

***MBE DECODED—  
MULTISTATE BAR EXAM***

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***MBE DECODED—  
MULTISTATE BAR EXAM***

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***SECOND EDITION***

***MARY BASICK \* TINA SCHINDLER***



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# **PREFACE**

Dear Bar Taker,

Thank you for buying this book and we hope you find it helpful. We wrote it because we wanted a similar book to use with our students and there was no such book readily available that included thorough coverage of the MBE tested rules in a condensed format. Preparing to pass the bar exam is a lot of work, and with this book we are trying to do our part to make the preparation more manageable and affordable and bar passage more attainable.

This book is a handy reference that can be used during law school, for early bar study (which we highly recommend), and during the traditional post-graduation bar prep study period. We included examples from MBE fact patterns to illustrate the concepts to aid rule understanding and shortcut pattern recognition. Having spent a lot of time analyzing MBE questions (all NCBE released questions as of October 2025), we noticed patterns in the way the bar examiners attempted to entice bar takers into selecting the wrong answer (which we call decoys), and we have shared those insights with you. Through working with bar takers, we have discovered an effective way to attack MBE questions and study for success on the MBE. We hope this information assists you as you study to pass the bar exam. While the NCBE is transitioning to the NextGen bar exam, we have a section that discusses those changes as well for guidance on how to use this book in regard to the current MBE exam and a future NextGen multiple-choice exam. Remember that you will need to use an additional source to actually practice MBE questions.

We wish you all the best on the bar exam and in all your future endeavors.

Mary Basick & Tina Schindler

# **ACKNOWLEDGEMENTS**

We could not write this book without the motivation provided by our students and the support of many. We are lucky to be inspired every day by our students and our many outstanding colleagues working in bar preparation. We are thankful and delighted to work with Elaine Page, Irene Elias, Greg Erb, Elva Si, Conner Marshall, and the rest of the Aspen team. We must, however, extend our deepest appreciation to our long-suffering families for putting up with our seemingly never-ending book updates (that we actually really love doing!).

# INTRODUCTION

| <b>MBE AT A GLANCE</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                            |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|
| The multistate bar exam (MBE) is developed by the National Conference of Bar Examiners (NCBE) and is administered in 49 U.S. states and 5 U.S. territories.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                            |
| <b>SUBJECTS</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                            |
| <ul style="list-style-type: none"> <li>◆ Civil Procedure</li> <li>◆ Constitutional Law</li> <li>◆ Contracts</li> <li>◆ Criminal Law and Criminal Procedure</li> <li>◆ Evidence</li> <li>◆ Real Property</li> <li>◆ Torts</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p>* For a listing of topics, see the NCBE Subject Matter Outlines at <a href="http://www.ncbex.org">www.ncbex.org</a></p> |
| <b>CURRENT EXAM FORMAT*</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                            |
| <ul style="list-style-type: none"> <li>◆ Multiple choice</li> <li>◆ Random subject order</li> <li>◆ Administration twice a year, in February and July</li> <li>◆ 200 Questions in 6 hours. This averages to 1.8 minutes per question (this is an average, and some questions take longer to solve than others).               <ul style="list-style-type: none"> <li>◇ 100 Question set in a 3-hour morning (a.m.) session</li> <li>◇ 100 Question set in a 3-hour afternoon (p.m.) session</li> </ul> </li> <li>◆ Several versions of the test are utilized to inhibit cheating. The a.m. and p.m. sets may not be of equivalent difficulty, and which set is more difficult may vary between students answering different versions of the question sets.</li> </ul> <p>*While the NCBE is moving from the current UBE to the NextGen UBE (with a few jurisdictions adopting the new exam in July 2026 but many adopting it by 2028), they have indicated that they will still maintain using some traditional MBE style questions. The numbers of questions is uncertain at this time, but it is still wise to make sure you understand the laws being tested and this book will help you achieve that goal.</p> |                                                                                                                            |
| <b>EXAM SCORING</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                            |
| <ul style="list-style-type: none"> <li>◆ 175 Questions of the 200 Questions are scored (25 Q per each subject).</li> <li>◆ 25 Questions of the 200 Questions are unscored pretest questions, which the NCBE uses to vet future questions. (You can't tell which questions are the pretest questions, but as a result, you may notice some subjects seem more heavily tested than others. You may even be surprised to encounter questions in a non-tested subject that may be added to the test in the future.)</li> <li>◆ The NCBE releases "scaled scores" for each administration. This is done to ensure that each administration of the exam has an equivalent difficulty level. The passing "cut score" based on that scaled score is determined individually by each jurisdiction that administers the MBE exam (and is typically combined with the scores from the written portion of the bar exam in that jurisdiction to determine bar passage). Jurisdictional information is available at <a href="http://www.ncbex.org">www.ncbex.org</a>.</li> </ul>                                                                                                                                                 |                                                                                                                            |

- ◆ Most bar takers want to know what “raw” score (percentile correct) they need to pass the exam in their jurisdiction, but frustratingly, the NCBE does not release this information. Nonetheless, we can make an estimate. To hit the passing cut score, you would need approximately 58% correct for jurisdictions with the lowest cut scores (129); approximately 62% for jurisdictions with the national average cut score (135); and approximately 68% correct for the jurisdictions with the highest cut scores (145). Your goal should be to score a few points over these estimates to fall comfortably in the passing zone. The book *Strategies and Tactics for the MBE* has a very good and understandable explanation of MBE scoring if you are interested in more detail. These numbers will likely change as jurisdictions adopt the NextGen UBE.

## **NEXTGEN UBE: WHAT TO EXPECT**

As mentioned earlier, the NCBE is transitioning to a new bar exam beginning in a few jurisdictions as soon as July 2026 with most jurisdictions transitioning in July 2028. Similarly, states that have yet to adopt the NextGen bar exam (like CA) will only be permitted to use the current MBE questions through the February 2028 bar exam. We will go through a few important changes that will impact taking multiple-choice questions on the NextGen bar exam and how you can still use this book to help you succeed. First, the new exam will be administered using a computer-based program rather than using paper questions with scantrons. Since most bar exam companies already use online multiple-choice questions, you will already be practicing taking MBE (MCQs on the NextGen UBE exam) on the computer. Further, we discuss how to practice taking online MCQs on the computer below for additional guidance. Second, there will still be multiple-choice questions (MCQs) on the NextGen UBE in addition to integrated question sets (and performance tasks). The new MCQs will be tested in sets of 40 questions over 72 minutes, which is 1.8 minutes per question (same as the current testing time). We expect three sets of MCQs. They will mostly be similar to the current questions covering the same subjects, with the addition of Business Associations (and in July 2028 Family Law). Many MCQs will have four answer choices just like the ones in this book; however, some will contain six answer choices where you can select more than one correct answer (two correct answers). Partial credit will be given to the select-two multiple-choice questions. While these questions will appear slightly different, they will arguably be easier since they will be more focused on issue spotting and problem-solving skills rather than rote memorization of some nuanced exception to an exception to a main rule. Overall, the MCQs will make up approximately 49% of your total exam score so it is important to master the MCQs. The NCBE intends to release content scope outlines (for a substantial fee) for each subject but to date they have very few practice questions in the new style available to practice, and the ones they do have available (especially the four-answer choice ones) seem to mirror the existing ones, which is why this book is still a good resource to learn the law as well as to practice taking those questions. The question calls will put you in the role play position of advising a client, but they are otherwise very similar to existing questions. For now, we think this book contains concise testable rules that you can use to master the MCQs now or in the future. You will need to add in Business Associations for those taking the exam in the next year. But we have no doubt you can learn what you need to know in due time! You’ve got this!

## TWO KEY COMPONENTS FOR SUCCESS ON THE MBE

There are two equally important components for MBE success:

- 1) **Skill** at solving MBE style questions; and
- 2) **Rule knowledge** and memorization.

## SKILL: HOW TO SOLVE MBE QUESTIONS

Using good technique to solve MBE questions can increase your score by 10-15%, which can be the difference maker in achieving a passing MBE score. MBE questions are hard, and after our recent review of the newest NCBE released question sets, it seems the questions continue to grow in difficulty. They test a huge volume of rules from memory in excruciating detail. In addition, the bar examiners have designed the answer choices to *hide the correct answer* and entice you into selecting the wrong answer. Many bar takers are not intuitively good at this testing style, but the good news is, MBE test taking is a skill, and like any other skill, you can learn good techniques and improve your outcome. Using a good proactive problem-solving strategy allows you to avoid the bar examiners' traps and achieve a passing score.

| <b>SOLVING MBE QUESTIONS DECODED</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Read the call of the question first:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <ul style="list-style-type: none"> <li>◆ Since the subjects are in random order, reading the call first will sometimes identify the <b>subject</b> (i.e., torts) and <b>issue</b> (i.e., strict liability) being tested so you can read the fact pattern with the appropriate rules in mind. If you can't identify the subject or issue by reading the call of the question, usually a glance at the sentence <i>before</i> the call of the question will provide the subject information.</li> <li>◆ This "starting at the bottom" approach might take some getting used to, but in the end, it will save you time and increase your accuracy.</li> </ul>                                                                                                                                                                                                                                                                                                         |
| <b>Solve the problem <i>before</i> looking at the answer choices (when possible):</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <p>MBE questions are nothing more than a hypothetical problem posed by a pretend client. Your job is to solve the problem.</p> <ul style="list-style-type: none"> <li>◆ <b>Read the fact pattern</b> carefully looking for <i>legally significant</i> facts. Every fact is included for a reason. A fact is either included to satisfy a rule element, or as a decoy fact to distract you from the issue being tested and provide material for a wrong answer choice. (See below for more on MBE Decoys.)</li> <li>◆ <b>Issue/Rule:</b> What rule is going to solve the problem? Identify the general rule, including all elements and/or any sub-rule being tested (if you were not already able to do so from reading the call of the question/preceding sentence).</li> <li>◆ <b>Analyze:</b> Solve the problem by applying facts to the rule/elements. Try to pinpoint the precise element/sub-element/exception/defense being tested by the facts.</li> </ul> |

◆ **Conclude:**

- ◇ If possible, answer the call of the question with a “because” statement that identifies the precise element on which the question turns. Be specific. Precision here will help you to tease through the answer choices, especially when choosing between two seemingly viable options.

**Example:** P’s defamation action will not prevail *because* no special damages are shown as required for regular slander (the pinpoint issue raised by the facts).

- ◇ For some questions, you will not be able to conclude without first looking at the answer choices. For example, if the call asks “what is the most serious crime for which defendant can be convicted?” you will first need to see the options available. Then, using a process of elimination analyze each choice and conclude accordingly.
- ◇ For questions that ask for the “most helpful” or “strongest argument,” try to role play and come up with good arguments a lawyer would make *prior* to looking at the answer choices so you have some options in mind to compare against the choices provided.

Solving first is a proactive approach that puts you in charge and prevents the bar examiners from clouding the issue to distract you by introducing other tangentially related concepts into your thought process. It is much harder to entice you into selecting a wrong answer when you have already solved the problem by focusing on the question call and the facts, decided what the right answer should be, and identified why.

**Decode the available options to select the best answer:**

- ◆ After solving first (when possible), look for the answer choice that best comports with your analysis.
- ◆ Use the process of elimination to eliminate all poor options.
- ◆ Consider every option and identify *why* each is right or wrong. Doing so will help you gain extra rule review, provide pattern recognition on the decoy answers and identify your own patterns when selecting wrong answers.

