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BAR REVIEW



& Strategies & Tactics for the MBE

(Multistate Bar Exam)

Revised by

Nancy Rapoport, University of Nevada,
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Constitutional Law ■ Contracts ■ Criminal Law and Procedure
Evidence ■ Real Property and Future Interests ■ Torts



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Strategies & Tactics[®] for the **MBE**

Multistate Bar Exam

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ABOUT THE MBE

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

Is the MBE required in every state?

Almost. As of July 2009, only two states — Louisiana and Washington — *don't* administer the MBE.

The District of Columbia, the Virgin Islands, Guam, the Northern Mariana Islands, and Palau also require the MBE.

When is the MBE given?

In most states, the MBE is given twice each year — on the last Wednesday in February and on the last Wednesday in July — but a few states offer the MBE only once a year. Most states also administer their own, state-specific exams on the day(s) immediately before or after the MBE; these state-specific exams usually consist of essays covering a variety of subjects. In addition, other multistate exams, such as the Multistate Essay Examination (MEE) and the Multistate Performance Test (MPT), take place on the day(s) immediately before or after the MBE.

What's the format of the MBE?

The Multistate Bar Examination is a six-hour examination consisting of 200 questions. The exam is divided into two parts: Part I is administered in the morning and Part II is administered in the afternoon. Each part takes three hours and contains 100 questions.

What subjects are covered on the Multistate Bar Exam?

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

Many students believe that Civil Procedure is tested on the MBE. It's not. The MBE currently covers only the six subjects listed above.

How many questions are there on each subject?

As of July, 2005 the MBE is made up of 34 questions each on Contracts and Torts, and 33 questions each on Constitutional Law, Criminal Law, Evidence, and Real Property (for a total of 200 questions). In other words ***all six subjects on the MBE are given substantially equal weight.***

This means that, if your jurisdiction considers a raw score of 120 to be a "passing score," you could get every single question in any one subject wrong and still pass the MBE, so long as you scored well enough in all the other subjects. In fact, in some jurisdictions you could, theoretically, miss ***every*** question in ***two*** subjects and still pass the MBE, but you'd have to miss virtually no questions in the other subject areas.

What's the format of MBE questions?

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

What order are the questions in?

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

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

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

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

How is the MBE graded?

Each question is worth one point, making a total possible “raw” score of 200. Because the difficulty of the MBE may vary from one exam to another (for example, the July 2006 MBE may be somewhat more difficult than the February 2006 MBE), “raw” scores are not comparable from year to year. To handle this problem, the Bar Examiners use a statistical procedure, called “equating,” to produce what are called “scaled” scores — raw scores that have been adjusted so that the performance of Bar Examinees can be compared from exam to exam (within the limitations of measurement and equating error). For instance, if the July 2006 MBE turns out to be more difficult than previous MBEs, the scores of students who took the July exam would be adjusted (“scaled”) upward to account for this difference in difficulty. If, on the other hand, the July 2006 exam was easier than previous MBEs, then the scores of those who took it would be adjusted (“scaled”) downward to account for that difference. This scoring procedure helps to ensure that no applicant is unfairly penalized or rewarded for taking a particular version of the exam.

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

Will I lose points for wrong answers?

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

Are the official answers to the MBE ever wrong?

The answer to this has to be a “qualified yes.”

Even though the MBE is exceptionally carefully prepared, sometimes questions don't operate as the Bar Examiners expected them to. In order to compensate for this, the Bar Examiners use a process called “early item analysis.” The process works this way: immediately after each MBE is administered, the answer sheets of approximately 1,500 applicants in several different jurisdictions are quickly scored and analyzed. If a large number of the applicants who score the highest on the entire exam marked the wrong option to any particular question, then the official, “correct” answer is considered suspect. All suspect questions are sent back to the drafting committee that prepared them, and the committees then reexamine the questions. If they find that any question is confusing, they change the answer key in the following manner: in the rare cases where a committee finds that an entire question is faulty, everyone gets credit for his answer regardless of his choice. More often, however, two rejected choices are clearly wrong, and it has simply proven too difficult to select accurately between the two remaining answer choices. In such cases, credit is given only to applicants who marked either of the two remaining answers. Once the “early item analysis” process is completed, all answer sheets are scored using the corrected key.

