Prof. Rogelio Lasso

I. INTRODUCTION

Multiple choice questions in law school bear little resemblance to the multiple choice questions students are likely to have encountered in undergraduate school. I base the multiple choice questions in my final exams on multiple choice questions from old multistate bar examinations. As anyone who has taken the bar can tell you, the multiple choice questions in the multistate section are very difficult. Most law graduates who do not pass the bar exam the first time, fail to pass because they score too low on the multistate, multiple choice questions.

Multiple choice questions in the bar exam are difficult for several reasons. The factual scenarios are often complex and some of the options for answers are hard to distinguish from one another. The questions and the answers often contain distracting information designed to lure the reader from the real focus of the question. To do well in these type of multiple choice questions, students must not only thoroughly understand the applicable substantive law being tested in a given question, but must also have developed sharp reasoning skills, and must understand the unique way in which these multiple-choice questions are asked.

I believe you are less likely to be ambushed by the multistate bar exam if you are familiar with the type and degree of difficulty of its questions early during law school. For that reason, a significant portion of my final exams consist of multiple choice questions modeled after the bar questions.

This document is designed to provide you with basic information about law school multiple-choice questions.

II. TERMINOLOGY OF MULTIPLE CHOICE QUESTIONS

- A. Questions or items (many forms)
- B. Multiple Choice Questions have Three Distinct Parts: Root (facts); Stem (question); and Options (answers)
- C. Root (Underlying Facts)
 - 1. Written in either present or past tense
 - 2. Can be short or very long
 - 3. Can have one set of options or several
 - 4. All the facts can be significant or many can be irrelevant
- D. Stem (question)
 - 1. Call of the Options or the task to be done
 - 2. Form of a question or a call for the completion of a sentence
 - 3. Can add facts to the root
 - 4. May require assumptions to be made
 - 5. May specify what cause of action or theory to advance; may not
- E. Options (Choices given as answers)
 - 1. May state conclusions only
 - 2. may link conclusion with a reason to support it
 - 3. options may seem related

4. options may be totally independent

III. SAMPLE MULTIPLE CHOICE QUESTION

ROOT

Philip was a 10-year-old boy. Macco was a company that sold new and used machinery. Macco stored discarded machinery, pending sale for scrap, on a large vacant area it owned. This area was unfenced and was one-quarter mile from the housing development where Philip lived. Macco knew that children frequently played in the area and on the machinery. Philip's parents had directed him not to play on the machinery because it was dangerous. One day Philip was playing on a press in Macco's storage area. The press had several wheels, each geared to the other. Philip climbed on the larger wheel, which was about five feet in diameter. Philip's weight caused the wheel to rotate, his foot was caught between two wheels that were set into motion, and he was severely injured. A claim for relief was asserted by Philip through a duly appointed guardian. Macco denied liability and pleaded Philip's contributory fault as a defense.

STEM (question)

In determining whether Macco breached a duty to Philip, which of the following is the most significant?

OPTIONS

- (A) Whether the press on which Philip was injured was visible from a public way
- (B) Whether the maintenance of the area for the storage of discarded machinery was a private nuisance
- (C) Whether the maintenance of the area for the storage of discarded machinery was a public nuisance
- (D) Whether Macco could have eliminated the risk of harm without unduly interfering with Macco's normal operations.

IV. GENERAL CHARACTERISTICS OF MULTIPLE CHOICE QUESTIONS

- A. very flexible form of objective testing
 - 1. almost as flexible as the essay
 - 2. any essay item can be converted into a multiple choice.
- B. can be made more or less sophisticated
 - 1. adjusting the complexity of the factual root
 - 2. changing the manner in which the call of the guestion is worded, and
 - 3. by posing options which are either complex and close or simple and more clearly discernible.

V. DISTRACTORS AND FOILS

A. Introduction

- 1. Wrong Options are called Distractors or foils
- 2. A Distractors is something which compellingly and confusingly attracts in the wrong direction
- 3. Foil is something which serves to set off another thing to advantage or disadvantage by contrasting with it.
- 4. Game is played this way: typical questions
 - a. Should test knowledge and reasoning
 - b. Shouldn't be obvious
 - c. Shouldn't use tricky devices or puzzling language
 - d. Often use Distractors and foils
- 5. All the options are designed to give a look of superficial plausibility. Read them carefully!

Following are some potential pitfalls in multiple-choice questions and suggested approaches to deal with them:

B. Incomplete definitions and arguments in the option

Option states: Murder is the unjustified killing of a human being.

This is likely the wrong option because

Murder is the unjustified killing of a human being with malice or forethought.

