

MBE PRACTICE EXAM — SESSION 2

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100 questions. Give yourself 3 hours—1.8 minutes per question. The answer key is on the last page; the full explanations, exam tactics, and answer flowcharts are in the annotated PDF and the online version.

Question 101

Under a state law, oil and gas rights can pass by will or through intestate succession. Some oil and gas rights in the state have been divided into very small interests after several generations of passing by intestate succession. It therefore is difficult to enter into extraction contracts in the state because of the need to include large numbers of heirs for any given tract of land. To remedy this problem, the state has enacted a law that provides that, at the death of an owner of less than 1% of the oil and gas interests in a tract of land, that owner's oil and gas rights are extinguished and his or her interests are transferred pro rata to the remaining owners.

Is this law constitutional?

- (A) No, because the law effects a taking of property without just compensation.
- (B) No, because the law unduly burdens interstate commerce in oil and gas production.
- (C) Yes, because property inheritance is a privilege created by state law.
- (D) Yes, because the law rationally promotes the legitimate state interest in fostering resource development.

Question 102

A woman was charged with stealing from her employer. Her lawyer advised her to plead guilty, citing overwhelming evidence that included a video recording of her confession and multiple witnesses. The woman repeatedly asked whether a guilty plea might lead to her deportation because she had come to the United States as a child and had lawful permanent resident status but not citizenship. The lawyer assured the woman that the charge would not result in deportation and emphasized the unusually favorable terms of the plea bargain. The woman accepted the plea offer.

At the end of the woman's short prison term, immigration authorities informed her that the conviction required her deportation. The woman filed a motion to vacate the plea, citing ineffective assistance of counsel.

How is the court likely to rule?

- (A) Counsel was ineffective, and under the circumstances, the woman suffered prejudice even though there was only a remote chance of success at trial.
- (B) Counsel was ineffective, but the woman suffered no prejudice because she admitted guilt when tendering the plea.
- (C) Counsel was not ineffective, because a criminal attorney is not required to provide advice about the collateral consequences of conviction.
- (D) Counsel was not ineffective, because there was overwhelming evidence of guilt.

Question 103

A recreational outfitter placed an online order with a seller for 20 new kayaks. The outfitter agreed to delivery by carrier under a destination contract, paid for the order, and received an email confirmation from the seller. The seller placed shipping labels on 20 individual kayaks in the seller's warehouse. The shipping labels listed the outfitter's name and address, the order number, and the proposed delivery date. The seller informed the carrier that the kayaks were ready to be picked up from the seller's warehouse for delivery to the outfitter. The carrier picked up the kayaks and delivered them to the outfitter.

At what point were the kayaks identified to the contract?

- (A) When the outfitter and the seller entered into the contract.
- (B) When the seller placed the shipping labels on the kayaks.
- (C) When the carrier picked up the kayaks.
- (D) When the carrier delivered the kayaks to the outfitter.

Question 104

In a diversity action in federal court, the plaintiff seeks to have a drug abuse counselor from an employee assistance program testify about her communications with the defendant. The communications are privileged against disclosure under the relevant law of the state where the plaintiff's cause of action arose.

What should govern the court's determination of the admissibility of the counselor's testimony?

- (A) Federal common law as interpreted in the light of reason and experience.
- (B) Federal statutory law.
- (C) The court's sound discretion in the interest of justice.
- (D) The state's privilege law.

Question 105

A company hired an attorney to sue a former company manager for violating a covenant not to compete. The company's president told the attorney that the manager had begun working for a competitor and gave the attorney a copy of the signed covenant.

The attorney brought a federal diversity action against the manager and attached to the complaint a copy of the signed covenant. The attorney also moved for a preliminary injunction, referring to the attached covenant and submitting a supporting affidavit from the company's president.

At the hearing on the preliminary injunction motion, the manager denied ever having signed such a covenant and conclusively demonstrated that the copy of a signed covenant attached to the company's motion was forged. The court, on its own initiative, ordered the attorney to show cause why the attorney should not be sanctioned under Rule 11.

Would sanctions against the attorney be proper?

- (A) No, because the court did not give the attorney notice and 21 days to withdraw the preliminary injunction motion.
- (B) No, because the motion was supported by evidence that was likely sufficient to satisfy an objectively reasonable attorney.
- (C) Yes, because the attorney filed papers with the court that contained untrue assertions of fact.
- (D) Yes, because the attorney should have verified the manager's signature before attaching the covenant to the complaint.

Question 106

The owner of a local road-paving company has for several years provided road repair and maintenance services for a small town under an annual contract. The owner's price is usually lower than the prices of other bidders because the owner's equipment and personnel are located in the town.

In a recent town mayoral election, the owner supported the candidate challenging the incumbent mayor. The owner's paving trucks carried bumper stickers promoting the challenger. When the incumbent mayor saw the owner in a local restaurant, the mayor said, "You'd better get those bumper stickers off your trucks or you'll never pave another road in this town again." The owner refused to comply. The incumbent mayor won the election.

When the road construction projects for the next year were put out to bid, the owner of the local paving company was again the lowest bidder. The mayor, however, vetoed the selection and chose a contractor from farther away, at a much higher price. State law does not require selection of the lowest bidder.

Is the mayor's selection of the other contractor constitutional?

- (A) No, because the mayor's action in choosing a higher-cost bidder over a lower-cost bidder has no rational basis.
- (B) No, because the mayor's action is a violation of the owner's right to freedom of expression and association.
- (C) Yes, because state law does not require selection of the lowest bidder.
- (D) Yes, because the mayor can require those who work for the town to support its current administration to ensure that the work is consistent with the administration's policies.

Question 107

A woman purchased a car from a seller who had reset the car's odometer to read 25,000 miles. The seller was aware that the car's actual mileage was approximately 90,000. Unaware of the car's actual mileage, the woman resold the car

to a friend seven months later. At the time of the resale, the friend looked at the odometer, which read 30,000 miles, and said, "Great!" By then, the actual mileage was 95,000. Immediately after buying the car, the friend took it to his mechanic, who completed minor repairs and told the friend that he estimated the car's actual mileage to be approximately 100,000.

Assuming no applicable statutes, is the friend likely to prevail in an action to rescind his purchase of the car from the woman?

- (A) No, because the friend's reliance on the odometer reading was unreasonable, given that he did not have his mechanic check the mileage before he bought the car.
- (B) No, because the woman was unaware of the car's actual mileage when she sold the car to the friend.
- (C) Yes, because the car's actual mileage is a material fact that was not revealed to the friend before he bought the car.
- (D) Yes, because the car's odometer reading constituted an express warranty.

Question 108

A police department received reliable information that a woman was selling drugs from her apartment. Upon arriving at the apartment, officers noticed the smell of burning marijuana (which is an illegal substance in the jurisdiction) coming from inside the closed front door. They knocked on the door and announced, "Police!" Immediately, they began to hear sounds of items being moved inside. Concerned that evidence was being destroyed, the officers opened the unlocked door and entered the apartment, where they saw drugs and cash on the dining room table. They arrested the woman for drug offenses.

The woman has moved to suppress the evidence obtained from her apartment, arguing that the police violated the Fourth Amendment when they entered the apartment without a warrant.

Should the court grant the woman's motion to suppress?

- (A) No, because the police had probable cause and exigent circumstances.
- (B) No, because the police had reasonable suspicion and exigent circumstances.
- (C) Yes, because the police could have obtained a warrant.
- (D) Yes, because the police created any exigent circumstances.

Question 109

A woman owned land subject to a mortgage held by a bank. She fell behind in her mortgage loan payments, and the bank properly initiated foreclosure proceedings. The land was sold at a foreclosure sale that resulted in surplus proceeds to which the woman was entitled. Before payment of the surplus proceeds to her, she died testate.

In her duly probated will, which she had executed before granting the mortgage to the bank, the woman specifically devised the land to a charity. The remainder of the woman's estate was given by the will to her brother, her sole heir.

A dispute has arisen in the administration of the woman's estate about the foreclosure sale surplus proceeds. The woman's brother contends that he is now entitled to those proceeds.

Is the brother correct?

- (A) No, because the foreclosure sale was an involuntary act.
- (B) No, because the woman's will clearly indicated her intent for the charity to have the land.
- (C) Yes, because the foreclosure sale was completed before the woman's death.
- (D) Yes, because the woman's will was written before the mortgage was granted.

Question 110

A defendant is on trial for conspiracy to distribute drugs. The prosecutor wishes to introduce into evidence a ledger found at the defendant's home during the execution of a search warrant. The ledger includes detailed information regarding the defendant's purchases and sales of drugs over a two-year period. The prosecutor is considering two alternative ways to lay the foundation for admission of the ledger as a business record. The first alternative is to call the police officer who executed the search warrant to testify that she found the ledger in the defendant's home. The second alternative is to call a codefendant, who has pled guilty, to testify that he was the defendant's drug supplier for over two years and that he was present when the defendant used the ledger to record their transactions as well as transactions

with other buyers and sellers as they occurred.

Which of the following is correct regarding the ledger's admissibility under the business records exception to the hearsay rule?

- (A) The ledger may be admitted through either the officer or the codefendant.
- (B) The ledger may be admitted through the codefendant but not through the officer.
- (C) The ledger may not be admitted through either the officer or the codefendant, because business records may be introduced only through testimony by a records custodian.
- (D) The ledger may not be admitted through either the officer or the codefendant, because the business records exception to the hearsay rule does not apply to illegal activity.

Question 111

A trucker driving down an isolated country road late one night struck cattle that had escaped from a farmer's pen and wandered into the road. The trucker was unable to stop before hitting the cattle but was not driving carelessly. While he was not injured in the collision, the trucker sustained damage to his truck and lost income during the time it took to repair the truck.

The trucker sued the farmer for his damages and invoked the doctrine of *res ipsa loquitur*. At trial, the farmer introduced evidence that his cattle pen was of a sufficient height to prevent cattle from stepping over it and was constructed of thick steel pipe sitting in concrete with a substantial top rail. A sturdy pen such as this one would be more difficult for cattle to break through than one constructed of barbed wire or electric wire.

Should the trial court allow the case to go to the jury with a *res ipsa loquitur* instruction?

- (A) No, because it is possible that a third party wrongfully let the cattle out of the pen.
- (B) No, because the trucker must submit direct evidence of negligence in order to invoke the *res ipsa loquitur* doctrine.
- (C) Yes, because the farmer is strictly liable for harm caused by his escaping cattle.
- (D) Yes, because the jury could conclude that cattle would not ordinarily escape a strong, secure cattle pen in the absence of negligence.

Question 112

A corporation that was having a factory built filed a federal diversity action against the general contractor and an electrical subcontractor for the project. The complaint alleged breach of contract claims arising from construction delays and deficient electrical work that had caused the corporation significant financial losses.

The general contractor filed a crossclaim against the subcontractor, asserting only the defense that the general contractor was not liable to the corporation because the subcontractor's deficient work was the sole cause of the construction delays and the corporation's losses. After discovery, the corporation settled with the general contractor and dismissed the claims against it.

The subcontractor has moved to dismiss the general contractor's crossclaim.

Which of the following arguments best supports the motion?