**Example:** Answer “A” is wrong *because* it overstates the applicable standard; intent is not required in negligence.

- ◆ If an answer choice raises a rule you didn’t consider, analyze it now, but trust your gut on the rule you identified as being at issue. A rule that didn’t jump out at you in the first place is likely a decoy.
- ◆ Look out for decoy answers (see below).
- ◆ Pick the best answer.

For each subject we have provided step-by-step guided analyses of a limited number of select practice MBE questions so you can familiarize yourself with using this proactive approach. It may feel uncomfortable at first to try something new but stick with it. Like any skill, you will improve and get faster with practice. Once you have the proper approach mastered, you can use another MBE question database to practice thousands of questions and watch your scores rise!

Most bar takers approach MBE questions using the same old school approach they have always used with multiple-choice questions (e.g., read the question, read the answers, and if you know the content of the question the correct answer will “pop out” and be obvious). If you have tried to answer any MBE questions, you already know the old-school multiple-choice approach won’t be sufficient. This is because the bar examiners typically try every trick in the book to get you to pick the *wrong* answer.

## MBE DECOYS



One of the ways the bar examiners get you to select a wrong answer is by using a decoy, which is the use of particular phrasing or another tool of distraction to purposely lead you away from the correct answer. This is how you can get a question wrong even when you know the law being tested. Some decoys are universal and employed across all subjects, but many are subject/rule specific and those are included in each subject's chapter. We identify these throughout this book with a decoy duck.

**Hide the ball:** The most frequently used decoy is to hide the correct answer in plain sight. These are some of the bar examiner's favorite tactics:



**Decoy facts** are added to the question to distract. All facts are included in the question to either lead you to the correct answer or provide a decoy answer.

**Example:** The facts may include recording act language when it is irrelevant to solving the problem posed. There will be a *wrong* answer choice provided that relates to that irrelevant recording act rule/facts.



**Layperson's language** substituted for a legal concept in the *right* answer. You are looking for key legal terminology, so the correct answer choice seems too casual, or fact focused or vague to be correct. You may need to interpret the answer choice to link it to the legal meaning of the plain language utilized in the answer choice.

**Example:** In a *res ipsa loquitur* call of the question, the correct answer is that the defendant was *not* negligent because the defendant did not have exclusive control over the canned tuna that caused the plaintiff's injury (boxes of canned tuna fell on the plaintiff). The analysis is that since another party could be responsible for the canned tuna mishap, *res ipsa loquitur* can't be used to establish defendant's liability. The correct answer identified that the defendant was not negligent, but merely recited the fact that "...the case of tuna had been knocked over by the workmen." From this you had to interpret the language to mean a third party other than the defendant (here, the workmen) caused the damage, consequently the tuna was not in the exclusive control of the defendant as required for *res ipsa loquitur*. Had the answer included the correct legal terminology you were likely looking for, instead it would have stated that the canned tuna was "not in the *exclusive control* of the defendant."



**Buzz word** that relates to the applicable rule is placed in *wrong* answer.

**Example:** In the example above, after analyzing the question, the key words that you are looking for of "not in the exclusive control of defendant," would be placed in the *wrong* answer choice so if you read quickly, you might not notice that the rest of the wording in that choice makes that answer incorrect.

**Boo!** They like to scare you and play on your fears that you haven't prepared well enough to pass the exam. Wrong answer choices will include:



**Made-up rules:** Be wary of selecting any answer choice implicating a "rule" you have never heard of; it is likely a decoy. Ask yourself, "If this was a real rule, wouldn't I have learned it?" It is unlikely you have graduated from law school and prepared for the bar exam and yet there is still some magic rule that is a correct answer and yet you have never stumbled across it before. We have included all known rules that have been tested, even the old and most nuanced ones, so you should have some familiarity with the rules being tested. Be confident, trust your preparation, and believe in yourself!



**Obscure rules:** The bar examiners also use more obscure rules as decoys. These can be real rules that are not tested outright much but sound intimidating (e.g., attornment of a lease) or are old rules that are obsolete (e.g., *res gestae*).

**Decoys based on rule knowledge:** These are the more typical type of decoys you would expect on a multiple-choice exam. These rule-based decoys are often used in combination with some of the sneakier decoys identified above.



- ◆ **General rule** is a choice when the **rule exception** is satisfied, and visa versa.
- ◆ **General rule** is a choice when a **defense** is satisfied, and visa versa.
- ◆ **Wrong rule** or **inapplicable standard** is a choice.

**Example:** In a question on equal protection for a quasi-suspect class, there will be *wrong* answer choices reciting the language of rational basis (a standard too low) and/or strict scrutiny (a standard too high) and/or pairing the appropriate intermediate scrutiny language with an incorrect statement that the plaintiff bears the burden of proof (when the government bears the burden of proof).



- ◆ **Rule surrogates:** A correct answer choice may use a sub rule or other identifiable rule language as a surrogate for the rule.

**Example:** In an impeachment by bias evidence question, the correct answer choice may use language that the evidence is “admissible extrinsic evidence,” as a surrogate for the impeachment by bias rule, which allows extrinsic evidence (in contrast to the rule for impeachment by character for truthfulness, which does not allow extrinsic evidence).



- ◆ **Inapplicable rules:** The bar examiners will use rules with similar elements as decoys for each other.

**Example:** If the question is testing the hearsay exception of Past Recorded Recollection, you can bet Present Recollection Refreshed will be included as a wrong answer choice.

**Author’s note: A word about the examples and rules in this book.**

There are a lot of examples throughout this book which are used to illustrate rules and concepts. Almost every example in this book is derived from actual NCBE questions (which are often derived from cases). We have purposely not rephrased the questions for greater clarity in an effort to expose you to the type of (at times) obtuse and confusing language facing you on the exam. All parentheticals in the examples are author commentary included to aid understanding. Further, you will find the *examples* are not always written in a gender-neutral way, as they derive from drafted NCBE questions, though the remainder of the book uses current practices of gender neutrality (with the exception of some traditional rules, such as in estates in land). Lastly, the NCBE does not provide specific guidance regarding the rules eligible for testing on the MBE, beyond an unhelpfully broad listing of topics in the NCBE Subject Matter Outlines. We have purposely included all rules previously released as NCBE tested. It is possible they could test on a rule nuance not included here, and questions drafted by bar prep companies may include some unusual topics not included. However, we purposely opted to cover the known most testable rules, rather than every imaginable possibility, to keep the length as short as possible, while still enabling you to succeed on the exam. Finally, while there are images of children and animals (they are our real-life children and pets), rest assured that no children or animals were injured during the making of this book.

## **HOW TO STUDY TO SUCCEED ON THE MBE**

The MBE tests a vast amount of law, which you must understand and memorize in a compressed time period. Simultaneously, you need to familiarize yourself with MBE testing styles and patterns by doing a lot of MBE practice questions (approximately 2500 MBE practice questions results in a passing score for most bar takers, even in high cut-score jurisdictions, though this number varies based on an individual's MBE aptitude and cut score required). The key to managing all of this successfully is to learn the law by *doing* practice MBE questions and to start doing practice MBE questions early (get started during your final year of law school, if not sooner). It is not realistic to wait and practice *after* you've learned the law because you will run out of time.

It is helpful to think of preparing for the MBE in two stages. How you study for this exam will evolve as you get closer to the bar exam testing date.

- 1) **Phase one:** Study each subject in turn and refresh your memory on the law and/or learn some of the law from scratch. Practice single-subject MBE questions, mostly, without timing yourself. Circle back to the subjects you've already completed as you tackle new subjects. Track which topics you are struggling with in each subject to revisit later.
- 2) **Phase two:** After the law is refreshed, practice MBE with the subjects mixed together, and start timing yourself.

## **MBE STUDY—PHASE ONE**

(Depending on your bar study plan, this phase takes 4-5 weeks.) If you are using this book as an early bar prep resource, then we recommend you use it to follow your law school course (if there is one) or alternatively spend 2 weeks on a subject and then move on to the next subject so that you cover all seven subjects in 14 weeks (one semester of law school). Do this during your fall semester of your final year if possible (for May grads).

## **RULES**

Your goal is to learn as many rules as you can during phase one of review. Some subjects and topics will come back more easily than others.

- ◆ **Focus on the most heavily tested rules first (we have placed stars on these rules).**
- ◆ **Learn and review rules** with an emphasis on **understanding** the rules. Understand the rule, rule elements, sub-rules, sub-definitions, nuances, exceptions, and defenses. Your goal is to understand what each word in a rule means, such that you could give a lecture on the rule or explain the rule to a pretend client including an example of facts that *would* satisfy each element and facts that *would not* satisfy each element of each rule. If you can't think of factual examples, you probably don't understand the rule well enough to pass the bar.
- ◆ **You will not have full rule mastery:** Through the process of frequent review and working with a subject by doing practice MBE questions (and essays) most students will recall around 60-70% (give or take depending on the subject) by the time they move on to focus on the next subject. You will memorize the rest of the rules by continuing to review and practice with them over time. It isn't realistic to learn 100%

of the rules in each subject during phase one of study (the first pass through of a subject) and you shouldn't try to do so because it is not possible, and you will fall behind in bar prep and not get to all the subjects.

## PRACTICE

Your goal with completing practice MBE questions is to gain **rule mastery** by *using* rules to solve hypothetical problems, increase important MBE **pattern recognition**, and improve **MBE test taking skills** all at the same time.

**Study tip:** You will need a practice bank of MBE questions. Retired NCBE questions are the best to practice with because they are most similar to what you will encounter on exam day. Many bar companies license the NCBE questions. Additionally, the book *Strategies and Tactics for the MBE* includes licensed NCBE questions, has excellent answer explanations, and is very economical.

- ◆ **Practice for rule understanding and comprehension at first.** For the first day or two on a subject, you can complete questions one at a time (e.g., answer question one, review the answer explanation for question one, then answer question two, etc.). After the first few days, work in sets of at least 5-10 questions at a time before looking up answer explanations. After working with a subject for a few days, work practice questions in sets of 17 and work up to sets of 33 questions.
- ◆ **Practice without timed conditions at first.** Your goal here is quality of review, not speed. At first it may be slow going, especially if you are solving the questions before answering and working **open book**. As you gain rule recall and competence with MBE testing style, your speed will increase.
- ◆ **Practice MBE questions to increase pattern recognition:** There are only so many ways to ask a hypothetical question testing a concept. Completing many MBE questions increases pattern recognition, which improves issue spotting and accuracy.
- ◆ **Practice MBE questions to improve MBE test taking skills:** Most students can score around 55% after studying for the MBE, but that is an insufficient score to pass in most jurisdictions. Using the “solve first” technique described above increases scores by 10-15% for most students, which gets you right in the passing zone. You need to practice a lot of MBE questions to get good at the skill of solving MBE questions. With increased practice you will more easily see the common testing patterns and more importantly the decoys and become adept at avoiding them.
- ◆ **Review all missed rules regularly.** Depending on your study preferences, there are a lot of ways to incorporate regular review. If you use flashcards, you can employ a color-coded system to identify the frequency of review needed. For example, cards in the red pile need daily review until you get the rule down. Once you do, that card moves to the yellow pile. Cards in the yellow pile are reviewed two times a week. Cards in the green pile are rules you now feel comfortable with; review them once a week to keep them fresh. If you learn through outlines, then use different colors in your outline for rules that you know well, somewhat know, or need to learn because you keep missing those questions. If you are a visual learner, you can make flowcharts and mind maps to help you learn the rules. If you are an auditory learner, record the rules you need to understand with an example of how the rule is met and not met based on questions you've reviewed. Whatever style of learning works for you, be sure to utilize it or a combination to review the rules regularly.

