

Professor Heilman's Predictions—February 2024

My predictions are educated guesses based on reviewing the California Bar Examination for more than 30 years. I don't have any special expertise or inside knowledge. I base my predictions on what the bar examination has looked like in the past. The past exams have certain commonalities. First, the exam usually has a balance of multistate and non-multistate subjects. Generally, three to four multistate subjects are tested along with one or two non multistate subjects. Second, the exam usually includes at least one subject which requires you to address California-specific law. Third, Professional Responsibility is tested in some fashion on almost every exam. Fourth, there is usually at least one cross-over question. And, finally, the exam is intentionally designed to be unpredictable. Please don't rely too heavily on my predictions or any other predictions. Based on the unpredictability of the exam, **you should study and be prepared to write about every subject---even the subject you hope won't appear on the exam.**

As you will see below, I've placed the subjects in three categories: (1) the subjects I think are most likely; (2) the subjects I think are possible; and, (3) the subjects I think are less likely. But as I've already said, any subject is possible, and you need to study every topic. You can use my predictions (and your own) to help you prioritize in the last days before the exam. For each subject, I try to highlight subtopics which you should consider as part of your final review.

Subjects just tested on the last exam are slightly less likely to appear on this exam, but the Examiners often repeat one or more subjects. In fact, there are times when a subject is tested several times in a row. Professional Responsibility, of course, is the one subject you should always expect to see on the exam.

Here are the subjects tested on the last ten California Bar Examinations:

Past Bar Subjects

February 2019

1. Wills and Trusts/Community Property (Out-of-State Will; Quasi-CP; Intervivos Gift of Quasi-CP; Codicil; Testamentary Power of Conservator; Creditors' Rights)
2. Torts (Strict Liability for Animals; Negligence; Landowner Duties; Contributory Negligence; Assumption of Risk; Comparative Fault)
3. Real Property (Landlord-Tenant; Duty to Deliver Possession; Quiet Enjoyment; Warranty of Habitability; Surrender; Mitigation)
4. Evidence/Civil Procedure (Hearsay; Subsequent Remedial Measure; Expert and Law Opinion; Subject Matter Jurisdiction in Federal Court)
5. Professional Responsibility (Unauthorized Practice of Law; Advising Client to Ignore Court Order; Asserting Meritless Claims)

July 2019

1. Civil Procedure (Discovery; Interrogatories; Physical and Mental Examination; Privileges)
2. Remedies/Constitutional Law (Temporary Restraining Order; Preliminary Injunction; Declaratory Relief; First Amendment—Free Exercise/Establishment Clause)
3. Criminal Law and Procedure (4th Amendment Search and Seizure; Exclusionary Rule; Robbery)

4. Professional Responsibility (Frivolous Motion; Duty of Fairness to Opposing Party; Conflict of Interest)
5. Contracts (Contract Formation; Statute of Frauds; Anticipatory Repudiation; Remedies—Specific Performance)

February 2020

1. Torts (Defamation; Invasion of Privacy; Intentional Infliction of Emotional Distress) 2. Professional Responsibility (Representation of an Organization; Duty of Loyalty/Conflict of Interest; Duty of Confidentiality)
3. Contracts/Remedies (Common Law Contract; Parol Evidence/Integration; Ambiguity; Interpretation; Specific Performance)
4. Evidence (California Criminal Case; Authentication; Hearsay; Business Records; Co Conspirator Statements; Character/Impeachment; Attorney-Client Privilege) 5. Business Associations (Corporation vs. Partnership; Parties in a Partnership; Authority)

October 2020

1. Professional Responsibility (Conflict of Interest—Personal Relationship with Opposing Counsel; Scope of Representation; Withdrawal)
2. Business Associations (Directors' Duties; Shareholder Inspection of Books and Records; Dividends)
3. Property (Joint Tenants; Waste; Rental Income; Conveyance by Joint Tenant; Taxes)
4. Crimes/Criminal Procedure (Burglary, Larceny, Duress, Identifications)
5. Remedies/Contracts (Sale of House with Paintings; Misrepresentation/Fraud; Injunction; Specific Performance; Damages)

February 2021

1. Evidence (California; Character; Leading Question; Hearsay; Impeachment; Business Record)
2. Contracts/Remedies (UCC; Warranties; Disclaimer of Warranties; Limitation on Remedies; Consequential Damages)
3. Community Property (Separate Property Business with Community Labor; Pereira/Van Camp; Post-Separation Labor Contributed to Business)
4. Professional Responsibility (Referrals in Exchange for Percentage of Fees; Use of a Capper; Duty of Competence; Contingency Fee in Divorce; Sexual Relations with Client; Threatening Administrative Proceedings to Gain an Advantage in Civil Dispute)
5. Real Property (Express Easement; Exceeding the Scope of the Easement; Covenant Running with the Land; Changed Circumstances)