- (A) The crossclaim is improper, because it asserts a defense, not a claim for relief.
- (B) The crossclaim is improper, because the general contractor and the subcontractor are opposing parties, not co-parties.
- (C) The crossclaim is invalid, because the general contractor is no longer a party to the underlying action.
- (D) The crossclaim is premature, because it is contingent on a finding that the defendants breached the construction contract.

Question 113

Congress amended the federal bankruptcy statute to allow states to exempt a debtor's home from judgment creditors, so long as the debtor had established permanent residency in the state at least two years before entry of the judgment. The two-year residency requirement was intended to prevent debtors from defrauding creditors by moving to a state solely to take advantage of a favorable home-exemption law.

A state's law prohibited the execution of a judgment against a debtor's home. After the federal amendment, the state amended its law "to conform with the federal bankruptcy amendments," making the debtor's home exemption unavailable to any person who had established permanent residency in the state less than two years before entry of the judgment.

Following these amendments, a man moved to the state and purchased a home. Six months later, a creditor obtained a judgment against the man for negligently causing a car accident. The creditor now seeks to execute the judgment against the man's home, but the man has responded that he is entitled to the generally applicable debtor's home exemption under state law.

Which of the following is the man's best argument?

- (A) Automobile negligence is not a commercial activity and is therefore beyond the regulatory power of Congress pursuant to the commerce clause.
- (B) Congress cannot commandeer a state legislature to enact a law implementing federal policy.
- (C) Congress lacks the power to authorize the states to enact such restrictions based on the length of a person's residence within a state.
- (D) The two-year time period is too long to be rationally related to the prevention of fraud against creditors.

Question 114

A franchise agreement between a franchisor and a franchisee was drafted by the franchisor. The franchisor, which had the greater bargaining power, drafted the majority of the agreement's terms in its own favor.

Two years into the franchise agreement, a dispute has arisen regarding an aspect of the franchisee's operations that the agreement does not address.

If the parties take their dispute to court and both ask the court to supply the missing term, how will the court likely proceed?

- (A) It will rescind the agreement, because the terms of an agreement are for the parties to draft, not the court, and the parties apparently failed to execute a complete agreement.
- (B) It will supply a term that is favorable to the franchisee, because any omitted terms should be construed against the franchisor as the original drafter.
- (C) It will supply a term that is favorable to the franchisor, because had the parties initially considered the matter, the franchisor would have drafted the term in its own favor.
- (D) It will supply a term that is reasonable for both parties under the circumstances.

Question 115

A man decided to kill his neighbor, with whom he had been feuding for years. The man took a handgun and followed his neighbor to the county fairgrounds. When he had a clear shot, he aimed the gun and fired, but at the last second the neighbor moved. The shot missed the neighbor but struck and killed a police officer at the fairgrounds.

The jurisdiction defines murder as at common law but creates three degrees of murder: (a) Capital murder, punishable by death, is the intentional murder of a police officer. (b) First-degree murder, punishable by life in prison, is premeditated and deliberate murder. (c) Second-degree murder, punishable by up to 40 years in prison, is all other murders.

What is the most serious crime of which the man can properly be convicted?

- (A) Capital murder of the police officer.
- (B) First-degree murder of the police officer.
- (C) Second-degree murder of the police officer.
- (D) Attempted murder of the neighbor.

Question 116

A plaintiff sued a defendant for assault after a late-night barroom brawl. At trial, the plaintiff planned to call several bar patrons who had been present on the night in question to testify to the circumstances of the alleged assault. The trial judge ordered all witnesses excluded from the courtroom during the trial except for the parties. The trial judge then ordered the plaintiff to testify first during his case-in-chief and to relate his version of events before hearing the

testimony of other eyewitnesses. The plaintiff has objected to the order requiring him to testify first.

Did the trial judge exceed her authority in ordering the plaintiff to testify first?

- (A) No, because the trial judge has broad discretion to exercise control over the order of examining witnesses.
- (B) No, because the trial judge must determine the order in which evidence is presented at trial.
- (C) Yes, because a party is always permitted to control the presentation of proof during its case-in- chief.
- (D) Yes, because the defendant did not demonstrate likely prejudice from permitting the plaintiff to present evidence in any order he wished.

Question 117

A man owned two adjacent vacant tracts of land; he sold the westerly tract to a woman. The deed to the woman expressly stated that the use of the land was restricted to residential use and made the restriction binding on the woman and her heirs and assigns. In the deed, the man also expressly promised, for himself and his heirs, that he would insert a similar residential-use restriction in any deed to the easterly tract of land given in the future. The woman promptly recorded her deed.

Several years later, the man conveyed the easterly tract of land to an entrepreneur, who planned to open a convenience store on the land. The deed to the entrepreneur contained no restrictions on use. The entrepreneur had no actual notice of the man's promise to the woman to include a restriction in the deed.

When the woman heard of the entrepreneur's plans, she asked her attorney whether the entrepreneur is bound by the promised residential-use restriction.

Which of the following factors will be dispositive?

- (A) The type of index system used in the jurisdiction.
- (B) The type of recording act in the jurisdiction.
- (C) Whether the entrepreneur had a duty to search the title for the westerly tract.
- (D) Whether the woman has planned or built any improvements on her land.

Question 118

A driver was injured when one of the tires on her car ruptured, causing the car to veer off the road. The rupture resulted from a defect in the tire that existed at the time it was sold by the manufacturer to a retailer, who sold it to the driver and installed it on her car.

The driver sued the manufacturer on a strict products liability theory. During discovery, the driver's attorney obtained a memorandum that had circulated among engineers employed by the manufacturer. The memorandum acknowledged that undetectable defects would cause ruptures in approximately one out of every 10,000 tires sold. The manufacturer sells approximately 10 million tires per year.

After discovering this memorandum, the driver's attorney filed a timely amended complaint, adding a claim for battery. The manufacturer has moved for partial summary judgment, seeking dismissal of the battery claim, based on the undisputed facts set out above.

If no additional facts are provided to the court concerning the risk of tire rupture, should the court grant the motion?

- (A) No, because the evidence would permit a reasonable jury to conclude that a responsible manufacturer would have taken greater care to prevent ruptures.
- (B) No, because the evidence would permit a reasonable jury to conclude that the manufacturer knew to a substantial certainty that consumers would be injured by tire ruptures.
- (C) Yes, because a battery claim is inconsistent with a claim for strict products liability.
- (D) Yes, because the driver cannot establish that the manufacturer intended or knew to a substantial certainty that its placement of the tire into the stream of commerce would cause her to suffer a harmful or offensive contact.

Question 119

After conferring with the parties' attorneys in a federal civil action, the court entered a scheduling order with deadlines for completing discovery and filing dispositive motions. The order set a jury- selection and trial date for two months after the motions deadline.

After the motions deadline expired, and a month before jury selection and trial, the plaintiff's attorney moved for a six-month extension of the discovery, motions, and jury-trial deadlines. The attorney explained that she had been so busy that she had been unable to depose key witnesses or discuss settlement options with her client. The defendant objected to the extension on the ground that there had been ample time to prepare and that the delay would result in increased costs.

Is the court likely to grant the motion?

- (A) No, because the attorney has not shown good cause for the delay.
- (B) No, because the court has set the date for jury selection.
- (C) Yes, because the additional time could facilitate a settlement.
- (D) Yes, because the defendant has not shown sufficient prejudice that will result if the requested extension is granted.

Question 120

A city owned and operated an electric utility that supplied electricity to the city's businesses and residences. Citing the need for efficiency, the city implemented a plan to replace old electric meters with wireless meters in businesses and residences. The city's plan did not include advance notice to property owners or a method to obtain consent from property owners.

A homeowner who opposed the installation of the wireless meters was denied his request for a hearing on the city's plan. The homeowner then blocked the city's access to his house, obstructing the city's effort to replace the old meter. The city responded by threatening to arrest and prosecute the homeowner for disorderly conduct.

The homeowner then sued the city in federal district court, challenging the meter-replacement plan on due process grounds and seeking to enjoin its enforcement. The city moved to dismiss. While the city's motion was pending, the city council passed an emergency ordinance requiring both prior notice and property owner consent before the removal or replacement of any electric meter.

Should the court grant the city's motion?

- (A) No, because the city's action is capable of repetition yet evading review.
- (B) No, because the city's voluntary cessation of the challenged conduct does not moot the case.
- (C) Yes, because the case is moot.
- (D) Yes, because the case is not ripe.

Question 121

After reading a description of a person who had committed a rape, a parole officer noted that the description resembled one of his parolees. The officer called the parolee and asked him to drop by his office. The parolee came to the office and, after about 30 minutes of questioning, admitted having committed the rape. At no time did the officer give the parolee Miranda warnings.

The parolee was charged with rape and has moved to suppress his statement to the parole officer.

Should the court grant the motion to suppress?

- (A) No, because a parolee has no privilege against self-incrimination.
- (B) No, because the parolee was not in custody.
- (C) Yes, because Miranda warnings are required before interrogation by law enforcement officers.
- (D) Yes, because the parolee's statements were compelled, as he could reasonably believe that he was required to answer questions asked by his parole officer.

Question 122

An experienced construction company purchased sand in bulk from a distributor. The construction company mixed the sand with water and cement to make concrete. The distributor knew that an improper ratio of sand, water, and cement would result in defective concrete, but the distributor played no role in determining the ratio used by the construction company in mixing the concrete.

The construction company used the concrete to form supporting columns for a building. A year later, the building

collapsed during a minor earthquake, causing injury to the occupants.

Although the sand was not defective, the concrete forming the columns was defective because the mixture ratio of the sand, water, and cement was not proper. The defective concrete was a cause in fact of the collapse.

Do the injured building occupants have viable strict liability claims against the sand distributor?

- (A) No, because component suppliers are not strictly liable in tort.
- (B) No, because the distributor neither advised nor participated with the construction company in determining the mixture of sand, water, and cement.
- (C) Yes, because the concrete columns were defective.
- (D) Yes, because the distributor knew that an improper mixture of sand, water, and cement would result in defective concrete.

Question 123

During a criminal investigation of possible securities fraud committed by the senior management of a public corporation, the prosecutor has called a witness to testify before a grand jury. The witness will testify that he was an accountant for the corporation, that he dealt with its senior management on a daily basis concerning the corporation's financial disclosures to the public, and that, in his opinion, all members of the senior management knew that the disclosures were fraudulent.

Can the witness's testimony be considered by the grand jury?

- (A) No, because the witness has not been qualified as an expert regarding fraudulent financial disclosures.
- (B) No, because the witness's opinion about senior management's knowledge is not rationally based on his perception and would not be helpful to the grand jury.
- (C) Yes, because the rules of evidence do not apply to grand jury proceedings.
- (D) Yes, because the witness's opinion is rationally based on his perception and would be helpful to the grand jury.

Question 124

A man contracted with a personal flight instructor to take 15 flying lessons from her. The lessons were to begin two months from the signing of the contract. One month after the contract was signed, the man died when his car was struck by a drunk driver.

The instructor demanded that the man's estate pay for the 15 lessons. When the estate refused to pay, the instructor sued the estate.

