

The Second Edition of Essay Exam Writing for the California Bar Exam contains everything you need to pass the essay portion of the California bar exam. Learn how to manage your study time, improve your test performance, and objectively assess the quality of your answers. The authors' proven-effective preparation plan combines a succinct method for writing a successful essay with a strategic review of substantive law.

Second Edition Update

ESSAY EXAM WRITING *for the*
CALIFORNIA BAR EXAM

by MARY BASICK and TINA SCHINDLER

From beginning to end, everything you need to write a passing bar exam essay is here!

Write a passing essay with easy how-to tips and practice:

- Create a roadmap to succeed despite time constraints
- Use a checklist to spot issues effectively
- Be strategic to ensure spending time where the points are
- Make it easy for the exam grader to locate your key analysis
- Use the facts to craft effective analysis
- Practice Essays and Answer Grids—chosen to represent coverage on previous California bar exams, including crossover questions
- Sample essay answers that provide a model of a passing answer
- Troubleshooting tips to improve exam performance

Strategic, efficient, and user-friendly review of essay-tested substantive law:

- Focusing on the relationships among the rules to aid issue spotting
- Prioritizing most-frequently-tested topics
- Issues Checklist—a one-page list of the issues tested in each subject, organized to aid issue spotting
- Memorization Attack Sheet—a bulleted list of the rules, and a tool for memorization that also reinforces issue-spotting skills
- Annotated Rule Outline—a more complete version of the rules—annotated with *fact triggers*, *memorization tips*, and *exam tips* to assist with issue spotting, memorization, and exam writing
- Issues Tested Matrix—a detailed graph that analyzes by sub-topic the questions asked in each subject over the past 30+ years

Included in the Second Edition Update:

- Recent rule developments—most notably, Professional Responsibility, Constitutional Law, Civil Procedure, Criminal Procedure, and Business Associations
- Expanded coverage of specific topics emphasized on recent bar exams, such as the newly tested Takings and Zoning issues among other new areas of law
- Updated *Issues Test Matrices* and *Practice Questions*, reflecting current trends and more recent questions

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ESSAY EXAM WRITING *for the*
CALIFORNIA BAR EXAM

Second
Edition
Update

CORPORATIONS

Formation

De facto and de jure corp.
Piercing the corp. veil
Ultra vires acts
Promoter liability

Corporation Management, Directors
and Officers

Second Edition Update

PARTNERSHIP

General Partnerships

Formation
Partnership assets
Partner rights & duties
Relations of partner to partnership
Partner liability
Dissociation / Dissolution
Winding up

Includes
the 2018
Professional
Responsibility
rules

ESSAY EXAM WRITING *for the*
CALIFORNIA BAR EXAM

MARY BASICK • TINA SCHINDLER

Shareholders

Rights

Meetings and elections
Voting
Inspection
Dividend distribution
Shareholder agreements
Shareholder derivative suits

Federal Securities Laws

16(b)

10b-5

Fraudulent statements
Insider trading
Sarbanes-Oxley

Fundamental Changes

Dissolution

AGENCY

Formation
Principal's duties and remedies
Agent's duties and remedies
P's liability for A's k's (authority)
P's liability for A's torts (scope)

Formation

Partner rights & duties
Partner liability
Dissociation / Dissolution /
Winding up

LLP—LIMITED LIABILITY
PARTNERSHIPS

Formation
Partner rights & duties
Partner liability
Dissociation / Dissolution /
Winding up

LLC—LIMITED LIABILITY
COMPANIES

Formation
Partner rights & duties
Partner liability
Dissociation / Dissolution /
Winding up



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***Essay
Exam Writing
for the
California Bar Exam***

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SECOND EDITION UPDATE

MARY BASICK

TINA SCHINDLER



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Summary of Contents

	<i>Contents</i>	<i>ix</i>
	<i>Preface</i>	<i>xiii</i>
	<i>Acknowledgments</i>	<i>xv</i>
	INTRODUCTION	1
PART 1	BUSINESS ASSOCIATIONS	17
PART 2	CIVIL PROCEDURE	105
PART 3	COMMUNITY PROPERTY	185
PART 4	CONSTITUTIONAL LAW	261
PART 5	CONTRACTS	331
PART 6	CRIMES	403
PART 7	EVIDENCE	481
PART 8	PROFESSIONAL RESPONSIBILITY	575
PART 9	REAL PROPERTY	649
PART 10	REMEDIES	735
PART 11	TORTS	801
PART 12	WILLS AND TRUSTS	881
PART 13	CROSSOVER QUESTIONS	959

Contents

<i>Preface</i>	<i>xiii</i>
<i>Acknowledgments</i>	<i>xv</i>
<u>INTRODUCTION</u>	1
The Basics of Essay Exam Writing	1
Mastering the Essay Subjects—Memorization	1
Mastering the Essay Skills	3
Putting It All Together	6
Exam Day Strategy	14
Essay Exam Self-Assessment	16
PART 1 <u>BUSINESS ASSOCIATIONS</u>	17
Introduction to Business Associations	20
Business Associations Issues Checklist	21
Business Associations Memorization Attack Sheet	22
Business Associations Rule Outline	26
Business Associations Issues Tested Matrix	52
Business Associations Practice Essays, Answer Grids, and Sample Answers	57
PART 2 <u>CIVIL PROCEDURE</u>	105
Introduction to Civil Procedure	109
Civil Procedure Issues Checklist	110
Civil Procedure Memorization Attack Sheet	111
Civil Procedure Rule Outline	115
Civil Procedure Issues Tested Matrix	138
Civil Procedure Practice Essays, Answer Grids, and Sample Answers	143
PART 3 <u>COMMUNITY PROPERTY</u>	185
Introduction to Community Property	189
Community Property Issues Checklist and Essay Approach	190
Community Property Memorization Attack Sheet	191
Community Property Rule Outline	195
Community Property Issues Tested Matrix	214
Community Property Practice Essays, Answer Grids, and Sample Answers	221

PART 4	<u>CONSTITUTIONAL LAW</u>	261
	Introduction to Constitutional Law	265
	Constitutional Law Issues Checklist	266
	Constitutional Law Memorization Attack Sheet	267
	Constitutional Law Rule Outline	270
	Constitutional Law Issues Tested Matrix	285
	Constitutional Law Practice Essays, Answer Grids, and Sample Answers	291
PART 5	<u>CONTRACTS</u>	331
	Introduction to Contracts	337
	Contracts Issues Checklist	338
	Contracts Memorization Attack Sheet	339
	Contracts Rule Outline	342
	Contracts Issues Tested Matrix	362
	Contracts Practice Essays, Answer Grids, and Sample Answers	367
PART 6	<u>CRIMES</u>	403
	Introduction to Crimes	407
	Crimes Issues Checklist	408
	Crimes Memorization Attack Sheet	409
	Criminal Law Rule Outline	414
	Criminal Procedure Rule Outline	423
	Crimes Issues Tested Matrix	433
	Crimes Practice Essays, Answer Grids, and Sample Answers	439
PART 7	<u>EVIDENCE</u>	481
	Introduction to Evidence	486
	Evidence Issues Checklist	487
	Evidence Memorization Attack Sheet	488
	Evidence Rule Outline	492
	Evidence Issues Tested Matrix	516
	Evidence Practice Essays, Answer Grids, and Sample Answers	521
PART 8	<u>PROFESSIONAL RESPONSIBILITY</u>	575
	Introduction to Professional Responsibility	577
	Professional Responsibility Issues Checklist	579
	Professional Responsibility Memorization Attack Sheet	580
	Professional Responsibility Rule Outline	584
	Professional Responsibility Issues Tested Matrix	602
	Professional Responsibility Practice Essays, Answer Grids, and Sample Answers	611

PART 9	<u>REAL PROPERTY</u>	649
	Introduction to Real Property	653
	Real Property Issues Checklist	654
	Real Property Memorization Attack Sheet	655
	Real Property Rule Outline	659
	Real Property Issues Tested Matrix	686
	Real Property Practice Essays, Answer Grids, and Sample Answers	691
PART 10	<u>REMEDIES</u>	735
	Introduction to Remedies	737
	Remedies Issues Checklist	738
	Remedies Memorization Attack Sheet	739
	Remedies Rule Outline	741
	Remedies Issues Tested Matrix	757
	Remedies Practice Essays, Answer Grids, and Sample Answers	763
PART 11	<u>TORTS</u>	801
	Introduction to Torts	805
	Torts Issues Checklist	806
	Torts Memorization Attack Sheet	807
	Torts Rule Outline	810
	Torts Issues Tested Matrix	830
	Torts Practice Essays, Answer Grids, and Sample Answers	837
PART 12	<u>WILLS AND TRUSTS</u>	881
	Introduction to Wills and Trusts	885
	Wills and Trusts Issues Checklist	886
	Wills and Trusts Memorization Attack Sheet	887
	Wills Rule Outline	891
	Trusts Rule Outline	904
	Wills and Trusts Issues Tested Matrix	910
	Wills and Trusts Practice Essays, Answer Grids, and Sample Answers	917
PART 13	<u>CROSSOVER QUESTIONS</u>	959
	Introduction to Crossover Questions	959
	Crossover Question Practice Essays, Answer Grids, and Sample Answers	960

Preface

Dear Bar Exam Taker,

This book includes everything you need to know to write a passing essay answer for the California bar exam. After much experience working with potential bar takers and extensive analysis of past California bar exams we have created this book to be a condensed, yet thorough, review of all subjects covered on the exam, including instruction in the skill of essay writing.

The introduction covers the skills involved in successfully writing a passing California bar essay. In particular, this section includes valuable information on how to successfully organize and write a passing answer within the allotted time frame.

The substantive law is presented in several ways to assist you in understanding the law and then using it to solve the problem posed by an essay question. Each chapter includes the law in a checklist format for use in issue spotting, a memorization attack sheet to aid in memorizing the rules and their elements, and an efficient rule outline annotated throughout with exam, issue spotting, and memorization tips.

Practice essay questions and sample passing answers are included for each subject and all crossover questions are identified as such. We also include our assessment of each question to point out additional subject-specific tips and essay-taking strategies. In addition, each question has a corresponding grid identifying the issues, rules, analysis, and conclusions that were required of a passing answer to aid you in assessing your own performance.

We wish you the best of luck on the upcoming bar exam!