July 2021

1. Civil Procedure (Venue; Discovery-- Production of Documents, Motion to Compel; Claim and Issue Preclusion)
2. Professional Responsibility (Duty of Loyalty--Conflict of Interest, Shared Office Space; Inadvertent Disclosure of Document by Employee of Law Office; Duty to Supervise; Duty of Competence; Duty of Diligence)

3. Torts (Respondeat Superior; Independent Contractor; Duty of Care; Statutory Duty; Emergency; Proximate Cause)
4. Crimes/Criminal Procedure (Fifth Amendment—Miranda, Invocation of Right to Counsel; Search of Cell Phone Text Messages; Validity of Stop and Arrest; Automobile Exception; Search Incident to Arrest)
5. Wills/Community Property (Form Will; Will Executed in Another State; Quasi-CP; Omitted Spouse; Pretermitted Child and Omitted Child)

February 2022

1. Crimes/Criminal Procedure (Felony Murder; Attempted Murder; Stop and Frisk; Exclusionary Rule)
2. Community Property (Permanent Separation; Premarital Earnings; Disability Payments; Post-Separation Loan)
3. Real Property/Remedies (Nuisance; Trespass to Land; Damages; Injunctive Relief; Nominal Damages)
4. Evidence/Professional Responsibility (Hearsay—Admission of a Party, Declaration Against Interest; Attorney-Client Privilege; Multiple Hearsay; Duty of Confidentiality; Withdrawal)
5. Business Associations (Pre-incorporation contract; Liability of Directors for Breach of Contract; Piercing Corporate Veil; Breach of Fiduciary Duty; Fraud)

July 2022

1. Contracts (Sale of Goods; UCC 2-207; Remedies; FOB provision)
2. Constitutional Law (First Amendment; Symbolic Speech in School Setting; Procedural Due Process; Mootness)
3. Professional Responsibility (Amount of Fee; Contingency Fee Arrangement; Scope of Representation-Settlement; Commingling Client Funds; Release of Liability)
4. Business Associations (Closely-Held Corporation; Ultra Vires Acts; Shareholder Voting Agreement; Directors' Duties; Derivative Action)
5. Wills/Community Property (Formal Will; Form Will; Holographic Will; Omitted Child; Quasi-Community Property)

February 2023

1. Civil Procedure (Joinder; Discovery—Work Product; Physical Examination)
2. Constitutional Law (Tax and Spend Power; Equal Protection; Organizational Standing)
3. Real Property (Landlord-Tenant—Possession; Holdover Tenant; Quiet Enjoyment; Damages)
4. Professional Responsibility (Duty of Loyalty—Conflict with Former Client and Attorney's Personal Views; Duty of Confidentiality; Duty of Honesty)
5. Evidence (Hearsay; Lay Opinion; Expert Opinion; Learned Treatise; Prior Inconsistent Statement)

July 2023

1. Business Associations (Partnership; Partnership Liability; Liability of Partners for Torts; Implied Partnership)

2. Torts (Products Liability—Strict Products Liability; Negligence; Implied Warranty; Express Warranty; Misrepresentation)
3. Professional Responsibility (Attorney for Organization; Duty of Confidentiality; Duty of Loyalty; Duty to Communicate; Withdrawal)
4. Criminal Law (Burglary; Larceny; Arson; Felony Murder; Involuntary Manslaughter; Necessity; Confessions—Miranda, Due Process, 6th Amendment)
5. Remedies (Breach of Contract; Fraud; Reformation; Rescission; Specific Performance; Constructive Trust; Equitable Lien; Lowest Intermediate Balance Rule)

MOST LIKELY SUBJECTS ON THE UPCOMING BAR EXAM:

Professional Responsibility

Professional Responsibility is tested on almost every single exam. Professional Responsibility is usually tested as a full question, but it can just as easily be tested as a cross over question. And sometimes the Examiners have given both a full question and a cross-over question on the same exam.

The last three Professional Responsibility questions have involved some type of civil dispute. The Examiners last tested Professional Responsibility involving a criminal case in February 2022. I wouldn't be surprised by a question involving representation of a criminal defendant or a question involving the special obligations of prosecutors. Make sure you understand how the rules of professional responsibility limit the types of public statements a prosecutor can make.

The Examiners have often tested the situation where the defense attorney comes into possession of evidence of the crime. Similarly, be prepared for the situation where the defendant intends to testify falsely. Make sure you understand what a defense attorney is supposed to do in this situation. You should also be ready for a fact pattern where a third party retains the attorney to represent the defendant in a criminal case. The third party is usually the parent or employer of the criminal defendant. Remember the attorney's duty of loyalty and duty of confidentiality are owed to the client, not to the person paying for the representation.

Joint representation of criminal defendants hasn't been raised since July 2018. It is an important issue that has been tested a great deal in the past. Often, the attorney begins the joint representation only to discover that the clients' interests are in conflict. In this situation, the attorney will typically have to withdraw from representing both clients because the attorney cannot continue to represent one client whose interests are adverse to a former client. The issue gives the Examiners the opportunity to simultaneously raise the duty of loyalty and the duty of confidentiality.

