

## 2009 MBE Specifications Outline

### Constitutional Law

The terms “Constitution,” “constitutional,” and “unconstitutional” refer to the federal Constitution unless indicated otherwise. Approximately half of the Constitutional Law questions for the MBE will be based on category IV, and approximately half will be based on the remaining categories, I, II, and III.

- I. The nature of judicial review
  - A. Organization and relationship of state and federal courts in a federal system
  - B. Jurisdiction
    1. Constitutional basis
    2. Congressional power to define and limit
    3. The Eleventh Amendment and state sovereign immunity
  - C. Judicial Review in operation
    1. The “case or controversy” requirement, including the prohibition on advisory opinions, standing, ripeness, and mootness
    2. The “adequate and independent state ground”
    3. Political questions and justiciability
- II. The separation of powers
  - A. The powers of Congress
    1. Commerce, taxing, and spending powers
    2. War, defense, and foreign affairs powers
    3. Power to enforce the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments
    4. Other powers
  - B. The powers of the president
    1. As chief executive, including the take care clause
    2. As commander-in-chief
    3. Treaty and foreign affairs powers
    4. Appointment and removal of officials
  - C. Federal interbranch relationships
    1. Congressional limits on the executive
    2. The presentment requirement and the president’s powers to veto or to withhold action
    3. Non-delegation doctrine
    4. Executive, legislative, and judicial immunities
- III. The relation of nation and states in a federal system
  - A. Intergovernmental immunities
    1. Federal immunity from state law
    2. State immunity from federal law, including the 10<sup>th</sup> Amendment
  - B. Federalism-based limits on state authority
    1. Negative implications of the commerce clause
    2. Supremacy clause and preemption
    3. Full faith and credit
    4. Authorization of otherwise invalid state action

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- IV. Individual rights
  - A. State action
  - B. Due process
    - 1. Substantive due process
      - a. Fundamental rights
      - b. Other rights and interests
    - 2. Procedural due process, including personal jurisdiction
  - C. Equal protection
    - 1. Fundamental rights
    - 2. Classifications subject to heightened scrutiny
    - 3. Rational basis review
  - D. Takings
  - E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws
  - F. First Amendment freedoms
    - 1. Freedom of religion and separation of church and state
      - a. Free exercise
      - b. Establishment
    - 2. Freedom of expression
      - a. Content-based regulation of protected expression
      - b. Content-neutral regulation of protected expression
      - c. Regulation of unprotected expression
      - d. Regulation of commercial speech
      - e. Regulation of, or impositions upon, public school students, public employment, licenses, or benefits based upon exercise of expressive or associational rights
      - f. Regulation of expressive conduct
      - g. Prior restraint, vagueness, and overbreadth
    - 3. Freedom of the press
    - 4. Freedom of association

### Contracts

Examinees are to assume that Articles 1 and 2 of the Uniform Commercial Code have been adopted and are applicable when appropriate. Examinees should assume that the 2001 revision to Article 1 has been adopted, but that the 2003 proposed amendments to Article 2 have not been adopted. Approximately 60 percent of the Contracts questions for each MBE will be based on categories I, VII, and VIII, and approximately 40 percent will be based on the remaining categories, II, III, IV, V, VI, IX and X. Approximately 25 percent of the Contracts questions for each MBE will be based on provisions of the Uniform Commercial Code, Articles 1 and 2.