It is undisputed that the instructor was willing and ready to perform her obligations under the contract.

Is the instructor likely to prevail in the action against the estate?

- (A) No, because an offer lapses on the death of an offeror or an offeree.
- (B) No, because the man's death excused both his and the instructor's performance obligations.
- (C) Yes, because the instructor is not at fault for the man's inability to perform.
- (D) Yes, because the man's death does not discharge his contractual obligations.

Question 125

The owner of a residence advertised it for sale in various media. A buyer who lived in another state decided to purchase it. The buyer neither visited the residence prior to the purchase nor personally spoke with the seller. All of their communication was by mail. The buyer never asked the seller about the condition of the residence, nor did the seller say anything about it except to ask if the buyer wanted to inspect the property because he intended to sell it "as is." The buyer did not inspect the residence because, as she told the seller, she was an experienced land buyer, and also because privately she felt that the seller, being relatively inexperienced in real estate matters, was selling the residence below its fair market value.

Both parties signed a contract that was silent concerning the condition of the residence except to note that the sale was "as is." Two weeks later, the buyer sent the seller a check and the seller sent the buyer a warranty deed.

After receiving the deed, the buyer visited the residence for the first time and discovered termite infestation that had caused substantial damage. The seller had not known of the termites.

There is no applicable statute.

The buyer sued the seller for damages and/or rescission of the contract.

For whom will the court find?

- (A) For the buyer, because an “as is” clause is per se unconscionable in a residential sales transaction.
- (B) For the buyer, because she received a warranty deed.
- (C) For the seller, because he breached no duty.
- (D) For the seller, because of the doctrine of merger.

Question 126

A plaintiff domiciled in State A sued a defendant domiciled in State B, alleging that the defendant had failed to deliver products to the plaintiff under an ongoing contract. The plaintiff attached to the complaint an invoice for the products marked “paid” and a receipt for a wire transfer to the defendant in the amount of \$80,000. The defendant answered the complaint, denying that the plaintiff had suffered any losses and asserting a counterclaim for nonpayment of \$90,000 for an earlier delivery of products.

In response to the counterclaim, the plaintiff has moved for judgment on the pleadings.

How is the court likely to rule?

- (A) Deny the motion as premature, because the plaintiff has not yet answered the counterclaim.
- (B) Deny the motion, because a plaintiff that attaches items to the complaint cannot move for judgment on the pleadings.
- (C) Grant the motion, because the defendant failed to cross-move.
- (D) Grant the motion, because the defendant has not denied that it failed to deliver products after payment by the plaintiff.

Question 127

To encourage urban farming, a city ordinance requires vegetables sold at farmers’ markets in the city to have been grown within the city limits. A farmer who grows vegetables on land in a nearby state wants to sell those vegetables at a farmers’ market in the city. The farmer has challenged the ordinance on constitutional grounds.

What is the farmer’s best argument that the ordinance is unconstitutional?

- (A) The ordinance discriminates on its face against interstate commerce, and there are nondiscriminatory ways to promote the city’s interest in encouraging urban farming.
- (B) The ordinance is not substantially related to an important government interest.
- (C) The ordinance places an undue burden on interstate commerce that is clearly disproportionate to the city’s interest in encouraging urban farming.
- (D) The ordinance unconstitutionally burdens the farmer’s right to travel across state lines to sell his vegetables at the farmers’ market.

Question 128

A property owner hired an arborist to cut down all the trees on her property and to transport the trees to a lumber company. The owner agreed to pay the arborist \$10,000 when the work was complete. The arborist said that the work would take him three days.

On the first day, the arborist cut down all the trees. That evening, a fire caused by vandals completely destroyed the trees, making them unfit for use by the lumber company.

What, if anything, must the owner pay the arborist?

- (A) The arborist’s expectation interest, \$10,000 less any costs the arborist avoided by not completing his performance.
- (B) The arborist’s restitutionary interest, which would be the reasonable value of the services he rendered.
- (C) Nothing, because the contract was discharged by frustration of purpose.
- (D) Nothing, because the arborist did not complete the work.

Question 129

Over the course of a year, police in a small town received complaints about vandalism in public parks. They connected the incidents because the vandal left specific graffiti at each site, and investigation provided the police with a reasonable suspicion that the perpetrator was a specific local resident. Using an online directory that the resident had joined, the police obtained the resident's cell-phone number. The police then subpoenaed the cell-phone provider to provide one year of historical cell-phone site-location data. The data showed that for each incident, the resident's cell phone had been in the vicinity of the vandalized property.

The resident was charged with multiple counts of destruction of property. Defense counsel has moved to exclude the cell-phone site-location data, arguing that its collection violated the Fourth Amendment.

Did the collection of the data violate the Fourth Amendment?

- (A) No, because a person has no reasonable expectation of privacy in information shared with a third party.
- (B) No, because the subpoena was based on a cell-phone number that the resident had voluntarily placed in the public domain.
- (C) Yes, because a subpoena must be based on probable cause.
- (D) Yes, because a warrant is required to collect such extensive historical cell-phone site-location data.

Question 130

A landlord owns a 10-unit apartment building and lives in one of the apartments. A uniformly enforced provision in every apartment lease prohibits all pets. A tenant with a serious hearing impairment asked permission from the landlord to keep a hearing-assistance service dog in her apartment to alert and assist her in the event of fire or other emergency. The landlord refused.

Is the landlord's refusal likely a violation of the federal Fair Housing Act?

- (A) No, because the landlord lives in an apartment in the building.
- (B) No, because the tenant agreed to the "no pets" provision in her lease.
- (C) Yes, because the landlord's refusal is arbitrary.
- (D) Yes, because the tenant is entitled to a reasonable accommodation for her disability.

Question 131

A woman brought a wrongful death action against a car driver who hit and killed her husband while her husband was crossing a street. In settlement negotiations, the driver told the woman that he was sorry for what had happened and that he had been too drunk to drive when he ran into her husband with his car. The woman and the driver settled the wrongful death action for \$1 million.

Subsequently, the driver was charged with reckless homicide of the husband. At the driver's criminal trial, the prosecutor offered, as evidence of the driver's guilt, the driver's statement to the woman during settlement negotiations.

Is the driver's statement to the woman admissible in the subsequent criminal prosecution?

- (A) No, because it is hearsay not within any exception.
- (B) No, because a statement made in civil settlement negotiations between private parties is not admissible to prove the validity of a claim in a subsequent criminal prosecution.
- (C) Yes, because a statement made in civil settlement negotiations is admissible in a subsequent criminal prosecution.
- (D) Yes, because the statement's probative value outweighs the risk of prejudice and jury confusion.

Question 132

A shopper slipped and fell in a grocery store, injuring her wrist. In a medical malpractice action against the doctor who treated her, the shopper alleges that the doctor worsened the injury by his treatment. Normally, competent medical treatment would have resulted in a complete cure of the wrist injury.

The doctor is seeking to implead the grocery store. The grocery store contends that its alleged negligence was not a proximate cause of any of the injuries allegedly caused by the doctor.

Should the court allow the doctor to implead the grocery store?

- (A) No, because medical malpractice and the negligence of a possessor of property involve different standards of care.
- (B) No, because the alleged negligent acts of the grocery store and the doctor occurred sequentially and not concurrently.
- (C) No, because the fact-finder could find that the shopper sustained a single indivisible injury proximately caused by the negligence of both the grocery store and the doctor.
- (D) Yes, because the fact-finder could assign some of the responsibility for the shopper's injuries to the grocery store.

Question 133

A decedent's executor has brought a federal diversity action against a man, alleging that while the decedent and the man were riding dirt bikes on a track, the man's bike ran into the decedent's bike, causing the decedent to fall to her death. The man denies fault for the decedent's death.

At trial, the executor's only witness testifies that shortly before the accident he was riding 50 feet behind the man and saw the man rapidly approaching the decedent until they were only a few feet apart. This witness briefly looked away, heard an unusual noise, and immediately afterward saw the decedent and the decedent's bike on the ground.

The man calls three witnesses, none of whom had met the decedent or the man before. Two riders testify that they were riding parallel to the man and never saw his bike touch the decedent's bike. A track attendant, who was stationed close to the area where the decedent fell, testifies that he was watching the track and never saw any contact between the decedent and the man.

The man has moved for judgment as a matter of law.

Should the court grant the motion?

- (A) No, because the executor's evidence is sufficient for the jury to find for the executor.
- (B) No, because there is a credibility dispute for the jury to resolve.
- (C) Yes, because a verdict for the executor would be against the great weight of the evidence.
- (D) Yes, because the executor has presented insufficient evidence to support a verdict.

Question 134

A general contractor and a subcontractor signed a contract under which the subcontractor agreed to pour a cement foundation for a building project for \$12,000. Before the subcontractor performed, it discovered that it had made an error in computing the size of the foundation and should have quoted the general contractor \$18,000 for the work. The subcontractor informed the general contractor of the mistake and asked whether the general contractor would agree to pay \$15,000 for the foundation, which would cover the subcontractor's costs. After determining that other subcontractors would charge at least \$18,000 for the work, the general contractor agreed in writing. When the work was completed, the general contractor tendered the subcontractor \$12,000. The subcontractor refused to accept the payment.

If the subcontractor prevails in a suit against the general contractor, how much will the subcontractor be likely to recover?

- (A) \$12,000, because the contract modification was not supported by consideration.
- (B) \$12,000, because the subcontractor's mistake was unilateral.
- (C) \$15,000, because the contract modification was fair and equitable under the circumstances.
- (D) \$18,000, because that is the value of the benefit the subcontractor conferred on the general contractor.

Question 135

A state law to promote tourism creates an easement across a portion of a private farm for hikers who wish to use a historic trail that crosses the farm. The law allows the farm's owner to charge hikers a fee to cover the costs of this use, but it does not otherwise compensate the owner.

Is the law constitutional?

- (A) No, because the fee provision violates the privileges and immunities clause.

- (B) No, because the law takes the owner's property without just compensation.
- (C) Yes, because the fee provides the owner with just compensation.
- (D) Yes, because the law has the public purpose of promoting tourism.

Question 136

A son managed an apartment building that his elderly father owned. Ten months ago, the son asked the father to sign some tax documents related to the apartment building and slipped in among the documents a deed that conveyed the building to the son. The father did not read the documents before signing them because he trusted his son. After the father signed the deed, the son promptly recorded it.

Five months ago, the son sold the building to an investor, who promptly recorded her deed. The investor was unaware of the circumstances surrounding the conveyance of the building from the father to the son.

Two months ago, the father died survived by his wife and his son. The father's duly probated will, executed five years earlier, devised the apartment building to his wife.

Is the wife entitled to ownership of the apartment building?

- (A) No, because the father's actual signature is on the deed to the son.
- (B) No, because the investor was a bona fide purchaser without knowledge of the son's dishonesty in obtaining the deed from his father.
- (C) Yes, because the father executed the will before he signed the deed to the son.
- (D) Yes, because the son tricked his father into signing the deed to him and that deed is therefore void.

