specifically to your professor's class.

In sum, there are three rules to follow when you are ready to outline: (1) if you can locate a trustworthy outline from a student who took the same class with the ***same professor*** and scored a high grade, then use it as a starting point and supplement it with your own notes; (2) if you cannot find a trustworthy outline, then create your own by distilling your case briefs and class notes and supplementing them with commercial materials; and (3) if you are faced with the need to create several outlines, then find conscientious classmates to split up the work.

Finally, commercial outlines and, to some extent, less trustworthy class outlines from other students can be useful as backup reference guides. In any case, you must always confirm the accuracy of any outline you use, and you must always supplement the work of another with your own notes. In this way, you can capitalize on the work of others in condensing and organizing class material without compromising on your own standards of quality. We provide more in-depth information on various study aids like commercial outlines and hornbooks in our chapter on study aids.

READING YOUR PROFESSORS' ARTICLES

If you have the time, it can be useful to read those articles published by your professors that relate to topics they cover in their classes. From these articles, you will be able to identify the particular interests of your professors. You need not read every word of an article so long as you understand the themes and arguments, particularly the arguments advanced by your professor. Professors are known to give exams on their favorite topics, and they love to see students absorb those topics and arguments that most interest them. If you read your professors' articles, you will be better prepared to think like your professors when you study for and write your exams.

STUDYING FOR EXAMS

If all things go according to plan, you should be finished organizing your materials (class notes, outlines, case briefs, etc.) approximately two weeks prior to your first exam. By preparing for your exams throughout the semester, you will secure a tremendous advantage over some of your classmates who, invariably, will still be bogged down preparing their class outlines when the study period begins.

Unlike those students, you will be in a position to begin actively reviewing and digesting the information you have already organized. This is when your memory begins to retain your class material in a systematic and organized fashion. At this stage, some students choose to employ memorization methods like mnemonic devices and flash cards. Others prefer to continue boiling down outlines until they fit on one or two pages and can be committed to memory. The tactics that each student uses to absorb the class materials are unique to the individual. Most students typically revert back to what brought them success as an undergraduate. The objective is to be in a position, as soon as possible, to employ the methods you trust to get you good grades. By preparing throughout the year for your exams, you will leave nothing to chance.

BRIEFING CASES

A case brief is a short summary of the most significant portions of a reported legal decision. It captures and condenses relevant information from a variety of important categories and places it in a format that makes it easy to understand and simple to recall. All first-year law students must learn how to properly draft a case brief. Done correctly, the exercise of briefing cases serves two purposes: Primarily, it teaches students how to read critically and dissect case law, an invaluable skill for all practicing attorneys. Second, the intended product (a good brief) provides a student with a case synopsis that is infinitely useful should a professor call upon that student in class. Typically, case briefs are no more than one page in length, and they usually follow a standardized, but personal, format. In law school, everyone develops a personal case briefing style that facilitates the quickest recall of important information. Although case briefs often differ in style, the information contained within a complete brief should not differ from student to student.

Professors in virtually all first-year law school classes expect students to brief all of the assigned cases and to participate in informed discussions of those cases in class. The anxiety caused by the prospect of being called on in class is usually enough to persuade most law students to brief all of their cases. Nevertheless, some students brief cases only when they think they might be called on in class, and they avoid it when they feel they are safe from the professor's scrutiny. This is a grave mistake. Students should brief all of their cases all of the time. The ability to brief cases efficiently and accurately is nurtured gradually through practice. Moreover, case briefing is an analytical exercise that simulates a student's capacity to think like a lawyer, and the steady development of this capacity is critical to the success of a law student. It is no coincidence that, when grades are issued at the end of the semester, the students who brief all of their cases often realize a substantial payoff.

THE LEGAL OPINION

To understand the significance of a case brief, it is important to understand the function of case law in our legal system. In the United States, the law is defined primarily in three ways: through a constitution, through statutes, and through case law. Prior to starting law school, most students have some familiarity with the federal Constitution and federal and state statutes, but few have a clear understanding of the importance of case law. In law school, however, you will concentrate on learning the law and on understanding legal analysis primarily through examining case law.

Case law derives its significance from the legal doctrine known as *stare decisis* – Latin for "to stand by decisions." *Stare decisis* is a fundamental legal concept that instructs that the law of a particular case serves as legal precedent for future cases. Under the doctrine of *stare decisis*, when a court determines a legal principle that applies to a certain set of facts, the court is required to adhere to that principle in future cases where the facts are substantially similar, even if the parties to the dispute are not the same. The doctrine of *stare decisis* promotes fairness in our legal system because it ensures the consistent treatment of parties in similar circumstances. It also establishes a degree of predictability in our legal system since it allows parties to understand the potential consequences of their actions by examining legal precedents.

Courts publish legal opinions in order to establish written records of the legal principles applied in particular cases, to record the specific facts of those cases, and to explain the rationales for applying the relevant legal principles. A legal opinion gives the interested parties a fair accounting of a legal decision that affects their rights, and a published opinion establishes a written record that the public can use to aid in predicting the legal consequences of engaging in similar behavior. Legal opinions are usually drafted in a standard format that is logical, predictable, and makes it easy for experienced lawyers to locate critical information quickly.

An opinion usually commences with a short statement of the procedural posture of the case and a statement of the question that the court intends to answer within the opinion. The question, also known as "the issue," defines the scope of the opinion and is frequently limited to a simple, discrete portion of a case. It is important to note that legal opinions do not always deal with the substantive issues at the heart of a case. Many opinions deal with one or more narrow issues, such as the admissibility of a single piece of evidence or the propriety of a preliminary procedural decision. Nevertheless, even when a legal opinion deals with a seemingly minor part of a case, it is usually an issue that has a significant impact on the outcome of the case.

Second, an opinion sets forth the facts of the case. When reciting the facts, the court usually presents only those facts that are relevant to the discrete issue or issues at hand. A court will rarely engage in a protracted discussion of facts that are not important to the limited decision before it. Thus, if a court is ruling on the admissibility of the trial testimony of a certain individual, the opinion will set forth those facts that tend to make the testimony admissible and those facts that tend to make it inadmissible. The court, however, will not necessarily engage in a discussion of other important issues in the case, such as legal claims unrelated to the individual's testimony, or the remedies available to the prevailing party.

Finally, an opinion contains existing rules of law that pertain to the issue before the court, a conclusion or "holding" based on applying the existing rules of law to the facts of the case, and a rationale for the conclusion. The existing rules of law may include any constitutional provisions, statutes, or prior cases that may have a bearing on the decision. These legal rules, to the extent that they are controlling, instruct a court on the boundaries of its authority. If there is a statute or a case directly on point, then the court's job is easy, and the controversy can be disposed of quickly because the court has limited authority to deviate from the outcome dictated by the applicable law. When the court takes the time to draft and publish an opinion, however, there is usually no obviously controlling authority. In such cases, the court will look for instruction from previous similar cases or will be guided by matters of public policy. The court determines the propriety of following similar cases by comparing the relevant facts of the case with the matter before it.

Once the court determines the applicable law, it fashions its holding by applying the rules to the facts of the case, and explains its rationale for reaching this conclusion. If there is a statute or a prior case on point, the court's rationale will be as simple as citing to the existing legal authority and reasoning that, under the doctrine of *stare decisis*, the court is bound to follow the prior decision and rule in a parallel fashion. If no obviously controlling authority exists, the court will explain why it believes similar cases are applicable or not. On some occasions, a court will engage in an examination of public policy as the rationale for its decisions.

There are other noteworthy components of a legal opinion, but these components are often less important because they have no bearing on the court's ultimate decision. For instance, some courts discuss hypothetical situations that do not exist within the facts of the case. In other words, a court may speculate that, if certain facts were different, its decision would have been different. Such a gratuitous discussion within a legal opinion is known as *dictum*. *Dictum* does ***not*** serve as legal precedent for future decisions because it concerns matters that are not essential to the determination of the issue before the court. *Dictum* can be significant, however, because it gives insight into the thinking of a judge or panel of judges and can be helpful in predicting how they might rule on an issue in the future.

Sometimes a legal opinion issued by an appellate court includes a dissenting or a concurring opinion. Because appeals are decided by panels consisting of more than one judge – there are three judges on a federal Circuit Court of Appeals panel and nine judges on the Supreme Court panel – there is not always unanimity in a court's decision. As a result, only a majority vote is required to render a decision, and judges who disagree with court decisions may write a dissenting opinion explaining their disagreement with the majority and what they believe the decision should have been. Sometimes judges join in the court's decision but disagree with the reasoning stated in the court's opinion. In such cases, a judge may write a concurring opinion explaining the divergent reasoning. Dissenting and concurring opinions can be significant because, like *dictum*, they give the public insight into the thinking of a particular judge and help lawyers predict how that judge might rule on a related issue in the future. Dissenting and concurring opinions are particularly significant in Supreme Court cases because they give insight into the convictions of each particular Justice, and their convictions have a direct impact on some of the most weighty and controversial issues of our time.

HOW TO BRIEF A CASE

Now that you have a basic understanding of the significance of a legal opinion and the purpose of a case brief, it is time to learn how to brief a case. As previously stated, a case brief is a short summary of the most significant portions of a reported legal decision. The key to a good case brief is to capture the most important information from a legal opinion, but to be economical with your words. The longer a case brief becomes, the less useful it is as an aid to quick recall in class. Accordingly, your objective when briefing a case is twofold: First, you must learn to extract the most important information from a legal opinion; and second, you must learn to identify and omit information that is of marginal importance.

THE METHODOLOGY

Every complete case brief includes important information from each of the following categories:

- Casebook outline heading and page number;
- Case name, the issuing court, and the opinion date;
- Relevant facts;
- Procedural history of the case up to that point;
- Issue(s) that the court is being asked to decide;
- Holding – the court's ultimate legal conclusion(s);
- Court's rationale for its decision, including the existing legal rules employed by the court;
- Ultimate disposition of the case; and
- Dissenting opinion, if any.

In the following sections, we will separately examine each category of information listed above in the context of a famous contracts case – *Lonergan v. Scolnick* – and we will draft a proper case brief. When reading the rest of this section, please refer to the edited opinion in *Lonergan* that is located toward the end of this section and the one-page sample case brief that follows it. If you have not yet read *Lonergan*, please do so now. Then, take out a clean sheet of paper and actively brief the case yourself as we walk through each category. Your final product should look like the sample case brief we have provided. Later, we will repeat the exercise with a second case, *Vincent v. Lake Erie*, which appears immediately following *Lonergan*.

THE CASEBOOK OUTLINE HEADING AND PAGE NUMBER

At the top of the page, you should always record the outline heading and page number from the casebook showing where the particular case falls within the course curriculum. This will constantly remind you why you are reading the case and where you can find it. A casebook is a compilation of court decisions that have been organized and edited by the author in order to introduce you to the essential legal concepts that make up a particular course or body of law (*e.g.*, Contracts, Torts, Property). The cases are arranged deliberately, like building blocks, so that you gain exposure to each critical issue in a logical progression.

Fortunately, casebooks typically are arranged in outline format by chapter, allowing perceptive students to identify the fine point being taught through a particular case even before reading the case. Although you are not using a casebook for this exercise, the chapter where you would find *Lonergan* might be: Chapter I of your Contracts casebook, entitled "Assent" (an agreement between two parties); subchapter A. thereunder, entitled "Offer and Acceptance"; and section (1), entitled "What Constitutes An Offer?" If *Lonergan* is located under section (1), then you know that you are being asked to focus on ***one*** issue: ***what constitutes an offer***?

It is important to make a habit of recording the casebook outline heading at the top of the page because legal opinions can be extremely distracting. A single legal opinion often touches upon several different issues at once, creating a lot of confusion for a student who is not focused on the critical issue at hand. For instance, a negligence case in your Torts casebook may discuss a variety of interrelated but distinct subtopics like duty, breach, injury to the plaintiff, or causation by the defendant. Likewise, cases in your Civil Procedure casebook invariably touch upon substantive legal issues (*e.g.*, Contracts or Property) that have little to do with the procedural rules you are studying for that class. This makes it quite easy to lose sight of your limited objective, especially when you are asked to read a number of cases for each class. Moreover, this practice will give you a head start when you begin to create an outline for the class.

Recording the page number from the casebook is also worthwhile. Frequently, when students are called on in class, they need more than just a case brief to get them through a barrage of questions. Professors often focus in on specific passages in the text, so it is useful to be able to find the page where the case is located without undue delay. Habits such as this take no effort to develop and come in quite handy when you are in the hot seat. For the purposes of this exercise, suppose that *Lonergan* is located between pages 59 and 62 in your casebook.

Given the hypothetical casebook outline we have discussed, you should include the following information at the top of your brief:

CHAPTER I: ASSENT **pp. 59-62.**

Subchapter A: Offer and Acceptance

Section (1): What Constitutes an Offer?

To give you a better understanding of what a full casebook outline looks like, we have included one excerpted from the popular Torts casebook CASES AND MATERIALS ON TORTS (7th Ed.) by Richard A. Epstein, in conjunction with the second case we will brief together in class, *Vincent v. Lake Erie*. The Torts casebook outline, along with the *Vincent* opinion, appears later in this case-briefing section.

<u>THE CASE NAME AND THE ISSUING COURT</u>

At the top of the page, you must also include the name of the case, the issuing court, and the date of the opinion. Although self-evident, the case name is necessary to identify the case itself, and, in many instances, to help in identifying the parties to the dispute and their positions as plaintiff, defendant, appellant, appellee, or some other designation. The issuing court is important because it reveals the court's jurisdiction, including the geographic area covered by the court and the level of the court, including trial court, appellate court, or a court of final review. The date indicates when the opinion became law and enables you to identify whether or not the case may have been overruled and where it fell in the evolution of our jurisprudence. You should not worry if this information means little to you now. It will become meaningful after you take Civil Procedure. For *Lonergan*, this information is expressed as:

NAME: *Lonergan v. Scolnick* (California District Court of Appeal, Fourth District, 1954).

<u>THE RELEVANT FACTS</u>

The relevant facts of the case include only those facts that have, or arguably could have, a bearing on the ultimate decision to be made by the court. Generally, it is hard to accurately identify the relevant facts without knowing the issue before the court, and since the issue is often stated after the fact section of an opinion, it is important to read most cases twice before listing the relevant facts. You should first skim the case to get an overall understanding of the parties' dispute, and then, after you have identified the issues, the relevant facts may become more apparent in a second, more critical read-through. Remember, one of your objectives in briefing a case is brevity, so you should focus only on those facts that are so intertwined with the issue before the court that they must be considered by the court in making its ultimate decision.

FACTS:

- **(3/52) D placed ad in newspaper offering to sell 40 acres of land.**
- **P wrote to D about the ad.**
- **(3/26/52) D responded by letter with directions and stated that his lowest price was $2,500 and that "this is a form letter."**
- **(4/7/52) P wrote back again to ask if he had found the right property.**
- **(4/8/52) D wrote that P had found the right property and P better act quickly if he wanted to buy b/c D planned to have a buyer within a week.**
- **(4/12/52) D sold land to a third party.**
- **(4/14/52) P received D's letter of the 8th.**
- **(4/15/52) P wrote to D agreeing to buy land for $2,500; P opened escrow.**
- **(4/28/52) D refused to deliver deed; land now worth $6,081.**

JUDICIAL PROCEDURE

A point that many students overlook is how the case got to where it stands at the time the opinion was issued. During the life of a case, there are a wide variety of procedural milestones that can give rise to a major decision that becomes the subject of an opinion. When an opinion examines a decision of the court presiding over the case, it is important to know the procedural posture of the case. As you will learn in Civil Procedure, the procedural posture of a case often dictates the applicable legal standard, and the burdens of the parties to the dispute. In this regard, most courts will furnish a brief history of the case within an opinion.

Most often, you will read decisions from federal and state ***appellate*** courts reviewing the actions of the trial court that presided over the case. Make sure you identify the plaintiffs and defendants at the trial level and recognize who has become the appellant and appellee at the appellate level. The appellant is usually the person who lost or was aggrieved below and now appeals the lower court's decision; and the appellee is the person whose success below is now being contested on appeal. You must also identify the decision of the trial court that is subject to appellate review (*e.g.,* motion to dismiss the complaint, summary judgment, a directed verdict, a judgment notwithstanding the verdict, etc.) and the remedies that the parties are seeking. Keep in mind that when trying to identify the parties, the case name does not always provide the answers, because the order of the names in a case are switched in some jurisdictions depending on who is seeking review of the decision below.

Understanding the procedural posture of a particular case will help you to be more thoroughly prepared for class discussions. Every once in a while a law professor will ask a student questions about the prior disposition of the case (*i.e.*, which party prevailed below) or about the procedural motion before the court. Understanding the procedural posture of a case will also help you to become familiar with concepts that you will address in Civil or Criminal Procedure. By seeing procedural concepts at work in a variety of contexts and by understanding and identifying the path each case has taken, you will reinforce the rules learned in those classes, making it easier to spot issues on your final exams. Providing a section for judicial procedure in your brief will ensure that you capture these benefits. For *Lonergan*, your judicial procedure section should read as follows:

PROCEDURE: **Case submitted to Trial Court on stipulated facts. T. Ct. ruled that D made an offer of sale on 4/8/52, but that offer was conditioned on prompt acceptance by P which P did not do. Accordingly, T. Ct. held that there was no contract. T. Ct. entered judgment in favor of D. P appealed.**

<u>IDENTIFYING THE ISSUE</u>

Identifying the issue is the key to any brief. You may read a case diligently and write what you believe is a wonderful, well-structured brief, but if you have identified the issue improperly, much of your efforts will be for naught. Your brief will include irrelevant facts and rules of law, and you will have improperly defined the holding of the case. To avoid such a result, you should be thoughtful and spend time identifying the issue. Your task will be easier if you keep in mind that the casebook outline heading (which you should already have written at the top of your case brief) will give you a solid clue as to the identity of the issue.

When identifying the issue, you should define it as narrowly as you can. In reality, there are often many ways to state the issue in a legal opinion. For example, when briefing *Lonergan*, you could state the issue as: "Is D liable to P?" Or, you could state it as: "Was a contract properly formed?" These issues, however, are too broad. They do not help you to understand the nuances of the court's legal reasoning. In this instance, we already know from reading the casebook outline heading that the issue in *Lonergan* is related to "What constitutes an offer?" Accordingly, after carefully reading the opinion, we can define the issue as:

ISSUE: **Did D make an offer to P?**

<u>HOLDING</u>

The holding of a case is usually a simple answer to the question that constitutes the issue. Although a court rarely will answer a question with a simple yes or no, your brief should answer the question simply, if possible, and then contain a more detailed explanation of the conclusion. The holding in *Lonergan* would be stated as follows:

HOLDING: **No. Neither of D's letters constituted an offer because the language used in each of the letters reveals that they were not intended as an expression of fixed purpose to make a definite offer and that some further expression of assent on the part of the defendant was necessary.**

<u>REASONING</u>

In your brief, you must also record the court's reasoning or rationale for reaching its conclusion. The first part of this exercise involves identifying the preexisting legal rules relevant to resolving the matter before the court. These rules include any constitutional provisions, statutes, regulations, or prior cases that address the issue. Additionally, courts sometimes cite learned treatises or Restatements of the law when explaining well-settled legal rules.

For example, the *Lonergan* court would have conducted research to identify the controlling legal authority that defines the question "What constitutes an offer?" Since this is a well-settled area of the law, the court limited its citation of authority primarily to the Restatement of Contracts, a treatise-like volume authored by the American Law Institute that sets forth the standard principles of Contract Law. Within the opinion, the *Lonergan* court also cites *Niles v. Hancock*, 140 Cal. 157, a California case that stands for the same principle as the quoted section of the Restatement, but has language relating to written correspondence that is particularly applicable to the *Lonergan* dispute. For *Lonergan*, your statement of the applicable rules might appear as:

RULE: **Restatement of Contracts §25 – no offer if person receiving the promise knows or has reason to know that person making it does not intend it as expression of fixed purpose without further assent.**

In addition, the Reasoning section of your brief must contain the reasoning behind the pre-existing legal rules as well as the holding of the new case itself. This section of your brief is often one of the most useful for classroom discussion because professors have a fondness for discussing the underlying rationale behind the legal rules that are raised. Sometimes, a court's rationale for its decision is simply that there is a controlling statute or case that dictates a result, and other times, a court will delve into complex public policy issues to reach a principled result. It is also worthwhile to list additional reasons you can imagine for the court's conclusion even if they were not discussed by the court. This will stimulate your thoughts about the law and will help you anticipate classroom discussion. In *Lonergan*, the court is rather stingy in its stated reasoning so it is useful to speculate.

REASONING: **From the language of the letters, P knew or should have known that an offer was not made and that some further assent on the part of D was required. D did not create the impression that he was making an offer: 1) He stated in his first letter that it was a form letter, and 2) he stated in his second letter that he was hoping to have a buyer soon. As a result, it was unreasonable for P to believe that D was holding open an offer exclusively for him.**

On the other hand, if the letters had reasonably created the impression that an offer was being made, the court would probably have held D to the offer even if he did not mean to make one. After all, D is the one who controls his words, and if he is careless, P should not have to suffer.

DISPOSITION

It is important to note the procedural disposition of the case after the decision made by the court issuing the opinion because there can be a wide variety of procedural consequences as a result of a court's ruling. The consequences of a trial court's ruling on a motion to dismiss or a motion for summary judgment may be that some of the plaintiff's claims are eliminated from the suit, and, in some cases, a suit may be completely terminated by such a motion. Oftentimes, when the issuing court is an appellate court (as in *Lonergan*) the disposition is merely an affirmation of the trial court, which usually is nothing more than a verification of the result reached by the trial court. The most interesting consequences occur when an appellate court reverses a trial court. In such instances, the case is usually remanded to the trial court for further proceedings, and it is important to know the nature of those additional proceedings. We state the disposition in *Lonergan* as:

DISPOSITION: **Appellate court affirms T. Ct.'s decision in favor of D.**

It is important to realize that, in *Lonergan*, the appellate court agreed with the conclusion of the trial court but disagreed with its reasoning. While the appellate court concluded that no offer had been made, the trial court concluded that an offer had been made, but that it was expressly conditioned upon prompt acceptance by P, which P had not done. The appellate court affirmed the trial court because it reached the same result in the end: There was no enforceable contract. As a result, however, the reasoning of the trial court is no longer legal authority, and the case stands solely for the proposition advanced by the appellate court – that under the facts of the case, no offer was made.

DISSENTING AND CONCURRING OPINIONS

On occasion, you will see a dissenting or concurring opinion appended to the opinion of the court. When you see such an opinion, it is usually in connection with an appeal. Appeals are decided by panels of three or more appellate judges that rule based on majority vote. When one judge on a panel disagrees in some way with the opinion of the court, that judge may issue a dissenting or concurring opinion. A dissenting opinion expresses an opinion that disagrees with the conclusion reached by the court, and a concurring opinion expresses an opinion that agrees with the result reached by the court, but disagrees with its reasoning. In reality, dissenting and concurring opinions are relatively uncommon so when you are asked to read a dissent or a concurrence in your reading, you should take good notes. Such opinions will be particularly important to note in your Constitutional Law class because the dissenting and concurring opinions of Supreme Court Justices often give insight into the thinking of the individual justices and help the public predict how the justices might rule on related issues in the future. If you are asked to read a dissenting or concurring opinion, you are likely to be asked about it in class. In *Lonergan*, there was no published dissent or concurrence:

DISSENT: None.

SOME FINAL THOUGHTS ON CASE BRIEFING

Avoid the temptation to "book brief," especially during your first year of law school. Book briefing is a method of identifying important information in an opinion by highlighting the text and making notations in the margins of the casebook. It is a practice used mostly by students who are either too lazy to brief the case properly or do not have enough time to do so. Although it is better to book brief a case than to take no notes at all, it is important to brief all of your cases properly to the furthest extent possible. Students who book brief conduct a superficial analysis of a case that fails to capture the true benefits of the case-briefing exercise. As a result, students who book brief do not learn the process of legal analysis as quickly as others. Furthermore, students who book brief are often less organized for class. Cases are rarely organized in a way that allows students – at a glance – to recite the relevant facts, procedure, issue, rules, holding, reasoning, disposition, and dissenting opinion of a particular case. As a result, it can be difficult to locate information from a book brief, especially under the pressure of a professor's questions.

Finally, as you brief the cases assigned to you for each class session, organize them in a three-ringed binder in the order they were discussed. You may even want to place your class notes for each class in front of the case briefs in your binder. Organizing your notes and briefs in this format throughout the semester will allow you to use them to assist you in drafting an outline for the class when the time comes.

On the pages that follow, we have included for your review the *Lonergan v. Scolnick* decision and a sample brief based upon it. In addition, we have included a portion of a Torts casebook table of contents, together with the opinion from *Vincent v. Lake Erie*, which we ask you to read now, but will brief together in class for illustrative purposes.

Procedure:
- P sued D in Superior Ct. for specific performance or damages.
- Trial court found D made an offer, but the offer was not promptly accepted by P.
- Judgment for D.
- P appealed to intermediate app. ct.

CHAPTER I: ASSENT

Subchapter A: Offer and Acceptance

Section (1): What Constitutes an Offer?

Facts of underlying case

Lonergan v. Scolnick

District Court of Appeal, Fourth District, California. (1954)

APPEAL from a judgment of the Superior Court of San Bernardino County. Carl B. Hilliard, Judge. Affirmed.

Action for specific performance or for damages. Judgment for defendant affirmed.

Judge BARNARD delivered the Opinion of the Court:

This is an action for specific performance or for damages in the event specific performance was impossible.

The complaint alleged that on April 15, 1952, the parties entered into a contract whereby the defendant agreed to sell, and plaintiff agreed to buy, a 40-acre tract of land for $2,500; that this was a fair, just and reasonable value of the property; that on April 28, 1952, the defendant repudiated the contract and refused to deliver a deed; that on April 28, 1952, the property was worth $6,081; and that plaintiff has been damaged in the amount of $3,581. The answer denied that any contract had been entered into, or that anything was due to the plaintiff.

By stipulation, the issue of whether or not a contract was entered into between the parties was first tried, reserving the other issues for a further trial if that became necessary. The issue as to the existence of a contract was submitted upon an agreed statement, including certain letters between the parties, without the introduction of other evidence.

The stipulated facts are as follows: During March, 1952, the defendant placed an ad in a Los Angeles paper reading, so far as material here, "Joshua Tree vic. 40 acres, . . . need cash, will sacrifice." In response to an inquiry resulting from this ad the defendant, who lived in New York, wrote a letter to the plaintiff dated March 26, briefly describing the property, giving directions as to how to get there, stating that his rock-bottom price was $2,500 cash, and further stating that "This is a form letter." On April 7, the plaintiff wrote a letter to the defendant saying that he was not sure he had found the property, asking for its legal description, asking whether the land was all level or whether it included certain jutting rock hills, and suggesting a certain bank as escrow agent "should I desire to purchase the land." On April 8, the defendant wrote to the plaintiff saying "From your description you have found the property"; that this bank "is O.K. for escrow agent"; that the land was fairly level; giving the legal description; and then saying, "If you are really interested, you will have to decide fast, as I expect to have a buyer in the next week or so." On April 12, the defendant sold the property to a third party for $2,500. The plaintiff received defendant's letter of April 8 on April 14. On April 15 he wrote to the defendant thanking him for his letter "confirming that I was on the right land," stating that he would immediately proceed to have the escrow opened and would deposit $2,500 therein "in conformity with your offer," and asking the defendant to forward a deed with his instructions to the escrow agent. On April 17, 1952, the plaintiff started an escrow and placed in the hands of the escrow agent $100, agreeing to furnish an additional $2,400 at an unspecified time, with the provision that if the escrow was not closed by May 15, 1952, it should be completed as soon thereafter as possible unless a written demand for a return of the money or instruments was made by either party after that date. It was further stipulated that the plaintiff was ready and willing at all times to deposit the $2,400.

The matter was submitted on June 11, 1953. On July 10, 1953, the judge filed a memorandum opinion stating that it was his opinion that the letter of April 8, 1952, when considered with the previous correspondence, constituted an offer of sale which offer was, however, qualified and conditioned upon prompt acceptance by the plaintiff; that in spite of the condition thus imposed, the plaintiff delayed more than a week before notifying the defendant of his acceptance; and that since the plaintiff was aware of the necessity of promptly communicating his acceptance to the defendant his delay was not the prompt action required by the terms of the offer. Findings of fact were filed on October 2, 1953, finding that each and all of the statements in the agreed statement are true, and that all allegations to the contrary in the complaint are untrue. As conclusions of law, it was found that the plaintiff and defendant did not enter into a contract as alleged in the complaint or otherwise, and that the defendant is entitled to judgment against the plaintiff. Judgment was entered accordingly, from which the plaintiff has appealed.

The appellant contends that the judgment is contrary to the evidence and to the law since the facts, as found, do not support the conclusions of law upon which the judgment is based. It is argued that there is no conflict in the evidence, and this court is not bound by the trial court's construction of the written instruments involved; that the evidence conclusively shows that an offer was made to the plaintiff by the defendant, which offer was accepted

Issue: Whether D made an offer

by the mailing of plaintiff's letter of April 15; that upon receipt of defendant's letter of April 8 the plaintiff had a reasonable time within which to accept the offer that had been made; that by his letter of April 15 and his starting of an escrow the plaintiff accepted said offer; and that the agreed statement of facts establishes that a valid contract was entered into between the parties. In his briefs the appellant assumes that an offer was made by the defendant, and confined his argument to contending that the evidence shows that he accepted that offer within a reasonable time.

There can be no contract unless the minds of the parties have met and mutually agreed upon some specific thing. This is usually evidenced by one party making an offer which is accepted by the other party. Section 25 of the Restatement of the Law on Contracts reads:

> If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer.

The language used in *Niles v. Hancock*, 140 Cal. 157 (1903), "It is also clear from the correspondence that it was the intention of the defendant that the negotiations between him and the plaintiff were purely preliminary," is applicable here. The correspondence here indicates an intention on the part of the defendant to find out whether the plaintiff was interested, rather than an intention to make a definite offer to the plaintiff. The language used by the defendant in his letters of March 26 and April 8 rather clearly discloses that they were not intended as an expression of fixed purpose to make a definite offer, and was sufficient to advise the plaintiff that some further expression of assent on the part of the defendant was necessary.

The advertisement in the paper was a mere request for an offer. The letter of March 26 contains no definite offer, and clearly states that it is a form letter. It merely gives further particulars, in clarification of the advertisement, and tells the plaintiff how to locate the property if he was interested in looking into the matter. The letter of April 8 added nothing in the way of a definite offer. It merely answered some questions asked by the plaintiff, and stated that if the plaintiff was really interested he would have to act fast. The statement that he expected to have a buyer in the next week or so indicated that the defendant intended to sell to the first-comer, and was reserving the right to do so. From this statement, alone, the plaintiff knew or should have known that he was not being given time in which to accept an offer that was being made, but that some further assent on the part of the defendant was required. Under the language used the plaintiff was not being given a right to act within a reasonable time after receiving the letter; he was plainly told that the defendant intended to sell to another, if possible, and warned that he would have to act fast if he was interested in buying the land.

Regardless of any opinion previously expressed, the court found that no contract had been entered into between these parties, and we are in accord with the court's conclusion on that controlling issue. The court's construction of the letters involved was a reasonable one, and we think the most reasonable one, even if it be assumed that another construction was possible.

The judgment is affirmed.

Disposition: Affirmed

GRIFFIN, J., and MUSSELL, J., concurred.

A petition for a rehearing was denied December 13, 1954, and appellant's petition for a hearing by the Supreme Court was denied January 19, 1955.

Holding: D's letters did not constitute an offer that could be accepted by P.

Reasoning: From D's letters, P should have known that an offer was not made and that further assent was required by D.

Case Brief: Lonergan v. Scolnick

CHAPTER I: ASSENT **pp. 59-62.**

Subchapter A: Offer and Acceptance

Section (1): What Constitutes an Offer?

NAME: *Lonergan v. Scolnick*, (California District Court of Appeal, Fourth District, 1954)

FACTS:

- (3/52) D placed ad in newspaper offering to sell 40 acres of land.
- P wrote to D about the ad.
- (3/26/52) D responded by letter with directions and stated that lowest price was $2,500 and that "this is a form letter."
- (4/7/52) P wrote back again to find out if he had found the right property.
- (4/8/52) D wrote that P had found the property and P better act quickly if he wanted to buy b/c D planned to have a buyer within a week.
- (4/12/52) D sold land to third party.
- (4/14/52) P received D's letter of the 8th.
- (4/15/52) P wrote to D agreeing to buy land for $2,500; P opened escrow.
- (4/28/52) D refused to deliver deed to P; land now worth $6,081.

PROCEDURE: Case submitted to Trial Court on stipulated facts. T. Ct. ruled that D made an offer of sale on 4/8/52, but that offer was conditioned on prompt acceptance by P which P did not do. Accordingly, T. Ct. held that there was no contract. T. Ct. entered judgment in favor of D. P appealed.

ISSUE: Did D make an offer to P?

HOLDING: Neither of D's letters constituted an offer. The language used in each of the letters reveals that they were not intended as an expression of fixed purpose to make a definite offer and that some further expression of assent on the part of the defendant was necessary.

REASONING: <u>Rule</u>: Restatement of Contracts Section 25 – no offer if person receiving the promise knows or has reason to know that person making it does not intend it as expression of fixed purpose without further assent.

From the language of the letters, P knew or should have known that an offer was not made and that some further assent on the part of D was required. D did not create the impression that he was making an offer: 1) He stated in his first letter that it was a form letter, and 2) he stated in his second letter that he was hoping to have a buyer soon. As a result, it was unreasonable for P to believe that D was holding open an offer exclusively for him.

On the other hand, if the letters had reasonably created the impression that an offer was being made, the court would probably have held D to the offer even if he did not mean to make one. After all, D is the one who controls his words, and if he is careless, P should not have to suffer.

DISPOSITION: Appellate court affirms T. Ct.'s decision in favor of D.

DISSENT: None.

CLASS NOTES:

TABLE OF CONTENTS*

* * *

 This is a portion of the Table of Contents from the popular Torts casebook: CASES AND MATERIALS ON TORTS (7th Ed.) by Richard A. Epstein.

CHAPTER 1. INTENTIONALLY INFLICTED HARM: THE PRIMA FACIE CASE AND DEFENSES
Section B. Physical Harms
2. Nonconsensual Defenses
e. Necessity

Vincent et al. v. Lake Erie Transp. Co.
109 Minn. 456, 124 N.W. 221 (1910).

Appeal from District Court, St. Louis County; J. D. Ensign, Judge.

Action by R. C. Vincent and others against the Lake Erie Transportation Company. Verdict for plaintiffs. From an order denying a new trial, defendant appeals. Affirmed.

Mr. Justice O'BRIEN delivered the Opinion of the Court:

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p.m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift a way from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In *Depue v. Flatau*, 10 Minn. 299, 11 N.W. 1, 8 L.R.A. (N.S.), 485, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In *Ploof v. Putnam*, 71 Atl. 188, 20 L.R.A. (N.S.) 152, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the ship owner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

Mr. Justice LEWIS, dissenting:

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

STUDY AIDS

Study aids are commercial products that can help you to learn class materials and succeed on exams. Study aids are offered by a number of major educational publishers, cover every possible area of the law, and can be purchased online or in most law school bookstores. While study aids are useful, the choices are endless and often expensive. In an effort to alleviate some of the guesswork, we have scoured the ranks of available publications to provide you with helpful advice on choosing the right study aids, when and where to purchase them, and, perhaps most importantly, how to use them.

WHAT TYPES OF STUDY AIDS ARE AVAILABLE?

Study aids typically fall into one of six categories: (1) Case Briefs; (2) Overview References; (3) Commercial Outlines; (4) Hornbooks and Treatises; (5) Practice Aids; and (6) Organizational and Multimedia Tools.

A. Case Briefs

Case briefs are short summaries of the cases in your casebooks. In fact, commercial case briefs are keyed directly to specific casebooks, precisely tracking the cases in the order they appear. Many students use commercial case briefs to help them speed up the reading/briefing process and make certain that they understand the relevance of particular cases.

The truth is that you don't need to buy case briefs to succeed in law school. As we discuss in prep course lectures, one of the most important factors to succeeding in law school is reading and briefing every case ***on your own***. If you do decide to purchase commercial briefs, then you must avoid the temptation (which will be great) to save time by relying on them as your primary source for the material covered in your casebook. Students must never substitute reading commercial case briefs for reading the cases themselves, or using commercial case briefs in place of creating their own briefs.

Recommendations For Case Briefs		
barbri | LAW PREVIEW	**When to buy:**	If you plan to buy commercial case briefs, then it is best to purchase them along with your casebooks at the beginning of each semester/quarter (August 15-October 1 in the Fall, or January 2-February 15 in the Spring), so you can use them as you read/brief your cases.
	What to buy:	The most popular commercial case briefs series are: √ Casenote Legal Briefs (Aspen Publishers) √ High Court Case Summaries (Thomson/West) √ Legalines (Thomson/West)

B. Overview References

Overview references are the most basic study aids. They consist of general summaries of distinct areas of the law and are available to cover each of the core first-year law school courses (such as Torts and Criminal Law) and most of the popular advanced law school courses (such as Corporations, Trusts and Estates, and Securities Regulation). These study aids offer "big picture" accounts of specific areas of the law and explanations of basic legal concepts. Overview references are best used at the beginning of the semester by students who are seeking a generalized understanding of the framework of their courses and are beginning to create course outlines. Overview references are not comprehensive enough to explain all of the nuances of each particular course.

West's *Nutshell* series and Aspen's *Examples & Explanations* series are both examples of overview references that are widely available online and in law school bookstores. The *Examples &*

Explanations series has become popular among law students because of its ability to explain complex legal doctrines in plain English. As its name suggests, the *Examples & Explanations* series also provides helpful examples and explanations of legal questions that can arise in the classroom, as well as on exams.

Recommendations For Overview References

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When to buy: The best time to buy overview references is during the first part of a semester (August 15-October 15 in the Fall, or January 2-March 15 in the Spring) so they can be used as a reference throughout the semester.

What to buy: Overview references have become increasingly popular in the last 10-15 years. Some of the most well-known series include:

√ Examples & Explanations (Aspen Publishers)
√ Nutshell (Thomson/West)
√ Introduction To Law (Aspen Publishers)
√ Understanding Law (Lexis/Nexis)
√ Concepts & Insights (Foundation Press)

C. Commercial Outlines

Commercial outlines are comprehensive guides that are designed to cover all of the specific cases and legal rules typically covered in the standard law school courses. Compared to overview references, commercial outlines are far more exhaustive in coverage and are less effective in providing "big picture" summaries of the particular courses. Rather, they seek to anticipate all of the materials that will be covered in a course. They present the material in a condensed, highly structured fashion, and they are often designed to parallel the materials presented in popular casebooks. Commercial outlines are useful for class preparation, and because they supply the structure and the "black letter" principles of the courses they cover, can lay the foundation for course outlines you create during exam preparation. As exhaustive as they may be, commercial outlines are no substitute for course outlines you specifically tailor to the materials and lectures your professors present, because the editors of commercial outlines can never anticipate all of the materials presented by an individual professor or the topics that receive special attention in a particular course. Accordingly, we believe that commercial outlines are helpful only when used in conjunction with your professor's course materials and your class lecture notes.