Mary Basick and Tina Schindler

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***Essay
Exam Writing
for the
California Bar Exam***

INTRODUCTION

THE BASICS OF ESSAY EXAM WRITING

The essay portion of the California bar exam essentially tests two different things simultaneously: (1) a large quantity of substantive material and rules, and (2) essay exam writing skills under extreme time pressure. Success on the essay portion of the exam requires mastery of both. This introduction condenses into one handy reference section everything you need to know to succeed on the essay portion of the bar exam. As you study for the exam, return to these introductory pages frequently to reinforce your mastery of the most effective essay exam-taking approach and skills. This introduction covers techniques for mastering the substantive material tested on the essay exam, a review of the key exam-taking skills that are also tested on the exam, an approach for successfully combining the substantive mastery with the exam-taking skills, and a section on exam-day strategy.

I. MASTERING THE ESSAY SUBJECTS—MEMORIZATION

There is a vast quantity of substantive material that you are responsible for knowing and may potentially be tested on for the essay portion of the California bar exam. Depending on how you combine the subjects, there are at least 12 substantive areas of law eligible for testing on the essay portion of the exam. The first step in successfully preparing for the essay exam is creating a study schedule that will allow you to master the material so that you can fully understand and memorize the material. For each substantive area of law, this book contains an *issues checklist* to aid in issue spotting, a *memorization attack sheet* for easy memorization, and a *subject outline* that is tailored to focus on the issues that are essay tested within that subject. Our goal is to keep the rules compact here, so we have not included the more detailed or nuanced rules that are exclusively MBE tested.

Create a Study Schedule: It is important to map out day by day what you plan to accomplish to successfully prepare for the bar exam. A large amount of work must be done, and a schedule is an essential tool for staying on track and ensuring that you are adequately prepared for all of the subjects and skills you must master. If you are not using a commercial bar preparation program that provides a study schedule, you must create your own schedule. Plan to spend two to four days studying each subject eligible for testing, with the time varying depending on the relative depth of the subject and your own facility with the subject. For each subject you will need to study and understand the substantive material, memorize the rules, practice issue-spotting essay exams, and practice writing essay exams under

exam-type conditions. It is also important to spend time assessing your progress and reviewing your essays to ensure that you successfully spotted all the issues, properly identified and stated the applicable rules, and included all pertinent facts and arguments in the analysis. Of course, your study schedule should also include time dedicated to studying and practicing for the MBE and performance test portions of the exam.

Memorization: Since the essay covers such a large quantity of substantive material, it is important to have a plan for accurately memorizing all of this material. You will notice that each subject is presented here in various formats, with increasing amount of detail to assist in both your understanding of the subject and to aid memorization. First, each subject is presented in the broad *issue checklist* format, which basically lists the main issues that can arise in that subject. This is followed by the more detailed *memorization attack sheet*, which includes the rule elements. Lastly, there is a detailed *rule outline* for each subject, which explains the rules and presents them in sentence format, as they would be written in an exam.

To memorize, take each subject one at a time. Start by reviewing the subject outline. First, be sure to understand the meaning of each rule element. The key to both effective issue spotting and factual analysis is having an understanding of how and when a rule applies. Rote rule memorization without understanding the meaning of the rules will not lead to success. To illustrate, one of the rule elements required for a permanent injunction is “feasibility.” Without understanding what it means for a permanent injunction to be “feasible,” it is likely the corresponding analysis would be unsatisfactory. Simply memorizing the element “feasible” would not identify what is meant by the term, and thus what facts would make feasibility at issue in an essay question. This would lead either to a missed issue or poor analysis. Make every effort to have an understanding of the meaning of the rules, as well as memorizing the rules themselves. A good way to see if you have sufficient understanding of a rule is to try to explain it step by step and using examples to someone with no legal knowledge.

As a general rule, whatever memorization strategies worked in law school should be the main strategies you employ now. However, you may want to try some new ones as well. Start with memorizing individual rules. To memorize rules you can use flashcards, flowcharts, or outlines. You can say the rules aloud or use a recording device to record your own recitation of the rules and replay them later in the car or at the gym. Go through the issues checklist and try to state or write a rule for each issue listed, which reinforces both the rules and the overall structure of a subject. The memorization attack sheets are also a handy way to quiz yourself on the rule elements. Another effective memorization strategy is to practice writing out full rules in sentence format, which gives you an opportunity to practice writing and crafting rule statements that you will use later on the essay exams.

Once you have many of the individual rules memorized, move onto reviewing the entire subject. To review an entire subject, try to recreate your entire subject outline (or flowchart) from memory. Start with the big concepts, then add the subtopics, then add the rules that fall under the subtopics, then add the rule elements for each rule, then add the explanations and exceptions for each rule element using examples. This approach reinforces rule memorization, the overall structure of the subject, and how the legal concepts relate to one another, which aids in issue

spotting. You can do this on paper, or on a whiteboard, or orally. Each time you use this technique, start building out the subject outline in a different part of the checklist so you don't fall into the trap of knowing the first half of a subject much better than the second half. This method will help you identify the rules you know and the rules you don't know, so your studying can be more efficient as you target your energy on understanding and memorizing the rules you don't already know well. This study method also assists in issue spotting since the rules in the checklist are presented in the order that they logically arise in an essay question. Reviewing a subject this way also will reinforce how the concepts are interconnected and relate to one another.

Another approach is to try to explain an entire subject, including all issues and how they interrelate, to a willing friend or family member. Challenge yourself to adequately explain the rules in a manner that is logical, correct, and understandable. Use examples to illustrate the concepts. Have your listener ask questions so you must further explain or rephrase a concept whenever they get confused. This method also ensures that you know the rules well and how they relate to one another. The added bonus is you can spend some time with a loved one without feeling guilty about missing study time.

II. MASTERING THE ESSAY SKILLS

In addition to the vast substantive material covered on the essay exam, the exam also tests essential lawyering skills. The most important of these skills are issue spotting, fact application and analysis, effective time management, and the ability to discern what is more important from what is less important and spend your limited time accordingly.

Issue Spotting

Issue spotting is an essential skill for any lawyer and is also essential for success on the bar exam. In this book the substantive material is presented in the order that the issues logically arise in an essay exam to make issue spotting easier. Checklists are great tools to use for issue spotting. A checklist should include the essential issues and be concise enough to be jotted down in less than one minute. We've provided generic checklists for each subject, but each subject checklist should be personalized to be most effective for you. The purpose of a checklist is to help you spot the issues on an exam, so don't include issues that you would never miss spotting because they're so obvious it simply isn't necessary to take time to write them down. Likewise, do include issues that you have a hard time remembering or have a tendency to miss. It may also be helpful to have mini-checklists for subcategories. For example, on your main constitutional law issues checklist, you might just have First Amendment free speech listed as an issue. If after reading the essay you realize that the majority of the question involves free speech, you should then write out a mini-issues checklist that includes all possible issues that can arise regarding free speech. You should have these checklists memorized for each subject tested on the bar exam. When doing an essay question, you should jot down your issue-spotting checklist for the corresponding subject as soon as you recognize the subject being

tested, unless the call is very specific and tells you exactly what issues they want you to address. As you issue spot the exam, you can consult your checklist to ensure you don't miss any issues because missing issues can be fatal on the bar exam. However, be certain to discuss only the issues actually raised by the fact pattern. Discussion of a nonissue is worth no points and wastes valuable time.

The issues checklist also acts as a final check for issue spotting. Remember there are typically no "red herrings" or "homeless" facts on the essay portion of the bar exam. So, if you have facts remaining unused after you have organized the entire question, you should double-check your issues checklist to ensure that the "homeless" facts don't correspond to one of the issues you forgot to address. Although the points on the essay exam are mainly earned in the analysis of an issue, you will never get to the analysis if you don't spot the issue in the first place, which is why issue spotting is crucial to your success on the essay exam.

Fact Application and Analysis

The key to effective analysis is explaining how or why the applicable fact proves or disproves the rule element in question. A good answer will include so many facts that someone can recreate the fact pattern just from reading the answer. Just as you should double-check your issues checklist for any issues corresponding to "homeless" facts, you should also use your issues checklist to ensure that you aren't missing a key argument within your analysis or that the facts don't establish a rule element that you are omitting.

The most important aspect of analysis is being able to explain the legal significance of the facts rather than just reciting them in the appropriate place. Thus, when comparing your organized or written essay answer to the corresponding sample answer or grid, you should spend ample time comparing which facts were used and how they were used in your answer compared to the sample. Make sure that you are explaining how and why each applicable fact either proves or disproves the rule element that you are analyzing. Use the word "because" or "since" in your analysis because doing so forces you to explain how or why the fact is important. For example, consider the following analytical sentence: "Tom spit on Bob and being spat on would offend a reasonable person's sense of dignity since spitting is generally known in society as a sign of extreme disrespect and thus is offensive." Notice that the key *fact* (Tom spit on Bob) is tied to the *rule element* (offensive) with an explanation of *why* the conduct is offensive (offends a reasonable person's sense of dignity **since** it is a sign of extreme disrespect by societal standards). Compare the analytical sentence above to this one, "On the element of offensive, here the facts state that Tom spit on Bob and spitting offends a reasonable person's sense of dignity, therefore it is offensive." Notice that the key *fact* (Tom spit on Bob) is still tied to the *rule element* (offensive) but there is no explanation of *why* spitting is offensive. The facts are merely recited and this is followed by the conclusion. This is not proper analysis, but rather a "fact sandwich," because the facts are sandwiched between the rule element and the conclusion with no explanation of why or how the fact (spitting) establishes the rule element (offensive). Always explain how and why the facts prove or disprove the rule or rule element in issue.

To receive the maximum points, an essay must have proper analysis, as indicated above. In addition, sometimes it is necessary to make logical inferences or

assumptions from the facts given, which must be identified and then analyzed. This skill arises most often on torts and constitutional law essays and is discussed in more depth within the introduction to those subjects. Sometimes an example is the best way to make a point and should be included in the analysis. Overall, remember that issue spotting enables you to identify the rules at issue, and it is expected that you know the rules, but it is the use of the facts in the analysis that results in points being earned on an essay.

Time Management

The skill of time management is a large part of what is being assessed with essay questions. If they gave examinees 90 minutes per question, everyone could write a passing answer. The extreme time pressure puts a premium on planning and organizational skills. Spend no more than one hour per question, and of the hour spent on a question, plan to spend 15 minutes organizing your answer and the remaining time writing your answer. Remember that you will have three hours to answer three questions and three and a half hours to answer two questions and a performance test in the afternoon of day one, but you must manage your own time since you receive all materials at the same time during each of the sessions. We recommend that you bring a silent timer or reset your watch to 12:00 when the proctor starts the exam so you can manage your time and know at a glance when you have spent 15 minutes organizing a question, or one hour total on a question. The worst mistake students make is to spend one hour and 5 to 10 minutes on the first question and then the second, leaving only 40 minutes for the last question. Often students think they will spend more time on a subject they like and get that score of 80 so they can do poorly on their least favorite subject, but it never works out that way. They usually end up with a 60 and a 50. Don't bet on getting a high score on an essay just because you spend more than one hour on it. Statistically very few answers earn a score of 75 or greater.