Question 137

During jury selection in federal court, a prospective juror stated that her father and brother were federal agents and that she had met the agent who had arrested the defendant on a number of prior occasions because he played on her brother's softball team. When asked by the court whether she could judge the facts without being biased by knowing the arresting agent, the prospective juror expressed some doubt. The court nonetheless denied the defendant's request to dismiss the prospective juror. The defendant later exercised one of his peremptory challenges to remove the prospective juror from the jury.

The defendant was convicted. On appeal, he argues that the conviction should be reversed because the court erroneously failed to remove the prospective juror for cause.

How should the federal court of appeals decide the issue?

- (A) Reverse the conviction, because the failure to remove the prospective juror violated the defendant's right to an unbiased jury.
- (B) Reverse the conviction, because the failure to remove the prospective juror violated the defendant's right to exercise his peremptory challenges.
- (C) Uphold the conviction, because the trial court did not abuse its discretion in denying the challenge for cause.
- (D) Uphold the conviction, because the prospective juror did not serve on the jury.

Question 138

A farmer has sued a neighbor for starting a fire that burned down the farmer's barn. At trial, the farmer offers, under the public records exception, a properly authenticated copy of the fire marshal's official report, which found that the neighbor started the fire. The report states that this conclusion is based on the fire marshal's extensive training in fire investigation, on the fire marshal's examination of the scene, and on interviews with numerous witnesses. The report quotes one witness as saying, "I saw [the neighbor] light the match that started the fire." The neighbor objects to the admission of the report.

How should the court rule on the report's admissibility?

- (A) Admit the report containing the fire marshal's conclusion as a public record but exclude the witness's statement.
- (B) Admit the report in its entirety as a public record.
- (C) Exclude the report, because admitting it would deny the neighbor his right to confront witnesses against him.
- (D) Exclude the report, because the fire marshal's conclusion is based on multiple hearsay.

Question 139

After a woman left a company to start her own business, her former supervisor became convinced that she was breaching a noncompetition agreement that she had signed when she had begun employment with the company. At the supervisor's suggestion, the company assigned its security officer to investigate and provided the officer with information about the woman, including her telephone number. Unbeknownst to the company, the officer emailed the woman's phone service provider, pretending to be the woman, and obtained copies of her phone records, which showed that she had contacted several customers of the company after she left, in breach of the agreement. The records also revealed a number of phone calls by the woman to others, including medical providers.

The woman, after learning of the security officer's investigation, sued the company, asserting several tort claims.

Should the trial court allow the case to go to the jury?

- (A) No, because the company did not expressly authorize the security officer's acts.
- (B) No, because the woman was in breach of her noncompetition agreement with the company.
- (C) Yes, on a claim of intentional infliction of emotional distress.
- (D) Yes, on a claim of invasion of privacy.

Question 140

After a lengthy federal trial, the defendant moved for judgment as a matter of law (JMOL). The court denied the motion and sent the case to the jury, which returned a verdict for the plaintiff and awarded damages.

Five weeks after the court entered judgment on the verdict, the defendant filed a renewed motion for JMOL. One week after that motion was filed, the parties filed a stipulation agreeing to extend the time to file and respond to posttrial motions. In the stipulation, the defendant acknowledged that it had filed its renewed JMOL motion late, citing computer difficulties relating to an office move. The plaintiff has acknowledged that it suffered no prejudice as a result of the late renewal motion but opposes it.

Is the court likely to consider the renewed JMOL motion on the merits?

- (A) No, because the deadline for filing a renewed JMOL motion cannot be extended.
- (B) No, because the defendant failed to show good cause for its delay in filing the motion.
- (C) Yes, because although the motion was late, the defendant explained the reason, and the plaintiff suffered no prejudice.
- (D) Yes, because although the motion was late, the parties agreed to extend the time for posttrial motions.

Question 141

A woman was charged with a felony. After charges were filed but before the woman's trial, the state passed a law requiring any convicted felon to make a payment to the victim of the crime. Under the law, the payment "shall be such amount as the court may find appropriate at the time of sentencing, taking into account the gravity of the offense, but shall not exceed \$25,000." The law applies to all defendants whose trials or guilty pleas take place after the law's passage.

Is the law valid as applied to the woman?

- (A) No, because the law cannot be applied retroactively to crimes committed before its passage.
- (B) No, because the law fails to provide any standard for the court to use in passing sentence and thus violates procedural due process.
- (C) Yes, because the law is rationally related to the state's legitimate interest in punishing crime.
- (D) Yes, because the law is remedial rather than punitive.

Question 142

On December 2, an employer called a job applicant who had interviewed and offered her a position paying \$65,000 per year. The employer told the applicant that she could accept the offer by showing up for work on January 2 and that the term of employment would be one year from when she started.

The applicant showed up for and began work on January 2. Two weeks later, the employer discharged her without cause. The applicant has sued for breach of contract.

Would the statute of frauds be an effective defense for the employer in that action?

- (A) No, because the applicant's commencement of performance removed the statute of frauds as a defense.
- (B) No, because the agreement could have been fully performed within a year from the time that it was made.
- (C) Yes, because the agreement could not have been fully performed within a year from the time that the offer was communicated to the applicant.
- (D) Yes, because the agreement was for \$65,000.

Question 143

A woman bought a homeowner's insurance policy from an insurance company through one of its agents. One year later, a fire completely destroyed the woman's house and its contents, and she learned that the policy covered the cost of rebuilding the house but not the cost of replacing the contents.

The woman sued the insurance company for breach of contract, claiming that when the agent sold her the policy, he did not notify her, as was legally required, that she would have to purchase a supplemental policy to cover the house's contents. At trial, the woman testified that the agent had not provided the required notice.

The agent's supervisor plans to testify that the company issues thousands of policies through its agents each year and that it is the routine practice of those agents to discuss supplemental policy options with each customer. The woman's attorney has objected to this proffered testimony.

Should the court allow the supervisor's testimony?

- (A) No, because evidence of routine practice is not admissible when an eyewitness denies that the practice was followed.
- (B) No, because issuing insurance policies to individuals is not sufficiently automatic to constitute a routine practice.
- (C) Yes, as character evidence that the agent acted in a thorough manner when dealing with customers.
- (D) Yes, as evidence of the company's routine practice.

Question 144

A driver was stopped in traffic when he noticed a bicyclist riding quickly between the lanes of cars. To deter the bicyclist from continuing such dangerous behavior, the driver opened his car door as the bicyclist neared. The bicyclist, unable to stop, hit the door and fell, sustaining serious injuries.

In a jurisdiction that follows the common law definition of crimes, which is the most serious crime of which the driver can properly be convicted?

- (A) Attempted murder.
- (B) Attempted manslaughter.
- (C) Battery.
- (D) Assault.

Question 145

A graduate student who was moving needed cardboard boxes, so she went to her usual grocery store to look for some. The store regularly gave repeat customers empty boxes to promote goodwill. Seeing no boxes outside, the student entered the store and asked a store employee for help. The employee pointed toward the rear of the store and said that all the empty boxes were in the storeroom.

The student went into the storeroom through a door with a sign that said: "Keep Out. Employees Only." While in the storeroom, she tripped on a fold in a floor mat and fell into a stack of wooden crates. The topmost crate fell on the student, causing a head injury.

The student has sued the store to recover for her injury.

Which statement below is the most appropriate characterization of the student and her conduct under traditional common law rules?

- (A) The student assumed the risk, because she knew that the storeroom was not normally accessible to the public.
- (B) The student was a licensee in the store, because she had no intention of making a purchase at the store during the box-hunting visit.

- (C) The student was a trespasser in the storeroom, because she ignored the sign on the door barring entrance to the storeroom.
- (D) The student was an invitee in the storeroom, because she had permission to enter the storeroom consistent with the store's policy of making its empty boxes available to repeat customers.

Question 146

An owner acquired an apartment building and financed part of the purchase with a mortgage loan. The promissory note contained a clause that permitted the lender to accelerate the outstanding loan balance if the owner defaulted on the terms of the loan unless the owner cured the default within 10 days of a notice of default. The mortgage required the owner to make loan payments, maintain casualty insurance, and pay property taxes.

The owner made the loan payments when due but neglected to pay an insurance premium. When the lender learned that the owner was not maintaining the insurance, the lender notified the owner that the loan was in default and that it planned to accelerate the loan unless the lender received notification within 10 days that the premium had been paid. The owner failed to pay the premium within that time period, and the insurer notified both the owner and the lender that it was canceling the coverage.

In order to protect itself from a potential loss, the lender had the insurance policy reinstated by paying the delinquent premium. The owner then promptly tendered the amount of the delinquent insurance premium payment to the lender, but the lender refused to accept it.

The lender accelerated the loan, and after the owner failed to pay the accelerated amount, the lender initiated a foreclosure action. At the time of the acceleration, the owner was current on all loan payments.

There is no applicable statute.

Did the lender have the right to accelerate?

- (A) No, because the owner promptly tendered the delinquent payment amount to the lender.
- (B) No, because the owner's casualty insurance policy had been reinstated.
- (C) Yes, because acceleration is required before a foreclosure action can be initiated.
- (D) Yes, because the lapse in insurance coverage constituted a material default of the terms of the mortgage.

Question 147

A company incorporated and headquartered in State A brought a federal diversity action in State A against an attorney domiciled in State B. The complaint asserted that the attorney had sent defamatory emails to the company's customers in many different states, including State A. The attorney had few contacts with State A, and none of the contacts in that state were related to the alleged defamatory emails.

After being served in State B with the summons and complaint, the attorney determined that he was not subject to personal jurisdiction in State A and ignored the action. On the company's motion, the clerk entered a default in the action. After a hearing on damages, the court entered a default judgment for the company.

The attorney has moved for relief from the default judgment.

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

- (A) The attorney has a meritorious defense to the action, which he should be allowed to assert.
- (B) The attorney's failure to respond to the service of process was reasonable under the circumstances.
- (C) The default judgment is void, because the court did not have personal jurisdiction over the attorney.
- (D) The default judgment was entered as a result of the attorney's mistaken belief that he need not respond.

Question 148

The owner of a house leased it to a tenant for a one-year term. A provision in the lease stated that the owner had the right to place "For Rent" signs on the premises during the last 90 days of the lease term if the lease was not renewed. The lease also required the tenant to permit prospective lessees to enter and examine the premises during the 90-day period but did not address the owner's right to enter the premises for purposes of showing the house to prospective lessees.

The tenant decided not to renew the lease, and at the beginning of the 90-day period, the owner told the tenant that she was going to show the house to a prospective lessee. The tenant refused to allow the owner to enter the house but said

that the prospective lessee could enter.

Which of the following best supports the owner's right to enter the house?

- (A) The principle of reasonable expectations.
- (B) The duty of good faith.
- (C) The duty to use best efforts.
- (D) The objective theory of contracts.

Question 149

The number of large billboards along a city's major roadways has increased considerably in recent years. Many political groups have contributed to that increase with their growing use of billboards to display messages that further a variety of political candidates and public causes. The city council has received many complaints from residents claiming that the billboards are ugly and detract from picturesque sights along the roadways.

In response to these complaints, the city council has enacted an ordinance that substantially limits the number and the size of billboards that may be erected along designated scenic roadways.

A company that owns many of the billboards affected by this ordinance has filed suit, claiming that the ordinance violates the company's freedom of speech.