Recommendations For Commercial Outlines

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When to buy: The best time to buy commercial outlines is during the early to middle part of a semester (September 15-November 15 in the Fall, or January 31-April 15 in the Spring), so you can use them both to understand black letter law and to assist in preparing and refining your outlines.

What to buy: Some of the most popular commercial outlines include:

√ Emanuel Law Outlines (Aspen Publishers)
√ Gilbert Law Summaries (Thomson/West)
√ Black Letter Outlines (Thomson/West)

D. Hornbooks and Treatises

Hornbooks and legal treatises are exhaustive, narrative accounts of the general principles of law in the various branches of legal study written by respected scholars. While hornbooks and legal treatises are useful as study aids, these encyclopedic tomes are more appropriately characterized as "professional reference materials" because they are written for lawyers rather than law students. Thus, while they are convenient supplemental study aids, they are too comprehensive to be used as primary study materials.

For this reason, many students opt to not purchase hornbooks, and instead refer to the copies on reserve in their law library. One benefit to purchasing a hornbook during law school, however, is that you may continue to use it as a reference when you become a lawyer, which you are unlikely to do with other study aids.

Recommendations For Hornbooks and Treatises

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When to buy: The best time to buy hornbooks and treatises is during the first part of a semester (August 15-October 15 in the Fall, or January 2-March 15 in the Spring) so they can be used as a reference throughout the semester.

What to buy: Some of the most popular hornbooks and treatises include:

√ Hornbook Series (Thomson/West)
√ Concise Hornbook Series (Thomson/West)

E. Practice Aids

Practice aids help students practice the analytical skills they need to succeed on law school exams. Although understanding the law is critical to exam success, law school exams typically test a variety of other skills, including: (a) accurately identifying legal issues; (b) recalling the relevant law with speed; and (c) applying the law to a given set of facts efficiently and skillfully.

There are a number of commercial practice aids available to help students develop these skills. For example, many students have found Emanuel's *Law-In-A-Flash* series to be the most effective way to practice analytical skills. These flashcards do more than just help students memorize black letter rules; they also provide short hypothetical fact patterns that force students to apply those legal rules. The cards are arranged like an outline in topical form and are very effective in helping students to prepare for any exam format (*e.g.,* essay, short answer, or multiple-choice).

Similarly, Aspen's *Siegels* and *Glannon Guide,* and Kaplan/PMBR's *Finals* series are a few other excellent resources for self-quizzing. Available for most major subjects, each title works through key topics in a question-and-answer format. Sample multiple-choice questions and answers, as well as hypothetical fact patterns with model answers, allow you to practice for any exam format.

Because rule application is such a large part of any law school exam, we firmly believe that you would be committing "student malpractice" if you do not incorporate some practice aids into your regular study routine.

Recommendations For Practice Aids

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When to buy: Not surprisingly, the best time to buy practice aids is in the run-up to your exams (October 1-December 15 in the Fall, or March 1-May 5 in the Spring).

What to buy: Some of the most popular practice aids include:

√ Law-In-A-Flash Flashcards (Aspen Publishers)
√ Glannon Guide (Aspen Publishers)
√ BARBRI AMP
√ Siegels Essay & Multiple Choice Questions (Aspen Publishers)
√ Crunchtime (Aspen Publishers)
√ Questions & Answers (Lexis/Nexis)

F. Multimedia Study Aids & Organizational Tools

Students who learn best by listening find commercial audiotape lectures to be very helpful. These tapes are essentially commercial outlines that are narrated by law professors, and they provide an excellent opportunity to make productive use of your commute or time at the gym. The most popular audio series are West's *Law School Legends* or *Sum & Substance* series, and Aspen's *Fireside Chats*.

Apart from audio study aids, there are also products that help ease the day-to-day responsibilities of being a law student. Some students get overwhelmed when the voluminous notes they have taken, and the briefs they have created, become difficult to manage in a useful manner. Several companies have developed software products that allow students to organize and cross-reference all of their notes and briefs, and later to help create their course outlines. Assuming the software works as expected, early adoption of this type of technology can be a real timesaver later in the semester. If you plan to use software of this kind, however, we strongly encourage you to purchase it during the summer and get completely familiar with its strengths and limitations. Given that the learning curve in law school is already very steep, we would hate to have you arrive on campus with yet another skill to master or, worse, discover technical bugs later in the semester that might unnecessarily derail you from your path to success.

Recommendations For Audio Study Materials

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When to buy: The best time to buy audio study materials is during the second half of a semester (October 1-December 15 in the Fall, or March 1-May 5 in the Spring) when you are trying to reinforce what you already are learning in class.

What to buy: Some of the most popular audio series include:

√ Law School Legends (Thomson/West)
√ Sum & Substance (Thomson/West)
√ Fireside Chats (Aspen Publishers)

<u>HOW DO I FIND THE RIGHT STUDY AIDS?</u>

Study aids can be helpful in the quest for law school success, and all law students should at least consider investing in some commercial products. There are many products available, and they can be expensive, so it is important to give some thought to the products that are right for you. In addition to spending hundreds of dollars on casebooks, many students waste money investing in study aids that will get little use. Even worse, some students receive frustrating results because they waste time using study aids that are not properly suited for their courses or professors. Here are some tips on buying study aids:

<u>WHEN SHOULD I PURCHASE STUDY AIDS?</u>

Not too early, but not too late. On the one hand, there is no need to be hasty. Students who buy study aids too early in the semester, or even before law school begins, may waste their money on inappropriate products. At the beginning of the semester (or even during the summer if you have free time to read), you should consider buying general overview references to help you understand the course material, but you should otherwise hold off a few weeks before purchasing comprehensive study aids like commercial outlines and exam practice aids. Wait until you know which casebooks you will be using so you can determine if there are any study aids available that correspond to your casebooks. Give yourself some time to ease into your new life as a law student and to determine which commercial products are right for you.

Some law schools keep popular treatises, hornbooks, and even some commercial outlines on reserve in the law library. Thus, you may be able to take some of these commercial products for a “test drive” before making your purchases. Also, you should approach second- and third-year students who previously had your professor and ask which study aids they found most helpful. Many upper-class students – particularly those who enjoyed first-year success – readily offer valuable advice about the resources they used to achieve success in a particular professor’s class. You should also take some time to educate yourself about the options and to comparison shop to find the best deals. On the other hand, do not wait too long to purchase study aids. Students who wait until too late in the semester may not have time to gain the full benefit from their purchase.

LAW PREVIEW'S TOP PICKS

Below we have listed those study aids we think are particularly helpful to new law students taking the core first-year subjects.

VERY BEST CIVIL PROCEDURE STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: Civil Procedure	Glannon	Aspen
COMMERCIAL OUTLINE	- Emanuel Law Outline: Civil Procedure - Black Letter Outline Series: Civil Procedure	Emanuel Clermont	Aspen West
HORNBOOK & TREATISE	- Hornbook Series: Civil Procedure - Hornbook Series: Federal Courts	Friedenthal/Kane Wright	West West
ORGANIZATIONAL & MULTIMEDIA TOOLS	- Fireside Civil Procedure: An Audio Companion - Law School Legends: Civil Procedure - StudyDesk Briefing & Outlining Software	Glannon Miller n/a	Aspen West Aspen

VERY BEST CONSTITUTIONAL LAW STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: National Power & Federalism - Introduction to Law: Constitutional Law - Understanding Constitutional Law	Ides/May Chemerinsky Redlich/Schwartz	Aspen Aspen Lexis
COMMERCIAL OUTLINE	- Emanuel Law Outline: Constitutional Law	Emanuel	Aspen
HORNBOOK & TREATISE	- Hornbook Series: Constitutional Law	Nowak/Rotunda	West
ORGANIZATIONAL & MULTIMEDIA TOOLS	- Law School Legends (Audiotape): Constitutional Law - Legalines Software: Constitutional Law	Jeffries n/a	West West

VERY BEST CONTRACTS STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: Contracts - Concepts & Case Analysis In The Law Of Contract	Blum Chirelstein	Aspen Foundation
COMMERCIAL OUTLINE	- Emanuel Law Outline: Contracts - Black Letter Series: Contracts	Emanuel Calamari/Perillo	Aspen West
HORNBOOK & TREATISE	- Hornbook Series: Contracts - Hornbook Series: Corbin on Contracts, Student Edition	Calamari/Perillo Corbin	West West
ORGANIZATIONAL & MULTIMEDIA TOOLS	- Law School Legends (Audiotape): Contracts - Legalines Software: Contracts	Epstein n/a	West West

VERY BEST CRIMINAL LAW STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: Criminal Law - Understanding Criminal Law	Singer/La Fond Dressler	Aspen Lexis
COMMERCIAL OUTLINE	- Emanuel Law Outline: Criminal Law - Black Letter: Criminal Law	Emanuel Low	Aspen West
HORNBOOK & TREATISE	- Hornbook Series: Criminal Law	La Fave	West
ORGANIZATIONAL & MULTIMEDIA TOOLS	- Law School Legends (Audiotape): Criminal Law - Legalines Software: Criminal Law	Whitebread n/a	West West

VERY BEST PROPERTY STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: Property - Understanding Property Law	Burke/Snoe Sprankling	Aspen Lexis
COMMERCIAL OUTLINE	- Gilbert Law Summaries: Property - Emanuel Law Outline: Property (Keyed to Dukeminier/Krier)	Dukeminier Emanuel	West Aspen
HORNBOOK & TREATISE	- Hornbook Series: The Law of Property	Stoebuck	West
ORGANIZATIONAL & MULTIMEDIA	- Law School Legends (Audiotape): Real Property	Franzese	West

VERY BEST TORTS STUDY AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
OVERVIEW REFERENCE	- Examples & Explanations: Torts - Introduction to Law Series: Torts	Glannon Epstein	Aspen Lexis
COMMERCIAL OUTLINE	- Emanuel Law Outline: Torts - The Professor Series: Torts	Emanuel Finz	Aspen Aspen
HORNBOOK & TREATISE	- Hornbook Series: Prosser & Keeton on Torts	Prosser & Keeton	West
ORGANIZATIONAL & MULTIMEDIA TOOLS	- Legalines Software: Torts	n/a	West

LAW PREVIEW'S TOP EXAM PRACTICE AIDS PICKS

As we stress during our prep course lectures, the most successful students spend the months leading up to the exam not only learning the law, but also practicing its application. Below are titles that we believe are the most helpful exam practice aids.

VERY BEST EXAM PRACTICE AIDS			
Type of Study Aid	**Title**	**Author**	**Publisher**
COMPLETE FIRST YEAR SETS	- Law-In-A-Flash First Year Set - Siegel Essays & Multiple Choice First Year Set - Emanuel's First Year Questions & Answers	n/a Various Emanuel	Aspen Aspen Aspen
CIVIL PROCEDURE	- Law-In-A-Flash: Civil Procedure - Glannon Guide For Civil Procedure - Questions & Answers for Civil Procedure - BARBRI AMP: Civil Procedure	n/a Glannon Dorsaneo/Thornburg n/a	Aspen Aspen Lexis BARBRI
CONSTITUTIONAL LAW	- Law-In-A-Flash: Constitutional Law - Siegel Essays & Multiple Choice For Constitutional Law - Questions & Answers: Constitutional Law - BARBRI AMP: Constitutional Law	n/a n/a McGreal/Eads n/a	Aspen Aspen Lexis BARBRI
CONTRACTS	- Law-In-A-Flash: Contracts - Siegel Essays & Multiple Choice For Contracts - Questions & Answers: Contracts - BARBRI AMP: Contracts	n/a n/a Rowley n/a	Aspen Aspen Lexis BARBRI
CRIMINAL LAW	- Law-In-A-Flash: Criminal Law - Glannon Guide For Criminal Law - Questions & Answers: Criminal Law - BARBRI AMP: Criminal Law	n/a Levenson Levine/Marcus n/a	Aspen Aspen Lexis BARBRI
PROPERTY	- Law-In-A-Flash: Real Property & Future Interests - Siegel Essays & Multiple Choice For Property - Questions & Answers: Property - BARBRI AMP: Real Property	n/a n/a Nagel n/a	Aspen Aspen Lexis BARBRI
TORTS	- Law-In-A-Flash: Torts - Siegel Essays & Multiple Choice For Torts - Questions & Answers: Torts - BARBRI AMP: Torts	n/a n/a Bernstein/Leonard n/a	Aspen Aspen Lexis BARBRI

EXAM-TAKING STRATEGIES

PART I: THE BASICS

Before discussing the specific techniques that you should employ when analyzing hypothetical fact patterns on your exams, it is important to discuss fundamental exam-taking principles that the most successful law students understand.

WHAT IS EXPECTED OF YOU

To excel on law school essay exams, you must rid yourself of two common misconceptions: (1) knowing the black letter law alone will earn you a top grade; and (2) arriving at the "correct" conclusion to each exam question is all that stands between you and membership on the Law Review.

A. Knowing the Law Is Not Enough

While you must master the black letter law in each of your courses, the ability to recite rules will not be enough to help you earn the top grades. Because of the competitive law school environment, most students walk into finals having studied and memorized the same rules as their classmates. Because of this common knowledge base, rote memorization and the ability to recall the law quickly is not enough to separate the top students from the rest of the class.

Law school exams test the analytical skills lawyers use, and, like lawyers, professors expect students to do more than recite the black letter law. A client never asks his attorney simply to recite the elements of an intentional battery, or to provide the elements of a case for adverse possession. Instead, clients come to lawyers with stories. Lawyers are paid to sift through a client's account of what happened and identify those facts that give rise to disputes for which the law may provide a remedy. Then, lawyers anticipate arguments for and against the application of a particular legal rule and advise their clients of how a court would likely resolve the dispute. You have a similar job to perform on your law school exams.

B. Often There Is No "Correct" Response to an Exam Hypothetical

In an attempt to replicate what happens in legal practice, law professors create hypothetical fact patterns that give rise to legal disputes. Because there are two sides to every dispute, law professors often provide some facts in favor of each party to a dispute. In Criminal Law, professors will often provide facts asserting the commission of a crime but will also provide the facts that can be used as a defense. Consequently, there typically is no clear-cut "correct" response, and a student's conclusion usually receives few, if any, points.

Because each student memorizes the same legal rules and there is often no single correct answer to an exam question, you may wonder what differentiates top students from average students. Top students distinguish themselves by the sophistication of their analysis. Top students understand that professors test their ability to perform like a lawyer. Top students know that their professors expect them to identify the legally significant facts, apply the legal rules studied during the semester, and make predictions about what may happen in a court of law. While professors want students to arrive at reasonable conclusions, they award the most points in recognition of a student's ability to identify the arguments that either support or undermine their conclusions.

Simply put, in addition to memorizing black letter law, top students develop and hone their ability to analyze legal problems like a lawyer. The following four skills are essential to exam success:

1. Identifying legally significant facts that give rise to disputes between parties;
2. Identifying the legal principles that the parties will assert to resolve their disputes;
3. Identifying the arguments the parties will make in support of, and against, the application of those principles; and
4. Writing an essay that communicates this information easily and effectively.

These four skills are the focus of Law Preview's Exam-Taking Strategies Workshop and of this section of the course materials.

PROPER USE OF THE READING PERIOD

Law schools typically provide a reading period after classes end and before exams begin for students to study for their finals. The length of the reading period varies from school to school, but typically lasts from four to 10 days. (*See* Figure A.)

Before your reading period begins, you must set a schedule and apportion the study time you devote to each of your classes. Remember, all classes are ***not*** weighted equal. The number of credits your law school assigns to each class determines its weight in your grade point average. For example, during a semester you may take four courses totaling 14 credits: Torts and Property for four credits each, and Civil Procedure and Criminal Law for three credits each. In this case, the Torts and Property classes are each worth almost 30% of your overall grade point average, and Civil Procedure and Criminal Law are each worth about 20%. As a result, you should spend more time preparing for your Torts and Property exams – after all, they mean more to your overall grade and class rank. If there are 10 days in your reading period, about 60% (six full days) would be devoted, in equal parts, to Torts and Property, and only about four days would be split between your remaining two three-credit classes.

This point is further illustrated by considering the grades you may receive in each of those classes. Assume you receive two four-credit A's in Property and Torts, and two three-credit B's in Civil Procedure and Criminal Law. On a classic four-point scale, your overall GPA would be 3.57. If, on the other hand, you earned A's in Criminal Law and Civil Procedure, and B's in Torts and Property, your GPA would only be 3.43. While both of these GPAs are impressive, the difference between the two is significant because, at many schools, the cutoff for Dean's List and for graduation honors is a GPA of 3.50. In addition, the distinction of earning a membership on the Law Review can hinge on 1/100th of a point. Accordingly, to optimize your chances for success, you must apportion your study time based on your course credit distribution.

Once you have allocated your time, how do you spend it? Many of your classmates will make the mistake of spending the reading period creating course outlines because they believe that outlining is the best way to prepare for exams. Do not fall into this trap. An excellent outline will not earn you an excellent grade. As you know, a course outline is a single document that contains a synthesis of all the cases you reviewed during the semester, together with your class notes and other relevant materials. Detailed course outlines are necessary study aids because they help you get your arms around all of the material you have covered and they assist you in learning and remembering the applicable legal principles in each of your courses. The process of compiling a course outline will help you to learn the law, but it should never overtake the more important task of practicing your legal application skills.

FIGURE A - SAMPLE CALENDAR

DECEMBER						
SUNDAY	**MONDAY**	**TUESDAY**	**WEDNESDAY**	**THURSDAY**	**FRIDAY**	**SATURDAY**
28	29	30	1	2	3	4
WORK ON OUTLINES & DAILY CLASS ASSIGNMENTS	**USE CLASS CREDITS TO PRIORITIZE REMAINING STUDY DAYS**	**FINISH OUTLINES** **CLASSES END**	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS
5	6	7	8	9	10	11
STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES **NO STUDYING AFTER 5PM**	**1ST EXAM**	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES **NO STUDYING AFTER 5PM**	**2ND EXAM**	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS
12	13	14	15	16	17	18
STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES **NO STUDYING AFTER 5PM**	**3RD EXAM**	STUDY FROM OUTLINES TAKE & REVIEW MODEL EXAMS	STUDY FROM OUTLINES **NO STUDYING AFTER 5PM**	**4TH EXAM**	
19	20	21	22	23	24	25
26	27	28	29	30	31	1

You should create your course outline on an ongoing basis throughout the semester to help reinforce your learning. Your outline must be completed ***before*** the reading period begins in order for you to benefit from the exercise. Your course outline will be lengthy (perhaps 10 to 30 or 40 pages), but it will also be of little utility unless there is ample opportunity to study it. Top students use the reading period to absorb the information they compiled during the semester by using the active study techniques that worked for them in college: using mnemonics and flashcards, reformatting their outlines into flow charts, or condensing them down onto four or five handwritten pages that can be committed to memory. You cannot do any of these things effectively if you spend the entire reading period creating your course outlines.

In addition, you need plenty of time during the reading period to practice legal application skills. Your professors will test your ability to ***apply*** legal rules. To develop these legal application skills, you must repeatedly take practice exams and work with hypothetical fact patterns. For optimal success, you must engage in these activities during the reading period, after you fully understand the significance of every rule covered by your course syllabus and how those rules interrelate.

On the Day Before Your Exam . . .

To perform your best on your law school exams, it is important to be well-rested. Your energy level will affect your ability to think clearly and recall the law with speed. If you follow the schedule we propose, you should be finished preparing for each of your exams one day early. This means you have finished reviewing and refining your outline, you have memorized the black letter law, and you have taken a number of practice tests. During the afternoon before each exam, you should spend your time relaxing and simply thinking about what you have studied and how the specific rules work together to further advance societal goals.

You may feel compelled to study up until the very moment your exam begins. Fight this temptation. At some stage, you will reach the point of diminishing returns and your efforts will begin to work against you. Plan to stop studying at approximately 5 p.m. the day before your exam and do something for yourself that takes your mind off the next day's challenge. Instead of studying until the wee hours of the morning, it is probably more constructive to have a good dinner, see an early movie, and get a good night's rest. Before you go to bed, do not forget to set your alarm and, as a backup, you may want to ask a family member or friend to give you a wake-up call.

On the Day Of Your Exam . . .

Prepare a healthy breakfast. We suggest that you dress in layers to ensure comfort no matter what the temperature in the classroom. Arrive at the testing site at least 20 minutes prior to the start of your exam. Find a seat and get comfortable with your surroundings.

Under no circumstances should you talk to your classmates about the subject matter before the test. Some nervous students love to reassure themselves by posing questions about discrete points that can sow the seeds of doubt in the minds of their classmates. There is nothing to be gained by engaging in this discourse. If you have not learned the law by the day of the exam, you are not going to figure it out in the minutes before the test. Participating in a conversation about a fine point of law that will probably not appear on the exam can undermine your confidence by calling into question your level of understanding.

Similarly, after the test ends, shun classmates who want to talk about the issues tested. Comparing answers is pointless and, again, can undercut your overall confidence. Put on your headphones, walk out of the test, and begin to focus on your next exam.

PART II: STRATEGIES FOR CONQUERING LAW SCHOOL EXAMS

Drafting an organized, well-reasoned answer on a law school essay examination is more of a science than an art. Students who demonstrate style, creativity, and reflection will earn some benefit. However, the students who score the most points are those who employ a methodical – almost mechanical – approach to analyzing hypothetical fact patterns. Students who discipline themselves and practice the following critical exam-taking strategies will have the techniques to conquer any exam hypothetical.

EXAM-TAKING STRATEGY #1
MANAGE YOUR TIME

The most significant difference between the type of legal analysis lawyers use in practice and law students use during examinations is the amount of time that each has to analyze the questions presented. In practice, attorneys usually take their time to research each discrete issue so that they can provide the most complete and intelligent advice to their clients. By contrast, law school exams are frequently administered under extreme time pressure. Law students must master the rules and guiding principles of an entire legal subject and apply those rules to the numerous issues a busy hypothetical fact pattern raises – all within an incredibly short amount of time. It is difficult for a law student to score all of the points available on a law school exam. Indeed, most students could spend days trying to write the perfect answer. Unfortunately, they are not afforded that luxury.

The good news is that you do not have to write a perfect answer to receive a top grade. Law school exams are scored on a curve, so it is the best – not the perfect – answer that receives an A grade. If a fact pattern raises 20 issues that merit discussion and you fully analyze only 10, then you will still receive an A so long as your classmates discussed nine or fewer issues. As a result, your goal is simply to score more points than anyone else does. This requires speed in identifying issues, a quick recall of the applicable legal rules, and clarity in communicating your analysis.

With so much to do in such a short amount of time, effective time management is imperative. Budgeting your time so that you can finish the test is the very first step to exam success. In fact, many times simply finishing the exam is enough to distinguish your answer from those of some of your classmates.

Professors rarely ask students to budget their own time on the exam and will typically assign time guidelines (or point allocations) for each section of the examination. In order to receive full credit, you ***must*** adhere to your professor's recommended time limits. Unfortunately, many students will "borrow" time from later sections of the test in order to write more complete answers in earlier sections. Exceeding the allotted time on a particular section is a flawed strategy because it deprives you of the opportunity to achieve full credit on later sections of the test. Moreover, perfection on any single question is not your goal. Remember, given the time constraints, it is difficult to write perfect exam answers. You simply want to write a set of answers that, as a whole, are better than your classmates' answers. The proper strategy requires that you spend sufficient time on each question so that you do not miss the opportunity to accumulate easy points on later questions.

Do not be misled into thinking that impressive answers to the earlier sections of the exam will convince the professor that you have mastered the law and, therefore, are more capable than your less-than-perfect answers in later sections demonstrate. Grading in law school is purely objective, and most professors adhere to rigid grading formulas that allocate points based on certain anticipated responses. Professors will not assume that you would have successfully answered unfinished sections based on prior, more complete answers. To do so would unfairly penalize those students who followed the time recommendations and completed the exam, but did not write the most complete answers on earlier sections.

<u>MACRO TIME MANAGEMENT</u>

Effective time management requires that you first determine how much time you have for the entire exam. You should ascertain this information from your professor well before exam day, and you should confirm how much time you have by reading the general directions usually set forth on the front page of your exam booklet. Next, quickly flip through each section of the examination. If the professor recommends how much time to spend on each part, add up the minutes and compare it to the total time for the exam. Occasionally, a professor will provide students with extra time (*i.e.*, when the sum of the recommended time from the individual parts is less than the time allotted for the entire exam). It is helpful to know before you begin the exam whether you have additional time to use at your discretion.

If, instead of providing time recommendations, your professor assigns points to each section of the exam, you should total the points for all the sections and then divide that number into the total minutes you have for the test. This formula allows you to convert those points into minutes. For example, suppose you have three hours (*i.e.*, 180 minutes) to answer three separate sections worth 10, 40, and 50 points respectively. You should spend 18 minutes on the section worth 10 points, 72 minutes on the 40-point section, and 90 minutes on the final 50-point section. By converting points into minutes, you will enable yourself to spread your efforts evenly across your exam and you will maximize your ability to manage your time.

Because of your time constraints, you should spend only one minute on this macro time management step.

<u>MICRO TIME MANAGEMENT</u>

Once you have determined how much time you have for each section of your exam, you must follow these time limits. Managing time on law school essay questions presents more of a challenge than managing time on multiple-choice or short-answer questions. For each hypothetical, you must budget time for reading the interrogatory and fact pattern, identifying disputes and outlining arguments, and, finally, drafting your response.

Effective time management not only allows you to finish the test, but it also improves the quality of your answers to individual questions. As soon as you have finished reading each hypothetical fact pattern, your inclination will be to start writing because you will readily spot relevant disputes that merit discussion. You must resist this temptation and start methodically deconstructing the fact pattern so that you do not overlook important issues.

For each hypothetical fact pattern you encounter, spend one-fourth of your time identifying disputes and outlining arguments. The remaining three-fourths of the time should be spent drafting your response. Because you will be under a lot of pressure during the exam, do not rely entirely on your memory to control your time allocation. Before you begin reading the hypothetical fact pattern, write down three different times at the top of the page: (1) when you begin reading the fact pattern, analyzing, and outlining your response; (2) when you must begin writing your response (*see* Figure B), and (3) when you must finish writing and move on to the next section.

FIGURE B

PRACTICE TORTS HYPOTHETICAL
60 MINUTES

Begin Analyzing: 2:00PM
Begin Writing: 2:15PM
End Writing: 3:00PM

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

* * *

EXAM-TAKING STRATEGY #2
READ THE INTERROGATORY FIRST

At the end of each hypothetical fact pattern (or sometimes at the beginning), you will receive important instructions about how to respond. This section is often referred to as the "interrogatory" or the "call of the question." In the interrogatory, you may learn details about the jurisdiction in which the story took place (*e.g.,* model penal code jurisdiction vs. common law jurisdiction). You also may be asked to assume a role (*e.g.,* attorney for plaintiff, judge, law clerk), and you may be directed how to limit your response (*e.g.,* discuss the rights and liabilities of ***all*** parties vs. identify ***one*** party's best claims or defenses).

After allocating your time (Strategy #1), your next step is to scrutinize the interrogatory and follow its directions. Your professor will award points only for those portions of your answer that fall within the limitations of the interrogatory; again, to award points for an answer that falls outside the call of the question would unfairly penalize students who followed the instructions. By failing to follow the interrogatory's instructions, you will waste precious time by writing about disputes and issues that will not raise your grade.

Take a moment and review the practice Torts exam question in Figure C; locate the interrogatory first and then read the fact pattern. This example demonstrates why it is wise to locate and read the interrogatory before delving into the hypothetical. The interrogatory in Figure C instructs the examinee to focus on Cindy's claims against the other actors. The interrogatory makes it clear that you are not expected to address legitimate claims that other parties may have against each other (*e.g.,* General Hospital's indemnification claim against the manufacturer of the Claws of Life, Burger Prince's indemnification claim against DollCo, etc.). By reading the interrogatory before the hypothetical, you can avoid being sidetracked by contemplating these valid, yet extraneous, claims.

Notice also that sometimes an interrogatory's silence can be just as informative. For example, in Figure C, the professor fails to identify the controlling jurisdiction. This omission invites astute exam takers to accumulate even more points by addressing both majority and minority rules if their application would result in a different outcome.

FIGURE C

PRACTICE ~~TORTS HYP~~OTHETICAL
60 MINUTES

Begin analyzing: 2:00PM
Begin writing: 2:15PM
End writing: 3:00PM

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

Dr. Green's first attempt to remove the object using the Heimlich Maneuver was unsuccessful, and resulted in two fractured ribs. He next decided to use "The Claws of Life," which is a widely used and accepted medical device designed to remove small objects from children's throats. After Dr. Green carefully inserted the device into Cindy's mouth and applied the normal amount of pressure to the handle of the device, it unexpectedly broke off in Cindy's mouth, cracking four of her teeth and cutting her tongue. Dr. Ross, who was on call at the hospital that day, arrived on the scene and successfully removed the head of a popular action figure doll from Cindy's esophagus. The action figure, the prize in a kid's meal promoted by the popular fast food restaurant Burger Prince, came in packaging that specifically stated it was intended for children ages five and older. DollCo, a company that produces and distributes promotional products and kid's toys, manufactured the action figure using a design that did not include a removable head.

Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims Cindy can assert.

EXAM-TAKING STRATEGY #3
IDENTIFYING AND FRAMING DISPUTES THAT SEEK RESOLUTION

Our legal system is adversarial – that is, it pits litigants against one another in a search for truth and justice. The system is designed to avoid the potential for physical violence by providing people with a forum for resolving disputes. As a result, a basic prerequisite for litigants entering the legal system is that they have a legitimate dispute that requires resolution. The hypothetical fact patterns that make up law school exams are designed to present such legitimate disputes. Strategy #3 is for you to identify those legitimate disputes – ones that are both presented by your hypothetical fact pattern and within the parameters of the interrogatory – and then to describe the disputes concisely. This requires you to identify: (1) the parties to a dispute; (2) the goals of the parties; and (3) a recognized legal theory for relief and any relevant defenses.

DEFINING THE PARTIES TO A DISPUTE

Trying to read and analyze an exam hypothetical as a whole is like trying to consume a 16oz Porterhouse in one bite: It is impossible and causes many students to choke. Successful students deconstruct fact patterns, breaking them down into "bite-sized" parts – individual disputes that can be analyzed in isolation. The easiest way to break down your fact patterns is to begin by identifying the parties to a dispute and their specific goals.

In civil actions, the ***plaintiff*** (the party seeking to enforce a right) bears the responsibility of commencing the action, asserting a legal theory for recovery, producing factual evidence to support his claims, and persuading the jury in cases involving a jury trial. In criminal actions, the prosecutor, as a representative of the people, commences the action against a criminal defendant and has the burden of persuading a jury that the defendant is guilty of the charges beyond a reasonable doubt. Our system of justice is built upon the belief that the truth will emerge from a trial directed by interested parties – plaintiffs or prosecutors who commence the action to enforce a legal right, and defendants who seek to avoid civil or criminal liability. Every matter that results in litigation is rooted in the simple premise that one party feels aggrieved by another party's acts (or sometimes omissions) and asks the court to take action.

As a result, the first step in your analysis is to identify the parties to a dispute. You can usually identify potential civil plaintiffs by considering the following questions: Who has something to complain about? Who has suffered economic loss? Who has suffered physical harm? Who is outraged or offended? These are your likely plaintiffs. You can usually identify potential civil defendants by considering the following questions: Who conceivably could be blamed for the plaintiff's unhappy state? Who may have done something wrong? Who arguably contributed to the harm or loss? Who made the harm or loss worse? Who has money? These are your likely defendants.

Although it is most common to discuss the parties in the context of civil litigation (*i.e.,* plaintiff vs. defendant), realize that your analysis is the same whenever a party petitions the court to take action (*e.g.,* movant vs. nonmovant in procedural and evidentiary matters, tenant vs. landlord or bailor vs. bailee in property matters, state vs. defendant in criminal matters). Therefore, in some of your classes it may be constructive to think in terms of the ***initiating party*** (the party who first petitions the court for relief) and the ***opposing party*** (the party who opposes that request for relief), instead of thinking in terms of plaintiff vs. defendant.

<u>DEFINING THE GOALS OF THE PARTIES</u>

Parties resort to litigation because they want the government, embodied by the court, to award them a remedy that will redress a wrong they have suffered. A party who feels aggrieved by another's actions will petition the court to redress that injury in a specific manner, and the other party will argue against the proposed remedy. Potential remedies are vast and may include monetary awards, injunctions, declarations, specific performance, and criminal sanctions, to name a few. Focusing on the parties' objectives in litigation will help you to identify the subject matter of the dispute, which will help you to define the possible legal theories for relief. Therefore, in framing your disputes, it is useful for you to identify the goals of the parties.

Subject	Initiating Party's Goals	Opposing Party's Goals
Torts	Consumer seeks money for injuries	Manufacturer seeks to avoid liability
Contracts	Subcontractor seeks unpaid money	Contractor seeks to avoid liability
Property	Squatter seeks to acquire property	Landowner seeks to keep property
Criminal Law	State seeks to put drunk driver in jail	Drunk driver seeks an acquittal
Civil Procedure	Nonmovant seeks to prosecute action	Movant seeks to dispose of action

<u>IDENTIFYING A RECOGNIZED LEGAL THEORY</u>

After you have identified the parties to the dispute and their goals, you must identify the legal theory (or theories) that the parties might assert to achieve their objectives. However, you cannot identify all disputes that legitimately require resolution simply by identifying potential litigants and defining their objectives. Unfortunately, the law does not offer a remedy for every wrong. For example, a potential litigant may be offended by a rude gesture from her neighbor, or a supply company may lose a business deal because a competitor underbids his rate. Both situations involve someone feeling injured, but if the law does not recognize the injury as one that can be redressed by the courts, then resorting to litigation would be frivolous. Because the law does not provide redress for every loss, plaintiffs must identify a recognized ***legal theory*** (*i.e.*, cause of action) that, if proved, would entitle them to relief. On the other hand, sometimes the law provides for circumstances in which a defendant may avoid the relief sought by the plaintiff despite the fact that the plaintiff has proven the existence of a legal theory for relief. As you know, a legal theory that justifies the relief sought by the plaintiff is often called the "cause of action," and a legal theory that enables a defendant to avoid the requested relief is called a "defense" to the cause of action. To properly identify and frame a dispute, then, you must identify a legal theory that entitles the plaintiff to relief (a cause of action) and any corresponding legal theory by which the defendant might avoid the desired relief (any defenses).

It is at this point that many students experience frustration. After an entire semester of studying, students expect legal theories to jump off the page, but it is never that simple. Identifying an applicable legal theory can be quite difficult because it requires you to understand the nature of the wrong that the plaintiff perceives by examining the factual circumstances from the perspective of both the plaintiff and the defendant. Such a factual examination should lead you to any applicable legal theories.

Legal theories, including both causes of action and defenses, are composed of ***elements*** – factual circumstances that, if proven to exist, allow a court to exercise its power and grant relief to the aggrieved party. By looking for elements that trigger the various legal theories as you examine the facts surrounding the dispute, you will be able to identify the legal theories that may govern this case. In other words, by recognizing the facts that constitute elements of legal theories scattered throughout the fact pattern, you should be able to piece together the applicable legal theories that further the parties' interests.

Consider the cause of action for battery – perhaps the simplest theory for recovery in tort. A ***cause of action*** for battery exists when there is: (1) an ***intentional*** infliction of (2) a ***harmful or offensive*** (3) ***bodily contact***. A ***defense*** to tortious battery exists where there is ***consent*** to the bodily contact at issue. Each of these elements describes facts that, combined, make up the intentional tort of battery. As you read your Torts exam, you should be prepared to identify all instances in which ***bodily contact*** was arguably made and then be prepared to recognize facts that could show that the possible contact was both ***harmful or offensive*** and ***intentional***. All the while, you should be conscious of any facts that could show that the plaintiff ***consented*** to the contact. Where the hypothetical presents these factual circumstances, you are prepared to frame the dispute, provided, of course, that the dispute falls within the parameters of the interrogatory.

FIGURE D

A cause of action for battery exists when there is:

legal theory for recovery

(1) An *intentional* infliction of
- a. TEST: If the defendant intended to make contact with the plaintiff, then a court must find that the defendant satisfied the "intent" element.
- b. ALTERNATIVE TEST: If the defendant intended to commit a battery on someone else, but accidentally made contact with the plaintiff, a court must find the defendant satisfied the "intent" element.

factual elements that establish the legal theory

(2) A *harmful* or *offensive*
- a. TEST FOR HARMFUL: If a contact caused physical pain, then a court must find that the defendant satisfied the "harmful" element.
- b. TEST FOR OFFENSIVE: If a contact is such that a reasonable person not unduly sensitive to his dignity would have been offended, then a court must find that the defendant satisfied the "offensive" element.

(3) *Bodily contact*.
- a. TEST: If the defendant, or an instrumentality under the defendant's control, made contact with the plaintiff's body, a court must find that the "contact" element has been satisfied.
- b. ALTERNATIVE TEST: If the defendant, or an instrumentality under the defendant's control, made contact with the plaintiff's clothes, or something she is holding, but did not make actual contact with the plaintiff's body, the court must find that the "contact" element has been satisfied.

Sometimes it is difficult to determine whether an element of a legal theory exists. The law has developed ***legal tests*** or ***standards*** to determine whether these factual elements exist. You must remember the legal tests or standards that you have learned when searching your exams for facts that comprise elements of the applicable legal theories.

As you read the fact pattern, understand that every word may have legal significance. Carefully sift through the story and ask yourself, "Why is this fact here?" "What is the significance of this date?" and "Does the relationship between the parties have any importance?" While reviewing the fact pattern, compare each fact with your mental checklist of key elements that trigger legal theories. Once you start looking for elements, the legal theories should become evident. For this reason, a mastery of the elements (*e.g.,* black letter law) is critical if you want to excel.

In the following chart, we have substituted the subject matter of the plaintiff's claim with a more specific legal theory of recovery, thereby further framing the dispute:

Legal Theory	Initiating Party's Goals	Opposing Party's Goals
Products Liability	Consumer seeks money for injuries	Manufacturer seeks to avoid liability
Breach of Contract	Subcontractor seeks unpaid money	Contractor seeks to avoid liability
Adverse Possession	Squatter seeks to acquire property	Landowner seeks to keep property
Manslaughter	State seeks to put drunk driver in jail	Drunk driver seeks an acquittal
Motion to Dismiss	Nonmovant wants to prosecute action	Movant seeks to dispose of action

FRAMING YOUR DISPUTES

Once you have identified the parties to the dispute, their goals, and the applicable legal theories, it is time to frame the dispute in words. A framed dispute is a question that contains each part of the dispute that you have identified: (1) the parties to the dispute; (2) the goals of each of the parties; and (3) the legal theory that the initiating party will use to accomplish its objective.

