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Strategies & Tactics for the Finz Multistate Method

Fifth Edition

STEVEN R. FINZ

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Dedication

To Iris

To Jimmy and Mary

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How to Use This Book

This book contains a collection of questions (called "items") in the Multistate Bar Exam format, accompanied by answers (called "options") and explanations. Each of the explanations is intended to be a mini-dissertation on the topic involved.

The chapter entitled **Strategies & Tactics: Playing the MBE Game to Win** (what we call the **Multistate Method**) sets forth a detailed method for approaching and dealing with items in this format. You should study the chapter diligently before beginning to practice with the items that follow it. By the time you have worked your way through 50 or 60 items, you should have become so familiar with this Multistate Method that its use is second nature.

The questions are divided into the seven subject areas tested on the Multistate Bar Examination: Civil Procedure, Constitutional Law, Contracts, Criminal Law and Criminal Procedure, Evidence, Real Property, and Torts. If you are still in law school, you can use the separate sections to review the material that you are studying in each of the subject areas. Each section is accompanied by a subject matter outline and a question index. Using the question index, you can look for questions dealing with the particular topics and subtopics that you wish to review.

The items that appear in this book are similar in content and form to the questions that appear on the Multistate Bar Examination (MBE). On the MBE, each item tests only one general subject area but is likely to cover several topics and subtopics within that area. A Torts question, for example, may test knowledge of intentional torts, negligence, nuisance, and proximate cause, all in the same set of answers (options).

For this reason, most questions (items) in this book may be listed in several different places in the question index. If you have just completed your study of intentional torts and wish to field questions that test your newly acquired knowledge, you can find them by looking at the appropriate place in the Torts question index. You may discover, however, that the same questions also test knowledge of topics that you have not yet studied. This need not prevent the questions from being useful to you.

The Multistate Method game plan suggests that, in answering Multistate items, you treat each option (*i.e.*, proposed answer) as a separate true-false question. Using this approach, you can choose to deal only with the options for which your studies have prepared you. The explanation accompanying each item analyzes why the answer we pick is correct and why each of the incorrect options is incorrect. You can use these analyses to check your responses to the options.

If you are preparing for the MBE, you should work on the items in each of the subject areas after completing your review of those areas. If your review has not prepared you for all the options, you will know what areas need further review. The explanations can help you complete your study.

In addition, this book contains a 200-question practice exam in which the items are shuffled, as they are on the MBE, so that the seven subjects are tested in random order. If you need additional questions to review, or want Strategies & Tactics on each MBE subject, you should purchase a copy of *Strategies & Tactics for the MBE*, also published by Aspen Publishing and available at your local bookstore. For each MBE subject, *Strategies & Tactics for the MBE* delivers detailed advice on what to study and what traps to watch for, as well as actual released MBE questions with detailed answers.

For substantive MBE review, you should check out the *Law in a Flash* MBE Set, which contains flash cards on all MBE subjects (Civil Procedure, Constitutional Law, Contracts, Criminal Law, Criminal Procedure [tested on the MBE as part of Criminal

Law], Evidence, Future Interests [tested as part of Property], Real Property, Sales [tested as part of Contracts], and Torts) as well as a copy of *Strategies & Tactics for the MBE*. The MBE Set is available at your local bookstore.

If you are preparing for the bar exam, you should wait until you have completed your review of all seven Multistate subjects before taking the practice exam contained in this book. It may be a good idea to simulate examination conditions when taking it. Turn off your phone, lock your door, tell the rest of the world to go away, and give yourself three uninterrupted hours for each half of the exam.

GOOD LUCK!

Strategies & Tactics® —Playing the MBE Game to Win

TERROR AND THE MBE

It's given on the last Wednesday of February and July in almost every one of the 50 states, and it has become a significant factor in the bar admitting standards of most states. It evokes loathing and paranoia from the souls of embryonic attorneys across the land. It's the Multistate Bar Examination (the MBE), an all-day challenge consisting of 200 questions on seven important subjects. It scares the devil out of most of us.

The reason it's so frightening to us is that our profession attracts people who learned as they were growing up that they could talk their way into and argue their way out of most situations. I'm one of these people. You probably are, too. Much of the time, people like us treat life as a game. The trouble with the MBE is that it doesn't give us a chance to talk or argue, which is what we believe we do best. We find it too structured, too restrictive. There's not enough game in it. It cramps our style.

When we think that, though, we're forgetting that the people who create the MBE are cut from the same cloth as we are. They are law professors and practitioners who have argued their way into and out of trouble all their lives. They've been playing the same game with their lives that we've been playing with ours. The ideas that appeal to them also appeal to us. The only difference is that they specialize in testing and finding out what other lawyers are made of. Their exam does a pretty good job of it, but we have to approach it the way we approach other problems in our lives—as a game that must be played from a position of strength.

It helps to realize that, by its very nature, the MBE has certain aspects that work in our favor. First, because it is given in most of the states, it can test only general principles of law—no petty details. Second, because its multiple-choice format eliminates the options of argument or explanation, each issue must be so precisely drawn that only one of the four possible answers satisfies the requirements of the question. Most important, because it is given to budding lawyers, the most argumentative and litigious people in the world, it must be scrupulously fair and unassailable.

To assure that the exam will be just and to protect it against attack, the creators of the MBE have developed a method for constructing questions. They stick to a policy that requires that there be no trick questions and no trick answers. No problem will be solved on the basis of a subtle turn of word or phrase. They even have rules to assure the effective use of apostrophes and to eliminate the confusing misuse of pronouns. Questions are screened repeatedly before they are used, and then screened again.

After the exam has been given, the answers are analyzed. Questions that proved too tricky to be fair are invalidated and eliminated from further consideration. Questions that show themselves to have no correct answer or more than one correct answer are also invalidated. Applicants are not supposed to be asked to select the best of four bad answers or four good answers. There is only one demonstrably correct answer to each question. The others are clearly incorrect. That is, it's clear if we follow the right analytical steps.

Since they have a method for creating the exam, we need a method for taking it. This chapter provides a unique Multistate Method. To develop our method, we must begin by understanding theirs.

STRUCTURE OF QUESTIONS

Questions, or "items," as the examiners call them, can be broken into three distinct parts: the root, the stem, and the options.

The ***root*** is the part of the item containing the underlying facts.

The ***stem*** is the part of the item containing the call of the options or assigning a task. Sometimes it is in the form of a question; sometimes it calls for the completion of a sentence.

The ***options*** are the answer choices. Sometimes they state conclusions and nothing more; sometimes they link a conclusion with a reason to support it. Sometimes two or more of the options seem to be related to each other; sometimes each of the four is independent of the other three. One of them is always the correct option; three of them are always incorrect.

Exhibit A shows a typical item.

DISTRACTORS AND *FOILS*

The examiners spend a lot of time and energy creating three wrong options for each item. They call the incorrect options "distractors" or "foils." In using those names, they have unwittingly tipped their hand. According to Webster, a "distractor" is something that compellingly and confusingly attracts in the wrong direction. A "foil" is something that serves to set off another thing to advantage or disadvantage by contrasting with it. By definition, some of the incorrect options are there to make the others look good, and some of them are there to make the correct option seem bad.

Here, again, the nature of the exam works in our favor. The examination is supposed to be a test of knowledge. The correct choice must be somewhere among the four options, but it can't be left exposed for everyone to see; it has to be hidden. According to their own rules, the examiners can't use tricky devices or puzzling language, so they have to hide it behind a screen of distractors and foils. Like a magician's banter, these are designed to make us look away from the real action. That's how the game is played.

Many of the people who create the MBE are law professors or former law professors. In creating distractors and foils, they use insight that comes from their experience with law students. After all, the main purpose of the exam is to find out whether we are finished studying the law and ready to start practicing it. Their foils and distractors are usually based on anticipating the errors that law students are likely to make.

Their method gives all the options a look of superficial plausibility. At first glance, every option appears to be correct. Our response to their bag of tricks must therefore include a careful reading of the language that they use.

Exhibit A

Construction of an MBE question or "Item"

Root of the question (Facts)	Congress passes a law providing that no one who has been a member of an organization that uses unlawful means to deprive any group or person of their rights under the United States Constitution is eligible for employment by the federal government.
Stem of the question ("Call" of options)	Is the law constitutional?
Options (Answer choices)	(A) No, because it is an *ex post facto* law. (B) No, because it prohibits members of certain organizations from holding public office whether or not they knew the purpose of the organizations. (C) Yes, because employment by the federal government is not a right but a privilege. (D) Yes, because the federal government has the right to protect itself by not employing persons who hold views inconsistent with the United States Constitution.

Incomplete definitions and arguments

No one needs to be more precise in the use of language than a lawyer. Learning to communicate precisely is one of the goals of a law school education. A first-semester law student may define "murder" as the unjustified killing of a human being, but a lawyer knows that an unjustified killing isn't murder unless it's an unjustified killing of ***another*** human being ***with malice aforethought***.

Some of the foils and distractors that appear on the MBE consist of incomplete or imprecise statements, like those made by beginners in the classroom. An option that says, "John is guilty of murder because he committed the unjustified killing of a human being," is wrong because it is based on an incomplete definition. Don't assume that the examiners left out the rest of the definition by mistake, or that they expect you to know what they really mean. Don't allow yourself to complete the argument or definition in your mind and conclude that it is correct.

Dealing with the facts

Lawyers must be very careful with facts. They must assume nothing in addition to what has been established or given. In summing up to a jury, for example, trial counsel may not refer to any facts that have not been proven. Frequently, distractors and foils are designed to find out whether we have the ability to play the game the way a lawyer plays it. If a prosecutor proved only that the defendant shot the victim and that the victim died an hour later, the defendant's prosecution for murder would have to be dismissed unless the prosecutor had also proven that the defendant's bullet caused the victim's death. If the facts in the root of the item do not say that the victim died as a result of the defendant's bullet, don't assume or infer that she did. Only a medical expert is competent to draw such a conclusion, and you are probably not a doctor. Without such proof, we must conclude that the defendant's guilt has not been established.

On the other hand, lawyers can't get away with ignoring facts that have been established. In arguing appeals, for example, lawyers may not claim that the facts proven at the trial should be ignored. They are restricted to making arguments about the legal effects of the proven facts. Since examiners are out to determine whether we can do a lawyer's job, they are likely to fill the root with implausible facts in an effort to trick us into rejecting or disbelieving them. Falling for their ploy can be disastrous. In taking the MBE, we must accept the facts that are given to us, no matter how unlikely or implausible they may seem.

We may have been taught, for example, that an intoxicated person is not capable of driving her car in a reasonable manner. If, however, an item's root tells us that after the defendant drank two quarts of whiskey, she was driving her car in a reasonable manner when she collided with the plaintiff, we must accept this as true. Since negligence is unreasonable conduct, and since we are told that the defendant was driving her car in a reasonable manner, we must conclude that she was not negligent.

Common errors

Some areas of the law are so confusing to law students that they furnish the examiners with a fertile field in which to cultivate foils and distractors. The literature distributed by the examiners

indicates that incorrect options contained in MBE items are frequently based on common errors made by law students. Often, these common errors result from misunderstandings about the significance of legal expressions that have different meanings for lawyers than for laypersons.

The doctrine of "last clear chance" is an example of how this common confusion can be used to create an effective foil or distractor. "Last clear chance" is a doctrine that can be raised only by a plaintiff; its only effect is to eliminate the consequence of the plaintiff's contributory negligence. Thus, even in a jurisdiction that applies the "all-or-nothing" rule of contributory negligence, a plaintiff who goes to sleep in the middle of the road and is struck by a defendant who sees her in time but fails to take reasonable steps to avoid striking her may still win her case. In finding for the plaintiff, the court is likely to say that the plaintiff's negligence does not bar her recovery because the defendant had the "last clear chance" to avoid the accident.

Knowing that many students are confused about this doctrine, the examiners may create a distractor that says, "The defendant wins because the plaintiff had the last clear chance to avoid the accident." It sounds logical, but not to someone who understands that "last clear chance" is a doctrine available only to plaintiffs.