- 1. Don't complete the definition or argument in your mind and conclude that the incomplete option is correct.
- C. Deal with the Facts given
 - 1. Assume nothing in addition to what has been established or given.
 - E.g. Prosecutor proves that John shot Mary and that Mary died an hour later. Is John guilty of murder?
 - No: Must also prove that John's bullet caused Mary's death. The facts, as given, do not demonstrate murder.
 - 2. Don't ignore facts in the question!
 - We have been taught that an intoxicated person cannot usually drive a car in a reasonable manner. The root (question) states that although Mary drank two quarts of whiskey, she was driving her car in a reasonable manner when she collided with Paul. Was Mary negligent?
 - No: Negligence is unreasonable conduct, since you were told that she was driving her car in a reasonable manner, you must conclude that she was not negligent.

D. Common Errors

- 1. Wrong options are often based on common errors previously made by students.
- 2. Misunderstanding about the significance of legal expressions
 - a. Plaintiff goes to sleep in the middle of the road and is struck by defendant who sees her in time but fails to take reasonable steps to avoid striking her.
 - (1) Defendant wins because plaintiff had the last clear chance
 - (a) NO: Doctrine of last clear chance applies only to plaintiff

E. Overlooking the Obvious

1. Sometime the option is so obviously correct that there is no rational excuse for missing it. Don't ignore an obviously correct answer.

F. Plausible Creations

- 1. Ignore meaningless garbage: Post Hoc Ergo Propter Hoc
- a. after which, therefore because of which is the name given to the error in reasoning
- b. E.g. wrong option would state "it always rain after I wash my car, so washing my car makes it rains."
- 2. Double talk
- a. A plaintiff could not be the holder of a certain easement because "an incorporeal hereditament lies only in grant."
- 3. Doctrine or Rule never heard of means its probably incorrect.

G. Unfamiliar phrases

- 1. Multiple Choice (MC) questions may use familiar concepts in non traditional words.
- a. Instead of saying: "John owed Mary a duty of reasonable care only if he created a foreseeable risk to her."
- b. A correct option May say: "John had no obligation to Mary unless it appeared that John's conduct would injure her."
- 2. remember substance is more important than form.

VI. PLAY THE RIGHT ROLE

- A. Roles assigned in the stem may vary from Judge, Advocate, or Scholar.
- B. When you are asked to act as the Judge:
 - 1. E.g. "If John sues Mary for battery, the court should find in favor of.. "
 - 2. Start out with no particular result or conclusion in mind.
 - 3. Do not decide questions of facts.
 - 4. Be alert for misstatements about facts in lawyers arguments.
 - 5. Do not try to resolve the issue until you have considered all the arguments presented in the options.
 - 6. Examine each option in turn.
 - a. Are facts and law accurately stated?
 - b. Is conclusion offered consistent with the argument advanced?
 - 7. The correct option is the one where the argument advanced is based on accurate statements of fact and law and is consistent with the conclusion offered.
 - a. Select it, even though you may not like the result.
- C. When you are asked to act as an Advocate:
 - 1. E.g. "Which of the following is the most effective argument in favor of Mary's position?"
 - 2. Examine each option in turn.
 - a. Is the law accurately stated?
 - b. Are the inferences on which it is based justified by the facts given?
 - c. Could the argument result in victory for the client?
 - 3. The correct option is the one where the argument advanced is based on accurate statements of fact and law and is consistent with the conclusion offered.
 - a. Select it, even though you don't really believe that your client can win.
- D. When you are asked to act as a scholar:

- 1. E.g. "The interest in Blackacre which John had on the day after Testatrix's death is best described as a .."
 - 2. Don't try to decide or influence the outcome
- 3. Use your knowledge of the law to recognize the legal significance of a particular fact or to select the most applicable rule
 - 4. Focus on a specific and limited issue
- 5. Resolve the issue in your mine and then examine each of the options carefully and select the one which comes closest to the select you have already formulated.
 - a. Select it, even though you don't really believe it's just.

VII. STRATEGIES AND TACTICS IN RESOLVING MULTIPLE CHOICE QUESTIONS

- A. Remember who will be tripped up on Multiple Choice Questions
 - 1. Panickers; People operating by instinct; and/or People who are unprepared and don't know the law.
 - 2. Panickers
 - a. Panic inhibits memory from operating.
 - b. Panic leads to failure to read carefully.
 - 3. People operating by instinct
 - a. Multiple Choice questions are designed to apply legal principles to factual situations in a rational, disciplined manner.
 - b. instinct will cause you to:
 - (1) overlook stated facts;
 - (2) let emotion take precedent over reasoning.
 - 4. People who are unprepared and don't know the law
 - a. Multiple Choice questions require that you know the materials very well.
 - b. Unlike undergraduate, purely guessing at these questions is a high-risk proposition.

