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& Strategies Tactics for the MBE

This new edition of **Strategies & Tactics for the MBE**, Seventh Edition, has been carefully revised by Steve Emanuel and is full of up-to-date advice on how to answer Multistate Bar Exam (MBE) questions. It includes details on how to handle each MBE subject; specific, step-by-step strategies for analyzing different question types; tips about how subtle differences in wording can completely change the meaning of an answer choice; and strategies for "rewording" questions in your mind to make them easier to analyze.

Strategies & Tactics for the MBE contains a full-length, 200-question practice MBE plus more than 470 additional questions arranged by subject. That's a total of over ***640 actual past MBE questions***, of which 30 are on Civil Procedure (plus 35 additional author-written Civil Procedure questions). All questions and answers have been carefully vetted by Steve Emanuel personally. Every subject begins with detailed advice on how to handle MBE questions on that subject and how to focus your studies on the most common and trickiest MBE topics. Every question has a fully explained answer that analyzes, in detail, every answer choice—after all, it's just as important to know why any given wrong choice is wrong as it is to know why the correct choice is right. **Strategies & Tactics for the MBE** will give you the skills to succeed . . . and the confidence to excel.

Why use **Strategies and Tactics for the MBE?**

- It contains ***more than 640 questions***, each of which represents an ***actual question asked on a past MBE***
- It contains ***65 Civil Procedure questions. 30*** of these are ***actual questions from past MBEs***, with answer explanations personally drafted by Steve Emanuel. Plus, there are another ***35*** MBE-format Civil Procedure questions, with detailed answer explanations, that were ***written by Steve Emanuel*** based on sub-topics actually tested on past MBEs since Civil Procedure entered the MBE in 2015.
- This book assumes you ***haven't studied*** the substantive law in question since your ***first year*** in law school. So if an answer choice addresses, say, *Erie* doctrine or the M'Naghten Rule or *quantum meruit*, the explanation will restate the doctrine in detail, before analyzing how it applies to the question.
- This book gives you unparalleled step-by-step analysis of ***each choice***, and is particularly noteworthy for its detailed analysis of ***why each wrong choice is wrong***.
- All detailed answers have been written by Steve Emanuel, who is a member of the New York, Connecticut, Maryland, and Virginia bars and has passed the California bar exam.

★ **Bonus!!** In addition to the 640+ practice questions mentioned above, this edition contains a ***100-question practice exam*** released by the NCBE, together with the NCBE's brief answer explanations ("MBE OPE-4"). This gives you additional practice in all MBE subjects except Civil Procedure.

Open this book to an answer section, and compare it to any other MBE preparation book . . . you'll see that **Strategies & Tactics for the MBE** is the only book that gives you the detailed insights you need.

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Strategies & Tactics for the MBE *Seventh Edition*

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& Strategies Tactics for the MBE

(Multistate Bar Exam)

Seventh Edition

Steven L. Emanuel

■ Civil Procedure ■ Constitutional Law ■ Contracts ■ Criminal Law and Procedure ■ Evidence ■ Real Property and Future Interests ■ Torts

ASPEN PUBLISHING

Strategies & Tactics® for the MBE

Multistate Bar Exam

Seventh Edition

The late

Kimm Walton, J.D.

and

Steve Emanuel, J.D.

This revision prepared by

Steve Emanuel

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PREFACE

Thanks for buying this book. I hope and believe that if you use it conscientiously, it will help you a lot on the MBE portion of your state's bar exam. In fact, there is some evidence that it helps students meaningfully improve their performance on bar-exam *essay questions* in the seven MBE subjects as well.

Of special note, this new edition contains 30 more questions on Civil Procedure than the prior edition did. Civil Procedure did not become part of the MBE until February 2015. Therefore, unlike all the other questions in this book, many of the Civil Procedure questions here (both in the Civil Procedure section and in the Practice Exam) are not actual past MBE questions released by the examiners, but rather, questions drafted by my editorial team and me that we hope will prove comparable to the ones you will encounter on the exam. However, Questions 1-30 in the Civil Procedure section are actual past MBE questions released by the examiners, and are new in this edition.

The first few editions of this book, dating to the 1990s, were written solely by the late Kimm Walton, J.D. Kimm and I then collaborated on several later editions in the early 2000s. Kimm was also the sole original author of the *Law in a Flash* series of legal flashcards published by Aspen Publishing. Kimm, who died tragically in 2013 at age 53, was a wonderful (and funny) legal writer whom my colleagues and I greatly miss.

For this 2020 edition, I did the substantial majority of the editorial revision work myself and take full responsibility for all errors. I would, however, like to express my thanks to several people who worked with me on this and/or previous editions:

On this edition: Barbara Lasoff, my publishing colleague.

On the prior (6th) edition: Helen Hershkoff, Herbert M. and Svetlana Wachtell Professor of Law, New York University Law School. Don Bushell, J.D., member of the California bar. Dana Wilson, J.D., editor.

Good luck on the MBE and on the rest of the bar exam. If you'd like any other publication from Aspen Publishing, you can find it at your bookstore or at www.AspenPublishing.com. If you'd like to contact me, you can email me at semanuel@westnet.com.

Steve Emanuel

Larchmont, NY

July 2019

ABOUT THE MBE

If you're like most students, there's quite a bit about the Multistate Bar Exam (MBE) that you don't know. Here are the answers to some of the questions we hear most frequently.

Is the MBE required in every state?

Almost. As of July 2019, only one state—Louisiana—***doesn't*** administer the MBE. The District of Columbia, the Virgin Islands, Guam, the Northern Mariana Islands, and Palau also require the MBE.

When is the MBE given?

In most states, the MBE is given twice each year—on the last Wednesday in February and on the last Wednesday in July—but a few states offer the MBE only once a year. Most states (33 as of July, 2019) administer the MBE as part of the Uniform Bar Exam (UBE), with the number scheduled to grow to 36 by the February 2021 exam. The UBE is a two-day exam; the Multistate Performance Test and the Multistate Essay Exam are given on Tuesday and the MBE on Wednesday.

What's the format of the MBE?

The Multistate Bar Examination is a six-hour examination consisting of 200 questions. The exam is divided into two parts: Part I is administered in the morning and Part II is administered in the afternoon. Each part takes three hours and contains 100 questions. ***Of the 200 questions, only 175 are scored, with the other 25 being evaluated for future use. You can't tell which 25 won't be scored, so you have to try hard on all 200.***

What subjects are covered on the Multistate Bar Exam?

Currently, there are seven subjects on the MBE: Civil Procedure, Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts.

How many questions are there on each subject?

As of July 2019, the 175 questions that are scored are distributed exactly evenly, 25 in each of the seven subjects. Taking all 200 questions (scored and unscored) into account, you will see four subjects with 29 questions and three subjects with 28 questions.

What's the format of MBE questions?

The MBE is an "objective" exam; that is, it's ***multiple-choice from a given set of facts.*** Each question has four possible answer options, with one correct answer and three incorrect choices.

What order are the questions in?

Questions on the MBE are presented in a completely ***random*** manner. Both the level of difficulty and the subject matter may vary from one question to the next. This means that your first MBE question may be very difficult, but the following question may be relatively easy. Since MBE test questions are set up in a random order of difficulty, the MBE is different from many other standardized tests you've taken (such as the SAT), where the questions become progressively more difficult within each section of the test.

MBE questions are also random in subject matter, so a Property question may be followed by a Torts question, which may be followed by a Contracts question. Note also that you won't be told the subject matter of any question; you have to figure out what area is being tested by carefully reading the question itself.

Are all the questions on the MBE given the same weight?

Yes; difficult questions are worth no more than easy ones.

How is the MBE graded?

Each "scored" question is worth one point, making a total possible "raw" score of 175. Because the difficulty of the MBE may vary from one exam to another (for example, the July 2019 MBE may be somewhat more difficult than the February 2018 MBE), "raw" scores are not comparable from year to year. To handle this problem, the Bar Examiners use a statistical procedure, called "equating," to produce what are called "scaled" scores — raw scores that have been adjusted so that the performance of Bar Examinees can be compared from exam to exam (within the limitations of measurement and equating error). This scaling procedure helps to ensure that no applicant is unfairly penalized or rewarded for taking a particular version of the exam. I say more about the scaling process beginning on p. xi.

Keep in mind that no credit is given for any answer except the best one. Also, if you fill in more than one answer to a question, you'll get no credit for the question (even if one of your answers is the correct one).

Will I lose points for wrong answers?

No. The MBE isn't like the SAT or "Jeopardy" — you aren't penalized for wrong answers. (And you don't have to state your answer in the form of a question.) In other words, even if you don't have any idea what the right answer is to a particular question, it's best to guess! You've got nothing to lose, and, if you follow the advice in this book, you've got everything to gain.

Are the official answers to the MBE ever wrong?

Yes, but only very occasionally. Notice that we said that you are asked 200 questions, but only 175 are scored, with the rest being evaluated for future use. This "evaluation" process, coupled with the stringent pre- and post-exam review process used by the examiners, means that it's quite rare that the examiners conclude that a question has multiple correct answers or is otherwise flawed. In those rare cases, usually two rejected choices are clearly wrong, and the problem is that even high-scoring candidates have had trouble selecting accurately between the two remaining answer choices. In such cases, credit is given only to applicants who marked either of the two remaining answers.

What score do I need to pass?

Each state sets its own passing score for the entire bar exam. The best source of information about what MBE score you need to be at a "passing level" for any given state is a publication issued by the NCBE, called "Comprehensive Guide to Bar Admission Requirements." The 2019 version of this Guide was, at the time we went to press, available by going to www.ncbex.org and selecting "NCBE Publications," then "Bar Admission Guide" and then "View Complete Guide." The information about what MBE score will put you on a passing track for your state is given in Chart 10 of the Guide, "Grading and Scoring."[1]

1. Much of the "score that's needed to be on track to pass" information from Chart 9 is reproduced in Table 1 beginning on p. xii below.

The score needed to pass the MBE varies according to ***where you're taking the exam,*** because the Bar Examiners of each jurisdiction use the MBE in different ways. In the many states that use the UBE, all weight the MBE as 50% of the total score (with 30% for the MEE and 20% for the MPT).

The vast majority of states establish a specific score needed to pass their individual bar exams by combining MBE and essay scores. Even though the MBE isn't in any state the sole determining factor in your passing the bar exam, it contributes significantly to the result—in all but about four states, the MBE accounts for between 40% and 50% of your total score.

So, what percentage of the questions do you have to answer correctly to be on track to pass your state's bar exam? That's a surprisingly difficult question to answer, for two main reasons:

1. As noted, each state gets to set its own passing score; and
2. The MBE varies in difficulty from one administration to another. Therefore, getting, say, 65% of the questions right on one test might put you on track to just barely pass in your state, while the same 65% might fall short of the on-track-to-pass threshold in that same state on a different administration of the test.

But we can make some *estimates* of the percentage-of-correct-answers you'll need to pass. First, we need to define two terms: "raw" score and "scaled" score.

Your raw score: Your ***"raw"*** score is ***the number of questions you answer correctly on the test.*** On your official score report, your "raw score" will be shown as the number you got correct out of the ***175 questions that counted (not*** the ones correct out of the 200 total that you saw and tried to answer, which includes the 25 non-counting questions). But for purposes of using this book (including the Practice Exam), I'll talk about your ***"S&T Raw Score,"*** which will be the number correct you get out of ***all 200 questions*** that appear (e.g., the full 200 on the Practice Exam at the back of this book)—that will help you then derive a computation of ***what percentage*** of questions you have to get right.

Your scaled score: Your ***"scaled"*** score is a number (between 1 and 200) that the NCBE computes separately for each administration of the exam, based on your raw score. The purpose of this scaling process is to ensure that differences in difficulty between one particular MBE and another don't affect your chances of passing. Here's how the MBE describes the scaling process (which they call the "equating" process in the explanation below):

> The statistical process of equating adjusts for variations in the difficulty of the questions, producing scaled scores that represent the same level of performance across all MBE administrations. For instance, if the questions appearing on the July MBE were more difficult than those appearing on the February MBE, then the scaled scores for the July MBE would be adjusted upward to account for this difference. These adjustments ensure that no examinee is unfairly penalized or rewarded for taking a more or less difficult exam.

Now that we've gotten our nomenclature defined—raw vs. scaled scores—let's look at what it typically takes to be "on track to pass." Notice that I don't refer to a "passing score," but instead talk about being "on track to pass." That's because, if you'll recall, each state gets to combine your scores on the MBE and non-MBE portions in whatever weights it wishes, and also gets to set its overall passing threshold however it wishes—so the concept of a single "passing score" on the MBE is meaningless. But, what I *can* talk meaningfully about is the minimum score needed to be "on track to pass"—that's the MBE score that, if you demonstrated the same proficiency (i.e., the same "percentile rank" relative to all fellow test-takers in your state on that administration) on the MBE as on the non-MBE part, would be just enough to let you pass the exam.

Scaled MBE Score Needed to Be On Track to Pass

So, then, let's first talk about what ***scaled*** MBE score you would typically need to be on track to pass (after which we'll talk about what raw score would typically correspond to that scaled score). The following table shows you, in the right-hand column, the lowest MBE Scaled Score that would put you on track to just barely pass, assuming your scores put you in the same "percentile rank" in your state's test-takers on the non-MBE parts as on the MBE itself.

Table 1

Lowest Scaled MBE Score Needed to Be on Track to Pass, By State, as of the July 2019 Exam

State	% Weight Given to MBE	Minimum Scaled MBE Score to Be on Track to Pass
Alabama	50	130
Alaska	50	140
Arizona	50	136.5
Arkansas	50	135
California	50	144
Colorado	50	138
Connecticut	50	133
Delaware	40	145
District of Columbia	50	133
Florida	50	136
Georgia	50	135
Hawaii	50	134
Idaho	50	136
Illinois	50	133
Indiana	50	132
Iowa	50	133
Kansas	50	133
Kentucky	—*	132*
Louisiana	—	—
Maine	50	138
Maryland	50	133
Massachusetts	50	135
Michigan	50	135
Minnesota	50	130
Mississippi	40	132
Missouri	50	130
Montana	50	133
Nebraska	50	135
Nevada	33	138
New Hampshire	50	135
New Jersey	50	133
New Mexico	30	130
New York	50	133
North Carolina	50	135
North Dakota	50	130
Ohio	33	135
Oklahoma	50	135
Oregon	50	137

State	% Weight Given to MBE	Minimum Scaled MBE Score to Be on Track to Pass
Pennsylvania	45	136
Rhode Island	50	138
South Carolina	50	133
South Dakota	—**	133
Tennessee	50	135
Texas	40	135
Utah	50	135
Vermont	50	135
Virginia	40	140
Washington	50	135
West Virginia	50	135
Wisconsin	50	129
Wyoming	50	135

Source: Comprehensive Guide to Bar Admission Requirements 2019, Chart 10, by the National Conference of Bar Examiners, downloaded from www.ncbex.org on 7/25/19.

Notes:
* Kentucky: MBE and non-MBE are separate components, each with a minimum passing score; must have at least 132 on the MBE. Effective January 2020, must have at least 135 on the MBE.
** South Dakota: MBE and non-MBE are separate components, each with a minimum passing score; you must have at least 133 on the MBE.

As you can see from Table 1, the scaled MBE score to be barely on track to pass varies considerably across states. Putting aside the two states with separate per-component minimums (Kentucky and South Dakota), the minimum on-track scaled score ranges from a low of 129 in Wisconsin (with the next lowest, 130, in effect in Alabama, Minnesota, Missouri, New Mexico, and North Dakota) to a high of 145 in Delaware (with the next highest, 144, in California).

For the five states with the largest number of bar-takers (accounting for about 51% of bar-takers nationally), here are the minimum on-track-to-pass MBE scores:

California: 144
Florida: 136
New Jersey: 133
New York: 133
Texas: 135

So if you've heard that "the California bar is the toughest," that's an almost-true statement; only Delaware, with a one-point higher threshold, is tougher. On the other hand, New York's reputation for being "almost as tough as California" is clearly NOT justified.