Similarly, a foil or distractor may be based on the "dead man's rule," which excludes evidence of certain conversations with a person now deceased. Although the "dead man's rule" sometimes keeps evidence out, it never justifies the admission of evidence. Thus, an option that says, "The evidence is admissible under the dead man's rule" has to be incorrect, even though at first glance it sounds logical.

Overlooking the obvious

Some lawyers lose cases because they overlook the obvious. Perhaps that's why the examiners occasionally create an option that is so obviously correct that there is no rational excuse for missing it. It's amazing how many applicants reject such an option in the belief that nothing so important could possibly be so easy.

Items regarding the sufficiency of a deed description are good examples of this technique. The general rule is that a description in a deed is sufficient if it adequately identifies the realty conveyed. Usually, it is impossible to decide whether a description satisfies this requirement without knowing something about surveying in general and the geographical area involved in particular. Since the MBE is not a test of surveying or geographical knowledge, however, its creators cannot expect us to determine the validity of a particular description. Instead, they are likely to give the language of a deed description, tell you that it adequately identifies the realty conveyed, ask whether it is valid, and then create an option that says, "The description is valid because it adequately identifies the realty conveyed." Can anything be more obviously correct? Don't miss a gift like that one.

Plausible creations

Some applicants are so intimidated by the examination process that they are sure the correct options will involve concepts they never heard of before. This not only leads them to reject options that are obviously correct, it causes them to select options that consist of meaningless garbage.

Knowing this, the examiners occasionally indulge their sense of whimsy by building foils and distractors around Latin words or phrases that sound momentous but are used in a context that makes them meaningless.

Post hoc ergo propter hoc is an example of a Latin phrase that may be at the core of one of these seemingly plausible creations. The expression translates as "after which, therefore because of which," and is a name given to the error in reasoning that leads people to offer such arguments as "It always rains after I wash my car, so washing my car makes it rain" (*i.e.*, it rains after (and, therefore, because) I wash my car). This is likely to show up as a foil or distractor in an option that says something like, "John will win under the doctrine of *post hoc ergo propter hoc*."

If that kind of bluff fools us, we will end up at the examiners' mercy. In a question that actually appeared on a past MBE, many applicants were taken in by a double-talk option that stated that a plaintiff could not be the holder of a certain easement because "an incorporeal hereditament lies only in grant." One way to avoid falling for such seemingly plausible creations is to remember that after passing all your law school finals, taking a bar review course, and cramming for the exam, you probably are familiar with any rule of law that will matter to the examiners. If an option cites a doctrine or rule that you never heard of, it's probably incorrect.

Unfamiliar phrases

This doesn't mean that all the correct options will use familiar language. One of the goals of the exam is to determine whether we really understand the law that we've learned or whether we've just been trained like parrots to spout phrases. To accomplish this goal, the examiners may describe familiar concepts in nontraditional words. Instead of saying, for example, that the defendant owed the plaintiff a duty of reasonable care because he created a foreseeable risk to her, they may say, "The defendant owed an obligation to the plaintiff because it appeared that the defendant's conduct would injure her." Instead of saying that strict liability is imposed on one who engages in an ultra-hazardous activity, they may say that "a defendant is liable without regard to fault because his or her occupation is extremely dangerous." Remember that there are many ways of saying anything, and that substance is far more important than form.

PLAYING THE RIGHT ROLE

In the real world, lawyers play various roles. Sometimes they are judges, deciding the outcome of an issue or selecting the winner of a case. Sometimes they are advocates, making the best argument possible for one of the parties, even though there's no telling whether that party is going to win. Sometimes they are scholars, unconcerned about who wins or loses, interested only in seeing the legal significance of a fact or in selecting the most applicable rule of law, without caring whose interest will be served. It is natural that the items appearing in the MBE game should cast us in each of these three roles. This makes knowing how to act in each of the roles an important part of our Multistate Method.

Acting as the judge

[*Typical stem:* If the plaintiff sues the defendant for battery, should the court find in the plaintiff's favor?]

In the real world, the judge starts out with no particular result or conclusion in mind. He or she does not decide questions of fact but is always alert for misstatements about the facts in lawyers' arguments. If an argument does not accurately characterize the facts, is based on an inference not justified by the facts, or is based on a rule of law that is not correctly stated, the judge rejects it. He or she rules in favor of the argument in which accurate statements about the facts and law are consistent with the conclusion with which they are coupled.

When you are asked to act as judge, do not decide questions of fact. Do not try to determine who should win or how the issue should be resolved until you have considered all the arguments presented in the options. Examine each option in turn. First, see whether the facts and law are accurately stated. If not, reject the option. See whether the conclusion offered is consistent with the argument advanced. If not, reject the option. There will be only one option in which the argument advanced is based on accurate statements of fact and law and is consistent with the conclusion offered. This is the correct choice. Select it, even though you may not like the result. After all, you're a judge.

Acting as the advocate

[*Typical stem:* Which of the following is the most effective argument in favor of the defendant's position?]

Unlike the judge, the advocate works toward a particular result—the one he or she's been paid or assigned to accomplish. It doesn't matter whether he or she believes that the client will win. So long as there is any question at all for either the judge or jury, he or she understands that a client is entitled to representation. The advocate assumes that the client can win and then makes the argument that is most likely to bring about the victory. He or she doesn't invent facts but presents and interprets in the light most favorable to the client those facts that have been established.

When an item asks you to be an advocate, examine each of the options in turn to see whether the law is accurately stated and whether the inferences on which the option is based are justified by the facts that are given. If not, reject it. See whether the option presented could possibly result in victory for the client the stem has assigned you to represent. If not, reject it. There will be only one option in which the argument advanced is based on accurate statements of law and fact and which supports your client's position. Choose it, even if you don't really believe that your client can win. After all, you're an advocate.

Acting as the scholar

[Typical stem: What best describes the interest in the land that the son had on the day after the landowner's death?]

The scholar doesn't try to decide or influence the outcome of a case. The scholar uses his or her knowledge of the law to recognize the legal significance of a particular fact or to select the most applicable rule. He or she sees an intellectual challenge and nothing more. Like a professor asking a question in the classroom, he or she doesn't care who wins or loses. He or she focuses on a specific and limited issue, listens to each of the options chosen by the students, and then smiles at the student whose choice comes closest to the one he or she had in mind when he or she asked the question.

Do the same with an item that casts you in the role of a scholar. Forget about who will win or lose. Don't worry whether the option you select will result in justice. Just focus on the specific issues involved and try to resolve them in your mind. Then examine each of the options carefully and select the one that comes closest to the selection you have already formulated.

TIMING

Our Multistate Method must teach the most efficient possible use of time. Most people barely manage to answer all the items in the allotted time. **You probably will not have an opportunity to go back and check your choices**. It's wise to get them right on the first pass because that's probably the only chance you will get. Additionally, going back and changing answers never seems to work out well.

According to the Examiners, seven subjects are tested. The test presents 200 questions total—25 questions in each of the seven subjects (25 questions are being "tested" by the Examiners that do not form part of your score, but you won't be able to distinguish these questions). You should recognize, however, that in reality, *10* law school subjects are tested—the section on Contracts includes questions on Sales, the section on Property includes questions on Future Interests, and the section on Criminal Law includes questions on Criminal Procedure.

There are usually two or more versions of each exam so that, although everyone gets the same questions, the questions are not in the same order. They are randomly shuffled in each version. Therefore, you may see two real property items in a row and then not see another until 10 or 20 items later.

Everyone feels stronger in some of the subjects than in others, and there will be a powerful temptation to go looking for those questions that deal with your best subjects. Resist that temptation. **Answer the questions in the order in which they appear**.

There are three good reasons why you should take this advice. First, the tough ones aren't going to get any easier with the passage of time. If anything, fatigue will make them seem even tougher, so there's no point in putting them off. Second, if you read item #3, for example, and decide not to answer it until later, part of your mind will still be working on it when you try to answer subsequent items. This will keep you from devoting all your energy to the item before you and may even cause you to base a choice in one question on facts that you still remember from item #3. Third and most important, if you skip item #3, there will be a blank space on your answer sheet, and you may become confused into putting the answer to item #4 in the space for item #3. Once you do that, every choice that follows will be written in the wrong space.

This potential pitfall alone makes it better to guess than to leave a blank space. But there's more. The examiners give you one point for every correct choice and don't subtract any points for a wrong choice. This means that a wrong choice is certainly no worse than a blank space. In most states, you can get 60 or more wrong and still pass the exam. If you can't come up with the correct option, guess and move ahead. You have at least a 25 percent chance of guessing correctly.

After the exam is over, the examiners usually determine that some of the items—sometimes as many as 10—were invalid. When this happens, they often give credit for any option chosen. This means that you may receive a point even if you guessed wrong. If you left it blank, though, you'll get nothing.

You won't really be guessing anyway, because a "guess" is a choice that is based on no real knowledge. By the time you get to the bar exam, your head will be so filled with information that there won't be any item that you don't know at least something about. Even if it's buried deep in the unconscious recesses of your mind, this knowledge will increase the probability that the option you choose is correct.

Time is not on your side. You'll have two three-hour sessions with 100 items in each. That breaks down to 33.3 items per hour, about 17 items per half hour, or 1.8 minutes per item. It is important to stay on schedule. Each item is worth one point. You don't get anything extra for the ones you spend extra time on. Every extra second you spend on one item is a second less that you'll have to spend on the next.

THE TEST BECOMES A GAME

After observing a courtroom proceeding for the first time, the layperson typically scratches his or her temple and says, "It's a game. Nothing but a game." We, on the other hand, say it's serious business. But when we reflect on the origins of the adversary system, we see knights in armor jousting on a field of battle in the belief that the righteous was assured of winning the contest.

It started out as a game, and we're kidding ourselves if we try to believe that there isn't any game left in it. In a way, the phrase "adversary system" is a euphemism for a complex and exciting game that society plays, with lawyers as its game pieces. It is fitting, therefore, that the bar examination, which tests competency to practice law, is, itself, a kind of game, testing, among other things, the applicant's ability to play.

All games involve a combination of knowledge and strategy. A craps shooter has no control over the numbers that come up on the dice; he or she wins or loses by making bets based on his or her knowledge of the odds. A card player decides "when to hold 'em and when to fold 'em" by knowing what cards are in the deck and remembering which ones have already been dealt. Trivial Pursuit champions win by moving their game pieces in the most advantageous way, but they don't get to move them at all unless they know the answers to the questions that appear on the game cards.

The MBE is a game that can't be won without knowledge but knowledge isn't everything. Given enough time, any decent lawyer who approaches the MBE seriously enough to prepare for it adequately can get a passing score. But the exam is long and the hours are short. Without an effective strategy, an applicant is likely to be cut down by the clock. Ding dong. Game over.

To avoid running out of time, move through every item as swiftly as possible. To avoid being foiled and distracted, however, read every relevant word patiently and carefully. At first, these goals seem to be inconsistent with each other. By beginning with an orientation, our Multistate Method provides us with a strategy for accomplishing both of them.

ORIENTATION

The fact pattern in an item's root may raise dozens of issues, some of which can be resolved and some of which won't ever be resolved. Usually, however, the stem is more narrowly drawn to eliminate all but

one or two of the possible issues. If we waste time answering questions that weren't asked, we won't have a chance of answering the ones that were.

To avoid being drawn in to a series of false directions, ***always begin with a quick reading of the stem*** to determine the call of the question. Look for the role that each stem assigns and the task that it sets before you. It may specify a particular cause of action, it may name a crime, it may point to a clause of the United States Constitution, or it may designate the parties, plaintiff, and defendant.

After the stem, ***quickly*** read the root. We're still not ready to begin choosing among the options, so we aren't sure what we're looking for, even though the stem gave us a pretty good idea. This first reading of the root is part of our orientation.

Don't struggle too hard at this point to understand all the facts. Don't worry about keeping the chronology straight. Don't begin drawing those little diagrams you learned about in law school or bar review. Some facts in the root may not even be relevant to the options, and attempting to deal with them at this point may turn out to be a waste of time. If necessary, you can always return to the root to check the facts again.

