

STEVE EMANUEL'S

BOOTCAMP FOR THE MBE

**SIMULATED MBE:
QUESTIONS AND
ANSWERS**



Wolters Kluwer
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STEVE EMANUEL'S **Bootcamp for the MBE**

SIMULATED MBE: **QUESTIONS AND ANSWERS**

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PREFACE

Dear Bootcamp enrollee:

Thanks for enrolling in Steve Emanuel's Bootcamp for the MBE.

The book contains the same 200-question Simulated MBE that is available to you for taking online, together with our explanatory answers to each question.

- This Simulated MBE has the *same distribution of subjects* as a “real” MBE: 34 questions in each of Contracts and Torts, and 33 questions in each of the other four subjects (Constitutional Law, Criminal Law and Procedure, Evidence, and Real Property)
- It has approximately the *same distribution of topics* within each subject as a real MBE. For instance, it has the same 60/40 mix between substantive and procedural Criminal Law questions, and the same mix between sales (i.e., UCC) and non-sales questions within the Contracts questions.
- Most of the questions are based on *actual questions* that have appeared on past MBEs. However, we have converted these actual questions to the current MBE format, which features somewhat shorter fact patterns, almost no multiple-question fact patterns, and little use of proper names.
- We’ve extensively researched and written these explanatory *answers* to ensure accuracy. I have personally, over the space of multiple years, researched original sources like Restatements and multi-volume treatises to give you not only “the right answer” but also a detailed chain of reasoning that will help you with other questions you may encounter in the same subject areas. You can see a partial listing of our sources if you look at the abbreviations note at the start of the answers, on p. 140.

The entire Emanuel Bar Review team joins me in saying that we’re glad you chose Steve Emanuel's Bootcamp for the MBE. GOOD LUCK on your upcoming bar exam!

Steve Emanuel
Larchmont, NY
April, 2010

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SUBJECT MATTER BREAKDOWN OF QUESTIONS

This listing tells you which questions involve which subject, for the Simulated MBE.

CONSTITUTIONAL LAW

3, 5, 9, 19, 32, 51, 52, 59, 62, 67, 71, 75, 76, 80, 86, 89, 90, 94, 99, 101, 106, 107, 114, 120, 128, 132, 133, 137, 150, 164, 185, 193, 194

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Of the above, the following involve Criminal Procedure: 30, 54, 81, 82, 102, 122, 127, 146, 153, 168, 177, 183, 200

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SIMULATED MBE

A.M. SESSION

TIME: 3 HOURS

Directions: Each of the questions or incomplete statements below is followed by four suggested answers or completions. You are to choose the best of the stated alternatives. Answer all questions according to the generally accepted view, except where otherwise noted.

For the purposes of this test, you are to assume that Articles 1 and 2 of the Uniform Commercial Code have been adopted. You are to assume that the 2001 proposed amendments to Article 1 and the 2003 proposed amendments to Article 2 have not been adopted. You are also to assume relevant application of Article 9 of the UCC concerning fixtures. The Federal Rules of Evidence are deemed to control. The terms “Constitution,” “constitutional,” and “unconstitutional” refer to the federal Constitution unless indicated to the contrary. You are to assume that there is no applicable statute unless otherwise specified; however, survival actions and claims for wrongful death should be assumed to be available where applicable. You should assume that joint and several liability, with pure comparative negligence, is the relevant rule unless otherwise indicated.

1. A patient had been under the care of a cardiologist for three years prior to submitting to an elective operation that was performed by a surgeon. Two days thereafter, the patient suffered a stroke, resulting in a coma, caused by a blood clot that lodged in her brain. When it appeared that she had entered a permanent vegetative state, with no hope of recovery, the artificial life-support system that had been provided was withdrawn, and she died a few hours later. The withdrawal of artificial life support had been requested by her family, and duly approved by a court. The surgeon was not involved in that decision, or in its execution.