Subject	Framed Issue
Torts	Whether Consumer can successfully assert a products liability cause of action against Manufacturer and recover money for her injuries.
Contracts	Whether Subcontractor can successfully recover unpaid money from Contractor using a breach of contract theory.
Property	Whether Squatter can acquire Blackacre from Landowner by adverse possession.
Criminal Law	Whether State can convict Drunk Driver using a theory of Manslaughter.
Civil Procedure	Whether Movant can successfully move to dismiss Nonmovant's complaint using Fed. R. Civ. P 12(b).

By framing the dispute, you now have a question to answer where one did not exist before. By framing the various disputes using the legal theories that the parties may assert to achieve their goals, students have taken the first step toward identifying issues the professor wants analyzed.

However, framing the dispute does not necessarily mean that you have spotted "the issue." When resolving disputes you will encounter points of disagreement about whether the proffered legal theory will resolve the dispute. Each point of disagreement represents an ***issue*** that needs to be addressed by argument from the parties. Just like smoke signals fire, if you are looking for ***issues*** (fire) you must follow the ***disputes*** (smoke). If, however, there is no disagreement (*i.e.*, the opposing party has no arguments against the application of a legal theory), then the dispute itself is ***the issue***.

Practice spotting and framing disputes using the Torts hypothetical in Example 1 which follows. Sample responses can be found in Appendix A.

EXAMPLE 1

PRACTICE TORTS HYPOTHETICAL
(60 MINUTES)

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

Dr. Green's first attempt to remove the object using the Heimlich Maneuver was unsuccessful, and resulted in two fractured ribs. He next decided to use "The Claws of Life," which is a widely used and accepted medical device designed to remove small objects from children's throats. After Dr. Green carefully inserted the device into Cindy's mouth and applied the normal amount of pressure to the handle of the device, it unexpectedly broke off in Cindy's mouth, cracking four of her teeth and cutting her tongue. Dr. Ross, who was on call at the hospital that day, arrived on the scene and successfully removed the head of a popular action figure doll from Cindy's esophagus. The action figure, the prize in a kid's meal promoted by the popular fast food restaurant Burger Prince, came in packaging that specifically stated it was intended for children ages five and older. DollCo, a company that produces and distributes promotional products and kid's toys, manufactured the action figure using a design that did not include a removable head.

Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims that Cindy can assert.

EXAM-TAKING STRATEGY #4: SPOTTING ISSUES & ARGUMENTS

If you have sought exam-taking advice from other law students, you have undoubtedly heard, "All you have to do is 'issue spot.'" While partially true, this truncated advice offers very little guidance for most students because it assumes that they know what an issue is, and how to spot one. Most egregiously, this advice fails to address what students should do once they spot an issue.

Issues are legitimate points of disagreement between litigants about whether a particular legal theory governs their dispute. An issue arises when there is a question about the strength of a litigant's claim for relief – one party literally "***takes issue***" with the other's theory and makes arguments against its validity. Most simply put, an issue is the weak spot in a plaintiff's claim or in a defendant's defense; it is the point on which the success of the legal theory hinges, and it is where the parties will concentrate their arguments.

Chaotic fact patterns create doubts about the applicability of a legal rule. The confusion that hypotheticals often create makes it nearly impossible to spot discrete legal issues without first understanding the parties' general conflict; therefore, you must always first frame the dispute (Strategy #3). Once the dispute has been framed and a legal theory has been asserted, it is easier to identify problems surrounding the theory's application – to spot the issues – as well as to detect the arguments that each party can raise.

In some cases, your job will be relatively easy. You will identify a theory or cause of action that a litigant might assert, list the elements of the cause of action, and discuss the factual arguments that each party will use to establish those elements, or to imply that one is missing. Other times, disputes might require more sophisticated legal or policy arguments. Regardless of the complexity of the issues you encounter, you must become familiar with the types of arguments ***both*** parties can make and be prepared to make a case for ***both*** positions.

TYPES OF ARGUMENTS

An old legal maxim states: "First argue the facts. If the facts are not on your side, argue the law. If neither the facts nor the law is on your side, argue public policy." When resolving disputes, you should consider all three types of arguments, in that order.

A. Factual Arguments

Factual arguments support (or refute) the elements of a legal theory. Because every legal theory contains ***elements*** – factual circumstances that must be established before a court can exercise its power and grant relief – initiating parties must prove the facts that satisfy each element of their legal theory. By contrast, opposing parties must scrutinize the factual circumstances alleged by their counterpart to determine if there are any arguments against their existence.

1. Identifying Missing Facts

After identifying and framing a dispute (*see* Strategy #3), you must set forth those facts the initiating party will use to establish its claim for relief. Review the fact pattern and determine if it contains each of the elements (facts) needed to support the proffered theory. If so, that party has met its burden and created a presumption for recovery that the opposing party must now overcome.

If, on the other hand, an element cannot be established by the facts provided, you have identified a factual argument that the opposing party can assert to avoid liability. Although disputes you encounter will require detailed analysis and sophisticated arguments, identifying missing facts is the easiest and most effective argument for a defendant because a case must be dismissed as a matter of law if a plaintiff cannot demonstrate each element of its theory for recovery.

2. Identifying Vague or Ambiguous Facts

Factual arguments also occur when hypotheticals contain facts that are open to interpretation. Professors draft ambiguous stories that create doubts about whether a particular rule can be established. For professors, such uncertainty invites an inquiry that evaluates the depth of a student's legal knowledge. However, for students, ambiguous facts can be a source of frustration, particularly among those who seek finality in their analysis.

Often, students who feel uncomfortable with the uncertainties in a hypothetical tend to avoid the troublesome facts by adopting a reading that favors one party and resolving the dispute without any mention of a different interpretation. This is the wrong approach. Ambiguous facts are present because your professor wants you to discuss them. Thus, instead of feeling intimidated by facts that are unclear, you should identify the factual uncertainties that are problematic and side with the party that has the most reasonable interpretation. To illustrate this point, consider the following property hypothetical in Example 2.

EXAMPLE 2

SAMPLE PROPERTY HYPOTHETICAL
(30 MINUTES)

In 1970, co-tenants Donny and Marie moved into Blackacre, a spacious 27-room mansion situated on approximately 50 acres in Bedrock, an affluent suburb of Old York City. Donny contributed 60% of the $200,000 purchase price with money he earned as a pop singer. Marie contributed the other 40% with money she received as a gift from her (now) late uncle, Mike Brady. Donny was out of possession for most of the past 32 years. During Donny's absence, Marie created beautiful gardens and ponds on the southeast quadrant of the Blackacre estate and remodeled the basement. Marie was very careful that all of her interior renovations conformed to Bedrock's building codes. Moreover, even though most of the area where she has created her gardens is in an environmentally sensitive area as defined under the Bedrock Zoning Code, Marie underwent the State of Old York's Environmental Quality Review process and received all of the necessary approvals from the Bedrock Planning Board before she ever planted her first marigold.

Marie has come to you for legal advice. She would like to know her rights with respect to Donny and Blackacre. Please advise her, anticipating the possible responses to her contentions. Assume that the statutory period for a claim of adverse possession in Old York is 10 years.

From the interrogatory, it is clear the professor expects the student to address whether Marie can successfully stake a claim to Blackacre using an adverse possession theory. In this hypothetical, there is a factual uncertainty with regard to two elements of the adverse possession claim: (1) the exclusivity element (*i.e.,* whether Marie held the property exclusively for the 10-year statutory period); and (2) the hostility element (*i.e.*, Marie and Donny were co-tenants, so absent an ouster, both had a right to possess Blackacre). Consider, for example, the exclusivity element. Because the length of Donny's absence has been described as "***most of*** the past 32 years," it is implied that he has returned to the property intermittently; if properly timed, these visits could destroy an element of Marie's claim. Similarly, with respect to the hostility element, there is no mention of why Donny was not in possession. Unless he was forcibly thrown off the land, Marie will have difficulty proving her possession was truly adverse. Without making up new facts, a student responding to this hypothetical would have to demonstrate how ***both*** Donny and Marie will construe these vague details in a light most favorable to them.

While you are expected to find in favor of one of the parties, the most successful students always qualify their conclusions, acknowledging that additional fact-finding might reveal the fatal weakness in the winner's case. Thus, when you identify ambiguous facts, it is always wise to qualify your conclusion by stating: "If further examination determines [insert alternative interpretation of the vague fact by the losing party] then the outcome may be different." Hedging an answer in this fashion is ***not*** the sign of an indecisive law student; rather, it is the trait of a competent student because attorneys seldom offer their clients a guarantee.

B. Legal Arguments

Unlike factual arguments that are case-specific, legal arguments apply to many cases. Parties can use legal arguments to: (1) establish (or debunk) elements; (2) identify competing legal theories that would result in different outcomes; (3) offer counter theories and defenses; and (4) argue for the extension of an existing rule to cover new circumstances.

1. Legal Tests for Establishing Elements

As we have mentioned, elements are factual circumstances that, combined, establish a legal rule or theory. To guide courts in determining whether an element can be established, the law has created tests. These tests come in various forms and permeate almost every aspect of law. They define: (1) our relationships (*e.g.,* in torts, tests determine whether a plaintiff was a trespasser, licensee, or invitee on a defendant's land); (2) how we characterize certain types of property (*e.g.,* in property, tests determine whether found goods were lost or mislaid); (3) the scope of our laws (*e.g.,* in civil procedure, tests determine the scope of a court's jurisdiction); or (4) the legal significance of our words or conduct (*e.g.,* in contracts, tests determine whether certain conduct could be interpreted as a valid offer). The common characteristic of all legal tests is that they seek to establish factual elements of a legal theory. In fact, while many of the cases in your casebook are used to broadly outline the elements of certain legal theories, the majority of your cases are actually much more narrowly focused and illustrate the various ways to prove the elements of those theories.

For example, consider again the cause of action for tortious battery. To recover, a claimant must prove, among other things, subjective elements like a defendant's intent or whether a contact was "offensive." Because judges and juries cannot get inside the minds of litigants, they use objective tests to aid them in their fact-finding efforts. Accordingly, when determining whether a defendant's contact was "offensive," a jury cannot delve into the plaintiff's private thoughts, but it can apply a test to assist in labeling the defendant's conduct (*i.e.,* would a reasonable person not unduly sensitive to his dignity find the contact offensive?). If the element satisfies the test, the element has been established; if the element does not satisfy the test, however, the element has not been proven, and the entire cause of action must fail.

For this reason, legal tests are used not only as a sword by parties seeking to establish the elements of their claims, but also as a shield by those hoping to avoid liability. Even when the initiating party has a valid claim for recovery, the opposing party must always examine the claim by using the available legal tests to scrutinize each element. Again, because a defendant's best chance to avoid liability is by showing that one (or more) of the elements of a legal theory cannot be satisfied, it is during the application of these tests that the parties do battle most – the plaintiff arguing that a particular test establishes an element, and the defendant asserting arguments to the contrary. To illustrate this point, consider the contracts hypothetical in Example 3.

EXAMPLE 3

> CONTRACTS SHORT ANSWER QUESTION
> (15 MINUTES)
>
> After an extensive background check, Professor Smith received a voicemail from Law Preview's administrative staff on Monday, August 23 offering him a position to teach the Fall Exam-Taking Strategies course. The terms of the offer were complete with dates, times, and salary and the voicemail requested a prompt response because Law Preview needed a professor to fill that spot. On that same day, Professor Smith wrote a note (that he personally walked down to the campus mailroom and placed in the school's out-going mail bin) which read: "I accept, I accept, I accept! I am thrilled to be teaching for such a wonderful organization."
>
> On Thursday, August 26, when Professor Smith called the Law Preview office to inquire about travel arrangements to the site, he learned that the teaching position he was offered had been given to another professor on the morning of Wednesday, August 25. The other professor was the company's first choice for the spot, but she previously declined the invitation thinking she was unavailable to teach due to a scheduling conflict. Professor Smith's acceptance had been received on Wednesday afternoon after the other professor was retained.
>
> Enraged, Professor Smith demands immediate payment of the agreed upon salary and the company refuses, arguing that there was no contract. What result?

A student framing this dispute may state the query: "Can Smith assert a claim for breach of contract against Law Preview and collect his expectation damages?" In his analysis, the student may conclude that Smith, as the initiating party (a prospective plaintiff) would argue that all the elements of an enforceable contract had been satisfied because there was: (1) an offer (in the form of a voicemail that detailed all the material terms of the agreement); (2) an acceptance (relying on the mailbox rule that an acceptance is effective immediately upon dispatch); and (3) consideration (Law Preview agreed to pay Smith to lecture). The student might then assert that Law Preview's refusal to perform under the contract amounts to a breach entitling Smith to recover his expectation damages.

While it appears that all the elements for a successful breach of contract action have been established, before finding in favor of Smith, the student should apply the applicable legal tests to determine whether Law Preview has any arguments that would defeat an element of Smith's claim. Upon closer examination, the student would see that Law Preview could argue that Smith's acceptance was invalid, relying on Restatement Second of Contracts section 30(2) which provides that an acceptance to an offer may be given "in any manner and by any medium reasonable under the circumstances." By demonstrating that Smith's mode of acceptance (*i.e.,* a letter) fails the reasonableness test under the circumstances (*i.e.,* in response to a voicemail seeking a prompt answer), Law Preview has a valid argument that its offer was never accepted. Using this line of reasoning, Law Preview would contend that because an enforceable contract never existed, Smith is barred from any recovery.

Professors often test their students' ability to apply these legal tests because it demonstrates students' understanding of the general rule (*e.g.,* the elements to a cause of action for breach of contract) and the nuances inherent in the rule's application (*e.g.,* what constitutes a valid acceptance) – the real ***issue*** (point of disagreement) that the professor wants students to explore.

<u>2. Legal Arguments Can Show Splits in the Law</u>

Because the law is not the same in every jurisdiction, parties can disagree about which law governs their dispute. Competing legal theories often coexist and are equally valid. This occurs when there are two divergent rules, and the application of each result in different outcomes. For instance, if the hypothetical fails to address in which jurisdiction the story takes place (*e.g.,* Model Penal Code vs. common law jurisdiction, minority vs. majority jurisdiction, etc.) both the initiating party and the opposing party could point to two different legal theories that accomplish their goals.

Geography is not the only reason for splits in the law. Evolution of the law can create circumstances when old and new theories coexist (if even for just a short amount of time). This occurs most frequently when a persuasive body such as the American Law Institute updates a Restatement or promulgates a new uniform law (*e.g.,* a new UCC section). For example, some courts have applied the mailbox rule's "acceptance upon dispatch" directive (a common law rule) to e-mail. The growing trend, however, is the one advocated by the Uniform Computer Information Transactions Act (UCITA) which provides that for contract formation purposes, acceptance by e-mail is effective upon receipt. When analyzing cutting-edge issues like these, it is best to discuss new legal trends, even though they may have not yet been adopted in your (or any) jurisdiction.

Splits in the law could also mean that your jurisdiction is one judicial ruling away from adopting a different legal standard. As a result, even where the initiating party seems to have the law on its side, sometimes the opposing party is not finished arguing. When alternative legal rules exist, it means that opposing parties have a basis for asking that the court discard the prevailing legal theory in favor of a different rule.

Expanding upon the law split evidenced by the mailbox rule and UCITA, review the sample responses to the contracts hypothetical in Example 4.

EXAMPLE 4

CONTRACT RULES

1. The common law "mailbox rule" provides that an offeree's acceptance is effective upon proper dispatch without regard to whether it ever reaches the offeror. The rule applies equally to bilateral contracts for the delivery of goods or services. Courts have determined that "dispatch" includes physically dropping a letter into a mailbox, as well as sending electronic transmissions (*e.g.,* via fax and e-mail).

2. In 2002, the American Law Institute amended the Uniform Commercial Code ("UCC") to include Article 2B, the Uniform Computer Information Transaction Act ("UCITA"). UCITA governs the sale of computer information transactions over $5,000. Computer information transactions are agreements that deal with "the creation, modification, access to, license, or distribution of computer information." Section 2B-203(4)(A) provides that for contract formation purposes, an acceptance by e-mail is effective upon receipt by the offeror.

SAMPLE CONTRACTS HYPOTHETICAL
(20 MINUTES)

Adam, who lives in the State of Flux, invented the "Tot Cart" – a stroller made of aluminum that weighs only 1/2-pound and collapses so that it can fit in a coat pocket. The Tot Cart retails for $1,000. During the first six months of production Adam has sold only 20 units. As a marketing ploy, Adam sent a Tot Cart to Oprah Windfall, host of a popular daytime talk show whose audience, affluent stay-at-home moms, represents his target market. Oprah featured the Tot Cart in her "Favorite Things" episode and gave one to each member of her audience by pointing at them and feverishly shouting like a possessed woman: "You get a cart! You get a cart! You get a cart!"

Orders for the Tot Cart began rolling in because of this exposure. As demand grew, Adam began to experience problems calculating his inventory. On April 1st, Adam sent an e-mail to Bill Yates, a software designer, providing: "I would like to retain you to design a database that can keep track of my inventory. I will pay $5,500 if you promise to deliver the software by April 10th." On April 4th, after Bill completed another project, he sent an e-mail to Adam saying, "I accept your terms. I have cleared my calendar, and I can easily meet your deadline." When Bill's e-mail arrived in Adam's inbox, Adam was away on the first day of a four-day vacation. On April 7th, Adam called Bill on his cell phone from a beach in Maui and told him he revoked his offer. When Bill received Adam's call, he had already invested 30 hours in the database project.

Bill has hired you as his attorney. Advise him regarding whether a valid contract was ever formed.

EXAMPLE 4 – SAMPLE RESPONSES

THE "ONE RULE" RESPONSE

Adam's e-mail on April 1st was an offer for a bilateral contract because it sought Bill's return promise ("promise delivery by April 10th"), and, as such, it could be revoked at any time prior to Bill's acceptance. Article 2B of the UCC ("UCITA") governs computer information transactions greater than $5,000 and provides that when an offeree sends an acceptance by e-mail, it is effective upon receipt. Adam will argue that UCITA governs this situation because his offer was for the creation of computer information (a database) valued at $5,500; therefore, his revocation on April 7th was proper because he never received nor read Bill's e-mail that arrived while Adam was on vacation. Bill will contend that his e-mail did constitute a valid acceptance because it was received (arrived in Adam's inbox) on April 4th, and interpreting the receipt requirement to mean "open and read" would establish a poor precedent (*e.g.*, it is much easier to objectively prove that an e-mail arrived in someone's inbox than it is to prove that the person actually opened and read the contents of that e-mail).

THE "TWO RULE" RESPONSE

Using the common law mailbox rule, Bill's e-mail will operate as a valid acceptance. Bill's e-mail might also be considered a valid acceptance even if the State of Flux has adopted UCC Article 2B ("UCITA"), provided that a court determines that UCITA's "receipt" requirement is satisfied when an e-mail arrives in someone's inbox and not when it is opened and read. Adam's e-mail on April 1st was an offer for a bilateral contract because it sought Bill's return promise ("promise delivery by April 10th"), and, as such, it could be revoked at any time prior to Bill's acceptance. The common law's mailbox rule provides that an offeree's acceptance of a bilateral contract is effective upon proper dispatch without regard to whether it ever reaches the offeror. Here Bill can argue that a contract was formed because his e-mail acceptance was sent (dispatched) on April 4th, thereby terminating Adam's power to revoke.

Jurisdictions that have adopted UCITA have abandoned the mailbox rule in computer information transactions greater than $5,000 where the offeree sends his acceptance by e-mail; instead, UCITA provides that an acceptance by e-mail is effective only upon receipt (not dispatch). Adam will argue that UCITA governs this situation because his offer was for the creation of computer information (a database) valued at $5,500; therefore, his revocation on April 7th was proper because he never received Bill's e-mail (e-mail arrived while Adam was on vacation and he never read it). Bill will contend that his e-mail constituted a valid acceptance because it was received (arrived in Adam's inbox) on April 4th. Bill can also assert that interpreting the receipt requirement to mean "open and read" would establish a poor precedent because it is much easier to objectively prove that an e-mail arrived in someone's inbox than it is to prove that the person actually opened and read its contents.

From these examples, it is clear that it is important to discuss legal arguments that show splits in the law. This demonstrates to the professor that you know the majority rule as well as the distinctions in the minority rule. Many students will not consider alternative legal theories. Others will avoid raising them because they think it may complicate their analysis. Identifying and arguing splits in the law is a fantastic way to distinguish your answer from your classmates' answers.

3. Legal Arguments Can Make New Law

Lawyers and courts do more than just interpret the law – they also establish legal precedents, known as case law. For instance, before the technology boom of the mid- to late-1990s, there was no Internet Law. After the advent of the Internet, lawyers and courts were forced to extend the rules from more conventional areas of law into cyberspace. Less than a decade later, it is hard to find a law school in the country that does not offer a class on Internet Law that teaches the rules as they have developed.

Because the law is constantly evolving, professors often draft hypotheticals that raise disputes not yet governed by existing legal theories. The facts of the hypotheticals are often similar to those covered by an existing rule of law, but a slight variation prevents their direct application. In this case, one party – typically the initiating party – can argue to extend the scope of the existing rule to cover the new factual circumstances. Hypotheticals that take this form reveal students' knowledge of the particular rules, as well as their understanding of the rationales for those rules. To illustrate this point, consider the torts hypothetical and the sample response in Example 5.

EXAMPLE 5

TORTS SHORT ANSWER HYPOTHETICAL
(20 MINUTES)

Alice, a feeble 88-year-old widow, was placed in Pleasant Pastures Nursing Home by her son, Charlie, and his wife, Barbara. For years, there had been intense animosity between Barbara and Alice, and Charlie sometimes thought it would be easier if his mother were to simply "pass on." In one of his biannual trips to visit Alice at Pleasant Pastures, mother and son strolled the picturesque grounds of the compound. As Alice bent over the railing of a small wooden bridge, the railing broke and she tumbled, landing face down in the shallow water below. Although he could have easily rescued his mother without any risk to himself, Charlie chose to do nothing and watched as Alice took her final breaths under water.

You have been retained to represent Alice's estate and have joined Charlie in a wrongful death action you filed against Pleasant Pastures. In your complaint, you allege Charlie's inaction caused his mother's death. Charlie's answer contends that he had no affirmative duty to rescue Alice. Putting aside any other claims that you may have against Charlie, what is the result?

EXAMPLE 5 – SAMPLE RESPONSE

Whether Charlie ("C") is liable for Alice's ("A") wrongful death because of his failure to rescue her.

While as a general rule a person does not have an affirmative duty to rescue another, a person's nonfeasance (inaction) may still be tortious if there is a special relationship between the defendant and victim.

C will argue that while the nature of the parent-child relationship does impose a duty on the part of the parent to protect the interests of the child, it does not operate in the reverse and impose a duty on a child to rescue a parent in distress. Even if the rule were extended to cover this situation, C may assert that inherent in the special relationship is that there exists an actual "relationship." He would argue that he was A's son by blood only, which is illustrated by the fact that he only visited her twice a year and wished her dead.

A's estate has a compelling argument that the duty to rescue should extend to C in these circumstances. Clearly, the parent-child relationship is present in these facts and when one looks to the rationale behind such a rule, a solid argument exists for the rule's extension to cover this situation. The rule is designed to protect the interests of those who, because of age or incapacity, are unable to protect themselves. Here we are told that A was "feeble" and presumably unable to adequately take care of herself (she is living in a nursing home). A strong argument can also be made that, like a parent looking after a child, A was in C's care during this stroll, thereby imposing a duty on C to rescue A regardless of whether they had a close familial bond.

Because of the societal interest in preserving life, a court will probably find that A's estate has the more compelling argument and find that a special relationship existed, thereby imposing a duty on C to aid in A's rescue.

C. Policy Arguments

The law is designed to preserve order while simultaneously serving as a mechanism for advancing the broader goals of a just society. Thus, virtually every legal theory serves some societal interest. Society's definitions of order and justice, however, change constantly. As a result, our view of the law constantly evolves.

Public policy arguments address the social reasons for a legal theory or rule and our interests in maintaining or revising a particular rule. Thankfully, the list of policy arguments is not endless. Because there is a finite number of policy arguments that seem to repeat in each course, you should familiarize yourself with them well in advance of your exam because making public policy arguments is another way that top students distinguish their exam answers from their classmates' responses.

Whenever possible, after discussing any factual or legal arguments the parties may make, you should try to identify: (1) the policy reason for the rule that is being applied; (2) how maintaining (or changing) the rule would advance that public goal; and (3) the impact a finding in favor of one party may have on future cases. Review Example 6 for the analysis of one possible dispute from the practice torts hypothetical on page 62, *supra*.

EXAMPLE 6

Whether Cindy ("C") can recover against Dr. Green ("G") for injuries to her teeth and tongue using a theory of products liability.

A theory of products liability imposes strict liability against manufacturers, and those who put defective products in the chain of commerce. There are two types of defects – manufacturing defects (when the product departs from its intended design) and design defects (when the product could have been designed better to prevent injury).

policy arguments strengthen Dr. Green's defense

C would argue that the Claws of Life ("COL") had a manufacturing defect (because it was not designed to break apart in patients' mouths). Because G is putting this defective device into the chain of commerce, she will argue that he should be held strictly liable for the injuries she suffered.

G will argue that courts have found that services by hospitals and doctors are generally exempted from strict liability for defects in medical devices. G did everything properly on these facts and the injuries to C's mouth and teeth were entirely the fault of the defective device.

Courts that have refused to hold doctors strictly liable for defective devices have found to do otherwise would increase the price of healthcare for everyone. G would probably argue that finding G liable using a products liability theory would set a bad precedent that might increase already high medical costs. In addition, G should argue that denying C's products liability claim against G would <u>not</u> foreclose her from collecting for her injuries – she could always sue the COL manufacturer directly.

G has the better argument and should avoid liability under a products liability theory.

<u>OUTLINING DISPUTES – THINK INSIDE THE BOX(ES) USING THE FLiP FLoP TREE</u>

Lack of organization is the most common and costly mistake students make on exams. Essays that thrash at the fact pattern, addressing disputes in a haphazard fashion, are not only bound to overlook issues but are also guaranteed to frustrate your professor. By using an analytical device that we call the "FLiP FLoP Tree," you will ensure that your analysis is thorough and your answers are well-organized.

Before you begin writing in your examination booklet, it is usually helpful to quickly outline the arguments you have identified. The outline is a quick sketch of each dispute – with a strong emphasis on the word "***quick***." You will not hand in these outlines, as students do not receive credit for notes made on scrap paper, so do not waste much time creating detailed outlines. The outlines are meant to remind you of the arguments you will rely on when drafting your response.

Outline each dispute you have identified using a separate piece of scrap paper. At the top of the page write out the framed dispute; directly below it, draw the FLiP FLoP Tree as illustrated in Figure E on page 73. Notice that each section of the tree contains a box where you can jot down facts or thoughts for each type of argument the parties to the dispute will make. Everything above the dashed line (the FLiP part of the tree) addresses the legal theory that the ***initiating*** party will assert; everything below the dashed line (the FLoP part of the tree) addresses a defense or counter-theory (if any) that the ***opposing*** party will assert. You do not have to fill in every box and, again, there must be an emphasis on brevity when outlining; your in-depth analysis will take place during the writing stage (Strategy #5).

After creating a FLiP FLoP Tree for every dispute that you intend to discuss, arrange them in the most logical order. If there are a number of characters in the fact pattern, it may be helpful to organize your response by party. Likewise, for hypotheticals with many different events or transactions, a chronological order may help. If you identify disputes whose resolution may affect the resolution of later disputes, consider discussing those first so you can save time when analyzing subsequent disputes and, more importantly, to avoid the mistake of having inconsistencies in your treatment of issues. Regardless of which organizational structure you adopt, your response must be organized!

FIGURE E

	Initiating Party	Opposing Party
F	Factual Arguments ***Supporting*** IP's Legal Theory	Factual Arguments ***Opposing*** IP's Legal Theory
L i	Legal Arguments ***Supporting*** IP's Legal Theory	Legal Arguments ***Opposing*** IP's Legal Theory
P	Policy Arguments ***Supporting*** IP's Legal Theory	Policy Arguments ***Opposing*** IP's Legal Theory
F	Factual Arguments ***Opposing*** OP's Defense	Factual Arguments ***Supporting*** OP's Defense
L o	Legal Arguments ***Opposing*** OP's Defense	Legal Arguments ***Supporting*** OP's Defense
P	Policy Arguments ***Opposing*** OP's Defense	Policy Arguments ***Supporting*** OP's Defense

EXAM-TAKING STRATEGY #5: DRAFTING YOUR RESPONSE

Once your time for analyzing the fact pattern has expired, you must begin drafting a response to the interrogatory. Because law school exams are usually intensely time-pressured, you must not spend more time than necessary outlining your response. Even if you feel as though you have not fully framed and outlined every dispute you plan to discuss, you need to begin getting your thoughts into your examination booklet so that you can start accumulating points. This section offers a straightforward essay style that will allow you to communicate your knowledge quickly and effectively, using a format that will be easy for your professor to grade.

STRUCTURING YOUR RESPONSE USING DRAC

From grammar school through college, you have been taught that essays should follow a universal format, complete with an introductory paragraph, a thesis statement, a body in support of the thesis statement, and a conclusion. While this format may have worked nicely for your "How I Spent My Summer Vacation" essay in sixth grade, it will not help on your law school exams.

By adopting our exam-taking approach, you will never try to analyze a fact pattern as a whole. Instead, you will deconstruct the fact pattern, breaking it down into individual disputes that you will then analyze and resolve separately. As a result, there should not be an overarching introductory paragraph and thesis statement that dictates where the entire essay is heading. Similarly, there is no need for an absolute conclusion. Once you have completed your analysis of every dispute (or run out of time for that section), simply indicate which party appears to have the stronger arguments, and then move on to the next part of the exam.

We recommend that your analysis of each dispute follow the DRAC method. DRAC is an acronym for four words: *Dispute*, *Rule*, *Arguments*, and *Conclusion*. The DRAC method operates as follows:

- STEP 1: The examinee sets forth the framed ***DISPUTE***;

- STEP 2: The examinee states the legal ***RULE*** (the applicable legal theory together with all of its elements) that the initiating party will assert to obtain the desired relief identified in step 1;

- STEP 3: The examinee sets forth the ***ARGUMENTS*** each side will assert in support of, and against, the application of the rule identified in step 2; and

- STEP 4: The examinee draws a ***CONCLUSION*** based upon which party has the stronger argument(s).

1. Understanding DRAC: The Dispute Component

After you open your exam booklet, the first thing you should write down is the first framed dispute that you intend to analyze. As set forth more fully in Strategy #3, *supra*, your framed dispute is a question containing: (1) the parties to the dispute; (2) the goals of the parties; and (3) the legal theory that the initiating party will use to accomplish that objective. Your framed dispute can be a one-sentence paragraph that tells your professor the problem you will analyze.

2. Understanding DRAC: The Rule Section

Next, directly below the framed dispute you should recite the black letter law of the legal theory that the initiating party will rely on (as set forth in your framed dispute). The purpose of this paragraph is to demonstrate to the professor that you know the relevant law. When writing the rule, number each of the elements. Numbering elements will make your answer easier to grade and provide you with a checklist of elements that the initiating party must prove to support its theory. Like the Dispute section, your recitation of the rule can be a one- or two-sentence paragraph.

3. Understanding DRAC: The Arguments Section

Next, directly below the Rule section, begin your discussion of the various arguments the parties will assert to further their respective goals. Using your FLiP FLoP Tree, first discuss all the arguments that the initiating party will use to establish the elements of its legal theory. Then, using separate paragraphs for each argument, analyze any factual, legal, or policy arguments that the opposing party will make to argue against granting the requested relief.

If the opposing party has a defense it can assert, begin by starting a new paragraph that sets forth the elements of the defense (another Rule section) and then follow up with separate paragraphs for each of the arguments the opposing party will use to show how those elements have been satisfied. Finally, analyze any factual, legal, or policy arguments that the initiating party will make in response to the asserted defense.

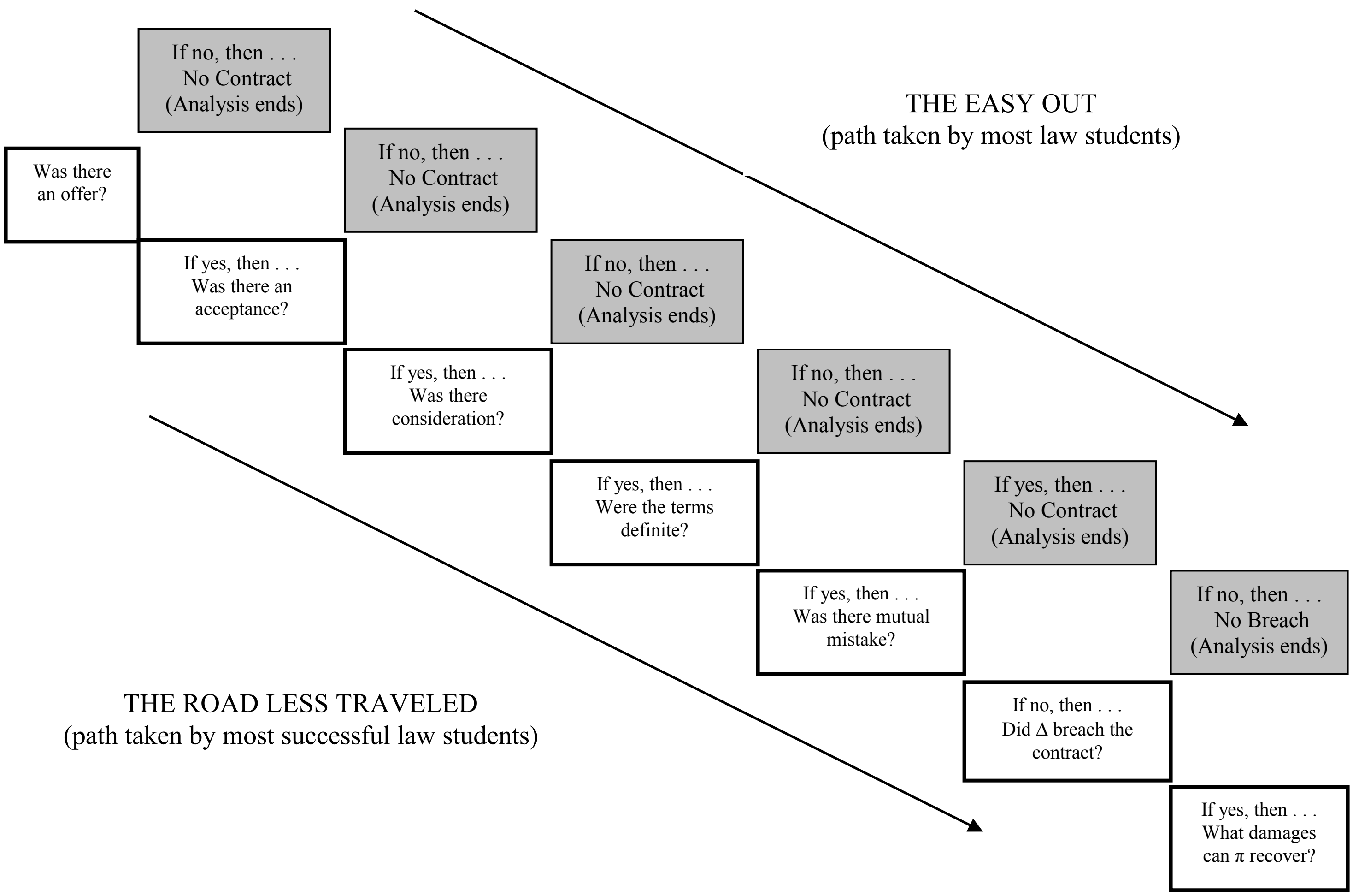
4. Understanding DRAC: The Conclusion Section

The conclusion is typically the least important part of a student's analysis because both parties will often have compelling arguments that give each side a realistic chance of success. Nevertheless, you should wrap up your discussion by identifying which party has the best argument and how a court would rule. Before formulating a firm conclusion, consider the effect, if any, your decision will have on the subsequent disputes you intend to address. Be careful that a finding in favor of one party will not adversely affect your ability to discuss subsequent disputes. Of course, when discussing subsequent disputes, you can always explain that they would arise only if the earlier dispute is resolved a certain way.

This point is illustrated by charting the steps in the analysis of the sample contracts question (Appendix B, *infra*) in Figure F. Notice that resolving any dispute in favor of the defendant by finding there was never a contract ends the analysis, and the examinee avoids having to analyze the remaining issues. If you do think that finding in favor of one party will extinguish the need to address additional issues, stick with your original conclusion but qualify it by arguing in the alternative for a finding that favors a different result. This technique will preserve the opportunity for you to address other issues that the professor is inviting you to discuss. While it may be tempting to arrive at a conclusion that brings finality to the analysis, the hallmark of a weak exam is analysis that only scratches the surface and does not delve deeper to address harder issues.

FIGURE F

CHART OF ANALYSIS



WAIT A MINUTE, ISN'T THIS JUST IRAC?

You have undoubtedly heard the proponents of using the IRAC matrix for examination analysis. Like DRAC, IRAC is an acronym. IRAC represents the words: *Issue*, *Rule*, *Application*, and *Conclusion* – the time-honored approach for drafting responses on law school essay exams. Praised for its simplicity, IRAC has helped hundreds of thousands of students survive their law school exams. However, if you are interested in doing more than just surviving your exams, then you will see how using the IRAC methodology is far too limiting for students who want to earn a top spot in their class.

1. There's No "I" in DRAC

The most obvious difference comes in the first step of the analysis. DRAC asks the student to focus on the general ***dispute*** between the parties – the cause of action or legal theory the initiating party will assert to achieve its goals (*e.g.*, whether A can recover against B for tortious battery). By contrast, IRAC asks students to focus on the ***issue*** that the parties will debate – a question that is usually much more narrowly framed (*e.g.,* whether A can establish that B's contact was "offensive" under the law). This narrow focus can cost you points because it causes you to overlook relevant arguments and observations.

In some ways, law school examinations are similar to those math quizzes you took in third grade when your teacher awarded credit to students who "showed their work" (*i.e.,* provided the steps they used to arrive at their answer). Wrong answers received partial credit if the student's analysis was sound; however, few, if any, points were awarded to those students who arrived at the "right" answer by luck (*e.g.,* using flawed analysis), or without having shown their steps.

Because finals in law school are notoriously time-pressured, many students feel it is acceptable to skip over elements that they believe are obviously present in the fact pattern. While it is true that elements over which there is no real disagreement are not really ***issues,*** you must still demonstrate to your professor that you recognize their existence. By failing to do so, your professor cannot be sure that you are aware of the legal significance of those other facts in the hypothetical. Because you are graded on a curve, your answer will be inferior to those of other students who take the time to identify and quickly address these obvious points.

Framing the entire dispute forces examinees to take nothing for granted by demonstrating to the professor that they know (and will address) each of the elements of an asserted legal theory. By framing an issue and focusing too narrowly on whether one element succeeds or fails, students often skip over the other elements needed to support a claim – a senseless error.