MAKING THE PLAY

Our first reading of the stem and root was an orientation, designed to find out what role we've been assigned to play and what task we've been asked to accomplish. Now it's time to accomplish it. Read the stem again, more carefully this time.

Basic game plan

Because the examiners' game plan includes options that make us look in the wrong direction, our Multistate Method must adopt a game plan that will keep us from being foiled and distracted. Since the wrong options are supposed to make the other options look either good or bad by comparison, don't compare one option to the others. Treat each as a separate option and as if it were the only one before you. Recall that, according to the examiners' policy, only one can be correct. To play it safe, even if you have found one that you think is true, don't stop until you have checked all four options.

With pencil in hand, examine each option carefully, returning to the root to confirm facts if necessary. Mark the option with a "T" if it is true, with an "F" if it is false, and with a "?" if you can't make up your mind. When you're done, you should have three "F"s and one "T." So long as you have a good clear "T," count "?"s as "F"s. If you have no "T"s at all, treat a "?" as a "T." The option with the "T" next to it is the correct answer.

Although this basic game plan works for all MBE item types, there are a few variations that may help us deal more efficiently with particular kinds of items.

Negative response

Occasionally a stem asks for a "reverse" response, such as "Which of the following is LEAST likely to violate the Fourteenth Amendment?" When that happens, restate the stem in the

reverse: "Would the following violate the Fourteenth Amendment?" You should end up with three "T"s (yes) and one "F" (no). Choose the one that got the "F."

Overlapping options

Sometimes some of the options contain parts of others. Typical options:

What crime is the defendant is guilty of?

(A) Burglary only.

(B) Robbery only.

(C) Burglary and Robbery.

(D) Neither Burglary nor Robbery.

Instead of trying to deal with these overlapping options in combination, break them down into the individual components (*e.g.*, Burglary and Robbery). Give each of the individual choices a "T" or "F," and then find the option that contains the correct combination of choices.

Three-to-one options

Most of the time, you are going to get two "yes" options and two "no" options. However, in some items, three of the options offer one conclusion coupled with different reasons for it, while the fourth offers the opposite conclusion with no reason at all. A typical question:

Should the court decide in the defendant's favor?

(A) No.

(B) Yes, because . . . .

(C) Yes, because . . . .

(D) Yes, because . . . .

Since the odd option is unaccompanied by a reason, it is impossible to select it without eliminating the other three first. For this reason, when confronted by a three-to-one options item, always consider the odd option last. Then choose it only if all of the others have received "F"s.

What-if options

Sometimes the options offer additional facts and the stem calls for selection of the fact pattern that would be most likely to bring about a particular result. This kind of item is like the classroom game in which the professor changes the facts in a case under discussion by saying, "Now, what if . . .?"

[*Typical stem:* Which of the following additional facts or inferences, if it was the only one true, would be most likely to result in a judgment for the plaintiff?]

It is important to remember that this kind of item does not require you to decide whether the additional fact or inference in the "what if" option is true; it directs you to assume that it is. If you encounter one of these, combine the stem with each "what-if" option in turn, accepting as true the

facts that it contains. In assigning a "T" or "F," don't ask whether the facts are true or the inference is justified; assume that they are. Then decide whether the existence of these additional facts or inferences would be likely to bring about the particular result (*e.g.*, in the previous item, ask, "If this fact were true or this inference were justified, would it result in a judgment for the plaintiff?").

SELECTING THE CORRECT OPTION

Selecting the correct option is easy once you've placed three "F"s and one "T" next to the given options. The hard part is deciding whether to give an option a "T" or "F." This becomes easier if an appropriate strategy is applied. Although the MBE will present you with 800 options (*i.e.*, four for each question), all options fall into only two categories. Our Multistate Method provides a strategy to use for each of the categories.

Simple options

Some options only state possible conclusions. These are called "simple options." Here's a typical simple-option item:

> A man took a diamond ring to a pawnshop and borrowed $20 on it. It was agreed that the loan was to be repaid within 60 days, and if it was not, the pawnshop owner, the defendant, could sell the ring. A week before the expiration of the 60 days, the defendant had an opportunity to sell the ring to a customer for $125. He did so, thinking it was unlikely that the man would repay the loan and that if he did, the defendant would be able to handle him somehow, even by paying for the ring if necessary. Two days later, the man came in with the money to reclaim his ring. The defendant told him that it had been stolen when his shop was burglarized one night and that therefore he was not responsible for its loss. Larceny, embezzlement, and false pretenses are separate crimes in the jurisdiction.
>
> Which of the following crimes has the defendant most likely committed?
>
> (A) Larceny.
> (B) Embezzlement.
> (C) Larceny by trick.
> (D) Obtaining by false pretenses.

These options are "simple" rather than "complex," but not "simple" rather than "difficult." Since nothing is given but a bare conclusion, simple options usually require the most work. In dealing with each simple option, it is necessary to remember the essential elements of whatever rule of law is applicable and to check the root to see whether every one of those elements is satisfied by the facts given.

In the previous example, to decide whether to mark option (A) with a "T" or "F," it is first necessary to remember that larceny is the trespassory taking and carrying off of personal property known to be another's with the intent to permanently deprive. Then it is necessary to return to the root to see whether the defendant trespassorily took the ring, whether he carried it off, whether he knew

that the ring belonged to another, and whether he had the intent to permanently deprive. The option can receive a "T" only if all the elements of the crime are satisfied by the facts.

In the real world, it is likely that some of these elements will raise questions of fact for a jury to determine or questions of law that ultimately will be decided by an appellate court. Different juries may come up with different answers to the questions of fact, and different appellate courts may come up with different answers to the questions of law. An MBE item must have three options that are clearly incorrect, however, and one that is clearly correct. This means that the facts must be structured so as to make it clear that at least one of the elements of the rule applicable in each option is unsatisfied.

In the previous example, the defendant's act cannot be larceny (option A) because there was clearly no trespassory taking. A defendant trespassorily takes when he or she receives possession contrary to the rights of the owner. Since the defendant received possession of the ring lawfully, with the man's consent, and with no improper purpose, he did not trespassorily take it and cannot be guilty of larceny. Larceny by trick (option C) is committed by fraudulently obtaining temporary possession of personal property known to be another's. Since the defendant was not planning to do so when he obtained the ring from the man, he cannot be guilty of larceny by trick. Obtaining by false pretenses (option D) is committed by fraudulently inducing another to transfer title to a chattel. Since the man never transferred title to the ring, the defendant cannot be guilty of obtaining it by false pretenses. As can be seen, options (A), (C), and (D) are clearly incorrect.

At the same time, the facts must establish that all the elements of the rule supporting the correct option are satisfied. Embezzlement (option B) is committed by criminally converting property of which the defendant has lawful custody. Since the man delivered the ring to the defendant before the defendant developed the intent to steal it, the defendant's custody was clearly lawful. Because only a person with the right to do so is entitled to sell a chattel, and because the defendant did not have the right to sell it, his sale of the ring was clearly a criminal conversion. Since all the elements of embezzlement are clearly satisfied, (B) must be the correct option.

Complex options

Most of the time, an option will consist of two parts: a conclusion and a reason giving rise to the conclusion. Here's a typical complex-option item:

> The plaintiff was eating in a restaurant when he began to choke on a piece of food that had lodged in his throat. The defendant, a physician who was dining at a nearby table, did not wish to become involved and did not render any assistance, although prompt medical attention would have been effective in removing the obstruction from the plaintiff's throat. Because of the failure to obtain prompt medical attention, the plaintiff suffered severe brain injury from lack of oxygen. The jurisdiction had a statute that relieved physicians of malpractice liability for emergency first aid. When the defendant saw the plaintiff choking, he knew the plaintiff was substantially certain to sustain serious injury.
>
> If the plaintiff asserts a claim against the defendant for his injuries, should the court rule in the plaintiff's favor?

(A) No, because the defendant did not cause the piece of food to lodge in the plaintiff's throat.

(B) No, because the defendant knew that the plaintiff was substantially certain to sustain serious injury.

(C) Yes, because the jurisdiction has a statute that relieves physicians of malpractice liability for emergency first aid.

(D) Yes, because a reasonably prudent person with the defendant's experience, training, and knowledge would have assisted the plaintiff.

"Because" as a conjunction

It is important to understand what an option built around the conjunction "because" or its synonym "since" means. An option of this kind actually makes two statements. If I say, "The street is wet *because* it is raining," my conclusion is "the street is wet," and my reason is "it is raining." If it isn't raining, my whole statement is false. Even if it is raining, my statement is true only if the rain is what is making the street wet.

To decide whether to give the option a "T" or "F," we must first determine whether the reason given is based on an accurate statement. In the real world, we can find out whether it is raining by looking out the window. In an MBE option, if the reason given involves a statement about the facts, we must return to the root to see whether the facts are accurate. If the reason involves a statement about the law, we must search our bank of knowledge to see whether it states the law accurately. If the reason is based on an inaccurate statement of either facts or law, the option gets an "F."

But even if the reason given is based on an accurate statement of the facts or law (*i.e.*, it is actually raining), we cannot give the option a "T" unless the reason logically justifies the conclusion. Since rain does make the street wet, the reason given in the previous statement (*i.e.*, it is raining) justifies the conclusion (*i.e.*, the street is wet), and the entire statement is correct. If the statement is, "The street is wet because the sun is shining," the statement is incorrect even if the sun is shining, because sunshine does not make the street wet.

Option (A) in the previous item says that the court should not find in the plaintiff's favor "because the defendant did not cause the piece of food to lodge in the plaintiff's throat." Since the reason given (*i.e.*, the defendant did not cause the piece of food to lodge in the plaintiff's throat) is a statement about the facts, we must return to the root to see whether it is accurate. According to the root, the defendant happened to be dining at a nearby table when the plaintiff began choking on food. Since there is no fact indicating that the defendant had anything to do with the food in the plaintiff's throat, the reason is based on an accurate statement about the facts. So far, option (A) is valid.

Next, we must decide whether the fact that the defendant did not cause the food to lodge in the plaintiff's throat justifies the conclusion that the court should find for the defendant. Here, of course, it is necessary to rely on our knowledge of the law. Under the law of negligence, a defendant is generally not under a duty to assist a plaintiff in peril unless the defendant did something to cause that peril. Since the defendant did not cause the food to lodge in the plaintiff's throat, the defendant had no obligation to help remove it, and his failure to do so cannot result in liability. Since the reason is an accurate statement, and since it logically justifies the conclusion with which it is coupled, option A should receive a "T."

If option (A) states the reason as follows: "The court should find for the defendant *because the plaintiff's brain injury resulted from a lack of oxygen*," the option would be incorrect. The root states that the plaintiff's brain injury was caused by a lack of oxygen, and this establishes that the reason is based on an accurate statement of the facts. But the medical cause of an injury does not necessarily determine whether a particular defendant is liable. Thus, the reason given does not justify the conclusion to which it is coupled, and the option should receive an "F."

Option (B) relies upon our knowledge of the law. A defendant who performs a voluntary act with the knowledge that it is substantially certain to result in injury intends that injury and may be liable for causing it. Intentional tort liability cannot be based on a failure to act, however, unless there was an obligation to act in the first place. Because of the rule that provides that a defendant has no duty to assist a plaintiff in peril unless the defendant caused that peril, the defendant had no obligation to assist the plaintiff. Thus, even if he was substantially certain that his failure to do so would result in injury, he is not liable for the injury. The option should receive an "F."

Option (C) references a statute that is in effect in the jurisdiction (a common distractor in MBE questions). Here, the question tells you that the jurisdiction has a statute that relieves physicians of malpractice liability for emergency first aid. Where they exist, statutes of the kind described (*i.e.*, "Good Samaritan" laws) protect a physician who renders aid, but they do not require that he or she render aid. For this reason, the existence of such a statute would not impose a duty on the defendant and would not be relevant to the defendant's liability. Its existence would not make him or her liable. For this reason, this option should receive an "F."