Well, then, what does it *mean*, in intuitive terms, to obtain a scaled MBE score of, say, 135 (which seems to be about the median minimum score on track to pass across all states)? One way to answer that question is to ask, *where would that score put you in a "national" competition against all recent law school graduates?*

Table 2 below shows, for all applicants nationally (both foreign- and US-trained, and both from ABA and non-ABA schools) who took the July 2018 bar, the distribution of scaled scores:

Table 2

July 2018 National Score Distribution, All Examinees

MBE Scaled Score	Percentage of Examinees in this 5-pt range	% of Examinees at this score or lower
85	0.1	0.1
90	0.1	0.2
95	0.3	0.5
100	0.5	1.0
105	1.3	2.3
110	1.8	4.1
115	3.6	7.7
120	5.6	13.3
125	7.3	20.6
130	9.5	30.1
135	9.2	39.3
140	11.4	50.7
145	12.0	62.7
150	9.7	72.4
155	9.0	81.4
160	7.6	89.0
165	5.6	94.6
170	3.1	97.7
175	1.7	99.4
180	0.4	99.8
185	0.1	99.9
190	0.0	99.9
Summary Statistics for July 2018:		
Median Scaled Score	139.5	
Standard Deviation	16.6	
These data represent scaled scores in increments of 5. For example, the percentage reported in the "% of examinees in this 5-pt range" column for 135 includes examinees whose MBE scaled scores were between 130.5 and 135.4, and says that this group represented 9.2 % of all July 2018 examinees nationwide. The right-hand column for that same scaled score of 135 says that examinees at the highest score in that group (135.4) had a score higher than or equal to 39.3 % of all July 2018 examinees.		
Source: https://thebarexaminer.org/statistics/2018-statistics/mbe2018		

So if you had taken the California bar in July 2018 and you wanted to know what a 144 scaled MBE score (the minimum score to be on track to pass in California) would represent in terms of the distribution of all bar applicants nationally who took that same exam, Table 2 would let you get a close, though not exact, answer. There's no entry for "144," but there is one for "145." If you read the footnote to Table 2, you'll see that the highest score reported in the "145" entry was actually a score of 145.4. And the right-hand column for the 145 entry shows you that at that highest-in-the-category score of 145.4, you would have been ahead of or even with 62.7% of all takers nationally. If you "interpolate" to estimate the value for a score of 144, you'd need to have been at about the *61st percentile* nationally (since each full MBE scaled point seems to represent about 2% of the national test-taking population, according to Table 2).

But now, suppose you had taken the *New York* bar, on that same July 2018 session. Here, Table 1 tells you you'd need to get a scaled MBE of *just 133* to be on track to pass in New York. Again, you'd have to interpolate the values in Table 2 to see where this score would put you in the national population on that session: 133 would be about halfway between 130 (30.1% of national takers at or below this score) and 135 (39.3% takers at or below). Halfway between 30.1% and 39.3% is 34.7%. So you would have been on track (just barely) to pass New York in July 2018 by getting a score that would have put you above or even with just *34.7%* of all takers nationally on that session.

Notice what a very large portion of the national bar-taker population would have passed New York, but failed California, in July 2018: Rounding to the nearest percentile point, *everyone between the 35th percentile and the 61st percentile—more than one-quarter of the whole population—would have simultaneously passed New York and failed California!* So where you want to practice makes a large practical difference in how high you have to place in this hypothetical national competition.

By the way, law students seem to know—whether consciously or not—how much the minimum-score-to-pass varies from state to state. For instance, students in California seem to know that they have to score much higher than students in states of more average difficulty level, and they come into the exam hall better-prepared, on average, to meet this higher standard. You can see this by comparing the bar-passage statistics released by California to the nationwide set released by the NCBE. (I don't reproduce these statistics here, but I've obtained them and have reviewed them carefully.)

Raw MBE Score Needed to Pass

Now, then, you're probably wondering what kind of **raw** score you need in order to achieve the scaled score(s) we talked about previously for various jurisdictions. In other words, *what is the arithmetic transformation by which the examiners convert a raw score to a scaled score?*

If you've been following our technical discussion of how scaled scores "equate" exam administrations of differing difficulty (see p. xi), you'll know that there is no single answer—any given raw score will convert to a higher scaled score on an unusually difficult administration than on an unusually easy one.

Also, remember (see p. ix) that what the NCBE and state-bar officials report as your raw score is out of 175 questions, not 200. But to make this book easier to use, and to give you an idea of what sort of "batting average" you need on the MBE questions, we're going to use what I'll call an "S&T Raw Score"—this is the number of questions you get right ***out of 200,*** not 175. (So when you take the Practice Exam at the back of this book, your S&T Raw Score will be the number you get correct out of the full 200 questions in the Practice Exam.)

Unfortunately, neither the NCBE nor the individual state boards of bar examiners supply very much information to give us even an approximate sense of how many extra points would typically be added to one's raw score to produce the scaled score. But we do have one significant piece of historical information on this front: The California examiners released a chart for the February 2011 exam, showing the raw-to-scaled conversion for that particular administration.[2] The number of points that the examiners added varied that year (as it apparently always does) depending where on the "curve" of raw scores a score was. Far more points get added to a raw score of, say, 100 (which converted in Feb. 2011 to a scaled score of 121, an addition of 21 points) than get added to a raw score of, say, 160 (which converted for that same session to a scaled score of 171, an addition of just 11 points).

Therefore, rather than reproduce the whole conversion chart for California in February 2011, I'll just give you the conversions for scaled scores in the "meaty" part of the curve, the part running from about the 40th

2. This is the most recent raw-to-scaled chart I have been able to find for any state, let alone for the entire country, for any administration of the MBE. Note that the conversion from raw to scaled is done at a national level, by the NCBE, so on any given administration, a given raw score will be converted to the same scaled score no matter where you take the bar exam.

percentile in the national pool to the 60th percentile; that's the part of the curve that will cover the minimum on-track-to-pass scaled score for all but the easiest states. Here is that part of the conversion chart (rounded to the nearest point):

Table 3
Raw-to-Scaled Conversion, February 2011

Raw Score (out of 190 scorable Qs)	Scaled Score
117	135
120	137
122	139
125	141
127	143
129	145
132	147
134	149
136	151

Source: California Bar Examiners

Table 3, which contains actual 2011 historical data, converts the raw score out of 190, not 200. (In 2011, 190 of the 200 questions on the MBE counted, versus 175 today) What we want is to know how to convert a raw score on a *200-question* exam (with no non-counting questions), like the Practice Exam at the back of this book, to a scaled score. And that means we'll have to take the above 190-question-based raw scores and multiply them by 200/190, or 1.053 times, to determine how many points to add to a 200-question-based raw score to get a scaled score. And, remember, even that computation will be accurate only if we assume that the 200-question practice exam is of the same level of difficulty as the February 2011 exam—that may or may not be a good assumption, but since February 2011 is the only reasonably-recent session for which we have any raw-to-scaled conversion data, it's the best we can do.

So here, then, is how you should convert your practice scores on a 200-question exam (in which all questions count) like the Practice Exam at the back of this book into a projected scaled score, assuming that the exam you're scoring is the same difficulty as the Feb. 2011 MBE:

Table 4
200-Question Practice Exam,
Estimated Raw-to-Scaled Conversion

(1) Raw Score out of 200 Questions	(2) Scaled Score	(3) # of Points to Add to Raw to Get Scaled (Col 2 minus Col 1)	(4) % of Raw Answers Correct to Achieve This Scaled Score
123	135	12	62%
126	137	11	63%
128	139	11	64%
132	141	9	66%
134	143	9	67%
136	145	9	68%
139	147	8	69%
141	149	8	71%
143	151	8	72%

So in a state of average difficulty (one with a minimum on-track-to-pass scaled MBE score of 135), you'd need to get a raw score of 123 out of 200 questions, or a "batting average" of about *62% correct*. And for the two most difficult states (Delaware @ 145 scaled and California @ 144 scaled), you'd need raw scores of 136 (68% correct) for Delaware and 135 (67.5%) for California.

In sum, even in the second-most difficult state in the U.S., California, if you can get a hair more than ***two-thirds of the MBE questions correct, you will be on track to pass.*** Not a trivial task, to be sure, but eminently achievable if you prepare conscientiously. So as you practice, keep in mind that you'll pass nearly everywhere if you can get about two-thirds of the MBE questions correct, assuming you perform at the same relative level of competence (compared to others in your state) as between the MBE and non-MBE portions of your exam.

Who writes MBE questions?

As you may imagine, drafting MBE questions is an involved process that includes many people. Here's how the NCBE described the process in their most recent discussion of the topic, in 2019:

> MBE questions are developed by drafting committees composed of recognized experts in the various subject areas. Before a test question is selected for inclusion in the MBE, it undergoes a multistage review process over the course of several years. Besides intensive review by the drafting committee members and testing specialists, each test question is reviewed by other national and state experts. All test questions must successfully pass all reviews before they are included in the MBE. After an MBE is administered, the performance of each test question is reviewed and evaluated by content and testing experts. This final review is conducted to ensure that the exam is graded fairly, particularly with regard to any questions affected by recent changes in the law.

Source: help.ncbex.org/mbe#general-2668, retrieved 7/28/19.

HOW TO USE THIS BOOK

If you use this book correctly, it can have a dramatic impact on your MBE performance. In this introductory section, we'll discuss how you can get the most out of this book.

First, it's important to know what this book can do for you, and what it can't. Correctly preparing for the MBE involves developing two skills: a ***complete grasp of the substantive law***, and the ***ability to analyze MBE questions***. This book deals with the second skill: analysis. Substantive review, on the other hand, is the task of learning all the law you need to know in order to pass the MBE. You may think, "But I'm going to do every single question in this book! Shouldn't I know the law by then?"

Unfortunately, the answer is no. Many students every year try to learn the law simply by doing thousands of simulated MBE questions. This is not good enough. Studying by answering MBE questions, even actual ones from past exams, such as the ones in this book, can't substitute for a good review of substantive law; it can only ***supplement*** it. While answering MBE questions will help reinforce many of the principles you need to know, it will provide only a random review and the **techniques** for exam-taking; it's not guaranteed to teach you all the law you need to know. Studying just by answering questions would be like attempting to write a short story by writing random sentences that sound good, all the while hoping that, when you're done, you'll have put together enough sentences to make a whole story. This is a less-than-effective way to review ***every*** aspect of the law.

The most effective way to review all the substantive law you need for the MBE is to review substantive material, to the level of detail you need, in an organized fashion. We have two suggestions. First, the *Law in a Flash Multistate Bar Review Set* is an easy and effective way to review all the substantive detail you need to know for the MBE. Second, we've found that the Capsule Summary portions of the *Emanuel Law Outlines* or *CrunchTime* series of outlines in the eight MBE subjects (counting Criminal Procedure as a separate subject rather than as part of Criminal Law), even though these summaries don't explicitly focus on the MBE syllabus, can be quite useful in reviewing the substantive rules tested on the MBE. All of the study aids mentioned in this paragraph are likely to be available at your local law school bookstore or can be ordered from us directly at www.AspenPublishing.com.

HOW THIS BOOK IS ORGANIZED

Here are the major features in this book:

- First, we give you ***details about the MBE*** and advice on ***how you should attack it***.
- Next, we give you "***Strategies and Tactics***" for each of the seven subjects on the MBE.
- These are followed immediately by **questions** on that particular MBE subject, so that you can practice the strategies. Except for some of the Civil Procedure questions,[3] these are ***actual past MBE questions***, which we are reprinting under special license from the MBE examiners. (Many are from exams given as recently as 2017.)

3. Questions 1-30 of the Civil Procedure questions are actual past MBE questions we've licensed from the NCBE. Questions 31-65 of the Civil Procedure questions are ones drafted by my team and me, based on the NCBE's syllabus and on the limited anecdotal reports of topic coverage we received from students who took the MBE beginning in February 2015, when Civil Procedure first appeared on the exam.

- We then give you an ***Answer Key*** (at the beginning of the answers for that subject) so you can quickly score yourself.
- Then, perhaps most important, we give you full ***explanatory answers*** for each question in that subject, with detailed explanations both of why the "correct" answer is the best one and why the other answer choices are not as good.
- Next, we give you a full-length, ***Practice MBE (again almost entirely from past actual MBE questions***[4]**)**, with an Answer Key and full explanatory answers.
- Then, we give you ***answer sheets***, so you can practice doing questions under simulated exam conditions.
- As a final bonus, we've added **100 questions** (with the NCBE's own short-form "annotation"-style answers) that the examiners released as "OPE-4" in 2013.[5]

ATTACKING THE MBE

The first thing to read is our description of the MBE and our advice on attacking it. Those sections will give you pointers on studying and analyzing questions — in fact, on learning to think like the Bar Examiners.

STRATEGIES AND TACTICS FOR EVERY MAJOR SUBJECT: TIMING YOURSELF

After reading "How to Attack the MBE," you should choose the subject you want to review first and read the "Strategies and Tactics" section for that subject; then, complete the practice questions in that subject. While the MBE is a timed test, try to avoid timing yourself when you first begin to practice. When you actually sit for the MBE, you'll have about 1.8 minutes to answer each question (assuming you don't fall behind). Right now, though, you aren't sitting for the MBE; you're learning how to take it. The important things to learn are, first, the black-letter law, followed by the nuances of the language the Bar Examiners use, the nature of the details they test, and, in effect, how to think the way they do. Learning these things necessarily requires more than a minute or so per question. Take your time on each question, and you'll benefit in the long run. As you become more proficient at answering MBE questions and learn more black-letter law through your substantive review, your speed will naturally increase.

USING ANSWER SHEETS

When you answer the questions on each subject or take the practice exam, use the scoring sheets provided in the back of the book. If you need more sheets, make copies of the ones provided. These scoring sheets are replicas of those you will use on the actual MBE. As you answer each question, make a note on a separate sheet of paper about those answers that were only your best guesses and not based on a sure knowledge of the law; you should then check those answers more carefully against the full answers given in this book.

SCORING YOUR PERFORMANCE

At the beginning of each Answer section, we give you an Answer Key to let you quickly score yourself.

When you compute your raw score for a given subject (the number of correct responses), keep in mind that the subjects vary somewhat in the mean scores produced by applicants. The NCBE has not published mean-score information on a per-subject basis since the July 2004 exam. However, Illinois has published such information about its own applicants on the February 2013 exam, the most recent per-subject information I have been able to find for any state. Table 5 shows this information, which will give you some idea of the relative difficulty of the six subjects that were covered on that exam.[6]

4. The 28 Civil Procedure questions on the Practice Exam are not past actual MBE questions; they were written by us to simulate the topics covered in the actual MBE questions, as described in the previous footnote.

5. The NCBE has released the OPE-4 set to end-users only in the form of an online interactive test module, for separate purchase.

6. Civil Procedure is not included in these figures because it did not become part of the MBE until February 2015.

Table 5

Subject Difficulty on the February 2013 MBE, Based on Illinois' Published Results

Raw Scores	Con. Law	Contracts	Crim. Law	Evidence	Real Prop.	Torts
Median # correctly answered	18.5	20.5	20.6	18.9	19.45	22.05
# of Q's	31	33	31	31	31	33
Correct answers as % of total	59.7%	62.1%	66.5%	61.3%	62.7%	66.7%
Rank order of difficulty	1 (hardest)	3	5	2	4	6 (easiest)

So in Illinois for February 2013, Con Law was the hardest subject (applicants got, on average, only 59.7% of the questions correct), and Evidence was the second hardest (61.3%). Torts was the easiest (applicants got an average of 66.7% correct), and Criminal Law was the next easiest (66.5%).[7] The other two subjects (Contracts and Real Property) were in the middle, clustered between 62.1% and 62.7%.

If we assume that the February 2013 exam was average in terms of the relative difficulty of the subjects, and that Illinois' applicants were representative of the whole country in terms of which subjects they found easiest/hardest (both reasonable though not empirically validated assumptions), here are a couple of conclusions that it seems sensible to draw:

1. The Criminal Law and Torts questions are on average the easiest, which means that you'd better "make hay while the sun shines" on these—these are probably the two subjects whose questions have the shortest average question-length, which is likely part of why they're easier. So if time runs short (or you think it may run short later on), your "yield per minute spent" is likely to be higher when spent on Crim Law and Torts questions than on the other subjects.
2. Conversely, since Con Law and Evidence are the two hardest, it may not be so profitable to spend quite as much time on these, on average—maybe taking an "either you know it or you don't" approach to these two subjects is a good strategy. In Evidence, particularly, the relevant principles (embodied in the Federal Rules of Evidence) are pretty hard to "guess" if you don't know them, so this isn't a good area in which to agonize in the hopes that you can "derive" or "intuit" the answer.
3. As of this writing (July 2019), no information has been officially published about the median student performance on the Civil Procedure questions, a subject first introduced in 2015. But anecdotal reports indicate that the Civ Pro questions are quite technical, are highly dependent on precise FRCP provisions, and are difficult to answer based on general principles. So I would expect them to be on average more difficult than the median MBE question, and probably not so worthy spending a lot of exam time on if you feel you can't narrow the answer down to, say, two choices.

When you score yourself using the Answer Key, compute the percentage you got correct, and compare: (1) how your own performance varies from subject to subject, to let you know where you need to spend the most time; and (2) how your performance in a subject compares with the above Illinois per-subject averages, again to get a clue about where you're relatively most deficient.

READ THE EXPLANATORY ANSWERS!

For every question you try, please ***read the explanatory answer***; if you do, you'll find that the answers in this book go far beyond telling you the basic principle involved in each question. We also analyze the specific error contained in every wrong answer; we even discuss what principles you may have been thinking about if you picked that answer. If your time is limited, you don't have to read every part of our explanatory answer to every question; you can choose to read only the discussion of the answer you chose, as well as the discussion

7. After the Feb. 2013 exam (whose pre-subject figures are reported in Table 5), the examiners increased the portion of constitutional criminal procedure questions on the Criminal Law part of the MBE from about 25% to about 50%. This probably had the effect of making the Criminal Law subject as a whole more relatively difficult than it was on the Feb. 2013 exam.

of the correct choice (if you didn't pick the correct answer). If, however, you were unsure of one of the other answer choices (for example, if you originally marked Choice (A) as the correct answer but then changed your mind), you may want to read the discussion of that answer as well. Remember, your goal in using this book is to become intimately familiar with MBE questions and how to answer them; reaching that goal requires that you feel comfortable with as many answer choices in this book as possible. In fact, you may even become frustrated sometimes, because you feel you're reading the same principles (for instance, the elements of strict product liability) over and over again, but that's intentional. We repeat those principles, in full, every time they're applicable, so that, by the time you take the MBE, those principles will be ***second nature*** to you. In our opinion, it's better to over-learn basic principles than have your knowledge be so tentative that you forget the principles when you take the MBE.