<u>2. "A" Stands For Arguments, Not Application</u>

The most significant difference between IRAC and DRAC comes in the third step of the analysis – the "A" in the acronym. The DRAC approach forces the examinee to set forth all the ***arguments*** the parties can make to support (and oppose) the application of the legal rule identified in step two, the "R" in the acronym. These arguments can be ***factual*** (*e.g.*, whether the elements of the rule can be found in the fact pattern), ***legal*** (*e.g.*, whether the elements of the rule can be established or debunked using legal tests or standards), and based on ***public policy*** (*e.g.*, whether, notwithstanding the rule, loftier public goals justify finding in favor of one party).

IRAC, on the other hand, simply asks the examinee to ***apply*** the rule of law identified in step two to the facts in the hypothetical. While this application presumably covers ***factual*** arguments concerning the existence of elements in the fact pattern, it leaves no room for ***legal*** and ***public policy*** arguments. Some students realize that, even using IRAC, they should address the legal and policy arguments the parties can make. However, most students who use a traditional IRAC approach often overlook these different arguments and forgo opportunities to score points. By focusing instead on the arguments that the parties can make, you will be much more thorough in your analysis.

IRAC's limitations are best illustrated by using both methods to respond to the Torts hypothetical in Example 6.

EXAMPLE 6

PRACTICE TORTS HYPOTHETICAL
(60 MINUTES)

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

Dr. Green's first attempt to remove the object using the Heimlich Maneuver was unsuccessful, and resulted in two fractured ribs. He next decided to use "The Claws of Life," which is a widely used and accepted medical device designed to remove small objects from children's throats. After Dr. Green carefully inserted the device into Cindy's mouth and applied the normal amount of pressure to the handle of the device, it unexpectedly broke off in Cindy's mouth, cracking four of her teeth and cutting her tongue. Dr. Ross, who was on call at the hospital that day, arrived on the scene and successfully removed the head of a popular action figure doll from Cindy's esophagus. The action figure, the prize in a kid's meal promoted by the popular fast food restaurant Burger Prince, came in packaging that specifically stated it was intended for children ages five and older. DollCo, a company that produces and distributes promotional products and kid's toys, manufactured the action figure using a design that did not include a removable head.

Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims that Cindy can assert.

SAMPLE "DRAC" ANALYSIS

DISPUTE #1: Whether Cindy ("C") can recover against Dr. Green ("G") for medical malpractice when he broke her ribs while performing the Heimlich Maneuver.

rule

To recover using a theory of medical malpractice, the plaintiff must show: (1) G owed a duty to C; (2) G breached his duty by acting carelessly; (3) G's negligence was the cause of C's harm; and (4) C suffered harm.

factual arguments

Here C will argue that G owed a duty to her as a patient of General Hospital and that while she was under his care, and during his performance of the Heimlich Maneuver, she suffered an injury (*i.e.,* broken ribs). She will argue that G's 38-hour shift during which he did not sleep, coupled with his comment to the nurse that he was "wiped out," created an inference that he was too tired to practice medicine competently. Given G's experience, his failure to step aside and not take C's case in the first place was a breach of the duty of care that he owed her. To satisfy her prima facie case, C will also argue that G's careless performance of the Heimlich Maneuver, a routine medical procedure, was caused by his lack of sleep and was the direct cause of her injuries.

Contrarily, G will argue that while he clearly owed a duty to C to perform the Heimlich Maneuver with due care, nothing in the facts suggests that he performed the procedure carelessly (thereby breaching his duty to her and causing her injuries). Assuming that the analysis stopped here, based upon these factual arguments G would argue that C cannot prove her prima facie case for medical malpractice and, therefore, he should avoid liability.

legal arguments

If G is correct and C does not have any <u>direct evidence</u> of G's negligence, because of the facts presented C may be able to successfully argue the *res ipsa loquitur* doctrine in order to satisfy her claim. The *res ipsa* doctrine provides a presumption that a defendant's ("$\triangle$") conduct was negligent where: (1) there is no direct evidence of $\triangle$'s precise conduct; (2) the event does not normally occur without negligence; and (3) any facts regarding $\triangle$'s negligence are within $\triangle$'s exclusive control.

These facts indicate that C was unconscious at the time G performed the Heimlich Maneuver and that her parents were not present (they were in the waiting room). Consequently, C has no direct evidence of G's negligence, and it appears from these facts that the only person who truly knows what happened is G. Moreover, the injuries that C suffered are the type that do not normally occur unless G performed the Heimlich Maneuver negligently. If C successfully asserts this legal theory, G's negligence will be presumed, and he will be forced to present direct evidence that he did not perform the Heimlich Maneuver negligently.

G might argue that *res ipsa* does not apply under these circumstances by asserting that he was not the only person present who can provide evidence of his negligence (*e.g.,* triage nurse or other hospital personnel present). However, there are no facts that indicate anyone else was present during his performance of the Heimlich Maneuver and, even if there were others present, because General Hospital will likely be named as another defendant under a theory of vicarious liability, those present might not be forthcoming (or truthful) with their testimony.

policy argument

C would also argue that shifting the burden to G in these circumstances is the only way to ensure a fair outcome. C's incapacity (both in age and in lack of consciousness) prevents her from having direct evidence of the cause of her injury. A finding in favor of G would set a very bad precedent for future malpractice cases.

conclusion

Based upon these facts, C would likely be able to establish a prima facie case against G for medical malpractice. If G, however, successfully argues that C's attempt to reach a jury should be prohibited because of her inability to provide direct evidence of his negligence, C could assert the *res ipsa* doctrine; at that point G's only hope of avoiding liability would rest on his ability to show that his conduct was not negligent.

SAMPLE "IRAC" ANALYSIS

ISSUE: Whether Cindy ("C") can recover against Dr. Green ("G") for medical malpractice when he broke her ribs while performing the Heimlich Maneuver.

rule — To recover using a theory of medical malpractice, the plaintiff must show: (1) G owed a duty to C; (2) G breached his duty by acting carelessly; (3) G's negligence was the cause of C's harm; and (4) C suffered harm.

application — Here C can show that G owed a duty to her as a patient of General Hospital and that while she was under his care, and during his performance of the Heimlich Maneuver, she suffered an injury (*i.e.*, broken ribs). She will say that G's 38-hour shift during which he did not sleep, coupled with his comment to the nurse that he was "wiped out," created an inference that he was too tired to practice medicine competently. To satisfy her prima facie case, C must assert that G's careless performance of the Heimlich Maneuver (a routine medical procedure) was caused by his lack of sleep and was the direct cause of her injuries. However, although negligence may be inferred because of the injuries she suffered, nothing in these facts expressly states that G performed the procedure carelessly.

conclusion — Based upon these facts, C cannot prove her prima facie case for medical malpractice and, therefore, G should avoid liability.

These sample answers illustrate how strictly applying the rule to the facts is often not enough to address some disputes. IRAC can pigeonhole students because there is no place for the application of other rules and arguments the parties might need to establish their case. The IRAC response properly addresses Cindy's obvious medical malpractice claim, but it only scratches the surface – failing to address the ***real*** issue the professor is testing (*i.e.*, Cindy's use of the *res ipsa* doctrine to prove her case). While this student could address the *res ipsa* issue in another IRAC matrix, these other issues can easily be overlooked.

IRAC can also limit students' ability to see arguments on both sides of the dispute. Because IRAC is easier, and typically results in a concrete conclusion, one of the most pervasive mistakes students make is failing to keep their minds open to all sides of an issue. Many law students adopt an adversarial mindset and write essays that would persuade the reader to find in favor of one side for a particular issue, often ignoring the valid arguments available to the other side. IRAC's "Application" step fosters this mistake by implying that there is a correct outcome (*i.e.,* if you apply the facts to the law, you will arrive at the right conclusion).

DRAC's "Arguments" step (and the FLiP FloP Tree) forces students to identify and address all of the arguments that each side has at its disposal, instead of simply applying the rule. This step prompts you to contemplate all of the legal and policy arguments that both sides will assert, and to demonstrate to your professor that you acknowledge the complexity of the dispute. This will show that you are able to weigh the conflicting interests both parties have and arrive at an objective conclusion. The best conclusion is one that you determine is the "most plausible" after having examined both sides of the argument.

EXAM DAY CHECKLIST

To benefit from the techniques we advocate, these steps must become automatic – a routine that you employ whenever you sit for a law school exam. Because conquering law school essay exams is more science than art, you must commit to memory the strategies we recommend, and practice using them well in advance of your exam. To aid you, we have created the following checklist that you can review in the minutes before each exam:

STEP #1 – TIME MANAGEMENT

- ❑ Macro Time Management – Determine how much time you have for the entire exam, and how much time you should allot for each section.
- ❑ Micro Time Management – Write down: (1) when you begin analyzing a section; (2) when you must begin writing; and (3) when you must finish and move on to the next section.

STEP #2 – READ THE INTERROGATORY FIRST

- ❑ Scrutinize the interrogatory and follow its directions.

STEP #3 – IDENTIFY AND FRAME DISPUTES THAT SEEK RESOLUTION

- ❑ Define the parties to the dispute.
- ❑ Define the goals of the parties.
- ❑ Identify a recognized legal theory that the initiating party might assert to achieve its objective.
- ❑ Frame each dispute as a question that contains: (1) the parties to the dispute; (2) the goals of the parties; and (3) the legal theory that the initiating party will assert.

STEP #4 – USE THE FLIP FLOP TREE TO IDENTIFY ARGUMENTS AND SPOT ISSUES

- ❑ Identify Factual Arguments – Find the facts that the initiating party will rely upon that show the elements of its claim have been met; then identify any missing or ambiguous facts that the opposing party will rely upon to show that the elements have not been met.
- ❑ Identify Legal Arguments – Find the legal arguments that both the initiating and opposing party will make in support of their positions.
- ❑ Identify Policy Arguments – Articulate the public policy benefits or detriments of finding in favor of one party or another.

STEP #5 – STRUCTURE YOUR RESPONSE USING DRAC

- ❑ Set forth the framed DISPUTE.
- ❑ State the RULE (the applicable legal theory together with all of its elements) that the initiating party will assert to obtain the desired relief.
- ❑ Set forth the factual, legal, and policy ARGUMENTS that each side will assert in support of, and against, the application of the legal theory.
- ❑ Draw a CONCLUSION about who should win based upon who has the stronger arguments, and then move on to the next framed dispute.

PART III: STRATEGIES FOR CONQUERING MULTIPLE-CHOICE EXAMS

Increasingly, law schools are requiring professors to use multiple-choice questions, either in combination with traditional essay questions or exclusively, to test students' knowledge of the law. Schools are doing this for three reasons: First, there is a belief that students will score higher on the Multistate Bar Exam ("MBE") if they gain experience with the types of multiple-choice questions they will face on that exam. By introducing MBE-style questions on exams, law schools provide students with three years to practice some of the skills they will need when they sit for the bar exam. Ultimately, higher MBE scores for law students means improved bar passage rates for law schools – a critical measure of success for every ABA-accredited school.

A second benefit of multiple-choice questions is that they are objective. Because multiple-choice questions are narrowly focused, they can be crafted to test a law student's knowledge of the law and analytical skills without regard for more general skills such as handwriting, organization, and vocabulary. The result is that each multiple-choice question contains a single correct answer that does not change based upon an individual's style or interpretation, thereby freeing multiple-choice exams from the criticism that they unfairly reward students for more polished communication skills, rather than knowledge or application of the law. This adds to the perception that the grading system in law school is fair.

A third and final benefit is that multiple-choice exams are much easier for professors to grade. Rather than sifting through pages of poor handwriting, hunting for the pieces of an "A" answer, a professor can feel confident that she has fairly evaluated each student simply by tallying up the student's correct answers. The resulting "time savings" is no small matter for professors who often prefer to spend their time polishing classroom lectures and preparing articles for scholarly publications.

Multiple-choice exams also have their critics. The most obvious criticism is that multiple-choice questions sap original thinking from the exam-taking process. Law schools are laboratories of thought, and law professors frequently draw new ideas from their discourse with their students. Law school exams are a part of that discourse, but multiple-choice questions eliminate the possibility that students might provide unanticipated answers that stimulate new ways of thinking about legal problems. Multiple-choice questions are also criticized because practicing lawyers do not have the luxury of choosing from amongst four or five answers – one of which is always correct – but instead are given a narrative problem and are expected to analyze it clearly and communicate that analysis effectively. Regardless of what you think of multiple-choice questions, they are increasingly common, so you must be prepared to deal with them if you expect to score well on your law school exams.

MULTIPLE-CHOICE EXAMS – QUESTION STRUCTURE

The multiple-choice questions that you are likely to encounter will contain short fact patterns no more than a paragraph in length, followed by four or five statements of law describing legal rights or liabilities potentially raised by the hypothetical. Although these hypothetical fact patterns tend to be shorter than those you may see in traditional essay questions, they are no less difficult. Multiple-choice questions are also not as forgiving as essay exams because there is no way to earn partial credit for a partially correct analysis. Each multiple-choice question contains one correct response, and any failure to identify that answer will cost points. A typical law school multiple-choice exam question is set forth below in Example 1.

EXAMPLE 1

Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven, alleging the tort of battery. What is Steven's best defense against liability?

a. Steven did not intend to hit Sarah.
b. Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
c. Steven did not make bodily contact with Sarah.
d. Sarah was a willing participant in the activity and thereby consented.
e. Steven exercised the privilege of necessity and was thereby justified in making the otherwise unlawful contact.

As you no doubt perceive – at least before we confirm the correct answer – a multiple-choice exam question is often a double-edged sword. On the one hand, you have the comfort of knowing that the correct response is listed somewhere on the page; on the other hand, each question usually contains one or two other choices that, at least arguably, appear to be correct. The trick is to learn how to weed through the options that, on the surface, appear to be correct in order to find the answers that truly are correct.

WHAT DISTINGUISHES TOP STUDENTS ON MULTIPLE-CHOICE EXAMS?

It should be understood that the most important characteristic that every successful law student possesses is a mastery of the substantive law being tested. Assuming that you have mastered the substantive law, you may wonder what other characteristics separate those who excel on multiple-choice questions from those who do not. First, top students remain calm during the test. Panic is the leading killer of law students in this country. Students who are unable to remain calm often misread facts or overlook obvious clues that point to the correct answer. Because the correct answer is always literally right in front of you, it is a senseless and avoidable mistake for you to fail to identify it simply because your nerves made you misread the question.

Knowledge of the substantive law alone will not help you to avoid the type of panic that will impair your ability to analyze multiple-choice questions. Even the most knowledgeable student can find himself spiraling out of control after struggling with a few early questions. The only known preventative cure for panic is practice. Practice creates a level of comfort with multiple-choice questions by creating familiarity with question structure, the themes and doctrines that are most often tested, and nuances of language that test makers use to lure inexperienced students into choosing a "good" response rather than the "best" response. Knowing how you will be tested is nearly as important as knowing what will be tested.

It should be obvious that you will not find a better source for practice exam questions than those that you receive from your professor. If your professors do not make sample exam questions available – and frankly even if they do – you should take advantage of the several fine exam practice aids that specifically address multiple-choice exams. Below is a list of books that provide students with hundreds of multiple-choice questions and a comprehensive analysis of the possible responses.

Recommendations For Multiple-Choice Practice Questions		
barbri | LAW PREVIEW	**When to buy:**	Not surprisingly, the best time to buy practice aids is in the run-up to your exams (October 1-December 15 in the Fall, or March 1-May 5 in the Spring).
	What to buy:	Some of the most popular exam practice aids series for multiple-choice and MBE-like questions are: • BARBRI AMP • Siegel Essay & Multiple Choice Q&A Series (Aspen Publishers) • Strategies & Tactics Series (Aspen Publishers)

Another common mistake is for law students to "shoot from the hip" by answering questions based upon intuition rather than using a methodical analysis to extract the best answer. Society as a whole does not want lawyers who rely on instinct when representing clients, so law professors seek to identify and penalize that type of behavior. As a result, multiple-choice questions are often written so that the best response is cleverly hidden among several other responses that might be correct but for the fact that there is a better option available.

Consider once again the choices in Example 1 (above). There the drafter included several triggering facts that might entice an eager reader to leap to the wrong conclusion. For example, choices "b." and "e." are both defenses to intentional torts but clearly do not apply on these facts. Choices "c." and "d." are a bit closer to the mark because they represent arguments that Steven might make in an effort to eliminate elements of Sarah's claim regardless of their ultimate chances for success. But once again, the examinee is asked to identify Steven's "***best*** defense" which in this case is choice "a."– Steven did not intend to hit Sarah. The fact pattern suggests that Steven acted purely out of reflex with no specific intent to make contact with Sarah, and if Steven can prove he did not possess the requisite intent, Sarah's *prima facie* case for battery disappears.

MULTIPLE-CHOICE EXAMINATIONS – BASIC STRATEGIES

Before you delve into the analytical steps you will need to conquer multiple-choice questions, you must understand basic strategies that will allow you to complete the test in the most efficient manner.

A. Time Management

Whether your examination is comprised of all essay questions, all multiple-choice questions, or a combination of both, one thing you can count on is that it will be administered under time pressure. Because you will receive no credit for questions you do not answer, it is in your best interest to answer all the questions on the exam. To do so, you must strictly budget your time.

After you determine the total amount of time you can devote to the multiple-choice section of your exam, divide the number of multiple-choice questions you must answer to determine the maximum amount of time you can spend on each question. For example, if you have 40 minutes to answer 20 questions, you should spend no more than 2 minutes per question. A failure to observe allotted time limits will end up costing points because you will be forced to race through the final questions (often the hardest ones) without enough time for a complete analysis, or even worse, you will end up having to guess at the answers (never a winning strategy). Top students know that it is pointless to get bogged down on one or two tough questions. If you find yourself stuck on a problem that you cannot answer within the allotted time, mark the question both in the question book and on the answer sheet to indicate that you have skipped it and need to return to it later if time permits.

B. Marking Your Answer Choices

Typically, you will receive an examination booklet that contains the questions and a corresponding answer sheet with spaces for your answers. Get into the habit of hand writing your final answer next to each question ***before*** marking your selection on the answer sheet. Do not simply circle the correct response under each question. Should you find yourself in the unfortunate position of getting to the last question in your examination booklet, but you have two spots left on your answer sheet, you will be glad you employed this strategy. You will be able to go back and quickly match up the responses in your answer booklet to the answer sheet without having to decipher your markings or rely on your memory to recall your selection.

EXAMPLE 2

A

Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven, alleging the tort of battery. What is Steven's best defense against liability?

a. Steven did not intend to hit Sarah.
b. Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
?
c. Steven did not make bodily contact with Sarah.
d. Sarah was a willing participant in the activity and thereby consented.
e. Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

Also, if you want to skip a question with the intention of returning to it later, you must create a symbol that will allow you to quickly identify the questions you need to revisit and, more importantly, to ensure that your strategic decision does not cause you to mismatch the questions and the blank spots on your answer sheet. A large star next to the unanswered response on your answer sheet and a dog-eared page in your examination book are usually enough to do the trick.

ANALYZING MULTIPLE-CHOICE QUESTIONS

A typical multiple-choice question contains three distinct parts: the interrogatory or "the call of the question," the hypothetical fact pattern, and the answer choices. You must analyze each part of the question in a mechanical, almost robotic, three-step process in order to arrive at the correct answer.

EXAMPLE 3

Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven alleging the tort of battery. What is Steven's best defense against liability?

facts

interrogatory

possible answers

a. Steven did not intend to hit Sarah.
b. Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
c. Steven did not make bodily contact with Sarah.
d. Sarah was a willing participant in the activity and thereby consented.
e. Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

A. Analyzing the Interrogatory

As with essay exams, you should read the interrogatory before delving into the facts. The interrogatory often provides important clues that will help you to analyze: (1) the facts as you read them; (2) details about the jurisdiction in which the facts take place (*e.g.*, Model Penal Code jurisdiction vs. common law jurisdiction); (3) the role you will be asked to assume (*e.g.*, attorney for the plaintiff or judge), and (4) your task when answering the question (*e.g.*, "identify the defendant's strongest defense" or "what is the most likely outcome?").

Because professors often draft interrogatories using overly broad language in order to obscure the focus of the question from the exam taker, you must consider the interrogatory's focus more narrowly. You will find this step invaluable when trying to isolate the "best" answer among a field of "good" choices. Here are some examples of narrowing the focus of the interrogatory:

Given Interrogatory	**Becomes . . .**
"As attorney for P your strongest claim is"	"What is the ***only*** claim that P can succeed with on these facts?"
"Of which crime is D least likely to be found guilty?"	"What is the ***only*** crime D did not commit based on these facts?"
"The court will grant D's motion because"	"What is the ***only*** basis for granting D's motion?"
"What is the defendant's strongest defense?" - or - "If defendant is acquitted it is most likely because the court will find . . ."	"What is the ***only*** way D cannot be found guilty on these facts?"
"What is the most likely outcome?" - or - "If P sues D, the court should find for . . ."	"What will the result be?"

B. Analyzing the Facts

Once you have identified the focus of the question by examining the interrogatory, you must read and analyze the facts. Inevitably, you will be presented with a hypothetical fact pattern, and then, in some fashion, you will be asked to identify the rights and liabilities of the various actors and predict an outcome. As we have already noted, your exam is going to be administered under time pressure, meaning you will generally have no longer than a couple of minutes per question. Because you need to spend the majority of your time analyzing the possible choices (*see* below), you will most likely be unable to read each fact pattern more than once. Read carefully, and, while reviewing the facts, remember these common-sense tips that often get forgotten on exam day.

1. Never Assume Facts

A common mistake by anxious law students is to assume facts that do not appear in the hypothetical fact pattern and, therefore, are not part of answering the question. We will see later, when we discuss eliminating responses that contain factual inaccuracies, that professors frequently include among possible choices a selection intended to induce such a misstep – often a choice designed to reconfirm a sloppy student's instinctive misinterpretation. It is important to rely solely upon the facts as given and draw only reasonable inferences from them. Your professors are not going to forget to include important facts within the question; rather, they have meticulously crafted the questions you will be given. If you think there is an important fact missing, you are probably falling for a trap. By assuming facts, you will end up changing the focus of the question to one that is not intended, often with disastrous results.

2. Pay Close Attention to the Details

Lawyers are paid to worry about details, and you should operate under the assumption that each fact you encounter in the hypothetical fact pattern has legal significance and may affect your analysis of the question. While you will no doubt encounter the occasional red herring designed to trick careless students, you should not quickly dismiss stated facts or overlook legally operative words, such as those used to describe a person or her state of mind (*e.g.,* recklessly), a person's status (*e.g.,* invitee vs. trespasser), or any of the events contained in the fact pattern.

Read the fact pattern in Example 4, paying close attention to the details.

EXAMPLE 4

> Allen owns Baseball Collectables, a store that buys and sells baseball memorabilia. Steven, age 17, walked into Allen's store and showed him a signed baseball Steven found in his grandfather's attic. The signature was smudged, and although Allen could not be 100% sure, he believed it was an authentic baseball signed by Babe Ruth, ordinarily worth tens of thousands of dollars. Allen explained to Steven that, because he was not certain of the signature's authenticity, he could offer Steven only $2,000 for the ball. Steven accepted. Immediately afterwards, before each party had tendered performance, Allen's business partner Jorge examined the ball and correctly determined that the signature was authentic. Allen then opened the cash register, took $2,000 out of the drawer, and handed it to Steven. Steven refused the money and walked out of the store with the baseball. If Baseball Collectables sues Steven in a jurisdiction that follows the Restatement (Second) of Contracts, what will the result be?
>
> a. Judgment for Steven because of his age.
> b. Judgment for Baseball Collectables because to prove a valid contract there must be adequate consideration.
> c. Judgment for Steven because there was a mutual mistake concerning the authenticity of the ball.
> d. Judgment for Steven because the contract was void because of Steven's incapacity to contract.
> e. Judgment for Steven because he could lawfully disaffirm the contract.

Here, the examinee must know the rule contained in the Restatement (Second) of Contracts section 14, which states that until a person reaches the age of majority (18 years), any contract that he enters into can be voided at his option. Given the applicable rule, the entire hypothetical hinges on two of the words used to describe Steven: "age 17." Skipping over those two words makes it impossible to answer the question correctly. Try another hypothetical:

EXAMPLE 5

> Ariel consumed three vodka tonics at Bill's Bar & Grill. After walking to her car and getting behind the wheel, Ariel pulled out of the parking lot and was driving home reasonably on an unlit street when 12-year-old Charlie, wearing all black, darted into the street while trying to escape his friends during a game of flashlight tag. Ariel hit Charlie with her car. When the police arrived, Ariel passed a field sobriety test, but her blood alcohol level was then determined to be above the legal limit, and she was immediately arrested for driving while intoxicated. In a comparative negligence jurisdiction, what is the most likely outcome of Charlie's subsequent negligence suit against Ariel?
>
> a. Judgment for Charlie because alcohol affected Ariel's ability to avoid the accident.
> b. Judgment for Ariel because of Charlie's comparative negligence.
> c. Judgment for Ariel because she was not negligent.
> d. Judgment for Ariel because she did not owe a duty to Charlie.
> e. Judgment for Charlie because Ariel's actions constitute negligence per se.

Notice that although Ariel had consumed three alcoholic beverages and was subsequently arrested for DWI, before she hit Charlie she was driving "reasonably." Assuming she could prove this fact in court, Ariel would be able to avoid civil liability entirely under a negligence theory.

C. Analyzing the Answers

The correct answer to a multiple-choice question is often not readily evident because what makes it correct is simply that it is the "best" answer expertly disguised among a field of close contenders. When this is the case, you must engage in deductive reasoning, which, if properly employed, will lead you to the correct response by eliminating all other options. Accordingly, unless you can readily identify the correct answer, you should think of your mission as an effort to eliminate responses you can identify as incorrect.

Before we jump into specific tips for identifying incorrect responses, it is important to note that the wisdom of the FLiP FLoP Tree™ applies to multiple-choice exams. You obviously cannot prepare a FLiP FLoP Tree™ for every multiple-choice question you encounter because of time constraints, but the analysis for finding the central issues in dispute is identical to what you've already learned when dissecting traditional essay exams.

Like essay exams, every multiple-choice question requires that you identify the nature of the dispute and the legal theory the initiating party will assert, and consider the ***factual***, ***legal***, and ***policy*** arguments both parties will advance in support of their positions. Once you identify the arguments that each of the parties will make in support of, or against, the application of a particular legal theory, you are closer to discovering the issue being tested and identifying the correct response. Let us examine, once again, the fact pattern set forth in Example 1.

> Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven, alleging the tort of battery. What is Steven's best defense against liability?
>
> a. Steven did not intend to hit Sarah.
> b. Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
> c. Steven did not make bodily contact with Sarah.
> d. Sarah was a willing participant in the activity and thereby consented to the contact.
> e. Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

Here the interrogatory seeks Steven's best defense against liability. You should begin by narrowing the focus for the interrogatory by looking at whether Steven's best defense might be pointing out that Sarah cannot establish the elements of battery. Assume that the three elements of a common law battery claim apply here: (a) intentional (b) bodily contact that is (c) harmful or offensive. Your mental FLiP FLoP Tree™ should look something like this:

	Sarah Will Argue	Steven Will Argue
F	- Intent? No facts! - Contact -- caused by tray - Contact was "harmful" (concussion)	- No facts indicate that Steven acted intentionally. - No "bodily" contact
L	- Although no "bodily" contact, tray was instrumentality of harm within Steven's control.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- By engaging in the sledding activity, Sarah implicitly consented to such contact.
P	- N/A	- N/A

This careful analysis makes it quite evident that Sarah's toughest challenge will be to prove that Steven acted with the requisite level of intent to be liable for battery. Steven will no doubt emphasize his own lack of intent, and that there was no "bodily" contact. He can also assert the defense of consent. As we will see below, the strength of the latter arguments is questionable.

1. Eliminating Incorrect Responses

Once you have identified the central issue in the parties' dispute, you should begin the process of systematically eliminating answers that cannot be correct. Eliminating two or three possible responses allows you to focus your attention on the remaining choices – sorting out the merely "good" answers from the "best" answer.

To have a chance at being correct, a response must first pass a two-prong test: It must be factually and legally correct. Responses that list erroneous facts, or worse, give a one-sided interpretation of ambiguous facts that are in dispute must be incorrect. Similarly, a response that uses faulty legal reasoning, or misapplies or misstates the law must also be incorrect and should be eliminated.

Be careful, however, because finding responses that are factually or legally accurate does not mean you have identified the correct answer. A response that passes this preliminary step simply means that it cannot be eliminated – qualifying it as a possible choice but not necessarily the "best" answer. We will examine what distinguishes the two after we practice identifying responses that contain factual or legal inaccuracies.

<u>A. Examples of When Factual Inaccuracies Make A Response Incorrect.</u>

When examining responses for factual inaccuracies, you will likely encounter the following three types that will enable you to immediately dismiss the possible choice: (1) the response will conflict with the given facts; (2) the response will make an unreasonable inference from the facts; or (3) the response will assume as established an ambiguous fact that is central to the dispute.

(i) Responses that contain facts that contradict those in the fact pattern must be incorrect and should be eliminated.

> Ariel consumed three vodka tonics at Bill's Bar & Grill. After walking to her car and getting behind the wheel, Ariel pulled out of the parking lot and was driving home reasonably on an unlit street when 12-year-old Charlie, wearing all black, darted into the street while trying to escape his friends during a game of flashlight tag. Ariel hit Charlie with her car. When the police arrived, Ariel passed a field sobriety test, but her blood alcohol level was then determined to be above the legal limit, and she was immediately arrested for driving while intoxicated. In a comparative negligence jurisdiction, what is the most likely outcome of Charlie's subsequent negligence suit against Ariel?
>
> ~~a.~~ Judgment for Charlie because alcohol affected Ariel's ability to avoid the accident.
> b. Judgment for Ariel because of Charlie's comparative negligence.
> c. Judgment for Ariel because she was not negligent.
> d. Judgment for Ariel because she did not owe a duty to Charlie.
> e. Judgment for Charlie because Ariel's actions constitute negligence per se.

In this example, choice "a." must be eliminated because it conflicts with the given facts. There is nothing in the fact pattern to suggest that Ariel's drinking was the cause of the accident. Rather, the fact pattern clearly states that she was driving reasonably at the time of the accident and passed a field sobriety test.

(ii) Responses that draw unreasonable inferences from the fact pattern must be incorrect and should be eliminated.

> Marcus was tubing behind a boat driven by James. After Marcus indicated that he wanted to go faster, James gunned the throttle and then cut the wheel sharply to the left. The combination of speed and the sharp turn whipped Marcus outside of the wake and smashed him into an oncoming boat driven by Peter, who happened to be drinking from an open can of beer. In the State of Flux, a contributory negligence jurisdiction, it is a misdemeanor to have an open alcoholic container in a motorboat. Marcus survived the accident but is now paralyzed from the waist down. What is the result of the tort action against James brought by Marcus?
>
> a. James will be found liable under a negligence theory.
> b. James will be found liable for the intentional tort of battery.
> c. Both a. and b.
> d. James will not be held liable because of Peter's intervening criminal act.
> ~~e.~~ James will be found negligent, but because Marcus should have been more careful and not have encouraged James to drive faster, any award would be foreclosed to him using a contributory negligence theory.

In this example, choice "e." should be eliminated because it draws an unreasonable inference from the fact pattern. There is nothing in these facts to suggest that Marcus acted unreasonably by instructing James to go faster.

(iii) Responses that unfairly interpret an ambiguous fact that is central to the dispute cannot be correct and must be eliminated.

> In 1988, Sam, a permanent resident of Illinois, purchased Blackacre, a 10-acre parcel in Old York. The land was undeveloped and situated on a premier trout stream. Sam always dreamed of building a retirement home on Blackacre when he finally retired from the practice of law. He spent the one-week vacation he was able to take each year on Blackacre fishing and clearing the land in the middle of the parcel where he planned to put his retirement home. The clearing could not be seen from the road. In 1993, Sam became a partner at his firm and the workload became even greater, preventing him from visiting Blackacre for most of the next 14 years. In 1994, Jim happened upon Blackacre and noticed the clearing where he began camping almost all year. In the summer months, Jim even grazed cattle on the land. In 1998, Jim erected a crude shack and a fence on Blackacre. In 2007, when Sam finally retired, he returned to Blackacre to begin building his dream home. Jim refused to let Sam on the property and sued to quiet title. If Old York is a common law jurisdiction with a 10-year statutory period for adverse possession, what is the result of Jim's lawsuit?
>
> ~~a.~~ Judgment for Jim because his occupation of the land was open, notorious, exclusive and adverse for the entire statutory period.
> ~~b.~~ Judgment for Jim if he can show his occupation of the land was open and notorious.
> ~~c.~~ Judgment for Sam unless Jim proves his occupation of the land was exclusive.
> ~~d.~~ Judgment for Sam because Jim's occupation of the land was not continuous and exclusive.
> e. Judgment for Sam unless Jim proves he occupied Blackacre exclusively and continuously.

In this example, choices "a." through "d." assume the only fact in dispute—that Jim held Blackacre continuously for the entire statutory period. The words "most of" create a factual ambiguity about the timing of Sam's return. If Sam's trips to Blackacre were properly timed, Jim may not be able to satisfy the continuity element of an adverse possession claim.

<u>B. Examples of When Legal Inaccuracies Will Make a Response Incorrect</u>

On a law school exam, it will come as no surprise that responses will be incorrect where they misstate a legal rule or standard, apply the wrong rule given the facts, or make sweeping statements of law that, although correct, do not apply to the facts.

(i) Responses that misstate a legal rule or standard cannot be correct.

> Ariel consumed three vodka tonics at Bill's Bar & Grill. After walking to her car and getting behind the wheel, Ariel pulled out of the parking lot and was driving home reasonably on an unlit street when 12-year-old Charlie, wearing all black, darted into the street while trying to escape his friends during a game of flashlight tag. Ariel hit Charlie with her car. When the police arrived, Ariel passed a field sobriety test, but her blood alcohol level was then determined to be above the legal limit, and she was immediately arrested for driving while intoxicated. In a comparative negligence jurisdiction, what is the most likely outcome of Charlie's subsequent negligence suit against Ariel?
>
> a. Judgment for Charlie because alcohol affected Ariel's ability to avoid the accident.
> ~~b.~~ Judgment for Ariel because of Charlie's comparative negligence.
> c. Judgment for Ariel because she was not negligent.
> d. Judgment for Ariel because she did not owe a duty to Charlie.
> e. Judgment for Charlie because Ariel's actions constitute negligence per se.

Choice "b." must be eliminated because it misstates the theory of comparative negligence. In a comparative negligence jurisdiction, Charlie's own negligence would not bar him from recovery, it would merely decrease his potential award – it is the ***contributory*** negligence theory that bars a negligent plaintiff's recovery.

> Allen owns Baseball Collectables, a store that buys and sells baseball memorabilia. Steven, age 17, walked into Allen's store and showed him a signed baseball Steven found in his grandfather's attic. The signature was smudged, and although Allen could not be 100% sure, he believed it was an authentic baseball signed by Babe Ruth, ordinarily worth tens of thousands of dollars. Allen explained to Steven that, because he was not certain of the signature's authenticity, he could offer Steven only $2,000 for the ball. Steven accepted. Immediately afterwards, before each party had tendered performance, Allen's business partner Jorge examined the ball and correctly determined that the signature was authentic. Allen then opened the cash register, took $2,000 out of the drawer, and handed it to Steven. Steven refused the money and walked out of the store with the baseball. If Baseball Collectables sues Steven in a jurisdiction that follows the Restatement (Second) of Contracts, what will the result be?
>
> a. Judgment for Steven because of his age.
> b. Judgment for Baseball Collectables because to prove a valid contract there must be adequate consideration.
> c. Judgment for Steven because there was a mutual mistake concerning the authenticity of the ball.
> ~~d.~~ Judgment for Steven because the contract was void because of Steven's incapacity to contract.
> e. Judgment for Steven because he could lawfully disaffirm the contract.

Here, choice "d." must be eliminated because it misstates the applicable law. Under the Restatement (Second) of Contracts, contracts by minors are ***voidable*** by the minor; they are not void.

(ii) Responses that, given the facts, apply the wrong legal rule or standard must be eliminated.

> Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven, alleging the tort of battery. What is Steven's best defense against liability?
>
> a. Steven did not intend to hit Sarah.
> ~~b.~~ Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
> c. Steven did not make bodily contact with Sarah.
> d. Sarah was a willing participant in the activity and thereby consented to the contact.
> ~~e.~~ Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

Here, choice "b." can be eliminated because, although a defendant can assert self-defense to justify conduct that would otherwise constitute a battery, it can be used only to prevent a threat of imminent harm that is initiated by the plaintiff. In this example, Steven was protecting himself from hitting the wall, not from any threat from Sarah.

Similarly, choice "e." applies an improper rule given the facts because the doctrine of necessity provides that a person is privileged to prevent injury to himself by injuring ***private property***. The necessity defense can be asserted in response to a tort against property, not a tort against a person, and thus such a defense is clearly misplaced on these facts.

> Marcus was tubing behind a boat driven by James. After Marcus indicated that he wanted to go faster, James gunned the throttle and then cut the wheel sharply to the left. The combination of speed and the sharp turn whipped Marcus outside of the wake and smashed him into an oncoming boat driven by Peter, who happened to be drinking from an open can of beer. In the State of Flux, a contributory negligence jurisdiction, it is a misdemeanor to have an open alcoholic container in a motorboat. Marcus survived the accident but is now paralyzed from the waist down. What is the result of the tort action against James brought by Marcus?
>
> a. James will be found liable under a negligence theory.
> b. James will be found liable for the intentional tort of battery.
> ~~c.~~ Both a. and b.
> d. James will not be held liable because of Peter's intervening criminal act.
> e. James will be found negligent, but because he should have been more careful and not have encouraged James to drive faster, any award would be foreclosed to Marcus using a contributory negligence theory.

Choice "c." must be incorrect because under the law it is impossible for a tortfeasor to act negligently and intentionally with respect to the same harm.

(iii) Responses that offer sweeping statements of law.

> Allen owns Baseball Collectables, a store that buys and sells baseball memorabilia. Steven, age 17, walked into Allen's store and showed him a signed baseball Steven found in his grandfather's attic. The signature was smudged, and although Allen could not be 100% sure, he believed it was an authentic baseball signed by Babe Ruth, ordinarily worth tens of thousands of dollars. Allen explained to Steven that, because he was not certain of the signature's authenticity, he could offer Steven only $2,000 for the ball. Steven accepted. Immediately afterwards, before each party had tendered performance, Allen's business partner Jorge examined the ball and correctly determined that the signature was authentic. Allen then opened the cash register, took $2,000 out of the drawer, and handed it to Steven. Steven refused the money and walked out of the store with the baseball. If Baseball Collectables sues Steven in a jurisdiction that follows the Restatement (Second) of Contracts, what will the result be?
>
> a. Judgment for Baseball Collectables because to prove a valid contract there must be adequate consideration.
> b. Judgment for Steven because of his age.
> c. Judgment for Steven because there was a mutual mistake concerning the authenticity of the ball.
> d. Judgment for Steven because he could lawfully disaffirm the contract.
> e. Judgment for Steven because the contract was void because of Steven's incapacity to contract.

Choice "b." should be eliminated because, although it is a correct statement of the law, it is overbroad and, while correct, is not narrowly tailored to the issue being tested.