- I. Formation of contracts
  - A. Mutual assent
    - 1. Offer and acceptance

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2. Mistake, misunderstanding, misrepresentation, nondisclosure, confidential relationship, fraud, undue influence, and duress
  3. Problems of communication and “battle of the forms”
  4. Indefiniteness or absence of terms
- B. Capacity to contract
  - C. Illegality, unconscionability, and public policy
  - D. Implied-in-fact contract and quasi-contract
  - E. “Pre-contract” obligations based on detrimental reliance
  - F. Express and implied warranties in sale-of-goods contracts
- II. Consideration
- A. Bargain and exchange
  - B. “Adequacy” of consideration: mutuality of obligation, implied promises, and disproportionate exchanges
  - C. Modern substitutes for bargain: “moral obligation,” detrimental reliance, and statutory substitutes
  - D. Modification of contracts: preexisting duties
  - E. Compromise and settlement of claims
- III. Third-party beneficiary contracts
- A. Intended beneficiaries
  - B. Incidental beneficiaries
  - C. Impairment or extinguishment of third-party rights by contract modification or mutual rescission
  - D. Enforcement by the promisee
- IV. Assignment of rights and delegation of duties
- V. Statutes of frauds
- VI. Parol evidence and interpretation
- VII. Conditions
- A. Express
  - B. Constructive
    1. Conditions of exchange: excuse or suspension by material breach
    2. Immaterial breach and substantial performance
    3. Independent covenants
    4. Constructive conditions of non-prevention, non-hindrance, and affirmative cooperation
  - C. Obligations of good faith and fair dealing in performance and enforcement of contracts
  - D. Suspension or excuse of conditions by waiver, election, or estoppel
  - E. Prospective inability to perform: effect on other party
- VIII. Remedies

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- A. Total and partial breach of contract
  - B. Anticipatory repudiation
  - C. Election of substantive rights and remedies
  - D. Specific performance; injunction against breach; declaratory judgment
  - E. Rescission and reformation
  - F. Measure of damages in major types of contract and breach
  - G. Consequential damages: causation, certainty, and foreseeability
  - H. Liquidated damages and penalties
  - I. Restitutionary and reliance recoveries
  - J. Remedial rights of defaulting parties
  - K. Avoidable consequences and mitigation of damages
- IX. Impossibility of performance and frustration of purpose
- X. Discharge of contractual duties

### **Criminal Law and Procedure**

Approximately half of the Criminal Law and Procedure questions for each MBE will be based on category V, and approximately half will be based on the remaining categories, I through IV.

- I. Homicide
  - A. Intended killings
    - 1. Premeditation, deliberation
    - 2. Provocation
  - B. Unintended killings
    - 1. Intent to injure
    - 2. Reckless and negligent killings
    - 3. Felony murder
    - 4. Misdemeanor manslaughter
- II. Other crimes
  - A. Theft
    - 1. Larceny
    - 2. Embezzlement
    - 3. False pretenses
  - B. Receiving stolen goods
  - C. Robbery
  - D. Burglary
  - E. Assault and battery
  - F. Rape; statutory rape
  - G. Kidnapping
  - H. Arson
  - I. Possession offenses
- III. Inchoate crimes; parties

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- A. Inchoate offenses
    - 1. Attempts
    - 2. Conspiracy
    - 3. Solicitation
  - B. Parties to crime
- IV. General principles
- A. Acts and omissions
  - B. State of mind
    - 1. Required mental state
    - 2. Strict liability
    - 3. Mistake of fact or law
  - C. Responsibility
    - 1. Mental disorder
    - 2. Intoxication
  - D. Causation
  - E. Justification and excuse
  - F. Jurisdiction
- V. Constitutional protection of accused persons
- A. Arrest, search and seizure
  - B. Confession and privilege against self-incrimination
  - C. Lineups and other forms of identification
  - D. Right to counsel
  - E. Fair trial and guilty pleas
  - F. Double jeopardy
  - G. Cruel and unusual punishment
  - H. Burdens of proof and persuasion

### Evidence

All Evidence questions should be answered according to the Federal Rules of Evidence. Approximately one-third of the Evidence questions for each MBE will be based on category I, one-third on category V, and one-third on the remaining categories, II, III, and IV.