Option (D) is incorrect because it is a misstatement of the law. Since a defendant is generally not under a duty to assist a plaintiff in peril unless the defendant did something to cause the peril in the first place, the defendant's liability is not measured by what any other person would have done. Since the fact that a reasonably prudent person with the defendant's experience, training, and knowledge would have assisted the plaintiff would not justify the conclusion that the court should find for the plaintiff, option (D) should receive an "F."

PRACTICE MAKES BETTER

By the time the exam comes around, you want to feel like you have done as many practice questions as you could have and that you left everything you had out on the field. As you're doing practice questions, keep a running list of "Things I Do Not Know" — basically a simple list of why you missed certain questions (*e.g.*, "Only defendants can remove to federal court."). Study that list every night. Memorize it so you never miss those points of law again. More than likely, those points of law will be on the MBE.

Anyone who says that practice makes perfect is telling a tall tale; no one and nothing can be perfect. Practice does lead to improvement, though. No matter how good you are at answering Multistate-type questions now, the more you practice, the better you'll get at it. If you know your law, practicing our Multistate Method will equip you with a strategy for achieving success on the MBE.

Instead of trying to find out what the questions are going to be, concentrate on mastering the Method so that you'll be ready for whatever comes. The questions in this book are similar to those that the Multistate Bar Examiners use.

Try to deal with each item by using the Method outlined in this chapter. Start by orienting yourself to the item with a quick reading of the stem and root, paying careful attention to the role that each assigns to you. Then apply the basic game plan, treating each option as a separate true-false choice and marking it with a "T," "F," or "?."

The MBE is a very special game because it's a game played only by prospective lawyers. Some will be winners, and others will be losers. Decide in advance which you intend to be and build your whole attitude from that basic decision. When you've learned to think of the MBE as a game, you may even find that you look forward to playing it. Afterward, you may hear yourself saying that it was fun. Nevertheless, it's a game you don't want to play more than once. So, practice, practice, practice.

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CIVIL PROCEDURE

1. A woman was injured when her car collided with a man's vehicle in State A. The woman was a citizen of State B, and the man was a citizen of State C. The woman filed her complaint in federal court in State C based on diversity jurisdiction. Because the man was deceased, she named the man's executor as defendant. The executor was also a citizen of State C. Because the executor was not home at the time the woman served her complaint, she left it with the executor's wife as allowed under the applicable federal rule. However, both the State C rule and the State A rule required personal service of process on executors of estates. The executor moved for summary judgment, arguing service was invalid because the woman failed to personally serve him with the complaint.

   How should the court rule?

   (A) Grant the motion, because the federal court must apply the law of the state in which it is sitting.

   (B) Grant the motion, because the federal court must apply the law of the state in which the claim arose.

   (C) Deny the motion, because the motion for summary judgment will affect the woman's substantive rights.

   (D) Deny the motion, because the rule is arguably procedural.

2. A man sued a company in federal court for claims based on the federal National Labor Relations Act. Thirty days after the service of the last pleading, the man's lawyer filed and served a demand for a jury trial. The court granted the demand, finding juries normally tried such claims and there was no compelling reason not to do so.

   Is the court's decision correct?

   (A) Yes, because the court has the discretion to allow an untimely request for a jury trial.

   (B) Yes, because there is no indication the man intended to waive his right to a jury trial.

   (C) No, the right to a jury trial is waived unless demand is made within 14 days after service of the last pleading.

   (D) No, a jury trial demand must be made in the initial complaint.

3. A musician, a citizen of State A, sued a company in federal court, claiming the company violated his federal copyright in a song he had written when the company used it as an advertising jingle without his permission. The company was incorporated in State B, and all of its executives and other decision-makers were headquartered in State C. The musician sought $30,000 in damages. Later, the woman who co-wrote the song, who was a citizen of State B, was allowed to join the lawsuit. She claimed $100,000 in damages.

   The company moved to dismiss the lawsuit for lack of subject matter jurisdiction. How should the court rule?

   (A) Deny the motion, because the woman's claim can be added to the musician's to meet the amount in controversy requirement.

   (B) Deny the motion, because the musician is making a federal copyright claim.

   (C) Grant the motion, because the woman is a citizen of State B.

   (D) Grant the motion, because the musician is only claiming $30,000 in damages.

4. After a man, a citizen of State A, was injured in an automobile accident, he sued several defendants for $100,000 in damages in state court in State B. The man sued a truck driver, a citizen of State B, a doctor, a citizen of State C, and a company, incorporated in State C and had headquartered in State D. The doctor filed a notice of removal to federal court in State B. Neither the truck driver nor the company objected to removal.

   Can the suit be removed to federal court?

   (A) Yes, because neither the truck driver nor the company objected.

   (B) Yes, because the case could have originally been brought in federal court.

   (C) No, because no federal question is involved.

   (D) No, because the truck driver is a citizen of State B.

5. A doctor, a citizen of State A, sued a pharmaceutical company, incorporated in State B and with its primary place of business in State B, in federal court in State B. The doctor claimed $500,000 in damages based on breach of contract and tortious interference claims, arguing the actions of the company made it impossible for him to make necessary contracts with medical suppliers in State C, where he also had a practice.

   In deciding the doctor's claims, what law regarding contracts and torts should the court apply?

   (A) The law of State A, because a plaintiff is the master of his or her claim.

   (B) The law of State B, because jurisdiction is based on diversity.

   (C) The law of State C, because this is where the claim arose.

   (D) The federal common law, because the doctor chose to sue in federal court.

6. After being injured by faulty construction work that was done on her home, a woman, a citizen of State A, sued a contractor, a citizen of State B, in federal court in State B. The woman claimed $30,000 for personal injuries, $40,000 for breach of contract, and $10,000 for negligence. After a trial, the jury only awarded $10,000 in damages for the woman's personal injuries, and $10,000 in damages for negligence. The contractor then challenged the verdict, arguing the federal court lacked jurisdiction over the claim. Did the federal court have proper jurisdiction?

   (A) Yes, because the amount in controversy was over $75,000.

   (B) Yes, because the contractor waived jurisdiction by not challenging it when the complaint was filed.

   (C) No, because the woman was only awarded $20,000 total.

   (D) No, because no individual claim was in excess of $75,000.

7. A freelance writer sued a magazine in federal court claiming federal civil rights violations. The court believed the claims made in the writer's complaint put the magazine on notice and supported a possible claim, but not a plausible one.

   Does the writer's complaint fulfill the applicable requirements of the federal rules?

   (A) Yes, because it put the magazine on notice.

   (B) Yes, because it supported a possible claim.

   (C) No, because it did not contain detailed assertions of the facts underlying the claim.

   (D) No, because it did not support a plausible claim.

8. A man was called as a juror in a case brought in federal court against his boss. During voir dire, he stated that he was positive he could be fair and impartial, was planning to start a new job in a few months in a different

state, and had no strong feelings or prior knowledge regarding the issues brought in the plaintiff's complaint.

Would it be proper for the juror to be excused?

(A) Yes, because his boss was one of the parties.

(B) Yes, because it is likely he had an actual bias in favor of his boss.

(C) No, because he was positive he could be fair and impartial.

(D) No, because he had no strong feelings or prior knowledge regarding the issues brought in the complaint.

9. A filmmaker from State A filed suit against a producer from State B in State B federal court. The filmmaker claimed $100,000 in damages related to business dealings between the two men. The state rules for service of process were identical to the federal ones. In order to serve the summons and complaint, the filmmaker first went to the producer's business office, but the producer was not there. Two adult employees, members of the company's executive team working on the new video game that was at the heart of the lawsuit, were at the office, and offered to accept service. Just as the employees made their offer, the producer's administrative assistant, who had just turned 18 years old that day, returned from lunch and offered to accept service. At the same time, the producer's wife arrived at the office and said she would take it. The filmmaker declined the offers and went to the producer's home to see if he was there. When he knocked on the door, the producer's adult sister answered the door. Although she had nothing to do with the producer's business, she told the filmmaker she had been living with her brother for two years and would accept service of the complaint.

Who would be the most appropriate person to accept service?

(A) The members of the executive team, because they are company decision-makers.

(B) The sister, because she lives with the producer.

(C) The administrative assistant, because she has implied authority to act on the producer's behalf.

(D) The wife, because she is married to the producer.

10. A woman, a citizen of State A, sued a doctor, a citizen of State B, in federal court in State B, claiming $200,000 in damages after she had an adverse reaction to a drug the doctor prescribed her. The doctor filed a motion for summary judgment, arguing State B's statute of limitations for claims such as the woman's had already expired. The woman countered that her claim was filed well within the federal statute of limitations.

How should the court rule?

(A) In favor of the woman, because statutes of limitation are arguably procedural.

(B) In favor of the woman, because the federal court applies federal common law in determining the appropriate statute of limitations.

(C) In favor of the doctor, because statutes of limitations are substantive law.

(D) In favor of the doctor, because the federal court should apply the law of the state in which it is sitting.

11. A company filed a diversity action in federal district court in State A against a man for breach of contract. After a trial, the district court found the applicable law of contracts in State A was unsettled. However, the district court ultimately determined that the highest court in the state would likely rule in favor of the company on that particular issue. The man appealed, arguing the district court misinterpreted state law. The court of appeals affirmed, stating it would defer to the district court's determination of state law since it was seated in that state.

Was the court of appeals decision correct?

(A) Yes, because the challenged law is substantive.

(B) Yes, because the district court sits in State A.

(C) No, because the district court was determining unsettled state law.

(D) No, because the district court should have sent the question to the state's highest court for a determination.

12. A man, a citizen of State A, sued a company, incorporated in State B and with its primary headquarters in State C, in federal district court in State A for $100,000 in damages after he was injured by one of the company's products. The company filed a pre-answer motion to dismiss, arguing the court lacked jurisdiction based on diversity because it was unlikely a court would award the man more than $500. The court denied the motion. In its subsequent answer, the company argued the case should be dismissed because the court lacked personal jurisdiction over it since it had never tried to make money in State A or use any of State A's roads.

How should the court rule?

(A) Dismiss the action, because the company did not purposefully avail itself of the privilege of conducting activities within the forum state.

(B) Dismiss the action, because exercise of jurisdiction would not be fair and reasonable.

(C) Not dismiss the action, because the company did not raise the issue in its first motion.

(D) Not dismiss the action, because the company put a product into the stream of commerce.

13. An independent contractor, a citizen of State A, sued a company, incorporated in State B and with its primary place of business in State C, in federal district court. The contractor claimed $100,000 for false imprisonment, stating "the contractor was confined in a storage room overnight when a company employee negligently locked the door with the contractor still inside." The contractor did not suffer any physical harm caused by his time in the storage room.

The company filed a motion to dismiss. How should the court rule?

(A) Grant the motion, because the contractor failed to state a claim.

(B) Grant the motion, because it is unlikely a court would award over $75,000 in damages in this case.

(C) Deny the motion, because the complaint puts the company on notice of the claim being asserted.

(D) Deny the motion, because there is no indication that it is impossible for recovery to be over $75,000.

14. A man owned a home in State A and lived there for 30 years. After meeting a woman online, he decided to sell his house and move to her home in State B for the foreseeable future to "give love a try." Three days later, the man was involved in an accident with a doctor who was domiciled in State B. He sued the doctor for $100,000 in federal district court in State B. Shortly after filing his suit, the man moved back to State A when his relationship with the woman unexpectedly ended after a fight. The doctor moved to dismiss for lack of subject matter jurisdiction.

Does the district court have jurisdiction over the claim?

(A) Yes, because the man was a citizen of State A when the injury occurred.

(B) Yes, because the man was a citizen of State A when the suit was filed.

(C) No, because the man was a citizen of State B when the injury occurred.

(D) No, because the man was a citizen of State B when the suit was filed.

15. A man, a citizen of State A, bought a life insurance online from a company based in State B. Several years later, a company based in State C agreed to assume the obligations of the State B company and mailed a reinsurance certificate to the man. The man accepted the new offer and paid premiums by mail from State A to the company's office in State C. The State C company had no other contacts with State A. When the man died, the company refused to pay the beneficiary of the policy because it believed the man had committed suicide, which wasn't covered under the policy. The beneficiary sued the company in State A pursuant to State A's long-arm statute. The company argued the State A court had no personal jurisdiction over it.