Some questions are harder than others, but each question is designed to be answered in one hour. Do not spend more than one hour on any single question. You can never do it without shortchanging time on another question, which almost always results in failing the question that got shortchanged. To help answer each question in one hour, it is imperative that you focus your energy on answering only the question asked. Pay attention to the call of the question. Don't rush through reading the fact pattern and misread what the question is asking; any time spent addressing a nonissue is time wasted. There is no extra credit on the bar exam, so thoroughly answer the question asked, but only the question asked.

Pay careful attention to the facts. For example, if the fact pattern is about a contract dispute but the facts state there is a valid contract, do not waste time discussing contract formation issues except in the briefest of terms.

Discerning What Is Important

This concept is related to time management, but more accurately addresses the concept of deciding the relative importance of all of the issues raised by an essay question and spending your time accordingly. Never lose sight that the goal of the essay answer is to solve the problem presented by the fact pattern. First, focus on

the call of the question. Pretend that you are a lawyer and a client walked into your office and told you this story. What issues are raised? What facts pose a problem for the client? Do not shy away from identifying problem areas in the question or identifying areas of ambiguity that need to be resolved. This is what a lawyer would do and that is your task. Your essay answer needs to focus on solving the problem. Spend your time wisely so that you spend the majority of your time on the bigger, more complex issues, and less time on the issues that are less complex.

Generally, you can determine which facts are worth the most points and weighted the most heavily by seeing how many facts are available to use with each issue. The more facts that correspond to a particular issue, or the more ambiguity raised by the facts, the more points it is likely worth. Issues that have colorable arguments on both sides are also worth comparatively more points. Be sure to organize the issues you spot around answering the call of the question. When outlining your answer, once you have matched up the facts to the issues you need only glance at your outline to easily see where most of the points are, because they will be the issues with the most facts matched up.

It is essential to plan out your answer before you start writing so you can be strategic and proportionately spend your time where the most points are. It is not important *how much* you write, but what you choose to write about in your answer. Based on what you plan to write about, your answer is either set up to pass or fail before you even write the first word. Students often make the mistake of treating each issue raised as if they are equally important. They are not. Spend your time where the points are and expand and contract the depth of your analysis accordingly to maximize your essay scores.

III. PUTTING IT ALL TOGETHER

An Approach to Taking Practice Exams

It is essential to write practice essay exams, and the more the better. It is also imperative that you plan out your answer and create a roadmap of what you plan to cover before you start writing. When you study a subject, for the first few practice exams you may want to double-check your issue spotting against a sample answer or grid so that you can add any missed issues *before* writing out the complete answer. Allow yourself 15 minutes to roadmap the answer from memory, then check your roadmap against the sample or grid and add any missing issues. Then allow yourself 45 minutes to write out the essay from your roadmap notes. With this approach you are still working under timed conditions, but you are allowing yourself some support as you become more familiar with the topic. Another benefit is that you will still get practice writing on all of the issues contained in the essay, even if you didn't spot them all at first. Some students prefer to work under exam conditions from the very first essay, organize their answer and immediately write their essay under timed conditions, and only complete the assessment after they've finished. If this is your preferred approach, it is a good idea to go back and write out the answer to address any missed issues for practice after self-assessing your original essay. Writing out all issues also aids in memorization, because the more you write out the rules the easier they become to recall.

Bar exams are different from the law school exams you are used to. It is essential to practice for the bar exam in replicated bar exam conditions to maximize your effectiveness. You must practice writing the essay exams within the one-hour time limit for two important reasons. First, you need to know exactly what you are capable of completing within one hour so you can properly manage your time during the exam. Second, you want to have already practiced and become comfortable writing on a wide variety of legal issues so during the exam the writing flows quickly and smoothly. For this reason, it is also good to write out more than one essay at a time to simulate real exam conditions. So, if you plan to write two to three essays in a day, do them at the same time just as you would on the real bar exam, rather than one in the morning and another one later in the day. The bar is a marathon and you have to train for it. Work on building your stamina because you are going to need it for the first day of the exam. Most law school exams are three hours and cover a single subject, whereas the first day of the bar exam consists of six and a half hours of writing in one day and covers several subjects.

Create a Roadmap to Organize a Passing Essay Answer

The goal is to write a passing essay, and the key to writing a good essay is solving the problem presented. Identify all of the issues, use all of the relevant facts, make it easy for the reader to score your essay by using headings, identify any problematic areas or ambiguities for the reader, spend your time wisely, and finish within one hour. If you are not used to organizing your answer before you write, you need to learn this essential skill. Be patient with yourself. It may take you longer to organize your answers until you get the hang of it. Use the following approach:

1. **Read the call of the question first.** This will provide some context as you read the fact pattern. Usually the call of the question will identify the subject, and sometimes a specific call will even identify and limit the legal issues.
2. **Read the fact pattern through once** before you pick up your pen to make notes or start typing. Sit on your hands if you must, but it is important to get a good grasp of the overall story of the fact pattern before you do anything else.
3. **Once you've read the fact pattern, carefully consider the call of the question.** If the call is very specific and, for example, asks, "Can plaintiff get specific performance?" then the bar examiners have issue spotted the exam for you. If the call of the question is more general, write down on your scratch paper your memorized checklist for the subject (or subjects) being tested. Read the facts carefully and slowly and issue spot as you go. Use your checklist to assist you in identifying additional issues.
4. **Roadmap your answer before you begin writing.** You should spend 15 minutes organizing your answer before you begin writing your answer. A passing essay starts with good organization. Even though you may feel compelled to start writing because of the time pressure, it is not possible to write a passing answer if you don't spot all of the issues and use all of the available facts, so it is imperative that you slow down and get it right at the organizational stage. Writing an answer without proper planning is like running a race in the wrong direction. Don't waste time making your notes look good; they

only need to be functional. Liberally use abbreviations, initials, and symbols. You can roadmap on paper, or on your computer, or a combination of both. Try several methods until you find one that works well for you.

5. **Organize by the call of the question and include all issues, rule elements, and facts.** Use the question call to create your macro organization. Note the legal issues you spot for each question call. Identify the rule elements that correspond to each issue. Next, identify the pertinent facts you will use to analyze each rule or element. Be certain to use all of the facts from the fact pattern in your analysis. Either highlight or check off facts as you use them. Do not rely on your memory of the facts; make sure they are accurate by writing them down. Unlike law school exams, there are rarely “red herrings” in bar fact patterns. If there is a “homeless” fact in the fact pattern that you haven’t figured out how to use, take a moment while outlining to consider what you can do with it. Go through your issues checklist and see if it raises a new issue you didn’t catch. Also, look at the issues you have already identified and see if you can use the fact to add weight to the analysis. Finally, be cognizant of crossover questions as they are increasingly popular with the bar examiners.
6. **Consider if there are two sides to each issue in the question.** Issues with contrasting arguments are always worth a lot of points, and you don’t want to miss these points. Also, it helps to remember that there are always two parties and two sides in a real legal dispute, so always consider what the opposing side would argue when you are arguing one side. There will not always be a colorable argument for the other side, but often there is and students can miss it because they are looking at the issue from only one perspective. Another issue that arises is that students can get personally swept up in the facts. The questions are not about real people. Don’t feel sorry for the girl who was kidnapped or the man whose car was stolen to the extent that you automatically write yourself out of points by concluding on their side because you want them to win. Even if the facts are horrible or gruesome, you must follow the law and not your feelings.
7. **Be strategic. Decide which issues are major and which are minor and plan to apportion your time.** Before you begin to write, look at the roadmap you’ve organized and assess where the points are. Issues with a lot of facts to use and those with two-sided arguments are always worth a lot of points, so spend your time accordingly. Put a star next to the major issues on your roadmap so you can see where the big points are at a glance. Be sure to apportion your writing time appropriately. If an essay has five key issues, you can do more in-depth analysis than if an essay has 15 key issues to address. Organize your answer first so you know what is being asked of you before you start to write because it is essential that you finish the essay.

Writing a Passing Essay Answer

After you’ve organized your answer, the next step is to actually write the essay answer. A good essay answer should include the following:

Format: Your answer should look organized and sound lawyerly. Write clearly and use proper grammar, spelling and punctuation. The answer should

be organized as an IRAC with an issue heading for each legal issue, followed by a rule statement, and then a separate paragraph for the corresponding analysis for that issue, followed by a conclusion. If there are multiple rule elements for the issue, each rule element can be separated and analyzed in its own paragraph. The rule elements should be analyzed in the same order that they are presented in the rule. If the elements have their own sub-rules or definitions, depending on time considerations you may opt to have subheadings for these subrules/elements (essentially you will then have mini-IRACs for each element). Issue statements are not necessary and are not worth any points so you can skip them. Don't waste time on introductions, restating the facts as a warm up, random musings, or nonissues. Use whitespace by skipping lines between paragraphs and issues to make it easy for the grader to read.

Issues: Identify each issue raised by the fact pattern. **Analyze one issue at a time and use issue headings to separate each issue.** Each issue should have its own IRAC structure. Preferably, each IRAC will also have its own issue heading, which is nothing more than the issue—for example, “Specific Performance.” The heading doesn't have to be fancy or long but makes it easy for the grader to find the issues and give you points. You don't want to bury a great issue-spot or key factual analysis where the reader (grader) can easily miss it. While there are examples of passing answers without headings, you risk the grader missing your issues if you don't use headings. It's not a hard and fast rule, but generally, if a rule element has its own rule, consider including a heading for the sub-rule. At a minimum, set off the analysis for each element in its own paragraph. Using headings and separate paragraphs also forces you to IRAC one issue at a time rather than combining multiple issues and rules into one paragraph, which often results in lost points because it is easier to omit some elements or analysis when you are combining multiple elements and issues together.

Rules: Have an accurate and grammatically correct rule statement for each rule. The rules should be precise and concise and contain all key elements and commonly used buzz words. Remember, this is a problem-solving exercise, not a dissertation, so you only need to use as much rule as you need to solve the problem posed. It is most effective to memorize a general statement for each rule, rather than to tailor it to include facts from the fact pattern.