**Completing practice questions:**

- ◆ **Work on one subject at a time initially**, but plan to circle back to the subjects you’ve already completed as you tackle new subjects.
- ◆ **Review the subject** before doing questions to help your brain to recall the rules. The cheat sheets in this book are perfect for this review.
- ◆ **Use the “solve first” technique** to answer MBE questions.
- ◆ **Try to answer the questions from memory first.** Identify the rule that applies to solve the problem, including all sub-rules and sub-definitions. Read the question and try to solve the problem from memory by identifying the specific rule (or rule element or exception upon which the facts turn) that will solve the problem.
- ◆ **Use an open book if needed:** Look up the rule, element, or exception if needed in this book, and then solve the problem. You will remember the rule better by *using* it to solve a question, rather than purely guessing. Don’t worry about timing yet; you are practicing the skill, gaining pattern recognition and learning rules all at the same time.

**Reviewing practice question answers:**

- ◆ **Review all answer explanations.** At first, reviewing the answer explanations may take longer than answering the questions. Quality is more important than quantity (but both are important). As you learn more rules, the review of answers will take less time.
- ◆ **Do something to learn missed rules:** For rules you **got wrong or needed to do open book**, *do something* extra to identify and learn that rule. What you do depends on your study preferences, but you need to memorialize that rule on a flashcard, handwritten on paper (a 7-subject notebook works well), add it to an outline or word document, draw a diagram or flow chart, or you can annotate directly in this rule book.
- ◆ **Add the facts** from the questions to your flashcard (or other study tool) to illustrate the rule. Doing so gives your brain **two ways** to retrieve a rule:
  - 1) By recalling the black letter law, and
  - 2) By recalling a similar fact pattern, which you can use to reverse engineer to determine the rule.
- ◆ **Do a quick IRAC for missed questions/rules:** A great technique to learn missed rules is to *write* a quick 1-2 sentence IRAC (like you would for an essay) that applies the facts from the question to the rule/element to cement the rule in your memory with an attached example so you can *learn* and *memorize* the missed rule. Add the IRAC to a flashcard, handwritten list of missed rules, or your outline.

**Example IRAC:****I: Contract modification****Common law—consideration required**

**R:** Additional consideration is required to modify a contract under the common law. The UCC does not require additional consideration, but only good faith.

**A:** When Builder and Painter agreed Painter would also paint an additional outbuilding, this was not a valid contract modification *because* while there was mutual assent, there was no additional consideration, as required under common law.

**C:** Therefore, the modification was not valid.

- ◆ **Mind-meld examples:** Sometimes you may know a rule but get the answer to a question wrong anyway because you don’t analyze the facts in the same way as the bar examiners when required to make a **judgment call**. On the MBE there is no mechanism to explain your answer, so you want to mind-meld and analyze the

facts similarly to the bar examiners. It is helpful to make a master flashcard (or a log or spreadsheet) for these rules where you can track the analysis of multiple fact patterns on a particular topic in one place, identifying facts that satisfy the rule/element (examples) and facts that do not (non-examples). Reviewing these cards will improve pattern recognition, deepen rule mastery, and most importantly, enable you to mind-meld and match your analysis to that of the bar examiners. These flashcards or spreadsheets are particularly helpful with judgment call questions (such as which questions/fact patterns the examiners think give rise to second-degree depraved heart murder compared to which questions they think only give rise to involuntary manslaughter based on criminal negligence). Every time you encounter a question that tests these issues, add the example to whichever column is appropriate (murder v. manslaughter).

| <b>Mind-meld example:</b><br><b>Rule: Prescriptive easement/Adverse possession:</b><br>Actual use,<br>Continuous use for the statutory period,<br>Open, notorious, visible use; and<br><b>Hostile use (without permission)</b> |                                                                                 |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| Hostile                                                                                                                                                                                                                        | Not hostile                                                                     |
| <ul style="list-style-type: none"> <li>◆ Use <i>unknown</i> to owner</li> <li>◆ Unsure of boundary, plant trees and erect fence on 10 foot strip of neighbor's land</li> </ul>                                                 | <ul style="list-style-type: none"> <li>◆ With permission of one co-T</li> </ul> |

- ◆ **Track why are you getting questions wrong:** If you are struggling with low MBE scores, slow down and track a few sets of questions to determine **why** you are missing each question. Identify if the problem is insufficient rule knowledge, or poor MBE technique, or both. If you can narrow the answer down to two good options, but have a hard time picking between the two, analyze the answer explanations to determine why one answer is better. See the “Troubleshooting Tips” for more ideas on making improvements.

**Question tracking example****Possible reasons why answer was wrong:****Rule:**

- ◆ Rule knowledge poor (didn't know rule/element/nuance well enough)
- ◆ Tricked by a non-rule/inapplicable rule

**Analysis:**

- ◆ Analysis incorrect (knew correct rule, but misapplied the facts)

**MBE technique:**

- ◆ Reading comprehension
- ◆ Decoy facts/rule

**Set facts:** June 1

76%

17Q

Adaptibar-mixed set

| Q  | Subject  | Rule             | Element @ issue                                                                             | Why I got it wrong...                                                           |
|----|----------|------------------|---------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| 5  | Torts    | IIED             | Bystander liability                                                                         | Rule nuance: P must <i>know</i> D present for IIED to a bystander               |
| 8  | Property | Life estate      | Vested remainder                                                                            | Decoy: RAP n/a to vested remainders, tricked by RAP in Q                        |
| 10 | Evidence | Settlement offer | Applies to disputed claims only                                                             | Rule nuance: Claim must be in dispute, here blurted offer @ scene so no dispute |
| 14 | Property | Foreclosure      | Junior interest can't bind senior interest, so foreclosure buyer took "subject to" mortgage | Read too fast. Got confused. Lots of decoy facts, too. Total guess.             |

## SCORES

Scores are typically low on the first few days working with a subject. As you continue to work with the subject over subsequent days, your scores should improve as you retain more rules and practice. However, some bar companies save the most difficult sets within each individual subject for the last day of a subject. If that is the case, you can always use a different source to practice and mix that in with your bar company questions. With each new subject you tackle, expect the pattern to repeat.

## MBE STUDY—PHASE TWO

(This phase usually takes 4-6 weeks, which varies by jurisdiction.) If you are using this book as an early bar prep resource and already spent 14 weeks reviewing all subjects (2 weeks per subject), now you can rotate through the subjects again in your final semester of law school, with a keen focus on topics that are heavily tested that you are scoring below 60% on. If you can master 2-3 heavily tested topics per subject, you will have a solid foundation entering intensive bar preparation post-graduation.

## RULES

- ◆ Continue to review all rules frequently.
- ◆ Work on learning the most heavily tested rules first and try to learn as many of the less frequently tested rules as you can.
- ◆ The final 2-3 weeks of bar study is the time to work on active short-term memorization (similar to what you did to prepare for final exams). See the “Memorization Tips” below.

## PRACTICE

- ◆ **Answer questions closed book primarily:** Once you have your rules mostly memorized, **work from memory**. Use an open book as a crutch to look up the part of the rule you can’t remember only when necessary.
- ◆ **Do mixed subject sets:** Work mostly on mixed subject sets.
- ◆ **Do targeted topic specific question sets** for special practice in subjects or topics of difficulty.
- ◆ **Do questions under timed conditions.** Timing becomes more important as you get closer to the exam. Work on completing sets under timed conditions. Pay attention to your timing and **don’t go too fast or too slow**. If you go too fast you are missing questions for poor reading comprehension. (If you finish more than 33 questions in less than 55 minutes then you are going too fast. You should not have more than 5 minutes extra time in any given hour on the MBE portion.) If you go too slow you risk not finishing enough questions to pass the exam. (If you are slow, the goal is to finish at least 90 questions with good accuracy in 3 hours.)

| <b>PRACTICE PACING CHART</b>                                                                                                                                                                                                                                                                                                  |                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| <b># Questions</b>                                                                                                                                                                                                                                                                                                            | <b>Target Time</b> |
| 17                                                                                                                                                                                                                                                                                                                            | 30 minutes         |
| 33                                                                                                                                                                                                                                                                                                                            | 1 hour             |
| 50                                                                                                                                                                                                                                                                                                                            | 1.5 hour           |
| 100                                                                                                                                                                                                                                                                                                                           | 3 hours            |
| <b>MBE timing goals:</b> If you are going faster than 1.6 minutes per question, or 33 questions in 55 minutes, you are leaving reading comprehension points on the table. Slow down and watch your scores increase, usually by 10-15%. If you are not able to finish more than 90 questions in 3 hours, you need to speed up. |                    |

- ◆ **Increase the number of questions in each set:** Practice MBE questions in increasingly larger sets of questions to build exam day stamina. Do questions mostly in a set of 33 questions and work your way up to 50 questions (particularly in the last few weeks of bar study). Once you have completed all MBE subjects in bar review, aim to do a set of 100 questions each week (to build up the stamina needed on exam day). If stamina is an issue, work on a larger set of questions every 2<sup>nd</sup> or 3<sup>rd</sup> day of bar study, instead of completing smaller sets of questions daily.
- ◆ **Complete an MBE simulation:** Exam simulations (full day 200-question MBE exams) are essential in helping you build your stamina and allow you to get much needed practice working in 3-hour blocks of time. Do the questions open book if you still need a crutch but do the simulation. An MBE simulation also helps you to identify weaknesses. Afterwards, pay attention to your own focus and attention issues over the course of the long day so you can adjust your final study plan to remedy

any issues. If you have already approved accommodations, we recommend you test yourself under those conditions. If you have not received accommodations, we recommend you try to test as if you will not receive the accommodations (until you receive official notice of your accommodations).