THE PRACTICE MBE

Some good advice: Complete the simulated, full-length MBE in our Practice MBE. By doing so, you may be able to save hundreds of dollars on Multistate seminars, which essentially give you a practice MBE and then tell you what your weak points are.

If you want to duplicate the "look and feel" of the real test, make sure the circumstances under which you take our Practice MBE are as similar as possible to those of the real MBE. First, time yourself! Second, sit in one room (perhaps a library) and work straight through, duplicating the two three-hour sessions of the actual MBE. Break only to use the bathroom, if necessary, but don't give yourself extra time for that (you won't get any on the MBE). Follow all the advice in our "Attacking the MBE" section when you take the practice MBE. Simulating the actual MBE in this way can significantly cut down on your anxiety when it's time for you to face the real thing. Taking the practice MBE under exam conditions gives you experience at actually sitting for the whole exam; you'll find that it's quite different from doing 25 or even 50 questions at a time. The experience of sitting for a practice MBE, both in simulating the environment and in practicing how your mind will organize, process, and function during the test (i.e., attacking the MBE), really is worth the six hours of time spent taking the Practice MBE.

WHAT TO DO WHEN YOUR STUDY TIME IS LIMITED

Ideally, you would have a month in which to use this book, so that you could cover an average of 20 pages a day. You may find, though, that you don't have the time to go through this entire process. If that's the case, you'll still find this book an invaluable study tool. You should prioritize your studies this way:

- Read "How to Attack the MBE."
- Read the Strategies and Tactics section for each subject, paying special attention to the coverage of each topic on the MBE.
- Do the practice questions for each subject, starting with Torts and Contracts.
- Do the Practice MBE.

In terms of your substantive review, if you don't have time to study every topic in every subject, pay special attention to the topics that are heavily tested by the MBE. For instance, in Torts, half the questions test only Negligence; thus, about 7% of the entire MBE is on Negligence, so you would be wise to learn the subject well. On the other hand, there are relatively few questions devoted to the subject of Future Interests within Real Property. So obviously you'll want to spend more time on Negligence than on Future Interests—especially since the latter not only represents fewer questions but is much more conceptually difficult and thus probably offers a lower yield per study hour.

In addition, keep in mind that some of the seven MBE subjects are easier than others, so, barring individual variables (e.g., you happen to be an expert on a difficult subject), you may want to concentrate your limited study time on questions in subjects that are likely to be easiest for you to answer. (See "Scoring Your Performance" above for more details.)

While the MBE requires a substantial amount of preparation, I believe that the time you spend in focused preparation really *will* in all likelihood be rewarded; your success will be proportionate to the amount of time you spend in reviewing the law and in understanding the techniques used by MBE examiners.

LIST OF SOURCE-NAME ABBREVIATIONS USED IN ANSWERS

The various Answer sections of this book (each of the seven per-subject sections as well as the Practice Exam section) contain abbreviated citations to other sources. Here, by subject, is what each abbreviation refers to.

CIVIL PROCEDURE

F,K&M (5th Ed.)—Friedenthal, Kane & Miller, Civil Procedure, Hornbook (5th Ed. 2015, West Academic Publ.)
FRCP—Federal Rules of Civil Procedure
W&M / W,M&K / W,M&C / W,M,C&F—Wright, Miller, et al., Federal Practice and Procedure (multi-volume practitioner treatise) (1986-2019; Thomson Reuters)

CONSTITUTIONAL LAW

Chemerinsky Treatise—Erwin Chemerinsky, Constitutional Law Principles and Policies, Treatise (5th Ed. 2015, Wolters Kluwer)

CONTRACTS

Farnsworth Treatise—E. Allan Farnsworth, Contracts, Treatise (4th Ed. 2004, Wolters Kluwer)
Rest. 2d / Rest. 2d (Contracts)—Restatement of the Law Second, Contracts (1981, American Law Inst.)
White & Summers UCC Practitioner Treatise—White & Summers, Uniform Commercial Code, Practitioner's Treatise Series (5th Ed. 2006, Thomson / West)

CRIMINAL LAW AND PROCEDURE

Substantive Criminal Law

LaFave—Wayne LaFave, Criminal Law, Hornbook (4th Ed. 2003, Thomson / West)
MPC—Model Penal Code (1962, American Law Inst.)
Criminal Procedure
L,I,K&K Hornbook—LaFave, Israel, King & Kerr, Criminal Procedure, Hornbook (6th Ed. 2017, West Academic Publ.)

EVIDENCE

FRE—Federal Rules of Evidence
M,K&R—Mueller, Kirkpatrick & Richter, Evidence, Treatise (6th Ed. 2018, Wolters Kluwer)
M&K—Mueller & Kirkpatrick, Evidence, Treatise (5th Ed. 2012, Wolters Kluwer)

REAL PROPERTY

A.L.P. / Amer. Law of Prop.—A. James Casner, American Law of Property, Treatise (1952-1954, Little Brown & Co.)
S&W—Stoebuck & Whitman, The Law of Property, Hornbook (3d Ed. 2000, West Group)
Singer Treatise (5th Ed.)—Joseph Singer, Property, Treatise (5th Ed. 2017, Wolters Kluwer)
Singer Treatise (3d Ed.)—Joseph Singer, Property, Treatise (3d Ed. 2010, Wolters Kluwer)
Rest. (First) Property—Restatement of the Law, Property (1965, American Law Inst.)
Rest. 3d (Mortgages)—Restatement of the Law Third, Property: Mortgages (1997, American Law Inst.)
Rest. 3d (Servitudes)—Restatement of the Law Third, Property: Servitudes (2000, American Law Inst.)
Rest. 3d (Wills)—Restatement of the Law Third, Property: Wills and Other Donative Transfers (1999, American Law Inst.)

TORTS

Dobbs, Hayden & Bublick Treatise—Dobbs, Hayden & Bublick, The Law of Torts, Practitioner Treatise Series (2d Ed. 2011, Thomson / West)
Dobbs—Dan B. Dobbs, The Law of Torts, Hornbook (1st Ed. 2000, West Group)
Rest. 2d / Rest. 2d Torts—Restatement of the Law Second, Torts (1965, American Law Inst.)
Rest. 3d (Apport.)—Restatement of the Law Third, Torts: Apportionment of Liability (2000, American Law Inst.)
Rest. 3d (Phys & Emot. Harm)—Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm (2009, 2012, American Law Inst.)
Rest. 3d (Prod. Liab.)—Restatement of the Law Third, Torts: Products Liability (1998, American Law Inst.)

HOW TO ATTACK THE MBE

"How often have I said to you,
that when you have eliminated the impossible, whatever
remains, however impossible, must be the truth."

—Sherlock Holmes

UNDERSTANDING THE NATURE OF THE BEAST

Let's say that you had both a photographic memory and unlimited time in which to study for the MBE; in addition, assume you had time to read every textbook and every treatise concerning every subject on the MBE. Would you still need to know how to analyze MBE questions? The simple answer is—***no,*** provided of course, that you could read and understand exam fact patterns. Your substantive knowledge would always lead you to the correct answer.

For most of us, though, that's just not reality—we don't have photographic memories, and we don't have unlimited time to study. That's why using this book is so important. In this section, you'll learn ***how to analyze MBE questions***. This section gives you basic tips on how to study, advice on how to time yourself on the MBE, other general advice on taking the exam, how to analyze the facts in MBE questions, how to use the process of elimination to arrive at the correct answer, and how to guess at the best response when your reasoning fails you (as it does the best of us).

Learning how to attack the MBE requires, first, that you understand why it's such a difficult test. Not all objective tests are difficult, but this one is. Take a look at the following hypothetical question:

> Laurel and Hardy, who've never seen each other before, are guests at a party. Laurel is standing in a corner, minding his own business, holding a cream pie. Hardy walks over and snatches the cream pie out of Laurel's hands, for no apparent reason, and frightens him. If Laurel sues Hardy, the claim most likely to succeed will be:
>
> A. Battery
> B. Murder
> C. Conspiracy
> D. Breach of contract

It doesn't take a rocket scientist to figure out that (A) is the correct answer, does it? No. That's because none of the other answers are even close to being correct—so (A) ***must*** be the best answer.

Let's change the question a bit, though—same facts, different answer choices:

> A. Assault, because although Hardy intended to frighten Laurel, he didn't touch him.
> B. Battery, because it isn't necessary that the person himself be touched for the claim to succeed.
> C. Intentional infliction of emotional distress, because Hardy intended to frighten Laurel.
> D. There is no likely claim, because Hardy's conduct wasn't tortious.

We've taken a simple objective question and made it into one that's far more difficult. Why is it more difficult? Because even though the answer's the same—battery, you need a ***much more detailed knowledge*** of Tort law to answer the second version. In the second question, we've "masked" the correct answer with very similar answers, so it's harder to figure out what the correct answer is. That's why we call incorrect answers "distractors": They're designed to ***distract*** you by tempting you to pick a similar, but wrong, answer.

If you were the National Conference of Bar Examiners, and you wanted a test that would distinguish the examinees with the best grasp of the substantive law from those who didn't know the law as well, which question would you ask? The second one. And that's exactly what they do.

HOW TO STUDY FOR THE MULTISTATE BAR EXAM

In the "About the MBE" section of this book, we told you that each of the seven subjects on the MBE is treated with virtually equal weight. There are 27 scored questions on each subject, except for Contracts, which has 28. The Bar Examiners have decided that each subject should be treated equally on the bar exam, and you should divide your study time accordingly. As we've said before, however, this doesn't mean that all topics within a given subject are treated equally—e.g., negligence.

When planning your study for the MBE, take into consideration two aspects for your substantive review: the ***scope*** of what you need to study, and the ***depth*** to which you have to study. The scope of what you need to study about each subject is covered in the "Strategies and Tactics" sections in this book, which you'll find at the beginning of each subject area. As you'll see, the subject coverage is ***broad***; the MBE is likely to contain a couple of questions on each of a variety of topics, rather than many on any one topic. That's straightforward. The depth to which you must study each subject, on the other hand, is worth addressing.

First, and most importantly, keep in mind that the exam is given ***nationwide***. This means that, in general, you must learn the majority principles and ignore the vagaries of local law. You must know what the majority ***approach*** is on any given topic, since that's typically what you'll be asked. It doesn't do you any good on the MBE to know that there are two or more views on a topic; you have to know which is the prevailing view.[8]

The sample questions in this book will, first, give you a feel for the details you need to master in order to pass the MBE—make no mistake about it, ***the MBE tests details, not broad concepts of law***. The explanatory answers will then give you further understanding of the majority views on a wide variety of principles. Thus, when you study, make sure you're noting the not-so-obvious details and that you understand the aims and the rationales of rules. For instance, you probably already know that, in Contracts, third-party intended beneficiaries have rights under a contract, while incidental beneficiaries do not. On the MBE, though, if you're given a question on third-party beneficiaries, you're unlikely to be tested on something so basic. Instead, you may need to know, for instance, when an intended beneficiary's rights "vest." The Bar Examiners know that, if you have only a superficial knowledge of the subject, you'll see that a question deals with third-party beneficiaries, you'll likely decide that the beneficiary mentioned is an "intended" beneficiary, and you'll therefore deem him to have enforceable rights on that basis. This will probably not be correct. The Bar Examiners want to reward students with more thorough knowledge of beneficiaries, e.g., students who know that, before a beneficiary's rights have vested, his rights can be cancelled by action of the two original contracting parties.

Here's another example. If you remember the "Mercy Rule" from Evidence, you probably remember that it allows the defendant in a criminal case to introduce evidence of his good character. If you see an MBE question concerning the Mercy Rule, and that's all you remember about the Rule, you'll probably get the answer wrong. Why? Because there are ***two other important points*** to remember about the Mercy Rule. First, the character evidence must be ***pertinent*** (probative) in order to be admissible. Thus, in an MBE question, you may see evidence that a defendant charged with fraud was a "peaceful" man. You should realize, though, that his peacefulness is not pertinent to the crime with which he's charged, so the Mercy Rule wouldn't make the evidence admissible. Second, under the Mercy Rule, the character evidence can only be offered in the form of ***reputation or opinion***; it can't be evidence of specific instances of conduct. So, even if a criminal defendant charged with fraud introduced evidence of his honesty, if the evidence was in the form of a specific instance

8. This statement is at least true when one approach commands a strong majority. Where there are two approaches each of which commands at least a substantial minority, typically it *will* be enough for you to know that there are two approaches, without knowing which is the "majority" view. That's because where two approaches have significant support, and one approach would give victory to P and the other would give victory to D, the examiners are likely to ask you, "If P wins, what will be the most likely reason?," and you'll just have to supply the theory (without knowing whether it's a majority or minority theory) that would result in a victory for P.

("He was honest in his dealings with me when he sold me his car"), it wouldn't be admissible. Once again, the Bar Examiners hope to catch those students with incomplete knowledge about the Rule. Even if you know the basics of the Rule, you could easily get the question wrong, because you don't know the Rule in enough depth to apply it to pertinent and specific facts!

As these examples indicate, your substantive review for the MBE must teach you to think about details; you simply cannot go into the MBE armed with only general superficial principles of law.

REMEMBER WHO WILL BE "TRIPPED UP" ON MBE QUESTIONS

Knowing what kind of person will be fooled by MBE questions can help you avoid becoming such a person. There are three general types of victims; they are those who

1. ***panic;***
2. ***operate by instinct*;** and
3. are ***unprepared***.

If you analyze MBE questions, keeping in mind that these are the three kinds of people who will pick an incorrect answer, you can avoid the answers ***they'd*** pick and improve your chances of choosing the correct answers. Let's look at what each of these people might do on the MBE.

1. Panickers.

Unfortunately, there are many completely justifiable reasons to approach the MBE in a sweat. For instance, you may have a job riding on your passing the Bar Exam. You may feel you didn't prepare enough. You may face a couple of very tough questions early on that torpedo your confidence. Remember, though, that, no matter what causes it, panic can have disastrous effects on your performance.

What does panicking do? For one thing, severe anxiety actually inhibits your memory from functioning well. As you've probably experienced, the more anxious you are about remembering something, the less likely you are to remember it. The only real cure for this is ***adequate preparation***. If you've prepared sufficiently, both substantively and by practicing MBE questions (and keeping in mind you need nowhere near a perfect score to pass the MBE), you should be able to keep your nerves from undermining your performance. Remember, you're not shooting for an A+ here; law school is over. Many people carry over to the bar exam their law school mentality of "I have to get the best score in the class." That's a mistake! On the bar exam, there's no difference between a student who passes by 5 points and a student who passes by 55 points; ***both pass***, and that's all that matters.

What we're primarily concerned about ***here***, though, is not your attitude coming into the exam, but its impact on your ability to analyze questions. If you panic, you will not read questions carefully enough to pick the right response. Keep this in mind as you study the questions in this book. It's clear from past MBEs that the Bar Examiners know what people will overlook when they panic—some answers are clearly incorrect simply because they misapply some very basic fact in the question! Understanding what a panicker would do can help you avoid the same mistake.

2. People who operate by instinct.

You've probably heard the old saying a million times: "Your first instinct is generally correct." On the MBE, ***ignore this advice at all costs***. The Bar Examiners aren't looking for lawyers who fly by the seat of their pants; they want lawyers who can apply legal principles to factual situations in a rational, disciplined manner. You should, therefore, follow an instinct only if you can tie that instinct to a principle of law.

How can your instincts hurt you on the MBE? One, they may make you overlook stated facts. Suppose, for example, that, in a Criminal Law question, you're asked if the defendant will be found guilty under the facts. One of the elements of the crime described is intent, and the only evidence on this issue is the defendant's own testimony, in which he states that he didn't intend to commit the crime. The facts tell you to ***assume the jury believes the defendant***. Now, your instincts may tell you that the defendant is lying through his teeth and that no one over the age of five would believe him, so you leap for the answer that says the defendant will be found guilty. Watch out! If ***the facts*** tell you that the jury believes him, your instincts shouldn't matter. If you follow your instincts, you'll pick an incorrect response. The facts might tell you that the jury will find that the defendant lacked intent and so isn't guilty.

Here's another mistake you'll make if you follow your instincts. You probably remember from Evidence class that no piece of evidence is ever ***really*** inadmissible; virtually everything is admissible, somehow. If you let your

instinct guide you on the MBE, therefore, you'd ***never*** pick the "inadmissible as hearsay not within any exception" response. And you'd be wrong fairly regularly. (For more on how to deal with this specific problem, see the "Strategies and Tactics" for Evidence.)