VIII. HOW TO ANALYZE MULTIPLE CHOICE QUESTIONS

- A. Analyzing the facts of the questions
 - 1. Read Carefully: Read the stem (facts) first.
 - 2. Don't Assume Facts.
 - 3. Choose the simple interpretation: Don't make more complex than they really are.
 - 4. Trigger factors to watch for in reading MC Questions.
 - a. Statutes
 - (1) conflicting common law rules, and no one majority;
 - (2) see if you will ignore instinct;
 - (3) read the statute carefully and apply it mechanically.
 - b. Pay special attention to seemingly meaningless details about people.
- B. Handling the specific inquiry in each question
 - 1. Reword the inquiry
 - a. What is the most likely outcome?
 - (1) What will be the most probable result and why?
 - b. Which claim is most likely to succeed?
 - (1) Which is the only claim that can succeed on these facts--and why?
 - c. What is Defendant's best defense?
 - (1) What would prevent the defendant from losing on these facts?

- d. If party X loses, the most likely basis for the judgment is that ...
 - (1) Party X lost because ..
- 2. Summon the applicable test or concept immediately before reading the options
 - a. helps prevent you from being seduced into choosing a Distractors
- C. Analyzing Responses the process of elimination
 - The best, and sometimes only, way to arrive at the correct answer is to use a process of elimination. Simply put, you arrive at the correct answer by eliminating from contention those which cannot be correct.
 - 2. How to eliminate incorrect responses.
 - a. Issue-spotting is very important!
 - (1) Spot the issues in the facts themselves and be sensitive to nuances in responses
 - (2) Don't be tempted into believing that you won't need to spot issues.

 Although you are working with a limited universe, one of the options must identify and resolve a central issue.
 - (3) You can use the responses to help identify what the central issue in the problem must be.
 - (a) break the options down into their theoretical bases,
 - (b) if the option is true what rule of law does it promote.
 - b. Be meticulous in your reading of alternatives
 - (1) Glance at the modifier quickly, then study the reasoning and finally there result
 - (2) if the reasoning is not correct than the response cannot be correct.
 - (3) Dealing with (common) modifiers.
 - (a) because, since, as: the answer can only be correct if:
 - i) the reasoning addresses and resolves a central issue or at least a more central issue than the other response
 - ii) the facts in the question completely *unequivocally* satisfy the reasoning
 - if the reasoning says "because he was drunk," the facts must state or infer unequivocally that he was drunk
 - iii) the result is consistent with the reasoning
 - if the reasoning states because the statement was an admission by a party opponent than the result must be admissible
 - (b) **If, as long as**: the answer can only be correct if:
 - i) reasoning need only be *plausible* under the facts
 - ii) the reasoning must address a central issue
 - ii) the result and the reasoning must agree
 - (c) Unless: the answer can only be correct if:
 - i) reasoning is the only way the result cannot occur
 - a) if you think of even one way that the result might come about the response cannot be correct.
 - 3. How an option may be wrong
 - a. Three ways:
 - (1) it mischaracterizes the facts;
 - (2) it misstate the law;
 - (3) it ignores a central issue.

- b. If an option does any one of the three, you can stop your analysis, eliminate it and move on.
- c. In order to be correct, option must be correct in every respect.
- d. The Reasoning mischaracterizes the facts
 - (1) blatant contradiction
 - (2) goes beyond the facts
 - (3) assumes as true a fact in dispute
- e. The Reasoning is legally wrong.
 - (1) Overstates the requirements of the law
 - (2) Antiquated rules and those from inapplicable body of law
 - (3) Rules that do not apply to the fact
 - (4) Over inclusive statements of the law which happen to be correct on the facts
 - (5) Overstate or understate the applicable legal standard
 - (6) CAVEAT: Options stating only a snippet of a legal rule may okay if the snippet addresses the central issue and there is no more complete option.
- f. An option can be wrong because, although it is factually and legally correct, it is not as precise or effective as another option.
 - (1) An option that is easier to prove is more likely to be correct than an option that is difficult to prove.
 - (2) A more precise answer is better than a less precise answer:
 - (a) addresses the factual situation in more respects than another option;
 - (b) addresses more issues in a fact pattern than another option does.
- D. How to guess intelligently when your reasoning fails you:
 - 1. Don't be lured into unsophisticated guessing.
 - 2. Ignore some things you already know about objective tests: don't waste your time searching for lapses in test construction.
 - 3. Don't guess until you've eliminated all the definitely wrong responses.
 - 4. Factors that should influence your guess:
 - a. Look at the facts and ask yourself, so what? The issue that jumps out is likely to be the issue that the correct response addresses.
 - b. Beware of Distractors, foils, seducers.
 - c. Beware of certainties: always, never, cannot must.
 - d. Beware of responses that rely on relationships between people.
 - e. Beware of focusing on results.
 - f. Be wary of answer choices from unrelated subjects or unstudied theories.
 - g. If two answers are opposites one is probably true.
 - h. Look for a common issue, if you are asked to argue both ways.
 - i. Remember the rules of minority jurisdictions.
 - i. Don't get bogged down on things you don't know.

