

TABLE OF CONTENTS

PREFACE	V
ACKNOWLEDGMENTS	VII
Chapter 1. How to Use This Book to Prepare for the MBE..... 1	
I. What Is the MBE?	1
II. Commonly Tested Subtopics on the MBE.....	2
A. Studying Smart: Focus on the Heavily Tested Subtopics	3
B. Studying Smart: Answer a Bunch of Practice MBE Questions.....	4
III. Learning the Law & Testing Recall with Mnemonics, Blueprints, & Examples.....	5
A. Working with Blueprints of the Law.....	5
B. Working with Mnemonics	6
C. Working with Examples	8
1. Suggestion: Keep a Bar Diary or Notebook When You Answer Practice Questions	9
2. Suggestion: Read the Call of the Question and Answer Choices Before Reading the Fact Pattern	10
Chapter 2. How to Use the Book to Supplement Your Law Studies 13	
I. Pre-Reading for Context	14
A. Getting a General Framework for the Black Letter Law ...	14
B. Using the Table of Contents to Help with Pre-Reading.....	15
II. Using Questions for Practice and Assessment	16
A. Applying Law to Facts That Are Different from the Cases You Read	16
B. IRAC-ing MBE Questions	18
Chapter 3. Civil Procedure 21	
I. Civil Procedure: Mnemonics & Blueprints	21
A. Jurisdiction	21
1. Subject-Matter Jurisdiction	22
a. Federal Question.....	23
b. Diversity Jurisdiction	23
i. Amount in Controversy.....	23
ii. Complete Diversity of Parties	24
(1) Determining Citizenship of a Person	25

TABLE OF CONTENTS

(2) Determining Citizenship of a Business or Corporation	25
iii. Erie Doctrine	26
(1) Fact Patterns for Federal Law vs. State Law	27
(2) Fact Patterns for State Law vs. State Law	28
2. Personal Jurisdiction	29
a. In Personam Jurisdiction	32
b. Minimum Contacts with the Forum State	33
B. Service of Process	36
1. Service on Defendants in the Forum State	37
2. Service on Out-of-State Defendants	38
3. Service on Businesses or Corporations	38
C. Supplemental Jurisdiction	39
1. Allowed for Compulsory Counterclaims, Cross-Claims, and Impleaders	40
2. Not Allowed for Compulsory Joinders or the Addition of Third-Party Defendants by Plaintiff	41
D. Removal Jurisdiction	41
E. Remand	43
F. Venue	43
G. Civil Litigation Process	46
1. Civil Litigation: Beginning Stages	47
a. Complaint	47
b. Motions Attacking the Complaint	47
c. Answer	49
d. Counterclaims and Cross-Claims	50
e. Rule 11 Certification	51
f. Discovery	52
2. Civil Litigation: Later Stages	53
a. Trial Motions	53
i. Motion for Summary Judgment	54
ii. Motion for a Directed Verdict	54
iii. Motion for Judgement Notwithstanding the Verdict	55
iv. Motion for a New Trial	56
b. Appeals	57
H. Injunctions	57
I. Class Actions	58
J. Claim and Issue Preclusion	60
1. Res Judicata	61
2. Collateral Estoppel	64

II. Civil Procedure: Examples.....	67
Chapter 4. Constitutional Law.....	73
I. Constitutional Law: Mnemonics & Blueprints.....	73
A. Separation of Powers.....	73
1. Federal Judicial Power.....	74
a. Judicial Review	75
b. Justiciability of a Case and Controversy.....	78
i. Adequate and Independent State Grounds	78
ii. Standing.....	78
iii. Mootness	80
iv. Ripeness.....	81
v. Political Questions	81
2. Federal Executive Power.....	82
3. Federal Legislative Power.....	84
a. No Federal General Police Powers.....	85
b. Enumerated Powers of Congress	86
i. Taxing & Spending	87
ii. Regulating Interstate Commerce.....	88
B. Dormant Commerce Clause	89
C. Individual Rights.....	92
1. Requirement of State Action.....	92
2. Levels of Scrutiny	94
3. Fundamental Rights	97
a. Fundamental Right to Travel	99
b. Fundamental Right to Vote.....	99
c. Fundamental Privacy Rights	99
4. Equal Protection	102
a. Equal Protection and Fundamental Rights	102
b. Equal Protection and Suspect Classifications....	103
c. Equal Protection and Quasi-Suspect Classifications	104
d. Equal Protection and Rational Basis Classification	105
5. Due Process	105
a. Procedural Due Process.....	105
b. Substantive Due Process	107
D. First Amendment	108
1. Freedom of Speech.....	109
a. Lesser-Protected Speech.....	109
i. Traditionally Unprotected Speech	110
(1) Fighting Words.....	111