If you let your instincts guide you, you may also let your emotions control your reasoning. Look at this example from a past MBE:

> A father, disappointed by his eight-year-old son's failure to do well in school, began systematically depriving the child of food during summer vacation. Although his son became seriously ill from malnutrition, the father failed to call a doctor. He believed that, as a parent, he had the sole right to determine whether the child was fed or received medical treatment. Eventually the child died. An autopsy disclosed that the child had suffered agonizingly as a result of the starvation, that a physician's aid would have alleviated the suffering, and that, although the child would have died in a few months from malnutrition, the actual cause of death was an untreatable form of cancer, which did not happen any earlier because of the malnutrition. The father was prosecuted for murder, defined in the jurisdiction as "unlawful killing of a human being with malice aforethought." The father should be
>
> A. acquitted, because of the defendant's good-faith belief concerning parental rights in supervising children.
> B. acquitted, because summoning the physician or feeding the child would not have prevented the child's death from cancer.
> C. convicted, because the father's treatment of his son showed reckless indifference to the value of life.
> D. convicted, because the child would have died from malnutrition had he not been afflicted with cancer.

What's your gut reaction? The father is a slimeball, right? Sure he is. But the fact is that he ***didn't*** cause his child's death; the child died of cancer, so the father can't be liable for the child's death. If you let your instincts overwhelm you, you'll pick (C)—after all, the father ***was*** recklessly indifferent to his child's welfare and deserves to be punished. If you do this, you'll get this question wrong. Remember: In real life, being an emotional, caring person is an asset, but on the MBE, it's not—you have to be robot-like in applying the law to the facts you're given. The correct answer is (B).

3. Those who are unprepared.

Obviously, the person the Bar Examiners most certainly intend to snare is the one who is unprepared for the MBE. Simply put, ***if you don't know the law, you shouldn't be a lawyer***. A person unprepared for the MBE will make mistakes, such as remembering only snippets of rules or forgetting how theories apply to facts. Of course, it's not possible to be completely prepared for every single legal issue on the MBE, so, to some extent, you're bound to be underprepared. If, though, you've recently completed law school when you take the MBE, you'll probably be able to answer as many as half of the MBE questions correctly simply on the basis of your classroom knowledge. If you review and understand the substantive law and learn from this book how to analyze questions, you should be able to answer enough of the remaining questions to pass.

HOW TO ANALYZE MBE QUESTIONS

The advice in this section addresses the MBE in general. The "Strategies and Tactics" section for each subject will give you specific tips on handling each particular subject, so you should always read the "Strategies and Tactics" before you attempt to answer any questions on a subject.

As you read further, you may find the process of analysis outlined here a bit overwhelming at first; you may even be tempted to skip over it. **Don't!** If you faithfully follow the procedure given below when you begin to practice answering questions, it will become second nature and you'll be able to apply it almost automatically. As a result, you'll be able to analyze MBE questions quickly and accurately, and you'll enter the MBE with a significant advantage.

A. Analyzing the facts of the question.

a. The composition of MBE questions.

Almost every MBE question will give you a factual setting and then a specific inquiry. Here's an example of a typical set of facts:

> The day after a seller completed the sale of his house and moved out, one of the slates flew off the roof during a windstorm. The slate struck a pedestrian, who was on the public sidewalk. The pedestrian was seriously injured. The roof is old and has lost several slates in ordinary windstorms on other occasions.
>
> If the pedestrian sues the seller to recover damages for his injuries, will the pedestrian prevail?
>
> A. Yes, because the roof was defective when the seller sold the house.
> B. Yes, if the seller should have been aware of the condition of the roof and should have realized that it was dangerous to persons outside the premises.
> C. No, because the seller was neither the owner nor the occupier of the house when the pedestrian was injured.
> D. No, if the pedestrian knew that in the past slates had blown off the roof during windstorms.

The first paragraph is the factual setting. The final sentence, beginning with "If the pedestrian . . . " is the specific inquiry or "the call of the question."

b. Read carefully.

In general, because of the time constraints of the MBE, you'll only have time to read a factual setting in detail once, so make that reading count! You have to read carefully in order to answer correctly, because many wrong answers ("distractors") are aimed at people who skip over important facts. As you read a question, you may want to highlight important points (you're allowed to mark in the question book), but watch your time.

The following example from a past MBE illustrates the importance of careful reading.

> A landlord, the owner in fee simple of a small farm consisting of thirty acres of land improved with a house and several outbuildings, leased the same to a tenant for a ten-year period. After two years had expired, the government condemned twenty acres of the property and allocated the compensation award to the landlord and the tenant according to their respective interest so taken. It so happened, however, that the twenty acres taken embraced all of the farm's tillable land, leaving only the house, outbuildings, and a small woodlot. There is no applicable statute in the jurisdiction where the property is located, nor any provision in the lease relating to condemnation. The tenant quit possession, and the landlord brought suit against him to recover rent. The landlord will
>
> A. lose, because there has been a frustration of purpose which excuses the tenant from further performance of his contract to pay rent.
> B. lose, because there has been a breach of the implied covenant of quiet enjoyment by the landlord's inability to provide the tenant with possession of the whole of the property for the entire term.
> C. win, because of the implied warranty on the part of the tenant to return the demised premises in the same condition at the end of the term as they were at the beginning.
> D. win, because the relationship of landlord and tenant was unaffected by the condemnation, thus leaving the tenant still obligated to pay rent.

If you read that question quickly, you might have overlooked the fact that ***the tenant was already compensated for his loss by the condemnation award,*** and you might therefore have chosen (A) or (B). Instead, if you read the question carefully, you could eliminate Choices (A) and (B), since under both of those choices the tenant prevails, and his prior recovery alone should suggest to you that he shouldn't. You could, therefore, narrow your choice down to (C) or (D). (In fact, the correct response is (D).) See how important it is to read the facts carefully?

c. Don't assume facts.

A corollary to the "read carefully" rule is that you should be careful not to read into the questions on the MBE facts that aren't there. The MBE is a meticulously crafted test; the facts you need in order to answer the question will be given to you, so you must rely only on those facts and on reasonable inferences from them. (This has important ramifications in choosing a correct response, which we'll discuss in detail a little later on.)

d. Choose the simple interpretation.

Don't make problems more complex than they really are. If there are multiple ways to interpret a question, one that makes the problem straightforward and others that make it very difficult, choose the straightforward interpretation.

e. "Trigger" factors to watch for in reading MBE questions.

While you should read every question carefully, there are a few "trigger" items that are extremely likely to determine the correct answer.

1. Statutes.

Some MBE questions contain statutes. A statute may be given for two reasons:

a. There are conflicting common law rules, but no one majority rule.

For instance, burglary is subject to several different rules: Some states limit burglary to a residence and to nighttime; others require neither or only one of these. The same conflict is evident in defining degrees of murder. If a question involves that kind of precise issue, you'll almost certainly be given a statute to guide you as to which rule applies.

b. The Examiners want to see if you can ignore your instincts.

Sometimes you'll be given a statute that doesn't comport with what you think ought to happen. For example, a criminal statute may require knowledge, but your gut reaction is that the conduct described need only constitute ***negligence*** to result in liability. Follow the statute, not your instinct.

As both (a) and (b) indicate, the most important things to do when you're faced with a statute are to read it carefully and to apply it ***mechanically***. If a question contains a statute, the statute almost certainly determines the central issue, and answering correctly almost certainly depends upon interpreting the statute as it was written.

Here's an example from a past MBE:

> A state statute requires any person licensed to sell prescription drugs to file with the State Board of Health a report listing the types and amounts of such drugs sold, if his sales of such drugs exceed $50,000 during a calendar year. The statute makes it a misdemeanor to "knowingly fail to file" such a report.
>
> A pharmacist, who is licensed to sell prescription drugs, sold $63,000 worth of prescription drugs during a particular year but did not file the report. Charged with committing the misdemeanor, the pharmacist testifies that he did a very poor job of keeping records and did not realize that his sales of prescription drugs had exceeded $50,000. If the jury believes the pharmacist, he should be found
>
> A. guilty, because this is a public welfare offense.
> B. guilty, because he cannot be excused on the basis of his own failure to keep proper records.
> C. not guilty, because the statute punishes omissions and he was not given fair warning of his duty to act.
> D. not guilty, because he was not aware of the value of the drugs he had sold.

Here, you're probably tempted to select Choice (B), because you figure that if the pharmacist is such a bonehead that he doesn't keep complete records, he should be liable—it's really not fair for him to rely on his sloppiness to avoid liability. Focus on the statute, though. The statute requires "knowing" behavior, so if the pharmacist's behavior wasn't "knowing," he can't be guilty. Since he didn't realize he'd sold more than $50,000 worth of prescription drugs, he didn't act knowingly when he failed to file the report, so he can't be guilty under the statute. Mechanically applying the statute to these facts will lead you straight to the correct response: (D).

2. Pay special attention to seemingly meaningless details about people.

While the Bar Examiners do sometimes give you a ***deliberate*** red herring, you should always assume that ***every fact in every question is important.*** Even when the Examiners limit themselves to presenting only facts that are needed to make the question "airtight," the fact patterns and answer

choices tend to become pretty lengthy. And the Examiners don't want the test to become a test of speed reading. So based on my review of many hundreds of past MBE questions, I can say this with confidence: *You should assume that if the examiners give you a fact, that fact is somehow needed to help make the right answer right, or at least one wrong answer choice wrong.*

For instance, normally, you won't be told any personal characteristics about people in the questions; you'll typically see only statements such as: "A man contracted with a woman" or "a farmer shot a rancher," and you can generally assume that all the people mentioned are sane, responsible adults. If, therefore, a question does tell you more about a person, such as that "A ten-year-old boy contracted with a man," the extra information given is likely to be important, so you should note it and use it. In Contract Law, what does including the boy's age suggest? An incapacity to contract.

The same kind of thing is true in the following examples. Say you're told that "A defense witness, who has been chronically unemployed since age 16, is testifying." Since the question has given you an additional fact about the witness, look at that fact. What does "chronically unemployed" tell you? It tells you, for one thing, that the witness probably isn't an expert witness, and so probably can't offer certain kinds of opinion testimony. Or, say you're told that "A novelist offered to sell his snow blower to his next-door neighbor." Ask yourself, what does the offeror's being a novelist suggest? For one thing, that he's not a merchant dealing in snow blowers, so his offer ***can't*** be irrevocable without consideration. See how it works? Here's another example, based on a past MBE question:

> A contractor, who had been in the painting and contracting business for ten years and had a fine reputation, contracted to paint a farmer's barn. The barn was a standard red barn with loft. The contract had no provision regarding assignment. The contractor recently assigned the contract to a commercial painter, whose experience and reputation with regard to commercial painting were comparable to those of the contractor. Which of the following statements is correct?
>
> A. The contractor is in breach of contract.
> B. The farmer may refuse to accept performance by the commercial painter.
> C. The farmer is required to accept performance by the commercial painter.
> D. There is a novation.

Focus specifically on the description after the commercial painter's identification in the question—"whose experience and reputation . . . were comparable. . . . " What does this suggest to you? If you remember the rules on assignment, you know that, to be valid, an assignment cannot *increase the risk* that the promisee (here, the farmer) will not receive the promised performance. What does the commercial painter's comparable experience and reputation suggest? That the farmer's *risk won't be increased*, and that the assignment is likely to be valid! Of course, assignments have other elements as well, but if you focused on the additional information given and ***applied*** it, you'd clearly eliminate Choices (A) and (B), and that would give you a 50-50 chance of choosing the correct answer. (In fact, the correct response is (C). Choice (D) is wrong because a novation requires the consent of the promisee to performance by the assignee.)

f. Handling the specific inquiry in each question.

1. Reword the inquiry.

Most questions on the MBE are framed in the positive; that is, you're told to look, for example, for the "most likely outcome" or the "claim that is most likely to succeed" or the "best defense." You may find such questions difficult unless you reword them. This is how to do it:

Question: "What is the most likely outcome?"
Reword to: "What will the result be—and why?"

Question: "Which claim is most likely to succeed?
Reword to: "Which is the only claim that can succeed on these facts—and why?"

Question: "What is Defendant's best defense?"
Reword to: "Why won't the defendant be guilty on these facts?"

Question: "If party X loses, the most likely basis for the judgment is that . . . "
Reword to: "Party X loses because . . . "

What does this rewording do? It makes you look for one correct answer. Unless the Examiners have made a mistake in drafting the question, they're not going to ask you to choose the "better" answer as between two or more choices that each could be considered correct. Rather, the Examiners'

mission is to design a question to which there is only one "correct" answer, and as to which each of the other three choices is indisputably wrong, because it misstates the facts, the law, or both. If you reword the specific inquiry and thus focus your mind on finding one correct answer, you're less likely to be seduced by distractors.

In a ***few*** MBE questions, the specific inquiry or "call" will be worded ***in the negative***; that is, you are asked to determine, for example, "which claim won't succeed," "which is the least sufficient basis for admitting the evidence," "of which crime is Defendant least likely to be guilty," etc. The primary difference between handling negative as opposed to positive inquiries is in ***how you apply a process of elimination*** to arrive at the correct response (this will be discussed in detail below). The process for ***rewording***, however, is the same. Here's an example from a past MBE:

> In a narcotics conspiracy prosecution against the defendant, the prosecutor offers in evidence a tape recording of a telephone call allegedly made by the defendant. A lay witness is called to testify that the voice on the recording is the defendant's. Her testimony to which of the following would be the LEAST sufficient basis for admitting the recording?
>
> A. She had heard the same voice on a similar tape recording, after which the voice was identified to her by the defendant's brother as being the defendant's voice.
> B. She had heard the defendant speak many times, but never over the telephone.
> C. She had, specifically for the purpose of preparing to testify, talked with the defendant over the telephone at a time after the recording was made.
> D. She had been present with the defendant when he engaged in the conversation in question but had heard only the defendant's side of the conversation.

You should reword the question to read: "When ***won't*** the recording be admissible?" This forces you to look for the only insufficient basis for authentication and not to engage in drawing fine lines as to which type of authentication will be best. You'll find that rewording such questions makes it considerably easier to answer them. (In fact, the correct response is (A), since it's the *only* one where the witness has no personal knowledge of the defendant's voice.)

2. Summon the applicable test immediately.

If you're asked whether a certain result should occur, ***immediately*** summon to your mind the ***appropriate test*** under the rules you've learned. For example, if you're asked whether Defendant will be guilty of murder, focus on what murder requires: an unlawful killing, neither justifiable nor excusable, with malice aforethought. If you're asked if a state statute is constitutional, think immediately of the three-prong standard for constitutionality of state statutes: within state's power, not violating any person's constitutional rights, not an undue burden on interstate commerce. Sometimes you won't know the nature of a claim or of an argument until you read each answer choice; strategies for dealing with that situation are discussed elsewhere. If, however, you're asked about a certain result in the question itself, immediately calling to mind the applicable rule or test will help prevent you from being seduced into choosing a distractor.

B. Analyzing responses — the process of elimination.

The MBE is like other standardized tests in one very important respect: The best, and sometimes only, way to arrive at the correct answer is to use a process of elimination. Basically, you should arrive at the correct answer by eliminating, one by one, any answer that clearly ***cannot*** be correct.

Think about it: In theory, for each MBE question, you should be able to eliminate three answers as definitely wrong and, by doing that, get a perfect score — without knowing that any answer was definitely correct! Of course, this would never happen in reality, but it does indicate the value of knowing how to eliminate incorrect responses.

On the MBE, knowing how to recognize a bad response is ***your most valuable analytical skill***, and we'll teach you how to do it in this section. First, we'll discuss the basic procedure for eliminating incorrect responses (issue spotting and modifiers), and then we'll discuss how answer choices can be wrong.

a. The basic concept.

First, let's take a look at a question and go over the basics of the process of elimination as applied to the MBE. Here's a question from a past MBE.

> Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching."

> As a man was walking down the street, a gust of wind blew his hat off. The man reached out, trying to grab his hat, and narrowly missed striking a woman in the face with his hand. The woman, fearful of being struck by the man, pushed the man away.
>
> If charged with criminal assault, the man should be found
>
> A. guilty, because he caused the woman to be in apprehension of an offensive touching.
> B. guilty, because he should have realized he might strike someone by reaching out.
> C. not guilty, because he did not intend to hit the woman.
> D. not guilty, because he did not hit the woman.

In applying the process of elimination, you should analyze each answer choice separately, determining whether it's a possible correct answer or can instead be eliminated. Remember, in order for an answer to be correct, ***every aspect*** of it must be correct: It must correctly characterize the facts, it must state the correct law, its result must be consistent with its reasoning (if it's a "two part" answer), and it must address and resolve a central issue. If a response is ***potentially*** correct, mark a "Y" for "yes" next to the answer in the question booklet; if not, eliminate it with an "N" for "no."

Let's look at each of the responses for the question above.

As we discussed above, when you're told the nature of a claim in a specific question, you should ***immediately*** think of the test for that claim. The task is made easy for you in our grab-the-hat question, because the definition of criminal assault—"an attempt to commit a criminal battery"—is provided by the statute in the problem. Keeping this in mind, analyze each response. Choice (A) correctly characterizes the facts, but it understates the mens rea required for the crime: It suggests that merely causing apprehension is sufficient for guilt. Your knowledge of substantive law should, however, tell you that "attempt" requires ***intent***, but Choice (A) suggests that causing an apprehension of imminent contact is a criminal act, without regard to the accused's mens rea; thus, Choice (A) is definitely incorrect, and you should mark an "N" next to it.