C. Separating the "Best" Response From Merely "Good" Responses

Once you have methodically eliminated incorrect responses, you will probably find yourself with two or three remaining choices that appear to accurately restate the facts and/or law. The next step is to determine which of those responses represents the best answer in light of the facts. Most likely you will find that, although each statement is technically correct, one response is better because it is either easier to prove, or addresses the central issue in dispute more precisely.

(i) Examples where one response is easier to prove.

> Steven, Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven, alleging the tort of battery. What is Steven's best defense against liability?
>
> a. Steven did not intend to hit Sarah.
> b. Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
> c. Steven did not make bodily contact with Sarah.
> d. Sarah was a willing participant in the activity and thereby consented to the contact.
> e. Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

In this example, the reader is able to eliminate choices "b." and "e." because they contain misstatements of the law. As we noted earlier, the interrogatory is looking for Steven's ***best*** defense. In a suit for battery, Sarah must prove that Steven acted with the specific intent to cause the harmful bodily contact. Between choices "a." and "c.," choice "a." is the easier to prove because, unlike choice "b." where Sarah might have an argument that "bodily contact" took place, there are absolutely no facts that demonstrate that Steven acted with the specific intent to cause harmful bodily contact with Sarah. Consequently, choice "c." can be eliminated.

Between choices "a." and "d.," again choice "a." is the better choice. Choice "d." states that Steven might be able to assert the affirmative defense of consent because Sarah was hit while taking part in the sledding; however, because an affirmative defense assumes that the plaintiff is able to prove the *prima facie* case, it is not as good as a defense that knocks out an element of the *prima facie* case (*i.e.,* requisite intent). As a result, choice "d." can be eliminated, which leaves choice "a." as Steven's best defense.

Ariel consumed three vodka tonics at Bill's Bar & Grill. After walking to her car and getting behind the wheel, Ariel pulled out of the parking lot and was driving home reasonably on an unlit street when 12-year-old Charlie, wearing all black, darted into the street while trying to escape his friends during a game of flashlight tag. Ariel hit Charlie with her car. When the police arrived, Ariel passed a field sobriety test, but her blood alcohol level was then determined to be above the legal limit, and she was immediately arrested for driving while intoxicated. In a comparative negligence jurisdiction, what is the most likely outcome of Charlie's subsequent negligence suit against Ariel?

~~a.~~ Judgment for Charlie because alcohol affected Ariel's ability to avoid the accident.
~~b.~~ Judgment for Ariel because of Charlie's comparative negligence.
c. Judgment for Ariel because she was not negligent.
~~d.~~ Judgment for Ariel because she did not owe a duty to Charlie.
e. Judgment for Charlie because Ariel's actions constitute negligence per se.

By process of elimination, the reader is left with two choices: "c." and "e." Although both choices address the central issue in the dispute that the professor wants the student to address (*i.e.,* whether Ariel breached her duty by driving unreasonably), choice "c." is the better answer since it is supported by the facts (*i.e.,* Ariel was not negligent because the facts say she was driving reasonably).

If choice "e." seemed attractive, it may be because you failed to read the facts closely enough. True, Ariel violated a statute meant to protect pedestrians like Charlie because she had been drinking before operating her car; however, ***negligence per se*** creates a ***rebuttable presumption*** of negligence which can be overcome if the defendant can prove that she exercised due care and that the defendant's violation of the statute was not the cause of the plaintiff's injury. Here, the facts tell us that Ariel was driving reasonably and presumably would be able to overcome the presumption created by the doctrine.

(ii) Examples of responses that address the central issue in dispute more precisely.

Allen owns Baseball Collectables, a store that buys and sells baseball memorabilia. Steven, age 17, walked into Allen's store and showed him a signed baseball Steven found in his grandfather's attic. The signature was smudged, and although Allen could not be 100% sure, he believed it was an authentic baseball signed by Babe Ruth, ordinarily worth tens of thousands of dollars. Allen explained to Steven that, because he was not certain of the signature's authenticity, he could offer Steven only $2,000 for the ball. Steven accepted. Immediately afterwards, before each party had tendered performance, Allen's business partner Jorge examined the ball and correctly determined that the signature was authentic. Allen then opened the cash register, took $2,000 out of the drawer, and handed it to Steven. Steven refused the money and walked out of the store with the baseball. If Baseball Collectables sues Steven in a jurisdiction that follows the Restatement (Second) of Contracts, what will the result be?

- a. Judgment for Steven because of his age.
- ~~b.~~ Judgment for Baseball Collectables because to prove a valid contract there must be adequate consideration.
- ~~c.~~ Judgment for Steven because there was a mutual mistake concerning the authenticity of the ball.
- ~~d.~~ Judgment for Steven because the contract was void because of Steven's incapacity to contract.
- e. Judgment for Steven because he could lawfully disaffirm the contract.

By process of elimination, a student would be left with choices "a." and "e." Both choices are correct and address the central issue of the case (*i.e.,* Steven was a minor, making the contract voidable). However, choice "e." is the better answer because it more precisely describes the circumstances – Steven exercised his rights as a minor and elected to disaffirm the contract.

CONCLUSION

Multiple-choice examinations are an increasing trend in law schools, and, as a result, all law students should be prepared to handle questions in this format. Despite the fact that multiple-choice questions are frequently and justifiably criticized for failing to test aspiring lawyers in a manner that reflects legal practice, resourceful law students should welcome these types of questions. They offer an opportunity for motivated students to distinguish themselves from their colleagues simply by being better prepared to recognize the standard ways in which professors assess student perceptiveness through varied characterizations of the facts and the law in the answer choices. This introduction was intended to expose you to some of the most common testing devices used on multiple-choice exams, but you will not be properly prepared unless you take it upon yourself to practice multiple-choice questions. If you do so, you will increase the likelihood that you will excel in law school.

ORGANIZATION OF THE FEDERAL JUDICIARY

The structure of the federal court system has varied a great deal throughout the history of the nation. The Constitution provides merely that the judicial power of the United States "be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."[1] Thus, the only indispensable federal court is the Supreme Court. Congress has established and abolished other U.S. courts as national needs have changed over time.

The federal courts are presided over by judicial officers. In the Supreme Court, the judicial officers are called Justices. In the courts of appeals, district courts, and other courts, most of the judicial officers are called judges. Today's Justices and judges have the authority, duties, and benefits assigned to them by law, as prescribed in the Constitution and enacted by Congress.

Judges who are at least 65 years of age and have served as active judges for a minimum of 15 years often elect to take senior status. As senior judges, they may continue to hear cases, deal with administrative matters, and serve on special commissions and committees. Currently, nearly 15% of the federal courts' caseload is handled by senior judges.

THE SUPREME COURT

If the federal court system is viewed as a pyramid, at the top is the Supreme Court of the United States, the nation's highest court. The Supreme Court consists of nine Justices appointed for life by the President with the advice and consent of the Senate. One Justice is appointed as the Chief Justice and has additional administrative duties related both to the Supreme Court and the entire federal court system. Each Justice is assigned to one or more of the courts of appeals for emergency responses. The Supreme Court meets on the first Monday of October each year and usually continues in session through June.

The Supreme Court, in most instances, chooses the cases that it hears. It receives and disposes of about 10,000 cases each year, most by a brief decision that the subject matter is either not proper or not of sufficient importance to warrant review by the full court. In the end, the Court hears and decides on the merits only about 100 cases per year. Most cases reach the Supreme Court on a writ of *certiorari*, the legal mechanism by which a party requests that the Court review a specific question determined by a lower court. The Supreme Court often denies writs of certiorari without stating a reason. Cases are generally heard *en banc*, which means by all the Justices sitting together in open court. The present members of the Supreme Court are: Chief Justice John G. Roberts Jr.; Justices Antonin Scalia Jr.; Anthony M. Kennedy; Clarence Thomas; Ruth Bader Ginsburg; Stephen G. Breyer; Samuel A. Alito, Jr.; Sonia M. Sotomayor; and Elena Kagan.

COURTS OF APPEALS

Below the Supreme Court are the 13 United States Courts of Appeals. These appellate courts review the judicial decisions made at the district court level. One circuit – the United States Circuit Court of Appeals for the District of Columbia – hears appeals only from the district court located in Washington, D.C. Eleven other circuits – the First Circuit through the Eleventh Circuit – cover district courts in a few exclusive states each. For example, the Second Circuit covers district courts located in New York, Connecticut, and Vermont. A final federal court of appeals – the Court of Appeals for the Federal Circuit – is devoted exclusively to agency appeals concerning federal issues such as patent law. The First Circuit is the smallest court of appeals. It has only six judgeships. The largest is the Ninth Circuit, with 28 judgeships. The U.S. Court of Appeals for the Armed Forces is also on this level. It hears appeals from the United States military courts of review.

DISTRICT COURTS

Below the courts of appeals are the 94 United States district courts and the specialized courts, such as the Tax Court, the Court of Federal Claims, the Court of Veterans Appeals, and the Court of International Trade. The 94 district courts are spread out among the 50 states, the District of Columbia, and the United States territories – Guam, the Virgin Islands, Puerto Rico, and the Northern Mariana Islands. Some states,

[1] U.S. CONST. ART. III, § 1, CL. 1

such as Alaska, are composed of a single judicial district. Other states, such as California and New York, have several judicial districts.

There are various routes a case may take to arrive in federal court. Some cases originate in a United States district court, while others are removed from a state court or federal agency. A party involved in a suit in a U.S. court may proceed through at least three levels of review. Generally, the case will be heard and decided by one of the district courts on the first level. If a party is dissatisfied with the decision rendered, then the party may have the decision reviewed in one of the courts of appeals. If dissatisfied with the decision of the appeals court, then the party may seek further review in the Supreme Court of the United States. The Supreme Court, however, primarily reviews cases that involve unresolved matters of national importance and accepts only a small number of cases each term. For instance, the Supreme Court often grants *certiorari* when two or more federal circuit courts of appeals disagree on a question of federal law.

This pyramidic organization of the courts serves two purposes: First, the courts of appeals can correct errors that have been made by the trial courts. Second, the Supreme Court can ensure constitutional supremacy by reviewing cases in which constitutional issues have been decided, and it can ensure the uniformity of decisions where two or more lower courts have reached different results.

Magistrate Judges

In 1968, Congress created the federal magistrate judge position to assist district court judges in the discharge of their duties. There are both full-time and part-time magistrate judge positions, and these positions are assigned to the district courts according to district court caseload sizes (subject to funding by Congress). When a position is assigned to a district court, the new magistrate judge is appointed by the judges of the court. A full-time magistrate judge serves a term of eight years. A part-time magistrate judge serves a term of four years. Since its inception, the position of federal magistrate judge has increased in importance as the number of cases in the federal court system has risen. Magistrate judges handle a variety of matters including civil consent cases, misdemeanor trials, preliminary hearings, pretrial motions, and guilty pleas. In 2012, the federal court system had approximately 53 full-time magistrate judge positions, 39 part-time positions, and three combination clerk-of-the-court and magistrate judge positions.

NOTES

AN OVERVIEW OF CIVIL PROCEDURE

INTRODUCTION

When courts resolve legal disputes they must use both ***substantive*** and ***procedural*** rules. During law school, you will study bodies of substantive law like Contracts, Property, and Torts. These courses explore the rights and duties regulating everyday transactions as well as the standards of civil liability. By contrast, Civil Procedure examines the ***procedural*** rules that courts employ when resolving disputes brought before them.

As its name connotes, Civil Procedure covers the procedural questions presented in ***civil*** actions. Civil actions resolve disputes that arise out of the everyday interactions between people and entities. By contrast, ***criminal*** actions are commenced and prosecuted by the government to punish those who engage in conduct that violates the criminal law.[1] Thus, students should be aware that they will not be exposed to the procedural aspects of ***criminal*** suits in Civil Procedure; that topic is typically covered in an upper-level elective appropriately entitled Criminal Procedure.

The American system of justice is ***adversarial***, which means that the parties involved in the dispute bear the responsibility of commencing the action, framing the legal issues, producing factual evidence to support their claims, and, in the case of a jury trial, persuading the jury that the facts are as the parties have alleged. This system of justice was built on the belief that the truth is more likely to be revealed from a trial directed by interested parties, *i.e.*, the ***plaintiff*** (the prosecuting party who commences the action to enforce a right) and the ***defendant*** (the defending party who seeks to avoid liability).

Within the adversarial system, judges often referee between the dueling parties. They are responsible for interpreting and enforcing the established rules that further the primary objectives of the civil justice system: fairness and judicial economy. Since these two objectives may conflict, especially when faced with a backlog of civil cases that prevents parties from achieving justice in a timely manner, society has opted to temper justice with procedural rules that honor fairness in a limited way. Thus, the reoccurring theme you will encounter in this course is whether a particular procedural rule provides a just and efficient determination of a legal controversy. In fact, the Federal Rules of Civil Procedure[2] expound this policy by providing, in the very first Rule, "These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . [and] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[3]

ANATOMY OF A CIVIL ACTION – A CHRONOLOGICAL OVERVIEW

Undoubtedly, every civil case you will read is rooted on the simple premise that one party felt it was injured and decided to sue another party to compensate for the injury and/or to prevent further injuries. Before an attorney runs to the courthouse to commence an action, however, she should research the law and then counsel the potential client about the merit and strength of the claim.

The attorney must first determine if the injury complained of is one that can be remedied in a court of law. Not every right has a remedy, and there are many acts that may result in an injury that the law will not redress. For example, a potential litigant may be offended by a rude gesture from her next-door neighbor, or a supplier may lose a steady source of business because a competitor underbids it. Arguably, both situations involve someone feeling injured, but if the law does not recognize the injury complained of, then litigation would be a frivolous and wasteful exercise.

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1 Note that government involvement does not always indicate a criminal action. Federal, state, and local governments are often parties to civil suits as both plaintiffs and defendants.

2 There are two distinct civil court systems in the United States: the state court systems and the federal court system. Most schools teach students about Civil Procedure by introducing them to the Federal Rules of Civil Procedure (Fed. R. Civ. P. or "Rules") and the various statutes that govern the operation of the federal courts. The Fed. R. Civ. P. govern the conduct of all civil actions brought in federal district courts. While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions.

3 Fed. R. Civ. P. 1.

Even assuming that the action complained of is one for which courts can grant relief, an attorney should provide a thorough assessment of the strength of the case. Among the considerations are: whether the alleged wrongdoer can be found and brought to court; whether the aggrieved party can substantiate his claims with the testimony of witnesses and other documentary evidence; the credibility of the evidence the party intends to offer; the strength of any defenses that may be asserted; and whether, in the event of a victory, an award can be fashioned and enforced that would justify the effort expended enforcing the right.

If, after researching the law and advising the client about the merit and strength of the claim, the client wants to commence a civil action, then the attorney must decide in which court to bring the action.

GETTING TO THE COURTHOUSE

Before an action can be commenced, the aggrieved party must determine where to bring the action. In order to have jurisdiction to hear a claim, a court must have both: (a) jurisdiction over the subject matter of the dispute; and (b) jurisdiction over the parties to the action.

A. Subject Matter Jurisdiction

Unlike most state trial courts, which enjoy general subject matter jurisdiction (the power to hear almost any state or federal claim), the subject matter jurisdiction of federal district courts has been severely limited by Congress and the United States Constitution. The party seeking to invoke the jurisdiction of a federal court must show that the subject matter of the case is one that is within the competency of the court. Typically, there are two basic kinds of controversies over which the federal judiciary enjoys subject matter jurisdiction: diversity of citizenship jurisdiction (actions involving citizens of different states) and federal question jurisdiction (actions "arising under the Constitution, laws, or treaties of the United States").[4]

Diversity of citizenship jurisdiction was granted to the federal judiciary in order to provide a federal forum for an out-of-state litigant who might otherwise be exposed to local prejudice if the action was litigated in state court. To qualify, there must be "complete diversity" (no plaintiff can be a citizen of the same state as any defendant), and the amount in controversy must exceed $75,000. Diversity of citizenship jurisdiction, like most of the federal courts' jurisdiction, is ***not*** exclusive, which means that state courts are also competent to hear these cases. However, if a plaintiff decides to sue an out-of-state defendant in a state court in the plaintiff's home state, in an effort to avoid any local prejudice, the defendant can elect to remove the action to a federal court and assert diversity of citizenship as the jurisdictional grounds.

Like disputes between parties of different states, some questions of federal law can also be raised in state court; however, if the plaintiff wishes to bring the action in federal court, he must affirmatively plead that his claim is founded directly on federal law. In order for federal question jurisdiction to exist, the subject matter of the action must be such that either "federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law."[5] In most of the cases you will encounter, federal question jurisdiction will be established if federal law is the source of the cause of action. For instance, claims for trademark, copyright, antitrust, or securities violations clearly present federal questions because federal statutes provide the source of the right the plaintiff is asserting.

It is worth noting that, unlike the requirement for personal jurisdiction (below), which can be waived by a defendant, the requirement that the court have subject matter jurisdiction can never be waived. If a court lacks the authority to hear a certain type of case, no matter how badly both litigants

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4 28 U.S.C. §1331. *See also* U.S. CONST., ART. III, §2 (Federal courts also have jurisdiction to hear [a] cases involving ambassadors, public ministers, or consuls, [b] cases of admiralty and maritime jurisdiction, and [c] cases in which the United States is named as a party).

5 *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 28 (1983).

desire its resolution, the case must be immediately dismissed and then recommenced in the appropriate forum. (A federal court may be able to remand (*i.e.*, return) the case back to a state court for trial.)

B. Personal Jurisdiction

Notwithstanding a court's competency to hear the subject matter of a case, if the court lacks ***personal jurisdiction*** (jurisdiction over the person of the defendant) it cannot compel the defendant to appear and defend the action and, more importantly, cannot render an enforceable judgment against him. With a few exceptions, in order for a federal court to exercise personal jurisdiction over a defendant, the defendant must: reside or be found in the state in which the court sits, be subject to the "long-arm" jurisdiction of the state in which the court sits, or voluntarily consent to the jurisdiction of the court.

C. Venue

The law of personal jurisdiction (above) establishes constitutional limits on states' power to hail a defendant from another state within their borders for litigation. Venue relates to the proper place within the state to bring the suit. Many states have multiple districts that are divided by county. The plaintiff must select a district within which to file suit. Selection of the district is determined by the venue rules. A common place in which venue is allowed is the district in which a substantial part of the events giving rise to the claim occurred.[6]

COMMENCING THE ACTION

After deciding which court can hear the case, the plaintiff must then commence the action by serving the defendant with a summons and complaint. The summons (a jurisdiction-establishing paper issued by the court clerk) directs the defendant to appear and defend the action or else risk losing by default. A plaintiff typically serves the summons by personal service (personally handing it to the defendant) or by utilizing one of the several forms of substituted service such as leaving it with the defendant's registered agent or with a person of suitable age and discretion who lives in the defendant's home.

A pleading (a paper setting forth a claim for relief) called a "complaint" or "petition" is generally served with the summons. The complaint is only the initial pleading. Other parties to the action can, and often do, assert claims to avoid liability. For instance, in addition to the complaint, there can be counterclaims (claims asserted by a defendant against a plaintiff), cross-claims (claims asserted by a defendant against another defendant already in the action), and third-party claims (claims asserted by a defendant against a stranger to the action).

The complaint need not be an overly complex document. Federal Rule of Civil Procedure 8(a) explains that a complaint must only contain: "(1) a short and plain statement of the grounds for the court's jurisdiction, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought[.]"[7] The primary purpose of the complaint has traditionally been to frame the parties' dispute and provide the defendant with adequate notice of the plaintiff's allegations so that he may begin to prepare a defense. In recent years, the Supreme Court has held that a complaint needs to do something more than simply give notice to the defendant; it must present sufficient facts that make it ***plausible*** to think that the plaintiff indeed has a viable claim for relief.[8]

THE (PRE-ANSWER) MOTION TO DISMISS

The motion to dismiss, called a demurrer in some jurisdictions, is the first opportunity that a defendant has to test the legal sufficiency of the plaintiff's complaint. Before serving an answer (a responsive pleading from a defendant that typically denies the allegations in the complaint and/or asserts

[6] 28 U.S.C. §1391(a)(2), (b)(2).
[7] Fed. R. Civ. P. 8(a).
[8] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

specific defenses), the defendant can make a motion to dismiss the complaint. For instance, a defendant may seek dismissal by asserting that the plaintiff failed to satisfy its obligation under Rule 8(a)(2) to plead facts that demonstrate a plausible claim for relief.[9]

Even assuming that the complaint sets forth specific facts and everything actually happened as the plaintiff alleges, a defendant might still contend that no legal theory entitles the plaintiff to relief. The motion to dismiss is the equivalent of a procedural "So what?" and presents a question of law for the judge to decide.[10] The question is typically a simple one: Assuming, for the purposes of argument, that the plaintiff can prove all of the facts alleged in the complaint, is the plaintiff entitled to relief? If the plaintiff, in responding to the motion, fails to invoke a recognized legal theory to support the action, the court will dismiss the complaint and the action will end there unless, of course, the plaintiff appeals the judge's determination.

If, on the other hand, the plaintiff is able to articulate a legal theory to support the claim, the defendant's motion will be denied and the court will order the defendant to serve a written answer that admits or denies the allegations in the complaint.

> **Example:** Jim, a resident of Illinois, attends Law Preview's law school prep course at Northwestern University School of Law in Chicago. During the third hour of a lecture on Civil Procedure, Jim falls asleep with his head back over the chair and begins snoring loudly. In an effort to put an end to the racket, Professor Smith, a professor of law from California, begins walking toward Jim and speaking in a louder-than-normal voice. The sound of the professor's voice had the intended effect of rousing Jim, but when Jim shuddered awake he fell out of his chair and fractured three vertebrae. In Illinois, a person is liable for committing the tort of battery when he: (1) intentionally and wrongfully engages in conduct that (2) results in the offensive ***physical contact*** with a person who (3) does not consent to such contact.
>
> Using a complaint that reiterates these same facts, Jim decides to sue Professor Smith for battery and seeks to recover for the injuries that resulted from the professor's allegedly tortious conduct. Jim serves Professor Smith with the complaint and the professor immediately makes a pre-answer motion to dismiss claiming that, as a matter of law, he could not be liable for battery since he never came in physical contact with Jim. Unless Jim can provide an alternative legal theory the motion to dismiss will be granted and Jim's complaint will be dismissed because the facts as they exist do not entitle Jim to relief under the law.

DISCOVERY

Assuming that the plaintiff's claim is supported and the defendant serves an answer, the litigation progresses through what is called the discovery phase. It is during this time that testimony and factual evidence may be collected by, among other discovery devices, subpoenas for documents, a deposition (an oral examination of a witness under oath), or interrogatories (questions posed by counsel, in writing, to the other party). Parties may seek information relevant to the claims or defenses in the case. The rules provide for some protections against abuse by limiting the discovery to requests that are not overly burdensome, cumulative, or seek information that is privileged or otherwise protected.[11]

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[9] When deciding whether a plaintiff has satisfied its obligation to provide a "statement of the claim" under Rule 8(a)(2), courts perform a two-part test: First, a court will examine whether the complaint merely contains conclusions of law (*e.g.*, "the defendant acted ***recklessly***") or statements of fact that, if true, would impose liability on the defendant (*e.g.,* "the defendant acted recklessly ***when he drove his car down a busy sidewalk***"). Claims that are merely conclusory will be disregarded. Second, the court draws upon its own "judicial experience and common sense" to decide whether the remaining, non-conclusory allegations, if taken as true, constitute a "plausible" claim. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Claims that are not plausible may be dismissed, sometimes with leave to amend. This test is still disputed. Courts are wrestling with the questions of what exactly is a "conclusory" statement that will be disregarded and when a claim is "plausible" as opposed to merely possible.

[10] Judges decide and determine the applicable law in the case. Juries are responsible for determining the facts as the parties present them. For example, in the case of a simple hit and run, the judge may decide the following question of law: Is a plaintiff's expert qualified to give an opinion about the rate of speed the defendant was driving when he entered the intersection? The jury, on the other hand, may have to determine the following question of fact based on the evidence presented in the case: Did the defendant enter the intersection while the light was red?

[11] *See generally* Fed. R. Civ. P. 26.

THE MOTION FOR SUMMARY JUDGMENT

The next principal checkpoint in the life of a civil action is the motion for summary judgment. A motion for summary judgment can be made anytime before the eve of trial. The movant (the party seeking an order from the court) asks the court to decide the case without a trial, based upon the combination of law and facts revealed during the discovery phase. On a motion for summary judgment, the evidence is typically in the form of sworn affidavits, documents, or deposition transcripts procured during discovery. Since no trial has occurred at this point, there is no opportunity for the judge to have the benefit of testimony from live witnesses.

The movant, who can be either the plaintiff or defendant, argues that, given the applicable legal rule and the facts unearthed during the discovery phase, the court has no choice but to rule in his favor. In deciding whether to grant a motion for summary judgment, the court will construe all of the evidence collected during the discovery phase in a light most favorable to the nonmoving party (in this case, the party seeking a trial). The court will grant a motion for summary judgment only if there is no genuine dispute of material fact; *i.e.*, the evidence is one-sided enough to persuade the judge that a trial would generate no additional facts that would enable the jury to find for the nonmoving party.

If a motion for summary judgment is granted, a trial on that issue is averted. Summary judgment may be partial, meaning that only certain issues are taken as established but other issues in the case still require a trial, or it may be complete, meaning that the litigation ends. If, on the other hand, the motion is denied, it is typically because genuine disputes of material fact exist that can only be resolved at trial (*e.g.*, two different witnesses give conflicting versions of what they saw).

THE MOTION FOR A JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT)

At any time prior to the submission of the case to the jury, either party may make a motion for a judgment as a matter of law, commonly referred to as a motion for a directed verdict. By this time, the judge and the jury both have had the same opportunity to view the evidence presented by the parties. They have had an opportunity to view the demeanors of the witnesses offered in the case and draw conclusions about the persuasiveness of their testimonies. Accordingly, the party moving for a judgment as a matter of law tries to persuade the trial judge that, given the evidence presented in the case, a reasonable jury could not decide the case in any other way but in favor of the movant.[12]

If the motion for a directed verdict is granted, the case is usually over and the jury is released without ever having to decide the facts of the case. If the motion is denied, the case is then handed over to the jury to allow them to decide the pertinent facts of the case based upon the evidence they heard in the courtroom.

Because a denial of the motion merely sends the case to the jury, judges are less inclined to grant a motion for a directed verdict and, more often, reserve their decision on the motion until after the jury has rendered its decision. Our civil justice system places great faith in juries and, accordingly, judges are willing to allow them to serve their function and render a verdict. More importantly, if a judge's errant decision is reversed on appeal, the case must be retried from the beginning – thus wasting the jury's work up until that point. By contrast, a jury's determination of the facts cannot be the basis for reversal by an appellate court, with limited exceptions in instances where a new trial may be granted.

THE RENEWED MOTION FOR A JUDGMENT AS A MATTER OF LAW (JUDGMENT NOTWITHSTANDING THE VERDICT OR "JNOV")

[12] Federal Rule 50(a)(1) articulates the standard for granting a judgment as a matter of law as follows:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Unlike the other pretrial motions we have discussed up until this point, a renewed motion for a judgment as a matter of law (also known as a motion for a judgment notwithstanding the verdict) is a post-trial motion made after the jury has rendered its verdict. As its name suggests, the renewed motion for a judgment as a matter of law is simply a post-trial repetition of the motion for a directed verdict. Thus, to be eligible to request such relief, the movant must have first made a motion for a directed verdict before the case was given to the jury.

The movant in this scenario is the party whose motion for a directed verdict was previously denied. The movant seeks to have the judge set the jury verdict aside and render a judgment in its favor. As with a motion for a directed verdict, to prevail the movant must convince the judge that reasonable minds could not differ as to the just result.

MOTION FOR A NEW TRIAL

The judge presiding over a trial generally has broad discretion to grant a motion for a new trial. As its name suggests, the movant, in an attempt to cure a legal error that occurred during the trial, seeks to have an entirely new trial.

Not every legal error during the trial will justify granting a motion for a new trial. To serve as a basis for granting a new trial, the error complained of must affect the substantial rights of the parties and cannot be harmless.[13]

Although the reasons for granting a new trial are limitless, such motions are frequently sought to cure an erroneous statement of law in the instructions to a jury, misconduct during the trial by a party or by an attorney, or that the court erred by admitting or excluding a piece of evidence.

APPEAL

Assuming the motion for a new trial is denied, the aggrieved party may then resort to an appeal to cure what is perceived as an injustice at the trial level. An appeal is available to the appropriate circuit court in which the district court resides upon a "final judgment."[14] The party seeking an appeal must state the grounds for an appeal, generally an error that occurred during the litigation or trial.

RELIEF FROM JUDGMENT

Once the appeal is final the case is over. However, there is one final mechanism to alter the final decision in the case – Relief from Judgment[15] – under certain circumstances, including mistake, excusable neglect, fraud, or other misconduct of an adverse party, so long as the motion is made within a reasonable time and no more than one year after the judgment was entered on these bases.

FORMER ADJUDICATION

May the aggrieved party bring a second suit? Most of us are familiar with the concept of double jeopardy in criminal cases, which prevents a person from being tried twice for the same crime. In civil procedure there is a similar concept – a person who either brings or defends a case should not be able to try again just because they are dissatisfied with the result. This concept of former adjudication, or the effect of judgments on subsequent litigation, is typically divided into two doctrines: *res judicata* (claim preclusion) and *collateral estoppel* (issue preclusion). Claim preclusion forbids a party from relitigating a claim that should have been raised in the former litigation. Issue preclusion comes into play when a claim is not barred but when some issue involved in that claim has been previously adjudicated.

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13 Fed. R. Civ. P. 61.
14 *See* 28 U.S.C. §1291.
15 Fed. R. Civ. P. 60(b).

APPENDIX A

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A P P E N D I X A

FACTUAL AMBIGUITIES

The common law crime of burglary requires proof of the breaking and entering of a dwelling at night.

Practice Question

On a Sunday in early-April, Joe Fisherman arrived at the town pier well before dawn to do some fishing on his friend Steve's fishing boat. As he stepped onto the dock, he noticed that Steve had not yet arrived. He also realized that in his haste to leave the house, he forgot his fishing rod. Peering down through the plastic window of the protective tarp on the sailboat docked next to Steve's boat, Joe eyed a suitable rod. After making sure nobody was looking, Joe reached through an unzipped section of the canvas and picked up the rod. Paul, the sailboat's owner, who was passed out from a night of heavy drinking in the front cabin, did not feel the gentle rocking that occurred when Joe leaned down and took the rod.

Is Joe Fisherman guilty of burglary?

NOTES

APPENDIX B

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APPENDIX B

TORTS HYPOTHETICAL
60 MINUTES

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he had worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

Dr. Green's first attempt to remove the object using the Heimlich Maneuver was unsuccessful, and resulted in two fractured ribs. He next decided to use "The Claws of Life," which is a widely used and accepted medical device designed to remove small objects from children's throats. After Dr. Green carefully inserted the device into Cindy's mouth and applied the normal amount of pressure to the handle of the device, it unexpectedly broke off in Cindy's mouth, cracking four of her teeth and cutting her tongue. Dr. Ross, who was on call at the hospital that day, arrived on the scene and successfully removed the head of a popular action figure doll from Cindy's esophagus. The action figure, the prize in a kids' meal promoted by the popular fast food restaurant Burger Prince, came in packaging that specifically stated it was intended for children ages five and older. DollCo, a company that produces and distributes promotional products and kid's toys, manufactured the action figure using a design that did not include a removable head.

Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims that Cindy can assert.

A P P E N D I X B

SUMMARY OF RELEVANT LAW FOR TORTS HYPOTHETICAL #1*

I. The prima facie case for negligence is:

A. The defendant owed a legal duty to exercise care that would avoid unreasonable risk to others;

1. Professional Duty of Care: In negligence cases against professionals, including doctors, the duty of care owed is measured by the level of skill and knowledge commonly possessed by members of the profession in good standing.

B. The defendant breached that legal duty by acting carelessly (negligent);

1. Res Ipsa Loquitur. The res ipsa loquitur doctrine allows a plaintiff to create a rebuttable presumption that the defendant was negligent if the plaintiff can establish that:

a. There was no direct evidence of the defendant's conduct;

b. The plaintiff's injuries rarely occur without negligence;

c. The instrumentality of the harm was in the exclusive control of the defendant at the time the plaintiff was injured;

d. The plaintiff's injuries were probably not caused by the plaintiff's own conduct; and

e. The facts surrounding the defendant's conduct are within the defendant's exclusive control.

C. The defendant's breach of the legal duty was the proximate cause of the plaintiff's injuries; and

D. The plaintiff suffered an injury.

II. The doctrine of respondeat superior allows a plaintiff to hold a defendant's employer jointly liable for all tortious acts (whether intentional, negligent, or in strict liability) of its employees when:

A. The defendant was an employee subject to the employer's control; and

B. The defendant was acting within the scope of his or her employment.

III. A theory of strict products liability provides that a seller of a product is strictly liable for injuries caused by a product if such product is: (1) sold in a defective condition and (2) unreasonably dangerous to the consumer.

*** The following summary of intentional tort law is provided solely for the purpose of answering Torts Hypothetical #1. It is not a complete outline of the substantive law of Torts and should not be relied upon as such.**

A. "Seller" includes the product's manufacturer and any other person in the product's distributive chain of commerce (*e.g.,* wholesaler, retailer, etc.).

   1. <u>Health Professional Exception</u>: Where a health professional utilizes a defective product to provide healthcare services, the health professional will not be held liable in strict products liability for injuries caused by the defective product.

B. "Defective Condition" is defined by Restatement of Products Liability 3d §2 as:

   1. A "manufacturing defect" which occurs when the product deviated from the intended design (*e.g.,* product is structurally different from other products); or

   2. A "design defect" which occurs when all similar products that were manufactured by the defendant are the same and they all bear a feature whose design is itself defective, making it unreasonably dangerous; or

      a. <u>EXCEPTION</u>: FDA-approved medical devices are exempt from strict products liability claims under Restatement of Products Liability 3d §6.

         i. A plaintiff seeking to bring a defective design claim against a prescription drug or medical device manufacturer must show that "the foreseeable risks posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable healthcare providers, knowing of the risks and benefits, would not prescribe the drug or medical device for any class of patients."

   3. A "warning defect" which occurs when the manufacturer of the product failed to adequately warn the ultimate consumer or user of the product of the dangers surrounding the product's use, making it unreasonably unsafe.

C. To prove a strict products liability claim using Restatement of Torts 2d §402A, the plaintiff must establish:

   1. The product that caused her injury was defective; and

   2. The product was "unreasonably dangerous."

      a. <u>Test for "unreasonably dangerous"</u>: If an ordinary consumer would use the product even if he were aware of the defect, then the product is not unreasonably dangerous.

D. To prove a strict products liability claim using Restatement 3d of Products Liability §1, the plaintiff must establish:

   1. The defendant placed the defective product in the stream of commerce; and

   2. The defective product caused the plaintiff's injury.

Step 1: Time Management
Determine time allocation and write down when you start reading the problem, when you should start writing, and when you should end.

60 MINUTES

start: 1:25PM
begin writing: 1:45PM
end: 2:25PM

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

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Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims that Cindy can assert.

Step 2: Read the "Call of the Question" before reading the fact pattern.

This interrogatory gives the examinee three basic instructions:
(1) The role you are asked to assume.
- The professor asks you to act as attorney *for Cindy*.

(2) Identify the field of potential litigants and/or parties in conflict.
- The professor asks you to limit inquiry to claims Cindy has against other actors *and nobody else*.

(3) Discuss the goal of the examinee.
- Identify and analyze the arguments Cindy will make seeking recovery in tort law.
- Predict which arguments will succeed and fail.

It is also important to note that absent from the interrogatory is the controlling jurisdiction. This omission invites students to analyze majority and minority rules.

Green not careless with Claws of Life.

Products Liability against Claws of Life manufacturer for manufacturing defect? Look at claims against others in supply chain, e.g., products liability against Green and/or hospital?

Possible FDA defense by Claws of Life manufacturer?

Higher standard of care?

Arthur and Betty brought their three-year-old daughter, Cindy, to General Hospital's Emergency Room when she appeared to have trouble breathing. The parents explained to the triage nurse that Cindy was eating a kid's meal in the back seat of the family's car during a Saturday drive when she started choking. The parents were told to have a seat in the waiting area. Dr. Green, who specializes in pediatric cases and has more than 25 years of experience in emergency room medicine, examined the now unconscious girl and determined that a foreign object obstructed her airway. Minutes before Cindy arrived at the hospital, Dr. Green mentioned to the triage nurse who cared for Cindy that he was "wiped out" because he worked 38 hours straight without any sleep. Such long rotations are common in understaffed urban hospitals like General Hospital.

Dr. Green's first attempt to remove the object using the Heimlich Maneuver was unsuccessful, and resulted in two fractured ribs. He next decided to use "The Claws of Life," which is a widely used and accepted medical device designed to remove small objects from children's throats. After Dr. Green carefully inserted the device into Cindy's mouth and applied the normal amount of pressure to the handle of the device, it unexpectedly broke off in Cindy's mouth, cracking four of her teeth and cutting her tongue. Dr. Ross, who was on call at the hospital that day, arrived on the scene and successfully removed the head of a popular action figure doll from Cindy's esophagus. The action figure, the prize in a kid's meal promoted by the popular fast food restaurant Burger Prince, came in packaging that specifically stated it was intended for children ages five and older. DollCo, a company that produces and distributes promotional products and kids toys, manufactured the action figure using a design that did not include a removable head.

Although Arthur was relieved to learn that Cindy would eventually recover fully, he was angry that Cindy had two fractured ribs, four broken teeth, and a lacerated tongue. Arthur has retained you to represent Cindy. Discuss and evaluate the various claims that Cindy can assert.

Medical malpractice?
Unsuccessful does not necessarily mean "careless."

Res ipsa locquitor = presumption of negligence?

Products liability claim against DollCo for manufacturing defect?

Against Burger Prince for distributing?

Lack of sleep = breach of duty by Green?

Lack of sleep = breach of duty by hospital?
Industry custom defense?

- Vicarious liability against Hospital because it employed Green? Must first prove G was negligent to be vicariously liable.
- Unclear whether G = Employee or Independent Contractor

Negligence by Burger Prince worker for failing to ask age?

Vicarious liability against Burger Prince?

Negligence of Arthur and Betty for failing to supervise?

C's injuries consistent with negligent performance of the Heimlich Maneuver?

Possible res ipsa loquitur claim to show G breached his duty of care?

Dispute #1: Whether Cindy can recover against Dr. Green for medical malpractice when he broke her ribs while performing the Heimlich Maneuver.