Analysis: **Analysis is the “A” in our IRAC formula.** Each piece of analysis must include the legally significant **fact**, the rule or rule element, and an explanation of **how or why** that fact proves or disproves the rule or **rule element** at issue. Think of this as the sub-formula: Analysis = fact + how/why + rule element. Be sure to include all components of the analysis in your answer. The order of these three components is interchangeable (for example, you can have the rule first followed by the facts and explanation of why/how the fact proves or disproves the rule or you can have the facts first followed by rule and explanation). The key to success is that your analysis contains all three components. Analyze each rule element in the order given in the rule and analyze each rule element separately in its own paragraph. Another consideration when crafting analysis is if an issue is major or minor. An issue is major where it requires an (1) analysis of a pivotal issue, (2) analysis of an issue where there is an abundance of facts available to use in the analysis, or (3) where the available facts can be used to argue both sides of the

issue. When you have an issue that has colorable arguments on both sides, be sure to explain which side has the strongest argument prior to concluding. Though it is important to identify all issues that are raised by the facts, major issues are worth more points than minor issues and are thus worth more time and more real estate in your answer. An issue is minor where it is a “slam dunk” and few students are likely to miss it. For minor issues, you still need to properly address them, but you can typically do so in a more cursory way. Weave the rule and analysis into one sentence where possible. Efficiently identify how the fact establishes the rule or element and move on. If you consider an issue, but aren’t sure whether or not to include it, err on the side of inclusion, but know that it is likely a minor issue, so spend little time on it.

Conclusion: The conclusion can often go either way. The important thing is to have a conclusion that is consistent with your analysis. Never become so focused on the conclusion that you write yourself out of the question by failing to see alternative issues that may arise if an issue were to conclude the other way.

Self-Assessment

As part of a successful bar preparation strategy, it is essential that you develop the skill of assessing your own performance. You need to be able to assess your own practice essays with a critical eye so you can identify any problem areas in your essay writing or substantive knowledge and work to correct them. We have provided an Essay Exam Self-Assessment form at the end of the introduction, which you may want to use in your self-assessments. Many students find that it is difficult to accurately assess their own written work, and you may need to get some help with this if you are having difficulty.

After writing a practice essay, first consider how you did on the key skills of time management, organization and writing. Next, consider how you did substantively by comparing your answer to a sample answer or an answer grid and assess your performance on the following criteria:

Issue Spotting: Issue spotting is key because you can’t analyze an issue if you don’t spot it first.

Did you spot and identify the same issues?

Did you spot issues that weren’t there?

Headings: It is not essential to use the same headings as the sample answer or grid, but the important point is that someone reading your paper should be able to easily find all of the key analysis. Be brief. Use a key word, not an entire sentence, for the heading. Don’t bury important analysis in a place where a grader can’t easily locate it.

Did you use the same or similar headings?

Rules: It is important that you accurately state the rules in your essay answer since the rules provide the basis for the analysis that follows.

The language can be different, but is the rule correctly stated, including all essential elements?

Is your rule significantly shorter, or longer, than the one in the sample answer?
Did you use the “buzz words” associated with the rule?
Is the rule in sentence format?

Analysis or Fact Application: The analysis is the most important part of an essay answer and is also the most difficult part to self-assess. This is because there are many ways to adequately analyze an issue. Consequently, you aren’t looking for an exact comparison between your answer and the sample, but more of a general similarity of the analysis and the use of the available facts in the analysis.

Compare your answer to the sample answer (or a grid) issue by issue. Start with the first issue. Locate the first fact used in the analysis of that issue in the sample answer. Now, look for that fact in your analysis of that issue. Highlight your answer where you used the same fact in approximately the same way. If the sample answer used the fact in a more thorough or different way than you did, make a note of it. If the sample answer used a fact that you ignored, make a note of it. If you used a fact that the sample answer did not use for that issue, make a note of it. Continue the process looking at all of the facts in the first issue, then move on to the subsequent issues and repeat the process. Also pay close attention to what other components the sample answer linked with the facts. Often the analysis will contain three components, as explained above: the facts, the rule element, and the why or how the facts prove or disprove the rule. A good assessment mechanism is to highlight the facts in yellow, the rule element in blue, and the why and how in pink. This way you can easily see which components of your analysis are missing, if any, remembering that each sentence should be structured to combine these three pieces to make your analysis complete. It is not analysis if each of the above are on their own and not linked together. Now, take a critical look at your analysis:

Did you analyze each legal concept separately?
Did the sample answer use facts from the fact pattern that you ignored?
Did you identify the appropriate facts but leave it to the reader to determine how the existence of that fact established the legal element?
Did you present a one-sided argument when there were two sides to the analysis of that issue or rule element?
Was your analysis of an issue more cursory than the sample answer?
Was your analysis of an issue deeper than the sample answer?
Did your answer summarize and condense the facts?
Did your answer contain all three parts required for proper analysis (do you see all three highlighted colors linked together in your analysis)?

Conclusion: Sometimes the conclusion reached isn’t important, and sometimes there is only one logical conclusion or correct answer (especially in Professional Responsibility), but even in that case the points will be missed in the analysis section so the conclusion isn’t the focus. The important thing about a conclusion is to have one, and to make sure that it is consistent with your analysis.

Troubleshooting Tips to Improve Exam Performance

Process: If you are struggling with the process, try these tips:

Problem	Solution
Roadmapping takes too long	<ul style="list-style-type: none"> • If outlining before writing is new to you, you won't be working within time limits at first. • Bifurcate the process and take longer outlining while you learn the outlining skill, but always write your answer in 45 minutes. As you get more practice, your outlining time will lessen. • Try different organizing methods until you find one that works for you
Can't finish an essay in one hour	<ul style="list-style-type: none"> • Outline so you know what you're going to write before you start writing • Be strategic and expand and contract your analysis depending on if an issue is major or minor
Answer is too short so analysis is too thin	<ul style="list-style-type: none"> • A typical student can write approximately 1400-1500 words in 45 minutes. If you are significantly below that, you need to increase your typing speed.

Issues: If you missed an issue, or spotted an issue that wasn't there, ask yourself why.

Problem	Solution
Missed issue because did not know the rule	<ul style="list-style-type: none"> • Study and memorize the rule. • Use a checklist to issue spot. • Add the rule to your checklist.
Did know the rule, but not well enough to identify how the facts would raise it as an issue	<ul style="list-style-type: none"> • Understand the meaning of the rule elements, rather than rote memorization. • Practice issue-spotting exams that raise the issue to identify how facts will be used (see Issues Tested Matrix to locate). • Review fact patterns testing the issue to identify which facts tend to trigger the issue and create fact triggers for these issues by listing facts from the various essays you organize that test this issue (some fact triggers are already included in the outlines).
Saw the issue, but dismissed it as a nonissue	<ul style="list-style-type: none"> • Your job is to use the facts to prove and disprove legal issues. Any issue that requires thought to dismiss should be included in the answer. i.e., "This rule is not established because. . ."
The issue seemed too minor to include	<ul style="list-style-type: none"> • Minor issues should be included, but with truncated analysis.
Did not use all the facts in the fact pattern	<ul style="list-style-type: none"> • Check off facts or highlight them as they are used to ensure that all are used.
Addressed a nonissue	<ul style="list-style-type: none"> • Don't write about issues where there are no facts available from the fact pattern to use.

Headings: Were the headings sufficient?

Problem	Solution
Did not use a heading where needed	<ul style="list-style-type: none"> • Every legal concept should be set off with its own heading so it is easy to locate, including elements that have their own rules.

Rules: Were the rules accurate and adequate?

Problem	Solution
Did not remember the rule	<ul style="list-style-type: none"> • Memorize the rules and review all subjects weekly to reinforce.
Rule is shorter than sample	<ul style="list-style-type: none"> • Make sure the rule you memorize includes all essential elements.
Rule is longer than sample	<ul style="list-style-type: none"> • Review the rule to determine if it includes elements that are unnecessary or duplicative and remove them. • Carefully craft rule so that it is stated as concisely as possible.
Rule is missing important “buzz words”	<ul style="list-style-type: none"> • Craft the rule to include key “buzz words” that are associated with the rule; do not use synonyms.
Rule is not in sentence format	<ul style="list-style-type: none"> • Draft a grammatically correct sentence that includes all rule elements; memorize it.

Fact Application: Was the analysis logically organized, sufficient, and thorough?

Problem	Solution
Legal issues are merged together	<ul style="list-style-type: none"> • Analyze each legal issue separately by IRACing each issue separately with headings.
Analysis is jumbled or hard to follow	<ul style="list-style-type: none"> • Analyze each element of a rule in the same sequential order given in your rule statement.
Missing analysis on some of the rule elements	<ul style="list-style-type: none"> • Be methodical to ensure that you analyze each element of the rule and don’t skip any rule elements
Missing key facts in the analysis	<ul style="list-style-type: none"> • When organizing the answer, cross off each fact or highlight it as it is used to ensure all are used. • Identify a fact to correspond to each rule element.
Analysis did not explain how or why a fact established the issue or rule element	<ul style="list-style-type: none"> • Listing the facts is not enough; the analysis must explain how or why the fact establishes the rule element • Use the words “since” or “because” to force yourself to explain the how or why. • Analysis = fact + how/why that fact proves or disproves + rule element • Review your practice answers and highlight the three components of analysis (fact, how/why, rule element) in different colors to ensure you include the how and why every time.

Problem	Solution
Analysis did not link your fact and how/why explanation to the rule element it proves or disproves	<ul style="list-style-type: none"> • Analysis = fact + how/why that fact proves or disproves + rule element • Review your practice answers and highlight the three components of analysis (fact, how/why, rule element) in different colors to ensure you link to your rule element every time.
One-sided argument instead of two-sided	<ul style="list-style-type: none"> • Decide if there is a plausible contrary argument for each issue/rule element. • Role-play and pretend to represent each side of the dispute to see both sides.
Analysis is deep when it should be cursory, or analysis is cursory when it should be deep	<ul style="list-style-type: none"> • At the organization step, decide whether an issue is major or minor and treat each accordingly. • For minor issues, practice writing cursory or truncated analyses by weaving the rule and facts together into one sentence. • For major issues, be certain to use all available facts to analyze each element. • For each issue/rule element, always consider if there is a plausible contrary argument, and if so, argue it.
Facts are summarized and less effective	<ul style="list-style-type: none"> • Use the facts exactly as they appear in the fact pattern, including using quotes. • Expand on the facts where appropriate by making logical factual inferences.