Should the court uphold the ordinance?

- (A) No, because the ordinance burdens political speech and is not necessary to further a compelling government interest.
- (B) No, because the ordinance restricts speech in a traditional public forum.
- (C) Yes, because the ordinance is narrowly tailored to further the substantial government interest in the city's appearance.
- (D) Yes, because the ordinance reasonably regulates the use of public roadways.

Question 150

A defendant was charged with two counts of murder. One trial witness was a child who had seen one of the killings. Before calling the child to testify, the prosecution moved to remove the defendant from the courtroom, arguing that the child would be intimidated by seeing the defendant. The court denied the motion.

When the child entered the courtroom to testify, the defendant became unruly, moving as though he was about to lunge from his chair toward the child. The judge warned the defendant to stop the behavior. After a second warning, the judge told the defendant that he would be removed from the courtroom if he continued to behave inappropriately. The defendant then shouted a threat at the child. At that point, the court ordered the defendant removed from the courtroom.

When the child finished testifying, subject to full cross-examination by defense counsel, the defendant was allowed back into the courtroom. The trial concluded, and the jury convicted the defendant. The defendant appealed the conviction, challenging only his exclusion from the courtroom.

Should the court of appeals reverse the conviction?

- (A) No, because a defendant may be excluded from the courtroom to protect a minor witness from further trauma.
- (B) No, because the right to be present can be forfeited by disruptive behavior.
- (C) Yes, because the error requires automatic reversal.
- (D) Yes, unless the error in excluding the defendant was harmless.

Question 151

In a probation revocation proceeding, the government has called the defendant's probation officer to testify. The probation officer will testify that a confidential informant told her that the defendant had violated his probation by associating with known criminals. The defendant objects to the proposed testimony.

Is the probation officer's testimony admissible in the probation revocation proceeding?

- (A) No, because the testimony relates hearsay not within any exception.
- (B) No, because the confidential informant's statement to the probation officer constitutes an improper lay opinion.

- (C) Yes, because the Federal Rules of Evidence do not apply to probation revocation proceedings.
- (D) Yes, because the confidential informant's statement is not offered for its truth.

Question 152

A school bus driver reported to a middle school principal that a student had harassed other children on the bus. The principal informed the student's parents of the bus driver's report and told them that, because of the student's behavior, the student could not ride the bus for the next week and would have to be driven to school by a parent.

The following Monday morning, after the bus driver had let the children off the bus in front of the school, but before she could close the door and drive away, the student's father pulled his car directly in front of her bus, blocking the driver's path. Because there was another bus right behind hers, the driver was unable to move her bus.

The father got out of his car and strode toward the open door of the bus, screaming at the driver: "You messed with the wrong family! I am going to get you!" Feeling threatened, the bus driver quickly closed the door. The father pounded on the door with enough force to dent it, screaming obscenities at the driver, until a school security guard intervened.

If the driver were to sue the father, which cause of action would give her the best chance of recovery?

- (A) Assault.
- (B) Battery.
- (C) Intentional infliction of emotional distress.
- (D) Trespass to chattels.

Question 153

Fifteen years ago, a man who owned vacant land granted an easement over that land, by deed of gift, to his neighbor for use as a shortcut to her cabin. The deed was silent concerning the easement's location; however, the neighbor used a 15-foot strip along the west side of the man's land.

Last year, the neighbor's cabin was destroyed by fire. The neighbor rebuilt the cabin in a new location, as required by the local building code, and now wants to access the cabin from the east side of the man's land. The neighbor has told the man that she plans to relocate the easement on the east side of his land at her expense. The man has told the neighbor that the easement cannot be relocated. The man's land remains vacant.

Does the man have the right to stop the neighbor from relocating the easement?

- (A) No, because the location of the easement was not fixed in the original grant.
- (B) No, because the neighbor would not have asked to relocate the easement if her cabin had not been destroyed by fire.
- (C) Yes, because the grant of the easement was by deed of gift and without consideration.
- (D) Yes, because the neighbor's use of the easement on the west fixed the location of the easement.

Question 154

Three employees sued their employer in federal court for failing to pay overtime wages, in violation of both federal and state law. The employer moved for summary judgment on the federal-law claims but not on the state-law claims, which closely paralleled the federal-law claims. The court granted the employer's motion.

The employees have moved in the district court for an order certifying an immediate appeal of the grant of summary judgment on the federal-law claims because there is no just reason for delay.

Is the court likely to grant the motion?

- (A) No, because the employees should have filed their certification motion in the court of appeals.
- (B) No, because the federal-law claims are not separate and distinct from the state-law claims.
- (C) Yes, because denying an immediate appeal may prejudice the employees by delaying their recovery.
- (D) Yes, because the employees are entitled to immediate review of the grant of summary judgment on the federal-law claims.

Question 155

Late one evening, a woman sitting in her living room with the lights off saw a man using a flashlight to look into her car,

which was parked on the street in front of her home. The woman had left an expensive laptop computer on the front seat of the car and knew that there had been a series of car thefts in the area. After seeing the man break her car window, the woman retrieved a shotgun, fired it, and hit the man. She then called the police. When the police officers arrived, they arrested both the man and the woman.

The woman is charged with aggravated assault. At trial, her attorney has asked the court to instruct the jury that she was permitted to use force in defending her property. The jurisdiction follows common law principles for defenses.

Should the court give the jury the requested instruction?

- (A) No, because the woman had a duty to retreat before using deadly force.
- (B) No, because the woman was not entitled to use deadly force in defense of property.
- (C) Yes, because the woman did not use deadly force but simply injured the man.
- (D) Yes, because the woman was entitled to use deadly force to defend her home.

Question 156

Congress recently enacted a statute that provides the US Supreme Court with original jurisdiction over any cause of action against a military officer for official misconduct. The stated intent of the statute is to ensure the prompt disposition of such actions by eliminating the need for appeals.

Is the statute constitutional?

- (A) No, because Article II authorizes the President as commander in chief of the armed forces to sanction military misconduct.
- (B) No, because Article III fixes the Supreme Court's original jurisdiction.
- (C) Yes, because Article I vests in Congress the power to establish military tribunals.
- (D) Yes, because Congress has the authority under Article III to define the Supreme Court's original jurisdiction.

Question 157

A blasting company was conducting blasting operations in connection with a highway-widening project. Prior to setting off a charge, the blasting company supervisor posted a large warning sign and stationed a flagman to stop automobiles along the highway. Although a motorist saw and understood both the sign and the flagman's instruction to stop, the motorist nonetheless continued past the flagman and the sign and was traveling along the highway at the moment of the blast. A flying rock from the blast hit and severely damaged the motorist's car.

The jurisdiction follows the traditional common law rules governing contributory negligence and assumption of risk.

If the motorist pursues a claim against the blasting company to recover for the damage to the car, and all the foregoing facts are established, how much should the motorist recover?

- (A) The full value of the car.
- (B) The full cost of restoring the car to its condition just before the accident.
- (C) The full cost of restoring the car to its condition just before the accident, reduced by the percentage by which the motorist's conduct contributed to the accident.
- (D) Nothing.

Question 158

A buyer contracted to purchase grain from a broker. The parties' written agreement provided for delivery and payment on March 19 at the broker's warehouse and stated that time was of the essence due to the volatility in market prices for grain.

On March 19, neither party appeared at the warehouse. On March 21, the buyer called the broker and asked if he would come to the warehouse so that the buyer could take delivery of the grain and make payment. The broker refused the buyer's request.

Does the buyer have a viable breach of contract claim against the broker?

- (A) No, because both parties' performance obligations under the contract were discharged.
- (B) No, because the buyer breached the contract by not tendering payment on March 19.
- (C) Yes, because the broker breached the contract by not tendering the grain on March 19.

(D) Yes, because the buyer manifested an intent to perform before the broker refused to perform.

Question 159

A buyer and a seller signed a written contract for the sale of a house. The contract was silent regarding which items would stay with the house.

Before the closing, the buyer learned that the seller planned to remove several items that the buyer thought should stay with the house: a garbage disposal, a dining room ceiling fan, and a power lawn mower.

Which of these three items, if any, may the seller remove?

- (A) He may not remove any of the items.
- (B) He may remove all three items.
- (C) He may remove the power lawn mower and the ceiling fan.
- (D) He may remove the power lawn mower.

Question 160

A defendant has been charged with conspiracy to commit arson and insurance fraud after his restaurant burned to the ground late one night. At trial, the prosecutor presents evidence that, two days before the fire, the defendant paid \$10,000 to a man who was later seen entering the restaurant shortly before the fire started. The man has invoked his Fifth Amendment privilege and refuses to testify at the defendant's trial. The prosecutor calls the man's fiancée, who testifies that on the day of the fire, she noticed that the man seemed nervous and asked him what was wrong. She says that he told her, "I'm getting paid \$10,000 to burn down a restaurant tonight, and I'm a little nervous about it." The defendant objects to the admission of the man's statement to the fiancée, relying on the hearsay rule and the confrontation clause.

Is the man's statement to the fiancée admissible?

- (A) No, because the man's statement is hearsay not within any exception.
- (B) No, because the man's statement is testimonial, so admitting it would violate the defendant's right to confrontation.
- (C) Yes, because the man's statement is a nontestimonial declaration against penal interest.
- (D) Yes, because the man's statement is a nontestimonial statement by a coconspirator.

Question 161

A scientist domiciled in State A brought a federal civil action against his former employer, a company incorporated and headquartered in State A, alleging retaliatory discharge under federal and state law and seeking damages under federal and state law.

The company moved to dismiss the federal claim, and the court granted the motion. The court's written order read in its entirety: "[The company's] motion to dismiss the federal claim is granted." The scientist immediately appealed this decision to the court of appeals.

Is the appeal proper?

- (A) No, because there is no final judgment.
- (B) No, because there is no subject-matter jurisdiction over the state-law claim.
- (C) Yes, as a discretionary interlocutory appeal.
- (D) Yes, because the decision on the federal claim is final.

Question 162

A speaker at a rally in a public park argued that paper money was unconstitutional because Article I gave Congress the power only to "coin" money. The speaker ended his speech by setting fire to a pile of one-dollar bills. Although the fire was promptly extinguished and there had been no risk that it would spread, the speaker was convicted of violating a local ordinance against starting an open fire in a public place without a permit from the fire department. The speaker has challenged the conviction on constitutional grounds.

How should the court rule?

- (A) The ordinance is constitutional, because it is narrowly tailored to further a significant government interest that is unrelated to the suppression of free expression, and individuals have other ways of communicating their messages.
- (B) The ordinance is constitutional, because it regulates conduct rather than speech.
- (C) The ordinance is unconstitutional as applied, because the absence of a fire risk demonstrates that the prosecution was a pretext for government censorship.
- (D) The ordinance is unconstitutional, because it is overbroad.

Question 163

A trucking company employed nine salaried dispatchers to ensure that its truck fleet operated according to schedule. Two years ago, as a cost-saving measure, the company reduced the number of dispatchers to six, and each of the remaining dispatchers had to work substantially longer hours.