Do not let the fact that the Bar Examiners use this “early item analysis” process to correct for faulty questions influence you too much. If you enter the MBE anticipating that one or more questions are going to be reviewed and discarded, you may prematurely decide that some questions are unanswerable. If you do this and just mark an answer choice randomly, figuring that you’ll get credit even if you’re wrong, you’ll be making a *big mistake*. The question may simply be a difficult one that requires a bit more analysis. Also, the drafters simply don’t make many mistakes — certainly no more than a handful on each exam — so deciding that a particular question is flawed is not good strategy.

What score do I need to pass?

The score needed to pass the MBE varies according to **where you’re taking the exam**, because the Bar Examiners of each jurisdiction use the MBE in different ways. In some states, if you score high enough on the MBE, the Bar Examiners won’t even look at your essays, since they assume that, if you did very well on the MBE, you’re likely to score well on the essays, too, so there’s really no need to grade your essays.

Most states, however, establish a specific score needed to “pass” their individual bar exams by combining MBE and essay scores. States use one of three formulas to combine the two scores: the standard deviation method, the comparative range method, and the equi-percentile method. All three methods are quite complex, and explaining them is beyond the scope of this book. What you need to know is that, even if the MBE isn’t the sole determining factor in your passing the bar exam, it contributes significantly to the result.

As a general rule, if you can get 130 “raw” questions correct, you should be on track to pass even in a tough jurisdiction. For instance, in July 2001 California had the lowest passing rate: 57 percent.¹ On that July 2001 MBE, the mean raw score nationally was 128.72. And the standard deviation on that exam was 19.46. If we do some statistical manipulation, and if we make the reasonable assumption that the applicants in California were exactly as good on the MBE as the applicant pool nationally was, to be just barely on track to pass in California (i.e., to be better than exactly 43 percent of the other applicants), you would have needed to get a raw score of 125 on that exam (which would have equated to a scaled score of about 140).

Or, consider a more typical jurisdiction, with a pass rate of 67 percent for July takers. (Michigan in July 2001 passed 66 percent, for instance.) Again assuming that this state’s takers are exactly as strong as the national average, you would have to get just 120 raw questions correct to be on track to just barely pass (i.e., to do better than 33 percent of the other applicants).

So this is not an exam where you’re expected to score a “90 percent” or anything close to it. If you can answer two-thirds of the questions correctly, and you perform at that same relative level of competence on your state’s essay and/or performance test, you’re nearly certain to pass.

Who writes MBE questions?

As you may imagine, drafting MBE questions is an involved process that includes many people. Each of the six major subjects is handled by a committee of five people — three law professors and two bar examiners. At semiannual meetings, each committee, along with special question writers, drafts 30 or 40 MBE questions. Each committee then meets for two days with experts on testing, after which the questions are redrafted. After the semiannual meeting, each committee member reviews the questions and then, a few weeks later, reviews the final form of the questions. The questions are also subject to a final review by a practicing attorney and, usually, by a law professor who is not a member of the drafting committee.

Since the MBE is so important (it is, after all, part of almost every jurisdiction’s bar examination), the bar examiners of each participating jurisdiction are given an opportunity to review the test in its final stages. At that time, the entire test can be accepted or rejected; in addition, the local bar examiners may suggest changing only certain parts of the exam. Each drafting committee considers these suggestions and makes any changes the committee decides are needed.

1. In virtually all states and in every year, the mean score on the February exam is significantly lower than on the July exam. That’s because February has many more repeaters. The mean scaled score in February tends to be about 6 points lower than in July. Pass rates are also lower in February. To pick one example, only 37 percent passed the February 2001 California exam, compared with 57 percent who passed the July 2001 California exam.

HOW TO USE THIS BOOK

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

First, it's important to know what this book can do for you, and what it can't. Correctly preparing for the MBE involves developing two skills: a **complete grasp of the substantive law**, and the **ability to analyze MBE questions**. This book deals with the second skill: analysis. Substantive review, on the other hand, is the task of learning all the law you need to know in order to pass the MBE. You may think, "But I'm going to do every single question in this book! Shouldn't I know the law by then?" Unfortunately, the answer is no. Many students every year try to learn the law simply by doing thousands of simulated MBE questions. This is not good enough. Studying by answering MBE questions, even actual ones from past exams, such as the ones in this book, can't substitute for a good review of substantive law; it can only **supplement** it. While answering MBE questions will help reinforce many of the principles you need to know, it will provide only a random review and the **techniques** for exam-taking; it's not guaranteed to teach you all the law you need to know. Studying just by answering questions would be like attempting to write a short story by writing random sentences that sound good, all the while hoping that, when you're done, you'll have put together enough sentences to make a whole story. This is a less-than-effective way to review **every** aspect of the law.

