

Semantics and Legal Logic

(Multistate Bar Exam)

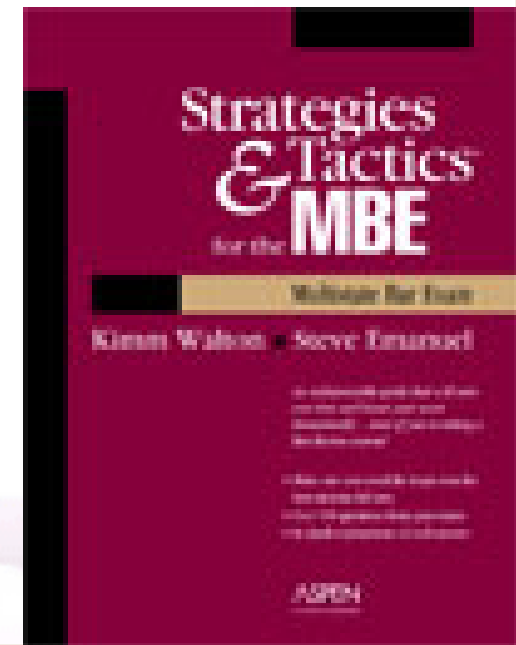
Fall 2005

- Joe Rose, Prof.



Required Textbook

- *Strategies & Tactics for the MBE*
- Authors: Kimm Walton, J.D. and Steve Emmanuel, J.D.
- List Price: \$48.95
- Publisher: Aspen
aspenpublishers.com
- ISBN: 0735544182
- Format: Paperback



About the Multistate Bar Exam



About the Multistate Bar Exam

- All states in the U.S. except Louisiana and Washington administer the MBE
- The MBE is given twice each year, on the last Wed. in February and the last Wed. in July



Format of the MBE

- 6 hours total
- 200 questions total
- Two parts, 3 hours each
- 100 questions in the morning
- 100 questions in the afternoon
- 1.8 min. (1 min., 48 sec.) per question on average



Subjects Covered by the MBE

- Constitutional Law
- Contracts
- Criminal Law & Procedure
- Evidence (F.R.E.)
- Real Property
- Torts



Subjects **NOT** Covered

- Civil Procedure
- Professional Responsibility
- Community Property
- Wills
- Trusts
- Remedies
- Corporations
(Business Organizations)



Question Distribution

• Contracts	=	34
• Torts	=	34
• Con. Law	=	33
• Evidence	=	33
• Real Property	=	33
• Criminal Law	=	33
• TOTAL	=	200



Question Format

- “Objective” exam
- Multiple choice
- Four possible answer choices per question
- One correct answer choice
- Three incorrect answer choices
- Random subject order



Question Difficulty Levels

- Varying difficulty levels
- Random difficulty level
- **NOT** progressively more or less difficult
- All questions are weighted evenly
- Two versions of the MBE administered during each session (AM v. PM)



Grading of the MBE

- Each question = 1 point
- Max. possible raw score = 200
- “Equating” used to “scale” raw scores
- No penalty for wrong answers (other than losing credit for that point)



“Early Item Analysis”

- Analysis of approx. 1,500 applicants from several different jurisdictions
- Unusually high (statistically significant) number of wrong answers on a particular question among otherwise high scorers?
- Question goes back to drafting committee.



“Early Item Analysis”

- If committee finds entire question faulty then everyone gets credit for that question (rare)
- More frequently, two answer choices are creditable, the other two are “clearly wrong answers”



Passing MBE Score

- California had lowest passing score nationally in July 2001, at 57%
- = "Raw" score of 125
- = "Scaled" score of 140
- Mean score of February takers is usually lower than July takers



Who Writes MBE Questions?

- 6 committees, one for each subject
- 3 law professors and 2 bar examiners per committee
- Question writers help
- Testing experts help
- Semiannual meetings
- 30 – 40 questions drafted
- Final review: attorney/prof.



Attacking the MBE



Attacking the MBE

- Substantive law study
 - Scope (Breadth)
 - Depth
- Practice MBE questions
 - Careful reading
 - Analysis
 - Don't assume facts
 - Don't make problems more complex than they really are
 - Endurance



“Trigger” Factors to Watch For

- Statutes, if given, are likely to be controlling on the answer
 - Given where conflicting common law rules and no majority rule
 - Given to test your ability to ignore your instincts



“Trigger” Factors to Watch For

- Seemingly meaningless details about people
 - Example #1:
 - “Able contracted with Baker”
 - Cf. “Able, a ten-year old, contracted with Baker”



“Trigger” Factors to Watch For

- Seemingly meaningless details about people
 - Example #2:
 - “Lee, a chronically unemployed person, is testifying.”



“Trigger” Factors to Watch For

- Seemingly meaningless details about people
 - Example #3:
 - “Fred, a pharmacist, offers to sell his snow blower to Arnie.”