	C WILL ARGUE	G WILL ARGUE
F	- Lack of sleep = breach of duty. - Evidence of negligence in hands of G.	- No evidence of carelessness. - G only person with knowledge?
L	- Res ipsa to create presumption of negligence? - Broken ribs do not normally occur w/o negligence. - G only person with knowledge. - G = specialist held to higher standard of care.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

<u>Dispute #2:</u> *Whether Cindy can recover against Dr. Green for injuries to her teeth and tongue using a medical malpractice theory.*

	C WILL ARGUE	G WILL ARGUE
F	- N/A	- No evidence that G breached duty. - "<u>Carefully</u> inserted." - Applied "<u>normal</u> amount of pressure." - Claws of Life = widely used and accepted medical device.
L	- Negligence Theory - G owed C a duty.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #3: *Whether Cindy can recover against Dr. Green for injuries to her teeth and tongue using a products liability theory.*

	C WILL ARGUE	G WILL ARGUE
F	- Defective product used by G caused her injury.	- N/A
L	- G put defective device in stream of commerce. - Strict liability.	- Services by doctors and hospitals generally exempt from strict liability for defects in medical devices.
P	- N/A	- Finding G liable for products liability would increase medical costs.
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #4: Whether Cindy can recover against General Hospital using theory of respondeat superior.

	C WILL ARGUE	GH WILL ARGUE
F	- C was injured by G's negligence. - G was employed by GH.	- Facts are unclear about whether GH employed G (he could be independent contractor). - If G = independent contractor, no respondeat superior.
L	- Assumes G found negligent in dispute 1 or 2. - Negligence occurred in ordinary course of G's duties. - Test: ordinary course = intent to further business purpose.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #5: *Whether Cindy can recover against General Hospital for negligence.*

	C WILL ARGUE	GH WILL ARGUE
F	- GH allowed G to work w/o adequate sleep.	- No evidence that G's lack of sleep caused injury.
L	- Owed duty to C. - GH breached duty with unreasonable work schedule. - Causation?	- Long shifts are "common" or industry standard and therefore "reasonable."
P	- Send a message to hospitals to give doctors more sleep.	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #6: *Whether Cindy can recover against COL manufacturer when device broke in her mouth.*

	C WILL ARGUE	COL WILL ARGUE
F	- C was injured. - COL was being used properly.	- G used COL improperly.
L	- Strict liability if person injured - Manufacturing defect Rest. 3d Prod. Liab. §2(a). - Test = product departs from its intended design.	- Minority view Rest. Torts §402A? - C must show COL was "unreasonably dangerous." - TEST: if C would still use COL knowing the true condition of the product then not "unreasonably dangerous."
P	- N/A	- N/A
F	- N/A	- FDA approved.
L	- Special exemption applies to design defects, <u>not</u> manufacturing defects.	- Special automatic exemption for medical devices Rest. 3d Products Liability §6.
P	- N/A	- N/A

Dispute #7: *Whether Cindy can recover against DollCo for manufacturing and distributing a product that broke, causing her to choke.*

	C WILL ARGUE	D WILL ARGUE
F	- C was injured when doll's head broke off.	- N/A
L	- Strict liability if person injured by defect. Rest. 3d Prod. Liab. §1. - Manufacturing defect Rest. 3d Prod. Liab. §2(a). - Test = product departs from its intended design.	- Minority view Rest. Torts §402A? - C must show doll was "unreasonably dangerous." - TEST: if C would still use doll knowing the true condition of the product then not "unreasonably dangerous."
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #8: *Whether Cindy can recover against Burger Prince for distributing a product that broke, causing her to choke.*

	C WILL ARGUE	BP WILL ARGUE
F	- C was injured when doll's head broke off.	- N/A
L	- Strict liability if person injured by defect. Rest. 3d Prod. Liab. §1. - Manufacturing defect Rest. 3d Prod. Liab. §2(a). - Test = product departs from its intended design.	- Minority view Rest. Torts §402A? - C must show doll was "unreasonably dangerous." - TEST: if C would still use doll knowing the true condition of the product then not "unreasonably dangerous."
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #9: *Whether Cindy can recover against BP using theory of negligence because they gave her a toy without asking her age.*

	C WILL ARGUE	BP WILL ARGUE
F	- Employee gave toy without inquiring age of child.	- N/A
L	- BP employee owed C a duty. - BP's employee breached that duty.	- N/A
P	- Hand Theory - remedial measure is inexpensive and would not be unduly burdensome.	- Unreasonable to ask every child's age. - Asks BP to assume the role of parent.
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #10: Whether Cindy can recover against her parents for negligence (failure to supervise).

	C WILL ARGUE	A&B WILL ARGUE
F	- Parents gave C toy that was not age appropriate. - Package "clearly marked" ages five and up.	- N/A
L	- A&B owed duty to supervise and protect C. - Test for Duty: "reasonable parent" test. - A&B breached that duty. - Breach was a cause of C's injuries.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- Immunity has been abolished by many states.	- Common law immunity bars suits between parents and children.
P	- Increased risk of collusion/fraud.	- Courts unwilling to recognize parent's general duty to supervise because to do so would expose parent to 3d party contribution claims (reducing child's award).

<u>Dispute #1</u>: Whether Cindy ("C") can recover against Dr. Green ("G") for medical malpractice when he broke her ribs while performing the Heimlich Maneuver.

To recover using a theory of medical malpractice, C must show: (1) G (a medical service provider) owed a duty to C; (2) G breached his duty by not conforming his conduct to the degree of care exercised by reasonably well-qualified doctors; (3) G's breach was the actual and proximate cause of C's injuries; and (4) C was injured.

C will argue that G owed a duty to her because she was his patient. C can further contend that G breached this duty. G worked a 38-hour shift, during which he did not sleep. His lack of rest and his admission to the nurse that he was "wiped out" creates an inference that he was too tired to practice medicine competently. G's performance of tasks he was too tired to perform breached his duty of care. The Heimlich Maneuver is a common procedure. It is unlikely that a rested doctor would have caused similar injuries when using such a common procedure. C will argue that G's breach was the actual cause of her injuries because but for his lack of sleep, he would have performed the Heimlich Maneuver properly. C was injured because G broke two of her ribs while performing the Heimlich Maneuver.

G will concede that he owed a duty to C to perform the Heimlich Maneuver with due care, and that C suffered injuries during the procedure. However, G can argue that he did not breach his duty of care, and that even if a court were to find a breach, any alleged breach was not the proximate cause of C's injuries. It is typical for doctors to work long shifts without sleep. Thus, G did not breach his duty of care merely by treating C while he was tired. Moreover, there is no evidence that G performed the Heimlich Maneuver incompetently. Injuries from medical procedures can occur even without careless conduct, and there is no factual evidence that G performed the Heimlich Maneuver incompetently.

However, even if a court accepted G's arguments, C may be able to argue successfully the res ipsa loquitur doctrine in order to establish her claim. The res ipsa doctrine provides a presumption that a defendant's ("△") conduct was negligent where: (1) there is no direct evidence of △'s precise conduct; (2) the plaintiff's injuries do not normally occur without negligence; (3) the instrumentality of the harm was in the exclusive control of △; (4) the injuries were not caused by the plaintiff's own actions; and (5) any evidence regarding △'s negligence is more readily available to △ than to the plaintiff.

G performed the Heimlich Maneuver using his own hands (instruments within △'s exclusive control) while C lay unconscious without her parents present because they were instructed to wait in the waiting room. Thus, because she was unconscious, C has no direct evidence of G's negligence, and probably was not the cause of her injuries. Moreover, the injuries that C suffered would not normally occur unless G performed the Heimlich Maneuver negligently. The Heimlich Maneuver can be performed without causing injury even by people without medical training. Medical professionals are certainly able to perform the Heimlich Maneuver without causing injury. Finally, because C was unconscious, G is the only person who knows what happened. Thus, the facts regarding G's negligence are within his exclusive control. If C asserts the res ipsa loquitur theory successfully, G's negligence will be presumed and G will have the burden of showing that he did not perform the Heimlich Maneuver negligently.

G's only reasonable argument is that even routine medical procedures can cause patients injuries, even when competently performed. Thus, G can contend that these injuries can occur without negligence, and thus the res ipsa loquitur doctrine should not apply. In the alternative, G can come forward with evidence showing that he did not act negligently and breach the duty he owed to C.

Absent such a showing by G—no facts exist on this record—C's res ipsa loquitur will likely be successful. Shifting the burden to Dr. G in these circumstances is the only way to ensure a fair outcome. C's incapacity, both in age and in lack of consciousness, prevents her from having direct evidence of the cause of her injury. Thus, it is reasonable to shift the burden to G because he has superior access to proof of whether he was negligent.

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Dispute #2: Whether C can recover against G using a theory of medical malpractice because he injured her teeth and tongue while using the Claws of Life ("COL").

[*See* Dispute #1 for the elements of negligence.]

Although G owed C a duty, G will argue that he never breached his duty of care. The facts demonstrate that G used due care. G "carefully inserted" the COL, and was applying "the normal amount of pressure" when the COL broke. There is neither evidence that there was a visible defect in the COL nor that G had notice that the COL may have been defective. Thus, G exercised due care when using the device.

Thus, this claim for medical malpractice will likely fail.

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Dispute #3: Whether C can recover against G using a theory of products liability because he injured her teeth and tongue while using the Claws of Life.

A theory of products liability imposes strict liability on manufacturers of defective products, and on those who put defective products in the chain of commerce. According to Rest. 3d Product Liability §2, there are three types of defects: 1) "manufacturing defects" where the creation of the product departed from its intended design; 2) "design defects" where the product could have been designed better to prevent injury; and 3) "warning defects" where the maker of the product failed to warn of the dangers surrounding the product's use, making it unreasonably unsafe.

The facts expressly state that the device "unexpectedly broke," which implies that the device was not designed to break apart in patients' mouths. In addition, because this type of defect is one that was not intended by the manufacturer, COL was not bound to place a warning of that potential danger. Consequently, C will argue that the COL had a ***manufacturing defect*** and because G put this defective device into the chain of commerce by using it on C, C will argue that G should be strictly liable for the injuries she suffered.

C will argue that the G is strictly liable for the injuries to her teeth and mouth under a products liability theory. Most states have adopted the rule articulated in Rest. 3d Prod. Liab. §1. Under the Rest. 3d §1, a defendant is strictly liable for distributing a defective product if: 1) the defendant placed the defective product in the stream of commerce and 2) the defective product caused the plaintiff's injury. C can easily establish both elements. G put the COL into the stream of commerce because he used it to treat her. C's teeth and tongue were injured when the device broke.

Although most states have adopted Rest. 3d Prod. Liab. §1, some jurisdictions still use the test contained in Restatement 2d Torts §402A. Section 402A provides that in order to recover, a plaintiff must establish: (1) the product that caused her injury was defective; ***and*** (2) the product was "unreasonably dangerous." If an ordinary consumer would still use the product even if he were aware of the defect, then the product is not "unreasonably dangerous." C can satisfy both elements of §402A. The COL was defective because a medical device should not break while being used for its appropriate purpose. The COL was also unreasonably dangerous. A reasonable consumer would not have used the COL if he knew it was defective because an ordinary consumer would not want a medical device to break in his mouth.

Although C will argue that she should prevail against G, regardless of which products liability rule has been adopted in her jurisdiction, G will argue that the ***health professional exception*** would allow him to avoid liability on this cause of action. The health professional exception to strict products liability provides that services by hospitals and doctors are generally exempt from strict products liability claims for defects in medical devices. As shown above, G used the COL competently. Thus, the injuries to C's mouth and teeth were entirely the fault of the defective device.

Further, holding doctors strictly liable for using defective devices would result in even higher medical costs. Because people need access to affordable healthcare, it is important to keep healthcare costs reasonable. Moreover, holding doctors strictly liable does not advance any goal of making recovery more possible for plaintiffs. It is not necessary to hold doctors strictly liable for product defects because patients still have reasonable avenues for recovery if a defective device is used on them. Patients could always sue the manufacturer directly for defects in their products. Thus, public policy underlying G's arguments suggest that he should not be strictly liable for using the COL on C.

G has the better argument, and will likely be able to avoid liability under a products liability theory.

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<u>Dispute #4:</u> Whether C can recover against General Hospital ("GH") using a theory of respondeat superior.

Under a vicarious liability theory (respondeat superior), an employer is jointly liable for the torts committed by its employee, provided that the employee was acting within the scope of his employment.

G was acting within the scope of his employment when treating C because he was hired by GH to treat patients. If G is found liable in Dispute #1 and/or #2 discussed above, a court will conclude that GH is liable to the same extent as G in either or both of those disputes.

The facts are silent, however, about whether G was actually employed by GH or whether he was acting as an independent contractor. A growing number of hospitals have begun retaining doctors as independent contractors specifically to shield themselves from vicarious liability claims. If further fact-finding shows that G was in fact an independent contractor, then a court will likely conclude that GH is not vicariously liable for any alleged torts of G.

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<u>Dispute #5:</u> Whether C can recover against GH for its negligence in managing its hospital staff.

Notwithstanding G's employment status (see Dispute #4 above), C can recover against GH for its negligence if she can prove that GH was negligent in the way it operated its hospital.

[*See* Dispute #1 for the elements of negligence.]

C will argue that GH owed her a duty to provide her with competent doctors. C will argue that GH's policy of allowing doctors to practice medicine after long shifts with no sleep created an unreasonable risk that such doctors will make careless mistakes that a rested doctor would not have made. In fact, as discussed in Dispute #1, G was not competent because he had not slept for 38 hours. Thus, GH's policy caused GH to breach its duty to provide C with competent doctors. This breach was the proximate cause of C's injuries. Because G lacked sufficient rest, C received substandard care for her condition. (*See* Dispute #1 above). Thus, GH's policies were the cause of C's injuries that C suffered because of G's negligent performance of the Heimlich Maneuver.

GH can argue that while it owed C a duty, it did not breach that duty by having long rotations that resulted in sleep-deprived doctors. Hospitals similar to GH also allow doctors to have long rotations. Thus, GH can argue that industry custom demonstrates that its policies are reasonable. Therefore, GH did not breach a duty to C. Courts will customarily defer to the custom and practice of a profession. Thus, the fact that GH's practice is consistent with industry practice is a powerful argument.

C will argue that a hospital should not be able to avoid liability simply because it follows industry practice. If the medical profession adopts a standard that is unreasonable, the only incentive for the medical profession to modify its behavior is to be found liable. Otherwise, unreasonable behavior would be inoculated from any consequences, which would result in the medical profession not adopting reasonable changes to its practices. Patients should be treated by reasonably well-rested doctors, not doctors who have gone without sleep for almost two days. Finding a breach of duty in these circumstances would encourage hospitals to adopt more reasonable hours for its doctors – something that would be a good thing as a matter of public policy.

If a court finds that GH's policy breached a duty to C, GH can still argue that C cannot prove that its purported breach was the proximate cause of her injuries. There is no evidence that G performed the Heimlich Maneuver incompetently. Injuries from medical procedures can occur even without careless conduct, and there is no factual evidence that G performed the Heimlich Maneuver incompetently. (*See* Dispute #1 above). If C cannot prove that G's lack of sleep caused her injuries, C certainly cannot establish the even more tenuous connection between her injuries and GH's staffing policies.

Thus, unless C can prove that G's lack of sleep was the cause of her injuries, a court will likely find in favor of GH.

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<u>Dispute #6:</u> Whether C can recover against the COL manufacturer using a strict products liability theory because the COL had a manufacturing defect.

[*See* rules regarding types of defective products in Dispute #3 above.]

C can easily establish that the COL had a manufacturing defect, as the COL was not designed to break apart during its use. (*See* Dispute #3).

Cindy will argue that the COL manufacturer is strictly liable for the injuries to her teeth and mouth under a products liability theory. Most states have adopted the rule articulated in Rest. 3d Prod. Liab. §1. Under Rest. 3d §1, a manufacturer is liable for a manufacturing defect if: 1) the manufacturer placed the defective product in the stream of commerce and 2) the defective product caused the plaintiff's injury. C can easily establish each element of the Rest. 3d Products Liability Rule. The COL manufacturer put the COL into the stream of commerce because it sold the product to GH for its use in its emergency rooms. C's teeth and tongue were injured when the device broke. Thus, COL is liable to C under this theory.

Although there is a special exemption for medical devices set forth in Rest. 3d Prod. Liab. §6, this exemption will not apply in this situation. The exemption articulated in Section 6 applies only to design defects; C's injury was the result of a manufacturing defect (*see* Dispute #3 above).

Although most states have adopted Rest. 3d Prod. Liab. §1, some jurisdictions still use the test contained in Restatement 2d Torts §402A. Section 402A provides that in order to recover, C would have to show the following: 1) the product that caused her injury was defective ***and*** 2) the product was "unreasonably dangerous." If an ordinary consumer would still use the product even if he were aware of the defect, then the product is not "unreasonably dangerous." C can satisfy both elements of §402A. The COL was defective because a medical device should not break while being used for its appropriate purpose. The COL was also unreasonably dangerous. A reasonable consumer would not have used the COL if she knew it was defective, because an ordinary consumer would not want a medical device to break in her mouth.

C should be able to prevail against the COL manufacturer, regardless of which products liability rule is controlling in her jurisdiction.

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<u>Dispute #7:</u> Whether C can recover against DollCo ("D") for manufacturing and distributing a doll that broke and caused her to choke.

[*See* rules for types of product defects in Dispute #3 above.]

Regardless of any age warnings on the packaging, C will be able to establish that the doll had a manufacturing defect because the facts expressly state that the doll was not designed to have a removable head.

[*See* Dispute #6 for products liability rules.]

Assuming the jurisdiction has adopted Rest. 3d Prod. Liab. (*See* Dispute #6 above), D does not have any reasonable arguments that will allow it to avoid liability for C's choking. D put a defective product into the stream of commerce, and this defective product was the direct cause of C's choking.

If C is in a jurisdiction that still uses Rest. Torts 2d §402A (*see* Dispute #6 above), then D might argue that the doll was not unreasonably dangerous to its intended age group, children who are over five years old. To show that the product was unreasonably dangerous, C would have to prove that a reasonable person would not have used the doll knowing its true condition. It is unlikely that a reasonable person would let a five-year-old child use a doll when the doll's head could cause their child to choke. Thus, even in a §402A jurisdiction, C would likely prevail.

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<u>Dispute #8:</u> Whether C can recover against Burger Prince ("BP") for distributing a doll that broke and caused her to choke.

C will be able to show that the doll suffered from a manufacturing defect. (*See* Dispute #7).

[*See* Dispute #6 for products liability rules.]

Because BP placed the defective doll in the stream of commerce, BP would stand in the same shoes as DollCo. The analysis of this dispute is identical to the analysis discussed in Dispute #7.

If C can establish DollCo's liability (Dispute #7), then C can hold BP jointly liable.

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<u>Dispute #9:</u> Whether Cindy can establish BP was negligent for selling her a doll that was intended for use by children older than her.

C can recover against BP for negligence if she can prove that: 1) BP owed her a duty of care; 2) BP breached its duty; 3) BP's breach was the proximate cause of C's injuries; and 4) C was injured.

C can argue that BP owed her a duty to inquire about her age before selling her an action figure that was intended to be sold only to children above five years old. BP owed this duty because it was foreseeable that a toy would have caused injuries to children younger than the age the toy is intended for. BP breached that duty by failing to require its employees to ask C's parents whether C was old enough to receive the action figure. BP's failure to ask C's age caused C to receive an age-inappropriate toy. This caused her to choke. Thus, BP's breach was the proximate cause of her injuries.

BP would argue that it is unreasonable to require its employees to ask the age of every child who purchases a kids' meal. BP can contend that it is unduly burdensome to have its employees ask the age of every person who receives a kids' meal because it is the business of BP to serve its customers quickly and efficiently.

However, BP's argument is weak. Using the "Hand Theory," C can argue successfully that because the appropriate action (*e.g.,* asking customers' ages) costs far less than the gravity of the resulting harm (*e.g.*, the potential death of a child) and the probability that the harm would occur (*e.g.,* the harm was obviously more probable than not, given the warning on the toy packaging), BP owed a duty to its younger customers and should have a policy requiring its employees to ask the age of the children who will receive its kids' meals. C's policy argument is a strong one. Society has a strong interest in protecting the health of children, and the imposition of this duty imposes minimal costs on BP.

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Dispute #10: Whether Cindy can establish a negligence claim against her parents, Arthur and Betty (A&B), for failing to adequately supervise her.

[*See* Dispute #9 for the rule for negligence.]

C can argue that because of the special parent-child relationship, A&B owed her a duty to keep her safe. A&B breached this duty by failing to inspect the packaging to ensure that the action figure was appropriate for C. Because A&B gave her a toy that was not age-appropriate, A&B's breach caused C's choking.

A&B can assert the common law immunity that shields parents from tort actions brought by their children and that holding parents liable for negligently supervising their children is against public policy. Parents and unemancipated children should be viewed as one economic unit. For this reason, courts have been unwilling to recognize a parent's general duty to supervise because to do so would expose the parent to third-party contribution claims, which would reduce a child's damage award if the child sued multiple parties for her injuries.

APPENDIX C

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TORTS EXAM QUESTION*
(60 MINUTES)

Pierre LaRue, a native Frenchman vacationing in the United States, approaches Henri Casset, the owner and operator of Casset's Wine and Cheese Shop. LaRue tells Casset that he has heard that Casset occasionally makes and sells Margaux, a French cheese that is prohibited from manufacture or sale in the United States by the Food and Drug Administration due to the usually high and irreducible levels of bacteria produced in the manufacturing process. LaRue asks Casset to sell him a piece of the Margaux cheese and Casset, having just made a new batch the night before, agrees.

LaRue takes the Margaux cheese, a loaf of bread, and a bottle of Bordeaux wine out through a sliding glass door onto the back patio of Casset's Wine and Cheese Shop, a 50-square-foot flagstone area encircled by a stone fence approximately four feet high. After about 20 minutes, LaRue becomes violently ill and calls out to Casset for help.

Casset comes out to the patio and sees that LaRue is getting quite ill. Casset then turns around, shuts and locks the sliding glass door to the patio, gathers all of the Margaux cheese and ingredients, gets into his car and drives to a neighboring town. Casset hopes that LaRue will eventually be found dead on the patio (thus unable to talk) and that Casset will be able to claim that he never met LaRue and has no idea how he came into the possession of contraband Margaux cheese.

Eventually, LaRue's cries of pain are heard by Morris Miller, a passerby who enters the patio through a closed but unlocked gate in the patio wall. Miller, seeing that LaRue is very ill and apparently growing worse by the minute, picks up a chair on the patio, throws it through the sliding glass door, enters the shop, and calls for an ambulance. While waiting for the ambulance to arrive, Miller goes through LaRue's pockets looking for identification. He finds a number of cards, all in French, which he hands to the ambulance personnel when they arrive, and a large wad of euros, which he slips into his own pocket.

LaRue arrives at the hospital very ill and in a nearly hysterical state. When LaRue looks up at the attending physician in the emergency room, Dr. Tobin, he believes that Tobin's stethoscope is a poisonous snake and so he quickly reaches up, cries out "couleuvre," and violently pulls the stethoscope down from around Tobin's neck.

Once Tobin recovers, he determines that LaRue is suffering from a serious case of food poisoning and that the preferred treatment is an immediate evacuation of LaRue's stomach. Tobin leans over LaRue's bed, right above his head, and loudly states, "We are about to pump your stomach. I believe that this is necessary in order to save your life. If you object to having this procedure performed on you, please say so now." When LaRue says nothing in response, Tobin performs the stomach pump and LaRue eventually recovers.

Please identify and analyze all potential intentional tort law claims that are reasonably raised in the above factual situation. Please discuss both the nature of the potential claim and all reasonable arguments available to either the plaintiff or defendant.

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* Exam question by Professor Marin Scordato, The Catholic University of America – Columbus School of Law.

OUTLINE OF SELECTED INTENTIONAL TORT DOCTRINE FOR PRACTICE EXAMINATION*

1. The definition of ***intent*** for all intentional torts is:

   1.1. the defendant had the ***legal capacity*** to possess intent (an ability to perceive and conform to behavioral standards);

   1.2. the defendant's actions were ***volitional*** (voluntary); ***and***

   1.3. the defendant had the ***purpose or desire*** to inflict the harm upon the plaintiff; ***or***

   1.4. the defendant knew with ***substantial certainty*** that his actions would result in the infliction of the harm upon the plaintiff.

2. The prima facie case for the tort of ***battery*** is:

   2.1. the defendant caused a ***bodily contact*** to be experienced by the plaintiff;

   2.2. the bodily contact that the plaintiff experienced was ***harmful***; ***and***

   2.3. the defendant acted with ***intent***.

3. The prima facie case for the tort of ***false imprisonment*** is:

   3.1. the defendant acted ***intending to confine*** the plaintiff within fixed boundaries;

   3.2. the defendant's acts resulted in the ***complete confinement*** of the plaintiff; ***and***

   3.3. the plaintiff was ***conscious*** of the confinement, or was otherwise harmed by it.

   3.4. "***Complete confinement***" exists when there is ***no avenue of escape*** that is:

      3.4.1.1. available (physically feasible);

      3.4.1.2. reasonable (for the plaintiff to use); ***and***

      3.4.1.3. of which the plaintiff is aware.

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* **The following summary of intentional tort law is provided solely for the purpose of answering the practice torts hypothetical. It is not intended to be a complete outline of the law of intentional torts and should not be relied upon as such.**

4. The prima facie case for the tort of ***trespass to land*** is:

   4.1. the defendant ***violates*** the plaintiff's interest in the ***exclusive possession*** of real property; ***and***

   4.2. the defendant acts with ***intent***.

5. The prima facie case for the tort of ***trespass to chattels*** is:

   5.1. the defendant violates the plaintiff's interest in the ***physical condition*** of ***personal property***; ***and***

   5.2. the defendant acts with ***intent***.

6. The prima facie case for the tort of ***conversion*** is:

   6.1. the defendant violates the plaintiff's interest in the ***right to possess personal property***; ***and***

   6.2. the defendant acts with ***intent***.

7. The defense of ***consent*** is available when:

   7.1. a ***reasonable person*** in the position of the ***defendant*** would have believed that the plaintiff was consenting to the defendant's harmful actions; ***and***

   7.2. the defendant's harmful actions fell within the plaintiff's ***scope of consent***.

   7.3. The plaintiff's consent will ***not*** be deemed to be legally valid if:

      7.3.1. it was procured by the defendant through the use of ***fraud or misrepresentation***;

      7.3.2. it was procured by the defendant through the use of ***duress***;

      7.3.3. the plaintiff was ***not legally capable*** of granting consent to the harm; or

      7.3.4. the plaintiff was consenting to an ***illegal activity***.

         7.3.4.1. A minority of states, and the Restatement, hold that consent to an illegal act is valid consent, and thus operates as a defense to an intentional tort, unless the law that makes the act illegal was passed primarily to protect people like the plaintiff from the harmful behavior of people like the defendant.

7.4. Consent is ***implied by law*** when:

7.4.1. the plaintiff is ***unable to grant consent*** to the defendant's actions;

7.4.2. the defendant's actions were ***necessary*** in order to save the plaintiff from ***death or serious bodily harm***;

7.4.3. the defendant acted in ***good faith*** to aid the plaintiff;

7.4.4. a ***reasonable person*** in the position of the plaintiff ***would most likely have consented*** to the defendant's actions if they could; ***and***

7.4.5. there was ***no indication that the plaintiff would object*** to the defendant's actions if he could.

8. The defense of defense of others is available when:

8.1 a reasonable person in the position of the defendant would have believed that:

8.1.1. a ***third person*** was facing ***imminent bodily harm*** from the actions of the ***plaintiff***; ***and***

8.1.2. the ***assistance*** of the defendant was ***reasonably necessary*** in order to prevent, or reduce, the threatened harm to the third person.

PRACTICE TORTS HYPOTHETICAL # 2

Step 1: Time Management

Determine time allocation and write down when you start reading the problem, when you should start writing, and when you should end.

TORTS EXAM QUESTION

(60 MINUTES)

Language implies that not everyone is making it and thus L may know it is illegal in the U.S.

Knowledge that cheese was harmful because he was French?

Pierre LaRue, a native Frenchman vacationing in the United States, approaches Henri Casset, the owner and operator of Casset's Wine and Cheese Shop. LaRue tells Casset that he has heard that Casset occasionally makes and sells Margaux, a French cheese that is prohibited from manufacturer or sale in the United States by the Food and Drug Administration due to the usually high and irreducible levels of bacteria produced in the manufacturing process. LaRue asks Casset to sell him a piece of the Margaux cheese and Casset, having just made a new batch the night before, agrees.

Consent?

Conversation = evidence that L speaks English?

Outside = confine? Avenue of escape?

LaRue takes the Margaux cheese, a loaf of bread and a bottle of Bordeaux wine out through a sliding glass door onto the back patio of Casset's Wine and Cheese Shop, a 50 square foot flagstone area encircled by a stone fence approximately 4 feet high. After about 20 minutes, LaRue becomes violently ill and calls out to Casset for help.

Trespass to land?

Casset comes out to the patio and sees that LaRue is getting quite ill. Casset then turns around, shuts and locks the sliding glass door to the patio, gathers all of the Margaux cheese and ingredients, gets into his care and drives to a neighboring town. Casset hopes that LaRue will eventually be found dead on the patio (thus unable to talk) and that Casset will be able to claim that he never met LaRue and has no idea how he came into possession of contraband Margaux Cheese.

Defense of others?

Language implies that C believes P is confined in the patio area?

Trespass to chattels or conversion

Eventually, LaRue's cries of pain are heard by Morris Miller, a passerby who enters the patio through a closed but unlocked gate in the patio wall. Miller, seeing that LaRue is very ill and apparently growing worse by the minute, picks up a chair on the patio, throws it through the sliding glass door, enters the shop and calls for an ambulance. While waiting for the ambulance to arrive, Miller goes through LaRue's pockets looking for identification. He finds a number of cards, all in French, which he hands to the ambulance personnel when they arrive, and a large wad of francs, which he slips into his own pocket.

Is it really "necessary" to look for identification?

Conversion by M?

LaRue arrives at the hospital very ill and in a nearly hysterical state. When LaRue looks up at the attending physician in the emergency room, Dr. Tobin, he believes that Tobin's stethoscope is a poisonous snake and so he quickly reaches up, cries out "couleuvre" and violently pulls the stethoscope down from around Tobin's neck.

Capacity? Lack of intent?

Good faith belief that pumping was necessary

Once Tobin recovers, he determines that LaRue is suffering from a serious case of food poisoning and that the preferred treatment is an immediate evacuation of LaRue's stomach. Tobin leans over LaRue's bed, right above his head, and loudly states, "We are about to pump your stomach. I believe that this is necessary in order to save your life. If you object to having this procedure performed on you, please say so now." When LaRue says nothing in response, Tobin performs the stomach pump and LaRue eventually recovers.

Battery? Lack of touching person, but does touch object attached to the person

Does T know that L is French and might not be able to understand him? Does T really think that L has mental capacity to consent? Does emergency situation give implied consent?

PRACTICE TORTS HYPOTHETICAL # 2

Please identify and analyze all potential intentional tort law claims that are reasonably raised in the above factual situation. Please discuss both the nature of the potential claim and all reasonable arguments available to either plaintiff or defendant.

Step 2: Read the "Call of the Question" Before Reading the Fact Pattern.

This interrogatory gives the examinee three basic instructions:

(1) The role you are asked to assume.

- The professor asks you to act as an *objective* law student.

(2) Field of potential litigants and/or parties in conflict.

- The professor asks you to address *any and all litigants*.

(3) Goal of examinee.

- ONLY analyze *intentional tort claims* – NOT negligence!
- Identify and analyze the argument parties will make.
- Predict which arguments will succeed and fail.

It is also important to note that absent from the interrogatory is the controlling jurisdiction. This omission invites students to analyze majority and minority rules.

Dispute #1: Whether L could successfully sue C for the intentional tort of battery.

	L WILL ARGUE	C WILL ARGUE
F	-Contact= ingestion of contaminated food - L suffered harm - C intentionally made/sold illegal cheese.	- No bodily contact - No intent
L	-Passes test for intent because C violated a statute with the purpose of preventing the substantial certainty of illness resulting from eating cheese.	- Fails test for intent because no purpose or desire and problematic substantial certainty.
P		
F		
L	-Exception to consent defense = no defense of consent b/c L did not consent to an illegal activity. -Fails minority test for consent b/c statue protects against harm L suffered.	~Defense of consent. ~Minority consent test = consent b/c L could consent to illegal activity.
P		

PRACTICE TORTS HYPOTHETICAL # 2

<u>Dispute #2:</u> Whether L could successfully sue Casset for the intentional tort of false imprisonment.

	L WILL ARGUE	C WILL ARGUE
F	-Intent to confine indicated by C's belief that L would remain on the patio. ~No indication that L knew gate was unlocked. ~L's condition prevented escape. ~C's action of locking the door confined L to the extent that he could not get the emergency help (access to phone) that he needed.	~No intent to confine ~No "complete confinement." ~No facts that L thought he was confined.
L	~Avenue of escape must be available (physically feasible).	
P		
F		
L		
P		

Dispute #3: Whether C could successfully sue M for the intentional tort of trespass to land when he entered the patio and store.

	C WILL ARGUE	M WILL ARGUE
F	~ Intent to enter land. ~No implicit consent because C can always refuse to allow someone entry. ~ Open door does not equal consent to entry.	~Land was not in exclusive possession of C b/c part of the business is giving implicit consent for public to enter.
L		
P		
F		
L	~M did not know that C was the source of L's threat or harm.	~Defense of others b/c imminent threat to L, and M's trespass was necessary to reduce harm.
P		~Public interest in defending M's action.

Dispute #4: Whether C could successfully sue M for the intentional tort of trespass to chattels or conversion for damage to sliding doors.

	C WILL ARGUE	M WILL ARGUE
F	~ Trespass to chattels: M intended to violate C's interest in the physical condition of sliding glass door. ~ Conversion: M intentionally violated C's interest in the right to possess the sliding glass door.	
L		
P		
F		
L		~Defense of others b/c imminent threat to L, and M's trespass was necessary to reduce harm.
P		~Public interest in defending M's action.

<u>Dispute #5:</u> Whether L could successfully sue M for the intentional tort of battery for going through L's pockets.

	L WILL ARGUE	M WILL ARGUE
F	~M intentionally went through L's pockets without his consent.	
L		
P		
F		
L	~ Looking for ID is not "necessary."	~Implied consent as a matter of law b/c L could not consent, M acted in good faith, M's actions were necessary, a reasonable person would have consented, and L probably would not object.
P	~M was acting in bad faith.	~Public interest in defending M's action.

PRACTICE TORTS HYPOTHETICAL # 2

Dispute #6: Whether L could successfully sue M for the intentional tort of conversion for taking the euros.

	L WILL ARGUE	M WILL ARGUE
F	-M intentionally violated L's interest in his right to possess the euros.	
L		
P		
F		
L		
P		

Dispute #7: Whether T could successfully sue L for the intentional tort of battery when he pulled on the stethoscope around T's neck.

	T WILL ARGUE	L WILL ARGUE
F	- Bodily contact exists b/c the stethoscope was around T's neck ~ Facts indicate some type of harm ~ Facts indicate no consent	~No intent
L		~ Lack of capacity to form consent because of inability to conform to behavioral standards. ~ L's actions were not volitional (more like a reflex) ~ L did not have purpose or desire to inflict harm (was grabbing "snake"). ~ Implied consent by T because of job/generally expected circumstances.
P		
F		
L		~Implied consent by working in hospital.
P		

PRACTICE TORTS HYPOTHETICAL # 2

Dispute #8: Whether L could successfully sue C for the intentional tort of false imprisonment.

	L WILL ARGUE	C WILL ARGUE
F	- No consent to pump stomach (harmful touching).	~No facts show that T knew L to be a French national.
L		
P		
F		
L	~ T could not reasonably believe that L would answer his request for consent given his state of mind. ~ T could not reasonably believe that L would answer his request for consent given that all his ID information was in French.	~Implied consent as a matter of law b/c L could not consent, T acted in good faith, T's actions were necessary, a reasonable person would have consented, and L probably would not object.
P		

PRACTICE TORTS HYPOTHETICAL # 2

<u>Dispute #1:</u> Whether LaRue (L) can successfully sue Casset (C) for battery after being poisoned by cheese that L purchased from C.

To establish battery, the plaintiff must show that the defendant (i) intentionally caused (ii) harmful or offensive (iii) bodily contact with the plaintiff.

A) Intent

To establish intent, L must show that: (i) C had the legal capacity to possess intent, (ii) C's actions were volitional, and ***either*** (iii) C had the purpose or desire to inflict harm on L, ***OR*** (iv) C knew with substantial certainty that his actions would result in injury to L. [This rule for intent is applicable to all intentional torts, and is applied to all disputes herein where intent is an element.]

C had the capacity to possess intent, as the facts suggest that C is an adult who was capable of owning and operating a business. C also clearly acted voluntarily. The facts state that C "agreed" to sell the cheese, and there are no facts suggesting that L forced him to sell the cheese.

While L will likely concede that C did not sell the cheese with the purpose of causing harm to L, L will likely be able to successfully establish intent by arguing that C knew with a ***substantial certainty*** that the cheese he sold to L would give him food poisoning. C intentionally made and sold cheese that contained "high and irreducible levels" of bacteria. This cheese was prohibited from manufacture or sale by the FDA because of the levels of bacteria it contained. As an owner of a cheese store, C likely is familiar with the FDA regulation. Moreover, C is likely familiar with the ***reason*** for the FDA ban. Because the cheese is banned due to concerns about bacteria, the entire purpose of the regulation is easily inferred: to prevent consumers from suffering injuries like food poisoning.

Further, C is a professional maker of cheese. Thus, regardless of the existence of the FDA regulation, C is certainly knowledgeable about the contents of the cheeses that he makes and sells. Thus, C knew that food poisoning would be the likely result of someone eating Margaux cheese. C's actions after L became ill further suggest that C knew the cheese was substantially likely to cause injury. After L became ill, C quickly deduced that L had food poisoning. If C could guess this so quickly after he sold the cheese, it suggests that he knew ***before*** he sold the cheese that there was a substantial certainty that the cheese could make L become ill.

B) Bodily Contact

A defendant does not need to physically touch the plaintiff in order for the bodily contact element to be established. Instead, a plaintiff can establish bodily contact by showing that the plaintiff suffered from an indirect contact (*e.g*., an agent or instrumentality of harm that the defendant set in motion). Even though the defendant may relinquish control over the instrumentality causing the harm, the instrumentality of the harm acts as an extension of the defendant. By selling L illegal and dangerous cheese, C created a series of events that resulted in L suffering bodily injury. Because the cheese was dangerous, it was an instrumentality of harm that C set in motion when he sold it to L. The cheese sale is similar to a defendant throwing a rock at a plaintiff or shooting a bullet at a plaintiff. Even though C didn't physically touch L, something under his control caused L's injury. L's violent illness was a "contact" from an instrumentality under C's control. Thus, L can establish the bodily contact element.

C) Harmful or Offensive

L can also establish the harmful or offensive element. Harmful contact includes contact that results in pain or bodily harm. Illness is a form of bodily harm. L became "violently ill" after eating the cheese. Thus, L can easily establish that the contact he suffered from the cheese was harmful or offensive.

D) Consent

Assuming a battery exists, C's best defense against liability is that L actually consented to the battery by voluntarily buying and ingesting the illegal cheese.