The most effective way to review all the substantive law you need for the MBE is to review substantive material, to the level of detail you need, in an organized fashion. The Law In A Flash Multistate Bar Review Set is an easy and effective way to review all the substantive detail you need to know for the MBE. If you bought this book as part of the Multistate Review Set, then you have everything you need to prepare for the MBE; if not, you can purchase the set from your local bookstore or from us directly at (800) EMANUEL. Regardless of your source of study, you shouldn't rely exclusively on this book, or on practice MBE questions of any kind, for your substantive review.

HOW THIS BOOK IS ORGANIZED

Here are the major features in this book:

- First, we give you **details about the MBE** and advice on **how you should attack it**.
- Next, we give you "**Strategies and Tactics**" for each of the six subjects on the MBE.
- These are followed immediately by **questions** on that particular MBE subject, so that you can practice the strategies. These are **actual past MBE questions**, which we are reprinting under special license from the MBE examiners. (Many are from the recently released February 2009 exam.)
- We then give you an **Answer Key** (at the beginning of the answers for that subject) so you can quickly score yourself.
- Then, perhaps most important, we give you full **explanatory answers** for each question in that subject, with detailed explanations both of why the "correct" answer is the best one and why the other answer choices are not as good.
- Next, we give you a full-length, **practice MBE (again entirely from past actual MBE questions)**, with an Answer Key and full explanatory answers.
- Lastly, we give you **answer sheets**, so you can practice doing questions under simulated exam conditions.

ATTACKING THE MBE

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

STRATEGIES AND TACTICS FOR EVERY MAJOR SUBJECT: TIMING YOURSELF

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

USING ANSWER SHEETS

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

SCORING YOUR PERFORMANCE

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

When you compute your raw score for a given subject (the number of correct responses), keep in mind that the subjects vary somewhat in the mean scores produced by applicants. Table 1 shows the raw scores for the July 2001 test, to give you some idea of relative difficulties.

Table 1: Subject Difficulty on the July 2001 MBE

Raw Scores	Con. Law	Contracts	Crim. Law	Evidence	Real Prop.	Torts
Mean # correctly answered	22.9	21.8	21.6	21.4	19.2	21.9
# of Q’s	33	34	33	33	33	34
Correct answers as % of Total	69.4%	64.1%	65.5%	64.8%	58.2%	64.4%
Rank order of difficulty	6 (easiest)	2	5	4	1 (hardest)	3

So Real Property was far and away the hardest (applicants got, on average, only 58.2 percent of the questions correct), Con Law was by far the easiest (applicants got an average of 69.4 percent correct), and the other four subjects were tightly clustered between 64.1 percent and 65.5 percent. One of the lessons of this is that you shouldn’t waste too much time on the (many) very long and very difficult Real Property questions, because you won’t get enough extra ones right to make a difference anyway. Conversely, you’ve got to “make hay while the sun shines” on the relatively easy (and short) Con Law questions. These results are fairly typical of July exams across many years.

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

READ THE EXPLANATORY ANSWERS!

For every question you try, please you **read the explanatory answer**; if you do, you'll find that the answers in this book go far beyond telling you the basic principle involved in each question. We also analyze the specific error contained in every wrong answer; we even discuss what principles you may have been thinking about if you picked that answer. If your time is limited, you don't have to read every part of our explanatory answer to every question; you can choose to read only the discussion of the answer you chose, as well as the discussion of the correct choice (if you didn't pick the correct answer). If, however, you were unsure of one of the other answer choices (for example, if you originally marked choice A as the correct answer but then changed your mind), you may want to read the discussion of that answer as well. Remember, your goal in using this book is to become intimately familiar with MBE questions and how to answer them; reaching that goal requires that you feel comfortable with as many answer choices in this book as possible. In fact, you may even become frustrated sometimes, because you feel you're reading the same principles (for instance, the elements of strict product liability) over and over again, but that's intentional. We repeat those principles, in full, every time they're applicable, so that, by the time you take the MBE, those principles will be **second nature** to you. In our opinion, it's better to over-learn basic principles than that your knowledge be so tentative that you forget the principles when you take the MBE.