IX. HOW TO TAKE MULTIPLE CHOICE TEST

A. Be prepared physically and mentally.

(Prepare well, get enough rest, eat well, etc.)

- B. Timing: Figure how much time you have per question and stick to a schedule.
 - 1. For example, on the MBE (Multi-State Bar) you need to finish 17 questions per half

hour to complete the exam.

- 2. In my exams, I allot 5 minutes per question. Some will take you much less time, some will take you a little longer.
- C. Write in the exam book the issues, key facts, etc.
- D. Don't skip questions.
- E. Answer questions in an episodic fashion (individually). Don't let one question influence the next.
- F. Maintain your concentration.

X. VARIETIES IN FORM OF MULTIPLE CHOICE ITEMS

- A. Very wide variety of forms for multiple choice items
- B. Most significant form types
 - 1. Simple fact pattern
 - 2. Complex fact pattern
 - 3. Two tier options
 - 4. Overlapping options
 - 5. Complex two tier options
 - 6. Question Series
 - 7. Common option series

C. Illustration B1: Simple Fact Pattern

John was fired from his job. Too proud to apply for unemployment benefits, he used his savings to feed his family. When one of his children became ill, he did not seek medical attention for the child at a state clinic because he did not want to accept what he regarded as charity. Eventually, weakened by malnutrition, the child died as a result of the illness. John has committed:

- (A) murder
- (B) involuntary manslaughter
- (C) voluntary manslaughter
- (D) no form of criminal homicide

D. Illustration B2: Complex Fact Pattern

Homer and Purcell entered into a valid, enforceable written contract by which Homer agreed to sell and Purcell agreed to purchase Blackacre, which was Homer's residence. One of the contract provisions was that after the closing Homer had the right to remain in residence at Blackacre for up to 30 days before delivering possession to Purcell. The closing took place as scheduled. Title passed to Purcell and Homer remained in possession. Within a few days after the closing, the new house next door which was being constructed for Homer was burned to the ground, and at the end of the 30-day period Homer refused to move out of Blackacre; instead, Homer tendered to Purcell a monthly rental payment in excess of the fair rental value of Blackacre. Purcell rejected the proposal and that day brought an appropriate action to gain immediate possession of Blackacre. The contract was silent as to the consequences of Homer's failure to give up possession within the 30-day period, and the jurisdiction in which Blackacre is located has no statute dealing directly with this situation, although the landlord-tenant law of the jurisdiction requires a landlord to give a

tenant 30 days notice before a tenant may be evicted. Purcell did not give Homer any such 30-day statutory notice. Purcell's best legal argument in support of his action to gain immediate possession is that Homer is a:

- (A) trespasser ab initio
- (B) licensee
- (C) tenant at sufferance
- (D) tenant from month to month

E. Illustration B3: <u>Two Tier Options</u>

On March 1, Zeller orally agreed to sell his land, Homestead, to Byer for \$46,000 to be paid on March 31. Byer orally agreed to pay \$25,000 of the purchase price to Quincy in satisfaction of a debt which Zeller said he had promised to pay Quincy.

On March 10, Byer dictated the agreement to his secretary but omitted all reference to the payment of the \$25,000 to Quincy. In typing the agreement, the secretary mistakenly typed in \$45,000 rather than \$46,000 as the purchase price. Neither Buyer nor Zeller carefully read the writing before signing it on March 15. Neither noticed the error in price and neither raised any question concerning omission of the payment to Quincy. 35. In an action by Quincy against Byer for \$25,000, which of the following is (are) correct?

- I. Byer could successfully raise the Statute of Frauds as a defense because the Byer-Zeller agreement was to answer for the debt of another.
- II. Byer could successfully raise the Statute of Frauds as a defense because the Byer-Zeller agreement was for the sale of an interest in land.
 - (A) I only
 - (B) II only
 - (C) Both I and II
 - (D) Neither I nor II

F. Illustration B4: Overlapping Options

Defendant was tried for robbery. Victim and Worth were the only witnesses called to testify. Victim testified that Defendant threatened her with a knife, grabbed her purse, and ran off with it. Worth testified that he saw Defendant grab Victim's purse and run way with it but that he neither saw a knife nor heard any threats. On this evidence the jury could properly return a verdict of guilty of:

- (A) robbery only
- (B) larceny only
- (C) either robbery or larceny
- (D) both robbery and larceny

G. Illustration B5: Complex Two Tier Options

In a lawsuit by Norma against Harriet to recover \$750 as a brokerage fee, which of the following arguments would effective support Harriet's position?