Whether a Professional Responsibility question involves a criminal case or a civil case, the Examiners almost always test the duty of loyalty and conflicts of interest. This issue can be raised in numerous ways. Watch out for a situation involving representation of a client where the representation comes into conflict with the interests of a former client. You should also be ready for a question where the attorney's personal interests or business interests conflict with the interests of the client.

The most recent Professional Responsibility question involved an attorney who represented an organization. This topic seems less likely since it was just tested. However, make sure you understand that when an attorney represents an organization, the attorney's duty of

loyalty is to the organization, not to the individuals who make up the organization. Also, make sure you understand who holds the attorney-client privilege. The most recent question involved a situation involving misconduct in the organization. It triggered the issue of whether the attorney should “report up” the corporate command chain and whether the attorney is permitted to “report out” the misconduct. Don’t be surprised by a cross-over question involving a corporation or partnership where a director or partner is also an attorney.

Most Professional Responsibility essays will raise an issue about the duty of confidentiality.

Review the difference between the duty of confidentiality and the attorney-client privilege. You should also review the exceptions to the duty of confidentiality and the differences between the ABA and California rules in this regard.

The Examiners have frequently tested the issue of attorney’s fees. Remember that under the ABA Rules, fees have to be reasonable. Under California law, fees can’t be unconscionable. In evaluating fees, courts typically look at the skill and effort needed to do the work, the experience and education of the attorney, and what is customary in the area for the type of work. Make sure you review the specific requirements for contingency fees, especially the differences between the ABA and California requirements. Don’t forget to review the rules regarding advancing legal expenses and advancing personal expenses to the client.

The issue of attorney advertising hasn’t been tested for a while. An attorney can advertise to the general public or to those in need of specific legal services, but advertising must be truthful and not misleading. Advertising cannot guarantee a result. Watch out for the issue of an attorney claiming a specialization or the issue of an attorney claiming to be “of counsel” to a firm. You should also understand the difference between advertising and solicitation. Although solicitation is generally not permitted, you should understand when an attorney can directly advertise to those in need of legal services.

The Examiners have tested the issue of sexual relations with a client on numerous occasions. You should be prepared to write about it.

When addressing a Professional Responsibility question, it may make sense to organize your discussion around the various actions or inactions by the attorney. For each action the attorney has taken or failed to take, identify what rules of professional responsibility are triggered by the attorney’s conduct. Also, don’t focus solely on the attorney’s misconduct. If the attorney has done something which is consistent with the rules, you should include that in your answer. However, in many Professional Responsibility questions, most of the attorney’s actions are in violation of the rules. In some essays, you should describe not only how the attorney violated the rules, but also what the attorney should have done in the situation. Where there are differences between the ABA Rules and California law, make sure you clearly explain the differences. Finally, pay close attention to the facts in a Professional Responsibility question and incorporate the facts into your answer. For instance, when there is a conflict of interest, use the facts to show how the interests of the client diverge from the interests of another client or former client.

Contracts

Contracts is an important topic for the Bar Examiners, but it didn’t appear on the last two exams. However, the Remedies question on the last exam was based on a contractual dispute. A full Contracts question seems likely on this exam.

Always be prepared for a question involving contract formation. You should understand the requirements for a valid offer. You should also review how an offer might be terminated. The Examiners haven't given a question involving an option contract or a merchant's firm offer for some time. These two topics are overdue. Be prepared for the situation where there is an option contract and an attempted revocation before the expiration of the option period. With formation questions, you should be prepared for a question involving the mailbox rule or a question where there is an acceptance with an attempted revocation designed to overtake the acceptance. Make sure you understand the different approaches to acceptance under the common law (the mirror image rule) and the UCC (a seasonable assent). You should also be ready for a question involving UCC 2-207 although the issue was tested recently. Consideration is rarely the main focus of an essay but watch out for promises which appear to be illusory. A question might involve someone who promises to purchase goods only if the party deems them suitable for the upcoming year or only if the party deems it desirable. Make sure you understand how this is different from situations where a party agrees to purchase all its requirements, or a party agrees to sell its entire output. In those situations, the promise is not illusory because the UCC imposes an obligation of good faith on the parties. While some Contracts questions test only on formation issues, most questions will also require you to address performance and breach. You should also be ready for a question involving an anticipatory repudiation or where prospective inability to perform is triggered. Make sure you understand the differences between these two. You should also be able to discuss the remedies available to the non-breaching party in these circumstances. You should also understand the differences between a material breach and a minor breach. Make sure to review the perfect tender rule under the UCC.

The Statute of Frauds is a frequently raised topic. When it is a major focus of the question, the fact pattern typically raises one or more exceptions to the writing requirement. Part performance and estoppel are frequently tested exceptions.