THE PRACTICE MBE

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

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

WHAT TO DO WHEN YOUR STUDY TIME IS LIMITED

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

➤ Read "How to Attack the MBE."

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

In terms of your substantive review, if you don't have time to study every topic in every subject, pay special attention to the topics that are heavily tested by the MBE. You'll find that information in the outlines at the beginning of the "Strategies and Tactics" sections for every subject. For instance, there are 34 questions each on Torts and Contracts, and 33 each on the other four major subjects (Evidence, Criminal Law, Real Property, and Constitutional Law). In Torts, half the questions test only Negligence; thus, almost 8.5 percent of the entire MBE is on Negligence, so you would be wise to learn the subject well. On the other hand, there are relatively few questions

devoted to the subject of Future Interests. Obviously, you will want to spend more time on Negligence than on Future Interests, which is one of the more difficult subjects on the MBE.

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

While the MBE requires a substantial amount of preparation, remember that time spent preparing should be rewarded; your success will be proportionate to the amount of time you spend in reviewing the law and in understanding the techniques used by MBE examiners.

HOW TO ATTACK THE MBE

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

— *Sherlock Holmes*

UNDERSTANDING THE NATURE OF THE BEAST

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

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

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

Laurel and Hardy, who’ve never seen each other before, are guests at a party. Laurel is standing in a corner, minding his own business, holding a cream pie. Hardy walks over and snatches the cream pie out of Laurel’s hands, for no apparent reason, and frightens him. If Laurel sues Hardy, the claim most likely to succeed will be

- A. Battery
- B. Murder
- C. Conspiracy
- D. Breach of contract

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

Let’s change the question a bit, though — same facts, different answers:

- A. Assault, because although Hardy intended to frighten Laurel, he didn’t touch him
- B. Battery, because it isn’t necessary that the person himself be touched for the claim to succeed
- C. Intentional infliction of emotional distress, because Hardy intended to frighten Laurel

D. There is no likely claim, because Hardy's conduct wasn't tortious

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

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

HOW TO STUDY FOR THE MULTISTATE BAR EXAM

In the "About the MBE" section of this book, we told you that each of the six subjects on the MBE is treated with virtually equal weight. There are 33 questions on each subject, except for Contracts and Torts, which have 34 each. The Bar Examiners have decided that each subject should be treated equally on the bar exam, and you should divide your study time accordingly. As we've said before, however, this doesn't mean that all topics within a given subject are treated equally — e.g., negligence.

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

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

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

Here's another example. If you remember the "Mercy Rule" from Evidence, you probably remember that it allows the defendant in a criminal case to introduce evidence of his good character. If you see an MBE question concerning the Mercy Rule, and that's all you remember about the Rule, you'll probably get the answer wrong. Why? Because there are ***two other important points*** to remember about the Mercy Rule. First, the character evidence must be ***pertinent*** (probative) in order to be admissible. Thus, in an MBE question, you may see evidence that a defendant charged with fraud was a "peaceful" man. You should realize, though, that his peacefulness is unrelated to the crime with which he's charged, so the Mercy Rule wouldn't make the evidence admissible. Second, under the Mercy Rule, the character evidence can only be offered in the form of ***reputation or opinion***; it can't be evidence of specific instances of conduct. So, even if a criminal defendant charged with fraud introduced evidence of his honesty, if the evidence was in the form of a specific instance ("He was honest in his dealings with me when he sold me his car"), it wouldn't be admissible. Once again, the Bar Examiners hope to catch those students with incomplete knowledge about the Rule. Even if you know the basics of the Rule, you could miss two questions, because you don't know the Rule in enough depth to apply it to pertinent and specific facts!

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

REMEMBER WHO WILL BE “TRIPPED UP” ON MBE QUESTIONS

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

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

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

1. Panickers.

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

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

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

2. People who operate by instinct.

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

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

Here’s another mistake you’ll make if you follow your instincts. You probably remember from Evidence class that no piece of evidence is ever *really* inadmissible; virtually everything is admissible, somehow. If you let your instinct guide you on the MBE, therefore, you’d *never* pick the “inadmissible as hearsay not within any exception” response. And you’d be wrong fairly regularly. (For more on how to deal with this specific problem, see the “Strategies and Tactics” for Evidence.)