- I. Harriet made no promise to pay such a fee.
- II. Even if it be assumed <u>arguendo</u> that Harriet made a promise to pay such a fee, there was no bargained-for consideration for the promise.
 - III. There was no effective offer and acceptance between Norma and Harriet.
 - (A) I and II only

- (B) I and III only
- (C) II and III only
- (D) I, II, and III

H. Illustration B6: Question Series

Questions 53-55 are based on the following fact situation.

Harry met Bill, who was known to him to be a burglar, in a bar. Harry told Bill that he needed money. He promised to pay Bill \$500 if Bill would go to Harry's house the following night and take some silverware. Harry explained to Bill that, although the silverware was legally his, his wife would object to his selling it.

Harry pointed out his home, one of a group of similar tract houses. He drew a floor plan of the house that showed the location of the silverware. Harry said that his wife usually took several sleeping pills before retiring, and that he would make sure that she took them the next night. He promised to leave a window unlocked.

Everything went according to the plan except that Bill, deceived by the similarity of the tract houses, went to the wrong house. He found a window unlocked, climbed in and found silver where Harry had indicated. He took the silver to the cocktail lounge where the payoff was to take place. At that point the police arrested the two men.

- 53. If Harry were charged with burglary, his best argument for acquittal would be that:
- (A) there was no breaking
- (B) he consented to the entry
- (C) no overt act was committed by him
- (D) there was no intent to commit a felony
- 54. Bill's best argument for acquittal of burglary is that he:
- (A) acted under a mistake of law
- (B) had the consent of the owner
- (C) reasonably thought he was in Harry's house
- (D) found the window unlocked

I. Illustration B7: Common Option Series

Question 31 and 32 each describe an offense. Select from the choices (A-D) the most serious offense of which the defendant could be properly convicted.

- (A) involuntary manslaughter
- (B) voluntary manslaughter
- (C) murder
- (D) none of the above
- 31. Defendant, an avid fan of his home town football team, shot at the leg of a star player for a rival team, intending to injure his leg enough to hospitalize for a few weeks, but not to kill him. The victim died of loss of blood.
- 32. Defendant, a worker in a metal working shop, had long been teasing Vincent, a young colleague, by calling him insulting names and ridiculing him. One day Vincent responded to the teasing by picking up a metal bar and attacking Defendant. Defendant could have escaped from the shop. He parried the blow with his left arm, and with his right hand struck Vincent a blow on his jaw from which the young man died.

XI. VARIETIES IN NATURE OF THE QUESTION

There are four major varieties of multiple choice items when classified by the nature and thrust of the call of the question.

There are Items that call for:

- 1. the one correct answer;
- 2. the one incorrect answer;
- 3. the best answer (relative to the other options only); and
- 4. the <u>worst answer</u> (relative to the other options only).

A. One Correct Answer

- 1. Only one of the options is correct;
- 2. it is absolutely correct;
- 3. the remaining options are incorrect.
- 4. Each option can be read as a single item in a true/false cluster
 - a. with the added factor that the student knows that only one option is true while the other options are false.
- 5. Student may derive the correct answer either:
 - a. by knowing it when he sees it or
 - b. by the process of elimination (i.e., systematically eliminating incorrect or false options).
- 6. One Correct Answer: Illustration

Which of the following statements is most accurate?

- (A) Payment of Daniel of the \$100 was a condition precedent to Paul's duty of performance.
- (B) The performances of Paul and Daniel under the contract were concurrently conditional.
- (C) Payment by Daniel of the \$100 was a condition subsequent to Paul's duty of performance.
- (D) Performance by Paul under the contract was a condition precedent to Daniel's duty of payment of the \$100.

7. Illustration 2

In a collision case, Plaintiff offers in evidence a photograph showing the scene of the accident while the cars were still in place. A proper foundation must include, as a minimum, testimony by which of the following?

- (A) The photographer
- (B) A person who was present at the time the photograph was taken.
- (C) A person who observed the cars while they were still in place.
- (D) A person in whose custody the photograph has been since it was developed.