## SCORES

- ◆ Expect your scores to go down when you move into doing all questions in full mixed subject review. It is much harder on your brain to retrieve a rule from a much larger pool of rules (seven subjects) and scores typically decrease for a few days (to as long as 7-10 days) as your brain adjusts to the increased cognitive load.
- ◆ Once your brain adjusts to mixed subject review, you can expect your scores to jump back to approximately where they were as you *ended* working on each subject.
- ◆ Scores should continue to increase as you gain rule mastery and get closer to the exam date.

| <b>EFFECTIVE MBE STUDY DECODED</b>                                                                                                                                                                                                        |                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                   |
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| Effective MBE study is flexible and evolves over the typical 8-11 weeks of bar study. The goal in the beginning is rule understanding and acquisition. As the exam date nears the focus shifts to competence under timed exam conditions. |                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                   |
|                                                                                                                                                                                                                                           | <b>PHASE ONE</b><br>One subject at a time:<br>first 4-5 weeks                                                                                                                                                                          | <b>PHASE TWO</b><br>All subjects mixed:<br>final 4-6 weeks                                                                                                                                                                                                                                        |
| <b>Memory</b>                                                                                                                                                                                                                             | <ul style="list-style-type: none"> <li>◆ Doing Q open book at first.</li> <li>◆ As recall increases, work towards closed book from memory.</li> </ul>                                                                                  | <ul style="list-style-type: none"> <li>◆ Ok to peek at rules occasionally.</li> <li>◆ Work towards totally closed book from memory.</li> <li>◆ See memorization tips.</li> </ul>                                                                                                                  |
| <b>Q Sets</b>                                                                                                                                                                                                                             | <ul style="list-style-type: none"> <li>◆ Doing one Q at a time ok at first.</li> <li>◆ Move towards completing sets of 17 Q and 33 Q.</li> </ul>                                                                                       | <ul style="list-style-type: none"> <li>◆ Always work in sets, mostly of 33 (sets of 50 in last few weeks).</li> <li>◆ Aim to do a set of 100 Q each week (for stamina).</li> <li>◆ Do a simulated MBE exam.</li> </ul>                                                                            |
| <b>Timing</b>                                                                                                                                                                                                                             | <ul style="list-style-type: none"> <li>◆ At first, work at your own pace.</li> <li>◆ Doing Q open book to learn rules as you go takes more time.</li> </ul>                                                                            | <ul style="list-style-type: none"> <li>◆ Work under timed conditions.</li> <li>◆ Troubleshoot any timing problems.</li> </ul>                                                                                                                                                                     |
| <b>Scores</b>                                                                                                                                                                                                                             | <ul style="list-style-type: none"> <li>◆ In each subject expect scores to start low and climb as you gain competence in that subject.</li> <li>◆ Scores will fall and repeat the pattern as each new subject is introduced.</li> </ul> | <ul style="list-style-type: none"> <li>◆ Scores will drop when you move to all mixed review (it takes time for your brain to adjust to working with all subjects simultaneously).</li> <li>◆ Scores should continue to climb as you gain rule mastery and get closer to the exam date.</li> </ul> |
| <b>Review</b>                                                                                                                                                                                                                             | <ul style="list-style-type: none"> <li>◆ Review all previously studied subjects weekly.</li> <li>◆ Continue to complete MBE Qs in previously studied subjects.</li> </ul>                                                              | <ul style="list-style-type: none"> <li>◆ Review all subjects regularly.</li> <li>◆ Do MBE Qs in all subjects mixed.</li> <li>◆ Identify any problem areas and do targeted review and MBE sets on that topic.</li> </ul>                                                                           |

## MBE PRACTICE TIPS

- ◆ **Practice how you will be tested on exam day:** Try to do some (ideally 1/3) of your MBE practice on paper IF that is how you will be MBE tested on exam day for your jurisdiction. Completing questions on paper feels different than doing questions online for both the process and timing (bar takers tend to go too fast online). Making notes on the questions themselves is most efficient and helpful since you will not be provided with separate scratch paper. However, if you are taking the NextGen UBE exam, the delivery method is expected to be computer-based so it will feel more similar to your online practice.
- ◆ **Always fill in a bubble (answer each question).** Flag the ones you need to come back to (if you have time) but always fill in an answer choice before moving on to the next question so you don't accidentally mark your answers off by a number.
- ◆ **Try to use more than one source for MBE practice questions.** Using different sources ensures you are not simply familiarizing yourself with the language cues of the question author(s). The NCBE released questions are the most similar to what you will see on exam day. You can purchase questions directly from the NCBE website or through a bar prep company that licenses the questions.
- ◆ **Watch your speed practicing online:** Students tend to go too fast doing practice MBE questions in online formats.
- ◆ **Don't worry if you do a set of Qs and score poorly.** It happens. You could be tired or randomly got a disproportionate set of questions on rules you don't know well. More importantly, pay attention to your scoring pattern over time since you want to base your study plan on the overall pattern, not an aberration.
- ◆ **Self-assessment is key to improving MBE scores.** Determine *why* you are getting questions wrong to identify skill and substance deficiencies, so they can be fixed.

## RULE MEMORIZATION TIPS

Many bar takers are rightly concerned about having enough time to memorize all the material. Think of the task as a huge pile of rules you need to know. Bit by bit you refresh your memory and learn rules and move them from the big pile of rules you need to know into the pile of rules that you do know.

### **Rule understanding is the goal:**

- ◆ **Preview:** This is where you familiarize yourself with a subject *before* doing a deep review of a subject. You can start with the subject **cheat sheet** or chapter in this book, or review your own notes, outlines, or flashcards. The idea with a preview is to **refresh your memory** on the subject before the deep dive review. The cheat sheets in this book work well.
- ◆ **Deep review:** Study the subjects deeply with a **focus on rule understanding**. You must understand all the rule elements and key terms to spot issues and apply rules correctly. If you understand how a rule works, it is much easier to recall. Be strategic and **focus on the heavily tested rules first**. Most bar takers do a deep subject review through a commercial bar prep program utilizing videos or some lecture method of substantive review.
- ◆ **Active review:** This is the process of working with the rules after you've done a deep review. Your goal is to **understand** the rules, including all elements, sub-elements, and sub-definitions, not just rote memorization. Use the following techniques to ensure you have sufficient depth of rule understanding:
  - ◇ **Build a subject outline from memory:** Start with a checklist (the big topics macro structure of the subject), then working in small chunks pick one section at a time and build by adding all rules, elements, and sub-elements. Each time you review a subject, start with the same checklist, but alternate the section(s) where you start the detailed rule build out so that you allot equal time to all sections/topics (otherwise you will know the first half of the subject better than the back half). Keep a running list of the topics that need more review. This technique is versatile

depending on your study preference, and can be done verbally, by hand on paper, using a whiteboard, on a computer document, using flashcards, etc.

- ◇ **Pretend you are explaining the rules to a client:** For each rule, identify the elements, and all sub-rules and sub-definitions. For each element and sub-element or sub-definition give an example of a fact that would *satisfy* the element, and a fact that would *not satisfy* the element. You can enlist the help of family and friends or even your dog to do this.
- ◇ **Do practice MBE (and essay) questions:** *Using the rules* to solve problems aids memorization and depth of rule understanding.
- ◆ **Memorize:** Once you understand, start committing rules to memory.

**Regular weekly review:** Frequent review is key to memorization. As you move from subject to subject, review all of the subjects you have already covered weekly to pick up a few more rules and ensure you don't forget the rules you already know. You can review a different subject for 30 minutes each day or designate one day a week to spend reviewing all the subjects you've already studied.

**Short-term memory,** which is the type of memory we use when we “cram” for a test, only lasts for a short time so it isn't possible to cram and memorize the many rules you need for the bar exam. The final 2-3 weeks before the bar exam is when you will actively use short-term memory to try to memorize the rules that haven't managed to stick in your memory yet. If you have prioritized studying the heavily tested rules first, do the best you can here, but it is fine (and normal) if you go into the bar not knowing every single rule that is potentially tested.

| <b>MBE TROUBLESHOOTING TIPS</b>                                                                                                                                |                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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| If your MBE scores are lower than desired, first identify the problem. MBE scores can be low for a lot of reasons. Before you despair, consider the following: |                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>SYMPTOM</b>                                                                                                                                                 | <b>DIAGNOSIS</b>    | <b>HOW TO FIX</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Frequently can't pick between two tempting answer choices                                                                                                      | Weak rule knowledge | <ul style="list-style-type: none"> <li>◆ <b>Increase rule mastery:</b> You need to understand what all the words in each rule mean.</li> <li>◆ Rote memorization is not sufficient.</li> <li>◆ <b>Rule recall:</b> If you can't remember a rule use an open book as a crutch. Afterwards, do something to actively memorize that rule.</li> <li>◆ <b>Target problem areas:</b> Do some targeted MBE questions in highly tested areas where you are weak.</li> <li>◆ See the sections on “Study Phase One” and “Rule Memorization Tips” for strategies on increasing rule understanding.</li> </ul> |
|                                                                                                                                                                | Poor MBE technique  | <ul style="list-style-type: none"> <li>◆ Slow down.</li> <li>◆ Solve the Q all the way through before looking at the answer choices.</li> <li>◆ Try to pinpoint the element being tested/at issue before looking at the answer choices.</li> <li>◆ Answer the call of the question with “because” explaining what the answer should be and why (if possible).</li> <li>◆ Mechanically apply law to fact.</li> <li>◆ Do not peek at the answer choices to “help” solve the problem.</li> <li>◆ See the section on “Skill: How to Solve MBE Questions.”</li> </ul>                                   |

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| <ul style="list-style-type: none"> <li>◆ Mind wanders</li> <li>◆ Get confused reading answer choices &amp; have to reread facts</li> </ul>                                                     | Reading comprehension                         | <ul style="list-style-type: none"> <li>◆ Slow down (read carefully once).</li> <li>◆ Make notes/draw a diagram.</li> <li>◆ Outline/identify key terms/dates.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                                                                                                                                                                                                | Fatigue                                       | <ul style="list-style-type: none"> <li>◆ Don't practice MBE when you are tired.</li> <li>◆ Take a break.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|                                                                                                                                                                                                | Stamina                                       | <ul style="list-style-type: none"> <li>◆ Complete a set of 100 Qs weekly in phase 2 of study.</li> <li>◆ Take a simulated MBE exam.</li> <li>◆ <b>Slow to warm up:</b> If you do poorly on the first 5-10 questions in a set, do 5 warm up questions first.</li> <li>◆ <b>Sluggish in the a.m./p.m.:</b> Practice MBE questions during the time of day that is difficult for you. You can also vary your meals to see what gives your brain staying power for the morning or afternoon session.</li> <li>◆ <b>Hitting the wall after X number of questions:</b> Aim to do practice sets 10-15 questions longer than your hit-the-wall number to build stamina.</li> <li>◆ <b>Plan for a brain break:</b> If you have maxed out your attention and can't complete 100 questions straight, build in a break to regain focus (e.g., get up to stretch, take a seated meditation break, etc.).</li> </ul> |
| Have a bad set (or a few bad sets)                                                                                                                                                             | Fatigue                                       | <ul style="list-style-type: none"> <li>◆ MBEs require the full attention of a well-rested brain. If you are ending your day with MBE practice, you are probably losing points simply because of fatigue. Try moving your MBE practice to the afternoon or morning to get a more realistic view of your scores.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Picking the answer that makes sense or feels right                                                                                                                                             | Getting tripped up by the facts and/or decoys | <ul style="list-style-type: none"> <li>◆ Don't use your own "real world" knowledge to solve Qs.</li> <li>◆ Have no sympathy for the "MBE people" (they are not real and the good guy often loses).</li> <li>◆ Mechanically apply law to fact.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Your timing is off and you are going: <ul style="list-style-type: none"> <li>◆ Too fast (with poor accuracy), or</li> <li>◆ Too slow (and risk not finishing in the allotted time).</li> </ul> | Timing problem                                | <ul style="list-style-type: none"> <li>◆ <b>Too fast:</b> Slow down and annotate the question itself. IRACing the question will also force you to slow down.</li> <li>◆ <b>Too slow:</b> This is often a <b>disguised technique problem</b>. Read more deliberately on the first read, use good technique to increase accuracy and annotate the question as you read it. Being methodical will save time in the long run.</li> <li>◆ <b>Too slow—a slow reader:</b> Your goal is to finish at least 90 questions in 3 hours (guess on the last 10). Accuracy is most important. You may opt to skip long fact patterns, which will enable you to answer more questions (but bubble skipped answers, so you don't mess up the numbering).</li> <li>◆ <b>Too slow—a very slow reader:</b> Try speed reading drills.</li> </ul>                                                                          |
| All of the above                                                                                                                                                                               |                                               | <p><b>Practice, practice, practice:</b> More practice is what leads to bar passage. When in doubt, do actual practice problems over reviewing the rules one more time to feel "ready." You will never feel ready enough, so do the practice.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

# TAKING MBE QUESTIONS ONLINE

Bar exam companies primarily offer their MBE questions online, with few printed questions. Nonetheless, we recommend that you practice doing some (ideally 1/3) of your questions on paper like the real exam IF your jurisdiction is testing using a paper answer sheet. For the questions you practice online, most bar companies also offer some type of highlighting and/or strike through feature so practice using those when doing practice questions to help you focus in on the rule (like you will on paper when using your pencil).