TABLE OF CONTENTS

(2) Incitement.....	112
(3) Defamation	112
(4) Obscenity	115
ii. Quasi-Protected Speech	116
(1) Commercial Speech	118
(2) Expressive Conduct.....	120
b. Content-Based Restrictions.....	120
c. Content-Neutral Restrictions.....	121
i. Public Forum Regulations	122
ii. Non-Public Forum Regulations.....	124
2. Freedom of Association.....	125
3. Freedom of Religion.....	126
a. Establishment Clause.....	126
i. Lemon Test	127
ii. Religion and Public-School Activities	128
b. Free Exercise Clause	130
E. Thirteenth Amendment	130
F. Takings Clause	131
G. Ex-Post Facto Laws and Bills of Attainder.....	132
II. Constitutional Law: Examples	134
Chapter 5. Contracts.....	139
I. Contracts: Mnemonics & Blueprints.....	139
A. UCC vs. Common Law	139
B. Contract Formation	140
1. Offers	141
a. Offers Are Statements, Not Inquiries, Advertisements, or Invitations to Deal	143
b. Termination of an Offer.....	144
i. Rejection	146
ii. Revocation	146
(1) Revocation and Common Law Option Contracts.....	147
(2) Revocation and UCC Firm Offer Contracts.....	149
iii. Death.....	150
iv. Time (Lapse of).....	150
v. Counteroffer	150
2. Acceptance.....	151
a. Acceptance and Bilateral vs. Unilateral Contracts	152
b. Acceptance and the Mailbox Rule	154
c. Acceptance and the Mirror Image Rule.....	156

d.	UCC and the Battle of Forms.....	157
e.	UCC and the Perfect Tender Rule	158
	i. Acceptance and Shipping of Non-Conforming Goods.....	159
	ii. Shipment of Non-Conforming Goods and Installment Contracts.....	161
3.	Consideration	164
	a. Past/Moral Consideration Is NOT Consideration	167
	b. Illusory Promises Are NOT Consideration	167
	c. A Promise to Give a Gift Is NOT Consideration	168
	d. A Promise Not to Sue Is Valid Consideration	169
	e. A Promise to Pay a Debt Barred by the Statute of Limitations Is Valid Consideration	170
	f. A Promise to Pay a Debt That Has Been Discharged by Bankruptcy Is Valid Consideration	170
4.	Promissory Estoppel Acts as a Substitute for Consideration	171
C.	Defenses to Contract Formation.....	172
1.	Mistake.....	175
	a. Unilateral Mistake.....	175
	b. Mutual Mistake.....	175
2.	Incapacity	176
3.	Statute of Frauds	177
D.	Parol Evidence Rule	180
1.	The Parol Evidence Rule Does Not Apply to Defenses to Formation.....	182
2.	The Parol Evidence Rule Does Not Apply to Conditions Precedent.....	182
E.	Third-Party Beneficiaries	183
1.	Is a Third Party Benefiting from the Contract?	184
2.	Is the Third Party an Intended or Incidental Beneficiary?.....	184
3.	Did the Third Party Rights for the Intended Beneficiary Vest?	185
F.	Assignments and Delegations.....	187
G.	Changes to a Contract	189
1.	Modification	189
2.	Novations	190
3.	Accord and Satisfaction	192

H.	Performance and Breach.....	195
1.	Expectancy Damages.....	196
2.	Reliance Damages.....	197
3.	Incidental Damages.....	198
4.	Consequential Damages	198
5.	Restitution Damages	198
6.	Substantial Performance.....	199
7.	Specific Performance	200
8.	Common MBE Topics Related to Performance	201
a.	Conditions to Performance	203
b.	Discharge of Performance	205
i.	Impracticability	205
ii.	Impossibility	206
c.	Non-Conforming Goods	207
d.	Excuse of Conditions.....	209
e.	Anticipatory Repudiation	212
f.	Risk of Loss	214
II.	Contracts: Examples	217
Chapter 6. Criminal Law & Criminal Procedure		223
I.	Criminal Law & Criminal Procedure: Mnemonics & Blueprints	223
A.	Criminal Law	223
1.	Homicide.....	223
a.	Murder Defined by Statute	224
i.	First-Degree Murder.....	224
ii.	Second-Degree Murder	225
b.	Common Law Murder.....	226
i.	Intent to Kill.....	228
ii.	Intent to Inflict Serious Bodily Injury	228
iii.	Depraved Heart/Reckless Disregard Murder	229
iv.	Felony Murder.....	231
v.	Summary of Common Law Murder	232
c.	Manslaughter Crimes	233
i.	Voluntary Manslaughter	234
ii.	Involuntary Manslaughter	235
d.	Summary of Homicide Crimes	237
e.	Additional Homicide Rules.....	239
i.	Causation.....	239
ii.	Proximate Cause and Refusing Medical Attention.....	240