B. One Incorrect Answer Variety

1. A variation of the single correct answer.

- 2. The negative form of the question which asks the student to pick out the one false/incorrect statement from a set of options.
- 3. The remaining options, the Distractors, are correct statements.
- 4. The student can still use the process of elimination but this time, he/she eliminates the true statements.
- 5. One Incorrect Answer Variety: Illustration

Which of the following crimes is LEAST likely to result in a felony murder conviction if the victim dies during the perpetration of the crime?

- (A) rape
- (B) robbery
- (C) larceny
- (D) kidnaping

6. Illustration 2

Which of the following statements regarding the legal effect of Daniel's illness is LEAST accurate?

- (A) Daniel's illness and the related development excused Paul from his obligation to deliver the cards on or before December 15,
- (B) Prompt notice by Daniel to Paul of Daniel's recovery from illness was an implied condition of Paul's duty under the circumstances.
- (C) Paul was under a duty of immediate performance of his promise to deliver the cards, as of December 15, by reason of the express language of the contract and despite the illness of Daniel and the related developments.
- (D) Daniel's conduct after his illness constituted a waiver of the necessity of Paul's performing on or before December 15.

C. One Best Answer

- 1. most flexible and effective variety of multiple choice items
- 2. permits more subtle gradations of correct/incorrectness by simply asking the student to select the option which BEST responds to the interrogatory.
- 3. calls for relative judgments
- does not require the examiner to draft options which are absolutely true/correct and false/incorrect
- 5. Allows a wide variety of question types which can focus on various tasks and competencies such as:
 - a. Best, more likely or most probable results
 - b. Best reasoning supporting a stated result.
 - c. Best argument supporting a stated position or a particular party.
 - d. Best defense.
 - e. <u>applicable concept</u>--the concept, (e.g., crime, cause of action, doctrine) which best applies to a fact pattern or describes a stated result.
- f. Most helpful facts--the fact or facts which will MOST help a particular party or the success of a particular argument/position.
- g. Best of MOST EFFECTIVE tactic or approach.

6. Best Result Illustration

Roofer entered into a written contract with Orissa to repair the roof of Orissa's home, the repairs to be done "in a workmanlike manner." Roofer completed the repairs and took all of his equipment away, with the exception of a 20-foot extension ladder, which was left against the side of the house. He intended to come back and get the ladder the next morning. At that time, Orissa and her family were away on a trip. During the night, a thief, using the ladder to gain access to an upstairs window, entered the house and stole some valuable jewels. Orissa has asserted a claim against Roofer for damages for the loss of the jewels.

In her claim against Roofer, Orissa will

- (A) prevail, because by leaving the ladder Roofer became a trespasser on Orissa's property.
- (B) prevail, because by leaving the ladder Roofer created the risk that a person might unlawfully enter the house.
 - (C) not prevail, because the act of the thief was a superseding cause.
 - (D) not prevail, because Orissa's claim is limited to damages for breach of contract.

7. Best Reasoning Supporting a Stated Position:

Tess occupied an apartment in a building owned by Len. She paid rent of \$125 in advance each month. During the second month of occupancy, Tess organized the tenants in the building as a tenants' association and the association made demands of Len concerning certain repairs and improvements the tenants wanted. When Tess tendered rent for the third month, Len notified her that rent for the fourth and subsequent months would be \$200 per month. Tess protested and pointed u=out that all other tenants paid rent of \$125 per month. Thereupon, Len gave the required statutory notice that the tenancy was being terminated at the end of the third month. By an appropriate proceeding, Tess contests Len's right to terminate. If Tess succeeds, it will be because

- (A) a periodic tenancy was created by implication.
- (B) the doctrine prohibiting retaliatory eviction is part of the law of the jurisdiction.
- (C) the \$200 rent demanded violates the agreement implied by the rate charged to other tenants.
 - (D) the law implies a term of one year in the absence of any express agreement.

D. Best Argument Supporting a Stated Position or Particular Party

a. Illustration

Professor Merrill, in a lecture in her psychology course at a private university, described an experiment in which a group of college students in a neighboring city rushed out and washed cars stopped at traffic lights during the rush hour. She described how people reacted differently--with shock, joy, and surprise. At the conclusion of her report, she said, "You understand, of course, that you are not to undertake this or any other experiment unless you first clear with me." Four of Merrill's students decided to try the same experiment but not clear with Merrill.

One subject of their experiment, Carr, said, "I was shocked. There were two people on each side of the car. At first I thought negatively. I thought they were going to attack me

and thought of driving away. Then I quieted down and decided there were too many dirty cars in the city anyway."

Charitable immunity has been abolished in the jurisdiction.

If Carr asserts a claim against the students who washed his car, his best theory is

- (A) assault.
- (B) negligence.
- (C) invasion of privacy.
- (D) false imprisonment.

b. *Illustration*

Which of the following would be most important in deciding an action by Quincy against Byer for \$25,000?