The doctrines of impossibility, impracticability and frustration of purpose are also tested often. Make sure you know the requirements for these justifications for non-performance. While these doctrines can be raised together in the same fact pattern, make sure you understand the differences between them.

The Examiners recently tested the Parol Evidence Rule. You should always be ready to explain the rule. Also, review the situations where Parol Evidence is admissible, for instance to interpret an ambiguous writing, to reform a writing where there is a typographical error, or where there is a collateral agreement. You should also review the various doctrines which help courts interpret ambiguous provisions in a contract such as the course of performance, the course of dealings and the custom in the industry.

The Examiners have asked several questions recently involving specific contractual provisions such as waivers of warranties, an F.O.B. term, or an "as is" clause. While these types of questions are not common, make sure you review these types of specific contractual provisions. Also, make sure you understand the significance of a "time is of the essence" term in a contract. When time is made "of the essence" in a contract, any delay is considered a material breach.

Contracts questions frequently cross over with Remedies. Make sure you understand the difference between expectation damages and consequential damages. You should also

understand incidental damages. Review the requirements for a liquidated damages clause to be enforceable. Specific performance is another frequently tested issue. Review the remedies for breach under the UCC. Remember the requirement that the non-breaching party has to take reasonable steps to mitigate damages. In addition, remember that damages can't be speculative; they must be reasonably certain.

On several occasions, Contracts has been crossed over with Business Associations. Watch out for a situation where one of the promoters of a corporation has entered into a pre incorporation contract.

Civil Procedure

Civil Procedure has only been tested once in the last four exams and it wasn't on the last exam. It seems somewhat more likely to appear on this exam. Civil Procedure also gives the Examiners the opportunity to test on California law by giving you a question set in a California state court.

You should be ready for a question involving personal jurisdiction since it hasn't been tested since July 2016. Make sure you understand the traditional methods of personal jurisdiction as well as the approach permitted under International Shoe. Make sure you understand how a defendant challenges personal jurisdiction. In state court in California, the defendant can make a special appearance to challenge personal jurisdiction. In federal court, a defendant can combine a challenge to personal jurisdiction with other challenges in a Rule 12 motion.

Subject matter jurisdiction is a frequently tested topic. The Examiners usually test on diversity jurisdiction. You should understand how a court determines the citizenship of individuals and corporations for purposes of diversity jurisdiction. You should also review how the amount in controversy is determined. Courts look at the good faith allegations of the plaintiff's complaint; what the plaintiff ultimately recovers doesn't matter when determining the amount in controversy. You should review how a court determines the amount in controversy when a plaintiff is seeking specific performance or injunctive relief. Make sure you understand when a plaintiff can aggregate claims to meet the amount in controversy. You should also review federal question jurisdiction although it is tested less often. Also, remember that subject matter jurisdiction can be raised at any time, even on appeal. There have been a number of questions where a case is filed in state court, but it has been removed to federal court. This allows the Examiners to test both removal and subject matter jurisdiction in federal court. You should review the procedural and time limitations on removal. The Examiners might also test some issue regarding California procedure prior to the removal such as the sufficiency of the complaint or service of process.

Review the requirements for a valid complaint. You should especially review the rules regarding amendments to complaints and the relation back doctrine, particularly what happens when a new party is added in an amended complaint.

Collateral estoppel and res judicata were tested in July 2021 after not being tested for a long time. The Examiners have sometimes tested both doctrines in detail. Make sure you understand the difference between federal law and the California "primary rights" doctrine with respect to res judicata. And make sure you understand non-mutual collateral estoppel and

when it is permitted.

Venue in federal court was tested fairly recently. The topic appears on a regular basis. You should review the different ways venue might be changed. Also, make sure you review the rules regarding venue in state courts in California.

The requirements for joinder under Rule 19 were tested last February so the topic seems unlikely. However, you still need to understand joinder for the multistate portion of the exam. Make sure you understand the requirements for impleader. When impleader is tested, the Examiners frequently raise the issue of supplemental jurisdiction.

Intervention hasn't been tested for some time. Review the difference between intervention as of right and permissive intervention.

Discovery was tested last February, but it's a topic which has been tested frequently in the last ten years. Make sure you understand the broad scope of discovery. You should also review the different discovery mechanisms, including their scope and limitations. Make sure you understand what discovery mechanisms are possible against those who are not parties to the litigation. Also, review the different sanctions which can be imposed for noncompliance with discovery obligations. Most discovery can be conducted without a court order, however that is not the case for a mental or physical examination of a party. You should have a good understanding of the work product privilege, even though the topic was tested last February.

The final judgment rule for appeals is an easy issue to test. Remember that a party cannot appeal until there is a final judgment unless one of the limited exceptions applies. The right to jury trial was tested recently, but you should still understand that the 7th Amendment guarantees a right to jury trial only for actions at law, and not actions in equity. Make sure you understand the difference between a legal claim and an equitable claim. Also, remember that in federal court, the legal claims must be tried first to preserve the right to a jury trial.