IV. EXAM DAY STRATEGY

There are exam day strategies pertaining to the essay exam that you should implement to maximize your potential exam score and minimize your stress.

1. **Be prepared for anything.** Anything can happen so be as prepared as you can for all possibilities. Computers can crash, software can glitch, electricity can be disrupted, and even earthquakes can occur (as they have in the past). Even if you plan to type, bring a pen, just in case.
2. **Do a few practice questions before you go to the test site** to get your brain moving. If you tend to freeze when you start an exam, do a few MBE questions or issue spot an essay in a favorite subject to get your brain warmed up in the morning. Just do the questions, don't look at the answers.
3. **Answer the essay questions in the order presented.** Do not be tempted to even glance at the next question until you are ready to answer it. Some students think it will be helpful to scan the three questions looking for one related to a subject in which they feel particularly confident. However, doing so wastes time and there is no time to waste on the bar exam. Even worse, while a student is answering the chosen question, his mind will keep wandering back to the scary question he skipped. Consequently, he doesn't give his full attention to any of the questions, which is not an effective strategy.

You must answer all questions anyway, so you might as well do them in the order they were given to you.

4. **Spend only one hour on each essay question—no matter what.** Some questions are absolutely more difficult than others, but every question is designed to be answered in only one hour. Your essay answers are being graded in comparison to all of the other bar exam takers who are typically only taking one hour to answer each question. If a question is a real “racehorse”—a question containing many facts and issues to be analyzed—the key to a passing answer is writing an answer that identifies all of the issues and contains very cursory analysis of the non-key issues. If a student takes more than an hour to write a more detailed answer, he will likely not receive much higher than the passing score on that question, which he likely would have received in the first place. However, in the process, he virtually guaranteed failure on the essay question that was shortchanged for time because it is virtually impossible to write a passing answer in less than an hour.
5. **Do not worry about what the people around you are doing.** Bar exam takers will do some unusual things during the exam; ignore them.
6. **Don’t panic if you have no idea what to do with an essay question.** There is usually one unusual question on every bar exam. Take a deep breath. The bar exam is graded on a curve. If you have properly studied for the exam, you can be certain that if you are befuddled by the question, so is everyone else in the room. Figure out what the underlying subject is and write down your checklist. Take the fact pattern sentence by sentence and look for issues. Don’t take longer than an hour and don’t think about it again once the hour is over. One way to help with these unusual exams is to ensure that you use the facts in a logical manner even if you aren’t sure of the rule. Imagine yourself in front of a judge with new facts that came to you and you need to make a plausible argument. Think on your feet and do your best. The key is to show the examiners that you can solve a problem and express yourself in a lawyerlike manner.
7. **Do not talk about the essay questions** with anyone during the exam. Make a pact not to talk about it with your friends and use headphones to avoid overhearing what other bar exam takers are saying around the exam site or adjacent hotel. Just as in law school, the people who talk the most and loudest often have the least idea of what they are talking about. No good can come from listening to self-appointed experts theorize about what issues were on the essay questions, and it can actually be harmful if it rattles your confidence or makes you doubt yourself. It is best not to do a post-mortem on this exam; but if you must, wait until the entire exam is over and then only discuss it with someone whose judgment you trust.

ESSAY EXAM SELF-ASSESSMENT

ESSAY SKILLS:

- **TIME MANAGEMENT**
 - _____ Proper time prioritization/allocation and finished exam
- **ORGANIZATION**
 - _____ Logical and responsive to call
 - _____ Headings used for each legal issue (one or two words only)
 - _____ Uses white space between issues to assist grader
 - _____ IRAC used in analysis consistently
- **WRITING**
 - _____ Proper grammar, capitalization, punctuation and few typos
 - _____ Clarity of writing and expression

CONTENT:

- **ISSUE SPOTTING**
 - _____ All major issues identified, most minor issues
 - Areas to improve—issue spotting:**
 - _____ Missed major issues
 - _____ Missed minor issues
 - _____ Included nonissues
- **RULES**
 - _____ Accurate and complete rule statements were used
 - Areas to improve—rules:**
 - _____ Rule included unnecessary elements (too much rule)
 - _____ Rule failed to include necessary elements (too little rule)
 - _____ Rule missed important “buzz words”
- **ANALYSIS**
 - _____ Analysis explained how and why the facts established the rules
 - Areas to improve—analysis:**
 - _____ Failed to analyze each legal issue separately
 - _____ Analysis did not explain “how or why” facts prove or disprove
 - _____ Important facts were missing from the analysis
 - _____ Facts were summarized instead of using key, specific facts
 - _____ Analysis was cursory where it should have been deep
 - _____ Analysis was deep where it should have been cursory
 - _____ Missed a two-sided argument
 - _____ Analysis didn’t link the three analysis components together (fact + rule + how/why)
- **CONCLUSION**
 - _____ Conclusion logically flowed from analysis

PART I BUSINESS ASSOCIATIONS

BUSINESS ASSOCIATIONS TABLE OF CONTENTS

	Page
I. CORPORATIONS	26
A. Corporation formation and structure	26
1. Corporate formation	26
a. De jure corporation	26
b. De facto corporation	26
c. Corporation by estoppel	26
d. Piercing the corporate veil	26
2. Corporate powers	27
a. Purpose	27
b. Ultra vires acts	27
c. Debt acquisition	27
d. Issue shares of stock in the corporation	27
3. Pre-incorporation actions by a promoter	28
a. Liability for promoter contracts	28
b. Promoter duties	29
B. Corporation management, directors, and officers	29
1. Corporate management structure	29
2. Actions of the board of directors	30
3. Duties of directors and officers	30
a. Duty of care (business judgment rule)	30
b. Duty of loyalty	31
1. Conflict of interest (self-dealing)	31
2. Usurping a corporate opportunity	31
3. Unfair competition	32
c. Duty to disclose	32
4. Rights of directors and officers	32
5. Liability of directors and officers	32
C. Shareholders	32
1. Rights of shareholders	32
2. Shareholder agreements	34
3. Shareholder suits	34
a. Direct suit	34
b. Derivative suit	34

4. Shareholder duties	35
5. Shareholder liability	35
D. Federal securities laws	35
1. Section 16(b): short-swing profits	35
2. Section 10b-5: insider trading	36
a. Fraud (misrepresentation) prima facie case	36
b. 10b-5 may be violated in four ways	36
1. Direct trading by an insider	36
2. Tippers	37
3. Tippees	37
4. Misappropriators	37
3. The Sarbanes-Oxley Act	37
E. Corporate fundamental changes	38
1. Corporate fundamental change—typical procedure	38
2. Types of fundamental changes	38
3. Dissenter appraisal rights	39
II. AGENCY	39
A. Formation of principal-agent relationship	39
1. Agreement	39
2. Capacity	40
3. All contract formalities are not required	40
B. Duties of principal and agent and remedies for breach	40
1. Principal duties	40
2. Agent duties	40
C. Principal's liability for agent's contracts	41
1. Actual express authority	41
2. Actual implied authority	41
3. Apparent authority	42
4. Ratification	42
5. Agent acting without authority	43
D. Principal's liability for agent's torts	43
1. Scope of principal-agent relationship	43
2. Independent contractors	43
3. Intentional torts	43
III. PARTNERSHIP	44
A. General partnership	44
1. Definition	44
2. Formation	44
3. Partnership assets	44
4. Partnership rights and duties	45
5. Partnership relations with third parties	46
6. Partnership liability	46
7. Dissociation, dissolution, and winding up	47
B. Limited partnership	48
1. Definition	48
2. Formation	48
3. Partnership rights and duties	49
4. Partner liabilities	49

a. General partners	49
b. Limited partners	49
5. Dissolution	49
IV. LLP—LIMITED LIABILITY PARTNERSHIPS	50
A. Definition	50
B. Formation	50
C. Liability of limited liability partners	50
D. Fiduciary obligations	50
E. Dissociation and dissolution	50
V. LLC—LIMITED LIABILITY COMPANIES	50
A. Definition	50
B. Formation	50
C. Rights and duties of LLC members	51
D. Liability of LLC members	51
E. Dissolution	51

INTRODUCTION TO BUSINESS ASSOCIATIONS

The topic of business associations encompasses the subjects of corporations, agency, and partnership. There are a lot of substantive rules eligible for testing, but the vast majority of essay questions cover the frequently tested topics in corporations of duty of care and duty of loyalty, shareholder rights and agreements, and fundamental changes in corporate structure. The agency issues involving agent authority and general partnership issues have been the most tested since agency and partnership became eligible for testing in 2007. In referencing old bar exam answers, keep in mind that the Model Business Corporation Act was just revised and adopted in December 2016, so some of the rules have changed and old bar questions and answers may show the older rules.

In business association questions it is important to analyze the conduct of each person presented in the fact pattern separately. There will frequently be a fact pattern that identifies two or more corporate officers or directors, and they will usually take a corporate action leading to liability under 10b-5 or action that breaches a fiduciary duty. Usually, each party is privy to different information and thus won't have equal responsibility. Be certain to analyze the facts pertaining to each party under the rule separately to avoid missing key analysis.

Be certain to thoroughly go through the issues checklist looking for issues pertaining to each party identified in the fact pattern to successfully issue-spot a business associations essay. Business association issues tend to cluster in predictable ways. A party who is in violation of 16(b) is almost always also in violation of 10b-5 (though not necessarily the other way around) and they may have also breached the duty of loyalty. With few exceptions, when the duty of care is at issue, the duty of loyalty is also at issue. The facts that raise issues relating to pre-incorporation liability, piercing the corporate veil, and ultra vires acts also typically raise the issues of duty of care and/or duty of loyalty. The duty of care and duty of loyalty is almost always tested on business associations questions, so be sure to know those rules very well.

Business association essay questions typically provide a lot of factual detail to analyze, and many of the issues can, and should, be argued both ways to receive maximum points. Business association essays are frequently crossover questions. The business association topics may cross over with each other. For example, an essay may cover corporations and the agency relationship of a corporate promoter or a director who exceeds authority. It is also common to see business associations cross over with professional responsibility where one of the parties is either a lawyer or seeks the advice of a lawyer. We recommend you review many crossover questions by viewing the issues tested matrix to see which questions are crossovers and issues, especially the professional responsibility/business associations crossover questions.