- (A) Whether the Byer-Zeller agreement was completely integrated.
- (B) Whether Byer was negligent in not having carefully read the written agreement.
- (C) Whether Zeller was negligent in not having carefully read the written agreement.
- (D) Whether Quincy was a party to the contract.

c. Illustration

A state accredits both public and private schools, licenses their teachers, and supplies textbooks on secular subjects to all such schools. Country Schoolhouse, a private school that offers elementary and secondary education in the state, denies admission to all non-Caucasians. In the suit to enjoin as unconstitutional and continued racially exclusionary admissions policy of the Country Schoolhouse, which of the following is the strongest argument AGAINST the school?

- (A) Because education is a public function, the Country Schoolhouse may not discriminate on racial grounds.
- (B) The state is so involved in school regulation and support that the equal protection clause of the Fourteenth Amendment is applicable to the school.
- (C) The state is constitutionally obligated to climate segregation in all public and private educational institutions within the state.
- (D) Any school with teachers who are licensed by the state is forbidden to discriminate on racial grounds.

1. Best Defense

a. Illustration

Dexter, a physician, and Caroline, his patient, had sexual intercourse in his office. Caroline is a married woman and if charged with the crime of adultery, her best defense would be which of the following?

- (A) She promptly reported the incident to her husband, who condoned her conduct.
- (B) Dexter induced her to believe that a natural cure through sexual intercourse was best for her condition.
- (C) Dexter induced her to believe that she was pregnant, that childbirth would be dangerous to her life, and that he could abort the pregnancy by sexual intercourse.
 - (D) Dexter induced her to believe he was using a medical instrument.

b. *Illustration*

While negligently driving his father's uninsured automobile, 25-year-old Arthur crashed into an automobile driven by Betty. Both Arthur and Betty were injured. Charles, Arthur's father, erroneously believing that he was liable because he owned the automobile, said to Betty: "I will see to it that you are reimbursed for any losses you incur as a result of the accident." Charles also called Physician and told him to take care of Betty, and that he, Charles, would pay the bill.

Arthur, having no assets, died as a result of his injuries. Dodge, one of Arthur's creditors, wrote to Charles stating that Arthur owed him a clothing bill of \$200 and that he was going to file a claim against Arthur's estate. Charles replied: "If you don't file a claim against Arthur's estate, I will pay what he owed you."

In an action by Betty against Charles for wages lost while she was incapacitated as a result of the accident, which of the following would be Charles's best defense?

- (A) Lack of consideration
- (B) Mistake of fact as to basic assumption
- (C) Statute of Frauds
- (D) Indefiniteness of Charles's promise

2. Applicable Concept

a. Illustration

The strongest constitutional basis for the enactment of a federal statute requiring colleges and universities receiving federal funds to offer student aid solely on the basis of need is the

- (A) police power
- (B) war and defense power
- (C) power to tax and spend for the general welfare
- (D) power to enforce the privileges and immunities clause of the Fourteenth Amendment

b. Illustration

If Employee was cutting a sheet of plywood, and while he was doing so, the saw blade flew to pieces and severely cut Employee's arm, and if Employee asserts a claim against Storekeeper, the theory on which Employee is most likely to prevail is

- (A) strict liability in tort
- (B) express warranty
- (C) negligence, relying on res ipsa loquitur
- (D) negligence, relying on the sale of an inherently dangerous product

c. Illustration

Suppose that before closing, the house on the property had been totally destroyed by fire. In determining the rights of Sue and Peg, the court would most likely consider the doctrine of equitable

- (A) marshaling
- (B) sequestration
- (C) subrogation
- (D) conversion

d. Illustration

A state statute divides murder into degrees. First degree murder is defined as murder with premeditation and deliberation or a homicide in the commission of arson, rape, robbery, burglary or kidnaping. Second degree murder is all other murder at common law.

In which of the following situations in Defendant most likely to be guilty of first degree murder?

- (A) Immediately after being insulted by Robert, Defendant takes a knife and stabs and kills Robert.
- (B) Angered over having been struck by Sam, Defendant buys rat poison and puts it in Sam's coffee. Sam drinks the coffee and dies as a result.
- (C) Intending to injure Fred, Defendant lies in wait and, as Fred comes by, Defendant strikes him with a broom handle. As a result of the blow, Fred dies.
- (D) Defendant, highly intoxicated, discovers a revolver on a table. He picks it up, points it at Alice, and pulls the trigger. The gun discharges, and Alice is killed.