One of the remaining dispatchers complained to his supervisor that the stress and fatigue associated with the new working conditions were too much for him to handle. The supervisor told the dispatcher that he should quit if he couldn't handle the increased hours.

Over the next three months, the dispatcher continued to complain about the working conditions, to no effect. The dispatcher suffered severe emotional distress from the working conditions, but no physical injury. He eventually was hospitalized and had to miss several months of work as a result of the emotional distress.

The dispatcher sued the trucking company for negligence. The company has moved for summary judgment, based on the undisputed facts set out above. Assume that there is no applicable workers' compensation statute.

How should the court rule on the motion?

- (A) Deny the motion, because the jury must determine the extent of the emotional distress suffered by the dispatcher.
- (B) Deny the motion, because there is evidence from which a jury could reasonably conclude that the supervisor failed to act with ordinary care.
- (C) Grant the motion, because the dispatcher suffered no physical injury.
- (D) Grant the motion, because there is no evidence from which a jury could reasonably conclude that the supervisor acted carelessly with respect to the dispatcher's emotional well-being.

Question 164

A woman shot at her husband, intending to kill him. The bullet passed through the husband's shoulder, wounding him, and struck the couple's son in the head, killing the son instantly.

The woman has been charged with attempted murder of her husband and murder of her son.

Which of the following, if authorized by state law, would be constitutionally permissible?

- (A) The woman may be tried in separate trials for both murder and attempted murder and, if convicted, can be punished for both.
- (B) The woman may be tried, convicted, and punished for both murder and attempted murder, but only if the two charges are tried together.
- (C) The woman may be tried for and convicted of both crimes, but the sentences must run concurrently.
- (D) The woman may be tried for both murder and attempted murder but can be convicted of only one of them.

Question 165

In a writing signed on February 1, a buyer agreed to purchase a specified quantity of lumber from a seller for \$12,500, delivery to be made on July 1. Thereafter, the market price of lumber increased significantly. Due to this price increase, on June 14 the seller told the buyer that it would not deliver the lumber unless the buyer agreed to a purchase price of \$14,500 and agreed to waive any claim for damages against the seller. The buyer refused and told the seller that she would purchase lumber elsewhere. On June 18, after a reasonable search for alternative sources, the buyer purchased lumber from another supplier for \$15,500.

If the buyer sues the seller for breach, will the buyer be likely to prevail?

- (A) Yes, and the buyer will recover damages of \$3,000, because that is the difference between the cost of cover and

the contract price.

- (B) Yes, but the buyer's damages will be limited to \$2,000, because she could have obtained the lumber from the seller for \$14,500.
- (C) No, because the seller's request for a price increase was made in good faith and as a result of market forces.
- (D) No, because the buyer breached her duty to mitigate her damages when she purchased replacement lumber at a price higher than that offered by the seller.

Question 166

A man died domiciled in State B. Under his will, he devised his cabin located in State A to a nephew. The man devised the balance of his estate to his son.

The man's son, who also lived in State B, survived the man.

The man's nephew predeceased the man. The nephew had lived in State C. The nephew's daughter, who lived in State D, survived the nephew and the man.

Which state's law will determine whether the bequest to the nephew lapsed?

- (A) The law of State A, because State A is where the cabin is located.
- (B) The law of State B, because State B is where the man was domiciled at the time of his death.
- (C) The law of State C, because State C is where the nephew lived at his death.
- (D) The law of State D, because State D has the most significant contacts.

Question 167

A manufacturer entered into a five-year contract with a distributor to supply the distributor with products to be distributed in State A. The manufacturer reserved the right to enter into additional such contracts with other State A distributors. The manufacturer knew that the distributor would, on the basis of the agreement, invest in an expansion of its distribution centers in State A in order to handle the distribution of the manufacturer's products to retail sellers in that state.

At the time the manufacturer entered into the contract, it had already firmly decided to withdraw from the State A market in two years. Because the distributor had heard rumors of such a plan, its chief executive officer, before signing the contract, asked a representative of the manufacturer whether such a plan was in place. The representative denied the existence of any such plan.

Two years into the contract, the manufacturer announced that it no longer intended to sell products in State A and canceled its contract with the distributor. The manufacturer did not thereafter supply products for distribution or sale in State A.

Does the distributor have a viable fraud claim against the manufacturer?

- (A) No, because the distributor's exclusive remedy is for breach of contract.
- (B) No, because the manufacturer did not misstate any material facts when entering into the contract.
- (C) Yes, because the manufacturer denied that it had a withdrawal plan when the distributor asked about it at the time the contract was formed.
- (D) Yes, because the manufacturer reserved the right to do business with other State A distributors.

Question 168

A consumer brought a federal diversity action in State A against a manufacturer, asserting products liability claims under State A law. The consumer sought to bring the action on behalf of a nationwide class. State A law prohibits such class actions.

Which law applies to determine whether the action may proceed as a class action?

- (A) Federal law, because the issue of whether the action may proceed as a class action is governed by the Federal Rules of Civil Procedure.
- (B) Federal law, because there is a substantial federal interest in resolving matters that involve consumers from across the United States.
- (C) State A law, because not applying State A law will be outcome-determinative.

(D) State A law, because the action arises under State A law.

Question 169

A developer financed the purchase of a tract of vacant land with a mortgage loan from the seller. Two years later, at a time when the land remained vacant, the developer took out a second mortgage loan from an investor to construct self-storage units on the land. Both mortgages were promptly recorded in the order in which they were executed.

The developer made all payments on both mortgage loans for several years but eventually defaulted on the loan from the seller, who threatened to initiate foreclosure proceedings. To avoid the foreclosure, the developer executed a deed in lieu of foreclosure conveying the land back to the seller. But before the developer delivered the deed to the seller, it notified the investor of the proposed conveyance and gave her the option to cure the developer's default on the seller's loan. The investor declined to do so, and the developer delivered the deed to the seller.

If nothing else has happened since the conveyance to the seller, is the investor's mortgage still valid?

- (A) No, because the investor declined to cure the developer's default on the seller's loan.
- (B) No, because the seller's mortgage was a purchase money mortgage.
- (C) Yes, because a deed in lieu of foreclosure does not eliminate junior mortgages.
- (D) Yes, because the investor's mortgage secures improvements made to vacant land.

Question 170

Swimmers were unable to use a city-owned beach for several days because demonstrators protesting city policies had taken over the beach. Immediately after the demonstration ended, the city enacted an ordinance that banned "all First Amendment activities" on the beach.

What is the best argument AGAINST the constitutionality of the ordinance?

- (A) The ordinance amounts to a prior restraint on speech.
- (B) The ordinance is overly broad.
- (C) The beach is a public forum.
- (D) The city enacted the ordinance to prevent further protests of its policies.

Question 171

Two men agreed to rob a bank. In the course of the robbery, the first man shot and killed a teller. The police arrived and arrested both men as they were leaving the bank.

The men were charged with felony murder and tried separately. The first man (the actual shooter) was tried and convicted, but the jury refused to sentence him to death, so he was sentenced to life imprisonment.

The second man was also tried and convicted. The prosecution agreed, based on medical records, that he was intellectually disabled with an IQ of only 60. The jury nonetheless sentenced the second man to death.

Is the second man's death sentence constitutional?

- (A) No, because it is constitutionally disproportionate in light of the lesser sentence imposed on the actual shooter.
- (B) No, because of the second man's intellectual disability.
- (C) No, because the second man was not the actual shooter.
- (D) Yes.

Question 172

A homeowner entered into a contract with a builder under which the builder was to install two new bathrooms in the homeowner's house. The stated price for the first bathroom was \$30,000, and the price for the second bathroom was \$35,000. The builder, without justification, left the job after completing the \$30,000 bathroom. The homeowner found another contractor to complete the second bathroom for \$35,000 and has suffered no losses as a result of the builder's breach.

The builder has sued the homeowner for the \$30,000 contract price of the first bathroom, which remains unpaid.

What is the most likely result of the builder's suit?

- (A) The builder will recover nothing, because he materially breached the contract.

- (B) The builder will recover the reasonable value of his work.
- (C) The builder will recover in restitution the amount by which the bathroom increased the value of the homeowner's house, not to exceed \$30,000.
- (D) The builder will recover \$30,000, because the contract is divisible into two parts.

Question 173

A pedestrian sued a defendant for injuries he suffered after the defendant allegedly drove his car through a red light and struck the pedestrian in a crosswalk. At trial, a woman who had seen the accident testified that she clearly saw the defendant run the red light and hit the pedestrian. The defendant did not cross-examine the woman, and she was excused as a witness and immediately left the jurisdiction. The defendant then called the woman's neighbor to testify that the woman had told him a week after the accident that the defendant had not run the red light. The pedestrian objects to the neighbor's testimony about the woman's statement.

Is the neighbor's testimony about the woman's statement admissible?

- (A) Yes, both to prove that the defendant did not run the red light and to impeach the woman.
- (B) Yes, only to prove that the defendant did not run the red light.
- (C) Yes, only to impeach the woman with her prior inconsistent statement.
- (D) No, because the statement is hearsay if offered to prove that the defendant did not run the red light and cannot be offered to impeach because the woman was not given an opportunity to explain or deny the statement.

Question 174

A mother purchased over-the-counter pain medication for her daughter, who suffered from headaches. The packaging indicated that the pills were "coated" but did not list the ingredients in the coating. A few days after she bought the medication, because the daughter was in extreme pain, the mother gave the daughter three times the recommended dose of the medication. Thirty minutes later, because the daughter had a very rare allergy to an ingredient in the coating, she had a severe allergic reaction, for which she was hospitalized. The mother was aware of the daughter's allergy, but she did not know that the medication contained the ingredient to which the daughter was allergic.

In a failure-to-warn action brought against the manufacturer of the medication, which of the arguments below would be the LEAST promising as a defense?

- (A) The daughter's allergy to the ingredient in the coating was very rare.
- (B) The manufacturer's duty was to warn learned intermediaries, not consumers of the medication.
- (C) The mother should not have given her daughter a triple dose of the medication.
- (D) The mother, knowing of her daughter's very rare allergy, should not have purchased the medication without knowing what ingredients were in the coating.

Question 175

A car owner brought a federal diversity action against the car's manufacturer, alleging that the manufacturer had fraudulently misrepresented the car's compliance with federal emissions standards. The manufacturer answered, denying the allegations.

After discovery closed, the court entered a final pretrial order setting out the issues for trial. One week later, the owner moved to amend the order to include the issue of whether the manufacturer had also fraudulently misrepresented the car's fuel economy.

What standard will the court use to determine whether to grant the owner's motion?

- (A) The motion may be granted if justice so requires.
- (B) The motion may be granted if the owner's omission of the fuel economy issue was due to oversight, inadvertence, or excusable neglect.
- (C) The motion may be granted only for good cause.
- (D) The motion may be granted only to prevent manifest injustice.

Question 176

A defendant was tried on a charge of first-degree premeditated murder. At the end of trial, the court granted the defendant's request to have the jury also instructed on the lesser included offense of second-degree murder. After being instructed on the elements of both first- and second-degree murder, the jury found the defendant guilty of second-degree murder.

The defendant appealed. The appellate court reversed the conviction based on an erroneous evidentiary ruling.