- I. Presentation of evidence
  - A. Introduction of evidence
    - 1. Requirement of personal knowledge
    - 2. Refreshing recollection
    - 3. Objections and offers of proof
    - 4. Lay opinions
    - 5. Competency of witnesses
    - 6. Judicial notice
    - 7. Roles of judge and jury
    - 8. Limited admissibility
  - B. Presumptions

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- C. Mode and order
    - 1. Control by court
    - 2. Scope of examination
    - 3. Form of questions
    - 4. Exclusion of witnesses
  - D. Impeachment, contradiction, and rehabilitation
  - E. Proceedings to which evidence rules apply
- II. Relevancy and reasons for excluding relevant evidence
- A. Probative value
    - 1. Relevancy
    - 2. Exclusion for unfair prejudice, confusion, or waste of time
  - B. Authentication and identification
  - C. Character and related concepts
    - 1. Admissibility of character
    - 2. Methods of proving character
    - 3. Habit and routine practice
    - 4. Other crimes, acts, transactions, and events
    - 5. Prior sexual misconduct of a defendant
  - D. Expert testimony
    - 1. Qualifications of witnesses
    - 2. Bases of testimony
    - 3. Ultimate issue rule
    - 4. Reliability and relevancy
    - 5. Proper subject matter for expert testimony
  - E. Real, demonstrative, and experimental evidence
- III. Privileges and other policy exclusions
- A. Spousal immunity and marital communications
  - B. Attorney-client and work product
  - C. Physician/psychotherapist-patient
  - D. Self-incrimination
  - E. Other privileges
  - F. Insurance coverage
  - G. Remedial measures
  - H. Compromise, payment of medical expenses, and plea negotiations
  - I. Past sexual conduct of a victim
- IV. Writings, recordings, and photographs
- A. Requirement of original
  - B. Summaries
  - C. Completeness rule
- V. Hearsay and circumstances of its admissibility
- A. Definition of hearsay
    - 1. What is hearsay

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2. Prior statements by witness
3. Statements attributable to party-opponent
4. Multiple hearsay
- B. Present sense impressions and excited utterances
- C. Statements of mental, emotional, or physical condition
- D. Statements for purposes of medical diagnosis and treatment
- E. Past recollection recorded
- F. Business records
- G. Public records and reports
- H. Learned treatises
- I. Former testimony; depositions
- J. Statements against interest
- K. Other exceptions to the hearsay rule
- L. Right to confront witnesses

### Real Property

Approximately one-fifth of the Real Property questions on the MBE will be based on each of the categories I-V.

- I. Ownership
  - A. Present estates
    1. Fees simple
    2. Defeasible fees simple
    3. Life estates
  - B. Future interests
    1. Reversions
    2. Remainders, vested and contingent
    3. Executory interests
    4. Possibilities of reverter, powers of termination
    5. Rules of affecting these interests
  - C. Cotenancy
    1. Types
      - a. Tenancy in common
      - b. Joint tenancy
    2. Severance
    3. Partition
    4. Relations among cotenants
    5. Alienability, descendability, devisability
  - D. The law of landlord and tenant
    1. Types of holdings: creation and termination
      - a. Terms of years
      - b. Tenancies at will
      - c. Holdovers and other tenancies at sufferance
      - d. Periodic tenancies
    2. Possession and rent

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3. Assignment and subletting
  4. Termination (surrender, mitigation of damages, and anticipatory breach)
  5. Habitability and suitability
  - E. Special problems
    1. Rule Against Perpetuities: common law and as modified
    2. Alienability, descendability, and devisability
    3. Fair housing/discrimination
- II. Rights in land
- A. Covenants at law and in equity
    1. Nature and type
    2. Creation
    3. Scope
    4. Termination
  - B. Easements, profits, and licenses
    1. Nature and type
    2. Methods of creation
      - a. Express
      - b. Implied
        - i. Quasi-use
        - ii. Necessity
        - iii. Plat
      - c. Prescription
    3. Scope
    4. Termination
  - C. Fixtures (including relevant application of Article 9, UCC)
  - D. Zoning (fundamentals other than regulatory taking)
- III. Contracts
- A. Real estate brokerage
  - B. Creation and construction
    1. Statute of frauds and exceptions
    2. Essential terms
    3. Time for performance
    4. Remedies for breach
  - C. Marketability of title
  - D. Equitable conversion (including risk of loss)
  - E. Options and rights of first refusal
  - F. Fitness and suitability
  - G. Merger
- IV. Mortgages/security devices
- A. Types of security devices
    1. Mortgages (including deeds of trust)
      - a. In general