iii.	Proximate Cause and a Third-Party's Medical Negligence	241
2.	Non-Homicide Crimes: Inchoate Crimes.....	241
a.	Inchoate Crimes	242
b.	Inchoate Crimes and the Impossibility Defense	244
i.	Legal Impossibility Is a Valid Defense	244
ii.	Factual Impossibility Is NOT a Valid Defense	245
c.	Conspiracy	246
i.	Common Law Conspiracy vs. Model Penal Code Conspiracy.....	247
ii.	Conspiracy and the Impossibility Defenses.....	248
(1)	Legal Impossibility Is a Valid Defense to Conspiracy.....	248
(2)	Factual Impossibility Is NOT a Valid Defense to Conspiracy.....	249
iii.	Conspiracy Does NOT Merge with the Underlying Crime	249
iv.	Conspiracy and Co-Conspirators	250
d.	Attempt.....	251
i.	Substantial Step Towards Completing Underlying Crime	251
ii.	Attempt and Withdrawal from Underlying Crime	252
iii.	Attempt and the Impossibility Defenses	253
(1)	Legal Impossibility Is a Valid Defense to Attempt	253
(2)	Factual Impossibility Is NOT a Valid Defense to Attempt	254
iv.	Attempt Merges with the Underlying Crime	255
e.	Solicitation.....	255
i.	Solicitation and the Impossibility Defenses.....	257
(1)	Legal Impossibility Is Valid Defense to Solicitation.....	257
(2)	Factual Impossibility Is NOT a Valid Defense to Solicitation	257
ii.	Solicitation Merges with the Underlying Crime	258

3.	Non-Homicide Crimes: Crimes Against Property	258
a.	Larceny	258
i.	Larceny and Intent	259
ii.	Larceny and Returning the Stolen Property	260
iii.	Larceny by Trick, False Pretenses, & Embezzlement	261
(1)	Larceny by Trick	263
(2)	Larceny by False Pretenses	263
(3)	Embezzlement	264
b.	Robbery	264
c.	Burglary.....	266
i.	Burglary and the Intent to Commit a Felony Element	267
ii.	Burglary Does NOT Merge with the Underlying Felony	267
iii.	Burglary and the Breaking and Entering Elements.....	268
4.	Defenses	269
a.	Self-Defense, Defense of Others, and Defense of Property	269
b.	Insanity.....	271
c.	Intoxication	273
d.	Mistake of Fact.....	274
e.	Other Defenses.....	275
B.	Criminal Procedure	276
1.	Fourth Amendment	278
a.	Arrest or Seizure of a Party	279
b.	Searches and Reasonable Expectation of Privacy	280
c.	Exceptions to the Warrant Requirement	281
i.	Exigent Circumstances.....	283
ii.	Search Incident to a Lawful Arrest.....	283
iii.	Consent	284
iv.	Automobile Exception	284
v.	Plain View.....	285
vi.	Evidence from an Administrative Search...	285
vii.	Stop and Frisk Stops.....	286
2.	Fifth Amendment	286
a.	Protection Against Self-Incrimination from Testimonial Evidence	287
b.	Miranda Warnings and Custodial Interrogation	287

c.	Confessions and Volunteered Statements.....	289
d.	Waiver of Miranda Rights	290
e.	Exceptions to Miranda.....	291
f.	Double Jeopardy	291
i.	First Trial That Ended in a Final Judgment.....	292
ii.	Jeopardy Must Attach for the Second Trial.....	292
3.	Sixth Amendment.....	294
4.	Death Penalty	296
II.	Criminal Law & Criminal Procedure: Examples	297
Chapter 7. Evidence.....		303
I.	Evidence: Mnemonics & Blueprints	303
A.	Presentation of Evidence.....	303
1.	Questions of Law & Questions of Fact	304
2.	Burden of Proof	305
3.	Burden of Production.....	306
4.	Burden of Persuasion	306
5.	Judicial Notice	307
6.	Leading Questions	308
7.	Competency & Lay Witnesses.....	308
8.	Present Recollection Refreshed.....	310
9.	Expert Witnesses	312
B.	Relevancy	313
1.	Exclusion of Relevant Evidence Under Rule 403	314
2.	Exclusion of Relevant Evidence Based on Public Policy	315
C.	Habit Evidence	317
D.	Character Evidence	319
1.	Character Evidence and Civil Cases	320
2.	Evidence of a Criminal Defendant's Character	322
3.	Evidence of the Victim's Character in a Criminal Case	324
4.	Admission of Evidence of the Defendant's Prior Bad Acts	325
E.	Authentication	327
F.	Best Evidence Rule.....	328
G.	Impeachment	329
1.	Methods of Impeachment	331
a.	Prior Inconsistent Statements	333
b.	Bias	334
c.	Testing the Accuracy of What Was Perceived....	334