Below is a review of some important tools that may be valuable to you when practicing MBE questions online. While the tools that are available on any particular online exam administration (or online practice bank of questions) may be slightly different, this guide should give you an idea of how they can be used to efficiently work through the questions without annotating the questions themselves or using scratch paper.

## ONLINE MBE PRACTICE TOOLS:

- ✓ **Digital scratch paper (essentially a notes box):** You should use this to type up rule elements and/or key facts after you spot the issue (using shorthand as you would on paper). For issues with simple rules, you will likely be able to answer those without using the scratch paper. For other questions you may need to jot down some of the rule or try to summarize the key facts and/or parties (particularly for more complicated fact patterns in real property, civil procedure, and contracts). Some companies allow you to turn your notes boxes into flashcards which might be a good resource for you. You can also still use real scratch paper (but note you will only have the space on the sides of the question on the real exam and not full blank sheets). See the example below.
- ✓ **Flag questions:** You can “flag” questions that you want to come back to later (or note the question number to revisit later).
- ✓ **Strike through:** Most bar companies offer the ability to strike through incorrect answer options once you determine that an answer is not correct. You can use this as you would use your pencil on the paper questions. This tool will be available on the NextGen MCQs as well.
- ✓ **Highlighting:** You can highlight words or sentences within the question. **WARNING:** Be careful to figure out what the issue is before you highlight any facts, so you only focus in on the legally significant facts. Otherwise, you risk highlighting everything, including the decoy facts. And note that on the paper exam, you CANNOT bring in highlighters or pens on the MBE testing day, so you will be marking up your question by circling words or underlining them with your PENCIL only in lieu of any online highlighting tool you might be using with your online question practice. On the NextGen exam, this option might not be available as it seems they will only have a strike through tool available. Practice as you will be tested.
- ✓ **Timer:** You can set up a timer once you start the exam. The timer will then automatically count down the allocated time for the session. Pay attention to your timing as you go through the questions.

**EXAMPLE of using online tools to take an MBE question online**

A builder borrowed \$10,000 from a lender to finance a small construction job under a contract with a homeowner. The builder gave the lender a writing that stated, "Any money I receive from the homeowner will be paid immediately to the lender, regardless of any demands from other creditors." The builder died after completing the job but before the homeowner paid. The lender demanded that the homeowner pay the \$10,000 due to the builder directly to the lender. The homeowner refused, saying that he would pay directly to the builder's estate everything that he owed the builder.

Is the lender likely to succeed in an action against the homeowner for \$10,000?

- A. No, because the builder's death terminated the lender's right to receive payment directly from the homeowner.
- B. No, because the writing the builder gave to the lender did not transfer to the lender the right to receive payment from the homeowner.
- C. Yes, because the builder had manifested an intent that the homeowner pay the \$10,000 directly to the lender.
- D. Yes, because the lender is an intended beneficiary of the builder-homeowner contract.

**Approach**

- 1. Read the call — action against the homeowner for \$10,000 — probably real property.
- 2. Issue? Not clear so read facts first to see if you can determine the issue. The facts that you might have highlighted are highlighted above (these would be underlined or circled on paper). In the first sentence, you can see that there are three parties involved (builder, lender, homeowner) so the issue likely revolves around third parties as it relates to the lender v. homeowner call (builder clearly involved but need to see how the parties play out so jotting down their relationship might be helpful).
- 3. What you might write down on your virtual scratch paper (note box) or on real scratch paper while your question is on the computer:

B -----\$10k from L

B has K w/H

B-----writing to L – give \$ from H to L

B died before H paid

L -----wants \$ from H

Assign.? – *rights given to another? no b/c no writing says H gives to L NOT to B (which would be an assignment) -K between B and H for \$\$ NOT B and L (the part in italics would mostly be figured out without actually writing it down to save time, but it is included here to demonstrate the thought process that supplements the notes).*

- 4. After jotting down some notes, you can see that H has no duty to pay B because there was not an assignment. You could next look at the answer choices and use the strike through function if you wanted to (but sometimes you won't need to do this). So, you could just select the correct answer choice, which is B and move on to the next question.

## 5. Characters that might be helpful:

- ◆ Use the first letter only for names or parties to save time: B for builder (do this on paper too)
- ◆ Dashes to connect parties horizontally or to connect facts: -----
- ◆ V or I letters if you want to make a connection vertically (by hitting return or enter between each letter to bring you to the next row) but it is recommended for diagrams you just use real paper (unless you are creating online flashcards with examples):

(B) Builder----- (H) homeowner

v

v

v

(L) Lender

OR

(B) Builder----- (H) homeowner

I

I

I

(H) Homeowner



# **PART I CIVIL PROCEDURE**

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★ Favorite Testing Area

# CIVIL PROCEDURE MBE OUTLINE

| MBE CIVIL PROCEDURE AT A GLANCE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                          |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Applicable law:</b> The Federal Rules of Civil Procedure (FRCP) and sections of Title 28 of the U.S. Code pertaining to trial and appellate jurisdiction, venue and transfer apply on the MBE. Federal common law (case law) is also tested.</p>                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                          |
| 17 Questions (approx.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 8 Questions (approx.)                                                                                                                                                                                                                                                                                                                                    |
| Subject matter jurisdiction<br>Supplemental/removal jurisdiction<br>Personal jurisdiction<br>Service of process/notice<br>Venue/transfer/forum non conveniens<br>Injunctions/temporary restraining orders<br>Pleadings (amended/supplemental)<br>Rule 11<br>Joinder parties/claims/class actions<br>Discovery (disclosure/sanctions)<br>Adjudication without trial<br>Pretrial conference and orders<br>Pretrial motions: pleadings, dismiss, MSJ<br>Motions: JMOL<br>Post-trial motions: relief from judgment, new trial                                                                                                                                                       | State law in federal court<br>Federal common law<br>Right to a jury trial<br>Jury selection/composition<br>Jury instructions<br>Defaults and dismissals<br>Jury verdicts: types/challenges<br>Judicial findings & conclusions<br>Issue and claim preclusion<br>Appeals — interlocutory review<br>Final judgment rule<br>Scope of review — judge and jury |
| <p><b>MBE tip:</b> Civil Procedure was added as eligible for MBE testing in 2015. For this reason, there are fewer released questions, resulting in fewer examples in this chapter.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                          |
| <p><b>Civ. Pro. MBE testing tips:</b></p> <ul style="list-style-type: none"> <li>◆ Know the details of numerous Federal Rules of Civil Procedure (FRCP).</li> <li>◆ Know when rights are waived if not asserted.</li> <li>◆ The typical two-sided civil procedure issues (where the result is ambiguous) that law professors like to test, will be tested in a more superficial way on the MBE. This is because in MBE testing format, there has to be a correct answer, so many MBE questions will ask specific questions or “best argument” type questions.</li> </ul>                                                                                                        |                                                                                                                                                                                                                                                                                                                                                          |
| <p><b>Common Civ. Pro. testing call:</b> Many released civil procedure questions test your strategizing problem skills by asking, “What is the best argument” or “<i>best response</i>” for one of the parties involved, or “How should the court proceed?” Look for an option that accomplishes the most for the party. For example, it is important to know which method is best to have a case dismissed (e.g., it is better to find an answer choice that dismisses a case rather than an opportunity for the other party to amend). Even though 2-3 of the answer choices might be a viable option for the party in question, only one will be the <i>best</i> answer.</p> |                                                                                                                                                                                                                                                                                                                                                          |

## I. PROPER COURT — PRELIMINARY ISSUES

The first inquiry in civil procedure always centers on whether it is proper for the court selected to resolve the case at hand. To hear a case, the court must have jurisdiction over the **persons** involved, the **subject matter** of the suit, the case must be held in the proper **venue**, the defendant must have **notice** of the suit, and the **proper law** must be used to resolve the issues.

**A. Personal jurisdiction** means the court must have proper **jurisdiction over the parties** to an action, and it is established through a traditional basis or using the minimum contacts standard.

1. **Traditional basis for personal jurisdiction** exists where the defendant:
  - a. **Consents (express or implied)** to jurisdiction in the forum state. One can expressly consent by contract, or one can impliedly consent by failing to make a timely objection to a lack of personal jurisdiction.
  - b. Is **domiciled** in the forum state. A person's domicile is the state in which they have **physical presence** (physical element) and the **subjective intent to remain** (mental element).
  - c. Is **present** in the forum state **when served** with process (tag jurisdiction).
    1. **Except: Presence by force or fraud is invalid.** A defendant's presence in the forum when served will not be valid when the presence in the forum is secured by **force or fraud of the opposing party**.
    2. **Except: "Involuntary" presence is invalid.** Generally, a defendant's presence in the forum is considered involuntary and not the basis for service while present if the presence is to take part in another **judicial proceeding** or to make a **special appearance to contest jurisdiction**, or for **military transfer**.
2. **Modernly, the minimum contacts standard** allows personal jurisdiction over nonresidents of the forum state provided there is a **long-arm statute**, and the exercise of jurisdiction is in keeping with the constitutional due process requirements of the **minimum contacts standard** (due process), meaning an analysis is required on the **nature of the defendant's contacts** with the forum state and the **fairness** factors (reasonableness based on contacts).
  - a. A **long arm statute** is the mechanism that gives a state the power to reach beyond its own borders and assert jurisdiction over a nonresident.
    1. **Co-extensive long arm statutes:** Some jurisdictions give their state courts power over any person or property **to the extent allowed by the Constitution**, meaning the minimum contacts standard is applied.
    2. **Limited long arm statutes** (enumerated act): Some jurisdictions have specific long arm statutes that give its courts power over nonresidents **only for enumerated acts** — e.g., the commission of a tort while in the state. Where a specific long arm statute applies, the exercise of jurisdiction must satisfy that statute and also meet the constitutional requirements of the minimum contacts standard.
  - b. **Nature of the defendant's contacts:** A defendant must have sufficient **minimum contacts** with the forum state such that asserting jurisdiction over the defendant does not offend **traditional notions of fair play and substantial justice**.
    1. **Minimum contacts:** When the defendant has **purposefully availed** themselves of the **benefits and protections of the state** such that it is reasonably **foreseeable that they could be haled into court** (in the forum), the defendant has minimum contacts with the forum state.

**Example:** Activities that show purposeful availment of the benefits and protections of a state include driving on a road in the forum state (availing themselves of use of the road maintenance and emergency responders) or conducting business in the forum state (availing themselves of use of the forum state laws to make money).