Wills/Trusts

Wills and Trusts wasn't on the last two exams. It seems like a likely subject on this exam. The last two times the subject was tested was in July 2021 and July 2022. Both times, the question was primarily a Wills question crossed over with Community Property. Trusts hasn't been tested since 2016. I wouldn't be surprised by a question focusing exclusively on Trusts, especially one testing on the fiduciary responsibilities of trustees.

Be prepared for a question involving the requirements for creating a valid trust. A trust requires a settlor, identifiable beneficiaries, a trustee, intent to create a trust, a trust res, and a valid trust purpose. Remember that the settlor can also be the beneficiary and the trustee for a trust. This is typically the case where a settlor creates an inter vivos trust for his or her own benefit. The Examiners have occasionally tested the use of "precatory language" and whether that is sufficient to establish a valid trust.

Make sure you understand the different types of trusts, particularly the difference between an inter vivos trust and a testamentary trust. Be prepared for the pour over situation where a testator drafts a will which leaves money or property to an existing trust. Be ready for a spendthrift trust. Remember with a spendthrift trust, ordinary creditors cannot reach the principal, but make sure you know the exceptions such as creditors who have supplied necessities, government creditors who are seeking taxes, and creditors trying to enforce child

or spousal support obligations.

Trust questions frequently focus on the fiduciary duties of the trustee. Review the duty of loyalty and issues involving self-dealing. Unlike Corporations where some interested director transactions are permitted, in the Trusts context, all self-dealing is prohibited. You should understand when a trust creates mandatory duties for the trustee and when the trustee has discretion. Make sure you know the specific obligations of trustees to account, to make the trust property productive, and to earmark trust property. Review the types of investments trustees are permitted to make including the use of statutory lists in some states. You should also understand the trustee's obligation to diversify the trust assets. A frequently tested situation involves a trustee who decides to invest most of the trust assets in some new or risky venture. Also, make sure you understand the duty of the trustee to personally perform. This is usually raised where there are two trustees, and one improperly delegates all responsibility to the other trustee.

On occasion, the Examiners have tested the difference between a secret trust and a semi-secret trust. Neither is a valid trust. Make sure you understand that the remedy for a secret trust is a constructive trust, whereas the remedy for a semi-secret trust is a resulting trust for the settlor or settlor's heirs.

Modification and termination of a trust are not major topics, but they have been tested on several occasions. Make sure you review when and how a trust can be modified. Review the different types of remedial trusts: constructive trusts and resulting trusts, especially the purchase money resulting trust.

If Wills is tested, I would anticipate a stand-alone question or one crossing over with Trusts. I don't think the Examiners will give a cross-over question with Community Property on this exam.

The Examiners often test on the requirements for valid execution of a will. Be prepared for a standard question focusing on the requirements for witnesses, especially the issue of the interested witness. You should also know the rules for wills executed in another state. You should understand that a testator needs testamentary capacity to make a will. You should also review undue influence and the different ways it can arise. Remember that even if all the formalities for a will are not satisfied, a will can be admitted to probate if there is clear and convincing evidence that the testator intended for the document to be his will. Review the requirements for a valid holographic will.

The Examiners have often tested both dependent relative revocation (DRR) and revival. DRR arises when the testator revokes a will under a mistaken belief that a new testamentary disposition is valid. If the new disposition is invalid, the revoked will or revoked provision is restored so long as that is consistent with the testator's intent. DRR is often raised in a fact pattern where a testator crosses out a provision in a will and attempts to increase the gift by interlineation. Revival arises when the testator's first will is revoked by a second will. The testator then revokes the second will. The issue is whether the first will is revived. Once again, a court will focus on ascertaining the testator's intent. A court will revive the first will if it appears that the testator intended to revive the first will by revoking the second will.

Review the difference between a general bequest and a specific bequest. This is usually raised when the testator leaves stock or a vehicle to someone in the will. If the will refers to "my" shares of stock or "my" vehicle, this would traditionally make the gift a specific bequest. If

the stock or vehicle is not in the testator's estate at death, the gift would be adeemed by extinction.

With respect to the distribution of the testator's estate the issue of lapse and anti-lapse are tested most frequently. On occasion, the Examiners have tested advancement and abatement. The Examiners often raise the issue of the pretermitted child or the omitted spouse, although both of those issues were tested recently.

Some Wills questions involve a testator who doesn't distribute his entire estate in his will or where portions of the will fail or a gift lapses. The assets not addressed in the will pass via intestate succession. Make sure you understand the rules for property which passes by intestacy. The Examiners could give you a question where the residual beneficiary predeceases the testator and the bequest is not saved by anti-lapse. The property in the residuary would then pass by intestate succession. Also, a pretermitted child takes his or her intestate share, so you need to know what the child would receive if the testator died intestate.