TABLE OF CONTENTS

	d. Character for Untruthfulness	334	
2.	Impeachment and Evidence of a Witness' Prior Criminal Conviction	335	
H.	Privileges.....	336	
1.	Doctor-Patient Privilege.....	337	
2.	Attorney-Client Privilege	338	
3.	Privileges Related to Individuals Who Are Married to One Another.....	338	
	a. Spousal Testimonial Privilege	339	
	b. Marital Communications Privilege.....	339	
I.	Hearsay	341	
1.	Analyzing Hearsay Questions.....	341	
	a. First: Determine if What Is Being Offered Is Non-Hearsay	342	
	b. Second: Determine if What Is Being Offered Is Hearsay.....	343	
		i. Out-of-Court Statement.....	343
		ii. Offered to Prove the Truth of the Matter Asserted	344
	c. Third: Determine if a Hearsay Exception Applies	346	
		i. Exceptions That Apply Only When the Declarant Is Unavailable to Testify	347
		(1) Dying Declarations.....	349
		(2) Statement Against Interest	350
		(3) Former Testimony	350
	ii. Exceptions That Apply No Matter if the Declarant Is Available to Testify or Not.....	351	
		(1) Hearsay Exceptions Related to Sensations or Physical/Medical Conditions	351
		(a) Statements Made for the Purpose of Seeking a Medical Diagnosis or Treatment	353
		(b) Statements of the Declarant's Then-Existing State of Mind or Physical Condition.....	353
		(c) Excited Utterances	354
		(d) Present Sense Impression.....	354
	(2) Hearsay Exceptions Related to Records.....	355	
	(a) Recorded Recollection.....	356	
	(b) Other Records	357	

TABLE OF CONTENTS

xxi

(c) Business Records.....	358
2. Hearsay and the Confrontation Clause.....	359
II. Evidence: Examples	361
Chapter 8. Property	367
I. Property: Mnemonics & Blueprints	367
A. Ownership of Real Property.....	368
1. Transferring Real Property.....	369
2. Present and Future Interests	371
a. Fee Simple Absolute	371
b. Defeasible Fees	372
i. Fee Simple Determinable	374
ii. Fee Simple Subject to a Condition Subsequent	375
iii. Fee Simple Subject to an Executory Interest	376
3. Life Estates	378
a. Life Estates and Waste.....	380
b. Types of Remainders	383
i. Contingent Remainders.....	384
ii. Vested Remainders	386
iii. Vested Remainders Subject to Open.....	387
c. Additional Future Interest Topics	389
4. Rule Against Perpetuities	390
a. Uncertain Future Interests	391
b. The Rule Against Perpetuities Is More Likely Violated in Inter Vivos Conveyances	393
c. Common RAP Fact Patterns on the MBE	395
i. Open Class Whose Members Must Reach an Age That Is Beyond 21 Years.....	396
ii. The Fertile Octogenarian	397
iii. Fee Simple Subject to an Executory Interest	399
B. Concurrent Estates.....	401
1. Tenancy in Common	401
2. Joint Tenancy with Right of Survivorship	403
a. Unities and Joint Tenancy	403
b. Severing the Joint Tenancy.....	404
c. Tenancy by the Entirety	407
C. Landlord and Tenant Law	408
1. Types of Interests Created by a Lease	408
a. Periodic Tenancy.....	408
b. Tenancy for Years	409