    Does the State A court have personal jurisdiction over the company?

    (A) Yes, because of State A's interest in protecting its residents in cases like this.

    (B) Yes, because the original policy was purchased online.

    (C) No, because the company did not have sufficient minimum contacts with State A.

    (D) No, because any judgment would violate the company's due process rights.

16. A truck driver from State A sued a trucking company in State A court for violations of the state's wage and hours laws. The truck driver claimed over $200,000 in damages. The trucking company moved to have the case removed to federal district court. The trucking company was incorporated in State B and all of its directors and top management who directed the company worked in State B. However, the company had 60 percent of its trucking fleet, its truck-driving school, and all of its repair centers in State A.

    Is removal of the claim to federal district court appropriate?

    (A) Yes, because the company is incorporated in State B.

    (B) Yes, because the company is directed from State B.

    (C) No, because the company has done a significant amount of business in State A.

    (D) No, because the truck driver's claims are based on State A law.

17. A woman sued a company in federal court, claiming several violations of federal patent law. During discovery, the woman's attorney inadvertently disclosed a draft report written by one of the woman's expert witnesses to the opposing party.

    May the attorney still claim work-product protection for the draft report?

    (A) Yes, by notifying the company of the accidental disclosure.

    (B) Yes, by asking the court for a protective order.

    (C) No, because the attorney waived work-product protection by disclosing the report.

    (D) No, because the report was not the final report intended for trial.

18. In 2016, a woman sued a company in federal court after a remote-controlled toy sold by the company exploded and severely injured her. She sent a discovery request to the company asking for "all electronically stored sales records relating to sales of the toys from 2006–2016." Although the company could produce the records for 2013–2016, the remaining sales records had been deleted a month before the woman had filed suit. The company said that under a new cost-saving initiative, it had started routinely deleting all sales records more than three years old to free up space on the company's computers. However, now that the suit had been filed, it had suspended the deletions. The woman contacted a computer expert, who said it might be possible to recover the lost records if the company had an old machine that had been retired from use before the routine deletions, but that finding the records would

be very expensive and might not recover anything. The woman argued the company should pay for the necessary experts to find the missing information.

If the company does not produce the missing information, should the court order it to do so?

(A) Yes, because the company intentionally deleted the requested information.

(B) Yes, because the information was potentially recoverable.

(C) No, because the deletions were done as part of the company's cost-saving initiative.

(D) No, because it was reasonable for the company to delete sales records that were more than three years old.

19. A man sued a doctor in federal court. The doctor decided to answer the complaint. Which of the following potential defenses will not be waived if doctor does not include the defense in his answer?

(A) Insufficient service of process.

(B) Improper venue.

(C) Lack of personal jurisdiction.

(D) Lack of subject matter jurisdiction.

20. After staying in a hotel in State A, a woman, a resident of State B, sued the hotel for breach of contract in a state court in State B. The hotel was incorporated and located in State A. The hotel did not do any business in State B, nor did it have any bank accounts or employees in State B. However, the hotel did advertise on a billboard in State B and its Internet site gave driving directions from several cities in State B, advertised its proximity to State B, and accepted reservations and credit card payments from people all over the world (including people in State B).

Is the hotel subject to personal jurisdiction in State B?

(A) Yes, because its advertising and Internet site targeted State B consumers.

(B) Yes, because it advertised on a billboard in State B.

(C) No, because it did not do any business in State B.

(D) No, because the injury occurred in State A.

21. A woman, a shareholder of a company, brought a class action lawsuit on behalf of herself and all other shareholders against the company in federal district court. The woman claimed $10,000 in damages, and noted that there were approximately 50 shareholders of company stock. If all 50 claims were aggregated, the amount in controversy would be $500,000 dollars.

Would the federal district court have subject matter jurisdiction over the claim?

(A) Yes, because it is being brought as a class action.

(B) Yes, because the aggregated amount in controversy exceeds $75,000.

(C) No, because there is no indication all shareholders will agree to join the action.

(D) No, because there is no indication any individual claim exceeds $75,000.

22. In 2016, a man, a citizen of State A, sued a woman, a citizen of State B, in federal district court in State B. The man and woman had been married for 10 years in State A before they were granted a divorce by a court in State A. The woman moved to State B in 2015. During the original divorce proceedings, the woman was granted custody of the couple's children, who were born in State A. The man now seeks custody of the children and alimony in excess of $75,000.

Does the federal court have jurisdiction over the case?

(A) Yes, because the woman moved to State B.

(B) Yes, because the children were born in State A.

(C) No, because the divorce was granted by State A.

(D) No, because the man is seeking custody of the children and alimony.

23. A student, who is a citizen of Ireland, sued a restaurant, incorporated in State A and with all of its offices in State A, in federal district court in State A. The student claimed $50,000 in personal injury and $50,000 for breach of contract.

Does the federal court have jurisdiction over the claim?

(A) Yes, because the student is a foreign national.

(B) Yes, because the amount in controversy is over $75,000.

(C) No, because the personal injury and contract claims cannot be aggregated.

(D) No, because there is no indication the defendant consented to the federal court's jurisdiction.

24. A man, a citizen of State A, sued a woman, a citizen of State B, for $100,000 in personal injuries caused by an automobile accident between the two. After a trial in federal district court, the court ruled in favor of the woman and awarded no damages to the man. The woman then filed suit in the same federal district court for $100,000 in personal injuries she suffered in the same accident. Soon thereafter, the man moved to State B, intending to stay there indefinitely.

May the woman file her claim in the federal court?

(A) Yes, because the federal court had subject matter jurisdiction over the first action regarding the accident.

(B) Yes, because citizenship is determined at the time the suit is filed.

(C) No, because the woman's claim is barred under the compulsory counterclaim rule.

(D) No, because the woman's claim is barred by *res judicata*.

25. A man sued a company in federal court claiming violations of federal civil rights and employment laws. Ten days after service of the last pleading directed to an important fact issue, the man filed a written demand for a jury trial on that issue with the court and served it on the company. Ten days after his demand, the man reconsidered and moved to have his jury demand withdrawn. The company opposed the man's motion.

How should the court rule on the man's motion?

(A) Allow the motion, because the man made the original jury demand.

(B) Allow the motion, because the man made the motion within 21 days of the last pleading directed to the issue.

(C) Deny the motion, because the man did not request withdrawal within seven days of the jury demand.

(D) Deny the motion, because the company did not consent to the withdrawal.

26. State A sent a certified letter to a homeowner informing him that if he did not pay his delinquent tax bill his property would be put up for public sale. By state law, the homeowner was required to keep his mailing address updated, but he had failed to do so when he had moved out of the home and into an apartment he owned in a nearby city. Consequently, the letter was returned as "unclaimed" to the state. The state took no further action before putting the property up for public sale 20 days later.

After his property was sold, the homeowner sued, claiming the state had violated his due process rights by failing to notify him of the sale. Was the state's notification of the sale sufficient?

(A) Yes, because the state sent notification by certified mail to the homeowner's last known address.

(B) Yes, because the state sent notification by certified mail to the property that was subject to the delinquent tax bill.

(C) No, because the letter was returned undelivered.

(D) No, because the property was put up for sale less than 60 days after the letter was returned.

27. After a jury trial in federal district court based on diversity jurisdiction, the court believed the jury's compensatory damage award met the state standard for excessiveness. Consequently, the court offered the plaintiff the choice of either accepting a lower award than that given by the jury or submitting to a new trial.

May the court do so?

(A) Yes, because the court believed the award was excessive under the state standard.

(B) Yes, because the court could simply lower the jury's award if it chose to do so.

(C) No, because there was no indication the jury's award was so excessive as to "shock the conscience."

(D) No, because forcing the plaintiff to accept a potentially lower award violates the Seventh Amendment.

28. In what situation may a court grant a party relief from a final judgment on the basis that the final judgment is void?

(A) When the party discovers new evidence that by due diligence could not have been discovered in time to move for a new trial.

(B) When the party is deprived of due process by failure to give notice.

(C) When fraud has been committed by the adverse party.

(D) When there has been a clerical omission in the court's judgment.

29. The owner of a gas station, who was a citizen of State A, sued a trucking company in federal district court. The trucking company was incorporated in State B, had its entire fleet of trucks and all of its repair centers in State C, and operated its trucks in 48 states. However, the company's CEO and other decision-making officers were based in State A. The gas station owner claimed $20,000 in actual damages and $1 million in punitive damages, arguing the trucking company violated federal trucking laws by habitually using a vacant strip of land adjoining the owner's gas station as a place to move hazardous cargo from one truck to another as trucks passed through the state.

Does the federal district court have subject matter jurisdiction over the owner's claim?

(A) Yes, because the claim involves a question of interstate commerce.

(B) Yes, because the owner's claim is based on federal law.

(C) No, because the owner is only claiming $20,000 in actual damages.

(D) No, because the trucking company is also a citizen of State A.

30. A songwriter sued a singer in federal court, claiming violation of federal copyright laws. The songwriter notified the singer that he planned to depose him for trial. However, on the day of the singer's deposition, the singer failed to appear.

Was the notice of deposition sufficient to compel the singer's appearance at the deposition?

(A) Yes, because the singer is an adverse party.

(B) Yes, because there is likely substantial need for the singer's deposition.

(C) No, because the songwriter did not subpoena the singer.

(D) No, because the singer will likely be called to testify at trial.

31. A woman sued a man in federal district court, claiming his use of her artwork on his blog constituted a violation of federal copyright law. The man defended himself by arguing that his use of the artwork met the legal definition of "fair use" under the applicable law because his blog was educational and he was writing critically about the artwork. The federal district court ruled in favor of the man, finding the way he used the artwork met the legal definition of "fair use." The woman appealed the decision.

What standard of review will the appellate court use in making a decision regarding whether the use of the artwork was "fair use"?

(A) *De novo*, because whether the use meets the legal definition of "fair use" is a question of fact.

(B) *De novo*, because whether the use meets the legal definition of "fair use" is a mixed question of law and fact.

(C) Abuse of discretion, because whether the use meets the legal definition of "fair use" is a question of fact.

(D) "Clearly erroneous," because whether the use meets the legal definition of "fair use" is a matter of law.

32. A city in State A sued the county claiming that the county's occupation tax violated both the State A and Federal Constitutions. The court ruled in favor of the county, finding the tax was lawful under both constitutions. Several county employees in State A then brought a class action suit against the county, challenging the same tax on the same basis as the prior claim. The county employees received no notice of the earlier lawsuit nor were they represented in the prior claim.

Are the employees barred from asserting their claim?

(A) Yes, because their claim is barred by *res judicata*.

(B) Yes, because their claim is barred by claim preclusion.

(C) No, because the employees did not receive notice of the earlier suit.

(D) No, because the employees are bringing their claim as a class action.

33. A man believed his business partner was stealing money from their business. Consequently, he sought a temporary restraining order from the court. Which of the following four requirements are not necessary for the court to grant a temporary restraining order without notice of a hearing to the man's business partner?

(A) The man must provide some security to pay for any costs or damages if the partner is wrongfully restrained.

(B) The man must certify in writing the efforts he made to give notice to his business partner and the reasons why the court should not require notice.

(C) The man must have first moved for and been granted a preliminary injunction against his partner.

(D) The man must give the court specific facts showing he will suffer immediate and irreparable injury.

34. An alternative energy company, incorporated in State A, placed 100 large wind turbines five miles off the coast of State B for the purpose of generating electric power for the citizens of State A, B, and C. After a hurricane, many of the turbines were destroyed. Much of the wreckage ended up in a State B city's harbor, making the harbor inaccessible to its large scallop and

fishing fleet for several weeks. While some of the ships were able to sail farther up the coast to another harbor in State C, several tons of seafood were lost or spoiled because the ships couldn't offload their cargo fast enough. Although there was no way to clearly calculate the damages, city accountants estimated that the city lost at least $1 million in port fees and fish processing costs.

The city sued the energy company in federal court, and the company moved to dismiss for lack of subject matter jurisdiction. Does the federal court have jurisdiction over the city's suit?