2. **Relatedness of claim to forum state:**

- a. **Specific Jurisdiction:** A claim arising from or directly related to an **activity in the state provides specific jurisdiction** over the defendant for **that claim only**.

**Example:** Driving in a state is sufficient activity in the state to find specific jurisdiction over the driver for suits arising from the driving.

**Example:** Franchisor, from State A, and Franchisee, from Canada, entered into a franchise contract. The contract was negotiated in State A and Franchisee understood that much of Franchisor's work to support Franchisee and oversee Franchisee's conduct pursuant to the contract would occur by Franchisor in State A. The contract specified State A law applied. For a suit regarding the franchise agreement, Franchisee's contacts with State A are sufficient to find specific jurisdiction over Franchisee in State A.

- b. **General Jurisdiction:** Where a defendant is "**essentially at home**" in the forum state, **general jurisdiction** will be found, and the forum state may exercise jurisdiction over the defendant for **any cause of action**.

**MBE tip:** The NCBE may still use the old terminology of "continuous and systematic contacts" for the general jurisdiction standard instead of the newer "essentially at home" language. Consider them synonymous. Modernly, general jurisdiction will only be found if one of the traditional bases is met.

- i. **Corporation:** A corporation is always essentially at home in the **state of incorporation or** the state of its **principal place of business**. A corporation is unlikely to be found essentially at home for general jurisdiction in any other forum, except in extraordinary cases.

**Example (not essentially at home):** An out-of-state corporation has a large amount of economic activity derived from the forum state, and 60% of their sales are *delivered* to buyers in the forum state. This is insufficient to determine the corporation is "essentially at home" in the forum state.

- ii. **Subsidiary corporation:** A subsidiary corporation is one that has a parent company owner. The "essentially at home" **status of the subsidiary controls**, not the parent company.

**Example:** Plaintiff (of State A) sued a parent corporation (of State B) and one of its foreign subsidiaries, a tire manufacturer, in State A federal court for wrongful death stemming from a car accident that killed his wife in Europe. The parent company does significant business throughout the U.S., including in State A. The foreign subsidiary manufactures tires for the European market, with 2% of its tires distributed in State A through the parent corporation. There is no personal jurisdiction for the subsidiary company because the claim does not arise from nor is it directly related to activity in State A (specific jurisdiction), and they do not have sufficient minimum contacts in State A to be "essentially at home." The contacts of the parent company are decoy ducks and irrelevant to determine the personal jurisdiction of the subsidiary (but it is unlikely the parent company is essentially at home in the forum either since they are not domiciled there).

- iii. **Foreign (non U.S.) corporations operating abroad cannot be essentially at home.** In-state contacts, such as through the use of independent contractors, are not imputed to a foreign parent corporation for purposes of jurisdiction.
- iv. **Internet websites:** The law is unsettled in this area and there is **no clear test or standard**.
  - a. **Passive websites** are websites where information is made available, but business is not transacted (e.g., no e-commerce takes place). These **generally do not meet** the rules for minimum contacts, as they simply make some postings available to the public.
  - b. **Targeted interactive websites**, where there is communication between a user and operator, **may meet** the rules for minimum contacts as they are designed to conduct direct business transactions and are integral to the defendant's business.

**Example:** State A hotel targeted State B consumers by providing rate information and accepting reservations on its website. They also advertised their proximity to State B and provided driving directions from State B. This targeted website subjects the State A hotel to personal jurisdiction in State B.
- v. **Stream of commerce cases:** There is not a clear standard, and decisions are decided on a case-by-case inquiry.
  - a. **Stream of commerce alone is insufficient.** Simply knowing a product may end up in a state through the stream of commerce without more is an insufficient basis for general jurisdiction. Other than that, there is not a case law consensus on stream of commerce cases.
  - b. **Intentionally targeting the forum, intentionally serving the needs in a state** (e.g., modifying a product to comply with state regulations and having a local presence), or a **sufficiently regular flow of business** in the forum **may** be sufficient minimum contacts.
- 3. **Fairness factors** (reasonableness based on contacts): The exercise of jurisdiction must be **fair** and **not offend traditional notions of fair play and substantial justice**. To analyze fairness, assess:
  - a. The **burden to the defendant**. Consider the location of witnesses and evidence, and the burden on the defendant to travel to the forum state. This is the most important factor.
  - b. The **forum state's interest** in adjudicating in the forum and in regulating activity within its borders and protecting its citizens.
  - c. **Plaintiff's interest** in litigating in the forum state and obtaining convenient and effective relief.
  - d. The **legal system's interest in efficient adjudication**.
  - e. Any shared **interest of the states in furthering substantive social policies** (e.g., the state's interest in promoting family harmony).

| <b>MINIMUM CONTACTS EXAMPLES</b>                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Yes Minimum Contacts</b>                                                                                                                                                                                                                                                                                                                                                                 | <b>No Minimum Contacts</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <ul style="list-style-type: none"> <li>◆ Franchisee in State A is in a 20-year contract with Franchisor from State B. The franchise contract directs most aspects of the business and calls the Franchisor to receive a percentage of the Franchisee's profits. The Franchisor sues in State B. Franchisee has purposely availed of State B and has sufficient minimum contacts.</li> </ul> | <ul style="list-style-type: none"> <li>◆ A financial services company in State B has locations only in State A and State B. Unknown to the financial services company, one customer moved to State C and wants to sue the company in State C. The financial services company does no other business in State C. The financial services company has insufficient minimum contacts to support personal jurisdiction.</li> <li>◆ A State B corporation has no business dealings in State A, except for the one-time hiring of an independent contractor who got in a car accident while driving in State A. The other driver sues the corporation in State A, but there are no minimum contacts in State A for the State B corporation.</li> </ul> |

### 3. Other forms of personal jurisdiction:

a. **Federal statutes can provide personal jurisdiction:** A federal statute (e.g., an antitrust statute) can contain provisions for "nationwide service of process" to attain personal jurisdiction, however such provisions are not automatic and must be specifically included in a statute. FRCP 4(k)(1)(C).

b. **In rem jurisdiction:** Jurisdiction is exercised **over property located in the forum state**. The property can be real property, personal property (e.g., a car), or intangible property (e.g., a bank account). When jurisdiction cannot be exercised over the defendant personally, the court makes a disposition regarding the property rights and it is binding on all (meaning everyone, including those not party to the suit). In rem cases are rare.

**Examples:** Distribution of real property from an estate; a condemnation proceeding on a piece of property.

c. **Quasi-in rem jurisdiction:** It is similar to in rem jurisdiction, however the court will render a judgment on property ownership **binding the plaintiff and defendant only**, as opposed to a ruling binding on all.

d. **100 mile "bulge" provision:** A federal court has personal jurisdiction **over a defendant (joined through impleader (FRCP 14) or required joinder (FRCP 19))** who is **served** (or waived service) within a judicial district of the U.S. **not more than 100 miles** from where the **summons was issued**. FRCP 4(k)(1)(B).

**Example:** P, domiciled in State A, brought a federal diversity negligence action against D, domiciled in State B, in federal court in State A. The action was based on an accident that occurred in State C. D was served with process at her office in State B, which is located 50 miles from the State A federal courthouse. D travels to State A once each year for a weeklong vacation and has no other State A contacts. D will successfully argue the court lacks PJ because the 100-mile bulge rule doesn't apply to defendants that are not brought in through impleader or required joinder. The 100-mile bulge rule answer is a decoy. And D doesn't meet any traditional basis or minimum contacts in State A.

4. Federal courts *may* hear a case without proper personal jurisdiction.

- a. **Waived if not raised timely.** Failure to raise a defense of personal jurisdiction in the **first Rule 12 response** to the complaint (e.g., in a pre-answer motion or answer) constitutes consent to jurisdiction by waiver.



- B. Subject matter jurisdiction (SMJ)** means the court must have proper **jurisdiction over the subject matter** of an action. Federal courts have limited subject matter jurisdiction and may hear cases involving **federal questions** or **diversity of citizenship** between the parties.

**MBE tip:** Federal question and diversity subject matter jurisdiction are primarily tested on the MBE, though federal courts also have exclusive jurisdiction over certain types of cases, such as admiralty, etc.

1. **Federal question jurisdiction:** Federal district courts have subject matter jurisdiction over civil actions **arising under federal law** (e.g., U.S. Constitution, federal statutes, treaties, etc.). 28 U.S.C. §1331.

**Examples:** Suits arising under federal law would include claims under a federal employment discrimination statute, copyright, patent infringement, federal truth in lending statute, free speech (1st Am.), violation of Federal National Labor Relations Act, etc.

- a. **Concurrent jurisdiction: State and federal** courts have concurrent jurisdiction over federal question claims (meaning plaintiffs can sue in *either* state or federal court) unless Congress has specifically stated that federal courts have exclusive jurisdiction over the subject matter.

1. **Exclusive jurisdiction cases:** Cases where federal courts have exclusive jurisdiction include cases involving bankruptcy, patent, copyright, trademark, securities cases, antitrust, maritime, suits between states, etc.

- b. **Well-pleaded complaint:** For federal question cases, plaintiff's federal claim must appear **on the face of plaintiff's complaint** itself (not in the defenses, anticipated rebuttal, counterclaims, answers, etc.).

**Example:** Starlet, from State A, sues Tabloid, from State A, for defamation and asserts in her claim the First Amendment does not protect the defamatory statement. Even though Starlet is anticipating a possible defense by asserting there is *not* a violation of the First Amendment, there is no federal question jurisdiction because the assertion is a possible defense and not in the claim itself.

- c. **Arising under federal law:** The plaintiff must be **seeking to enforce a federal right** for the case to "arise under" federal law. This includes:

1. Cases that involve a **real and substantial issue** of federal law and its determination must necessarily depend on resolution of the federal issue.
2. If the federal issue is **substantially important** to the resolution of a **state law claim**.

**MBE tip:** If you're in doubt as to whether the plaintiff is seeking to enforce a federal right, ask yourself if the federal law implicated provides a **right** (benefit) that the plaintiff is attempting to *enforce* (to receive the benefit).

**Example (arising under federal law):** Entrepreneur, from State A, sells hot sauce. Company, incorporated in State B and headquartered in State C, sues Entrepreneur for \$50,000 for infringing on their federal trademark. The court has federal question jurisdiction because the trademark infringement claim arises under **federal law**. (The facts about citizenship and the amount in controversy are irrelevant decoy ducks.)

**Example (not arising under federal law):** Railroad gave a married couple lifetime passes for free train rides in settlement of a claim. Subsequently, Congress passes a law forbidding railroads from providing free passes, so Railroad refuses to honor the couple's passes. The couple sues in federal court based on breach of contract, that the new federal law does not apply to them, and if it does, it is unconstitutional. Despite a federal law being involved in the dispute, the claim does **not arise under** federal law because the federal law does **not provide a right** that the plaintiffs are attempting to enforce. Quite the opposite, the federal law *voids* their right to free train rides. Thus, the plaintiffs do not have a federal question basis for jurisdiction.



**Decoy tip:** Be alert for questions with elaborate decoy duck facts about party citizenship and/or the amount in controversy, or an answer choice that seems appealing because it correctly points out that there is insufficient diversity or amount in controversy. If **federal question is the basis for SMJ**, those diversity facts are included to distract you and are irrelevant, as in the first example above.