c. Tenancy at Will	409
d. Tenancy at Sufferance	409
2. Responsibilities of the Landlord	410
3. Responsibilities of the Tenant	411
4. Subleasing and Assignments	411
a. Subleases	413
b. Assignments	415
D. Non-Ownership Rights in Land.....	418
1. Easements	418
a. Express Easement	421
b. Easement by Prescription	422
c. Easement by Implication.....	422
d. Easement by Necessity.....	422
e. Easement by Estoppel	423
2. Covenants.....	423
3. Equitable Servitude.....	425
E. Real Estate Contracts	427
1. Equitable Conversion	429
2. Seller's Duty to Disclose Material Defects	430
3. Deeds	431
a. Merger of Real Estate Contract and Deed	431
b. Types of Deeds	432
c. Recording the Deed	434
i. Recording Statutes.....	435
ii. Additional Recording Topics.....	437
F. Adverse Possession	438
G. Mortgages.....	440
1. Purchase Money Mortgage.....	440
2. Foreclosure	441
a. Deficiency Judgement.....	442
b. Mortgages and Lien vs. Title Theory Jurisdictions	442
c. Redemption	443
3. Multiple Creditors and Senior and Junior Interests	445
H. Additional Property Law Issues	448
1. Conflicts of Law	448
2. Fair Housing Act.....	449
II. Property: Examples	449
Chapter 9. Torts	455
I. Torts: Mnemonics & Blueprints	455
A. Negligence and Negligence-Related Topics	455

1.	Negligence	456
a.	Physical Damages Element.....	457
b.	Duty Element	457
i.	Additional Duty Rules	458
(1)	Duty to Render Aid or Rescue	458
(2)	Duty of Care in a “Trusting” Relationship.....	459
(3)	Duty of Care for Trespassers and Guests	461
(a)	Duty of Care for Trespassers	461
(b)	Duty of Care to Guests	462
(4)	Additional Standard of Care Topics....	465
c.	Causation Element	466
i.	Actual Cause	466
ii.	Proximate Cause	467
(1)	Intervening Cause.....	467
(2)	Superseding Cause.....	468
d.	Defenses.....	471
i.	Contributory Negligence.....	471
ii.	Comparative Negligence.....	472
(1)	Pure Comparative Negligence	472
(2)	Modified Comparative Negligence	473
iii.	Assumption of Risk	474
2.	Looks and Feels Like Negligence, But It’s Not	475
a.	Negligence Per Se	476
b.	Res Ipsa Loquitur	480
c.	Attractive Nuisance	482
3.	Joint and Several Liability.....	486
4.	Contribution	487
5.	Vicarious Liability	488
6.	Indemnification	491
B.	Intentional Torts.....	492
1.	Specific, General, and Transferred Intent	492
2.	Intentional Torts to Persons	495
a.	Defenses to Intentional Torts to Persons	495
i.	Consent	495
ii.	Self-Defense, Defense of Others, and Defense of Property.....	496
b.	Battery	497
c.	Assault	498
d.	False Imprisonment.....	499
e.	Intentional Infliction of Emotional Distress	501
i.	Bystander IIED Claims	502

ii. Negligent Infliction of Emotional Distress	505
3. Intentional Torts to Property	507
a. Necessity Defense to Intentional Torts to Property	507
i. Defense of Private Necessity	508
ii. Defense of Public Necessity	509
b. Trespass to Land	509
c. Trespass to Chattel	510
d. Conversion	511
C. Privacy Torts	512
1. Appropriation of Plaintiff's Name or Likeness	514
2. False Light Publication	514
3. Intrusion upon Seclusion	515
4. Public Disclosure of Private Facts	515
D. Strict Liability	516
1. Product Defect	517
2. Abnormally Dangerous Activity	518
3. Wild Animals	519
E. Defamation	520
1. Libel and Slander	520
2. Public and Private Figures	523
F. Miscellaneous Torts	525
1. Misrepresentation	525
2. Malicious Prosecution	526
3. Intentional Interference with Business Relations	527
II. Torts: Examples	527
Chapter 10. Answers & Explanations to Examples	533
I. Civil Procedure: Answers & Explanations for Examples	533
II. Constitutional Law: Answers & Explanations for Examples	550
III. Contracts: Answers & Explanations for Examples	565
IV. Criminal Law & Criminal Procedure: Answers & Explanations for Examples	581
V. Evidence: Answers & Explanations for Examples	592
VI. Property: Answers & Explanations for Examples	607
VII. Torts: Answers & Explanations for Examples	620
Appendix. Review of Highlighted Rules	633
I. Civil Procedure: Highlighted Rules	633
II. Constitutional Law: Highlighted Rules	644
III. Contracts: Highlighted Rules	658
IV. Criminal Law & Criminal Procedure: Highlighted Rules	674

TABLE OF CONTENTS**xxv**

V. Evidence: Highlighted Rules	689
VI. Property Law: Highlighted Rules.....	701
VII. Torts: Highlighted Rules.....	720
INDEX.....	733