The administrator of the patient's estate thereafter filed a wrongful death action against the surgeon, claiming that the surgeon was negligent in having failed to consult a cardiologist prior to the operation. At the trial the plaintiff offered evidence that accepted medical practice would require examination of the patient by a cardiologist prior to the type of operation that the surgeon performed.

In this action, the plaintiff should

- (A) prevail, if the surgeon was negligent in failing to have the patient examined by a cardiologist prior to the operation.
- (B) prevail, if the blood clot that caused the patient's death was caused by the operation which the surgeon performed.
- (C) not prevail, absent evidence that a cardiologist, had one examined the patient before the operation, would probably have provided advice that would have changed the outcome.
- (D) not prevail, because the surgeon had nothing to do with the withdrawal of artificial life support, which was the cause of the patient's death.

[Q3121]

GO ON TO THE NEXT PAGE.

2. On March 1, the owner of several apartment buildings received from an air conditioning company a letter offering to sell the apartment owner 1,200 window air conditioners suitable for the apartments in the latter's buildings. The A/C company's offer stated that it would remain open until March 20, but that the apartment owner's acceptance must be received on or before that date. On March 16, the apartment owner posted a letter of acceptance. On March 17, the A/C company telegraphed the apartment owner to advise that it was revoking the offer. The telegram reached the apartment owner on March 17, but the apartment owner's letter did not arrive at the A/C company's address until March 21.

As of March 22, which of the following is a correct statement?

- (A) The telegram revoking the offer was effective upon receipt.
- (B) The offer was revocable at any time for lack of consideration.
- (C) The mail was the only authorized means of revocation.
- (D) Under the terms of the A/C company's offer, the apartment owner's attempted acceptance was ineffective.

[Q1149]

3. The legislature of State X enacts a statute that it believes reconciles the state's interest in the preservation of human life with a woman's right to reproductive choice. That statute permits a woman to have an abortion on demand during the first trimester of pregnancy but prohibits a woman from having an abortion after that time unless her physician determines that the abortion is necessary to protect the woman's life or health.

If challenged on constitutional grounds in an appropriate court, this statute will probably be held

- (A) constitutional, because the state has made a rational policy choice that creates an equitable balance between the compelling state interest in protecting fetal life and the fundamental right of a woman to reproductive choice.
- (B) constitutional, because recent rulings by the United States Supreme Court indicate that after the first trimester a fetus may be characterized as a person whose right to life is protected by the due process clause of the Fourteenth Amendment.
- (C) unconstitutional, because the state has, without adequate justification, placed an undue burden on the fundamental right of a woman to reproductive choice prior to fetal viability.
- (D) unconstitutional, because a statute unqualifiedly permitting abortion at one stage of pregnancy, and denying it at another with only minor exceptions, establishes an arbitrary classification in violation of the equal protection clause of the Fourteenth Amendment.

[Q3096]

GO ON TO THE NEXT PAGE.

4. A landowner owned Blackacre, a vacant one-acre tract of land in state X. Five years ago, the landowner executed a deed conveying Blackacre to a particular church, “for the purpose of erecting a church building thereon.” Three years ago, the landowner died, leaving his nephew as his sole heir at law. His duly probated will left “all my Estate, both real and personal, to my friend [specifying the friend’s name].”

The church never constructed a church building on Blackacre and last month the church, for a valid consideration, conveyed Blackacre to a developer.

The developer brought an appropriate action to quiet title against the nephew, the friend, and the church, and joined the appropriate state X official. The official asserted that a charitable trust was created which has not terminated.

In such action, the court should find that title is now in

- (A) the developer.
- (B) the nephew.
- (C) the friend.
- (D) the state official.

[Q2172]

5. The National AIDS Prevention and Control Act is a new, comprehensive federal statute that was enacted to deal with the public health crisis caused by the AIDS virus. Congress and the President were concerned that inconsistent lower court rulings with respect to the constitutionality, interpretation, and application of the statute might adversely affect or delay its enforcement and, thereby, jeopardize the public health. As a result, they included a provision in the statute providing that all legal challenges concerning those matters may be initiated only by filing suit directly in the United States Supreme Court.