(A) Yes, because the city's claim is substantially related to interstate commerce.

(B) Yes, because the incident was substantially related to maritime activity.

(C) No, because all of the company's turbines were off the coast of State B.

(D) No, because all of the company's turbines were less than 10 miles offshore.

35. After severe flooding in State A, the Federal Emergency Management Association issued a check to a woman in State A to fix her home's air conditioning and heating units. Before the woman received the check, it was stolen from her mail carrier and cashed with the woman's forged signature at a small check-cashing business. The check was then turned over to a bank in State A, and the bank collected the funds owed on the check from the Federal Reserve. Eight months later, when the United States learned the check had been stolen, it sued the bank in federal district court in State A to recover the amount of the check. The bank responded that the applicable statute of limitations in State A barred the lawsuit because the federal district court was located in State A and there was no federal statue on point regarding the issue. The United States argued that there was no applicable statute of limitations under federal common law.

The federal district court ruled that State A law applied to the action and the United States was barred from bringing its suit. Is the district court's decision correct?

(A) Yes, because federal courts cannot create federal common law.

(B) Yes, because the federal court must follow the substantive law of State A.

(C) No, because the law is arguably procedural.

(D) No, because the action involves the obligations of the United States.

36. A man from the Northern District of State A got in an auto accident in the Eastern District of State B with a truck driver from the Western District of State C, a security guard from the Western District of State C, and a doctor from the Southern District of State D. The man sued the truck driver, the security guard, and the doctor in federal court based on diversity jurisdiction.

In which judicial districts would venue be proper for the man's action?

(A) The Eastern District of State B.

(B) The Northern District of State A, the Western District of State C, and the Southern District of State D.

(C) The Western District of State C and the Southern District of State D.

(D) The Western District of State C.

37. Which of the following motions is lost if a party fails to make it before filing an answer to a complaint?

(A) Motion to dismiss for lack of subject matter jurisdiction.

(B) Motion to dismiss for lack of personal jurisdiction.

(C) Motion for a more definite statement.

(D) Motion to dismiss for insufficient service of process.

38. A football player sued a doctor in federal district court. If the complaint was mailed to her and she waived formal service, how long does the doctor have to answer the complaint?

    (A) Within 14 days after receipt of the complaint.

    (B) Within 21 days after receipt of the complaint.

    (C) Within 21 days after the complaint was mailed.

    (D) Within 60 days after the request for waiver was mailed.

39. A man was a huge fan of a science fiction movie franchise. He owned every piece of merchandise that had ever been produced, every single book, and was the founding member of a group of people who dressed up as the franchise's characters and went to sporting events, carnivals, and other events. Finally, he named all of his children after franchise characters and turned his car into a life-size model of one of the franchise's spaceships. After a 20-year gap between movies, the franchise finally released a new film. The man went to go see it and thought it was terrible. In fact, he thought it was so terrible that it ruined everything he had ever liked about the franchise. Consequently, he sued the franchise's owners in federal court for damages to compensate him for having to buy a new car, rename his children, and sell all of his merchandise.

    How should the franchise's owners respond to the man's complaint?

    (A) Make a motion for a more definite statement.

    (B) Make a motion for summary judgment.

    (C) Make a motion for declaratory judgment.

    (D) Make a motion to dismiss for failure to state a claim.

40. A poet sued a playwright in federal district court in State A, claiming the playwright copied a play written by the poet and produced it in a theater in State A. The poet claimed violations of both federal copyright law and State A unfair competition laws. The playwright moved to dismiss the unfair competition claim for lack of subject matter jurisdiction.

    Does the federal district court have jurisdiction over the state claim?

    (A) Yes, because success on the federal claim is a prerequisite to success on the state claim.

    (B) Yes, because both claims arose out of production of the play in State A.

    (C) No, because the federal claim does not create pendent jurisdiction over the state claim.

    (D) No, because the unfair competition claim is governed by State A substantive law.

41. A model, a citizen of State A, sued a lawyer and an accountant in state court in State A for injuries sustained during a fight at a baseball game. The lawyer was a citizen of State A, and the accountant was a citizen of State B. The model claimed $100,000 in damages for cuts to his face and a broken nose that cost him several important modeling jobs. A year after filing suit, a surveillance tape at the stadium was discovered. It showed that the lawyer was not involved in the fight at all, so the model dismissed his claim against him. Twenty days after the dismissal, the accountant sought removal of the case to federal district court in State A.

    Can the accountant have the case removed to federal court?

    (A) Yes, because the lawyer's dismissal was based on newly discovered evidence.

    (B) Yes, because the accountant sought removal within 30 days of the lawyer's dismissal.

    (C) No, because the accountant sought removal more than 14 days after the lawyer's dismissal.

(D) No, because the accountant sought removal more than one year after the state court case was commenced.

42. A man, a 55-year-old native of Italy, filed suit in federal district court against his former employer alleging discrimination based on age and national origin. The federal district court dismissed the complaint, finding it failed to allege specific facts constituting a prima facie case of employment discrimination.

Was the federal district court's decision correct?

(A) Yes, because the man needed to show he had a prima facie case before the former employer would be required to answer.

(B) Yes, because the action was based on a federal question.

(C) No, because the man only needed to make a short and plain statement of his claim.

(D) No, because there was no indication that there was no set of facts on which relief could be granted.

43. A marine mechanic finished repairing a boat that was left in his care. After the repairs were done, a man, his ex-wife, and a mortgage lender all claimed to be the true owner of the boat. The mechanic does not want to keep the boat, and he fears that if he gives it to the wrong person, the other two will sue him for damages.

Under the circumstances, what would be the mechanic's best course of action?

(A) File an interpleader action.

(B) File a declaratory judgment action.

(C) File an impleader action.

(D) File an intervention of right action.

44. A plane traveling from State A to State B crashed in State A, killing all of the passengers. One hundred wrongful death actions against the airline were filed in federal district court in State A. Fifty wrongful death actions against the airline were filed against the airline in State B. State A and State B had very different laws regarding the amount of damages available in wrongful death actions. The airline requested a transfer of the 50 State B actions to State A federal district court based on convenience, noting the crash occurred in State A and the majority of those killed in the crash were State A residents.

If the State B actions are transferred to federal court in State A, what law will the federal court in State A apply to the State B actions?

(A) State A, because the federal district court is sitting in State A.

(B) State A, because the crash occurred in State A.

(C) State B, because the actions originated in State B.

(D) Federal common law, because there is a conflict between the laws of State A and State B.

45. A woman, a citizen of State A, underwent surgery in State B. During the surgery, a medical device that was being implanted in her back snapped and damaged her spine. The woman sued the manufacturer of the device in federal district court in State B and sued the doctor and the hospital in State B state court. The manufacturer moved to dismiss the woman's action for failure to join the doctor and hospital as necessary parties under Fed. R. Civ. P. 19(a).

Should the federal district court dismiss the woman's case?

(A) No, because the doctor and hospital are joint tortfeasors.

(B) No, because the doctor and hospital are potential defendants in the woman's action.

(C) Yes, because the doctor and hospital are necessary and indispensable parties.

(D) Yes, because the doctor and hospital are likely jointly and severally liable.

46. A cellphone company sued an Internet provider for patent infringement in federal district court. The Internet provider filed a motion to dismiss, and the district court ruled in the Internet provider's favor and awarded attorney's fees and costs. In granting the motion, the court found that the president and sole shareholder of the cellphone company had acted in an inequitable way and that his inequitable conduct was chargeable to the cellphone company. Because it was afraid it would be unable to collect the court's award, the Internet provider moved to amend its pleading to add the president personally under Fed. R. Civ. P. 15 and to amend the judgment to make him immediately liable for the award under Fed. R. Civ. P. 59(e).

Should the court grant the Internet provider's motion?

(A) No, because the president has not had an opportunity to respond to the claim for personal liability.

(B) No, because there is no indication that the new claim was the result of newly discovered evidence.

(C) Yes, because the president was president and sole shareholder of the cellphone company.

(D) Yes, because the president's actions are chargeable to the cellphone company.

47. A man sued a carpenter for negligence in federal district court after a ceiling repaired by the carpenter collapsed and injured the man. The district court ruled in the carpenter's favor, finding he was not negligent in making the repairs. The man then sued the company that employed the carpenter in federal district court, arguing its employee was negligent in repairing the roof.

May the man do so?

(A) No, because his claim is barred by *res judicata*.

(B) No, because his claim is barred by issue preclusion.

(C) Yes, under the doctrine of *respondeat superior*.

(D) Yes, because the company was not a party to the claim against the carpenter.

48. A processor sued a retailer for violation of one of its patents. Pursuant to Fed. R. Civ. P. 50(a), the retailer moved for judgment as a matter of law, arguing that there was insufficient evidence to support the processor's claim. The court denied the motion and sent the case to the jury. The jury ruled in favor of the processor. The retailer appealed, again arguing that there was insufficient evidence to support the claim. The processor responded that the retailer could not raise the evidence question on appeal because it did not move for either a renewed judgment as a matter of law under Fed. R. Civ. P. 50(b) or for a new trial under Fed. R. Civ. P. 59.

May the court of appeals review the sufficiency of the evidence?

(A) No, because the retailer failed to move for a renewed judgment as a matter of law or a new trial.

(B) No, because the processor received a final judgment from the jury.

(C) Yes, because questions regarding the sufficiency of the evidence may be brought at any time.

(D) Yes, because the retailer had moved for judgment as a matter of law before the jury's verdict.

49. Under which of the following situations is a court LEAST likely to find proper service of process?

(A) The plaintiff personally hands the summons and complaint to the defendant.

(B) A United States Marshal leaves the summons and complaint against a company with a company vice president.

(C) An 18-year-old college student leaves the summons and complaint at the defendant's house with the defendant's 18-year-old daughter.

(D) A 21-year-old woman leaves the summons and complaint at the defendant's house with an 18 year old who rents a room there.

50. Which of the following does not require leave of the court or stipulation of the parties?

(A) Deposing a witness more than once.

(B) Deposing a witness from 9–5 on a Monday.

(C) Deposing less than 12 witnesses.

(D) Deposing a witness over the telephone.

51. A student sued a university for racial discrimination in federal district court. During discovery, the student asked for "all items concerning university admission practices." Several years earlier, a professor at the university had written a highly critical internal memorandum concerning the university's admission policies. After the receipt of the memorandum, the university immediately turned it over to the university's attorneys, who were now representing the university in the student's action and used the memorandum in preparing the university's defense. Due to its inflammatory nature and the amount of hearsay it contained, the memorandum was inadmissible at trial.

Does the university have to provide the memorandum to the student?

(A) No, because it is inadmissible evidence.

(B) No, because it is privileged work product.

(C) Yes, because it could lead to the discovery of admissible evidence.

(D) Yes, because it would likely be impossible for the student to obtain the information in any other way.

52. A man, a citizen of State A, and a woman, a citizen of State B, sued a company, incorporated in State B and with its primary place of business in State C, in federal district court in State C after one of the company's trucks got in an auto accident with the man and woman in State C. The man claimed $100,000 in damages, while the woman claimed $30,000 in damages.

Does the federal district court have subject matter jurisdiction over the woman's claim?

(A) Yes, because the man is claiming $100,000 in damages.

(B) Yes, the woman's claim arose from the same auto accident.

(C) No, because the company is incorporated in State B.

(D) No, because the woman's claim is less than $75,000.

53. An artist, a citizen of State A, sued a writer, a citizen of State B in state court in State B for injuries sustained during a fistfight in State B. The artist claimed $30,000 in damages. The writer filed a counterclaim for $80,000 in damages based on the same fight.

The artist would like to remove the action to federal court based on diversity jurisdiction. May the artist do so?

(A) No, because the writer's counterclaim is permissive.

(B) No, because the artist filed the action against the writer.

(C) Yes, because the amount in controversy is now over $75,000.

(D) Yes, because the writer's counterclaim is compulsory.