May the defendant properly be retried on the original charge of first-degree murder?

- (A) No, because the jury effectively acquitted the defendant of first-degree murder.
- (B) No, because the vindictive-prosecution doctrine precludes punishing the defendant for taking the appeal.
- (C) Yes, because the defendant was the one who sought a lesser included offense instruction.
- (D) Yes, because the jury never returned a verdict on the first-degree murder charge.

Question 177

In a contract drafted by the owner of a commercial fishing company, the company agreed to provide a specified quantity of fresh tuna to a seafood cannery each week during the "summer season" at an agreed-upon rate. The owner of the fishing company honestly understood "summer season" to mean June 15 to September 15. The cannery's president honestly understood the term to mean May 15 to September 15, as it is understood according to trade usage in the parties' industry.

The parties have now discovered that they attach different meanings to the term "summer season."

How would a court likely resolve the different meanings attached to the term by the parties?

- (A) Because both parties were acting in good faith, they will be excused from performing under the contract.
- (B) Because the fishing company drafted the contract, the meaning of the term "summer season" will be construed against it, and the cannery's meaning will be used.
- (C) Because the fishing company works in the industry, it will be bound by the meaning supplied by trade usage.
- (D) Because the parties have attached different meanings to a key term of the contract, there is no contract.

Question 178

An organization that opposes capital punishment applied to a city for a permit to demonstrate in a public park near the statehouse. In its permit application, the organization stated that it would show videos of executions, and that the executions depicted in the videos are violent. Although the city regularly allows the park to be used for expressive activity, it denied the organization a permit. The city was concerned that the videos would be disturbing to visitors at the statehouse, especially children.

What standard of review should a court use in determining whether the city's denial of the permit violated the First Amendment?

- (A) Whether the city's denial of the permit was narrowly tailored to serve an important government interest.
- (B) Whether the city's denial of the permit was necessary to serve a compelling government interest.
- (C) Whether the organization has an ample, alternative opportunity for communicating its message.
- (D) Whether the violence in the videos is patently offensive according to the standards of the community.

Question 179

A dairy farmer bought a milking system for his cows from an independent distributor. The farmer did not communicate with the manufacturer of the milking system or any of its agents before purchasing the system. The distributor knew that the farmer had several lucrative contracts with milk wholesalers, but the manufacturer was unaware of these contracts. The system never operated properly because of a manufacturing defect, and as a result the dairy farmer lost much of the wholesale contract revenue.

Does the farmer have a viable strict products liability claim against the manufacturer for recovery of his lost revenue?

- (A) No, because of the economic loss doctrine.
- (B) No, because the manufacturer was not aware of the farmer's wholesale contracts.
- (C) Yes, because the consequential damages rule of contract law does not apply in a products liability action in which the product was in fact defective.

(D) Yes, because the milking system's defect proximately caused the farmer's loss of revenue.

Question 180

A defendant was charged with manufacturing methamphetamine with intent to distribute. At the defendant's trial, the prosecutor calls the defendant's college roommate. The roommate will testify that when he and the defendant were in college, eight years before the trial, he saw the defendant use cocaine on several occasions while studying for finals. The defendant objects to the roommate's testimony.

Is the roommate's testimony admissible?

- (A) No, because it is improper character evidence.
- (B) No, because the defendant was never convicted of the previous acts.
- (C) Yes, because it is probative of intent, and intent is an element of the charged crime.
- (D) Yes, because it is probative of the defendant's knowledge about drugs.

Question 181

A buyer purchased a house for \$300,000. The buyer financed the purchase, in part, with a \$250,000 loan from a bank, secured by a mortgage on the house. Before the closing, the buyer's attorney advised him to purchase a standard-form, \$300,000 title insurance policy naming the buyer as the insured. Because the buyer had forgotten to bring his checkbook to the closing, his son, who had accompanied him to the closing, paid the premium for him.

One year later, the buyer died. Under his will, the house passed to his son.

Two years later, the son was successfully sued by a previous record owner with a superior title to the house. The previous owner's claim had not been excepted in the buyer's title insurance policy through the carelessness of a title company employee. At the time of the lawsuit, the house was still subject to the bank's mortgage. The son immediately sought indemnification for the loss from the title insurance company.

Is the son entitled to indemnification from the title insurance company?

- (A) No, because the son was not named as an insured on the title policy.
- (B) No, because when a mortgage remains outstanding, a title policy protects only the mortgagee from any loss.
- (C) Yes, because the house passed to the son under the buyer's will.
- (D) Yes, because the son paid the policy premium.

Question 182

A train conductor brought an action against her railroad employer under a federal statute providing liability for work-related injuries occurring on railroads. The employer denied liability, claiming that the conductor's injuries pre-dated her employment and were outside the scope of the statute.

At the close of the evidence at trial, the employer moved for judgment as a matter of law (JMOL), which the court denied. The jury returned a verdict for the conductor.

The employer has renewed its JMOL motion.

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

- (A) Whether a preponderance of the evidence supports the verdict.
- (B) Whether the verdict is against the weight of the evidence.
- (C) Whether there is a scintilla of evidence to support the verdict.
- (D) Whether there is legally sufficient evidence to support the verdict.

Question 183

A defendant was on trial for murder, which the jurisdiction defines as a homicide with malice aforethought. Three witnesses testified for the state that the defendant approached the victim in a bar, engaged in a brief conversation with him, and then, without warning, drew a gun and shot the victim in the stomach. One witness for the state testified that just before the defendant drew his gun and shot the victim, the victim twice kicked the defendant in the groin. The state's evidence clearly established that the victim died as a result of the gunshot wound.

The defendant did not testify or offer any evidence. The defendant requested that the jury be instructed on voluntary

manslaughter based upon heat of passion from adequate provocation. The state argued that murder should be the only form of homicide submitted.

Should the court instruct on voluntary manslaughter?

- (A) No, because the defendant did not meet his burden of producing evidence of heat of passion from adequate provocation.
- (B) No, because the weight of the evidence indicated that the victim did nothing amounting to adequate provocation.
- (C) Yes, because a defendant is entitled, upon request, to an instruction on his theory of the case.
- (D) Yes, because there was evidence that reasonably could support a jury finding of adequate provocation.

Question 184

A carpenter owed a bank \$22,000 on an outstanding personal loan. The carpenter and a homeowner entered into a contract under which the carpenter agreed to perform work for the homeowner and the homeowner agreed to pay \$22,000 to the bank within 30 days of completion of the work.

The carpenter completed the work, but the homeowner incurred costs of \$2,000 to correct minor deficiencies in the work.

What amount, if any, is the homeowner obligated to pay the bank?

- (A) \$20,000, because the bank, as an intended beneficiary of the homeowner's contract with the carpenter, stands in the position of the carpenter.
- (B) \$22,000, and the homeowner can seek damages from the carpenter for the deficiencies in the work.
- (C) Nothing, because the bank is an incidental beneficiary of the homeowner's contract with the carpenter.
- (D) Nothing, because the carpenter's breach discharged the homeowner's obligation to pay the bank.

Question 185

A defendant has been sued for theft by his former employer. At trial, the employer seeks to call the defendant's estranged daughter to testify. The daughter would testify that her brother told her, "I helped [the defendant] steal money from his employer." The brother is available to testify but would be a hostile witness. The defendant's attorney objects to the daughter's testimony on hearsay grounds. The employer argues that the statement is admissible under the hearsay exception for statements against interest.

Should the court permit the daughter to testify about her brother's statement over the defendant's objection?

- (A) No, because the brother is available to testify.
- (B) No, because the hearsay exception for statements against penal interest applies only in criminal cases.
- (C) Yes, because the statement exposes the brother to criminal liability.
- (D) Yes, but only if corroborating circumstances clearly indicate the statement's trustworthiness.

Question 186

A multi-building apartment complex in a city residential neighborhood has a swimming pool, the use of which is restricted to tenants of the complex. The owner of the complex has applied to the city for a permit to construct an additional apartment building on the site. The city has told the owner that it will approve the permit only if the owner makes the swimming pool available to all residents of the neighborhood. The purpose of the condition is to compensate neighborhood residents for the increased street traffic that will result from the tenants of the new building.

Is the permit condition constitutional?

- (A) No, because requiring the owner to open the pool to all neighborhood residents violates the freedom of association of the current tenants of the complex.
- (B) No, because there is no logical nexus between the permit condition and the city's concern with increased street traffic.
- (C) Yes, because it does not undermine the owner's reasonable investment-backed expectations.
- (D) Yes, because it substantially advances the city's legitimate interest in reducing street traffic in the residential neighborhood.

Question 187

A contractor agreed in writing to build a house for a man for \$200,000. The contract stated that the man would pay the contractor \$60,000 when the foundation was laid, \$60,000 when the house was framed, \$60,000 when the walls were completed, and \$20,000 when the house was finished. After the contractor laid the foundation and expended \$50,000, but before the man paid the contractor anything, the contractor quit the project to take a higher-paying job.

Subject to the man's claim for damages for breach, how much is the contractor likely to recover for the work he performed?

- (A) \$50,000, on a theory of reliance.
- (B) \$60,000, on a theory of divisible contract.
- (C) The value of the benefit conferred, on a theory of restitution.
- (D) Nothing, because the contractor's breach was willful.

Question 188

A developer conveyed a three-acre tract of land to a man by a warranty deed containing a covenant specifying that the land could be used for residential purposes only. The applicable zoning law required that any home in the community be surrounded by at least two acres of vacant land. The man built a home on the land that fully complied with the zoning law and moved into it.

Subsequently, the man was diagnosed with a chronic debilitating disease. He told his daughter that he might have to sell his home, go to a nursing home, and after exhausting his assets paying for nursing home care, go on Medicaid for the rest of his life. His daughter offered to take care of him for the rest of his life if he would build her a small home on the westerly portion of his land. The man agreed, but because there was no way to site a home on the westerly portion of the land so that it was surrounded by two acres of vacant land, he applied to the local zoning board for a variance.

Should the variance be granted?

- (A) No, because hardship variances are not granted where the land is used for residential purposes.
- (B) No, because the man is not entitled to a hardship variance.
- (C) Yes, because hardship variances are normally granted when the proposed use is consistent with a covenant in a warranty deed.
- (D) Yes, because otherwise the man would have to go on Medicaid.

Question 189

A defendant was convicted of burglary following a jury trial in state court. After trial, defense counsel learned that the prosecution had failed to disclose that the key witness against the defendant had previously been convicted of perjury in another case. The defense filed a motion for a new trial.

The trial court rejected the defense argument and upheld the conviction because state discovery rules did not require the disclosure. The defendant then filed an appeal, arguing that the prosecution's failure to disclose this prior perjury conviction had violated his federal constitutional rights.

Can the state appellate court overturn the conviction based on the prosecution's failure to disclose the witness's prior perjury conviction?

- (A) No, because discovery is regulated by state rather than federal procedure.
- (B) No, because the prior conviction was mere impeachment rather than evidence of actual innocence.
- (C) Yes, if there was a reasonable probability of a different outcome.
- (D) Yes, regardless of the likelihood of a different outcome.