Similarly, Choice (B) is plausible on the facts, but it also misstates the law. The "should have realized" language in Choice (B) suggests that ***negligence*** is the standard required by the statute. In fact, this understates the mental element required. By requiring attempt, the statute clearly requires intent, not mere negligence. Thus, Choice (B) cannot be correct, and you should mark an "N" next to it, as well.

Choice (C) suggests that the man should not be guilty because he didn't intend to hit the woman. Choice (C) thus identifies the correct mental element, and it reflects one of the question's facts—that the man didn't intend to hit the woman but rather intended only to retrieve his hat. Furthermore, the man's lack of intent is a central issue, because the lack of this element of the crime would result in his acquittal. Finally, Choice (C)'s result agrees with its reasoning. Choice (C) is, therefore, a very strong likelihood, and you should mark a "Y" next to it.

Finally, Choice (D) states that the man can't be guilty, because he didn't actually hit the woman. As discussed above, focus in on the language of the statute. The statute cited doesn't actually require a touching; a mere attempt to touch is enough to satisfy the statute. Choice (D) misstates the law, so it cannot be a correct response. Mark it with an "N."

Process of elimination on this question, then, leaves you with three "N's" and only one "Y." The "Y" response must be the correct one and, in fact, it is.

You may feel that this is a laborious way to go about answering MBE questions, especially since you'll be working under time constraints when you actually take the test. Actually, it's the best way to master the MBE process. In fact, on many questions, you'll go through this process very quickly, because you'll immediately spot the best response and quickly eliminate the other three. When that happens, ***great!*** Just mark the correct response on your answer sheet and keep moving. (When you begin practicing for the exam, though, use as much time as you need to master this process. You'll speed up as you practice.)

A few paragraphs back, we told you that process of elimination sometimes is the only way to arrive at a correct response to an MBE question. Just look at the following question, from a past MBE:

> A tenant occupied an apartment in a building owned by a landlord. She paid rent of $1250 in advance each month. During the second month of occupancy, the tenant organized the tenants in the building as a tenants' association and the association made demands of the landlord concerning certain repairs and improvements the tenants wanted. When the tenant tendered rent for the third month, the landlord notified her that rent for the fourth and subsequent months

would be $2000 per month. The tenant protested and pointed out that all other tenants paid rent of $1250 per month. Thereupon, the landlord gave the required statutory notice that the tenancy was being terminated at the end of the third month. By an appropriate proceeding, the tenant contests the landlord's right to terminate. If the tenant succeeds, it will be because

A. a periodic tenancy was created by implication.
B. the doctrine prohibiting retaliatory eviction is part of the law of the jurisdiction.
C. the $2000 rent demanded violates the agreement implied by the rate charged to other tenants.
D. the law implies a term of one year in the absence of any express agreement.

You can, if you like, go through a detailed "Y" and "N" elimination with each response here. We include this question here, though, to point out that there are times when a correct answer can only be deduced by a process of elimination. Here, with a basic knowledge of Property Law, you'd be able to eliminate Choices (A), (C), and (D) conclusively. That would leave (B), a response you'd be unlikely to choose as the correct answer under any other circumstances. For one thing, the MBE is a national exam, and Choice (B) addresses local (perhaps minority) law;[9] furthermore, the doctrine of retaliatory eviction is a very minor point of Property Law, one you probably never covered in law school. If you've used the process of elimination, however, you know that the other three answers are unquestionably wrong under the rules that you've learned, so Choice (B) must be the right response. And it is.

b. How to eliminate incorrect responses.

Now that you've got the basic concept down, let's address some specifics on how to eliminate incorrect responses.

l. Issue spotting on the MBE.

Your ability to identify and resolve the central issue in each question is crucial to your ability to answer MBE questions correctly. To do this, you must not only spot issues in the facts themselves, but also be sensitive to nuances in the answer choices. The "Strategies and Tactics" sections address this in detail for each subject, so we'll examine only some basic principles here.

If you're used to taking essay exams in school, you already know the importance of issue spotting. Since the MBE is an ***objective*** test, you may be tempted to believe you won't need to spot issues. That's only ***partially*** correct. The MBE requires only ***modified*** issue spotting, because you're working with a limited set of possibilities: One of the choices ***must*** identify and resolve a central issue. You don't have to ***supply*** the right answer—you only have to ***recognize*** it.

Don't get too excited, though; you aren't completely off the hook, because you also have to be able to (1) identify ***what issue each response is addressing***, and (2) identify ***the central issue in the problem***. If the central issue isn't obvious to you, based on your reading of the facts, you can sometimes use the answer choices to help identify what the central issue must be, if you work correctly and in a disciplined fashion.

Let's address the "central issue in the problem" aspect of issue spotting first. This requires you to ask yourself, "what, ***in theory***, is going on in this problem?" Say, for instance, that the question asks if the plaintiff's claim for negligence will succeed. You must know that, to prove negligence, the plaintiff will have to prove duty, breach, causation, and damages; you must also know that the plaintiff will only succeed if the defendant doesn't have a valid defense. An issue raising one of these elements must be present in the facts of the question; the correct response will be the one that addresses and resolves that issue.

Suppose, instead, that you're trying to solve a problem for which you must pick which plaintiff's claim is "most likely to succeed." To do this, you must find the answer choice that most closely addresses, and overcomes, the greatest obstacle to the plaintiff's success. You'll have to (1) think of what, theoretically, the plaintiff must prove; (2) identify which element of his position is weakest (or which defense is strongest); and (3) choose an answer that states a valid argument for overcoming that obstacle.

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9. Notice that this question is of the form, "If [party X] wins, it will be because. . . . " As I said earlier, when the examiners want to test you on a doctrine that only a minority of jurisdictions follow, this is the way they'll typically construct the question, since even a very-rarely-applied doctrine can supply the correct answer if it's the only doctrine listed among the choices that would give a victory to the specified party.

To practice further, suppose you're faced with an Evidence question that asks you to identify the "most likely" basis on which a piece of evidence will be admissible. Ask yourself: What's the most likely reason the evidence **wouldn't** be admissible? Is it hearsay? Opinion? Character evidence? The correct response will have to address that central reason; by reading each of the choices, you'll find out, one way or another, what that issue is. Every answer choice, either explicitly or implicitly, addresses some issue. For example, in Torts questions, if an answer uses phrases such as "should have known," "reasonable care," and the like, the language used tells you that it must be addressing the issue of negligence.

Let's look at a fairly simple question from a past MBE.

> The plaintiff sued the defendant for damages for injuries that the plaintiff incurred when a badly rotted limb fell from a curbside tree in front of the defendant's home and hit the plaintiff. The defendant claimed that the tree was on city property and thus was the responsibility of the city. At trial, the plaintiff offered testimony that, a week ***after*** the accident, the defendant had cut the tree down with a chainsaw. The offered evidence is
>
> A. inadmissible, because there is a policy to encourage safety precautions.
> B. inadmissible, because it is irrelevant to the condition of the tree at the time of the accident.
> C. admissible to show the tree was on the defendant's property.
> D. admissible to show the tree was in a rotted condition.

What's going on here? The plaintiff is offering evidence of something the defendant did ***after*** an incident to fix a dangerous condition. What, in legal terms, is the plaintiff doing? He's offering evidence of a ***subsequent remedial measure***, and the fact that the defendant denied ownership of the property suggests that the plaintiff is offering the evidence to prove that the tree is on the defendant property. Remember that, while subsequent remedial measures are inadmissible to prove negligence or wrongdoing (due to the public policy concern of encouraging safety precautions), such evidence is admissible to prove *ownership and control*. Now look at the answer choices. Choice (A) states the general rationale of the subsequent remedial measure rule. Even if you didn't realize that the central issue in this problem was the admissibility of evidence of subsequent remedial measures, the language in (A) would suggest that you go back to the facts and see if you can't spot that issue. What does Choice (B) do? It suggests that the evidence is inadmissible because it doesn't make any issue in the case any more or less likely—the choice raises the issue of relevancy. Choice (C) ***implicitly*** recognizes that the problem is one of admitting evidence of subsequent remedial measures ***by invoking an exception to the general rule: proving ownership***. Choice (D) implicitly states that the evidence should be admissible because it's relevant to the facts at issue—that is, the defendant's chopping the tree down a week after the accident indicates that it was, in fact, in a rotted condition.

Once you've broken down the answer choices into their theoretical bases, it becomes much simpler to spot both the central issue and the choice that correctly resolves it: (C). The example also reinforces how important it is for you to be able to determine what ***exact issue*** a response is addressing, because that isn't always straightforward.

Generally, the central issue of each question is reasonably obvious in the fact pattern. Sometimes, though, the only way to spot the central issue is to determine the focus of the answer choices. Here's an example from a past MBE.

> The defendant is tried for armed bank robbery. The prosecution, in its case in chief, offers evidence that, when the defendant was arrested one day after the crime, he had a quantity of heroin and a hypodermic needle in his possession. This evidence should be
>
> A. admitted to prove the defendant's motive to commit the crime.
> B. admitted to prove the defendant's propensity to commit crimes.
> C. excluded, because its probative value is substantially outweighed by the danger of unfair prejudice.
> D. excluded, because such evidence may be offered only to rebut evidence of good character offered by defendant.

Let's focus on Choice (C). It suggests that the evidence is inadmissible because it's not legally relevant—that is, its probative value is substantially outweighed by the danger of unfair prejudice. To see if that's the correct response, you'd have to go back to the facts and, in essence, "spot" the issue. Is there a legal relevance problem in these facts? There ***is***, because the evidence is sufficiently "shocking" that a jury could give it undue weight and probably use it for purposes other than

those that are proper under these facts (considering the choices here, the evidence offered could only be used to prove motive, i.e., that he needed money to purchase drugs). You can see that the MBE format can actually benefit you; with an objective test, issue spotting is simplified, because the central issue must be resolved by at least one of the answer choices. Note, though, that issue spotting is still a vital skill, a skill you must have in order to answer most MBE questions correctly.

2. Language specifics.

On the MBE, in order to distinguish correct from incorrect answer choices, you must meticulously read the alternatives.

a. Glance at the modifier quickly, then study the reasoning and, finally, the result.

Many MBE answers will have three distinct parts: the result, the reasoning to support that result, and a ***modifier*** linking the two. For instance, an answer might read, "admissible, because the statement is an admission of a party-opponent," or "liable, only if she was negligent," or "guilty, because they planned and conspired to steal the stamps." The portion ***before*** the comma is the "result"; the ***first word after*** the comma (because, if, unless, since) is the "modifier"; the portion ***after*** the modifier is the "reasoning."

When you first look at the alternative answers after reading a question, glance quickly at the modifier. Usually, the modifier is "because." If it's ***something else***, such as "if," "unless," "but," "only if," or the like, make special note of this. We'll discuss why in a moment.

After you've glanced at the modifier, you should analyze the reasoning to see if it's correct. (This may seem counterintuitive, since you're likely to want to look at the result next.) The reasoning can be incorrect due to misstating the facts, misstating the law, or both. (More on this below.) If the reasoning is incorrect, the answer cannot be correct; you can eliminate it and move on.

If the reasoning is correct, you have to take another look at the modifier. Here's how you should deal with the three most common modifiers: "because," "if," and "unless."

1. Where "because" is the modifier.

As we said earlier, "because" is by far the most common modifier on the MBE. If "***because***" is used as the modifier, the answer can be correct only if:

- The reasoning addresses and resolves a central issue (or at least a more central issue than any other response);
- The facts in the question ***completely satisfy*** the reasoning (that is, if the reasoning says, "because he was drunk," the facts must state or imply ***unequivocally*** that he was drunk); and
- The result is consistent with the reasoning (for instance, if the reasoning states, "because the statement was an admission by a party-opponent," the result ***must*** be "admissible" in order for the answer to be correct).

Keep in mind that there are synonyms for "because" that are used on the MBE; these include "***since***" and "***as***" (for example, "admissible ***as*** a prior identification" really means "admissible ***because it*** (the statement) is a prior identification").

Now, let's take a look at those modifiers we told you to watch for: "if" and "unless."

2. Where "if" is the modifier.

Where "if" is the modifier, in order to be correct, the reasoning need only be ***plausible*** under the facts (that is, there can't be anything in the facts to suggest the reasoning ***couldn't*** be true), the reasoning must address a central issue, and the result and the reasoning must agree.

As you can see, the big difference between "because" and "if" is that the "because" reasoning must flow unequivocally from the facts; the "if" reasoning must be ***only plausible***. Take a look at the following example.

> A husband and wife, walking on a country road, were frightened by a bull running loose on the road. They climbed over a fence to get onto the adjacent property, owned by a farmer. After climbing over the fence, the husband and wife damaged some of the farmer's plants which were near the fence. The fence was posted with a large sign, "No Trespassing."
>
> The farmer saw the husband and wife and came toward them with his large watchdog on a long leash. The dog rushed at the wife. The farmer had intended only to frighten

the husband and wife, but the leash broke, and before the farmer could restrain the dog, the dog bit the wife. If the husband asserts a claim based on assault against the farmer, will the husband prevail?

A. Yes, because the farmer did not have a privilege to use excessive force.
B. Yes, if the husband reasonably believed that the dog might bite him.
C. No, if the dog did not come in contact with him.
D. No, if the farmer was trying to protect his property.

Let's look at Choice (B). Remember, before you even got to Choice (B), you should have thought of the elements for tortious assault: an act creating in plaintiff a reasonable apprehension of immediate harmful or offensive contact with plaintiff's person, intent to create this apprehension, and causation. You also should have noted that Choices (B), (C), and (D) all use the modifier "if" (which is quite unusual, since "because" is the normal modifier). So much for preliminaries. Let's go through the "if" reasoning to see if Choice (B) could be correct. First, is the reasoning plausible on the facts? Well, there's nothing to indicate that it ***couldn't*** be true, and since you could ***infer from the facts*** (remember, inferences are permissible) that the husband was physically close to ***the wife*** when the dog attacked her, it's plausible that ***the husband*** feared he'd be bitten, too. Second, does the choice resolve a central issue? Yes—it satisfies the apprehension element of assault, and that's the central issue on these facts, since it was the wife who was bitten, and so there would be some question as to whether the husband was put in apprehension of immediate contact. Finally, the reasoning and the result match: If the husband was put in fear, assuming the other elements of assault (which are not very much in question on these facts) were met, the husband would prevail. Of course, you'd have to eliminate the other possibilities to determine ***conclusively*** that (B) is correct, but it's clear from this analysis that (B) is the correct response.

Let's take a quick look at Choice (C) to see how a response with an "if" modifier can be incorrect. First, is the reasoning plausible on the facts? Yes—it's possible that the dog didn't come into contact with the husband, because the facts don't state otherwise. Second, does this choice address and resolve a central issue? ***No***—this is where Choice (C) falls apart. Assault doesn't require contact; battery does. Thus, the fact that the dog didn't come into contact with the husband would not determine if he'd prevail. Choice (C) can't, therefore, be the best response.

Keep in mind that "if" also has ***synonyms*** or ***equivalents*** ("as long as," for example); if you see such a synonym, your analysis should be the same.

3. Where "unless" is the modifier.

Now let's look at "unless" as a modifier. When this modifier is used, the reasoning must be the only circumstance under which the result cannot occur. If you can think of even ***one other way*** the result might come about, the response cannot be correct. Let's look at an example from a past MBE.

A chemical engineer knew of a particular small chemical company, but had no ownership interest in or connection with the company. The engineer noticed that the company's most recent, publicly issued financial statement listed, as part of the company's assets, a large inventory of a certain special chemical compound. This asset was listed at a cost of $100,000, but the engineer knew that the ingredients of the compound were in short supply and that the current market value of the inventory was in excess of $1,000,000. There was no current public quotation of the price of the company's stock. The book value of the company's stock, according to the financial statement, was $5 a share; its actual value was $30 a share.

Knowing these facts, the engineer offered to purchase from a stockholder of the company, at $6 a share, the 1,000 shares of company stock owned by the stockholder. The stockholder and the engineer had not previously met. The stockholder sold the stock to the engineer for $6 a share.

If the stockholder asserts a claim based on misrepresentation against the engineer, will the stockholder prevail?

A. Yes, because the engineer knew that the value of the stock was greater than the price she offered.
B. Yes, if the engineer did not inform the stockholder of the true value of the inventory.

C. No, unless the engineer told the stockholder that the stock was not worth more than $6 a share.
D. No, if the company's financial statement was available to the stockholder.