54. A man sued a company for civil rights violations. When the man's attorney failed to

comply with a discovery order, the company moved for sanctions under Fed. R. Civ. P. 37(a)(4). The federal district court granted the motion and also disqualified the attorney as counsel. The attorney immediately appealed the order for sanctions. The appellate court dismissed the appeal for lack of jurisdiction.

Is the appellate court's decision correct?

(A) No, because the sanctions are immediately appealable under the collateral order doctrine.

(B) No, because the attorney was disqualified as counsel.

(C) Yes, because there has been no final decision in the case.

(D) Yes, because appellate review of the order for sanctions is discretionary.

55. A professor sued an engineer in state court in State A for injuries he received during an auto accident. The court found that the engineer was negligent and ruled in favor of the professor. A woman who was also involved in the accident then sued the engineer in federal court in State B. The woman sought to use issue preclusion to stop the engineer from denying his negligence based on the State A decision. The laws of State A would allow her to do so, but the laws of State B would not.

May the woman use issue preclusion to stop the engineer from denying his negligence?

(A) No, because the federal court must follow the laws of State B.

(B) No, because the woman was not part of the first lawsuit.

(C) Yes, because the state courts of State A would allow it.

(D) Yes, because the State A decision would have *res judicata* effect.

56. A man, who was a citizen of State A, sued a corporation for violations of federal copyright law in state court in State B. His claim was for an injunction that he valued at over $100,000. The corporation, which was incorporated in State B and had its primary place of business in State C, filed a petition to remove the action to federal district court in State B.

Should the action be removed to federal district court in State B?

(A) Yes, because the man is suing for violations of federal copyright law.

(B) Yes, because there is complete diversity of citizenship.

(C) No, because the corporation is a citizen of State B.

(D) No, because the amount in controversy requirement was not met.

57. A man sued a company for violation of federal employment discrimination laws, claiming he was unlawfully terminated from his job. During discovery, the company asked in an interrogatory when, where, and by whom the man was fired from his position. The company's president answered the interrogatory, saying the company vice president fired the man in person in the man's office on December 1. However, after filing his answer, the president learned that the man was actually fired the day before, by the director of personnel, in the director's office, and that the vice president only happened to speak to the man on December 1 because he walked by when the man was cleaning out his office.

Under the circumstances, does the company need to amend its answer?

(A) No, because the man has not filed a response challenging the answer.

(B) No, because the company demonstrated good faith in filing its initial response.

(C) Yes, because the company's response was not based on the president's personal knowledge.

(D) Yes, because the company's response was materially incorrect.

58. A woman, a citizen of State A, was the editor of a magazine that was incorporated and had its primary place of business in State A. A rival magazine, incorporated in State B and with its primary place of business in State B, wrote several editorials in its magazine making fun of the woman. The woman sued the rival magazine for libel in federal district court in State C because it was the only state in the nation where the statute of limitations had not yet run out. Each magazine was sold nationally, and each magazine sold around 10,000 copies per month in State C.

The federal district court in State C dismissed the woman's claim, finding State C did not have jurisdiction. Is the federal district court's decision correct?

(A) No, because the rival magazine was marketed and sold in State C.

(B) No, because the only forum available was State C.

(C) Yes, because the woman did not have sufficient minimum contacts with State C.

(D) Yes, because the rival magazine did not have sufficient minimum contacts with State C.

59. A motorcyclist brought an action in federal district court in the Northern District of State A against a company after he was injured by one of the company's trucks. The action was filed shortly before the statute of limitations ran out on the motorcyclist's claim. The company moved to dismiss on the grounds that the federal court lacked personal jurisdiction over the company and that the venue was incorrect. The federal district court agreed with both of the company's claims. However, because the statute of limitations on the claim has run out, the district court believed it would be unfair to the motorcyclist to dismiss the claim.

What can the court do in regard to the motorcyclist's claim?

(A) The court can only dismiss the case, because it lacks personal jurisdiction.

(B) The court can only dismiss the case, because venue is incorrect.

(C) The court does not have to dismiss the case because it will lead to an unfair result.

(D) The court can transfer the case to a proper venue.

60. A fireman sued a landlord for negligence in federal district court in State A based on diversity jurisdiction. The fireman wanted to depose one of the landlord's former tenants as a witness because he was the only witness to some of the landlord's allegedly negligent actions. However, the tenant, who was not a party to the lawsuit, now lived 500 miles away in State B. The fireman's attorney served a notice of deposition at the tenant's residence, which stated that the deposition would take place in State A and that the attorney would pay the tenant's travel expenses. The tenant refused to travel to State A.

Can the fireman's attorney subpoena the witness to compel him to attend the deposition in State A?

(A) No, because there is no indication the fireman's attorney is licensed in State B.

(B) No, because the tenant now lives 500 miles away.

(C) Yes, because the tenant was the only witness.

(D) Yes, because the attorney is willing to pay the tenant's travel expenses.

61. A bar owner sued a doctor in state court in State A for damages related to an alleged assault and battery. Pursuant to State A law, the bar owner applied for an attachment of $76,000 on the doctor's home in order

to protect his ability to receive a monetary judgment if he was successful in his suit. The relevant statute authorized the attachment of real property without notice or opportunity for a prior hearing, although a defendant could request a hearing within 30 days after the property was attached. To receive an attachment, the plaintiff had to file an affidavit regarding his or her good faith belief that the claim would be successful. The state court granted the attachment and immediately informed the doctor.

The doctor filed suit in federal district court in State A, arguing the attachment violated his rights under the United States Constitution. How should the court rule?

(A) In favor of the bar owner, because the amount is over $75,000.

(B) In favor of the bar owner, because the doctor has 30 days in which to request a hearing.

(C) In favor of the doctor, because he must be awarded a hearing within 14 days of the attachment of real property.

(D) In favor of the doctor, because the attachment was granted based on the bar owner's allegations.

62. An engineer sued an oil company for injuries the engineer sustained during an oilfield explosion. The engineer learned a truck driver who was nearby was the only physical witness to the explosion, although a security camera recorded a video of the explosion as well. Twenty days after filing the complaint, the engineer served the truck driver with a set of interrogatories asking the truck driver to describe what he saw. The truck driver doesn't want to answer because he wasn't supposed to be at the oilfield that day.

Is the truck driver subject to sanctions if he fails to answer the interrogatories?

(A) Yes, because he was the only witness to the explosion.

(B) Yes, because he was served within 60 days of the suit being filed.

(C) No, because he is not a party to the action.

(D) No, because the engineer can get the same information from the security camera.

63. A man sued a woman in federal district court in State A for injuries he sustained from a fight. The woman moved for summary judgment and provided evidence that she was at work in another city at the time the fight was alleged to have occurred. In opposition to the motion, the man submitted an affidavit giving more detailed information about the fight with the woman. The federal district court believed that there was very little chance the man wasn't either mistaken or lying regarding the woman's involvement in a fight with him on the date and time the man alleged it occurred.

Should the federal district court grant summary judgment?

(A) No, because there is still some chance the man's claim is valid.

(B) No, because the man only submitted an affidavit in opposition.

(C) Yes, because the court believes the man is likely mistaken or lying.

(D) Yes, because the court believes there is very little chance the man's claim will be successful.

64. A banker went into an attorney's office seeking representation against a bus company. The banker claimed a company bus ran over him while he was crossing the street, causing serious injuries that led him to being in a coma for several weeks. The banker said the lingering effects of the coma made him unable to work. The attorney had a good faith belief that the banker was telling him the truth, so he filed a complaint against the company for $5 million in damages on the banker's behalf without getting a copy

of the police report or any other evidence. During trial, the police report regarding the bus accident was produced. It showed that it was the banker's brother who was hit by the bus and that he only suffered minor injuries. It was also shown that the banker was never hospitalized and had never stopped working. Ultimately, the company won the case, but it spent a considerable amount of money in attorney's fees to do so.

Can the company recover the lost attorney's fees from the banker or the banker's attorney?

(A) No, because it won the case.

(B) No, because the fees represent a valid contract between the company and its attorney.

(C) Yes, because the attorney and the banker conspired to commit fraud.

(D) Yes, because the attorney did not make a reasonable inquiry into the banker's claim.

65. A man sued a woman in federal court for injuries he sustained in an auto accident. The court ordered the attorneys involved in the action to attend a pretrial conference. Sometime later, the court ordered a second pretrial conference. This time, the court required the man and woman to be present. The man did not want to attend the second conference because he did not want to see the woman any more than he had to.

Does the man have to attend the second conference?

(A) No, because a party cannot be ordered to attend a pretrial conference.

(B) No, because a court cannot order more than one pretrial conference.

(C) Yes, because the court may require him to be available to consider possible settlement.

(D) Yes, because the man is the plaintiff in his suit.

66. A software manufacturer sued a computer company in federal district court in State A for breach of contract. The court's jurisdiction was based on diversity. At the close of the computer company's case, the computer company asked the judge to instruct the jury regarding certain points of State A contract law. The judge failed to do so, and the computer company's attorney failed to notice the omission. The jury found in the software manufacturer's favor. The computer company appealed, arguing the judge's failure to give the requested instruction constituted reversible error. The court of appeals believed the judge was wrong in failing to give the requested instruction.

How should the appellate court rule?

(A) Reverse the decision, because the computer company had requested the proper instruction.

(B) Reverse the decision, because the requested instruction was based on State A law.

(C) Affirm the decision, because the requested instruction was based on State A law.

(D) Affirm the decision, because the computer company's attorney failed to object.

67. A woman sued a doctor in federal district court for injuries she sustained during a surgical procedure. Her attorney hired an 18-year-old process server, who served the summons and complaint by leaving it at the doctor's home with his 17-year-old son. The doctor failed to file any response with the court.

If the woman moves for a default judgment, how should the court rule?

(A) Grant the motion, because the doctor had to respond within 21 days.

(B) Grant the motion, because the doctor had to respond within 60 days.

(C) Deny the motion, because the doctor's son was only 17 years old.

(D) Deny the motion, because the process server was only 18 years old.

68. A civil rights activist filed a class action in federal district court in State A against the State A Board of Education. The suit alleged that the school district engaged in discrimination against low-income students, specifically by giving more funding to schools in richer areas than to schools in poorer areas. A woman, who was the parent of a child who attended a school in one of the poorer areas, sought to intervene as of right in the action as a co-plaintiff.

May the woman intervene as of right?

(A) Yes, because there is no indication the existing parties will adequately represent her interest.

(B) Yes, because she has a child attending a school in a poorer area.

(C) No, because the action is being brought as a class action.

(D) No, because the action is being brought against a government entity.

69. A woman sued a psychiatrist for damages she claimed resulted from the psychiatrist hypnotizing her during a counseling session. The woman's attorney wanted to know whether the psychiatrist had any malpractice insurance that might cover the woman's claim, and whether that insurance might have an exclusion for alternative methods of treatment.

What does the woman's attorney need to do to find out whether the psychiatrist has an insurance policy?

(A) Serve the psychiatrist with an interrogatory asking the relevant question.

(B) Depose the psychiatrist regarding whether she has an insurance policy.

(C) File a request for production with the court.

(D) Nothing.

70. Two members of a local golf club wanted to bring a federal class action lawsuit against the club for racial discrimination. One of the members was a lawyer, and the other member was a doctor. The member who was a lawyer would serve as class representative. The two members claimed that the club systematically denied membership perks to black members. The doctor and the lawyer each claimed $100,000 in damages. There were 10 other black members of the club, who likely had damages of around $10,000 each.

May the group proceed as a class action?

(A) Yes, because the doctor and the lawyer are each claiming $100,000 in damages.

(B) Yes, because a class action serves the interest of judicial economy.

(C) No, because joinder of the class members is not impracticable.

(D) No, because each of the other 10 potential members likely had damages of around $10,000 each.

71. The United States Securities and Exchange Commission (SEC) filed suit against a company, alleging that its proxy statement was false and misleading. The federal district court ruled in favor of the SEC. A shareholder than filed an action for securities fraud against the company in federal district court. The shareholder moved for partial summary judgment against the company, arguing that the company was collaterally estopped from re-litigating the question of validity of the proxy statement.

How should the court rule?

(A) Grant the motion, because the issue was decided in the SEC action.