3. Most helpful facts

a. Illustration

Professor James said to Mary Digit, president of the X-L Secretarial Service, "Since you folks have done good typing work for me in the past, I promise to bring you the manuscript for my new book."

"When?" asked Mary Digit.

"First chapter next Monday," replied the Professor.

"Wouldn't that be nice," said Mary Digit.

The following Monday James, foregoing the services of another secretarial service brought chapter one to the X-L office but Mary Digit refused to take it, saying they were all booked up for three weeks.

Which of the following facts or inferences would be most helpful in an action by James against X-L?

- (A) "When" and "Wouldn't that be nice" implied a promise to type the manuscript.
- (B) James relied on Mary Digit's statement by bringing the manuscript to X-L.
- (C) X-L had done good work for James in the past.
- (D) James had foregone the services of another secretarial service.

b. *Illustration*

Philip was a 10-year-old boy. Macco was a company that sold new and used machinery. Macco stored discarded machinery, pending sale for scrap, on a large vacant area it owned. This area was unfenced and was one-quarter mile from the housing development where Philip lived. Macco knew that children frequently played in the area and on the machinery. Philip's parents had directed him not to play on the machinery because it was dangerous.

One day Philip was playing on a press in Macco's storage area. The press had several wheels, each geared to the other. Philip climbed on the larger wheel, which was about five feet in diameter. Philip's weight caused the wheel to rotate, his foot was caught between two wheels that were set into motion, and he was severely injured.

A claim for relief was asserted by Philip through a duly appointed guardian. Macco denied liability and pleaded Philip's contributory fault as a defense.

In determining whether Macco breached a duty to Philip, which of the following is the most significant?

(A) Whether the press on which Philip was injured was visible from a public way

- (B) Whether the maintenance of the area for the storage of discarded machinery was a private nuisance
- (C) Whether the maintenance of the area for the storage of discard machinery was a public nuisance
- (D) Whether Macco could have eliminated the risk of harm without unduly interfering with Macco's normal operations.

4. Most Effective Tactic of Approach

a. Illustration

Assume for the purpose of these questions that you are counsel to the state legislative committee that is responsible for real estate laws in your state.

The committee wants you to draft a statute governing the recording of deeds that fixes priorities of title, as reflected on the public record, as definitely as possible. Which of the following, divorced from other policy considerations, would best accomplish this particular result?

- (A) Eliminate the requirement of witnesses to deeds.
- (B) Make time of recording the controlling factor.
- (C) Make irrebuttable the declarations in the deeds that valuable considerations was paid.
- (D) Make the protection of bona fide purchasers the controlling factor.

5. One Worst Answer

- a. This negative variety of the above form will require the student to select the
- (1) WORST,
- (2) LEAST LIKELY/probable option or
- (3) the option that DOES NOT help, explain, or apply to the state problem.

b. One Worst Answer: Illustration

The committee wants you to draft legislation to make all restrictions on land use imposed by deeds (now or here-after recorded) unenforceable in the future so that public land-use planning through zoning will have exclusive control in matters of land use. Which of the following is LEAST likely to be a consideration in the drafting of such legislation?

- (A) Compensation for property rights taken by public authority
- (B) Impairment of contract
- (C) Sovereign immunity
- (D) Police power

c. Illustration

Potts sued Dobbs on a produce liability claim. Louis testified for Potts. On cross-examination, which of the following questions is the trial judge most likely to rule <u>improper</u>.

- (A) "Isn't it a fact that you are Potts' close friend?
- (B) "Isn't it true that you are known in the community as "Louie the Lush" because of your addiction to alcohol?"
 - (C) "Didn't you fail to report some income on your tax return last year?"
- (D) "Weren't you convicted, seven years ago in this court, for obtaining money under false pretenses?"

d. Illustration

A third state statute, enacted in 1880, makes criminal "the utterance in any public place of any blasphemy or sacrilege." Assume that there have been only a few recorded prosecutions under the 1880 statute. Doe is charged with violating its proscriptions. The charge is based wholly

on the speech he delivered on the steps of the Clinton State Capitol. Which of the following constitutional defenses to this prosecution under the 1880 statute would be the LEAST likely to succeed?

- (A) This statute is vague and, therefore, violates the due process clause of the Fourteenth Amendment.
- (B) This statute is an establishment of religion and, therefore, violates the due process clause of the Fourteenth Amendment.
- (C) Application of this statute to Doe denies him equal protection of the laws in violation of the Fourteenth Amendment.
- (D) Application of this statute to Doe denies him freedom of speech in violation of the Fourteenth Amendment.

1. Based on Michael Josephson, Evaluation and Grading in Law School (1984) and updates by Vernellia Randall and Rogelio Lasso.