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- b. Purchase-money mortgages
      - c. Future advance mortgages
    - 2. Land contracts
    - 3. Absolute deeds as security
  - B. Some security relationships
    - 1. Necessity and nature of obligation
    - 2. Theories: title, lien, and intermediate
    - 3. Rights and duties prior to foreclosure
    - 4. Right to redeem and clogging equity of redemption
  - C. Transfers by mortgagor
    - 1. Distinguishing “subject to” and “assuming”
    - 2. Rights and obligations of transferor
    - 3. Application of subrogation and suretyship principles
    - 4. Due-on-sale clauses
  - D. Transfers by mortgagee
  - E. Payment, discharges, and defenses
  - F. Foreclosure
    - 1. Types
    - 2. Rights of omitted parties
    - 3. Deficiency and surplus
    - 4. Redemption after foreclosure
    - 5. Deed in lieu of foreclosure
- V. Titles
  - A. Adverse possession
  - B. Transfer by deed
    - 1. Warranty and non-warranty deeds (including covenants for title)
    - 2. Necessity for a grantee and other deed requirements
    - 3. Delivery (including escrows)
  - C. Transfer by operation of law and by will
    - 1. In general
    - 2. Ademption
    - 3. Exoneration
    - 4. Lapse
    - 5. Abatement
  - D. Title assurance systems
    - 1. Recording acts (race, notice, and race-notice)
      - a. Indexes
      - b. Chain of title
      - c. Protected parties
      - d. Priorities
      - e. Notice
    - 2. Title insurance
  - E. Special problems
    - 1. After-acquired title (including estoppel by deed)
    - 2. Forged instruments and undelivered deeds

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3. Purchase-money mortgages
4. Judgment and tax liens

### Torts

The Torts questions should be answered according to principles of general applicability. Examinees are to assume that there is no applicable statute unless otherwise specified; however, survival actions and claims for wrongful death should be assumed to be available where applicable. Examinees should assume that joint and several liability, with pure comparative negligence, is the relevant rule unless otherwise indicated. Approximately half of the Torts questions for the MBE will be based on category II, and approximately half will be based on the remaining categories, I, III, IV, and V.

- I. Intentional torts
  - A. Harms to the person: assault, battery, false imprisonment, infliction of mental distress
  - B. Harms to property interests: trespass to land and chattels, conversion
  - C. Defenses to claims for physical harms
    1. Consent
    2. Privileges and immunities: protection of self and others; protection of property interests; parental discipline; protection of public interests; necessity; incomplete privilege
- II. Negligence
  - A. The duty question: including failure to act; unforeseeable plaintiffs; and obligations to control the conduct of third parties
  - B. The standard of care
    1. The reasonably prudent person: including children, physically and mentally impaired individuals, professional people, and other special classes
    2. Rules of conduct derived from statutes and custom
  - C. Problems relating to proof of fault, including *res ipsa loquitur*
  - D. Problems relating to causation
    1. But for and substantial causes
    2. Harms traceable to multiple causes
    3. Questions of apportionment of responsibility among multiple tortfeasors, including joint and several liability
  - E. Limitations on liability and special rules of liability
    1. Problems relating to “remote” or “unforeseeable” causes, “legal” or “proximate” cause, and “superseding” causes
    2. Claims against owners and occupiers of land
    3. Claims for mental distress not arising from physical harm; other intangible injuries
    4. Claims for pure economic loss
  - F. Liability for acts of others
    1. Employees and other agents

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2. Independent contractors and nondelegable duties
- G. Defenses
  1. Contributory fault, including common law contributory negligence and last clear chance, and the various forms of comparative negligence
  2. Assumption of risk
- III. Strict liability: claims arising from abnormally dangerous activities; the rule of Rylands v. Fletcher and other common law strict liability claims; defenses
- IV. Products liability: claims against manufacturers and others based on defects in manufacture, design, and warning; and defenses
- V. Other torts
  - A. Claims based on nuisance, and defenses
  - B. Claims based on defamation and invasion of privacy, defenses, and constitutional limitations
  - C. Claims based on misrepresentations, and defenses
  - D. Claims based on intentional interference with business relations, and defenses