2. **Diversity of citizenship jurisdiction:** Federal district courts have subject matter jurisdiction over actions (1) where the parties are **diverse (between citizens of different states)**, **and** (2) where the **amount in controversy exceeds \$75,000**. 28 U.S.C. §1332.

**MBE tip:** Diverse parties will most often be citizens from different states [Citizen (State X) v. Citizen (State Y)], but diverse parties also include:

- ◆ Citizen (State X) v. Foreigner (except if Foreigner is a permanent resident domiciled in the same state)
- ◆ Citizen (State X) v. Citizen (State Y) + Foreign additional party
- ◆ Foreign state/agency v. Citizen(s) (from any state)

- a. **Complete diversity of citizenship is required** at the time the action is commenced. No plaintiff may be a citizen of the same state as any defendant.

1. **Citizenship determination:**

- a. **Person:** A natural person's citizenship is determined by their **domicile**.

- i. **Person's domicile:** A person's domicile is the **state** where they are **physically present** (physical component) **and** have the **subjective intent** (mental component) to make their permanent home (intent to remain indefinitely). Each person can only have **one domicile** at a time.



**Decoy tip:** Both elements used to determine domicile (physical presence *and* a mental subjective intent) must be satisfied. In changing domicile, from one state to another state, a person retains their previous domicile until *both* elements are met. Look for facts of a person intending a permanent move who is not yet physically present in the new state; they retain their old domicile.

**MBE tip:** A U.S. citizen domiciled abroad is a U.S. citizen but is not considered a citizen of any particular state for determining diversity citizenship if they intend to remain abroad.

- ii. **Child's (minor's) domicile** is the same as their **parent's domicile** (e.g., a child away at boarding school has the domicile of their parent).

iii. **Legal representatives:** The citizenship of **minors, decedents, and incompetent** parties is determined by their **own citizenship**, *not* the citizenship of their legal representative (subject to the rule above for minors). 28 U.S.C. §1332(c)(2).

**Example:** An adult son (domiciled in state A) is killed in a car accident. His personal representative (one who can sue on behalf of an estate) is his mother (domiciled in state B). If his mother brings a wrongful death action on behalf of her son (not her own claim) against the driver of the other car (domiciled in state A) there will *not* be complete diversity of citizenship because the citizenship of the son at the moment of his death controls.

- b. **Corporation:** A corporation may be the citizen of **more than one** state. 28 U.S.C. §1332 (c)(1). A corporation is a citizen of both:
- i. **Every state of incorporation** (though often there is only one state); **and**
  - ii. The **one state** where the corporation has its **principal place of business** (PPB).
    - a. **Nerve center test:** The **principal place of business** is determined by the “**nerve center**” test and refers to the place where a corporation’s **officers direct, control, and coordinate the corporation’s activities**. Typically, this is where the corporation maintains its headquarters. This is not necessarily where the bulk of the physical operations are located.



**Decoy tip:** Questions often include decoy duck facts identifying the state where most of the physical corporate operations occur, or where most employees work, or where they conduct a substantial amount of business. These facts are irrelevant to determining the citizenship of a corporation for *diversity purposes* and are included to provide decoy answers.

- c. **Unincorporated associations** are citizens of **every state** in which **each partner/member is a citizen**, including limited and general partners. These are business entities that are not incorporated (e.g., partnerships, associations, LLCs, etc.). Diversity is defeated if *any* one partner shares citizenship with an opposing party.
  - d. **Alienage (foreign) citizenship included:** The “citizens of different states” requirement includes disputes **between a U.S. citizen *and* an alien** (foreign citizen), unless that alien is also a U.S. permanent resident sharing a domicile state with the opposing party. 28 U.S.C. §1332 (a)(2).
    - i. **Alienage restriction:** There is no federal jurisdiction for an action by an **alien against another alien**, unless there are also **U.S. citizens on both sides** of the controversy.
    - ii. **U.S. citizens domiciled abroad** may not use “alienage” jurisdiction for purposes of establishing diversity if they intend to remain abroad but are still citizens of the U.S. They are also not considered domiciled in any particular U.S. state if they intend to remain abroad.
  - e. **Class action:** Citizenship is determined by the citizenship of the **named class representative(s)**, not all members.
2. **Time of (lawsuit) filing determines citizenship.** The citizenship of the parties at the time the cause of action arose is irrelevant, as is a change of citizenship after filing the suit.

- a. **Except where the party “line-up” changes:** Where an actual **party is replaced** (e.g., because the wrong party was sued) through joinder or dismissal, subject matter jurisdiction will be **reassessed immediately** after the joinder or dismissal.

**Example:** There are two Ps; P1 from State A and P2 from State B. The D is from State A. If P1 voluntarily dismisses themselves from the action, the citizenship will immediately be reassessed, and now complete diversity will be met, and the case can proceed in federal court.

**MBE tip:** Diversity is determined at the time of filing, but if the parties change through joinder or dismissal, the claim is reassessed, so pay attention to any joinder issues that are tested with jurisdiction questions.

3. **One diverse claim is required:** Diversity is required as to one claim (the main claim), but it may be possible to add additional claims without complete diversity if “supplemental jurisdiction” extends. (See sec. I.B.4.)
4. **No collusive assignments allowed to create diversity:** A party may not assign their interest in a case improperly or collusively to create diversity to invoke subject matter jurisdiction. 28 U.S.C. §1359. Where one party has a claim, and they assign that claim to another and that assignee essentially functions as a debt collection agent, the assignment will be found to have been made collusively to invoke jurisdiction and is not allowed.

**Example:** Foreign Company A and foreign Company B have a contract dispute. Since they are both foreign citizens, they cannot sue each other in federal court. Foreign Company A assigned the contract cause of action (debt collection suit) to a U.S. lawyer in exchange for \$1 and the lawyer promised to pay 95% of the recovery back to foreign Company A. This is an improper assignment made collusively to obtain diversity jurisdiction and is not allowed.

- b. **The amount in controversy must exceed \$75,000**, not including attorney fees (unless recoverable by statute or contract), interest, and costs.



**Decoy tip:** The amount in controversy must *exceed* \$75,000 (e.g., \$75,000.01); not *equal* \$75,000.

1. **Aggregation:** Claims can be aggregated (add multiple claims together) to meet the \$75,000 amount in controversy requirement if there is **one plaintiff and one defendant**, or where there are **multiple plaintiffs** that share a **common undivided interest** or where there are multiple **joint tortfeasor** defendants and the claims are **common and undivided**.
- a. **One plaintiff v. one defendant:** P may aggregate all claims against a single D, even if the claims are unrelated.
- Example:** P (of State A) sues D (of State B) for \$10,000 for breach of contract, \$30,000 for negligence from a slip and fall accident, and \$40,000 for fraud. These three claims by one plaintiff against one defendant may be aggregated to meet the amount in controversy requirement even though the claims are unrelated.
- b. **No aggregation of claims asserted by or against multiple parties** (multiple Ps and/or multiple Ds), **except:**
- i. **Joint claims/liability cases only may aggregate.** Joint claims or joint liability are those claims with a **common undivided interest**, such as with joint tortfeasors where any one of the defendants could be responsible for the *entire*

loss. In joint claims/liability cases, several Ps may aggregate against one D, or one P may aggregate against several Ds.

For the examples below, assume the parties are diverse:

**Example (aggregate—several Ps and one D):** Four joint owners of a single piece of real property worth \$100,000 file an action against a defendant seeking to quiet title. The plaintiffs may aggregate their claims because they share a common undivided interest in the piece of property.

**Example (not aggregate—several Ps and one D):** Four pedestrian plaintiffs suffer \$25,000 each in damages when hit by a defendant in a single car accident. The plaintiffs cannot aggregate their claims against the defendant since each plaintiff has individual suits for injuries. Though the *cause* of their injuries is the same, and they coincidentally have claims in the same amount, their claims/interests are not common and undivided. Each plaintiff has their own individual unique claim (e.g., one pedestrian may have a broken leg and another a broken wrist).

**Example (aggregate—one P and several Ds):** One plaintiff has a car accident with two other drivers and suffers \$100,000 in damages. The plaintiff can aggregate claims against the two defendants since the plaintiff has *one total damages claim*, which is common and undivided because each defendant may be liable for the totality of the single claim.

**Example (not aggregate—one P and several Ds):** One plaintiff bought a home in disrepair from Seller and contracted with Builder to remodel the home. Plaintiff sues Seller for fraud for non-disclosure of electrical problems (\$50,000) and sues Builder for breach of contract (\$50,000). The plaintiff cannot aggregate the claims because these are two separate claims.

- c. **Counterclaims do not aggregate:** The value of any counterclaim cannot be aggregated with the original claim to meet the exceeding \$75,000 requirement.

**Example:** If a plaintiff has a breach of contract claim for \$50,000 and the defendant has a counterclaim for \$40,000, the claims cannot be aggregated to meet the excess of \$75,000 threshold and the amount in controversy will not be satisfied for diversity SMJ.

2. **“Legal certainty” test:** A plaintiff’s **good faith** claim for the amount in controversy will be sufficient unless it appears to a **legal certainty at the time of filing** that the plaintiff cannot recover over \$75,000.



**Decoy tip:** If the ultimate award in a case ends up being \$75,000 or less, it has no effect on the legitimacy of jurisdiction (since it is assessed at the time of filing), but this often provides the basis for a decoy answer.

3. **Valuation of equitable relief claims:** Courts will evaluate equitable claims, such as an injunction, based on the **value of the harm** caused. Jurisdictions are split, but the court can assess this from the point of view of the plaintiff or defendant, and either test can be utilized to satisfy the amount in controversy requirement.

- a. **Harm to plaintiff:** The act causing the need for injunctive relief must **harm** the plaintiff in an amount that exceeds \$75,000.

**Example:** Plaintiff (of State A) sues Neighbor (an absentee owner domiciled in State B) to enjoin him from building a home that will block Plaintiff’s view, in violation of a covenant. If the blocked view will reduce Plaintiff’s property value by \$100,000, the amount in controversy is satisfied since that is the valuation of the harm.

- b. **Cost to defendant:** The **cost** to the defendant to comply with the injunction exceeds \$75,000.

**Example:** Using the same example as above, assume Neighbor has already started building in violation of the covenant and it will cost him \$80,000 to tear down the building to comply with an injunction, the amount in controversy is satisfied since that is the cost of compliance for the defendant.

3. **Federal courts cannot hear a claim without proper subject matter jurisdiction** because federal courts do not have the authority to hear claims outside their jurisdiction.
- a. **No waiver:** A party cannot waive subject matter jurisdiction. A case without subject matter jurisdiction must be dismissed. FRCP 12(h)(3).
  - b. **Improper SMJ can be raised at any time in the proceedings**, even on appeal. If subject matter jurisdiction was lacking on a case that endured years of litigation and went to trial, the judgment will still be set aside.
  - c. **Courts must raise SMJ sua sponte** (on its own initiative) **if improper**, even if a party does not raise the issue.
  - d. **Exceptions to federal subject matter jurisdiction:** Federal courts will not hear actions involving **family law or probate** matters, such as issuance of divorce, alimony or child support, or to probate an estate.

**MBE tip:** Always affirmatively look for SMJ. It is always required and may arise in questions about other matters (e.g., intervention, removal and remand, issue or claim preclusion, etc.), but the question may hide the ball by not mentioning the words “diversity” or “subject matter jurisdiction” at all to tip you off.