ISSUES CHECKLIST

CORPORATIONS

Formation

- De facto and de jure corp.
- Piercing the corp. veil
- Ultra vires acts
- Promoter liability

Corp. Management, Directors & Officers

- Duty of care (BJR)
- Duty of loyalty

Shareholders

- Rights
 - Meetings and elections
 - Voting
 - Inspection
 - Dividend distribution
- Shareholder agreements
- Shareholder derivative suits

Federal Securities Laws

- 16(b)
- 10b-5
 - Fraudulent statements
 - Insider trading
- Sarbanes-Oxley

Fundamental Changes

- Dissolution

AGENCY

- Formation
- Principal's duties and remedies
- Agent's duties and remedies

- P's liability for A's k's (authority)

- P's liability for A's torts (scope)

PARTNERSHIP

General Partnerships

- Formation
- Partnership assets
- Partner rights & duties
- Relations of partner to 3rd parties
- Partner liability
- Dissociation/Dissolution/
- Winding up

Limited Partnerships

- Formation
- Ltd. partner rights & duties
- Ltd. partner liability
- Dissociation/dissolution/
- winding up

LLP

- Formation
- LL Partner rights & duties
- LL Partner liability
- Dissociation/Dissolution/
- Winding up

LLC

- Formation
- LLC member rights & duties
- LLC member liability
- Dissociation/Dissolution/
- Winding up

MEMORIZATION ATTACK SHEET

CORPORATION—FORMATION

- ◆ **Formation**
 - De jure corporation—file articles of incorporation:
 - ◆ Initial agent's name
 - ◆ Street address—office
 - ◆ Corporation name
 - ◆ Authorized # of shares
 - ◆ Name/address of incorporators
 - De facto corporation
 - Corporation by estoppel
- ◆ **Pierce corporate veil**
 - Alter ego
 - Undercapitalization
 - Fraud
 - Estoppel
- ◆ **Deep Rock Doctrine**
- ◆ **Ultra vires**
 - Act outside business purpose
- ◆ **Shares of stock issued**
 - Subscription agreement
 - Types of shares issued
 - Consideration required
 - No preemptive right for existing shareholder
- ◆ **Pre-incorporation liability**
 - Promoter: personal liability
 - Corp: not liable unless
 - ◆ Adopt contract, or
 - ◆ Accept benefit

CORPORATE DIRECTORS & OFFICERS

- ◆ **Meetings**
 - Quorum required
 - Presence by any means
 - Withdraw can break quorum
 - Dissent/abstention
- ◆ **Duty of care**
 - Reasonable prudent person

- Business judgment rule
 - ◆ Good faith
 - ◆ Corp's best interests
- ◆ **Duty of loyalty—no conflicts of interest**
 - **No self-dealing**
 - ◆ Presumed unfair, but
 - ◆ Conflict can be cured if authorized/approved & fair
 - **No usurp corp. opportunity**
 - ◆ Ok if good faith rejection &
 - ◆ Full disclosure
 - ◆ Remedy: disgorge profits
 - **No unfair competition**
- ◆ **Duty to disclose material info**
- ◆ **Rights of directors & officers**
 - Compensation
 - Indemnification
 - Inspection
- ◆ **Liability of directors & officers**
 - No personal liability generally

CORPORATE SHAREHOLDERS

- ◆ **Rights of shareholders**
 - Meetings
 - Voting
 - ◆ Right to vote by stock type
 - ◆ Voting by proxy allowed
 - ◆ Quorum required
 - Inspection
 - Dividends
- ◆ **Shareholder agreements**
 - Voting trust
 - Voting agreement
 - Management agreement
 - Restrictions on stock transfer
- ◆ **Shareholder suits**
 - Direct suit
 - Derivative suit on corp. behalf
- ◆ **Shareholder duties**
 - General rule: no fiduciary duty

- Modern trend: controlling shareholders owe a duty care & loyalty

◆ **Shareholder liability**

- General rule: no personal liability
- Except: professional corps.

FEDERAL SECURITIES LAW

◆ **16(b)—no short-swing profits**

- Corporation
 - ◆ On national exchange, OR
 - ◆ 10 million assets &
 - ◆ 2000 shareholders
- Corporate insiders
 - ◆ Officers & directors
 - ◆ Over 10% shareholders
- Trading within 6 months
- Damages/Remedy: disgorge profits

◆ **10b-5—no insider trading**

- Fraud/ Misrepresentation requires
 - ◆ Intent
 - ◆ Material misrepresentation or omission of insider information
 - ◆ Reliance
 - ◆ Buy or sell securities
 - ◆ Interstate commerce
 - ◆ Remedy: disgorge profits
- 10b-5 insiders—4 ways
 - ◆ Insider direct trading
 - ◆ Tipper: giving information
 - ◆ Tippee: receiving information
 - ◆ Misappropriator

◆ **Sarbanes-Oxley**

- Enhanced corporate reporting requirements
- Increased criminal penalties

CORPORATE FUNDAMENTAL CHANGES

◆ **Typical procedure**

- Board adopts resolution

- Written notice to shareholders
- Shareholders approve
- Update articles/file with state

◆ **Types of changes**

- Merger
- Share exchange
- Asset sale
- Conversion of corporate form
- Amend bylaws or articles
- Dissolution & winding up

◆ **Dissenter appraisal rights**

AGENCY

◆ **Formation**

- Agreement
- Benefit of principal
- Control of agent
- All contract formalities not required

◆ **Principal duties: as required in the contract**

◆ **Agent duties**

- Duty of care (BJR)
- Duty of loyalty—no conflicts
 - ◆ No self-dealing
 - ◆ No usurp principal opportunity
 - ◆ No secret profits
 - ◆ No commingling funds
- Duty of obedience
- Duty of communicate
- Express contractual duties

◆ **Agent is personally liable for third-party contracts only if**

- Agent acts with no authority
- Principal's identity unrevealed
- Principal's existence and identity undisclosed
- All parties intend so

◆ **Principal is liable for agent contracts if**

- Actual express authority
- Actual implied authority
 - ◆ Can be terminated by:

- Breach of agent's duty
- Lapse of stated, or reasonable time
- Operation law
- Changed circumstances
- Happening of specified event
- Unilateral termination by either party
- **Apparent authority**
 - ◆ Notice to third party required if actual authority terminated
 - ◆ Written "lingering" authority
 - ◆ Agent exceeds authority
- **Ratification**
- **If no authority:** agent personally liable
- ◆ **Principal liability for agent torts**
 - **Normal tort:** Liable if tort is within scope of relationship
 - ◆ Except frolic, but mere detour ok
 - **Independent contractors:** Not liable (no control of methods)
 - ◆ Except:
 - Ultrahazardous activities
 - Nondelegable duties
 - Negligent selection
 - Estoppel (hold out as agent)
 - **Intentional torts:** Not liable
 - ◆ Except:
 - Specifically authorized
 - Natural result
 - Motivated by desire to serve

PARTNERSHIP—GENERAL

- ◆ **Formation**
 - No formalities required
 - Intent to be co-owners required
 - Agency-like relationship

- ◆ **Partnership assets**
 - **Titled property (RUPA)**
 - ◆ Titled as partner
 - ◆ Partnership funds
 - **Untitled property**
 - ◆ Partnership funds
 - ◆ Close relationship/use of property
 - ◆ Listed as an asset in books
- ◆ **Partnership rights**
 - Ownership of property
 - Equal control, can't transfer
 - No right to salary (except for winding up)
 - Equal right to profit & losses (unless agreement otherwise)
 - Indemnification
- ◆ **Partner duties**
 - **Duty of care (BJR)**
 - **Duty of loyalty**—no conflicts (no self-dealing, usurping opportunity, secret profits, competition)
 - **Duty to disclose** material info
 - **Duty to account**
 - **Duty of obedience**
 - **Duty of good faith/fair dealing**
- ◆ **Partner relations w/3rd parties**
 - Personal liability for debts
 - Contract authority
 - ◆ Actual authority
 - ◆ Apparent authority
 - ◆ Estoppel
 - Torts: joint & several liability
- ◆ **Partnership liability**
 - Civil liability extends to:
 - ◆ Contracts within the scope
 - ◆ Tort within the scope
 - ◆ Liability is joint & several
 - Incoming partners
 - Outgoing partners
- ◆ **Dissociation**—partner leaves
- ◆ **Dissolution**—partnership ceases

- ◆ **Winding up**
 - Compensation allowed
 - Priority of distribution
 - ◆ Creditors
 - ◆ Partner loans
 - ◆ Capital contributions
 - ◆ Profits & surplus

PARTNERSHIP—LIMITED

- ◆ **Formation:** file certificate
- ◆ **Partner rights and duties**
 - General: same as general
 - Limited: no right to act on behalf & owe no duties
- ◆ **Partner liabilities**
 - General: same as general
 - Limited: not liable beyond capital contribution
- ◆ **Dissolution**—can be prompted by:
 - Time specified in certificate
 - Written consent of all
 - Dissociation of general partner
 - 90 days after dissociation of last limited partner
 - Judicial decree

- ◆ **Winding up activities**
 - Priority of distribution
 - ◆ Creditors
 - ◆ Partners & former partners previous distribution
 - ◆ Capital contributions
 - ◆ Partners

LLP

- Formed by filing statement
- LL partners have no personal liability
- Duty of care & loyalty owed
- Dissociation/dissolution similar to regular partnership

LLC

- Formed by filing articles of organization
- LLCs have no personal liability
- Management interest not freely transferable (limited liquidity)
- Duty of care & loyalty owed
- Dissolution-jx split

BUSINESS ASSOCIATIONS RULE OUTLINE

I. CORPORATIONS

- A. **Corporation formation and structure:** A corporation is a legal entity that exists separate from its owners, thus **shielding the owners and managers from personal liability** for the actions of the corporation.

1. **Corporate formation:**

- a. A **de jure corporation** meets all of the mandatory statutory requirements including that the incorporators (need at least one incorporator) **sign and file an articles of incorporation** with the secretary of state that includes:
1. **Initial agent's name** for the corporation
 2. **Street address** for corporation's initial registered office
 3. **Corporation's name**
 4. **Authorized number of shares** (maximum allowed)
 5. **Name and address** of each **incorporator**

Memorization tip: Remember "I SCAN" to include all of the information required on the **articles of incorporation**.