A majority of courts have held that a defendant can assert the defense of consent when (i) a reasonable person in the defendant's (Δ's) position would have believed that the plaintiff (π) was consenting to the Δ's harmful actions, ***and*** (ii) the Δ's harmful actions fell within the π's scope of consent.

L asked C to sell him the cheese. Thus, C reasonably believed that L was consenting to C selling him the cheese. Also, C can argue that the harm L suffered fell within the scope of L's consent. As a French national, L likely knew the Margaux was potentially harmful. Therefore, L's injury of food poisoning was within the scope of L's consent to buying and eating the cheese.

L will argue that, even assuming he knew the risks associated with eating the cheese, he still could not consent. L will note that courts have carved out an exception to the consent rule, and stated that a π cannot consent to an illegal activity. Because the FDA regulation prohibits the manufacture, sale, and purchase of Margaux cheese, L and C were engaging in an illegal activity. Thus, C cannot use L's voluntary purchase of the cheese as a defense of L's battery claim.

C will argue that a new trend, represented by a minority of courts and the Restatement, provides that consent to an illegal act can be valid and operate as a defense to an intentional tort. However, this rule has not been applied where the law that makes the act illegal was passed primarily to protect people like the π from the type of harm the π suffered. The FDA regulation was passed to protect people from getting food poisoning. Thus, even under the minority rule, it is unlikely that a court will find that L's voluntary purchase/ingestion of the cheese operates as a defense to the alleged battery.

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<u>Dispute #2:</u> Whether L can successfully sue C for false imprisonment when he left L on the back patio.

To establish a claim for false imprisonment, L must establish: (i) C intended to confine L within fixed boundaries; (ii) C's actions resulted in the complete confinement of L; and (iii) L was conscious of the confinement, or was otherwise harmed by it.

A) Did C act with the intent to confine L?

The facts clearly show that C intentionally locked the sliding glass door. L will further argue that C locked the door with the purpose of confining L. C hoped that L would "eventually be found dead on the patio (thus unable to talk)." By locking the sliding glass door, C purposely cut off an avenue for L to get medical help; for example, L would not be able to call for help from the store's phone. Moreover, C knew L was violently ill, and was calling C for help. Thus, C knew that L couldn't leave the patio on his own. C's hope that L would be found dead ***on the patio*** suggests C intended to confine L to the patio.

C will argue that he simply locked the door and kept L from entering the store. As proprietor of the store, C knew that the patio area was not a secure space. He knew there was a gate to the patio. Because he didn't attempt to keep L from using the gate, he didn't intend to confine L. Instead, C intended only to protect his store by locking the sliding glass door.

However, given L's deteriorating physical state, C knew with a substantial certainty that L would be confined to the patio. Thus, L can establish the intent element.

B) Was L "completely confined" by C's actions?

Complete confinement exists when there is no avenue of escape that is: (i) available (*i.e.*; physically feasible); (ii) reasonable; and (iii) of which the plaintiff is aware.

L will likely concede that there were two avenues of escape for a healthy person: (i) the unlocked gate, and (ii) climbing over the short, four-foot wall. However, while those avenues of escape were available, they were not reasonable under the circumstances. L was violently ill. He was so ill that he was calling for help. As L was violently ill because his illness was growing worse by the minute, it is not reasonable to expect him to climb over a wall or walk through a closed gate to escape. In addition, L was likely not aware of the avenue of escape. While the gate was unlocked, L did not know the gate was unlocked. Thus, he likely wasn't aware that leaving the patio was possible. Moreover, L's physical condition was deteriorating to the point where he became hysterical. It's unlikely a hysterical person would understand that he could leave an enclosed area.

C will argue that L was not completely confined because L had two available avenues of escape from the patio area: the unlocked gate and the low four-foot wall. These avenues of escape were reasonable. L was not unconscious, and the patio was very small. Even an ill person can crawl a short distance to escape through an unlocked gate. Finally, L was likely aware of the avenue of escape. L became sick after only 20 minutes. Twenty minutes is certainly enough time to review one's surroundings and notice that there is a gate in the patio wall.

C) Assuming L was completely confined, was L aware or harmed by it?

C's best argument to avoid liability on this claim is that there are no facts to indicate that L was conscious of his confinement or harmed by it. To establish this element, L must show that he was conscious of his confinement, or that his situation was worsened because of his confinement.

L will likely argue that he was aware of his confinement. He was on the patio for 20 minutes before he became ill. Thus, when he became ill, he knew that he would not be able to physically escape the patio because of his declining physical condition. Moreover, L can argue he was harmed by his confinement. The locked sliding glass door precluded him from entering the store and calling for help. It also precluded him from leaving the store to the street where he could have received help from passerby.

C will contend, however, that L was not aware he was confined. L had 20 minutes to observe that there was a gate. Thus, he knew that there was a way for him to leave the patio, or for someone else to enter and help him.

In the alternative, the facts indicate that L was in a "nearly hysterical" state. If L was hysterical, it is unlikely he knew that he was confined at all. Further, L was not harmed by the confinement. As evidenced by Miller's intervention, the general public could hear L's call for help while he was on the patio. Also, M was able to enter the gate and call an ambulance to get L medical care. Because L received prompt medical care, L was not harmed by his confinement.

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Dispute #3: Could C successfully sue Miller (M) for the intentional tort of trespass to land because M entered C's patio?

In order to establish a prima facie case for trespass to land, L must prove: (i) M violated C's interest in the exclusive possession of real property; and (ii) M acted with intent.

Under these facts, M appears to be an adult with no mental disability; he also entered C's patio voluntarily. Thus, M had the capacity to possess intent, and he acted volitionally. C also acted with the purpose of entering C's patio. Thus, M intended to violate C's interest in his exclusive possession of real property.

However, M will argue that C consented to M's entry onto C's property. [*See* Dispute #1 for the rule for consent.] M reasonably believed that C would consent to M's entry. C runs a business establishment; thus C actually encourages members of the public to enter his patio. There are tables and chairs on the patio, and C allowed L to use the patio to eat his cheese without objection. Further, the gate in the patio wall was unlocked. This suggests that a reasonable person would assume he was welcome to enter through the gate and walk into the patio area.

C will contend that while he may have consented to some members of the public entering the patio, the consent to enter was limited in scope to *his customers*. A business owner does not want everyone on his property, just paying customers. Because M was not a customer, C did not consent to have him enter the premises.

Furthermore, C can also argue that his consent, if any, would be limited to times when the business was open. C locked up the store and discontinued business for the day after L became ill. Any subsequent entry by M would be outside the scope of any consent by C.

Assuming C can establish a prima facie case for trespass to land, M can assert "defense of others" to justify his trespass. Defense of others is available as a defense to an intentional tort when a Δ reasonably believes: (i) a third person is facing imminent bodily harm from the actions of the π; and (ii) the Δ's assistance was reasonably necessary in order to prevent or reduce the threatened harm.

M will almost certainly be able to establish this defense. L was violently ill and his condition was deteriorating. Thus, L was facing imminent bodily harm. Moreover, M's trespass was reasonably necessary to reduce the possibility that L would suffer more serious injury. Without M's help, L quite possibly could have died. Thus, M's trespass was reasonably necessary.

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<u>Dispute #4:</u> Whether C can successfully sue M for the intentional tort of ***trespass to chattels*** or ***conversion*** because M broke C's sliding glass door.

To establish a prima facie case for ***trespass to chattels***, C must show: (i) M violated his interest in the physical condition of C's personal property; and (ii) M acted with intent.

Similarly, to prevail on a theory of ***conversion***, C must prove: (i) M violated C's interest in the right to possess personal property; and (ii) M acted with intent.

It is clear that M knew with a "substantial certainty" that throwing the patio chair through the sliding glass door would result in damage to the door and possibly the chair, so M had the requisite intent to satisfy both causes of action.

A cause of action for trespass to chattels and conversion would depend on the condition of the door and chair after M took his action. Although there are no facts with respect to the condition of the chair, the facts do state that the chair went "through" the glass door; consequently, C will probably be able to establish a prima facie case for trespass to chattels and conversion because M violated both the physical condition of, and C's right to possess, the glass door.

However, M can assert the "defense of others" defense. This defense will likely prevail. (*See* the analysis in Dispute #3)

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<u>Dispute #5:</u> Whether L could successfully sue M for battery because M went through L's pockets.

[*See* Dispute #1 for rule for battery.]

L will likely be able to establish that M committed battery. M clearly intended to go through L's pockets. Moreover, M caused bodily contact to be experienced by L. Physical contact includes coming into contact with a person's clothing. Thus, M's rifling through L's pockets satisfies the contact element. Finally, M's contact was harmful or offensive. Harmful contact is not limited to contact that causes physical injury. Contact is harmful or offensive if the contact is insulting to a reasonable person's dignity. Having one's personal items rummaged through is offensive to a reasonable person's dignity, especially when those personal items are in very close proximity to the person's body.

M will argue that the defense of implied consent justifies his actions. Consent is implied as a matter of law when: (i) the π is unable to grant consent; (ii) the Δ's actions were necessary in order to save the π from death or serious bodily injury; (iii) the Δ acted in good faith to aid the π; (iv) a reasonable person in the π's position would have consented to Δ's actions if he could; and (v) there was no indication that the π would have objected to the Δ's actions if he could.

M will likely be unsuccessful in arguing the defense of implied consent. L was likely unable to grant consent because his condition was deteriorating. However, M likely cannot establish that his actions were necessary to save L from death or serious injury. M had already called an ambulance. It wasn't medically necessary to learn L's name to protect him from bodily injury. Thus, M had no need to find L's identification. Further, M cannot establish he acted in good faith. M stole money from L when he looked through L's pockets. Theft is not consistent with good faith. Finally, a reasonable person would not have consented to M's actions. An ambulance was already called. A reasonable person would not want a stranger looking through his pockets. Instead, a reasonable person would expect that a trained medical professional would look through any of his personal effects that might be medically relevant.

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Dispute #6: Whether L can successfully sue M for conversion because M took L's money.

[*See* Dispute #4 for conversion rule.]

M clearly deprived L of his property interest in his money because he removed it from L's pocket. Further, M put the euros in his pocket, which suggests that he took the euros with the intent to deprive L of his property interest in the euros.

There appears to be no plausible argument/defense available to M.

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Dispute #7: Whether Tobin (T) can successfully sue L for battery because L pulled his stethoscope.

[*See* Dispute #1 for battery rule.]

Courts have interpreted the element "bodily contact" broadly to include items attached to a person's body. Even though L came in contact only with T's stethoscope instead of T's body, because the stethoscope was hanging around T's neck at the time of touching, there was physical contact. Moreover, L's contact was both harmful and offensive. Having one's head violently pulled down is physically painful, and also is offensive to a reasonable person's dignity.

L will argue that his act was unintentional. To establish intent, T must show that L had the legal capacity to possess intent (*See* Dispute #1 above). L arrived at the hospital in a "hysterical state," which suggests that he did not have the ability to conform his conduct to typical behavioral norms.

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Dispute #8: Whether L can successfully sue T for battery because T pumped L's stomach.

L can establish the prima facie case for battery because stomach evacuation is an intentional act that causes harmful bodily contact (*See* battery rule in Dispute #1).

T will likely rely on the defense of ***consent***. (*See* consent rule in Dispute #1 above). T told L he was going to do the procedure and L did not respond. L's silence suggested that he agreed to having his stomach pumped, since an ordinary person would object to such a violent procedure if he didn't want it. However, L will argue that he lacked the capacity to give consent (*See* argument in Dispute #7 re: L's legal capacity).

T's best argument is to rely on the defense of implied consent as a matter of law (*See* rule for implied consent in Dispute #5). Since most people in L's position would allow T to perform medical care to save their lives, T will probably successfully defend against L's battery claim.

Furthermore, there is a strong public policy that favors a finding in favor of T. If L won his battery claim, it would discourage doctors from aiding seriously ill patients.

APPENDIX D

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CONTRACTS HYPOTHETICAL*
60 MINUTES

Pierre Suave is the owner and operator of Old Paint, an antiques store. During the past 10 years, Pierre's brother, Rico Suave, a life insurance salesman who lives next door to Old Paint, has made a practice of loitering inside the store during operating hours to chat with customers. By his own admission, Rico does this as part of a calculated attempt to sell insurance to Pierre's clientele. Rico also frequently asks Pierre's attractive customers out on dates. Although Pierre finds this behavior annoying, he has been willing to live with it because Rico is his brother. Nevertheless, Pierre was planning a sophisticated antiques auction on Saturday, and was worried that Rico's presence would be distracting. On Friday afternoon, Pierre sent an e-mail addressed to his Aunt Celeste and his four cousins, stating, "If any of you can keep Don Juan Rico away from the shop tomorrow, I'll give you a thousand bucks. I'd even throw in foot massages for life and my firstborn!" Early Saturday morning, Pierre's cousin Sophia, who was desperate for cash, read this e-mail. Sophia scribbled off a note that said, "I accept your offer, Pierre. Sincerely, Sophia." She then placed the note in the corner mailbox. Immediately thereafter, Sophia rented a white van for $100 and a chauffeur's disguise for $50. She parked the van across the street from Rico's apartment with a placard in the van's window reading, "Courtesy Party Bus to Annual Wealthy & Uninsured Singles Convention." The ruse apparently fooled Rico, who, upon exiting his house on Saturday, noticed the van and boarded it. As the van pulled away, Pierre ran out of his shop to block its path, yelling, "I hope you're not expecting any compensation for this, Sophia." Rico immediately realized that he had been fooled and got out of the van, saying to Pierre: "Thanks for the heads up. Now, I can go to Aunt Celeste's house for the weekend, just like I arranged when she called me last night."

Sophia wishes to sue Pierre, and she has solicited your advice. Explain:

1. What are her arguments for recovery?

2. What are the chances that a lawsuit will succeed?

* Actual examination question offered by Professor Eric Talley, UC Berkley Boalt Hall School of Law.

A P P E N D I X   D

SUMMARY OF RELEVANT LAW FOR PRACTICE CONTRACTS EXAMINATION *

I. Contract Formation

A. Types of Contracts: Unilateral vs. Bilateral Contracts

1. Unilateral Contract: A contract that involves an exchange of the offeror's promise for the offeree's act.

   a. Offeror: A person making the offer.

   b. Offeree: A person accepting the offer.

   c. The offeree does not make a promise, but instead simply acts.

      i. Example: "I will pay you $100 if you paint my fence."

2. Bilateral Contract: A contract in which both sides exchange promises.

   a. The offeror and offeree both make promises.

      i. Example: "I promise to sell you my car if you promise to give me $500 now and the balance within a week."

B. Mutual Assent

1. The Objective Theory of Contracts

   a. A party's intent is deemed to be what a reasonable person in the position of the other party would believe was meant.

2. Offer, Acceptance, Revocation, Counteroffer

   a. Offer: The manifestation of willingness to enter into a bargain, so that a reasonable person believes that his assent would conclude the bargain.

      i. A statement made in jest will not be deemed an offer if the offeree knew it was a joke.

* **The following summary of Contract Law is provided solely for the purpose of answering the practice Contracts hypothetical in these materials. It is not a complete outline of the law of Contracts nor is it intended to be a complete outline of the law of Contracts and should not be relied upon as such.**

ii. An advertisement generally does not constitute an offer because it does not create the power of acceptance in the reader.

A. EXCEPTION: Advertisement for reward can be considered a valid offer when there are limited opportunities to accept.

b. Acceptance: A manifestation of assent to the terms of the offer in a manner that was invited or required by the offer.

i. Acceptance of a bilateral contract requires a return promise.

ii. Acceptance of a unilateral contract requires performance.

A. An offer for a unilateral contract is accepted by full performance of the requested act.

c. Revocation of Offers: An offeror can revoke an offer at any time before it is accepted.

i. EXCEPTION: For unilateral contracts, the beginning of the performance by the offeree makes the offer temporarily irrevocable.

3. The Mailbox Rule of Acceptance

a. Timing of offer (offer effective upon receipt).

b. Timing of acceptance (acceptance effective upon dispatch).

c. Timing of revocation (revocation effective upon dispatch).

4. Definiteness of Terms

a. Express and Implied Terms

i. Express Terms

A. No contract will be found if the terms of the parties' "agreement" are unduly indefinite.

1. EXCEPTION: If the court believes that the parties intended to form a contract and it can supply a "reasonable" meaning for the missing term, it will generally do so.

ii. Implied Terms

A. Implied obligation of good faith: In both UCC and non-UCC contracts, the court will supply an obligation of good faith and fair dealing.

1. RESTATEMENT §256 - Duty of good faith imposes an obligation to behave in a way that is consistent with the other party's reasonable expectations about how the contract will work

C. Enforceability

1. The Doctrine of Consideration provides that a contract will not be enforceable unless it is supported by "consideration."

a. Consideration exists when the offeror promises to give up something if the offeree suffers a legal detriment or otherwise circumscribes his liberty.

2. The Doctrine of Promissory Estoppel

a. Promissory Estoppel as a Substitute for Consideration

i. RESTATEMENT §90 - Promises which induce reliance on the part of the promisee will often be enforceable without consideration where:

A. The promisee's reliance was reasonably foreseeable to the promisor; and

B. The promisee actually relied upon the promise.

b. Promissory Estoppel can be asserted as an alternative cause of action (apart from breach of contract).

II. Contract Interpretation/Performance Issues

A. Establishing the Meaning of a Contract

1. Ambiguous Contract Terms

a. Ambiguous contract terms are interpreted against the drafter to give such terms a reasonable, lawful, and effective meaning.

b. Courts today allow parties to introduce extrinsic evidence to aid in the interpretation of a contract.

i. The trial court must admit extrinsic evidence that is offered to define ambiguous terms (*i.e.*, terms capable of more than one meaning).

III. Contract Avoidance Doctrines

A. Failure of a Basic Assumption

1. Mistakes of Present Existing Fact

a. Unilateral Mistake: When only one party has a mistaken belief about an existing fact.

i. Usually does not excuse a party from performance.

b. Mutual Mistake: A mistake of an existing fact that is shared by both parties can excuse one party from performance where:

i. The mistaken belief is not in accord with the existing facts;

A. Doctrine applies to existing facts, not an erroneous belief about what will happen in the future.

ii. The mistake occurs at the time of contracting;

iii. The mistake involves a basic assumption of the contract;

iv. The mistake has a material effect on the transaction; and

v. The party seeking to excuse its performance did not bear the risk of the mistake.

IV. Remedies for Breach of Contract

A. Expectation Damages (preferred method of damages): Putting the party in the same position had the contract been fully performed.

1. Calculated by determining the profit the non-breaching party would have received if the contract had been performed.

B. Reliance Damages: Putting party in same position had contract never been formed.

   1. Calculated by the amount the non-breaching party spent in executing its performance.

C. Restitution (prevents unjust enrichment): Value to the breaching party of the non-breaching party's performance.

Step 1: Time Management
Determine time allocation and write down when you start reading the problem, when you should start writing, and when you should end.

start: 1:25PM
begin writing: 1:45PM
end: 2:25PM

60 MINUTES

Pierre Suave is the owner and operator of Old Paint, an antiques store. During the past 10 years, Pierre's brother, Rico Suave, a life insurance salesman who lives next door to Old Paint, has made a practice of loitering inside the store during operating hours to chat with customers. By his own admission, Rico does this as part of a calculated attempt to sell insurance to Pierre's clientele. Rico also frequently asks Pierre's attractive customers out on dates. Although Pierre finds this behavior annoying, he has been willing to live with it because Rico is his brother. Nevertheless, Pierre was planning a sophisticated antiques auction on Saturday, and was worried that Rico's presence would be distracting. On Friday afternoon, Pierre sent an e-mail addressed to his Aunt Celeste and his four cousins, stating, "If any of you can keep Don Juan Rico away from the shop tomorrow, I'll give you a thousand bucks. I'd even throw in foot massages for life and my first born!" Early Saturday morning, Pierre's cousin Sophia, who was desperate for cash, read this e-mail. Sophia scribbled off a note that said, "I accept your offer, Pierre. Sincerely, Sophia." She then placed the note in the corner mailbox. Immediately thereafter, Sophia rented a white van for $100 and a chauffeur's disguise for $50. She parked the van across the street from Rico's apartment with a placard in the van's window reading, "Courtesy Party Bus to Annual Wealthy & Uninsured Singles Convention." The ruse apparently fooled Rico, who, upon exiting his house on Saturday, noticed the van and boarded it. As the van pulled away, Pierre ran out of his shop to block its path, yelling, "I hope you're not expecting any compensation for this, Sophia." Rico immediately realized that he had been fooled and got out of the van, saying to Pierre: "Thanks for the heads up. Now, I can go to Aunt Celeste's house for the weekend, just like I arranged when she called me last night."

Sophia wishes to sue Pierre, and she has solicited your advice. Explain:

1. What are her arguments for recovery?

2. What are the chances that a lawsuit will succeed?

Step 2: Read the "Call of the Question" before reading the fact pattern.

This interrogatory gives the examinee three basic instructions:
(1) The role you are asked to assume.
- The professor asks you to act as attorney _for Sophia_.

(2) Field of potential litigants and/or parties in conflict.
- The professor asks you to limit inquiry to claims Sophia has against Pierre _and nobody else_.

(3) Goal of the examinee.
- Identify and analyze the arguments Sophia will make seeking recovery in contract law.
- Predict which arguments will succeed and fail.

It is also important to note that absent from the interrogatory is the controlling jurisdiction. This omission invites students to analyze majority and minority rules.

e-mail = offer for unilateral contract not only to Sophia (e.g., reward)?

illegality of "first born" term? against public policy? Is this a joke?

Rico's prior conduct makes him a Don Juan?

is "foot massages" term too indefinite (e.g., length, when, where, etc.)? bizarre payment, could be a joke?

Pierre Suave is the owner and operator of Old Paint, an antiques store. For the last 10 years, Pierre's brother, Rico Suave, a life insurance salesman who lives next door to Old Paint, has made a practice of loitering inside the store during operating hours to chat with customers. By his own admission, Rico does this as part of a calculated attempt to sell insurance to Pierre's clientele. Rico also frequently asks Pierre's attractive customers out on dates. Although Pierre finds this behavior annoying, he has been willing to live with it because Rico is his brother. Nevertheless, Pierre was planning a sophisticated antiques auction on Saturday, and was worried that Rico's presence would be distracting. On Friday afternoon, Pierre sent an e-mail addressed to his Aunt Celeste and his four cousins, ~~stating~~, "If any of you can keep Don Juan Rico away from the shop tomorrow, I'll give you a thousand bucks. I'd even throw in foot massages for life ~~and~~ my first born!" Early Saturday morning, Pierre's cousin Sophia, who was desperate for cash, read this e-mail. Sophia scribbled off a note that said, "I accept your offer, Pierre. Sincerely, Sophia." She then placed the note in the corner mailbox. Immediately thereafter, Sophia rented a white van for $100 and a chauffeur's disguise for $50. She parked the van across the street from Rico's apartment with a placard in the van's window reading, "Courtesy Party Bus to Annual Wealthy & Uninsured Singles Convention." The ruse apparently fooled Rico, who, upon exiting his house on Saturday, noticed the van and boarded it. As the van pulled away, Pierre ran out of his shop to block its path, yelling, "I hope you're not expecting any compensation for this, Sophia." Rico ~~immediately~~ realized that he had been fooled and got out of the van, saying to Pierre: "Thanks for the heads up. Now I can go to Aunt Celeste's house for the weekend, just like I arranged when she called me last night."

Sophia wishes to sue Pierre, and she has solicited your advice. Explain:

1. What are her arguments for recovery?

2. What are the chances that a lawsuit will succeed?

kidnapping against public policy?

mutual mistake about Rico's plans?

unilateral contract accepted by performance, not return promise.

was S's attempted mode of acceptance unreasonable (e.g., offer by e-mail vs. acceptance by mail)?

does "mailbox rule" apply?

tendering performance creates an option contract in S?

S began performance in a reasonable time and spent $150 in reliance on P's offer.

promissory estoppel cause of action if no contract?

__IMPORTANT:__ Only 2 parties in conflict; focus on __S__ and __P__ disputes only.

interference before "acceptance by performance" completed; did P breach duty of good faith and fair dealing?

Don Juan Rico = Rico Suave? language interpretation issue?

__Timeline:__
Fri. afternoon - P sends e-mail
Fri .night - Aunt Celeste calls Rico for Sat. plans
Sat. morn. - S begins performance

Dispute #1 A): Whether P's e-mail to S was a valid offer.

	S WILL ARGUE	P WILL ARGUE
F	- Aunt Celeste seems to have relied on e-mail. - Language "I'll pay" and "I'd even …" shows terms can be divisible.	- No evidence that Celeste was reacting to e-mail when she called Rico.
L	- E-mail = reward not advertisement. - P's belief it's a joke is immaterial. - Divisibility of contract terms.	- E-mail = advertisement. - E-mail = joke; S's reliance was unreasonable. - S guilty of serious misconduct.
P	- N/A	- Court will not enforce illegal and indefinite terms.
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #1(B): *Whether S successfully accepted P's offer.*

	S WILL ARGUE	P WILL ARGUE
F	- S could have kept him away the whole day if it weren't for P. - P interfered with S's performance.	- No guarantee R would have stayed away whole day.
L	- Rico on bus = beginning tender creating option to complete performance.	- Unilateral contract (return mail ≠ acceptance). - Return letter ≠ reasonable mode of accepting e-mail offer. - S's partial performance ≠ acceptance. - S was engaged in illegal activity (kidnapping/fraud).
P	- P has unclean hands.	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #1(C): *Whether there was adequate consideration to support a contract between S and P.*

	S WILL ARGUE	P WILL ARGUE
F	- $1,000 ≠ evidence of joke . - S gave up legal right (how she spent her Saturday).	- Large amount of money ($1,000) = evidence of joke.
L	- S incurred a legal detriment. - P would have gained a benefit. - P's hidden belief that contract was a joke is not enough to void a contract (Lucy v. Zehmer).	- Not bargained for because e-mail = joke.
P	- Amount of consideration not an issue for the courts.	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #2: *Whether a court will interpret the term "Don Juan Rico" to mean "Rico Suave" and enforce the contract between P and S.*

	S WILL ARGUE	P WILL ARGUE
F	- *Rico Suave acted like a "Don Juan."* - *P did not tell S that she had the wrong person when he interfered.* - *Celeste had same interpretation.*	- *Don Juan Rico ≠ Rico Suave.*
L	- *Ambiguity interpreted against the drafter.* - *Canons of construction say look to course of performance.*	- *Contract terms not ambiguous since Don Juan Rico ≠ Rico Suave.*
P	- *Strong policy argument to interpret contract to execute the intent of parties.*	- *N/A*
F	- *N/A*	- *N/A*
L	- *N/A*	- *N/A*
P	- *N/A*	- *N/A*

Dispute #3: *Whether P can assert a mutual mistake excuse to relieve him from performing under the contract with S.*

	P WILL ARGUE	S WILL ARGUE
F	- On Saturday morning when S accepted by performance, Rico was going to Celeste's and not planning to be at the auction.	- No guarantee that Rico would have gone to Celeste's . - Rico might have broken plans to attend auction. - At time of offer, everyone believed that Rico would be in vicinity of auction. - E-mail sent on Friday afternoon; Celeste called Rico on Friday evening to invite him to her house because of P's offer.
L	- N/A	- No mutual mistake at time of contracting.
P	- N/A	- Circular argument would not serve as good precedent.
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

__Dispute #4:__ Whether P breached duty of good faith and fair dealing when he interfered with S's performance.

	S WILL ARGUE	P WILL ARGUE
F	- P interfered with S's performance by watching and waiting until Rico was on bus. - P's words were evidence that he knew what S was trying to do.	- N/A
L	- P's interference = material breach.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

__Dispute #5:__ Assuming a court finds that P breached the contract, what damages is S entitled to collect?

	S WILL ARGUE	P WILL ARGUE
F	- N/A	- N/A
L	- S is entitled to $1K promised. - S not entitled to $150 in expenses. - No duty to mitigate; savings would have been enjoyed by S.	- Uncertain that S would complete the contract successfully. - S's success is too speculative. - S has a duty to mitigate by returning rented items early for a partial refund.
P	- Would establish bad precedent if court adopted P's argument that outcome was uncertain.	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

__Dispute #6:__ If action for breach of contract fails, could S assert promissory estoppel as an alternative cause of action against P?

	S WILL ARGUE	P WILL ARGUE
F	- N/A	- N/A
L	- P should have foreseen that e-mail - would induce S's reliance. - S did act by beginning performance and renting van/disguise. - Inequity - if S were denied reliance damages, S would lose $150.	- P's e-mail was a joke and P could not have foreseen that his e-mail would induce S to act. - S should have mitigated damages.
P	- P is "more wrong" and should bear the risk of his "joke."	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #1: Whether a valid contract ("K") exists between Pierre ("P") and Sophia ("S").

If S seeks to recover for a breach of contract claim, S must first establish that there was a contract between S and P. To establish that a contract was formed, S must prove three elements: (1) an offer; (2) a valid acceptance; and (3) adequate consideration.

A. Whether P's e-mail to S was an offer.

An offer is defined as a manifestation of a willingness to enter into a bargain such that the offeree reasonably believes that his assent to the bargain is all that is necessary to create a contract. (Rest. §24)

S will argue that P's e-mail was a valid offer because it set the terms of the offer and the mode of acceptance. P might argue that because the offer was sent to several people, it was more akin to an advertisement than an offer. P's e-mail invited one of several people to accept an offer. Thus, no recipient of the e-mail would reasonably believe that her assent was all that was necessary to accept the offer. S will argue that although the e-mail was sent to several people, because of the nature of the task, the offer inherently limited the number of acceptances. Only one person would be able to remove Rico ("R") from P's store. Thus, S could argue successfully that the offer was much more akin to a reward or a "first-come-first-served" offer. Thus, the e-mail was not an invitation to offer, but a concrete proposal requiring only the offeree's assent.

P would next assert that the e-mail was made in jest and could not be reasonably viewed as an offer using an objective standard. P would offer the following evidence that his e-mail was only a joke. First, P offered a very large sum of money ($1,000) for a relatively simple task: keeping R occupied for the day. Second, he offered foot massages for life, which was a very unusual term that no reasonable person would take seriously. Third, he offered terms that are clearly against public policy: trading in human lives. The offer of, "I'll give you my first born" is frequently used as a joke to convey that the person really needs a favor.

S can argue that even if P thought he was making a joke, P's mental assent was not required for the formation of a contract. If P's conduct and words, objectively viewed, would have caused a reasonable person to believe that he intended to form a real agreement, the courts will find the e-mail to be an offer. (*Lucy v. Zehmer*) S can argue that a reasonable person would view P's e-mail as a serious offer. Although no reasonable person would take P's terms with respect to the foot massages and his first born seriously, a reasonable person could easily view P's offer of $1,000 as a serious offer. (*See* the discussion below for why a reasonable person could view the $1,000 term as divisible from the other terms contained in the offer.) S would argue that because auctions of this type could generate large revenues, the $1,000 paid to keep R away from the store might be trivial in comparison to what P could earn by the auction. Thus, a reasonable person would not view the $1,000 offer as a joke. Moreover, courts have traditionally refrained from passing judgment about the sufficiency of the consideration promised. Thus, a court would probably determine that the amount of money P offered is not sufficient evidence that the e-mail was a joke.

S would also present evidence that Aunt Celeste ("Aunt C") apparently acted on P's e-mail. Aunt C's actions also suggest that P's e-mail could be objectively viewed as a valid offer. If multiple people act on an offer, it is more reasonable to infer that the offer was viewed seriously.

If P argues successfully that the "foot massage" and "first born" terms are unenforceable because they are too indefinite or violate public policy, S could argue that the offer could be "divisible" into both legal and illegal components. Illegal K terms can be divisible from the rest of the K if: (1) the K terms can be clearly divided into different components; (2) the illegality does not affect the entire K; and (3) the party seeking performance is not guilty of serious misconduct.

S would argue that the contract is divisible by pointing to the language of the e-mail. The offer for $1,000 is stated in the future tense ("I'll give you"), but the terms which are bizarre and violate public policy are written in the subjunctive tense ("I'd even"). In addition, the $1,000 term is stated in its own sentence. Thus, there is clearly a division among the components of the e-mail. S would also argue that the contract did not hinge on the ill-defined/illegal terms. S could simply accept the $1,000 as payment; thus, excluding the other terms does not affect the entire agreement. Finally, S was not guilty of serious misconduct in carrying out her performance. While S lied to R, she did not harm him in any way. Moreover, because S was not responsible for the illegal terms that the offer contained, she was not responsible for the misconduct.

P would argue that S committed "serious misconduct" because she kidnapped R. This argument will likely not be successful because R was able to leave the van when he chose to.

Here the court will probably find that P's e-mail constituted an offer to accept a unilateral contract.

B. Whether S accepted P's offer (assuming an offer exists).

A bilateral contract is one where the offeror and offeree exchange promises. One method of accepting a bilateral contract is by using the "mailbox rule," which provides that an offeree's acceptance is effective upon dispatch. By contrast, a unilateral contract is one where the offeror seeks acceptance by full performance of the requested task, rather than a return promise.

Relying on S's argument that P's offer was akin to a reward, it is an offer for a unilateral contract. S would *not* be able to rely on the mailbox rule because this is an offer for a unilateral contract, and S would have to accept by actual performance. Even if it were an offer for a bilateral contract, P would argue that S's mode of acceptance (a letter dropped in a mailbox) was unreasonable given that the original offer was sent via e-mail.

S can argue that she performed on the contract. S rented a van, put on a disguise, and got R into the van in order to take him away from P's store. However, P can argue she did not complete the requested act because she did not keep R away for the entire day. Because she did not complete P's requested task, S did not perform. A person does not perform a unilateral contract merely by trying very hard or attempting to perform. To perform, S had to complete her task.

S could reply that once R stepped into the van, S had "tendered a beginning" of what was almost certainly going to culminate in complete performance. Once S began to perform, S's option to complete the task kicked in; thus, P owed S a duty to not interfere with or impede S's ability to complete the task. To impose this duty on P, P would have to be on notice that S had begun her performance. P's statement about compensation shows that P clearly knew that S was taking R away from his store in reliance on P's e-mail. Thus, P owed S a duty to let her finish the task.

P could argue that despite his interference, the fact that S got R on the bus did not guarantee that R would have stayed away for the entire day. R likely would have discovered the ruse before the day ended, especially because there was no convention. A court would likely reject P's argument. As a matter of public policy, courts do not like to speculate about the likelihood of future events. Moreover, because P tried to thwart S's acceptance, courts would likely view the facts in the light most favorable to S, not P.

P would finally argue that S should not be able to accept with performance that involved the illegal acts of kidnapping and intentional misrepresentation. However, S would probably be able to argue successfully that if her actions were tortious, the remedy is R's under tort law. S should still be able to enforce the K against P because S performed on the K and did not commit any tort against P.

The court would probably enforce P's obligation to let S complete performance after he had notice that she had begun performance. Thus, S would be able to argue successfully that she has accepted P's offer.

C. Whether there was adequate consideration for the contract between P and S.

Consideration is a bargained-for legal benefit conferred on one party or a legal detriment that is assumed by one party.

This is an easy issue because there is adequate consideration to support this contract. S can successfully argue that in return for P's promise of $1,000, S agreed to confer a benefit on P by spending her Saturday keeping R away from the store.

The court will find adequate consideration to support a contract between S and P.

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Dispute #2: Whether a court will interpret the term "Don Juan Rico" to mean "Rico Suave" and enforce the contract between P and S.

If material terms of a K are ambiguous, courts will accept extrinsic evidence relevant to the meaning of the ambiguous term. Among other types of extrinsic evidence, courts will consider the course of dealing between the parties in order to interpret the intent and understanding of the parties.

S can provide evidence that the parties understood "Don Juan Rico" to mean "Rico Suave." R loitered in P's store and asked attractive patrons on dates. If S knew about this type of activity, then she would understand Don Juan was simply a nickname for Rico Suave because it is common knowledge that another name for a womanizer is "Don Juan." As P's and R's cousin, it is highly likely that S was familiar with R's activity. Further, because P is R's brother and S is R's cousin, it is reasonable that S would believe "Don Juan ***Rico***" referred to "Rico Suave" who was close to both P and S.

S might point to other factual evidence that the parties understood that "Don Juan Rico" referred to Rico Suave. For example, when P tried to interfere with S's performance, he did not explain to S that she had the wrong man; instead, he said "I hope you're not expecting to get paid for . . ." This suggests P knew his e-mail referred to R, and that S would understand this as well. Second, Aunt C had the same interpretation of the meaning of "Don Juan Rico" because she also tried to accept P's offer.

P's only argument would be that the "Don Juan Rico" term was not intended to mean Rico Suave. The term is not ambiguous on its face. Thus, there is no reason to consider extrinsic evidence. However, because issues of contract interpretation are typically resolved against the drafter, a court is unlikely to side with P, the drafter of the original e-mail.

Assuming S can provide evidence that the parties to the contract understood "Don Juan Rico" to mean "Rico Suave," a court will likely conclude that the K is enforceable.

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<u>Dispute #3:</u> Whether P is excused from his obligation to pay S under the K because of a mutual mistake.

A mutual mistake can excuse one party from performance where: (1) there is a mistaken belief about the facts; (2) the mistake relates to facts that existed at the time the contract was formed; (3) the mistake involves a basic assumption upon which the contract was made; (4) the mistake has a material effect on the transaction; and (5) the party seeking the relief from performance did not "bear the risk" of the mistake.

P might argue that both parties were mistaken about whether R was going to be at the auction, when it appears he was going to spend the day at Aunt C's house. This clearly involves a basic assumption of the K because keeping R away from the store was the entire reason for the K. It also had a material effect on the transaction because P would never have made the offer had he known that R posed no threat to his auction. However, S can likely argue that the mistake did ***not*** occur at the time of contracting. The facts indicate that P sent his e-mail on Friday afternoon, and R stated that he made his plans to visit Aunt C on Friday night. Thus, there was no mistake at the time of contracting because P correctly assumed that R would be near his store on Saturday when P sent his e-mail.

P might argue that S could not accept the offer (thereby creating the contract) until she at least undertook performance on Saturday morning and both parties were mistaken at the time of contracting because they did not know that R had no plans to be around the store at the time of the auction. However, as a matter of fairness, a court would likely not accept this argument because P's e-mail caused the mistake, assuming that S can prove that Aunt C's invitation to R was motivated by P's e-mail.

S can also argue that there was no mistake because R's plan to visit Aunt C was not firm, as evidenced by his willingness to break his plans and get on S's van. R could easily have made a similar decision to cancel with Aunt C had he learned that the auction was taking place at P's store. Thus, there was no mutual mistake.

Because the mistake did not occur at the time of contracting, and there may have been no mistake at all, a court would probably not allow P to avoid his obligations under the K by asserting the mutual mistake excuse.

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<u>Dispute #4:</u> Whether P breached his duty of good faith and fair dealing ("GFFD") when he interfered with S's performance.

There is an implied duty of GFFD which is binding upon the parties of a contract. (Rest. § 256).

If S succeeds in her argument that once she began tendering performance, she had the option to complete performance, then P would have a duty to act in good faith and not interfere with her performance. This duty prevents P from changing his mind and withdrawing the consideration he offered.