Let's focus on Choice (C), which uses "unless" as a modifier. Using our method, when you look at Choice (C), you should say to yourself: "Is there any way the stockholder could prevail if the engineer didn't tell her the stock was worth more than $6 a share?" Remember, as soon as you read the specific inquiry in this question, you should have summoned to your mind the elements of misrepresentation: defendant's misrepresentation of a material past or present fact, defendant's knowledge of falsity/reckless disregard for falsity, defendant's intent to induce plaintiff's reliance, plaintiff's actual and justifiable reliance, and damages. You should also remember other substantive law: that misrepresentation can take the form of non-disclosure only when there exists a *duty to disclose*, due to special circumstances (such as a fiduciary relationship between the two parties). Beyond that, you should recognize that the facts give you additional personal information—that the engineer and the stockholder had ***never met***—which should strongly suggest to you that there was no special circumstance (e.g., a fiduciary relationship) that imposed on the engineer a duty of disclosure as to the real value of the stock; without such a duty, the engineer's non-disclosure couldn't be actionable as misrepresentation. Thus, what Choice (C) states is true: Without the engineer's representation to the stockholder that the stock was worth ***more*** than the engineer was proposing to pay for it, there is ***no way*** for the stockholder to prevail! Choice (C) is the correct response.

Before we leave this question, let's look at Choice (B), which uses "if" as a modifier. Go through your analysis process. First, is the reasoning plausible on the facts? Yes. There's nothing to suggest that the engineer ***did*** inform the stockholder of the inventory's true value. Second, does this resolve a central issue? No. It doesn't resolve the engineer's liability, which must be based on the element of duty. The central issue here concerns the engineer's duty to disclose the value of the stock, so the result Choice (B) reaches, that the stockholder will prevail, cannot be reached on its reasoning; it would ***have*** to provide a basis for liability. Since it doesn't, it can't be the best response.

Finally, look at Choice (A), which uses the "because" modifier. Remember, with "because," the reasoning must be unequivocally shown in the facts. Here, it is: You're expressly told that the engineer knew that the value of the company stock was far greater than what the engineer offered. But that fact doesn't resolve a central issue! Misrepresentation in the form of nondisclosure, as we discussed two paragraphs back, requires a duty to disclose. No such duty exists here. Thus, the engineer's knowledge of the true value of the stock ***doesn't*** make her liable, contrary to what Choice (A) states. (Incidentally, if the representation here were "positive"—e.g., the engineer told the stockholder, "This stock isn't worth more than $6"—then the engineer's knowledge of its value ***would*** be one element supporting a misrepresentation claim.)

Remember that we told you to look at the reasoning before the result? After doing all this work with modifiers, you should see why. Modifiers like "if" and "unless" can ***change the result***—they're "catch words." If you only looked at the answer choices to find a specific result, you couldn't isolate and reject an incorrect answer.

c. How answer choices can be wrong.

Having discussed the threshold issues of issue spotting and modifiers, let's examine how answer choices can be wrong.

In the last section, we told you that your most important analysis skill on the MBE is the ability to identify when an answer choice is definitely wrong. In this section, we'll address the different ways in which choices can be wrong and the order in which you should analyze each choice.

There are three general ways in which an answer choice can be wrong: (1) it can mischaracterize the facts; (2) it can misstate the law; and/or (3) it can ignore a central issue in the question. This is the order in which you should address each of these possibilities. Remember, if a choice fails in ***any respect***, you can stop your analysis, eliminate it, and move on; in order to be correct, an answer choice must be correct ***in every respect***.

Let's look at each of these elements in detail.

1. The reasoning mischaracterizes the facts.

If the reasoning doesn't reflect either the facts as they appear in the question or reasonable inferences drawn from those facts, the answer choice cannot be correct. This can happen in several ways.

a. A blatant contradiction of the facts as stated.

Look at this example from a past MBE:

> The defendant watched a liquor store furtively for some time, planning to hold it up. He bought a realistic-looking toy gun for the job. One night, just before the store's closing time, the defendant drove to the store, opened the front door, and entered. He reached in his pocket for the toy gun, but he became frightened and began to move back toward the front door. However, the shopkeeper had seen the butt of the gun. Fearing a hold up, the shopkeeper produced a gun from under the counter, pointed it at the defendant, and yelled, "Stop!" The defendant ran to the door and the toy gun fell from his pocket. The shopkeeper fired. The shot missed the defendant but struck and killed a passerby outside the store.
>
> A statute in the jurisdiction defines burglary as "breaking and entering any building or structure with the intent to commit a felony or to steal therein." On a charge of burglary, the defendant's best defense would be that
>
> A. the intent required was not present.
> B. the liquor store was open to the public.
> C. he had a change of heart and withdrew before committing any crime inside the store.
> D. he was unsuccessful, and so at most could only be guilty of attempted burglary.

Look at Choice (A), which states that the defendant lacked the requisite intent. This is clearly wrong on the facts: The defendant planned a hold up and entered the store intending to hold it up. Thus, his best defense ***couldn't*** be that he lacked the requisite intent, because ***the facts indicate otherwise***. You don't have to spend any more time here; since Choice (A) misstates the facts, it can't be correct—you can drop that choice without going further: You don't have to analyze the law or determine if the choice addresses a central issue more precisely than the other choices. (The correct Choice is (B), since there was no "breaking" given the fact that the store was open to the public.)

Look at another example dealing with misstating facts:

> A homeowner owned a house in City. On the lawn in front of his home and within five feet of the public sidewalk there was a large tree. The roots of the tree caused the sidewalk to buckle severely and become dangerous. An ordinance of City requires adjacent landowners to keep sidewalks in a safe condition. The homeowner engaged a contractor to repair the sidewalk, leaving it to the contractor to decide the details of how the repair should be made.
>
> The contractor dug up the sidewalk, cut back the roots of the tree, and laid a new sidewalk. Two days after the homeowner had paid the contractor the agreed price of the repair, the tree fell over onto the street and damaged a parked car belonging to a neighbor.
>
> The neighbor has asserted a claim against the contractor, who admits that cutting the roots caused the tree to fall.
>
> The best defense of the contractor is that
>
> A. the tree was on the property of the homeowner.
> B. he repaired the sidewalk in the manner directed by the homeowner.
> C. he could not reasonably foresee that the tree would fall.
> D. he was relieved of liability when the homeowner paid for the repair.

Look at Choice (B). You're told in the facts that the homeowner left "it to the contractor to decide the details of how the repair should be made." Choice (B) directly contradicts this by stating that the contractor repaired the sidewalk in the manner directed by the homeowner. You know, therefore, that Choice (B) cannot be correct. (The correct answer is (C), since *if* the contractor couldn't reasonably have foreseen that the tree would fall, he would not have been negligent, in a situation in which the plaintiff would have to prove negligence.)

You may already have guessed the reason you should eliminate factually incorrect choices; these choices often contain reasoning which is ***legally correct*** and would resolve a central issue in the question if it reflected the facts. As a result, you could easily be seduced (distracted) into choosing these choices if you didn't immediately check the facts and eliminate them from contention!

The examples we've looked at so far are examples of answer choices that directly contradict the facts. Be aware, however, that answer choices can be factually incorrect in ***other*** ways. Let's look at the other major ways an answer choice can misstate the facts.

b. The answer choice goes beyond the facts.

Look at this question, slightly modified from a past MBE:

> A salesman and a mechanic planned to hold up a bank. They drove to the bank in the salesman's car. The salesman entered while the mechanic remained as lookout in the car. After a few moments, the mechanic panicked and drove off.
>
> Soon after leaving the scene, the mechanic was stopped by two police officers for speeding. Noting his nervous condition, the police required the mechanic to exit the car, and one asked him if they might search the car. The mechanic agreed. The search turned up heroin concealed under the passenger seat. The heroin belonged to the salesman.
>
> In a prosecution of the salesman for heroin possession, the prosecution's best argument to sustain the validity of the search of the salesman's car would be that
>
> A. the search was reasonable under the circumstances, including the mechanic's nervous condition.
> B. the search was incident to a valid arrest.
> C. the mechanic had, under the circumstances, sufficient standing and authority to consent to the search.
> D. exigent circumstances, including the inherent mobility of the car, justified the search.

Look specifically at Choice (B), which presupposes there's been a valid arrest. The facts don't mention or imply an arrest; thus, Choice (B) goes beyond the facts, and, as a result, it can't possibly be correct. This example illustrates how a careful reading of the factual assumptions embedded in each choice can be helpful: The legal reasoning stated in Choice (B) might or might not be correct if the facts as stated in the choice were correct,[10] but the choice's misstatement of the facts makes it unquestionably incorrect.

c. The answer choice assumes a fact in dispute.

Sometimes, a choice will characterize a fact as settled when, in actuality, the facts don't show such a clear-cut resolution. Here's an example from a past MBE:

> A woman who owned a house and lot leased the same to a tenant for a term of five years. In addition to the house, there was also an unattached, two-car brick garage located on the lot. Although the tenant earned his living as an employee at the local grocery store, his hobby consisted of wood carving and the making of small furniture. The tenant installed a work bench, electric lights, and a radiator in the garage. He also laid pipes connecting the radiator with the heating plant inside the house. Thereafter the woman mortgaged the premises to a bank to secure a loan. The tenant was not given notice of the mortgage, but the mortgage was recorded. Still later, the woman defaulted on the mortgage payments, and the bank began foreclosure proceedings, as it was entitled to do under the terms of the mortgage. By this time the tenant's lease was almost ended. The tenant began the removal of the equipment he had installed in the garage. The bank brought an action to enjoin the removal of the equipment mentioned above. Both the woman and the tenant were named as defendants.
>
> If the court refuses the injunction, it will be because
>
> A. the tenant was without notice of the mortgage.
> B. the circumstances reveal that the equipment was installed for the tenant's exclusive benefit.
> C. in the absence of a contrary agreement, a residential tenant is entitled to remove any personal property he voluntarily brings upon the premises.
> D. the Statute of Frauds precludes the bank from claiming any interest in the equipment.

Look at Choice (C). Its reasoning characterizes the work bench, lights, and radiator ***conclusively*** as personal property. In fact, the central legal issue here is the characterization of those items — namely, whether they are personal property (and thus not subject to the mortgage) or "fixtures" (and thus subject to the mortgage). This is an issue because the items are of a type that ***could*** be subject to permanent annexation to the realty, depending on the intent of the annexor (here, the tenant) and other circumstances. They probably ***aren't*** fixtures here, though, because the tenant didn't intend to annex them permanently to the realty. Whatever the result, the point here is that Choice (C) ***assumes an essential fact that is the very issue to be resolved***: whether or not the items are personalty. (The correct answer is Choice (B).)

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10. There's no way to know whether the statement would be legally correct if the facts were correct; under *Arizona v. Gant*, the passenger-compartment search would be valid as incident to the arrest if and only if the mechanic posed a danger of interfering with the search; we're not told enough to know whether there was such a danger, given that one officer could have guarded the mechanic while the other did the search.

2. The reasoning is legally wrong.

Once you've determined that the reasoning in an answer choice represents the facts, you should determine whether it's legally correct. This is where careful substantive preparation will pay off!

Just as an answer choice can be ***factually*** incorrect in several ways, it can contain a number of different kinds of ***legal*** errors, too:

- It may overstate the requirements of a crime, tort, or admissibility of evidence;
- It may state an antiquated or otherwise inapplicable rule;
- It may state a rule that has no application to the facts;
- It may make an overinclusive statement of the law, which will be wrong even if it happens to be correct on the facts; or
- It may overstate or understate the correct legal standard.

We'll look at each of these possibilities separately, but first, let's stress once again how important it is to determine what words a response is using in stating a legal ***theory***. Remember, we addressed this in the "issue spotting" section. Its real importance, however, is in determining the legal validity of each response. Simply put, you can't determine if a response is legally correct if you don't understand what legal principle it's addressing.

With that in mind, let's look, in detail, at the major ways in which an answer choice can be legally incorrect.

a. Reasoning that overstates the requirements of a crime, tort, or admissibility of evidence.

This is a common kind of legal inaccuracy. For instance, you may face a question in which someone is claiming negligence, but the answer choice states that the defendant can't be guilty because he didn't act intentionally. Or a choice may tell you that a piece of hearsay evidence is inadmissible as an "excited utterance," because the declarant is available to testify—but unavailability is not a requirement of the "excited utterance" hearsay exception. Or you may be told that a criminal defendant cannot be guilty of murder because he didn't intentionally kill his victim—but "depraved heart" murder does not require intent. As these examples indicate, the most common kind of legal misstatement is one that overstates the requirements of a crime, tort, or evidence-admissibility rule. If you don't have your legal principles memorized correctly, you can be fooled by these misstatements, because they sound as though they should be correct.

b. Reasoning that uses antiquated rules or rules from inapplicable bodies of law.

If a rule is not the modern one, or it doesn't reflect the body of law on which the MBE relies, it can't be the basis of a correct response. For example, a husband is no longer vicariously liable for his wife's torts simply because they're married, and the attractive nuisance doctrine no longer requires that a child be lured onto property by the attractive nuisance. If an answer choice states an outmoded rule like these, it cannot be correct.

Similarly, you need to keep in mind the bodies of law on which the MBE relies. For instance, in Evidence Law, the MBE applies the Federal Rules of Evidence, ***not the common law***. Usually, when the correct answer to a question involves a matter in which the FRE and the common law differ, one of the distractors will state the common-law rule. A frequently used distractor is res gestae; res gestae is a common-law concept not recognized by the FRE. Thus, ***an answer choice relying on res gestae as the source of admissibility for hearsay can't be correct***. Similarly, where transactions in goods are involved, the MBE relies on the UCC, Article 2. If you apply a contradictory common-law rule to questions in which a transaction in goods is involved, you'll get the wrong answer—you can be sure that there are distractors tailor-made for just such a mistake! And finally, in Civil Procedure, you are to assume the Federal Rules of Civil Procedure are in effect; so in an area where the FRCP supplies a different rule than the common law or statutory rules of many states, an answer based on the latter will be wrong.

c. Reasoning applying rules that do not apply to the facts.

A response can correctly characterize the facts but then state a rule of law that is inapplicable to those facts. Here's an example from a prior MBE.

> The defendant is tried for armed robbery of the First Bank of City. At the request of police, the teller who was robbed prepared a sketch bearing a strong likeness to the defendant,

but the teller died in an automobile accident before the defendant was arrested. At trial the prosecution offers the sketch. The sketch is

A. admissible as an identification of a person after perceiving him.
B. admissible as past recollection recorded.
C. inadmissible as hearsay not within any exception.
D. inadmissible as an opinion of the teller.

Look at Choice (A). The teller's action concerning the defendant is an "identification" in the actual, physical sense, since she did "identify" him by making the sketch. While a prior identification can be admissible as an exclusion from the hearsay rule (and thus Choice (A) may suggest the application of a correct rule) it doesn't apply to these facts; these identifications are admissible only if the one who made the identification is a *testifying witness*. Here, you're told that the teller died, and that does a fairly complete job of eliminating the possibility that she's a testifying witness. Thus, even though the exclusion of prior identifications from the hearsay rule is a valid principle of the Federal Rules of Evidence, it simply doesn't apply to these facts, so Choice (A) can't be correct. (In fact, Choice (C) is the best response.)

d. Answer choices that make overinclusive statements of the law; these choices are wrong even if they happen to apply to these facts.

An answer choice that misstates the law ***cannot*** be correct, even if there is a piece of truth in the statement, as it applies to the facts. Suppose, for example, that a factual setting involves testimony that is inadmissible hearsay. One of the choices states that the testimony is "inadmissible, because hearsay is inadmissible." Now, under these specific facts, it's true that the testimony is inadmissible hearsay, but that's ***not because hearsay in general is inadmissible***—as you know, there are lots of exceptions and exclusions to the hearsay rule. Thus, the choice cannot be correct, because it makes an overinclusive statement of the law of hearsay evidence.

e. Answer choices that overstate or understate the applicable legal standard.

Remember the "Three Bears," in which Goldilocks sought the porridge that was neither too hot nor too cold? Well, on some MBE questions, you'll undertake an analogous task: picking the appropriate legal standard from among others that are too strict or too lenient. Here's an example from a past MBE:

During 2012 a series of arsons occurred in City. In early 2013 the City Council adopted this resolution:

City will pay $10,000 for the arrest and conviction of anyone guilty of any of the 2012 arsons committed here.

The foregoing was telecast by City's sole television station once daily for one week. Thereafter, in August 2013, the City Council by resolution repealed its reward offer and caused this resolution to be broadcast once daily for a week over two local radio stations, the local television station having meanwhile ceased operations.

If the city's reward offer was revocable, revocation could be effectively accomplished only

A. by publication in the legal notices of a local newspaper.
B. in the same manner as made, i.e., by local telecast at least once daily for one week.
C. in the same manner as made or by a comparable medium and frequency of publicity.
D. by notice mailed to all residents of the city and all other reasonably identifiable, potential offerees.

Your job here is to choose the minimum that City must do to revoke its offer. The rule on revoking "general offers" is that the offer must be revoked by ***equivalent notice*** to the original offerees—typically via an ad in the same medium as the offer. Here, you have to face the additional obstacle that the original medium, the local TV station, is no longer available. (Note that this makes Choice (B) an incorrect response—and one you might have chosen if you misread the facts.) Of the remaining three answer choices, (D) overstates the standard, and (A), in a sense, understates it, because a newspaper ad wouldn't reach the same audience. That leaves Choice (C) as "Baby Bear's porridge"—that is, the choice that is "just right," i.e., states the correct legal standard.

f. CAVEAT: Answer choices stating only a snippet of a legal rule, which address a central issue.