Question 190

At a defendant's trial for bank robbery, the prosecutor has presented evidence showing that the robbery was committed at 9:10 a.m. During the defense case, the defendant's girlfriend testifies on direct examination that the defendant was at home with her until approximately noon on the day of the robbery. The prosecutor's first question during her cross-examination is, "On the day of the robbery, you were questioned by an investigator and told him that [the defendant] had left the house by 8 a.m., didn't you?" The girlfriend denies having made the statement and says that the investigator must have misunderstood her. In rebuttal, the prosecutor proposes to call the investigator, who would

testify that the girlfriend told him in their interview that the defendant had left the house by 8 a.m. on the day of the robbery. The defendant objects to the investigator's proposed testimony about the girlfriend's prior statement.

Should the court allow the investigator's testimony about the girlfriend's prior statement?

- (A) No, because extrinsic evidence may not be used to prove a prior inconsistent statement.
- (B) No, because the girlfriend's earlier statement is hearsay not within any exception.
- (C) Yes, but only to impeach the girlfriend's direct testimony.
- (D) Yes, to impeach the girlfriend's direct testimony and to prove the time the defendant left home on the day of the robbery.

Question 191

The seller of a vacant building listed it for sale with a licensed real estate broker at a price of \$500,000. When the six-month listing period was about to expire, the broker presented an offer to purchase for the full listing price.

The broker did not disclose to the seller that the offer came from the broker's daughter, who planned to resell the building for \$600,000 to a company with which she had been negotiating. The seller accepted the daughter's offer, conveyed the building to the daughter, and paid the broker a commission.

After discovering that the purchaser was the broker's daughter, the seller commenced an action against the broker for return of the commission.

Who is likely to prevail in this action?

- (A) The broker, because the daughter, not the broker, purchased the building in an arm's-length transaction.
- (B) The broker, because the seller was obligated to sell to anyone at the full listing price.
- (C) The seller, because the broker's failure to make full disclosure breached a fiduciary duty to the seller.
- (D) The seller, because the daughter, not the seller, was primarily liable for payment of the commission.

Question 192

A married couple bought a new recreational vehicle (RV) to travel in. After the couple brought the RV home, but before they had moved any personal property into it, the RV spontaneously caught fire and was completely destroyed.

Does the couple have a viable strict products liability claim against the manufacturer of the RV?

- (A) No, because the damage was only to the RV itself.
- (B) No, because there is no indication that the manufacturer was negligent.
- (C) Yes, because a new RV will not spontaneously catch fire in the absence of negligence by its manufacturer.
- (D) Yes, because the RV was obviously defective and the manufacturer should be held strictly liable for the damage caused by the defect.

Question 193

An employee was fired after working for a state agency for 29 years. The employee sued the agency in federal court for employment discrimination. The employee agreed with the agency to settle the action in return for 12 monthly settlement payments. The agreement, however, was based on the employee's mistaken assumption that the settlement payments would constitute "earnable salary" under state law, entitling the employee to retire with 30 years of service at a higher pension rate.

Fifteen months after the court entered a judgment dismissing the employee's claim with prejudice, the employee learned that the payments did not constitute earnable salary under state law. The employee promptly moved to reopen the judgment on the ground of mistake.

Should the court grant the motion?

- (A) No, because mistake is not a ground on which a court may reopen a judgment.
- (B) No, because the employee did not file the motion within one year of the court's entry of judgment.
- (C) Yes, because the agency would be unjustly enriched if it did not have to pay the employee a higher pension rate for 30 years of service.
- (D) Yes, because the employee filed the motion promptly after learning of the mistake.

Question 194

A man purchased two warehouses on the same parcel of land and financed the purchase with a mortgage loan from a bank. Among other terms, the mortgage required the man to make all monthly payments of principal and interest on time, to pay all property taxes and assessments when due, to keep the property insured, and to not damage or impair the property or commit waste on the property. The man used the warehouses to store inventory for his business.

A few years later, the man changed the nature of his business. His business plan indicated that he would need only one of the two warehouses and that the warehouse to be used would need renovation. The man renovated one of the warehouses and tore the other one down and did not replace it.

When the bank learned of the man's actions, it accelerated the note and sent the man a letter containing a notice of default and intention to commence foreclosure proceedings. At the time the letter was sent, the man was current on his monthly mortgage payments and property insurance premiums.

After the man failed to pay the accelerated amount, the bank filed a foreclosure action. In that action, the man defended by offering into evidence an appraisal showing that the then-current value of the property was more than the balance due on the mortgage and more than the value of the property before the man renovated the one warehouse and tore down the other.

Which party is likely to prevail?

- (A) The bank, because a default will be implied by the court under these facts.
- (B) The bank, because the man violated the terms of the mortgage.
- (C) The man, because he is current on his mortgage payments and property insurance premiums.
- (D) The man, because the bank's collateral has not been impaired and in fact has been enhanced.

Question 195

A racetrack held a motorcycle race, which was sponsored by a local motorcycle dealership. Under the sponsorship agreement, the dealership was required to arrange for licensed and trained emergency medical technicians (EMTs) to be present during the race. The dealership contracted with a licensed and reputable emergency medical services (EMS) firm that supplied EMTs for events such as these.

A motorcyclist participating in the race was injured when he lost control of his motorcycle. The motorcyclist was treated at the scene by the EMTs. In removing the motorcyclist's helmet, one of the EMTs twisted the motorcyclist's neck, causing him to become permanently paralyzed.

The motorcyclist has sued both the EMS firm and the dealership, alleging that the EMT's careless conduct caused his paralysis.

Assuming the validity of the motorcyclist's negligence claim against the EMS firm, which of the following best characterizes the dealership's potential liability?

- (A) The dealership is directly liable for hiring the EMS firm.
- (B) The dealership is vicariously liable, because it owed a nondelegable duty to provide emergency care for the race.
- (C) The dealership is vicariously liable, because the EMT was careless in the course of her employment.
- (D) The dealership is neither directly liable nor vicariously liable.

Question 196

A defendant was tried in federal court for bank fraud. The defendant had retained private defense counsel.

As part of the prosecution's case, a federal agent testified regarding incriminating statements that the defendant's confederate, who by the time of trial was a fugitive, had made during a prior interview. Though this testimony violated the Confrontation Clause, the defense attorney raised no objection. The jury ultimately convicted the defendant.

The defendant has now hired new counsel for his appeal and argues that the admission of the federal agent's testimony was erroneous.

If the appeals court finds that the trial court should not have admitted the testimony, does it have the authority to reverse a conviction when the trial attorney raised no objection to the challenged testimony?

- (A) No, because failure to object waives a defendant's rights.
- (B) No, because the sole remedy is a claim for ineffective assistance of counsel.

- (C) Yes, because a defendant cannot be penalized for an attorney's failure to object.
- (D) Yes, because an appeals court may correct plain error affecting substantial rights.

Question 197

A seller agreed in writing to specially manufacture a machine for a buyer for \$100,000, with payment due on delivery. The seller expected to make a profit of \$10,000 on the sale. After the seller had spent \$30,000 on production of the machine and before the machine was complete, the buyer repudiated the contract. After the repudiation, the seller reasonably believed that if it completed the manufacture of the machine, it would be able to sell the machine to a third party. The seller completed the machine and sold it to a third party for \$92,000.

If the seller sues the buyer for breach of contract, how much, if anything, should the seller recover as damages?

- (A) \$8,000, the amount of the seller's lost profit after selling the completed machine to the third party.
- (B) \$10,000, the seller's anticipated profit had the buyer not repudiated.
- (C) \$40,000, the amount the seller spent on production of the machine before the buyer's repudiation plus the seller's anticipated profit.
- (D) Nothing, because the seller had a duty not to complete the manufacture of the machine after the buyer repudiated.

Question 198

A defendant has been indicted for shooting a gun at a local official. She has raised an insanity defense. At trial, the defendant's attorney seeks to call a qualified psychiatrist as an expert witness. The psychiatrist would testify (1) that at the time of the shooting the defendant suffered from schizophrenia and heard voices commanding her to shoot the official, and (2) that because of these auditory hallucinations, the defendant was legally insane at the time of the shooting. The prosecutor objects to the proposed testimony.

What is the proper ruling for the court to make?

- (A) The psychiatrist's testimony is admissible in its entirety, because it will be helpful to the jury.
- (B) The psychiatrist's testimony is admissible in its entirety, because the bar on expert testimony about a criminal defendant's mental state applies to the prosecution's expert witnesses only.
- (C) The psychiatrist's testimony regarding the defendant's schizophrenia and auditory hallucinations is admissible, but the testimony about whether the defendant was legally insane at the time of the shooting is inadmissible.
- (D) The psychiatrist's testimony is inadmissible in its entirety, because an expert witness may not testify about a criminal defendant's mental state.

Question 199

To express their disagreement with a city ordinance prohibiting public nudity, a group of demonstrators performed a dance in the nude in a city park. The demonstrators were convicted of violating the ordinance.

Do the convictions violate the First Amendment?

- (A) No, because the demonstrators' conduct is not protected by the First Amendment.
- (B) No, because the demonstrators' protected expression may be validly subject to content-neutral regulation such as the public nudity ordinance.
- (C) Yes, because the city park is a public forum.
- (D) Yes, because the demonstrators' conduct constitutes protected speech and the ordinance is not narrowly tailored to further a substantial government interest.

Question 200

At his death, a father devised a life estate in land to his daughter and the remainder to his son. The daughter later purported to convey a fee simple absolute interest in the land by warranty deed to a purchaser in exchange for valuable consideration. The purchaser properly recorded the deed. The son then transferred his remainder interest in the land to the daughter by quitclaim deed.

The daughter died, leaving her husband as her sole beneficiary and executor. The husband has consulted an attorney to determine the ownership of the land.

What advice should the attorney give the husband?

- (A) The husband owns the land, because the warranty deed conveyed the land as a life estate pur autre vie to the purchaser.
- (B) The purchaser owns a fee simple absolute interest in the land, because the son transferred his remainder interest to the daughter.
- (C) The purchaser owns a life estate in the land, and the husband owns the remainder.
- (D) The son owns the land, because the remainder was not alienable.

Answer Key

No.	Ans	No.	Ans	No.	Ans	No.	Ans
101	A	126	A	151	C	176	A
102	A	127	A	152	A	177	C
103	B	128	B	153	D	178	B
104	D	129	D	154	B	179	A
105	B	130	D	155	B	180	A
106	B	131	B	156	B	181	C
107	C	132	D	157	D	182	D
108	A	133	D	158	A	183	D
109	C	134	C	159	D	184	A
110	B	135	B	160	C	185	A
111	D	136	D	161	A	186	B
112	A	137	D	162	A	187	C
113	C	138	A	163	C	188	B
114	D	139	D	164	A	189	C
115	B	140	A	165	A	190	C
116	A	141	A	166	A	191	C
117	C	142	B	167	C	192	A
118	D	143	D	168	A	193	B
119	A	144	C	169	C	194	B
120	C	145	D	170	B	195	D
121	B	146	D	171	B	196	D
122	B	147	C	172	D	197	A
123	C	148	B	173	D	198	C
124	B	149	C	174	B	199	B
125	C	150	B	175	D	200	B