**Decoy tip:** A decoy answer may state an objection to subject matter jurisdiction was not timely. Since subject matter jurisdiction can be **raised at any time**, this will never be the correct answer.

4. **Supplemental jurisdiction** allows the extension of subject matter jurisdiction for an **additional claim(s)** that has been joined, that **does not itself invoke federal subject matter jurisdiction** (federal question or diversity), but **where the additional claim shares a common nucleus of operative fact** with a claim that *does* properly invoke federal subject matter jurisdiction, such that they should reasonably be tried together as part of the same **case or controversy**. This includes claims involving **joinder** or **intervention** of **additional parties**. 28 U.S.C. §1367(a).
- a. **Common nucleus of operative fact (CNOF):** This includes claims that arise from the **same transaction or occurrence** as the underlying (anchor) claim and extends even more broadly to claims with a “loose factual connection.”
    - 1. **Federal question case:** Supplemental jurisdiction is allowed so long as there is a common nucleus of operative fact between the federal question claim and the state law claim.
    - 2. **Diversity only case limitation:** There are limits to supplemental jurisdiction in diversity cases. The **plaintiff** may not use supplemental jurisdiction to overcome a lack of diversity (**but the defendant can!**) 28 U.S.C. §1367(b). **Supplemental jurisdiction is not allowed** over claims:

- a. By a **plaintiff against persons made parties** under:
  - i. **FRCP 14** (third-party claims/impleader, meaning one who may be liable to a defending party in the original action);
  - ii. **FRCP 19** (required joinder/indispensable party);
  - iii. **FRCP 20** (permissive joinder); or
    - a. **Exception:** Supplemental jurisdiction will apply if a new plaintiff (new party joined under FRCP 20) sues **one** defendant and the amount in controversy does not meet the minimum for their claim, but they **must still be diverse**. This new plaintiff's claim can essentially piggyback on the original claim of the original plaintiff where there was subject matter jurisdiction.
 

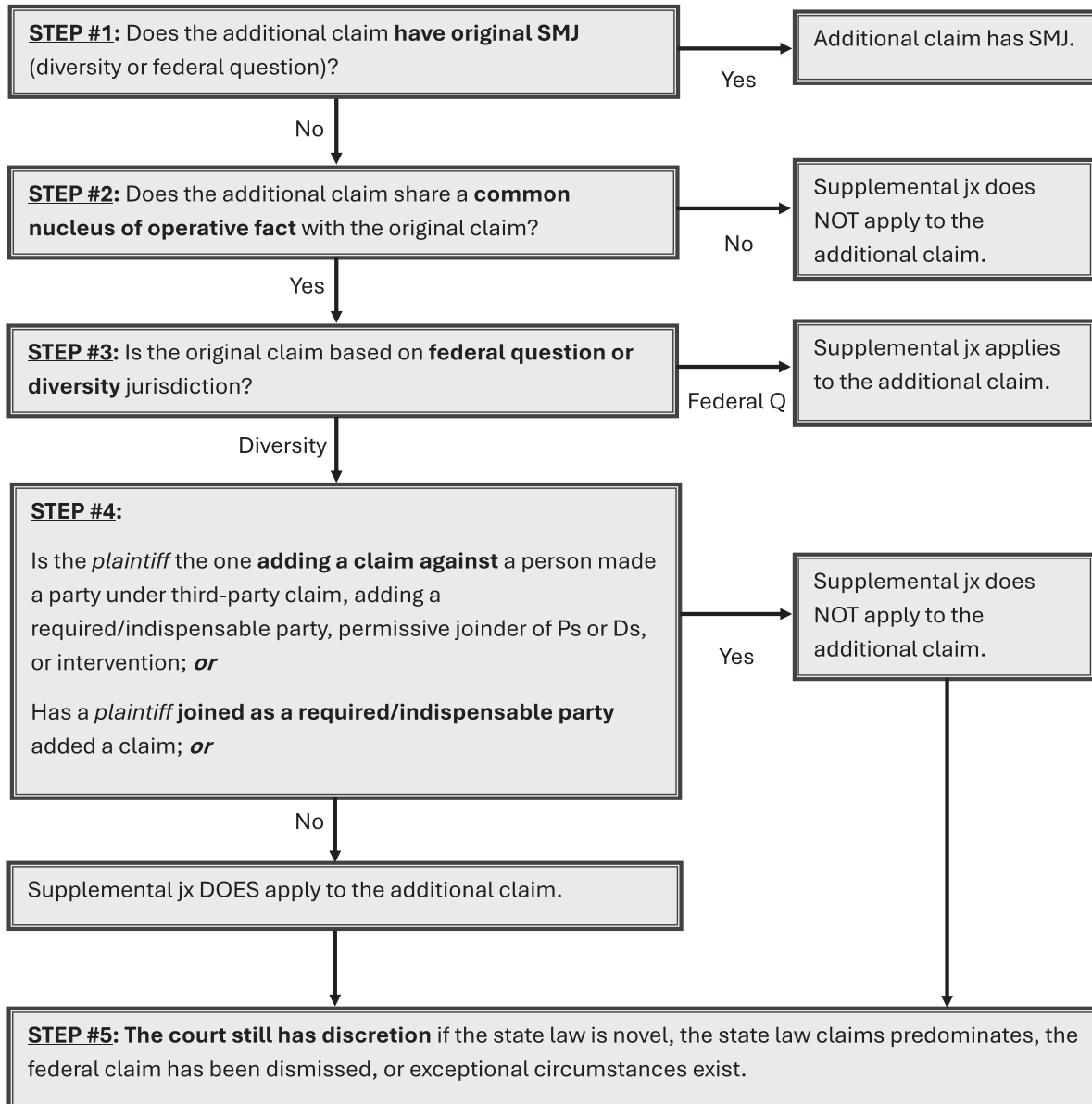
**Example:** P (of State A) sues D (of State B) in federal court for a car accident (negligence) resulting in \$100,000 in damages. Another P (P2) (of State A) was also injured in the accident as a pedestrian but only suffered \$50,000 in damages. Because P2's injuries arose from the same CNOF, they can later join the lawsuit under FRCP 20 and use supplemental jurisdiction even though they are a new P joining under FRCP 20 and don't meet the amount in controversy (note they are still diverse from D). This is based on a case-made exception to 28 U.S.C. §1367(b).
  - iv. **FRCP 24** (intervention by absentee party), or
- b. By a proposed **plaintiff to be joined** under FRCP 19 (required joinder/indispensable party), and
- c. By a proposed **plaintiff absentee person** (not a party) **seeking to intervene** under FRCP 24 (intervention).
3. **Plaintiff only limitation:** The plaintiff-only limitations noted only apply to plaintiffs. A defendant or third-party defendant does not become a "plaintiff" for purposes of 28 USC §1367(b) by also asserting a claim.
- b. **Court has discretion** to deny supplemental jurisdiction in certain situations. 28 U.S.C. §1367(c). The court may deny supplemental jurisdiction where:
  1. **State law claim is novel** or complex;
  2. **State law** claim is likely to **predominate** over the federal claim;
  3. **Federal claim has been dismissed** (but if the state claim is so related to the dismissed federal claim the court *may* still hear it); or
  4. **Exceptional circumstances** (i.e., an ongoing state proceeding).

**Example:** Where the original claim has been dismissed for failure to state a claim fairly early in the proceedings, the court would likely dismiss an additional claim that only had supplemental jurisdiction. However, where a state claim is so closely related to a federal claim, such as a lawsuit involving bank interest charges that give rise to both federal banking laws and state contracts laws, the court can dismiss the federal claim and still hear the state claim, even if the amount in controversy isn't met for the state claim, because the state law claim is so closely related to the federal claim.

**SUPPLEMENTAL JURISDICTION DECODED**

Solving MBE questions with more than one claim: All claims must have SMJ. Either on its own merit (original SMJ) or through supplemental jurisdiction (jx).

To solve these questions, use the following approach:



| Supplemental Jurisdiction Allowed                                                                                                                         | Supplemental Jurisdiction NOT allowed<br>(Diversity only cases)                                                                                                                                                                                                                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>◆ Compulsory counterclaims</li> <li>◆ Compulsory counterclaims w/ addl. parties</li> <li>◆ Cross claims</li> </ul> | <ul style="list-style-type: none"> <li>◆ Permissive counterclaims (no CNOF)</li> </ul>                                                                                                                                                                                                            |
| <ul style="list-style-type: none"> <li>◆ TPP v. TPD</li> <li>◆ TPD v. TPP</li> <li>◆ D impleads TPD</li> </ul>                                            | <ul style="list-style-type: none"> <li>◆ Original P v. TPD</li> <li>◆ Co-P and/or co-D joined by P to solve lack of <i>diversity</i> (FRCP 20)</li> <li>◆ Original P v. intervening P or D</li> <li>◆ P joined as required/indispensable P</li> <li>◆ Intervening P v. original P or D</li> </ul> |
| <ul style="list-style-type: none"> <li>◆ P2 (AIC too low) joins P1 (AIC ok) against one D if diversity not destroyed (FRCP 20/case law)</li> </ul>        | <ul style="list-style-type: none"> <li>◆ Multiple Ps joined to jointly satisfy <i>amount in controversy</i> requirement (FRCP 20) but end up defeating diversity</li> </ul>                                                                                                                       |
| <b>MBE tip:</b> These concepts are difficult to conceptualize. The best way to understand how they apply on the MBE is to do practice questions.          |                                                                                                                                                                                                                                                                                                   |

5. **Removal from state to federal court:** A **defendant may remove** a case to federal court that was originally filed in state court where the case **could have properly been brought** in federal court in the first place. 28 U.S.C. §1441. A removal is “of right,” meaning the court simply accepts the case (no motion is needed for the court to approve a removal). (This process is similar to a case transfer, but transfers apply *within* the same court system, and since the movement here is from state court to federal court, the correct term is “remove.”)

a. **Only defendants are eligible to remove** cases, and **all defendants must agree** to the removal.

**Example:** A plaintiff (from State A) sues a defendant (from State B) in State B court for federal copyright infringement in the amount of \$100,000. The defendant may remove to federal court because this is a federal question claim (federal copyright) that should have originally been brought in federal court. (The same removal rule would apply if the claim were based in diversity jurisdiction.)

1. **Plaintiffs may not remove** to federal court even if plaintiff’s circumstances change or the defendant files a counterclaim in state court that the original plaintiff would prefer to be heard in federal court.

2. **Waiver by litigating in state court:** A defendant who opts to litigate in state court (e.g., defendant files a permissive counterclaim, or engages in discovery) *before* removal may waive the right to remove to federal court.

b. **Time limit of 30 days:** The defendant must remove no later than 30 days after **service of the first “removable” document**, which means the document from which the grounds for removal become apparent. Typically, this is service of process of the initial complaint, but not always. Each defendant gets their own 30-day window and previously served defendants can join. (See example below under the one-year time limit section.)

c. **Limitations on removal for diversity cases only.** The limitations below only apply to cases where the basis for federal subject matter jurisdiction is **diversity** and do not apply if the basis is federal question jurisdiction.

1. **In-state defendants excluded** (also called the “**home state defendant**” rule): The defendant may not remove to federal court if **any defendant** is a citizen of the forum state in which the original state action is pending.