Make a special note of one exception to our rule that says an under- or over-inclusive statement of the law cannot be correct. Be particularly careful about the following type of "under-inclusive" legal statement: MBE answer choices don't usually state ***every*** element of the crime or tort in the reasoning when the "call" asks if a particular crime or tort has been committed. Instead, the reasoning will most likely state only one essential piece of the principle; the answer can be correct only if that piece satisfies the central issue in the facts. (Remember our discussion about determining "central issues.") Look at this example from a past MBE:

> A customer wanted to purchase a used motor vehicle from a car company. The used car lot of the company, in a remote section away from town, was enclosed by a ten-foot chain link fence. While the customer and a salesman for the company were in the used car lot looking at cars, a security guard locked the gate at 1:30 p.m., because it was Saturday and the lot was supposed to be closed after 1:00 p.m. Saturday until Monday morning. At 1:45 p.m., the customer and the salesman discovered they were locked in.
>
> There was no traffic in the vicinity and no way in which help could be summoned. After two hours, the customer began to panic at the prospect of remaining undiscovered and without food and water until Monday morning. The salesman decided to wait in a car until help should come. The customer tried to climb over the fence and, in doing so, fell and was injured. The customer asserts a claim based on false imprisonment against the car company for damages for his injuries. Will the customer prevail?
>
> A. Yes, because he was confined against his will.
> B. Yes, because he was harmed as a result of his confinement.
> C. No, unless the security guard was negligent in locking the gate.
> D. No, unless the security guard knew that someone was in the lot at the time the guard locked the gate.

Look at Choice (D). False imprisonment requires: (1) a defendant's act or omission that confines or restraints plaintiff to a bounded area (such that plaintiff believes there's no reasonable means of escape); (2) defendant must have intended to confine or restrain the plaintiff; and (3) causation. Choice (D) doesn't mention anything about the customer's belief that there was no reasonable means of escape. The only element on which that choice focuses is the security guard's knowledge that someone was in the lot when he locked the gate. In spite of that, (D) is the correct response. Why? Because there's only one real issue here: the guard's intent. All the other elements are quite plainly satisfied by the facts or inferences drawn from them. Thus, Choice (D) is correct; it focuses on the central issue here, ***even though it's an incomplete statement of a prima facie case of false imprisonment.***

3. An answer choice can be wrong even if it's factually and legally correct, if it's not as precise or effective as another answer choice.

Until now, we've addressed choices that cannot be correct because they include mistakes, either legal or factual. Here is something more subtle: an answer choice that, although correct, is less correct than one of the other choices and thus isn't the best response.

An answer choice can be incorrect simply because it doesn't meet the "call" as effectively as another choice. For instance, suppose that, under a given set of facts, there are two potential defenses available to a defendant; if one of those defenses meets an obstacle posed by the facts more effectively than the other, that will be the correct response. (Remember, we discussed this under "issue spotting.") Here are two rules to apply in determining which is the most "effective" of several potentially correct choices:

a. An answer choice that is easier to prove is more likely to be correct than an answer choice that is difficult to prove.

If you're asked for the plaintiff's best claim, and there are two potential claims, the better claim will generally be the one most easily proven on the facts. If you're asked the defendant's best defense, the same measure will apply: The easier, the better. Here's an example from a past MBE (one which we reviewed earlier):

> A salesman and a mechanic planned to hold up a bank. They drove to the bank in the salesman's car. The salesman entered while the mechanic remained as lookout in the car. After a few moments, the mechanic panicked and drove off.

Soon after leaving the scene, the mechanic was stopped by two police officers for speeding. Noting his nervous condition, the police required the mechanic to exit the car, and one asked him if they might search the car. The mechanic agreed. The search turned up heroin concealed under the passenger seat. The heroin belonged to the salesman.

In a prosecution of the salesman for heroin possession, the prosecution's best argument to sustain the validity of the search of the salesman's car would be that

A. the search was reasonable under the circumstances, including the mechanic's nervous condition.
B. the search was incident to a valid arrest.
C. the mechanic had, under the circumstances, sufficient standing and authority to consent to the search.
D. exigent circumstances, including the inherent mobility of the car, justified the search.

You'll remember that we analyzed this question earlier in the "misstating the facts" section. Here we're faced with a more difficult task: choosing from among the three potential answers, (A), (C), and (D) (remember that we eliminated (B)). While it's certainly true that exigent circumstances can provide the basis for a valid search, this would require that the prosecution introduce all sorts of evidence bearing on the reasonableness of the officers' belief that a search was merited. Choice (A) would also raise issues of reasonableness. If, on the other hand, the prosecutor relies on the mechanic's consent, assuming the mechanic was in a position to offer his consent, the prosecutor's task will be straightforward: Prove that the mechanic consented, that he had the authority to consent, and that's it — the search is valid. Thus, of the three potential answers here, a "consent" search is the easiest to prove, making it the prosecutor's best argument, so Choice (C) is correct.

b. A more precise answer is better than a less precise answer.

What do we mean by "precision?" Think of the question as a bull's-eye with many concentric circles. Precision means that one answer ***covers more of the bull's-eye than any other,*** i.e., ***it either addresses the factual situation in more respects*** than another, or it ***addresses more issues*** in the fact pattern than another. For instance, if you're asked whether a piece of evidence will be admissible, and you have two potential answers —" admissible even though it's hearsay" or "admissible under the 'present sense impression' exception to the hearsay rule"— the latter would be more precise and is more likely to be correct. Or, if there's a ***key legal issue*** in the problem, and one choice deals with that issue more head-on than another, the former is likely to be the best answer. Here's an example from a past MBE.

All lawyers practicing in a state must be members of the State Bar Association, by order of the state supreme court. Several state officials serve on the Bar Association's Board of Bar Governors. The Board of Bar Governors authorizes the payment of dues for two of its staff members to be members of the Cosmopolitan Club, a private dining club licensed to sell alcoholic beverages. The Cosmopolitan Club is frequented by affluent businessmen and professionals and by legislators. It is generally known that the purpose of the membership of the Bar Association staff is to enable them to go where members of the "elite" meet and to lobby for legislation in which the Bar Association is interested. The State Bar Association has numerous committees and subcommittees concerned with family law, real estate law, unauthorized practice, etc., and its recommendations often influence state policy. Some committee meetings are held at the Cosmopolitan Club. The club is known to have rules that restrict membership by race, religion, and sex.

Plaintiffs, husband and wife, who are members of the State Bar Association, petition the Board of Bar Governors to adopt a resolution prohibiting the payment of club dues to and the holding of meetings of the Bar Association or its committees at places that discriminate on the basis of race, religion, or sex. After substantial public discussion, the Board of Bar Governors, by a close vote, fails to pass such a resolution. These events receive extensive coverage in the local newspapers. Plaintiffs bring an action in federal court seeking an injunction against such payments and the holding of meetings in such places as the Cosmopolitan Club.

The strongest argument for plaintiffs is

A. private rights to discriminate and associate freely must defer to a public interest against discrimination on the basis at race, religion, or sex.
B. the failure of the State Bar Association to pass a resolution forbidding discrimination on the basis of race, religion, or sex constitutes a denial of equal protection.

C. the State Bar Association is an agency of the state and its payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.
D. the State Bar Association's payment of dues to such private clubs promotes discrimination on the basis of race, religion, and sex.

Here, look at Choices (C) and (D). They are very similar, except that Choice (C) has an element that (D) is missing: It characterizes the State Bar Association as an ***agency of the state***. This argument, if accepted by the court, would establish that there's ***state action*** involved here, and that's an important issue, since it enables plaintiffs to claim discrimination under the Fourteenth Amendment. (The Fourteenth Amendment doesn't bar purely private acts of discrimination.) If there were no Choice (C), Choice (D) would be a reasonably good answer. But taking into account Choice (C)'s greater precision (it covers more of the bull's-eye, by dealing with the state-action issue head-on), (C) is a better argument than (D). (Notice that it's not clear whether the State Bar Association really *is* an agency of the state — but you're asked for the plaintiffs' "best argument," and the best argument would have to be one that addresses the core issue of state action, which only (C) does.)

c. How to guess intelligently when your reasoning fails you.

No matter how well prepared you are for the MBE, there will be questions you simply can't figure out. ***Don't be lured into unthinking, unsophisticated guessing on those questions!*** Instead, keep in mind the tips outlined below. Remember, if there's one thing the Bar Examiners know how to do, it's how to write good "wrong" answers, and the reason those "wrong" answers are good is because they sound as though they should be correct!

1. Ignore some things you may already know about objective tests.

If you took objective tests in law school, this will be both a benefit ***and*** a detriment on the MBE. Obviously, you'll benefit from knowing how to take objective law exams, but this is a double-edged sword; many of the techniques of "gamesmanship" that may have helped you in law school ***won't*** help you on the MBE. There's a good reason for this: Your law school professors were experts on law, not test-making, and they most likely made mistakes that the Bar Examiners simply don't make. For instance, inexperienced test makers are more likely to make the correct answer be (C) or (D). The Bar Examiners don't do this; they completely randomize the positioning of the correct answer as among (A) through (D). Inexperienced test makers offer answers that are ***inadvertently*** overinclusive or underinclusive. Again, this is a mistake the Bar Examiners won't make. We could go on, but you get the point: Don't waste your time searching for lapses in test construction or reasoning.

2. Don't guess until you've eliminated all the definitely wrong responses.

Even if a question has you stumped, you'll almost certainly be able to eliminate at least one or two responses as definitely wrong. Don't try to guess until you've eliminated those responses. After all, if you can narrow your choice down to two potential answers, you've got a 50-50 chance of picking the best response, as opposed to the 1 in 4 chance you have if you choose at random.

3. Factors that should influence your guess.

Keep in mind that you should apply the following advice only **when your reasoning fails you**. You can undoubtedly think of exceptions to each one of these suggestions. Their only purpose is to state what's most likely to apply in the absence of other facts.

a. Look at the facts, and ask yourself, "So what?"

If you can't pick up what the central issue is from the four responses, go back and look at the fact pattern and see if there's an issue that you may have missed before and seems to predominate. If there is, then it's likely that the correct answer will address that issue.

b. Beware of "seducers."

We'll only touch on this issue here, since it's addressed in significant detail in each of the "Strategies and Tactics" sections at the beginning of each subject. In short, "seducers" exist in every subject. They're those terms that ***seem*** as though they ought to apply to a wide variety of facts, but that actually have no application to the particular fact situation.

For instance, take the "prior identifications" hearsay exception in Evidence. In lay terms, a prior identification would be defined as an identification made by one person of another at

any time prior to a specified event. Wouldn't it be easy if that were all the hearsay exception required? In fact, the hearsay exception for prior identifications (actually, it's a hearsay "exclusion") is usually just a siren's song on the MBE, because it's very technical and won't make otherwise excludable evidence admissible in the vast majority of cases.

Another example? The choice "Privileges and Immunities Clause of the Fourteenth Amendment" in Constitutional Law questions. As a practical matter, there are very few laws that violate this clause, but the text of the clause sounds as though it ought to make a whole variety of laws unconstitutional. That's why it's an MBE favorite as a wrong choice. Make sure you pay close attention to these and similar seducers in every subject.

c. Beware of certainties.

As you know by now, there are few "definites" in law. So be careful when an answer choice uses the words "always," "never," "cannot," "must," and the like. If a choice states something as a certainty, and you can think of even one situation where it doesn't ***apply,*** it can't be the best response!

d. Beware of responses that rely on "people" relationships.

As a general rule, the fact that people are related doesn't change the rules of Contract Law or Criminal Law or Tort Law (with the most obvious exception being the fiduciary duty that parents owe to their children). Generally, if an answer choice implies that one's duties toward someone else are somehow different because of a familial relationship, barring other facts the answer is less likely to be correct than the others.

e. Beware of answers that focus only on results.

No one is liable in Torts or Criminal Law solely because of ***the results*** of his or another's acts or omissions. For instance, in Criminal Law, one can only be liable for a criminal act or omission; if those don't exist, the results of one's behavior won't make one guilty. In Negligence, if there's no duty and so no breach of a duty, there can't be liability, regardless of the results of one's actions. Here's an example from a past MBE.

> A thief was in the act of siphoning gasoline from his neighbor's car in the neighbor's garage and without his consent when the gasoline exploded and a fire followed. A rescuer, seeing the fire, grabbed a fire extinguisher from his car and put out the fire, saving the thief's life and the neighbor's car and garage. In doing so, the rescuer was badly burned. If the rescuer asserts a claim against the neighbor for personal injuries, the rescuer will
>
> A. prevail, because he saved the neighbor's property.
> B. prevail, because he acted reasonably in an emergency.
> C. not prevail, because the neighbor was not at fault.
> D. not prevail, because the rescuer knowingly assumed the risk.

Look at Choice (A). This states only ***the results*** of all the acts described. It doesn't deal with the other essential elements of negligence liability. The ***results*** of the rescuer's acts could be relevant only if there was a statement of how the defendant ***caused*** those results. Thus, as a general rule, a response finding liability only on the basis of results, without regard to the defendant's causation of those results, is unlikely to be correct. (In fact, the correct answer here is (C), because it alone deals with the fact that aside from the strict-liability situation — not applicable here — a defendant can be liable only for fault or on a vicarious liability theory, neither of which was present here.)

f. Be wary of answer choices from unrelated subjects.

As we've noted elsewhere, what makes the MBE an excellent objective test is the fact that distractors are likely to resemble correct responses in some important respect. Thus, it stands to reason that a response that addresses a totally unrelated subject is ***less likely*** to be correct. Here's an example from a past MBE.

> A lawyer, an accountant, and a banker are charged in a common law jurisdiction with conspiracy to commit larceny. The state introduced evidence that they agreed to go to an investor's house to take stock certificates from a safe in the investor's bedroom, that they went to the house, and that they were arrested as they entered the investor's bedroom.

> The lawyer testified that he thought the stock certificates belonged to the banker, that the investor was improperly keeping them from the banker, and that he, the lawyer, went along to aid in retrieving the banker's property. The accountant testified that he suspected the lawyer and the banker of being thieves and joined up with them in order to catch them. He also testified that he made an anonymous telephone call to the police alerting them to the crime and that the call caused the police to be waiting for them when they walked into the investor's bedroom.
>
> The banker did not testify. If the jury believes both the lawyer and the accountant, it should find the banker
>
> A. guilty, because there was an agreement and the entry into the bedroom is sufficient for the overt act.
> B. guilty, because he intended to steal.
> C. not guilty, because a conviction would penalize him for exercising his right not to be a witness.
> D. not guilty, because the lawyer and the accountant did not intend to steal.

Look at Choice (C)—it sticks out like a sore thumb. In every other respect, this question is a substantive Criminal Law question, but up pops Choice (C), stating a (bogus) principle of Constitutional Criminal Procedure. Now, questions of Constitutional Criminal Procedure certainly appear as "Criminal Law" questions—but almost invariably, a question is "about" *either* substantive Criminal Law *or* Constitutional Criminal Procedure, not both. So the mere fact that Choice (C) is from "the other main branch" of the Criminal Law discipline compared with the other three choices makes it less likely to be the correct answer. (In fact, the correct response is Choice (D).)

g. If two answers are opposites, one is probably true.

This is a traditional rule of objective tests that holds true on the MBE. If there are two answers that are direct opposites, the test maker is probably testing your knowledge of the correct rule, so one of those two answers will likely be correct.

h. Remember minority rules.

Sometimes, if you're stuck when trying to find a party's best argument, it may help to think of minority rules. After all, if no other response makes sense to you, it could be that the case is taking place in a jurisdiction that recognizes a minority rule, and this makes an otherwise unattractive option the party's best argument. ***This doesn't mean that you should gear your studying to memorizing minority positions, because that is not a sensible use of your study time.*** If, however, you're reduced to guessing and you just happen to remember a rule that you know is followed by a minority of states, it might be worth applying it.

i. Choose the longest response.

If you've narrowed the responses down but simply cannot choose among the remaining answers, choose the longer one; since it probably contains more reasoning, it's more likely to be precise, and thus more likely to be the correct response (barring any clear facts indicating otherwise).

j. Most importantly, don't get bogged down on questions you don't know!

As you practice, learn to apply these guessing techniques quickly. When you're reduced to guessing, the most important thing is put down at least a ***tentative*** answer and move on to questions you're more likely to know. Remember, you're likely to answer about half the MBE questions fairly easily. If you waste time on questions you really don't know and can't reasonably guess, you run the risk of not having time to work on those you're capable of answering. Especially in Real Property and Civil Procedure, you'll find a number of questions that are technical, lengthy, and obviously difficult—so take care not to spend undue time on these.

What you might do is keep a list on a piece of scratch paper of the questions you want to come back to, if you have the time at the end of the session. Of course, as you answer each question, you should mark the responses you definitively eliminated as incorrect responses, so that, if you do have time to re-analyze the question, you won't waste time going over incorrect responses twice.

HOW TO TAKE THE MBE

So much for specifics on how to study and how to analyze questions. Let's focus on more general advice for taking the MBE.