The provision authorizing direct review of the constitutionality, interpretation, or application of this statute only in the United States Supreme Court is

- (A) constitutional, because it is authorized by the Article I power of Congress to enact all laws that are “necessary and proper” to implement the general welfare.
- (B) constitutional, because Article III provides that the jurisdiction of the United States Supreme Court is subject to such exceptions and such regulations as Congress shall make.
- (C) unconstitutional, because it denies persons who wish to challenge this statute the equal protection of the laws by requiring them to file suit in a court different from that in which persons who wish to challenge other statutes may file suit.
- (D) unconstitutional, because it is inconsistent with the specification in Article III of the original jurisdiction of the United States Supreme Court.

[Q1117]

GO ON TO THE NEXT PAGE.

6. The owner of a shopping mall hired a construction company to design and construct the entryway to the mall. The construction company negligently selected an unusually slippery material for the floor covering. A customer at the mall slipped on the floor of the entryway, sustaining injuries. The customer sued the mall owner for the construction company's negligent design of the mall's entryway.

Will the injured customer recover damages?

- (A) No, if the construction company was an independent contractor.
- (B) No, if no customers had previously slipped on the floor.
- (C) Yes, if the customer intended to make a purchase at the mall.
- (D) Yes, if the mall's duty to maintain safe conditions was nondelegable.

[QA019]

7. In a medical malpractice suit by the plaintiff against a surgeon, the plaintiff seeks to introduce a properly authenticated photocopy of the plaintiff's hospital chart. The chart contained a notation made by a medical resident that an aortic clamp had broken during the plaintiff's surgery. The resident made the notation in the regular course of practice, but had no personal knowledge of the operation, and cannot remember which of the operating physicians gave him the information.

The document is

- (A) admissible as a record of regularly conducted activity.
- (B) admissible as recorded recollection.
- (C) inadmissible as a violation of the best evidence rule.
- (D) inadmissible, because it is hearsay within hearsay.

[Q1092]

GO ON TO THE NEXT PAGE.

8. A defendant was charged with battery for allegedly attacking a man as they left a local bar together. No one else witnessed the fight. At trial, each testified that he had acted only in self-defense. The defendant called his next-door neighbor as a witness to testify as to the defendant's reputation both for truthfulness and for peacefulness. The government objected to the testimony in its entirety.

How should the court proceed?

- (A) Admit the evidence in its entirety.
- (B) Admit the evidence regarding the defendant's reputation for peacefulness, but exclude the evidence regarding his truthfulness.
- (C) Exclude the evidence regarding the defendant's reputation for peacefulness, but admit the evidence regarding his truthfulness.
- (D) Exclude the evidence in its entirety.

[QA029]

9. After several well-publicized deaths caused by fires in products made from highly flammable fabrics, the state of Orange enacted a statute prohibiting "the manufacture or assembly of any product in this state which contains any fabric that has not been tested and approved for flame retardancy by the Zetest Testing Company." The Zetest Testing Company is a privately owned and operated business located in Orange.

For many years, the plaintiff, a fabric mill located in the state of Orange, has had its fabric tested for flame retardancy by the Green Testing Company, located in the state of Green. Green Testing Company is a reliable organization that uses a process for testing and approving fabrics for flame retardancy identical in all respects to that used by the Zetest Testing Company.

Because the plaintiff wishes to continue to have its fabric tested solely by Green Testing Company, the plaintiff files an action in Orange state court challenging the constitutionality of the Orange statute as applied to its circumstances.

In this suit, the court should hold the statute to be

- (A) constitutional, because it is reasonably related to the protection of the reputation of the fabric industry located in the state of Orange.
- (B) constitutional, because it is a legitimate means of protecting the safety of the public.
- (C) unconstitutional, because it denies to the plaintiff the equal protection of the laws.
- (D) unconstitutional, because it imposes an unreasonable burden on interstate commerce.

[Q1060]

GO ON TO THE NEXT PAGE.