Sample MBE Question #1

Q:Addle, who has been in the painting and contracting business for ten years and has a fine reputation, contracts to paint Boone's barn. Boone's barn is a standard red barn with loft. The contract has no provision regarding assignment. If Addle assigns the contract to Coot, who has comparable experience and reputation, which of the following statements is correct?



Sample MBE Question #1

- (a) Addle is in breach of contract
- (b) Boone may refuse to accept performance by Coot
- (c) Boone is required to accept performance by Coot
- (d) There is a novation



Sample MBE Question #1

Correct Response:

- (c) Boone is required to accept performance by Coot



Read the Call of the Question First

- Helps you identify the subject matter of the question
- Helps you identify Red Herrings
- Put the call of the question in your own words if necessary – look for one correct answer



Rewording the Call of the Question

Call of the Question:

“What is the most likely outcome?”

Reword to:

“What will the result be
– and why?”



Rewording the Call of the Question

Call of the Question:

“Which claim is most likely to succeed?”

Reword to:

“Which is the *only* claim that can succeed on these facts – and why?”



Rewording the Call of the Question

Call of the Question:

“What is the Defendant’s best defense?”

Reword to:

“Why *won’t* the defendant be guilty on these facts?”



Rewording the Call of the Question

Call of the Question:

“If party X loses, the most likely basis for the judgment is that...”

Reword to:

“Party X loses because...”



Negative Correct Answers

- Used in a few MBE questions
- E.g. "What is the **least** sufficient basis for admitting the evidence?"
- E.g. "Of which crime is Defendant **least** likely to be guilty?"
- Reverse process of elimination



Sample MBE Question #2

Q:In a narcotics conspiracy prosecution against Daly, the prosecutor offers in evidence a tape recording of a telephone call allegedly made by Daly. A lay witness is called to testify that the voice on the recording is Daly's. Her testimony to which of the following would be the **LEAST** sufficient basis for admitting the recording?



Sample MBE Question #2

- **(a)** She heard the same voice on a similar tape recording identified to her by Daly's brother.
- **(b)** She had heard Daly speak many times, but never on the telephone
- **(c)** She had, specifically for the purpose of preparing to testify, talked with Daly over the telephone at a time after the recording was made
- **(d)** She had been present with Daley when he engaged in the conversation in question but heard only Daly's side of the conversation.



Sample MBE Question #2

Correct Response:

Least sufficient basis:

(a) She heard the same voice on a similar tape recording identified to her by Daly's brother.



Issue Spotting

- Even though MBE is an “objective” test, issue spotting is still necessary
- Identify the **central issue** in the problem posed.
- i.e., what, *in theory*, is going on in the problem?
- Ask yourself, what does each issue response ‘speak to’?



Actual Past MBE Question #1

Q:

Pitt sued Dow for damages for injuries that Pitt incurred when a badly rotted limb fell from a curbside tree in front of Dow's home and hit Pitt.

[MORE...]



Actual Past MBE Question #1

Q: (cont'd)

Dow claimed that the tree was on city property and thus was the responsibility of the city. At trial, Pitt offered testimony that, a week after the accident, Dow had cut the tree down with a chainsaw.

[MORE...]



Actual Past MBE Question #1

Q: (Call of the question)

The offered **evidence** is...



Actual Past MBE Question #1

Q: (Answer Choices)

(a) Inadmissible, because
there is a policy to
encourage safety
precautions



Actual Past MBE Question #1

Q: (Answer Choices)

(b) Inadmissible, because it is irrelevant to the condition of the tree at the time of the accident



Actual Past MBE Question #1

Q: (Answer Choices)

(c) Admissible to show the tree was on Dow's property



Actual Past MBE Question #1

Q: (Answer Choices)

(d) Admissible to show the tree was in a rotted condition



Actual Past MBE Question #1

Correct Answer

(c) Admissible to show the tree was on Dow's property



Process of Elimination

- Knowing how to recognize a bad answer choice is your most valuable analytical skill
- Usually can narrow down to two possibilities



Sample MBE Question #3

Q:

Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching."

[MORE...]



Sample MBE Question #3

Q: As Edward was walking down the street, a gust of wind blew his hat off. Edward reached out, trying to grab his hat, and narrowly missed striking Margaret in the face with his hand. Margaret, fearful of being struck by Edward, pushed Edward away.



Sample MBE Question #3

If charged with criminal assault, Edward should be found...

(a) guilty, because he caused Margaret to be in apprehension of an offensive touching

Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching.



Sample MBE Question #3

If charged with criminal assault, Edward should be found...

(b) guilty, because he should have realized he might strike someone by reaching out

Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching.



Sample MBE Question #3

If charged with criminal assault, Edward should be found...

(c) not guilty, because he did not intend to hit Margaret

Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching.



Sample MBE Question #3

If charged with criminal assault, Edward should be found...

(d) not guilty because he did not hit Margaret

Statutes in the jurisdiction define criminal assault as "an attempt to commit a criminal battery" and criminal battery as "causing an offensive touching.



Actual Past MBE Question #3

Q: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 that the tenants wanted. [MORE...]