1. How to prep physically for the test.

You've heard a million times that it's important to be sufficiently well-rested before you face an important exam, and that you shouldn't spend the evening before an exam popping stay-awake pills and cramming. That's true. Watch out, though. You may be tempted to do the opposite, to get twelve hours of sleep. If you're not used to that, it will have just as soporific an effect on you as getting too little sleep! Instead, for a week or so before the exam, try getting up at the hour you'll have to get up on the day of the exam (including travel time, etc., in your wake-up time estimate). That way, you can be sure you'll be alert when you have to be.

As to advice about what to eat, what to wear, what to take to the exam—we're confident that you, as a law school graduate, know perfectly well without being told that you shouldn't wear clothing that cuts off circulation to your extremities or causes difficulty breathing, and that you shouldn't breakfast on Twinkies and Hershey bars when you have to spend the day thinking (not to mention sitting still).

2. When you take the exam itself.

a. Timing.

It's imperative that you stick to a schedule when you take the MBE. With a hundred questions to answer in each of the two, three-hour sessions, you should finish 17 questions every half hour. Whatever you do, don't get behind! Otherwise, you may chew up time on questions you don't know and run out of time for questions you do know. (Remember, the questions are distributed randomly with respect to difficulty, so there are just as likely to be easy questions at the end of the test as at the beginning!)

b. Remember that you can write in the question booklet.

You don't have to leave your question booklet in pristine condition. Take whatever notes help you, highlight whatever you feel needs highlighting, and mark correct and incorrect responses in the margins (given the time constraints). Of course, remember that this ***isn't*** true of the answer sheet—mark only one answer choice for each question on the sheet and make sure that you don't leave any stray marks.

c. Advice on "skipping around."

On some standardized tests, you have enough time to make a general pass through every question and then go back and answer them. You can't do this on the MBE—there just isn't time. The ***worst*** thing you can do is read every fact pattern, answer the questions you know, and go back to the ones you don't. You'll almost certainly find that you won't have time to go back.

However, if you find while practicing that answering a series of longer questions fatigues you, you may need to give your mind a rest and answer a few shorter questions. This is fine, so long as you ***check carefully to make sure you're marking the matching boxes on the answer sheet***. Note that this advice is not inconsistent with the advice in the last paragraph, because here we're saying that, if you ***must*** skip around, just glance at the sheer length of questions without reading them at all.

d. Answer questions in an episodic fashion.

Don't let your reaction to any one question influence how you face ensuing questions. For instance, there will frequently be questions you'll find very easy. If this happens, thank your lucky stars, fill in the answer sheet, and go on. By the same token, if you're stunned by a tough question, make your best guess and then ***start completely fresh*** on the next question—don't go on thinking about a question you had some doubt about. (Although, as we've discussed, you can answer tentatively and make a list of questions to return to, if you have the time.)

e. Maintain your concentration all the way through.

You'll probably find that it's difficult to concentrate in the last hour or so of each session. If you have to, get up and get a drink of water, bite the inside of your cheek, dig your fingernails into your palms—do anything you have to do to stay focused on your work. The questions are randomly organized, so, if you don't concentrate toward the end, you're likely to miss some questions you'd otherwise find simple.

A FINAL WORD OF ADVICE

When it comes time to take the MBE, and you've prepared as much as you can . . . ***relax!*** Tens of thousands of people every year pass their state's bar exam, and they aren't any smarter than you are. By working with this book, you've indicated your determination to succeed. We wish you the best of luck, both on the bar exam and in your legal career.

STRATEGIES AND TACTICS

CIVIL PROCEDURE

COVERAGE AND ASSUMPTIONS

In the MBE *Civil Procedure* questions, you are to assume the application of: (1) the Federal Rules of Civil Procedure; and (2) the sections of Title 28 of the U.S. Code pertaining to trial and appellate jurisdiction, venue, and transfer.

The following Coverage Outline for the *Civil Procedure* portion of the MBE was adopted by the Bar Examiners for all exams to be given on or after February 2019. This is the most up-to-date outline of coverage released by the Examiners as we go to press (July 2019), and your substantive study for *Civil Procedure* should therefore be focused on these topics.

You will have 25 scorable[1] *Civil Procedure* questions on the exam. The NCBE says that approximately two-thirds of these will be based on categories I, III, and V in the Coverage Outline below, and approximately one-third will be based on the remaining categories II, IV, VI, and VII.

COVERAGE OUTLINE

Here's what you need to know:

I. Jurisdiction and venue
- A. Federal subject matter jurisdiction (federal question, diversity, supplemental, and removal)
- B. Personal jurisdiction
- C. Service of process and notice
- D. Venue, forum non conveniens, and transfer

II. Law applied by federal courts
- A. State law in federal court
- B. Federal common law

III. Pretrial procedures
- A. Preliminary injunctions and temporary restraining orders
- B. Pleadings and amended and supplemental pleadings
- C. Rule 11
- D. Joinder of parties and claims (including class actions)
- E. Discovery (including e-discovery), disclosure, and sanctions
- F. Adjudication without a trial
- G. Pretrial conference and order

IV. Jury trials
- A. Right to jury trial
- B. Selection and composition of juries
- C. Requests for and objections to jury instructions

V. Motions
- A. Pretrial motions, including motions addressed to face of pleadings, motions to dismiss, and summary judgment motions
- B. Motions for judgments as a matter of law (directed verdicts and judgments notwithstanding the verdict)
- C. Posttrial motions, including motions for relief from judgment and for new trial

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1. That is, you'll get 25 questions *that count* in your score. In addition, you'll get another 3 or 4 questions that won't count, and that are used by the NCBE for validation purposes. You'll have no way to know which ones count or not. Therefore, you'll see, and need to try to answer, 28 or 29 *Civil Procedure* questions in total.

VI. Verdicts and judgments
- A. Defaults and dismissals
- B. Jury verdicts — types and challenges
- C. Judicial findings and conclusions
- D. Effect; claim and issue preclusion

VII. Appealability and review
- A. Availability of interlocutory review
- B. Final judgment rule
- C. Scope of review for judge and jury

WHAT TO EXPECT

Based on the limited Civil Procedure questions released by the NCBE since they started testing Civ Pro in 2015, as well as accounts from students who have taken the MBE in recent years, here are some observations about what the examiners seem to be testing:

1. The questions tend to be far more focused on fine details embedded in the Federal Rules of Civil Procedure than questions you'd be asked on a typical law school *Civ Pro* exam. So you can pick up a lot of relatively easy points by mastering the FRCP's technical minutiae. As you review the "Study Strategies and Substantive Review" below or the sample questions themselves, you'll likely find it worthwhile to also read, as you go along, ***the full text of each Federal Rule sub-section we cite*** — you'd be surprised how much useful detail you can pick up just by reading and re-reading the full text of the FRCP.
2. By way of illustrating point (1) above, you'll likely be handsomely rewarded for learning FRCP details like: the allowable means for ***serving process*** in a federal action, or the kinds of claims that can be asserted by or against a ***third-party defendant***, or the rules governing when an ***interlocutory appeal*** can be taken.
3. It follows from (1) and (2) above that, unlike many non-*Civ Pro* areas tested on the MBE, your general ***intuition*** about "what the law ought to be" will be of very little use in answering most questions. You'll be tested on many arbitrarily designed procedural rules, as to which even the world's best legal intuition won't much help you, because ***you just need to "know the rule."***
4. Pay special attention to the situations in which various rights will be ***deemed waived*** if not timely exercised. For instance, it's well worth memorizing the list of defenses (e.g., lack of personal jurisdiction, improper service, improper venue, etc.) that are waived if not asserted in the answer or in a pre-answer motion against the complaint.
5. Similarly, the examiners like to test key provisions of ***Title 28 of the U.S. Code*** relating to things like subject-matter jurisdiction, removal, and venue. As with the FRCP, the examiners tend to test pretty narrow black-letter provisions found in Title 28 (e.g., the bright-line rule that D cannot remove from state to federal court if he is a citizen of the state where the action is pending).
6. Conversely, there is relatively ***little*** premium placed on your handling of the kinds of ***abstract*** jurisprudential issues that professors emphasize in law school. You won't need to master, say, the subtleties of the minimum contacts test, or the intricacies of offensive use of collateral estoppel by strangers to the first action, or the federal/state balancing under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). That's not to say that these abstract topics won't be tested — but they'll be tested at a relatively ***superficial*** level. And an hour spent preparing for these advanced conceptual topics is on average likely to pay you smaller dividends than an hour spent on the sort of FRCP minutia that you paid relatively little attention to in law school.

STUDY STRATEGIES AND SUBSTANTIVE REVIEW

We've carefully reviewed the above NCBE Coverage Outline and have tried to match the topics listed in the Outline with the particular substantive rules that seem to be tested most often. So this long section contains a pretty detailed review of those rules — together with examples of how the rules might be tested — organized in the same topic order as the Coverage Outline.

Because *Civil Procedure*'s presence on the MBE is relatively new (only since February 2015) — and because you may not yet have acquired narrative reviews covering the MBE approach to this subject that are as detailed as for the other six, traditional, MBE subjects — we've gone into much more detail here than in the "Study

Strategies" sections for the other subjects. That's also why we've changed the title of this section to indicate that it includes not just "Study Strategies" but also a "Substantive Review."

I. Jurisdiction and venue.

You probably spent a huge amount of time in your law school *Civil Procedure* class on various aspects of jurisdiction. The good news is that this intense study won't be wasted on the MBE: The examiners seem to be using a significant percentage of their *Civ Pro* arsenal on the various sub-topics in this area, including (a) federal subject matter jurisdiction; (b) personal jurisdiction (both state and federal); (c) the mechanics of service of process and notice; and (d) venue. We estimate that these sub-topics will play a major role in between 15 percent and 20 percent of the *Civ Pro* questions.

A. Federal subject-matter jurisdiction.

A majority of MBE *Civ Pro* questions seem to be set in ***federal*** court. Whenever the suit takes place in federal court (including when the defendant ***removes*** an action that the plaintiff brought in state court), you should check to be sure that the federal court has ***subject matter jurisdiction*** over the case. Here are some key points to keep in mind when you're assessing whether subject matter jurisdiction is present:

1. **Diversity or federal question:** There has to be *either* (1) ***diversity of citizenship*** between the parties or (2) a ***federal question*** (which basically requires that the right P is suing on arises under a federal statute, federal regulation, or the U.S. Constitution).

   So, for instance, let's imagine that in your question, the sole claim in the question is a tort or contracts claim by a single P against a single D. In that situation, the case cannot be heard in (or removed to) federal court unless P and D are ***"citizens" of different states.*** (And the fact that D has raised, or is expected to raise, a *defense* based on, say, a federal statute doesn't create a "federal question" — such a question is deemed to exist only if the federal issue appears as part of P's "well-pleaded complaint," which generally means that P's claim has to be ***"based on" federal law.***)

2. **"Complete" diversity:** For there to be "diversity," the diversity has to be ***"complete" — no P can be a citizen of the same state as any D.***

   - **One claim:** More precisely, there has to be at least ***one "claim"*** as to which there is complete diversity — if such a claim is present, then additional claims might be added by "supplemental jurisdiction," in which case there would not have to be complete diversity as to these additional claims.
   - **Typical fact patterns:** The examiners love to give you fact patterns in which the claim is based on state law, and there is either no diversity at all or incomplete diversity. And it may well be the case that neither the "stem" of the question nor any of the choices expressly mentions either "diversity" or "subject-matter jurisdiction" as being lacking. So it's up to you to always check, in any fact pattern involving a federal suit, whether the required subject-matter jurisdiction is present. Here are two examples to help you test your understanding of the requirement of complete diversity and also your understanding of how "supplemental jurisdiction" may repair what would otherwise be a fatal lack of diversity.

     Example 1 (just one claim in case, but multiple Ds): P, a pedestrian who is a citizen of State A, brings an auto-negligence suit in State A federal court against two drivers, D1 (a citizen of State A) and D2 (a citizen of State B). Even though P and D2 are diverse, the required "complete diversity" is not present, since P and D1 are *both citizens of State A*. And there's no federal question present either (since P's claim is based on state law). Therefore, the federal court does not have subject matter jurisdiction over the case, and the case must be *dismissed* (even if all 3 litigants consent to have it heard in federal court).

     Example 2 (multiple claims in case, with supplemental jurisdiction): P, a pedestrian who is a citizen of State A, is hit by a car driven by D (a citizen of State B) when the car fails to stop at a stop sign, apparently because of non-working brakes. P brings a negligence suit against D in State B federal court for $100,000, contending that D *negligently* failed to see that the brakes were kept in proper repair. D impleads X (a citizen of State B), a mechanic who worked on the brakes; D asserts that under state tort-law indemnity principles, if D is found liable for the bad brakes, X is required to indemnify D because X did the work negligently.

     Because impleader claims (brought under FRCP 14) by a Third Party Plaintiff against a Third Party Defendant are within the court's ***supplemental jurisdiction***, the federal court may hear

the entire case (including D's claim against X), even though there is no diversity between D and X. (Furthermore, the D-X claim doesn't have to meet the amount in controversy requirement of $75,000 for diversity cases, again because supplemental jurisdiction obviates the need for that claim to meet the requirement.)

3. **Supplemental jurisdiction:** Be on the lookout for situations in which there is an "anchor" or "main" claim, for which there is either complete diversity or a federal question, and then a second (or third) ***"additional"*** claim which, if viewed on a stand-alone basis, is not supported by either complete diversity or a federal question (or as to which there's diversity but less than $75,000 at stake). When you see such a multi-claim scenario, you MUST consider the possibility that ***supplemental jurisdiction (S.J.)*** applies to the additional claim **—** if so, the court ***can hear the whole case***, including the additional claim, even though the additional claim could not have been brought as a standalone claim in federal court due to the absence of subject matter jurisdiction. (Example 2 above is an illustration of how this can work.)

   So whenever you've got this type of multi-claim scenario — and there wouldn't be subject matter jurisdiction for the additional claim on a standalone basis — you've got to be able to say whether S.J. does or doesn't apply to the additional claim. This means that you have to ***memorize two lists***: the situations in which the S.J. doctrine *applies* to the additional claim, and the ones in which S.J. *doesn't apply* to that additional claim.

   - **Where S.J.** *applies* **to the additional claim:** Here are the most-likely-to-be-tested situations where S.J. ***applies*** to the extra (non-anchor) claim:
     - ***Compulsory*** counterclaims.

       Example 1: P (citizen of State A) brings a federal-question claim against D (citizen of State A). D asserts a state-law-based compulsory counterclaim (c.c.) against P (i.e., a claim based on the same transaction or occurrence) as the main P-vs.-D claim). The court can hear the c.c., even though there's no diversity between P and D, and even if less than $75,000 is at stake.

     - ***Additional parties to a compulsory counterclaim***.

       Example 2: Same fact pattern as in Example 1. D can add P2 as a co-defendant to D's c.c. against P, even though P2 and D are non-diverse.

     - ***Impleader of third-party defendants (TPDs)***, for purposes of claims ***by the third-party plaintiffs (TPPs) against the TPDs***, and claims ***by the TPDs against the TPPs***, but ***not*** claims by the ***original plaintiff*** against the TPDs.

       Example 3: P (citizen of State A) brings a state-law diversity claim against D (citizen of State B). D impleads X (a corporation that's a citizen of both State A and State B) on a state-law indemnity claim that will require X to reimburse D if D is found liable to P. The court can hear a $50,000 claim by D vs. X (even though D and X are not diverse, and the amount in controversy isn't met), and can hear a $50,000 state-law compulsory counterclaim by X vs. D (again, even though they're not diverse), as well as a $50,000 claim by X vs. P (even though *they're* not diverse). But the court *cannot* hear a state-law claim by P vs. X, because S.J. doesn't apply, and P is not diverse with X.

     - ***Multiple plaintiffs*** joined ***under Rule 20***, but for ***amount-in-controversy purposes only.***

       Example 4: P1 (State A citizen) and P2 (State B citizen) join as Rule 20 co-plaintiffs to sue D (State C citizen) on state-law claims. P1's claim is for $100,000, and P2's for $50,000; both arise from the same transaction/occurrence. S.J. applies so that P2 doesn't have to meet the amount-in-controversy requirement. (But S.J. *can't* relieve a ***lack of complete diversity*** in the Rule 20 joinder situation. So if P3, State C citizen, wants to join the suit on a state-law claim arising from that same transaction/occurrence as the main claim, the court cannot hear the case while P3 is present, since the P3/D combo causes a lack of complete diversity that S.J. can't fix.)

   - **Where S.J.** *doesn't* **apply to the additional claim:** Here are the most-likely-to-be-tested situations where S.J. ***doesn't*** apply:
     - ***Impleader of third-party defendants***, for purposes of solving lack-of-diversity or lack-of-amount-in-controversy problems in ***claims by the original plaintiff against the third-party defendant(s).***

       Example 5: In Example 3 above, if P makes a state-law claim vs. X (the third-party defendant), S.J. doesn't apply to that claim. So if P and X aren't diverse (or if the claim is not for more than $75,000), the court can't hear that claim.

     - ***Rule 20*** joinder ***of co-plaintiffs and/or co-defendants***, for purposes of solving a lack of complete diversity.