Evidence

Evidence has been tested in some fashion on the last five February exams, although two of those questions were cross-over question. One was a cross-over with Professional Responsibility. The other was a cross-over involving Civil Procedure. The Examiners might want to break the pattern of testing Evidence in February, but I still think Evidence is somewhat likely this time around. The last two Evidence questions in 2022 and 2023 involved the Federal Rules and the two previous questions in 2020 and 2021 involved California law. A question involving California law would not be surprising, particularly a cross-over question involving both California Evidence and Civil Procedure. However, you should always start with the assumption that the Federal Rules of Evidence apply unless the question tells you that the dispute is in a California state court or the Examiners tell you to answer according to California law.

I would always be prepared for a question focusing on hearsay. Be on the lookout for out-of-court statements which aren't offered for their truth, particularly statements offered to show the effect on the listener. The Examiners frequently test on statements of a party opponent. You should review the different kinds of statements of a party which are admissible against the party: the party's own statement; the adoptive admission; the vicarious admission; and, statements of a co-conspirator. Review the major exceptions to the hearsay rule: excited utterances; present sense impressions; statements made for purposes of diagnosis and treatment; statements of the declarant's present state of mind; business records; official records; dying declarations; declarations against interest; and, former testimony. Business records and, to a lesser extent, official records are frequently tested exceptions when there is a civil dispute. If an Evidence question is based on a criminal case, the Examiners might raise the dying declaration and former testimony exceptions. Also, don't forget to think about the Confrontation Clause if an Evidence question raises hearsay in a criminal case. Make sure you understand multiple or double hearsay.

Although character evidence can be tested in both a civil or criminal case, the topic is raised more frequently in the criminal setting. Character evidence tends to be tested in detail. You should understand not only when character evidence is admissible in criminal versus civil cases, but also what type of evidence is admissible to prove character—reputation, opinion or specific acts. Impeachment is also tested frequently. Make sure you understand when convictions are

admissible for impeachment, the limits on the admission of remote convictions and the way that convictions are proven for impeachment purposes. In addition to convictions, a witness can also be asked about prior bad acts involving dishonesty, but no extrinsic evidence is permitted. Impeachment is one of the areas where there are significant differences between the Federal Rules and California Law, so you need to review the California distinctions.

The Examiners often test one or more of the extrinsic policy exclusions such as subsequent remedial measures, proof of liability insurance, offers to settle, and offers to pay medical and other similar expenses. You should also be prepared for a question which focuses on problems with the form of questions, such as leading questions, compound questions and questions which assume facts not in evidence. Form problems are not usually the major thrust of a question, but they can be raised in almost any Evidence question.

The Examiners like to test on the two spousal privileges—the marital communication privilege and the spousal testimonial privilege. You should also be prepared for a question involving the clergy-penitent privilege or the psychotherapist-patient privilege.

Watch out for a question where the Best Evidence Rule is raised. Whenever a party is trying to prove the contents of a writing, recording or photograph, the Best Evidence Rule requires the introduction of the original unless there is a satisfactory explanation for the unavailability of the original. Keep in mind the Federal Rules allow for liberal introduction of duplicates. The Best Evidence Rule is often tested along with the business records exception in a civil dispute. You should think about the Best Evidence Rule, whenever you see a copy being introduced or a witness testifying regarding the contents of a document.

Authentication is another issue which can be easily overlooked. Remember that if a party is introducing something tangible, authentication is an issue. Watch out for situations where a party is offering evidence of the contents of a telephone conversation. The party needs to authenticate the conversation by providing sufficient information to identify the participants.

The topic of judicial notice gets tested occasionally. Make sure you understand the types of facts which can be judicially noticed. Also, you should review the different treatment of a judicially noticed fact in a criminal case versus a civil case.

Opinion testimony was recently tested, but you should still have a good understanding of the differences between lay and expert opinion testimony. Make sure you know those topics on which lay opinion is permitted. Review the requirements for expert opinion.

Evidence questions always tend to be racehorse questions where you need to address numerous issues in a short period of time. Budget your time and don't worry if you have to be conclusory in places.

Constitutional Law

Constitutional Law was not tested on the last exam, but it was tested on the July 2022 exam and the February 2023 exam. Interestingly, Constitutional Law has been tested on three times on the last ten exams. Even though it has been tested on two of the last three exams, it seems somewhat likely because of how infrequently it has been tested.

You should always be ready to discuss the justiciability requirements of ripeness, mootness and standing even though the Examiners just tested the requirements for organizational standing.

Be prepared for a question involving the Commerce Clause, both the power of the

federal government and the restrictions imposed on the states under the “Dormant” Commerce Clause. Remember that states are not permitted to discriminate against out-of-state commerce, not are they allowed to unduly burden interstate commerce.