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

Dutton, disappointed by his eight-year-old son's failure to do well in school, began systematically depriving the child of food during summer vacation. Although his son became seriously ill from malnutrition, Dutton failed to call a doctor. He believed that, as a parent, he had the sole right to determine whether the child was fed or received medical treatment. Eventually the child died. An autopsy disclosed that the child had suffered agonizingly as a result of the starvation, that a physician's aid would have alleviated the suffering, and that, although the child would have died in a few months from malnutrition, the actual cause of death was an untreatable form of cancer.

The father was prosecuted for murder, defined in the jurisdiction as "unlawful killing of a human being with malice aforethought." The father should be

- A. acquitted, because of the defendant's good-faith belief concerning parental rights in supervising children
- B. acquitted, because summoning the physician or feeding the child would not have prevented the child's death from cancer
- C. convicted, because the father's treatment of his son showed reckless indifference to the value of life
- D. convicted, because the child would have died from malnutrition had he not been afflicted with cancer

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

3. Those who are unprepared.

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

HOW TO ANALYZE MBE QUESTIONS

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

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

A. Analyzing the facts of the question.

a. The composition of MBE questions.

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

Al and Bill are identical twins. Al, angry at David, said, "You'd better stay out of my way. The next time I find you around here, I'll beat you up." Two days later, while in the neighborhood, David saw Bill coming toward him. As Bill came up to David, Bill raised his hand. Thinking Bill was Al, and fearing bodily harm, David struck Bill.

If Bill asserts a claim against David, and David relies on the privilege of self-defense, David will

- A. not prevail, because Bill was not an aggressor
- B. not prevail unless Bill intended his gesture as a threat
- C. prevail, if David honestly believed that Bill would attack him
- D. prevail only if a reasonable person under the circumstances would have believed that Bill would attack him

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

b. Read carefully.

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

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

Lester, the owner in fee simple of a small farm consisting of thirty acres of land improved with a house and several outbuildings, leased the same to Tanner for a ten-year period. After two years had expired, the government condemned twenty acres of the property and allocated the compensation award to Lester and Tanner according to their respective interest so taken. It so happened, however, that the twenty acres taken embraced all of the farm's tillable land, leaving only the house, outbuildings, and a small woodlot. There is no applicable statute in the jurisdiction where the property is located, nor any provision in the lease relating to condemnation. Tanner quit possession, and Lester brought suit against him to recover rent. Lester will

- A. lose, because there has been a frustration of purpose which excuses Tanner from further performance of his contract to pay rent
- B. lose, because there has been a breach of the implied covenant of quiet enjoyment by Lester's inability to provide Tanner with possession of the whole of the property for the entire term
- C. win, because of the implied warranty on the part of the tenant to return the demised premises in the same condition at the end of the term as they were at the beginning
- D. win, because the relationship of landlord and tenant was unaffected by the condemnation, thus leaving Tanner still obligated to pay rent

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

c. Don't assume facts.

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

d. Choose the simple interpretation.

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

e. **“Trigger” factors to watch for in reading MBE questions.**

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

1. **Statutes.**

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

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

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

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

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

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

Here’s an example from a past MBE:

A state statute requires any person licensed to sell prescription drugs to file with the State Board of Health a report listing the types and amounts of such drugs sold, if his sales of such drugs exceed \$50,000 during a calendar year. The statute makes it a misdemeanor to “knowingly fail to file” such a report.

Nelson, who is licensed to sell prescription drugs, sold \$63,000 worth of prescription drugs during 1976 but did not file the report. Charged with committing the misdemeanor, Nelson testifies that he did a very poor job of keeping records and did not realize that his sales of prescription drugs had exceeded \$50,000. If the jury believes Nelson, he should be found

- A. guilty, because this is a public welfare offense
- B. guilty, because he cannot be excused on the basis of his own failure to keep proper records
- C. not guilty, because the statute punishes omissions and he was not given fair warning of his duty to act
- D. not guilty, because he was not aware of the value of the drugs he had sold

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

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

While the Bar Examiners do sometimes give you a *deliberate* red herring, you should always assume that every fact in every question is important. For instance, normally, you won’t be told any personal characteristics about people in the questions; you’ll typically see only statements such as: “Able contracted with Baker” or “Jones shot Smith,” and you can generally assume that all the people mentioned are sane, responsible adults. If, therefore, a question does tell you more about a person, such as that “Able, a ten-year-old, contracted with Baker,” the extra information given is likely to be important, so you should note it and use it. In Contract Law, what does including Able’s age suggest? An incapacity to contract. The same kind of thing is true in the following examples.