(B) Grant the motion, because it is unlikely the shareholder could have intervened in the SEC action.

(C) Deny the motion, because to grant it would violate the company's right to a jury trial on that issue.

(D) Deny the motion, because the shareholder was not a party to the SEC action.

72. A singer sued a company in federal district court seeking an injunction to prevent the company from selling any copies of an album the singer recorded when he was a child. The singer would like to have his claim decided by a jury.

What does the singer need to do to have a jury hear his claim?

(A) Nothing, because the singer is not entitled to a jury.

(B) Serve the company with a separate written demand within 14 days of the last pleading directed to the issue.

(C) Serve the company either a separate written demand or a demand included within another pleading within 14 days of the last pleading directed to the issue.

(D) File a written demand with the court within 14 days of filing the complaint.

73. A man sued a company in federal district court in State A for injuries he received after riding on one of the company's rollercoasters. The case was tried in front of a seven-member jury. The jury returned a verdict 5–2 in favor of the man.

May a verdict be entered in the man's favor?

(A) No, because the verdict was not unanimous.

(B) No, because the jury had less than 12 members.

(C) Yes, because the majority of the jury ruled in the man's favor.

(D) Yes, because a super majority ruled in the man's favor.

74. A computer manufacturer shipped 100 computers to a store through a special delivery service. When the computers arrived at the store, all of them had cracked screens, and the store refused to pay. The manufacturer then filed suit against both the store and the delivery company in federal district court. The manufacturer was incorporated and had its primary place of business in State A. The delivery company was incorporated in State B and had its primary place of business in State B. The store was incorporated in State C and had its primary place of business in State B. The store wanted to make a claim against the delivery service for the damaged computers, but it wanted to file its own claim in State B state court after the manufacturer's claim is over.

May the store do so?

(A) No, because the issue of liability will already be fully litigated.

(B) No, because the claim arises from the same transaction or occurrence.

(C) Yes, because the store's claim is optional.

(D) Yes, because both the store and the delivery service are citizens of the same state.

75. A sporting goods company sued a supplier in federal district court in State A. The supplier moved to dismiss the claim for lack of jurisdiction, arguing it did not have sufficient minimum contacts with State A for State A to have personal jurisdiction over it. The supplier only had one salesman in State A, and that salesman worked out of his home and was paid through commissions. Importantly, the supplier noted it owned

no property in State A and derived only a small part of its total revenue from State A. The sporting goods company countered that orders and samples were subject to the supplier's approval and shipped directly from the supplier to buyers.

Does the court in State A have jurisdiction over the supplier?

(A) Yes, because the salesman solicited orders for the supplier in State A.

(B) Yes, because the supplier shipped directly to buyers.

(C) No, because the supplier only had one salesman in the state.

(D) No, because the salesman worked out of his home and was paid through commissions.

76. A man brought a negligence action against a local construction company, claiming an employee's negligence caused him to sustain a serious injury. At trial, the man offered the testimony of a friend who said a worker employed by the construction company was misusing a jackhammer when a piece of the building he was working on fell on the man. Three employees of the construction company testified that the worker was not misusing the jackhammer at the time of the man's injury. At the close of evidence, the construction company moved for judgment as a matter of law. The construction company's motion was denied. The case was submitted to a jury, which found in favor of the man. The construction company made a renewed motion for judgment as a matter of law.

What standard should the court apply in ruling on the motion?

(A) Whether there was sufficient evidence for a reasonable jury to find in the man's favor.

(B) Whether there was a genuine issue of material fact that did not support the man's claim.

(C) Whether there was at least a scintilla of evidence to support the verdict.

(D) Whether the verdict was against the weight of the evidence.

77. A plaintiff sued a defendant in federal court. The defendant moved to dismiss the complaint for failure to state a claim. In response, the plaintiff voluntarily dismissed the action. The plaintiff then filed a second action that alleged the same claims but fixed the pleading defects outlined in the defendant's motion to dismiss. The defendant moved to dismiss the second action, and the plaintiff again voluntarily dismissed the second action. The plaintiff then filed a third action that alleged the same claims but addressed other pleading defects noted in the defendant's second motion. The defendant moved to dismiss the third action.

Is the court likely to grant the defendant's motion?

(A) Yes, because the plaintiff's initial complaint was materially incomplete or incorrect.

(B) Yes, because the plaintiff's previously dismissed actions operated as an adjudication on the merits of the plaintiff's claim.

(C) No, because the plaintiff fixed the pleading defects outlined in the defendant's motions to dismiss.

(D) No, because the plaintiff voluntarily dismissed the first and second actions before the defendant moved for summary judgment on either of them.

78. A farmer filed a negligence claim against a paint factory in federal court. The farmer alleged that chemical runoff from the factory was poisoning his crops. After discovery, the factory moved for summary judgment. In support of its motion, the factory submitted a memorandum identifying facts that it claimed were not in dispute. It also cited and attached a report from a hydrologist who stated that any contamination found on the farmer's land

could not have come from chemical runoff from the factory.

What is the best way for the farmer to raise a genuine dispute of material fact?

(A) Submit a report from the farmer's expert hydrologist that contradicts the findings in the factory hydrologist's report.

(B) Submit the farmer's records showing the current level of pollution on the farmer's land.

(C) Submit an affidavit from the farmer's attorney detailing his conversations with the factory's hydrologist.

(D) Submit an affidavit from the farmer's expert hydrologist with findings that contradict the report of the factory's hydrologist.

79. A man sued a hospital for negligence in federal court. At trial, the man's attorney submitted a proposed jury instruction on negligence. The court did not accept the attorney's proposed instruction. Instead, the court gave a jury instruction that the attorney believed was legally incorrect and hurt the man's claim. The attorney did not object to the jury instruction and the jury returned a verdict in favor of the hospital.

The man moved for a new trial, claiming that the court's jury instruction was improper.

What is the man's best argument in support of his motion?

(A) The court's jury instruction was plain error that affected the man's substantial rights.

(B) The court's jury instruction was an issue of law that could be raised at any time.

(C) The man's proposed jury instruction acted as a formal objection.

(D) The man's jury instruction was a correct statement of the applicable law.

80. A company sued a man for negligence in federal court alleging that the man's electrical work caused a large fire. The man filed a motion to dismiss for lack of jurisdiction. The court denied the man's motion. The man did not file any other response.

Sixty days later, the company asked the clerk to enter default. The clerk did so. The company then applied for the entry of a default judgment and served the man with written notice three days before the default judgment hearing. After the hearing, the court entered a default judgment in the company's favor.

Ten days later, the man filed a motion to set aside the default judgment.

Is the court likely to grant the man's motion?

(A) Yes, because the man challenged the court's jurisdiction over the claim.

(B) Yes, because the man did not receive adequate notice of the hearing.

(C) No, because the man did not file any other response after the denial of his motion to dismiss for lack of jurisdiction.

(D) No, because the man did not file his motion to set aside the default judgment within seven days.

81. A woman filed a federal diversity action against a jewelry store for breach of contract. In the jewelry store's answer to the complaint, the jewelry store included as a separate defense an allegation that the woman had lost a similar claim against a different jewelry store five years earlier. The woman believed that the earlier action was irrelevant because it was factually different from the current action.

What is the woman's best response to the jewelry store's answer?

(A) Move for sanctions for asserting a frivolous defense in the answer.

(B) Move to amend the complaint to include facts regarding the differences between the two actions.

(C) Move to strike the separate defense as irrelevant.

(D) Reply with a denial of the separate defense.

82. A buyer sued a seller in federal court for breach of contract. The case was tried without a jury and was based solely on documentary evidence. At the close of evidence, the judge stated, "Judgment shall be entered for the buyer." The judgment was so entered.

What would be the seller's best argument for persuading an appellate court to reverse the court's judgment?

(A) The court erred by not providing findings and conclusions.

(B) The court's judgment was clearly erroneous because it was based solely on documentary evidence.

(C) The court erred by not giving the seller an opportunity to submit proposed findings and conclusions.

(D) The court erred by not requiring the buyer to submit proposed findings and conclusions.

83. An investor brought a federal diversity action against a company, alleging breach of contract. After the parties presented their evidence, the court instructed the jury on the law. Neither the investor nor the company filed a motion for judgment as a matter of law. The case went to the jury, and the jury found for the investor. The court entered judgment on the verdict.

The company moved for judgment as a matter of law, arguing that there was insufficient evidence to support the investor's claim. Although the court acknowledged that there were some problems with the evidence, the court denied the motion. The company appealed.

Should the appellate court consider the company's motion?

(A) No, because the company did not make a motion for judgment as a matter of law before the case went to the jury.

(B) No, because sufficiency of the evidence is solely determined by the jury.

(C) Yes, because the court acknowledged that there were problems with the evidence.

(D) Yes, because the trial court denied the motion before it was brought to the appellate court.

84. A truck driver, who was a citizen of State A, sued a corporation and one of its managers in federal court in State B. The corporation was located and incorporated in State B and the manager was a citizen of State B.

What would be the best method of serving the corporation and the manager?

(A) Service by the truck driver himself personally giving the summons and complaint to the chief executive officer of the corporation and the manager.

(B) Service by emailing copies of the summons and complaint to the corporation and the manager.

(C) Service by leaving copies of the summons and complaint at the offices of the chief executive officer of the corporation and the manager.

(D) The service required by State B's rules of civil procedure.

85. A man, a citizen of State A, was in a car accident in State B with a woman who was a citizen of a foreign country. Both the man and the woman suffered serious injuries. The man filed a negligence action against the woman in federal district court in State B for $100,000. State B was a contributory negligence state. The woman believed that the man ran a stop sign and was therefore responsible for the accident.

What is the best way for the woman to respond to the action?

(A) Move to dismiss for lack of subject matter jurisdiction, because the woman is not a United States citizen.

(B) Move to dismiss for personal jurisdiction, because the woman is not a United States citizen.

(C) File an answer raising the affirmative defense of contributory negligence and move for judgment on the pleadings.

(D) File an answer raising the affirmative defense of contributory negligence and assert a counterclaim for negligence.

86. A man sued a corporation in federal court for negligence. During trial, the corporation submitted a proposed jury instruction on contributory negligence. Before instructing the jury, the judge told the parties of the instructions she would give. The instructions did not include any instruction on contributory negligence. Neither party objected and the judge gave the jury her instructions. The jury ruled in the man's favor, and the judge entered judgment on the verdict. The corporation wanted to appeal the verdict on the ground that the court should have used its contributory negligence instruction.

May the corporation appeal the verdict?

(A) Yes, because the corporation submitted a proposed instruction on contributory negligence.

(B) Yes, because the judge did not give any instruction on contributory negligence.

(C) No, because the corporation did not object after the judge told the parties of the instructions she intended to give.

(D) No, because the corporation did not object before the jury reached a verdict.

87. A nurse domiciled in State A sued a doctor domiciled in State B in federal district court in State A. The nurse claimed that the doctor negligently injured her during a fire drill. The doctor moved to dismiss the claim for lack of personal jurisdiction. The court denied the motion and set deadlines for discovery and trial dates. The doctor appealed the denial of his motion.

Should the appellate court hear the doctor's appeal?

(A) Yes, because the appellate court's decision could end the nurse's action.

(B) Yes, because the doctor's appeal raises a constitutional question.

(C) No, because the appellate court lacks jurisdiction over the appeal.

(D) No, because the district court's decision on personal jurisdiction is a final decision.

88. An internationally famous artist entered into a five-year lease in a city building as part of the city's downtown revitalization project. One year into the lease, the artist informed the city that she was moving out of the building because the city had not completed promised renovations.

In response, the city sued the artist in federal court. The city asked for a permanent injunction to prevent the artist from breaking the lease. In her answer, the artist included a counterclaim for losses caused by the city's failure to do the renovations. The artist demanded a jury trial on her counterclaim. Both the artist and the city moved that their claim should be heard first.

How should the court rule?

(A) The city's claim should be heard first.

(B) The artist's counterclaim should be heard first.

(C) The court should schedule a jury trial of both claims at the same time.

(D) The court should schedule a nonjury trial of both claims at the same time.