Don’t be surprised by a question involving separation of powers. The Examiners have asked several questions in which Congress has delegated its legislative power to an Executive branch agency. Congress can delegate its legislative power provided Congress has provided an intelligible principle to guide the agency. You might also see a question where the President has taken an executive action potentially in conflict with the views of Congress. Occasionally, the Examiners ask a question involving the scope of the President’s power, for instance, where the President acts in the face of Congressional silence or disapproval especially in the realm of foreign affairs or the military. The Examiners typically avoid anything too topical. It’s unlikely that you will see a question involving abortion or student loan forgiveness. But don’t be surprised by a question involving the President’s power over the military or where the President has acted in response to a threat by a foreign government.

Review the Supremacy Clause and the different ways federal law can preempt state law. You should also understand the prohibition on the federal government “commandeering” a state agency. The 10th Amendment is rarely the main focus of a question, but it has been tested on several occasions.

The First Amendment has been the topic on many of the recent Constitutional Law questions. Two of the questions involved religion. Because religion has been tested frequently, the Examiners may avoid this topic. A question involving free speech or association is always fair game, but the topic was tested on the July 2022 exam. You should still review those categories of speech which are not protected by the First Amendment, such as obscenity and advocacy of imminent lawless action. You should also review the standard for regulating commercial speech, especially the standards for signs and billboards. Be prepared for a question involving time, place and manner restrictions in a public forum or a limited public forum.

Equal protection was tested last February, but it is a topic which is frequently raised. Be prepared for a question involving discrimination based on gender or national origin. Review the different classifications and the standards of review. Make sure you explain who has the burden when addressing an equal protection issue. Be prepared for a question where the government has enacted a policy which is not discriminatory on its face, but the policy has a disproportionate impact on a protected class and it was enacted for a discriminatory reason. Also, remember to raise an equal protection issue when the government is classifying in any way, even though there is no suspect or quasi-suspect class. For example, if a state is discriminating based on an economic factor, you should still discuss equal protection and explain that the classification will be analyzed under rational basis review.

If the Due Process Clause is raised, watch out for a procedural due process issue. You should review what interests are classified as liberty interests and what interests are classified as property interests. Be prepared for a question involving a person who loses government employment, government benefits or public education without notice or a hearing.

If the right of privacy is tested, the question would likely focus on something like household size, rather than on contraception, marriage or abortion.

Constitutional Law questions frequently involve a limited number of issues. The graders

will be looking at the depth and quality of your analysis. Make sure to incorporate the facts into your analysis. You can also analogize or distinguish past Supreme Court decisions, but you are not required to refer to cases by name. With a Constitutional Law question, you may end up writing about the same topic several times. The Examiners may give you a question where there are three different challengers who are raising the same legal issue, but each challenger is impacted by the government action in a different way.

POSSIBLE SUBJECTS

Criminal Law/Criminal Procedure

Criminal Law/Criminal Procedure was tested on the last exam, but it wasn't tested on the two prior exams. The Examiners sometimes repeat a subject that was just tested. This seems like a possible topic for repetition. The question on the last exam focused primarily on Criminal Law issues, so if Criminal Law is tested, it will probably focus more heavily on Criminal Procedure issues.

With most Criminal Procedure questions, a defendant is seeking to have various items of evidence excluded. Thus, it makes sense to start by mentioning the Exclusionary Rule. For example: "Defendant will argue that the drugs have to be excluded under the Exclusionary Rule because they were seized in violation of his 4th Amendment rights." Or, "Defendant will argue that his statement has to be excluded under the Exclusionary Rule because it was taken in violation of his 5th Amendment right to be free from compelled self-incrimination."

Most Criminal Procedure questions will involve a 4th Amendment issue. Make sure you understand the prerequisites for the 4th Amendment to apply: government conduct which intrudes into a defendant's reasonable expectation of privacy. Watch out for fact patterns where the 4th Amendment does not apply because the defendant knowingly exposed items to public view or because the search occurred in the open fields. Review the requirements for a valid search warrant. You should be ready to discuss the exceptions to the warrant requirement, especially the vehicle exception, search incident to arrest, consent, exigent circumstances and the border exception. Make sure you understand the plain view doctrine. Watch out for the situation where an individual has apparent authority to consent. Also be prepared for a scenario in which one joint occupant consents to a search but the other joint occupant refuses entry to the police.

You should definitely review the requirements for a stop and frisk. Also, remember that police are permitted to stop a vehicle based on reasonable suspicion rather than probable cause.

The other frequently tested topic in Criminal Procedure is the 5th Amendment and Miranda rights. Although this topic was just tested on the past bar exam, it is a topic the Examiners have repeated. You should understand what custody means for purposes of Miranda. Also, make sure you understand the concept of interrogation—it includes direct questioning as well as any words or conduct designed to elicit an incriminating statement. You should review the requirements for a defendant to waive his Miranda rights. Also, understand what happens when a defendant invokes his or her rights under Miranda. Make sure you know the difference between invoking your right to silence versus invoking your right to counsel under Miranda.