- b. A **de facto corporation** exists where there is **actual use of corporate power** and a **good faith**, but unsuccessful, **attempt to incorporate** under a valid incorporation statute.
1. **Limited liability:** The law will treat the defectively formed corporation as an actual corporation and the **shareholders will not be personally liable** for corporate obligations.
 2. **Determination:** The state may **deny corporate entity status** in a quo warranto proceeding, but third parties may not attack the corporate status.
- c. **Corporation by estoppel:** A person who deals with a business entity **believing it is a corporation**, or one who **incorrectly holds the business out as a corporation**, may be estopped from denying corporation status. This applies on a case-by-case basis and only in contract (reliance on corporate status), not to tort cases.
- d. **Piercing the corporate veil:** Generally, a corporate shareholder is not liable for the debts of a corporation, except when the court pierces the corporate veil and disregards the corporate entity, thus **holding shareholders personally liable** as justice requires. It is easier to find liability in closely held corporations (those with few shareholders that make the decisions).
1. **The veil can be pierced for the following reasons:**
 - a. **Alter ego:** Where the shareholders fail to treat the corporation as a separate entity, but more like an alter ego where **corporate formalities are ignored** and/or **personal funds are commingled**.
 - b. **Undercapitalization:** Where the shareholders' **monetary investment** at the time of formation is **insufficient** to cover

foreseeable liabilities; some courts in close corporations look at future debts if foreseeable.

- c. **Fraud:** Where a corporation is formed to commit fraud or as a mechanism for the shareholders to **hide behind to avoid existing obligations.**
 - d. **Estoppel:** Where a shareholder **represents that he will be personally liable** for corporate debts.
2. **Effect of piercing the corporate veil:** Active shareholders will have personal joint and several liability.

Issue-spotting tip: Where piercing the corporate veil is at issue, the facts often will also raise the issue of promoter liability for pre-incorporation contracts and breaches of fiduciary duties by directors. This issue often arises in situations where there are few shareholders and courts are more likely to pierce the corporate veil for tortious acts and not for contract issues.

- 3. **Deep Rock Doctrine:** When a corporation is insolvent, third-party creditors may be paid off before shareholder creditors, thus subordinating the shareholder claims.

2. **Corporate powers**

- a. **Purpose:** It is presumed that all corporations are formed for **any lawful business purpose** unless the articles define a limited, specific purpose.
- b. **Ultra vires acts:** *If* a corporation has a limited stated purpose and it **acts outside its stated business purpose**, it is acting “ultra vires.”
 - 1. Modernly, ultra vires acts are **generally enforceable.**
 - 2. **Ultra vires acts may be raised when:** (1) the ultra vires act causes the state to seek dissolution, (2) the corporation sues an officer, or (3) a shareholder sues to enjoin the proposed act.

Issue-spotting tip: Any time an essay identifies the purpose of the corporation, or places a restriction on corporate activities, consider whether ultra vires is an issue. While ultra vires is usually not an effective defense, on an exam it is important to spot the issue and complete the analysis if the facts give rise to it.

- c. **Acquire debt:** Corporations may borrow funds from outside sources to pursue the corporate purpose. Lenders do not acquire an ownership interest in the corporation. Debts may be secured (a bond) or unsecured (a debenture).
- d. **Issue shares of stock in the corporation**
 - 1. A **stock subscription agreement** is a contract where a **subscriber** makes a written promise **agreeing to buy a specified number of shares of stock.**
 - a. A **post-incorporation subscription** creates a contract between the subscriber and the corporation.

- b. A pre-incorporation subscription is irrevocable for six months unless otherwise stated in the agreement or all subscribers agree to revocation.
2. Shares of stock are equity securities that give the shareholder an ownership interest in the corporation.
 - a. **Quantity of shares available:** The articles of incorporation authorize the number of shares available to be sold. Shares that are sold are issued and outstanding. Shares that have yet to be sold are authorized but unissued.
 - b. **Types of shares:** The articles of incorporation can provide that different classes of stock shares are available (common or preferred). Preferred shares must state:
 - i. The number of shares in each class,
 - ii. A distinguishing name/classification for each class, and
 - iii. The rights, preferences, limitations, etc., of each class.
 - c. **Consideration is required** in exchange for stock shares and can include any tangible or intangible property or benefit to the corporation, such as cash, an exchange for services rendered, or cancellation of a debt owed, etc. Jurisdictions are split as to whether to include the exchange for future services or an unsecured debt (e.g., the RMBCA does allow these; CA does not).
 - i. **Traditional par value approach:** price is the stated minimum issuance price and stock may not be sold for less than par value.
 - ii. **Board's good faith:** No par means there is no minimum issuance price for the stock; generally the board of directors' good faith determination of the price is conclusive.
 - iii. **Treasury stock** is stock that was previously issued and had been reacquired by the corporation. It can be re-sold for less than par value and is treated like no par stock.
3. **Preemptive rights** refer to the right of an existing shareholder to maintain her percentage of ownership in a corporation when there is a new issuance of stock for cash. Modernly, unless the articles provide otherwise, a shareholder does not have preemptive rights.
3. **Pre-incorporation actions by a promoter:** Promoters are persons acting on behalf of a corporation that is not yet formed. Prior to incorporation it is common for a promoter to raise capital and contract for a location, business materials, equipment, etc.
 - a. **Liability for promoter contracts:**
 1. Promoters are personally liable for pre-incorporation contracts until there has been a novation replacing the promoter's liability with that of the corporation or there is an agreement

between the parties that expressly states that the promoter is not liable.

- a. **Right of reimbursement:** The promoter may have a right to reimbursement based on quasi contract for the value of the benefit received by the corporation, or on the implied adoption of the contract.
2. A **corporation is not generally liable** for, or bound to, pre-incorporation contracts.
 - a. **Except** that a corporation will be liable where the corporation expressly **adopts the contract** or **accepts the benefits** of the contract (note that the promoter is also still liable unless there has been a novation).
- b. **Promoter duties:** A promoter has a fiduciary relationship with the proposed corporation requiring **good faith**. Promoters cannot make a secret profit on their dealings with the corporation.

Promoter liability (pre-incorporation) fact triggers:

- Rent contract entered into before incorporation
- Equipment contract entered into before incorporation
- De facto company because of failure to properly incorporate
- Piercing the corporate veil

B. Corporation management, directors, and officers

1. Corporate management structure:

- a. **Director required:** All corporations must have at least one director, though they may have as many directors as they wish (including variable numbers).
- b. **Articles of incorporation** are filed with the state to establish the corporation, and any provisions contained in the articles will govern the corporation.
- c. **Bylaws:** Management of the corporation is conducted in accordance with the articles of incorporation and any corporate bylaws adopted by the board, which typically contain management provisions.
- d. **Election of the board of directors:** The initial board is elected at the first annual meeting and each year thereafter unless terms are staggered.
- e. **Officers and committees are appointed** by the board of directors to implement the board decisions and carry out operations.
- f. **Officer authority:** Officers have authority to act on behalf of the corporation based on agency law principles. An officer's authority to bind the corporation may be express, implied, or apparent. (See Agency, section II.C.)
- g. **Removal:**
 1. **Director:** A director can be removed with or without cause by a majority shareholder vote, unless the articles state removal only with cause permitted.

2. **Officer:** The board may remove an officer with or without cause.
- h. **Resignation** of an officer or director is allowed at any time with notice.
2. **Actions of the board of directors**
 - a. **Meetings:** The board of directors must hold meetings, which can be **regular meetings** in accordance with the bylaws without notice, or **special meetings** requiring at least two days' notice.
 1. **Quorum requirement:** A quorum, which is a **majority of the board** of directors, **must be present** at the time a vote is taken for board action to be valid, unless the bylaws or articles allow otherwise (but can be no fewer than one-third of the board members).
 - a. **Presence:** Presence can be by **any means of communication** so long as all members can hear each other and the means is not prohibited by the articles or bylaws (but members with conflicts don't count toward the quorum).
 - b. **Withdrawal allowed:** But, unlike shareholders, a director may break quorum by withdrawing from a meeting before the vote is taken.
 - c. **Dissenting members:** A member is deemed to assent to an action unless she objects at the beginning of the meeting (or when she arrives), her dissent or abstention is recorded in the minutes, or she delivers a written notice of such before the meeting is adjourned.
 - b. **Actions without meetings:** An action may be taken without a meeting if **all directors sign a written consent** describing the action taken and include that in the minutes or file it with corporate records.
 - c. **Delegation:** The board may delegate authority to a committee, or an officer.
 3. **Duties of directors and officers:** A director or officer owes the duty of **care**, duty of **loyalty**, and duty of **disclosure** to the corporation.
 - a. **Duty of care:** A director or officer owes the corporation a duty of care to act in **good faith** as a **reasonably prudent person** in a manner he **reasonably believes** is in the best interest of the corporation.
 1. The **business judgment rule (BJR)** applies the standard of care imposed for business judgments and provides the presumption that the directors or officers will manage the corporation in **good faith** and in the **best interests of the corporation** and its shareholders. The BJR is violated when a director's or officer's conduct is **unreasonable**.
 - a. **Reliance on others:** It is not unreasonable for a director to rely on information from officers, legal counsel, committees, etc. the director reasonably believes to be reliable and competent.

Duty of care fact triggers:

- Corporation changes to less profitable line of business
- Large expenditure when a merger is pending
- Officer misrepresents financials to induce contracting
- Subsidiary corp. sells items at cost to corporate owner
- Failure to investigate business opportunity/sale of company
- Issuing stock as a gift
- Officer makes business decision on personal bias
- Director takes inventory without paying

- b. **Duty of loyalty:** A director or officer owes a duty of loyalty to the corporation. A director must put the **interests of the corporation above his own interests**. The duty of loyalty arises three ways:
1. **Conflict of interest (self-dealing):** A director or officer has a conflict of interest when he (or a corporation he owns or has a relationship with, or his family member) enters into a **contract** with the corporation or has a **beneficial financial interest** in a contract.
 - a. **Self-dealing contracts are presumed unfair and voidable.**
 - b. **Conflict can be cured if:**
 - i. **Authorized** by disinterested board members after material disclosure; or
 - ii. **Approved** by majority of disinterested shareholders after material disclosure; and
 - iii. The transaction is **fair to the corporation**.

Duty of loyalty (conflict of interest) fact triggers:

- Directors vote to sell company or give a profitable contract to a director's or owner's company or relative
- Directors change business model to benefit corporate owner
- Director or officer buys stock based on insider info
- No proper investigation or inquiry to reveal self-dealing
- Director or relatives benefit from a corp. acquisition
- Any time a director has any personal interest in a transaction

2. **Usurping a corporate opportunity:** A director or officer may not personally act on a business opportunity without **first offering it to the corporation** where the corporation would expect to be presented the opportunity.
 - a. The director or officer may take the opportunity only after **good faith rejection** of the opportunity by the corporation if there was **full disclosure** of all material facts to a **disinterested board majority**.
 - b. **Remedy:** If the director or officer usurps a corporate opportunity, then the corporation may compel the director/officer to turn over the opportunity or **disgorge profits (constructive trust equitable restitution theory)**.