Actual Past MBE Question #3

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 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.



Actual Past MBE Question #3

If Tess succeeds, it will be because:

(a) A periodic tenancy was created by implication



Actual Past MBE Question #3

If Tess succeeds, it will be because:

- (b) The doctrine prohibiting retaliatory eviction is part of the law of the jurisdiction



Actual Past MBE Question #3

If Tess succeeds, it will be because:

- (c) The \$200 rent demanded violates the agreement implied by the rate charged to other tenants



Actual Past MBE Question #3

If Tess succeeds, it will be because:

- (d) The law implies a term of one year in the absence of any express agreement



Actual Past MBE Question #3

- Correct answer choice (b) is counterintuitive to the “national” nature of the MBE
- Answer choice (b) speaks to local law
- But: (a), (c) and (d) can be conclusively eliminated under settled property law (see p. 575, answer 136)



Language Specifics

- MBE answers have 3 distinct parts:
 - Result (conclusion)
 - Reasoning in support (analysis)
 - A modified **linking** these two



Language Specifics

- Typical modifiers
 - IF
 - UNLESS
 - BUT
 - ONLY IF
 - BECAUSE (most common)



“Because” as the Modifier

- “Because” answer choice can only be correct if:
 - Reasoning addresses and resolves a central issue
 - Facts given in the question **completely satisfy** the reasoning
 - The result and the reasoning “match” (i.e. are logically consistent)



“If” as the Modifier

- “If” answer choice can be correct if:
 - Reasoning addresses and resolves a central issue
 - Reasoning is merely **plausible** under the facts
 - The result and the reasoning “match” (i.e. are logically consistent)



“Unless” as the Modifier

- “If” answer choice can be correct if:
 - Reasoning addresses and resolves a central issue
 - Reasoning is the **only circumstance** under which the result **cannot** occur
 - The result and the reasoning “match” (i.e. are logically consistent)



Actual Past MBE Question #4

Q: Carver is a chemical engineer. She has no interest in or connection with Chemco. Carver noticed that Chemco's most recent, publicly issued financial statement listed, as part of Chemco's assets, a large inventory of a certain special chemical compound...."



Actual Past MBE Question #4

Let's interrupt to look down
to the call of the question...

If Page asserts a claim
based on
misrepresentation against
Carver, will page Prevail?



Actual Past MBE Question #4

Q:...This asset was listed at a cost of \$100,000, but Carver knew that the ingredients of the compound were in short supply and that the current market value of the inventory was in excess of \$1,000,000. There was no current public quotation of the price of Chemco stock. The book value of Chemco stock, according to the statement, was \$5 a share; its actual value was \$30 a share.



Actual Past MBE Question #4

Q:...Knowing these facts, Carver offered to purchase from Page, at \$6 a share, the 1,000 shares of Chemco stock owned by Page. Page and Carver had not previously met. Page sold the stock to Carver for \$6 a share.



Actual Past MBE Question #4

If Page asserts a claim based on *misrepresentation* against Carver, will page Prevail?

(a) Yes, because Carver knew that he value of the stock was greater than the price she offered



Actual Past MBE Question #4

If Page asserts a claim based on *misrepresentation* against Carver, will page Prevail?

(b) Yes, if Carver did not inform Page of the true value of the inventory



Actual Past MBE Question #4

If Page asserts a claim based on *misrepresentation* against Carver, will page Prevail?

(c) No, unless Carver told Page that the stock was no worth more than \$6 a share



Actual Past MBE Question #4

If Page asserts a claim based on *misrepresentation* against Carver, will page Prevail?

(d) No, if Chemco's financial statement was available to Page



Actual Past MBE Question #4

Correct answer:

(c) No, unless Carver told Page that the stock was no worth more than \$6 a share

Duty to disclose?

Special relationship?

Non-disclosure?



How Answer Choices Can Be Wrong

- Reasoning mischaracterizes or totally contradicts the facts
- Answer choice goes beyond the facts
- Answer choice assumes disputed facts
- Wrong rule of law (analysis)
- Outmoded law
- Inapplicable law
- Over-inclusive statements of the law (lack of precision)



Intelligent Guessing

- Don't guess until you've eliminated all the definitely wrong responses
- If two answers are direct opposites, one is probably correct
- Choose the longer response
- Choose a "hornbook sounding answer"



Mechanics of MBE Test Taking

- Write in the test booklet
- Underline or circle key word and phrases
- Circle your answer choice in the booklet before marking the scoring sheet
- Use pencil
- Don't skip around, go from start to finish



Mechanics of MBE Test Taking

- Don't gauge your performance on "room tension" (two versions of the test are handed out each session)
- Consider skipping long, complicated fact patterns with only one question at the end – make a guess and move on if needed for time
- Watch your time:
 - 17 questions per half hour
 - 34 questions per hour
 - 50 questions per 90 minutes



Mechanics of MBE Test Taking

- Forget about prior questions and answers and move on
- Don't use the "ABACADABA method"
- Don't consider equal distribution of answer choice letters