S can argue successfully that P's actions are circumstantial evidence of his bad faith. P waited until S's performance had begun and it was fairly certain that S would remove R from the vicinity of the auction before he announced that he wouldn't pay her. This announcement also kept S from successfully performing her duties under the contract. Thus, P's interruption of S's performance was a material breach of the contract.

The court would probably conclude that P did not act in good faith when he interrupted her performance and, therefore, P materially breached the contract.

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Dispute #5: Assuming a material breach by P, what damages is S entitled to recover?

Courts generally prefer to award expectation damages to the non-breaching party, putting her in the same place she would have been in had the contract been completed.

S would seek expectation damages for P's material breach (*see* Dispute #4). Thus, S could argue successfully that she is entitled to $1,000 because that was her expected payment under the contract. S would not be entitled to collect the money expended for the van and the disguise because she expected to expend this money in order to perform her portion of the contract (*e.g.*, *Hawkins v. McGee*). Beyond the $1,000, S will likely not be able to recover the foot massages for life or P's firstborn child. (*See* Dispute #1 above).

P might argue that S could have mitigated her damages by returning the van and disguise early for a refund. Although this is a creative argument, it would probably not succeed because this is a contract for a fixed price. Thus, the fixed price acts as a liquidated damages provision, so any savings from returning the van or disguise would be enjoyed by S, not P.

Assuming that a contract is found and that P materially breached it, S would be entitled to collect the $1,000.

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Dispute #6: If S's action for breach of contract fails, could S assert promissory estoppel as an alternative cause of action against P?

A party can assert a cause of action for promissory estoppel where: (1) it was reasonably foreseeable to the offeror that his promise would induce the offeree to take action; (2) that the offeree in fact acted on the promise; and (3) reliance damages are necessary to prevent injustice.

Applying an objective standard, S would argue that it was reasonably foreseeable that P's e-mail would induce S to take action. It appears from the facts that she genuinely believed P's offer to be a valid one, and others believed it to be valid as well. Therefore, her reliance was reasonable and foreseeable.

S also will argue that she acted on the promise (*see* Dispute #1.B). Thus, to avoid injustice, she should be entitled to recover reliance damages. Her reliance damages would be limited to the costs expended due to her reliance: the $150 she paid for the van and the disguise.

P can argue that because his e-mail "offer" contained such unusual terms, he could not reasonably foresee that someone would act in response to his e-mail. However, Aunt C also responded to P's e-mail. Thus, it's difficult for P to argue that it wasn't reasonably foreseeable that someone would reply to his e-mail, when two people in fact ***did*** respond seriously to his e-mail.

However, P would be able to argue that S had a duty to mitigate her damages by returning the van and disguise early. Because of the early hour, if P can prove that S could have received some of her money back had she taken the rented items back early, then she should have mitigated her reliance damages.

S would probably be able to recover her $150, but if evidence exists that she could have mitigated her damages, her award of reliance damages would be reduced accordingly.

APPENDIX E

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PROPERTY EXAM QUESTION
60 MINUTES

In 1970, co-tenants Donny and Marie moved into Blackacre, a spacious 27-room mansion situated on approximately 50 acres in Bedrock, an affluent suburb of Old York City. Donny contributed sixty percent of the $200,000 purchase price with money he earned as a pop singer. Marie contributed the other forty percent with money she received as a gift from her (now) late uncle, Mike Brady. Donny was out of possession for most of the past 32 years. During Donny's absence, Marie created beautiful gardens and ponds on the southeast quadrant of the Blackacre estate and remodeled the basement. Marie was very careful that all of her interior renovations conformed to Bedrock's building codes. Moreover, even though most of the area where she has created her gardens is in an environmentally sensitive area as defined under the Bedrock Zoning Code, Marie underwent the State of Old York's Environmental Quality Review process, and received all of the necessary approvals from the Bedrock Planning Board, before she ever planted her first marigold.

Last year, without Donny's permission, Marie leased the basement apartment to Fabio, a model, "for three years." During a recent photo shoot on the premises, Fabio installed high wattage lights. The lights caused an electrical fire. When Marie complained, Fabio responded, "Well, it's about time this apartment heated up. I've been freezing for months. And, by the way, this ceiling is too low and the toilet is not working." The following week Fabio left with two years remaining on the lease. He took the lighting installations with him.

Marie has come to you for legal advice. She would like to know her rights and duties with respect to Fabio and Donny. Please advise her, anticipating the possible responses to her contentions. Assume that the statutory period for a claim of adverse possession in Old York is 10 years.

Step 1: Time Management
Determine time allocation and write down when you start reading the problem, when you should start writing, and when you should end.

start: 1:25PM
begin writing: 1:45PM
end: 2:25PM

60 MINUTES

In 1970, co-tenants Donny and Marie moved into Blackacre, a spacious 27-room mansion situated on approximately 50 acres in Bedrock, an affluent suburb of Old York City. Donny contributed sixty percent of the $200,000 purchase price with money he earned as a pop singer. Marie contributed the other forty percent with money she received as a gift from her (now) late uncle, Mike Brady. Donny was out of possession for most of the past 32 years. During Donny's absence, Marie created beautiful gardens and ponds on the southeast quadrant of the Blackacre estate and remodeled the basement. Marie was very careful that all of her interior renovations conformed to Bedrock's building codes. Moreover, even though most of the area where she has created her gardens is in an environmentally sensitive area as defined under the Bedrock Zoning Code, Marie underwent the State of Old York's Environmental Quality Review process, and received all of the necessary approvals from the Bedrock Planning Board, before she ever planted her first marigold.

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Marie has come to you for legal advice. She would like to know her rights and duties with respect to Fabio and Donny. Please advise her, anticipating the possible responses to her contentions. Assume that the statutory period for a claim of adverse possession in Old York is 10 years.

Step 2: Read The "Call Of The" Question Before Reading Fact Pattern.

This interrogatory gives the examinee four basic instructions:

(1) The role you are asked to assume.

- The professor asks you to act as attorney *for Marie*.

(2) Field of potential litigants and/or parties in conflict.

- The professor asks you to limit inquiry to claims Marie has against Donny and Fabio *and* defenses that she may have to any claims they raise.

(3) Goal of the examinee.

- Identify and analyze Marie's rights and obligations under law of property.
- Predict which arguments will succeed and fail.

(4) Details about the controlling jurisdiction.

- Controlling jurisdiction recognizes claims for adverse possession.
- Professor expects examinee to address adverse possession theory.

Changed property. Does Donny have claim for ameliorative waste?

Co-tenants each have right to enjoy all of Blackacre.

"out of possession" does not necessarily mean ouster.

Most of? How often did he return?

60 MINUTES

In 1970, co-tenants Donny and Marie moved into Blackacre, a spacious 27-room mansion situated on approximately 50 acres in Bedrock, an affluent suburb of Old York City. Donny contributed sixty percent of the $200,000 purchase price with money he earned as a pop singer. Marie contributed the other forty percent with money she received as a gift from her (now) late uncle, Mike Brady. Donny was out of possession for most of the past 32 years. During Donny's absence, Marie created beautiful gardens and ponds on the southeast quadrant of the Blackacre estate and remodeled the basement. Marie was very careful that all of her interior renovations conformed to Bedrock's building codes. Moreover, even though most of the area where she has created her gardens is in an environmentally sensitive area as defined under the Bedrock Zoning Code, Marie underwent the State of Old York's Environmental Quality Review process, and received all of the necessary approvals from the Bedrock Planning Board, before she ever planted her first marigold.

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Marie has come to you for legal advice. She would like to know her rights and duties with respect to Fabio and Donny. Please advise her, anticipating the possible responses to her contentions. Assume that the statutory period for a claim of adverse possession in Old York is 10 years.

Fabio = tenant.
lights = fixtures and removal = waste.

Evidence to rebut habitability claim by Fabio?

Can Donnie collect his share of rent from Marie?

Does Marie have claim for permissive waste?

Breach of lease?
Can Marie collect 2 years of rent?

Did Marie breach the implied warranty of habitability?

Did Marie breach the implied warranty of quite enjoyment?

Can Marie acquire title to Blackacre using an adverse possession theory?

Was there hostility (ouster)?

Was possession exclusive (did Donny return)?

Dispute #1 (A): Has M acquired title to the whole of Blackacre to the exclusion of D through adverse possession?

	M WILL ARGUE	D WILL ARGUE
F	- M's possession was "open." - M's possession was "notorious." - M "actually" occupied Blackacre for 32 years	- No evidence that M was adverse to D (no ouster). - D was away "most of" 32 years (did D's returns interrupt continuity element)?
L	- N/A	- Co-tenants rights to possess the whole. - Ouster = affirmative act that removes other co-tenant.
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #2: Has M committed waste by creating the gardens and remodeling the basement or, alternatively, by letting parts of Blackacre fall into disrepair?

	D WILL ARGUE	M WILL ARGUE
F	- M improved property without D's permission. - There was a fire at Blackacre that presumably damaged property.	- M's "improvements" did not destroy sentimental value of property. - No evidence that Blackacre had any special sentimental value to M or D. - D's absence = indifference for property - M did not cause fire in basement and no evidence that M didn't take steps to correct.
L	- Permissive waste prevents occupier of property from destroying property to the detriment of others with a current/future interest in land. - Ameliorative waste prevents occupier of property from "improving" property to the detriment of others with a current/future interest in land.	
P	- N/A	- Law favors productive use of property.
F	- N/A	- N/A
L	- N/A	- If M is liable for permissive waste, M should implead F for contribution or indemnification.
P	- N/A	- N/A

<u>Dispute #3:</u> Is M entitled to collect money from D for the improvements to, and general maintenance of, Blackacre?

	M WILL ARGUE	D WILL ARGUE
F	- M spent money to improve property. - M's presumably spent money to maintain property in D's absence.	- No facts show that D approved M's plan to improve Blackacre.
L	- At partition, improving co-tenant is entitled to a credit for property appreciation (or debit for depreciation caused by "improvements"). - At partition occupying co-tenant may be entitled to credit for maintenance costs.	- Co-tenant not entitled to collect for unapproved improvements from other co-tenants. - Co-tenants not entitled to contribution for maintenance from non-occupying co-tenant.
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #4: Does D have a claim against M for rent?

	D WILL ARGUE	M WILL ARGUE
F	- M occupied all of Blackacre rent-free for 32 years. - M presumably collected rent from F.	- M and D were co-tenants. - No evidence that M ousted D. - If there was an ouster, (see Dispute #1) D's claim for rent from M or F may be too late.
L	- If co-tenant wrongfully ousts another, then an obligation to pay rent kicks in. - Co-tenants must share rent they collect by leasing their interests.	- Co-tenants have no obligation to pay rent to non-occupying co-tenants. - Co-tenants are entitled to rent their part, or all, of their interest in the property without other cotenant's permission.
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

<u>Dispute #5:</u> Does F have a claim against M and D for the breach of the covenant of quiet enjoyment or the implied warranty of habitability?

	F WILL ARGUE	M WILL ARGUE
F	- F vacated the dwelling because of conditions.	- No evidence that M did not take reasonable steps to repair. - M's construction was up to code so ceilings could not be too low. - F did not provide reasonable notice – is one week reasonable? - Conditions existed "for months" before F complained.
L	- Inadequate heat and plumbing have been found to render dwellings inhabitable.	- M & D are equally liable to F even though D did not enter into lease. - F must show that he gave M notice of defect and opportunity to cure.
P	- Law favors tenants (especially residential ones).	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

Dispute #6: Do M and D have claim(s) against F for waste?

	M & D WILL ARGUE	F WILL ARGUE
F	- F's removal of fixtures = waste. - F's negligence caused the fire (waste).	- N/A
L	- Tenant has an obligation not to commit permissive waste.	- N/A
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

<u>Dispute #7:</u> Do M and D have claim(s) against F for vacating with time left on a term of years lease?

	M & D WILL ARGUE	F WILL ARGUE
F	- F vacated premises with two years remaining.	- F will argue that conditions in the apartment justified his leaving.
L	- Absent a justification (defense), a tenant who vacates before the expiration of the lease still has a duty to pay rent.	- Breach of implied warranty of habitability or quiet enjoyment justify a tenant to vacate early.
P	- N/A	- N/A
F	- N/A	- N/A
L	- N/A	- N/A
P	- N/A	- N/A

KEY: M = Marie
D = Donny
F = Fabio

<u>Dispute #1</u>: Has M acquired title to the whole of Blackacre to the exclusion of D through adverse possession?

Ordinarily, a person in possession of real property, whether a trespasser or a co-tenant, can acquire title to real property from the true owner if that person occupies and uses the land: (1) openly (conspicuous, real use of the property), (2) notoriously (acting in such a fashion so that all those with interests in the property would be on notice of the possessor's occupation), (3) adversely (possessing the property in a hostile manner, without the consent of the true owner), (4) actually (physical occupation of the land rather than merely constructive occupation), and (5) continuously (uninterrupted possession) for the entire statutory period.

From the fact pattern it appears that Marie <u>actually</u> occupied Blackacre in an <u>open</u> and <u>notorious</u> manner. Her occupation of Blackacre could hardly be described as hidden since she clearly made extensive interior and exterior improvements to the property, always holding herself out as the true owner, and even applying for, and receiving, the necessary municipal approvals for these improvements.

However, it is unclear whether she has satisfied all of the elements of adverse possession that would allow her possession to ripen into title. Additional facts would be needed to determine: (A) Whether M occupied Blackacre <u>adversely</u> and/or (B) Whether M satisfied the elements of adverse possession <u>continuously</u> for the 10-year statutory period.

A) Whether M occupied Blackacre adversely

There is a question whether M's occupation of Blackacre was in fact <u>hostile and adverse</u> to D's interest. Since M is lawfully entitled to occupy the whole of the property, her possession of Blackacre can only be adverse or hostile to D's interest if she performed an ouster (an affirmative act by one co-tenant that precipitates the removal of another co-tenant). An ouster by M would repudiate D's title and assert an independent possessory right by M to Blackacre. Absent an ouster, M's exclusive possession of Blackacre for the 10-year statutory period cannot ripen into sole title since each tenant has an equal right to possess the whole of the property.

Here, the facts are unclear what gave rise to D's absence from Blackacre. Depending on the circumstances, D could successfully argue that he voluntarily left the premises and, if that is the case, M cannot sustain a claim for adverse possession against him. D would have a very strong argument that an ouster did not occur since there are no facts which indicate M refused to permit D to enter Blackacre (in fact, it appears that D periodically returned to Blackacre – See 1(B) below), or that M ever informed D that she regarded herself as the sole owner.

If additional fact-finding reveals that M did indeed oust D, thereby precipitating his absence, she could acquire title to Blackacre upon satisfying all the elements of adverse possession continuously for the 10-year statutory period.

B) Whether M satisfied the elements of adverse possession for the 10-year statutory period

Even assuming M occupied Blackacre openly and notoriously in a manner hostile to D's interest in the property, it is unclear whether she satisfied these elements for the 10-year statutory period. The facts presented clearly state, "D was out of possession for <u>most</u> of the past 32 years." Additional fact-finding would be needed to determine whether D's intermittent return(s) to Blackacre were properly timed so as to destroy any of the elements necessary for adverse possession.

On these facts, I would advise M that additional fact-finding is necessary to determine whether she could successfully assert a claim against D for adverse possession of Blackacre. If additional fact-finding reveals that M successfully ousted D from Blackacre and satisfied all the elements of adverse possession continuously for the 10-year statute of limitations, then M's claim could be sustained; otherwise, M's claim for adverse possession must fail.

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<u>Dispute #2</u>: Has M committed waste by creating the gardens and remodeling the basement or, alternatively, by letting parts of Blackacre fall into disrepair?

The initial assumption of waste law is that a person with an nonpossessory interest in real property (*e.g.*, a holder of a future interest in real property, a landlord, a nonpossessing co-tenant), is entitled to receive the property from the a person presently occupying the property in the condition it was in when the occupation began. Thus, the law of waste prevents the holder of a present possessory estate (*e.g.,* possessing co-tenant) from acting with regard to the property so as to cause undue harm to the current or future estate holder (e.g., nonpossessing co-tenant).

Waste is defined as the commission of any act (or omission) which alters the value or appearance of the property and may even include "ameliorating" wastes such as when, without obtaining the permission and consent of the other co-tenant(s), one co-tenant makes changes that enhance the value of the premises. Moreover, the law of waste covers "passive wastes" when a co-tenant is obligated to pay for the cost of any repairs that result from the occupying co-tenant's permissive waste or neglect.

A co-tenant (here, D) is entitled to bring an action for waste during the lifetime of the co-tenancy seeking monetary damages equal to the reduction of the present market value of property, or an injunction from future acts or omissions constituting waste. If D were to bring an action against M for waste, D could assert two separate theories: (A) a claim for ameliorative waste because of the changes M made to Blackacre and/or (B) a claim for passive waste resulting from M's neglect by allowing portions of Blackacre to fall into disrepair.

A) Whether D could successfully assert a claim for "ameliorating" waste because of M's improvements to Blackacre

If M made changes to Blackacre without D's consent, she may be liable to him for ameliorative waste. D, the nonpossessing cotenant, is entitled to enjoy Blackacre in the condition it was in before M made the improvements. But since M (a co-tenant), is also entitled to occupy, possess, and use the whole of the property, D's claim will only be successful if he can show how M's improvements impinge upon the sentimental value he places upon the premises.

Because the law favors the productive use of real property, and M's status as a cotenant gives her the lawful right to use Blackacre, D may have a difficult time successfully prosecuting a claim for ameliorative waste. If D brings a claim for ameliorative waste, M should argue her efforts do not seem to impinge upon the premise's sentimental value and are consistent with the overall tenor of the residence. Moreover, M would be wise to point out that they both purchased the property and it does not appear from these facts that Blackacre was a piece of land that either party held great sentimental value for before the purchase (*e.g.*, no facts to indicate that Blackacre was a piece of land that was handed down from generation to generation in either D's or M's family). M should also point to D's absence from Blackacre as proof of his indifference for the property. Given that D and M purchased Blackacre in 1970 and D "remained out of possession for most of the past 32 years," D may have a difficult time establishing what sentimental value (if any) he placed on the <u>unimproved</u> Blackacre, making unlikely his chance for success under a theory for ameliorative waste.

If additional facts reveal that D purchased Blackacre because he always had a soft spot in his heart for the property and that he truly wanted it to remain unchanged, or that M's improvements are not in keeping with the character of the property when it was originally purchased, the outcome in an action for ameliorative waste by D may be different.

B) Whether D can successfully assert a claim for permissive waste against M

If F's allegations about the poor condition of the basement (*e.g.*, toilet and heat not working in the basement apartment) are true, D may be able to assert a claim for permissive waste. If D is able to prove that M failed to take timely and reasonable steps to maintain the condition of the premises, she may be liable for permissive waste and the cost of any repairs. However, to be successful, D would have to prove that M was on notice of the deteriorating conditions and failed to take reasonable steps to correct the defects.

Here, M would most likely argue that F was renting and occupying the portion of the premises that appears to have been neglected and she did not have notice of the alleged problems in the basement apartment until just one week before F vacated the premises. Thus, M may be able to successfully argue that she did not have any notice of the alleged defects.

C) Whether M could successfully seek contribution (or indemnification) from F if she is found liable for permissive waste

In any action for permissive waste commenced by D, M would be wise to implead F as a third-party defendant. Because of F's status as a tenant, he also has an affirmative obligation not to commit waste. Here, by F's own admissions, some of the complained of problems in the basement apartment existed "for months." If F neglected to take reasonable steps to cure these problems, or to put M on notice of the need for repairs, F could be liable for some (or all) of the problems in the basement apartment.

An action by D for ameliorative waste, while not particularly a wise course, does reside. Moreover, if it turns out that M neglected Blackacre and allowed parts of it to fall into disrepair, D might be able to successfully assert a claim for permissive waste if D can prove that M was on notice of the deteriorating condition and took no reasonable steps to cure them. If D commences an action for permissive waste, I would advise M to implead F in order to seek contribution or indemnification for any liability she may have for permissive waste that occurred in the apartment.

===

Dispute #3: Is M entitled to collect money from D for the improvements to, and general maintenance of, Blackacre?

The improving co-tenant does not enjoy an affirmative right to contribution for unapproved improvements during the life of the co-tenancy. At partition, the improving co-tenant will receive a credit equal to any increase in value brought about by her efforts. On the other hand, an improving co-tenant will suffer a debit for any decrease in value caused by her so-called "improvements."

Similarly, there is generally no right of contribution for repairs and maintenance made by a possessing cotenant since it is generally considered too difficult to distinguish these from improvements. As with improvements, adjustments may be made in a partition of the property to cover the maintenance costs.

If M commenced an action (or counterclaimed) against D for moneys she expended improving Blackacre, it looks like she would be out of luck for now. Under these facts it does not appear that M sought D's approval before she began her "improvements." If M failed to secure D's permission and approval prior to engaging in the remodeling and gardening, she must wait until dissolution of the cotenancy to reap the rewards for her labors (and expenditures). If, however, additional fact-finding reveals that M put D on notice of her intention to remodel Blackacre and D granted his approval, then the outcome of M's action might be different.

As M's attorney, I would advise her that she is not entitled to be paid back for the improvements she made to, or her general maintenance of, Blackacre unless she shows that D approved the improvements. M would reap the rewards of her labors and expenditures upon the dissolution of the cotenancy (*e.g.*, at sale, or in an action for partition).

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Dispute #4: Does D have a claim against M for rent?

The majority rule is that each cotenant is entitled to possess the whole of the property and, therefore, a cotenant in sole possession of jointly owned property is not liable to other non-possessing cotenant(s) for rent.

Moreover, a co-tenant is free to lease his or her possessory interest out to strangers, and a lease signed by one cotenant for the rental of all or part of the property is effective. However, a cotenant is obligated to share rents and profits collected from a third person with the other co-tenant(s).

In an action by D seeking rent from M, D might assert two different claims: (A) a claim against M for rent because of her occupation of Blackacre and (B) a claim for rent M collected from F but did not share with D.

A) Whether a claim for rent from M for her occupation of Blackacre will be successful

According to the facts, M has exercised her right to occupy and possess the whole of Blackacre. D cannot – by staying out of possession – compel M to pay rent for what she has a right to do. D's right as a cotenant is to share possession of Blackacre, not charge M for her possession.

However, if it is determined that M wrongfully ousted D (see, Dispute #1 above), and D commences an ejectment action against M, then she might be liable to D for one-half the rental value of Blackacre. To be successful, D's ejectment action would have to be timely brought (*i.e.*, within the State of Old York's statute of limitations for adverse possession); otherwise, M's ouster, combined with possession, would ripen into sole legal title of Blackacre.

B) Whether a claim by D for rent collected from F will be successful

Assuming that F is paying rent to M and, because of his absence and lack of knowledge of F's lease, D has not received his share of the rental payments, D can successfully assert a claim for half of the rents collected from F. If however, it is determined that M ousted D and acquired title to Blackacre by adverse possession (see Dispute #1 above), then M could successfully argue that D's claim for rent should be denied.

Whether the two claims D might assert against M are successful depends upon whether or not M ousted D from Blackacre and/or ultimately satisfied the elements of adverse possession. If it is found that M failed to acquire title to Blackacre because there was no "ouster," then D's claim for rent from M must fail. Alternatively, if D was in fact ousted by M, but failed to commence a timely ejectment action seeking rent from M, then his claim must also fail.

Likewise if it were found that M failed to acquire title to Blackacre by adverse possession and she collected rents from F, then D would be entitled to one-half of the rent collected.

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Dispute #5: Does F have a claim against M and D for the breach of the covenant of quiet enjoyment or the implied warranty of habitability?

A claim for breach of the implied covenant of quiet enjoyment exists when (1) a tenant places the landlord on notice of circumstances that interfere with his enjoyment, (2) the landlord fails to take reasonable steps to correct the identified problems, (3) such problems substantially interfere with the tenant's enjoyment of the premises, and (4) the tenant vacates the dwelling prior to the expiration of his lease.

To sustain a claim for breach of the implied warranty of habitability, the tenant must show that: (1) he/she provided reasonable notice to the landlord of the alleged deficiency with the dwelling, (2) the landlord failed to take any meaningful steps to redress the reported problem, and (3) the premises were rendered uninhabitable because of landlord's inaction.

First, both D and M are responsible on these facts, no matter that it was M alone who leased the basement to F unless, of course, M prevails on a claim for adverse possession (see, Dispute #1 (above)). If F commences an action against M and D, he would most likely assert a claim for (A) an alleged breach of the covenant of quiet enjoyment and (B) the breach of the implied warranty of habitability.

A) Whether F will prevail under a theory that M and D breached the covenant of quiet enjoyment

If F is correct that the ceiling is too low (which is unlikely since M's renovations conformed to the Bedrock Building Code), the heat was not functioning and that the plumbing is infirm, he could well have a claim first for the breach of the implied covenant of quiet enjoyment. This implicit promise, which pertains to all residential leases, obliges the landlord to provide peaceful use and enjoyment, without substantial interference. F may try to argue that he has been constructively evicted because of the substantial interference posed by these uncorrected problems.

To sustain this claim, F must demonstrate that he provided reasonable notice of the problems to the landlord, and that M failed to respond meaningfully. Further, he must vacate within a reasonable time after the landlord fails to respond. Here, M and D should argue that F did indeed vacate – but only one week after informing M of the deficiencies in the apartment, raising the question whether he provided the landlord with an adequate time to investigate/address the alleged deficiencies in the apartment.

B) Whether F will prevail under a theory that M and D breached the implied warranty of habitability

If the State of Old York is among the majority of states that requires a landlord of residential premises to keep the premises in a habitable condition throughout the lease term, a cause of action may exist for breach of this warranty by M and D. Notwithstanding M's strict adherence to Bedrock's Building Code, F may have a colorable claim that the implied warranty of habitability was breached since inadequate heat and plumbing have been found to render dwellings unfit for basic human habitation.

The issue of M's liability would hinge on the notice (if any) F gave to M about the deteriorating condition of the leased property. M would argue that as a landlord she has no reason to know whether the complained of conditions exist unless F informs her of those facts. Here the facts do not show that F gave M any notice about the leased apartment's condition and, in fact, the alleged problem with the heat existed "for months" before he complained. If additional fact finding shows that F put M on notice of the deteriorating condition of the apartment, but she refused to cure the defects, then a claim based upon the implied warranty of habitability might succeed.

F may have a claim against both M and D for breach of the implied covenant of quiet enjoyment or the implied warranty of habitability. If F is able to substantiate his allegations, he should be able to proceed against M and D under these two theories and seek an abatement for the months during which he occupied the premises and/or release of his obligations under the lease.

However, as M's attorney, I would advise her that these two legal theories are most often raised as counter claims in actions brought by landlords against tenants for the early termination of a lease or for the tenant's failure to pay rent. Therefore, it is unlikely that F would press a claim against M and subject her to liability under either cause of action unless she first commenced an action against him.

==

Dispute #6: Do M and D have claim(s) against F for waste?

A tenant must not commit waste by either damaging the demised premises or removing installed fixtures (personal property which is annexed to real property).

F's installation – and subsequent removal – of the high wattage lights seems akin to voluntary waste, or an affirmative act of destructiveness. Assuming that the lights are fixtures, they must remain on the premises after he leaves. Additionally, M and D could have a claim against F for voluntary or permissive waste because the lights he installed caused the fire.

F's installation and then removal of the lights may render him liable for waste if the lights were indeed fixtures in the apartment. Additionally, depending on the amount of damage, if any, from the electrical fire, M and D could have a claim for permissive waste if M and D can prove that F's neglect caused the fire.

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Dispute #7: Do M and D have claim(s) against F for vacating with time left on a term of years lease?

A tenant who vacates with time left on the lease is a wrongdoer, unless the abandonment is justified.

F left the apartment with two years remaining on a 3-year lease. F's vacating of the premises would be impermissible, unless he is able to sustain his claim for constructive eviction and/or the landlords' breach of the implied warranty of habitability (see Dispute #4 above). If M and D sued F for his early departure and breach of the lease, and F did not successfully assert a defense for constructive eviction and/or breach of the implied warranty of habitability, his early departure would be unjustified and, therefore, M and D could prevail.

Unless F can prove the allegations in Dispute #4 (above), providing him with possible defenses for his early departure from Blackacre, he was wrong to vacate with time still remaining on the lease and may remain liable to M and D for rent.

APPENDIX F

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APPENDIX F

SAMPLE MULTIPLE-CHOICE QUESTIONS

Multiple-Choice Example #1

James was enjoying the last night of his spring break trip to Cancun, Mexico where he met Paulo, a drug dealer. James purchased marijuana from Paulo and proceeded to smoke some of it with his girlfriend, Erica. The next morning, as they were packing to return home to the United States, James slipped the unused marijuana into Erica's duffle bag without her knowledge. Erica checked the duffle bag at the airport ticket counter and received a claim receipt that would allow her to retrieve it once she landed. Upon landing, a police dog, which was trained to identify the smell of marijuana, sniffed all the checked baggage for the flight from Mexico and gave the appropriate signal to its handler that Erica's bag contained marijuana. Erica was allowed to claim her duffle bag at the baggage carousel. As she was exiting the airport, the police stopped her and searched her bag. After finding the marijuana, the police arrested her for the possession of an illegal drug. Prior to her trial on the drug possession charge, Erica moved to suppress the government's use of the marijuana as evidence against her. As the judge in this case, do you grant Erica's motion?

(A) Yes, unless the arresting officer had a warrant for Erica's arrest.
(B) Yes, unless Erica knew her bag contained an illegal substance.
(C) No, if when the officer arrested Erica, he had probable cause to believe that Erica's bag contained marijuana.
(D) No, because of the increased possibility of an airline hijacking post 9/11 makes the routine searches of airline passenger bags necessary to protect the public.

Multiple-Choice Example #2

Sally visits Fred's Fine Furs to have Fred repair the lining of her rare $30,000 pink mink coat. Fred has fallen on hard times and knows he is going to close his store in the next week, but hands Sally a claim ticket and tells her she can pick up the coat in two weeks. Fred repairs the lining and hangs the repaired coat in his store window. Alice, a buyer of fine furs, sees the coat and inquires about the price. Fred explained that because he was closing his store and was in need of some "fast cash," he would sell the coat to her for $5,000. Recognizing that she is getting a real bargain, Alice buys the coat and leaves the store. When Sally returns to Fred's Fine Furs, the store is closed and Fred has skipped town. The following week Sallie sees Alice wearing the coat and demands that she return it. Alice refuses. If Sally sues Alice in a UCC jurisdiction, which of the following statements set forth her best argument against Alice on these facts?

(A) Sally wins because a purchaser from a thief takes no title in personal property.
(B) Sally wins because Fred's title to the coat was voidable.
(C) Sally wins because Alice was not a bona fide purchaser because she was on inquiry notice of Fred's wrongful title from the circumstances surrounding the sale.
(D) Sally wins because Alice was not a bona fide purchaser because she was on actual notice of Fred's wrongful title.

Multiple-Choice Example #3

Dan's driver's license was revoked after he was convicted on three separate occasions of driving while intoxicated. After attending a court-ordered alcohol rehabilitation program, Dan has been sober for three months. In the early morning hours on January 1, Dan was driving home from a New Year's Eve party and a deer jumped in front of his car. Dan swerved to avoid the deer, lost control of his car and hit Sara who was walking home from the same party. Dan was charged with driving without a license (a misdemeanor) and third degree manslaughter under the following statute:

> "If the commission or attempt to commit a nonviolent misdemeanor is the proximate cause of a person's death, then the person committing said nonviolent misdemeanor shall be guilty of third degree manslaughter."

Should Dan be found guilty of third degree manslaughter?

(A) No, because driving without a license is not malum in se.
(B) Yes, because driving while intoxicated is a dangerous act.
(C) No, unless the State can prove that Dan proximately caused Sara's death by driving without a license.
(D) Yes, if Dan knew or should have known that driving without a license could result in death.

Multiple-Choice Example #4

Alice faxed a purchase order to Bob that read: "Please ship 187 Pentium Model XYZ microchips at the price listed in your catalog; quantity 500." Bob shipped 187 Pentium Model XY microchips to Alice – a substantially comparable microchip but one that has little or no market demand since the release of the Model XYZ microchip. Upon delivery, Alice noticed the discrepancy and demanded that Bob deliver Model XYZ microchips. Bob refused. If Alice sues for breach of contract in a jurisdiction that has adopted the UCC, what is the most likely result?

(A) Bob wins because there was a mutual mistake.
(B) Bob wins because his shipment was a counteroffer that Alice rejected.
(C) Alice wins because the offeror is master of her offer.
(D) Alice wins because Bob's shipment of Model XY microchips constituted an acceptance of Alice's offer to buy.

Multiple Choice Example #5

1988, Sam, a permanent resident of Illinois, purchased Blackacre, a 10-acre parcel in Old York. The land was undeveloped and situated on a premier trout stream. Sam always dreamed of building a retirement home on Blackacre when he finally retired from the practice of law. He spent the one-week vacation he was able to take each year on Blackacre fishing and clearing the land in the middle of the parcel where he planned to put his retirement home. The clearing could not be seen from the road. In 1993, Sam became a partner at his firm and the workload became even greater, preventing him from visiting Blackacre for most of the next 14 years. In 1994, Jim happened upon Blackacre and noticed the clearing where he began camping almost all year. In the summer months, Jim even grazed cattle on the land. In 1998, Jim erected a crude shack and a fence on Blackacre. In 2007, when Sam finally retired, he returned to Blackacre to begin building his dream home. Jim refused to let Sam on the property and sued to quiet title. If Old York is a common law jurisdiction with a 10-year statutory period for adverse possession, what is the result of Jim's lawsuit?

(A) Judgment for Jim because his occupation of the land was open, notorious, exclusive, and adverse for the entire statutory period.
(B) Judgment for Jim if he can show his occupation of the land was open and notorious.
(C) Judgment for Sam unless Jim proves his occupation of the land was exclusive.
(D) Judgment for Sam because Jim's occupation of the land was not continuous and exclusive.
(E) Judgment for Sam unless Jim proves he occupied Blackacre exclusively and continuously.

Multiple-Choice Example #6

Samantha attends Ladies' Night at the Old Watering Hole, a local bar owned by Jim. She sits down at a table next to the front window and places her purse beneath her chair. After watching Samantha drink pitchers of half-price margaritas for about four hours, Joe approached her and asked her to dance. When he was pulling her chair out to help Samantha get up and dance, she stumbled and Joe accidentally kicked the purse further under the table. After one dance, Samantha told Joe she wanted him to take her home and the two immediately left the bar. Later that evening Alex, another patron of the bar, spotted the purse on the floor and picked it up. After asking around trying to failing to find the true owner, Alex decided to keep it. Before leaving, Jim approached Alex and told him the purse belonged to him. What result?

(A) Judgment for Alex because he found the purse.
(B) Judgment for Jim because he owns the premises.
(C) Judgment for Alex because the purse was lost.
(D) Judgment for Alex unless Jim can prove the purse was mislaid.

Multiple-Choice Example #7

Vincent, Eric, Johnny Dramatic, and Turtle are all friends who live together in Los Angles while Vincent pursues an acting career. For protection, Turtle gets Arnold, an attack-trained Rottweiler, to guard the house. During one of their many parties, Turtle starts yelling at Marky Mark, an uninvited guest at the party. Marky Mark shoves Turtle and then starts walking away to leave the party. Turtle mumbles something that sounds like German and Arnold runs across the room and attacks Marky Mark. Marky Mark sues Turtle for battery, what result?

(A) Judgment for Turtle because there was no bodily contact.
(B) Judgment for Marky Mark because Turtle intended the battery.
(C) Judgment for Turtle because he was acting in self-defense.
(D) Judgment for Turtle unless Marky Mark can show that Turtle ordered the attack.
(E) Judgment for Marky Mark because an owner is strictly liable for injuries inflicted by a dangerous animal.

Multiple-Choice Example #8

Upon returning home from an afternoon softball game, Jeff opens his apartment door to find Brian, a drug addict who was burglarizing Jeff's apartment in order to help pay for his drug habit. Brian ties Jeff up and tells Jeff, "I'm not going to hurt you. I just need some things I can sell and then I'll be gone." He then continues ransacking the apartment looking for things to sell. Jeff is able to free himself and hides in a closet clutching his aluminum softball bat. As Brian walks by the closet door carrying Jeff's new 50" plasma television, Jeff yells, "OH NO YOU DON'T!" and hits Brian in the back of the knee, causing him to fall and drop the television. The television's glass screen shatters and a shard of glass pierces Brian's heart, killing him instantly. Brian's estate brings a wrongful death suit in tort against Jeff. What result?

(A) Judgment for Brian's estate if they can prove that Jeff's use of force exceeded what was necessary to protect his property.
(B) Judgment for Brian's estate, unless Jeff can prove that deadly force was necessary to protect his property.
(C) Judgment for Jeff because he issued a verbal warning before he attacked Brian with the softball bat.
(D) Judgment for Jeff because Brian represented a threat of serious bodily harm to Jeff.

Multiple-Choice Example #9

Charles, Ben, and Sarah – all seniors in high school – were enjoying a snow day outside on a hill behind the school where students regularly go sledding. Steven, using a cafeteria tray as a sled, went sliding down the hill, and it became clear that he was going to hit a small stone wall built on the hill specifically to deter sledding. Hoping to protect himself from severe bodily injury, Steven swerved to the side and rolled off the tray, which continued moving forward and hit Sarah in the head. Sarah was approximately 20 feet away walking up the hill after completing her own sled ride down the hill. Sarah suffered a concussion and later sued Steven alleging the tort of battery. What is Steven's best defense against liability?

(A) Steven did not intend to hit Sarah.
(B) Steven acted out of self-defense and was thereby justified in making the otherwise unlawful contact.
(C) Steven did not make bodily contact with Sarah.
(D) Sarah was a willing participant in the activity and thereby consented to the contact.
(E) Steven exercised his privilege of necessity and was thereby justified in making the otherwise unlawful contact.

Multiple-Choice Example #10

Allen owns Baseball Collectables, a store that buys and sells baseball memorabilia. Steven, age seventeen, walked into Allen's store and showed him a signed baseball Steven found in his grandfather's attic. The signature was smudged, and although Allen could not be 100% sure, he believed it was an authentic baseball signed by Babe Ruth, ordinarily worth tens of thousands of dollars. Allen explained to Steven that, because he was not certain of the signature's authenticity, he could offer Steven only $2,000 for the ball. Steven accepted. Immediately afterwards, before each party had tendered performance, Allen's business partner Jorge examined the ball and correctly determined that the signature was authentic. Allen then opened the cash register, took $2,000 out of the drawer, and handed it to Steven. Steven refused the money and walked out of the store with the baseball. If Baseball Collectables sues Steven in a jurisdiction that follows the Restatement (Second) of Contracts, what will the result be?

(A) Judgment for Baseball Collectables because to prove a valid contract there must be adequate consideration.
(B) Judgment for Steven because of his age.
(C) Judgment for Steven because there was a mutual mistake concerning the authenticity of the ball.
(D) Judgment for Steven because he could lawfully disaffirm the contract.
(E) Judgment for Steven because the contract was void because of Steven's incapacity to contract.