Duty of loyalty (usurp corp. opportunity) fact triggers:

- Officer takes a business opportunity as a side job
- Officer takes opportunity to make a windfall on a deal himself
- Any time a director learns of a business opportunity
- Director or family member is on other side of a deal from corporation

3. **Unfair competition:** A director or officer **may not unfairly compete** with the corporation.
- c. **Duty to disclose:** Directors and officers have a duty to disclose **material information** relevant to the corporation to board members.

Exam tip: When the duty of care is implicated, the duty of loyalty is usually also in issue. When analyzing the duties owed by a director or officer, always analyze the conduct of each party separately.

4. **Rights of directors and officers**

- a. **Compensation:** A director or officer is entitled to **fair compensation**, the rate of which the board of directors determines (it is not a conflict for the board to set reasonable director compensation unless the articles or bylaws state otherwise).
 - b. **Indemnification:**
 1. **Mandatory:** A director or officer is entitled to indemnification for expenses incurred on behalf of the corporation, and for expenses incurred if he **prevails in a proceeding brought against him** by the corporation.
 2. **Discretionary:** The corporation *may* indemnify directors or officers for unsuccessful proceedings against them if the directors or officers acted in **good faith** and they believed their actions were in the best interest of the corporation, unless the directors or officers are liable due to an improper financial benefit.
 - c. **Inspection:** A director or officer has a right to a reasonable inspection of corporate records or facilities.
5. **Liability of directors and officers:** The articles of incorporation **can provide for indemnification** of a director or officer for liability while acting as a director or officer except for when the director or officer received an unfair financial benefit or committed intentional wrongful acts or crimes.

C. **Shareholders**

1. **Rights of shareholders**

- a. **Meetings** are typically where shareholders convene and vote on corporate management issues. There are two types of meetings:

1. **General meetings** or annual meetings occur **once a year** and are where most shareholder voting occurs (10-60 days' notice required).
2. **Special meetings** can be held upon reasonable notice of the time, place, and business to be discussed (10-60 days' notice required and purpose).
- b. **Voting:** Shareholders have only **indirect corporate power** through the right to vote to elect or remove members of the board and approve fundamental changes in the corporate structure, such as mergers, dissolutions, etc.
 1. **Right to vote:** The **right to vote attaches to the type of stock held** by the shareholder. A corporation can have two types of stock: common and preferred. If the articles do not specify voting rights, both classes of stock may vote. Usually each outstanding share is entitled to one vote.
 2. **Voting by proxy:** A shareholder may vote in person or by proxy. A proxy is a **signed writing (can be electronic) authorizing another to cast a vote** on behalf of the shareholder.
 - a. A **revocable proxy** is an agency relationship between the shareholder and the proxy.
 - b. An **irrevocable proxy** occurs when the **proxy is coupled with interest**. The irrevocable proxy must be so **labeled**. The interest can relate to an interest in the shares (e.g., creditor or prospective purchaser) or an interest in the corporation (e.g., performance of services or granting credit in exchange for proxy rights).
 3. **Quorum:** For an action to pass there must be a quorum, which is a **majority of outstanding shares represented** (in person or by proxy) at the meeting. Quorum is based on the number of shares, not shareholders.
 - a. **Majority vote:** If a quorum is present, a majority of **votes cast** validates the proposed shareholder action.
 - b. **Except** votes regarding a **fundamental change** require a **majority vote of all outstanding shares** to validate the proposed action. (A higher standard.)
 4. **Vote calculation:** Two methods are employed:
 - a. **Straight voting:** Each shareholder casts one vote per share held. Therefore, a shareholder with more than 50% of the shares controls the vote.
 - b. **Cumulative voting for directors** allows a shareholder to multiply the number of shares held by the number of directors to be elected and then cast all votes for one or more directors.
 5. **Unanimous written consent:** Shareholders may also take action with unanimous written consent of all shareholders.
- c. **Inspection:** A shareholder **has a right to inspect** the corporate books (articles, resolutions, shareholder meeting minutes, etc.) upon a showing of a **proper purpose with five days' written**

notice. As to accounting or shareholder records or board minutes, the demand must be made in good faith and describe with reasonable particularity the purpose for the inspection, and the records must be directly connected to the stated purpose.

- d. **Dividends** are the distribution of cash, property, or stock that a shareholder may receive from the corporation.
 - 1. **Discretionary:** Dividends are given at the board's discretion. But a distribution is not permitted if it would lead to insolvency or is not allowed in the articles.
 - 2. **Types of dividend distribution:**
 - a. **Preferred with dividend preference:** Paid first to preferred with dividend preference as to stated amount, then remaining amount is paid to common stock.
 - b. **Preferred and participating:** Paid first to preferred and participating as indicated in preferred amount, then remaining amount is paid to common stock. (Preferred and participating stockholders also get a share of the dividends paid to common stock holders, if any.)
 - c. **Preferred and cumulative:** Paid first to preferred and cumulative as indicated for number of years not paid in the past, then remaining amount is paid to common stock.
 - d. **Cumulative if earned:** Dividends cumulate only if the corporation's total earnings for the year are more than the total amount of preferred dividends that would need to be paid out for the year.
 - e. **Common stock (nonpreferred):** Paid last and all shares are paid in equal amount.

2. Shareholder agreements

- a. A **voting trust** occurs when shareholders agree in writing to transfer their shares to a trustee who votes and distributes dividends in accordance with the voting trust. Often seen in closely held corporations. (valid for ten years)
- b. A **voting agreement** is a written agreement where the parties agree to vote their shares as agreed. Often seen in closely held corporations.
- c. A **management agreement** occurs where the shareholders agree to manage the corporation in an agreed-upon way as set forth in the articles or bylaws. (valid for ten years)
- d. **Restrictions on stock transfers** are generally **upheld if reasonable**—for example a right of first refusal—but absolute restraints are not reasonable. A third party will only be bound if the restriction is conspicuously noted or the third party had knowledge.

3. Shareholder suits

- a. **Direct suit:** A shareholder may bring a suit for **breach of fiduciary duty owed to the shareholder** (not the corporation itself but the shareholder).
- b. **Derivative suit:** A shareholder may bring a derivative suit **on behalf of the corporation** for harm done to the corporation. The

corporation receives the recovery, if any, and the shareholder is entitled to reimbursement for the expenses of litigation. The shareholder bringing the suit must:

1. **Own stock** at the time the claim arose.
2. **Adequately represent** the corporation.
3. **Make a demand** on directors to bring suit or redress the injury and the demand is rejected (corporation has 90 days to respond unless waiting that long would cause irreparable injury). The demand requirement used to be excused if doing so would be futile, but it is required modernly.

Issue-spotting tip: When a shareholder derivative suit is at issue, also look for the issues of breach of loyalty, breach of care, or disgorging of profits under 16(b).

4. Shareholder duties

- a. **General rule:** A shareholder owes no fiduciary duty to the corporation or other shareholders.
- b. **Modern trend: Controlling shareholders owe a fiduciary duty** to the corporation and minority shareholders of the duty of care and duty of loyalty. A controlling shareholder is one with enough voting strength to have a substantial impact on the corporation (not always 50% or more).
 1. **Sale of controlling shares to a looter:** Controlling shareholders cannot sell control of the corporation to a looter if they know, or have reason to know, that the buyer intends to harm the company.
 2. **Sale of controlling shares at a premium** may be allowed where the transaction is made in good faith and is fair. However, a controlling shareholder may not sell her controlling shares and receive a personal benefit for the sale of a corporate asset or corporate office.

Issue-spotting tip: Whenever a controlling shareholder sells shares, consider whether these issues are raised. The analysis is very fact dependent and many facts will be available to use in the analysis. For example, consider how high a premium is paid over trading value for the controlling shares, and if there are any side deals regarding the transaction. Analyze overall fairness.

5. Shareholder liability: Shareholders are **not personally liable** for the actions of the corporation.

- a. **Except professional corporations:** Typically, licensed professionals may incorporate but remain personally liable for malpractice (e.g., lawyers, doctors).

D. Federal securities laws

1. **Section 16(b) short-swing profits:** Any short-swing trading profits received within a six-month period by a corporate insider must be disgorged to the corporation. Requirements of 16(b):

- a. **Corporation must be:**
 - 1. **Listed on a national exchange**, or
 - 2. Have **\$10 million** or more in assets and at least **2,000 shareholders** (or at least **500** if the shareholders are **not accredited investors**). Accredited investors include high income or net worth individuals and officers and directors of the issuer.
- b. **Corporate insiders** are officers, directors, and shareholders that own more than 10% equity stock in the corporation.
 - 1. **Officers and directors** must be in their positions at the time of *either* the purchase or the sale of shares.
 - 2. **Over 10% shareholders** must be in that position at the time of *both* the purchase and the sale of the shares.
- c. **Trading** is making a **profitable** purchase and sale (or sale and purchase) of company equity stock within a **six-month period**.
- d. **Remedy:** The insider must **disgorge the profit** back to the corporation.

Issue-spotting tip: 16(b) may be at issue any time a director, officer, or shareholder buys or sells company stock. Section 10b-5 may also be at issue.

- 2. **Section 10b-5 disallows insider trading** and provides liability for any person who employs **fraud or deception** in connection with the purchase or sale of any security by means of any instrumentality of interstate commerce. In other words, **trading securities based on nonpublic corporate information** is not permitted.
 - a. **Fraud (misrepresentation) prima facie case requirements**
 - 1. **Intent** (can be recklessness) to defraud, deceive, or manipulate.
 - 2. **Material misrepresentation or omission:** Information is material where there is a **substantial likelihood that a reasonable investor would consider it important** in making an investment decision. Omission or failure to disclose only applies if the party has a duty to disclose.
 - 3. **Reliance:** There must be **actual reliance** on the misrepresentation or failure to disclose. (Typically a failure to disclose is relied upon anytime one buys or sells securities as a result of a material omission.)
 - 4. **Purchase or sale of securities** (in connection with).
 - 5. **Interstate commerce:** The trade must involve the use of some means of interstate commerce, such as a telephone, mail, email, national securities exchange, etc.
 - 6. **Damages/Remedy:** Damages are calculated as the difference between actual proceeds and what should have transpired based on the real value of the stock. These profits must be **disgorge**d to the company.
 - b. **10b-5 may be violated in the following four ways:**
 - 1. **Direct trading by an insider**