In addition to Miranda, you should also review when a defendant's statements violate either the Due Process Clause or the 6th Amendment right to counsel. Remember that the 6th Amendment right to counsel is only triggered after the defendant is formally charged by the filing of a criminal complaint or the return of a grand jury indictment.

The requirements for a valid guilty plea haven't been tested for some time. That is an issue which could easily be raised. You should also review when a criminal defendant has a right to jury trial and when the defendant has a right to counsel.

You should review the Confrontation Clause, particularly how it applies when two defendants are tried jointly and one defendant's out-of-court confession is offered against the other at trial. In this instance, there is a conflict between one defendant's right to confront and cross examine his accuser and the other defendant's 5th Amendment privilege not to testify.

The exceptions to the Exclusionary Rule are tested regularly. Review the following exceptions: impeachment, inevitable discovery, independent source, and attenuation. You should also review the good faith exception to the Exclusionary Rule and the exceptions to that exception.

The issue of identifications has been tested on numerous occasions. You should understand when pretrial identifications violate the Due Process Clause and when they violate the 6th Amendment right to counsel.

Double Jeopardy and the death penalty are topics which haven't been tested for so long that it is unlikely they will appear on an essay question. You should still understand some basic rules regarding the death penalty. Make sure you understand that the death penalty cannot be "automatic"; any statute must allow the defendant to put on all mitigating evidence. Also, the death penalty can only be imposed in murder cases and only on a defendant who killed, intended to kill, or participated in a felony in a significant way and death resulted. The death penalty also cannot be imposed upon someone who was a minor when the crime was committed.

If a question focuses more on Criminal Law, don't be surprised if the question involves accomplice liability or conspiracy liability. You should understand the requirements for each and the scope of liability for accomplices and co-conspirators. Be ready to discuss the defense of withdrawal if conspiracy is tested. When a question involves multiple defendants, the defendants usually have different mental states. One defendant is typically acting with intent, another defendant may have suspicions and the final defendant may be an unwitting dupe in the scheme. The Examiners expect you to understand which defendants have the requisite mens rea to be convicted of conspiracy or to be held liable as accomplices.

Attempt is a frequently tested topic. Make sure you understand the potential defense of impossibility and the distinction between factual and legal impossibility. Remember that attempt is a specific intent crime. Don't be surprised by a fact pattern raising the crime of solicitation.

You should always be ready for a question involving homicide. Make sure you're prepared for a question involving voluntary manslaughter. The Examiners have given several homicide questions where there was a question of whether the defendant satisfied the actus reus requirement. Also, be on the lookout for homicide questions involving causation. A question could involve a proximate cause issue such as intervening negligent medical care or some other foreseeable intervening factor which doesn't cut off the liability of the defendant.

The most recent Criminal Law question involved property crimes, so this topic seems less likely. You should still be prepared for a question involving larceny, embezzlement, robbery and burglary, and, of course, the modern crime of theft. Make sure you understand the common law crimes as well as the modern changes to those crimes.

Review the standard defenses of self-defense, defense of others, duress and necessity. Make sure you understand the differences between voluntary and involuntary intoxication. You should also review the different tests for insanity since that issue hasn't been tested for a while.

Real Property

Real Property wasn't on the last exam, but it has been tested a fair amount recently. It's actually been on the last three February exams. In February 2021, the question involved easements. In February 2022, the Examiners gave a question involving a nuisance. In February 2023, the question was a standard landlord-tenant question. I wouldn't be surprised by a Real Property question, but I think other topics are somewhat more likely.

You should always be prepared for a question involving the Takings Clause. Make sure you understand the different ways a taking can occur, especially the notion that a government regulation can be a taking if it deprives the owner of all reasonable economic value of the property. Make sure you understand exactions and the Nollan-Dolan standard for determining whether they are takings of property. You should also have a basic understanding of zoning and what a non-conforming use is.

Concurrent estates are tested frequently by the Examiners. The topic was last tested in 2020. Make sure you understand the difference between a joint tenancy and a tenancy in common. Review the four unities needed for a joint tenancy. When you get a question involving joint tenancy or tenancy in common, the Examiners often test on the rights and responsibilities of those who own as joint tenants or tenants in common. You should understand a co-owner's responsibility, if any, for repairs, improvements, mortgages and taxes. Make sure you understand what happens when a joint tenant borrows against his or her interest in a joint tenancy. Most jurisdictions follow the "lien theory," which means that the loan does not sever the joint tenancy. Some jurisdictions, however, follow the "title theory," whereby a loan severs the joint tenancy. Also, remember that one co-tenant can't adversely possess against another co-tenant without evidence of an ouster. Make sure you understand how a court can partition concurrent estates.

Adverse possession hasn't been fully tested since 2011, although there was a subissue in the October 2020 exam about adverse possession against a co-owner. When you see a statute of limitations in a Property question it is typically a trigger for a discussion of adverse possession or easement by prescription. If there is no statute, explain that the statutory period varies from jurisdiction to jurisdiction. Make sure you understand some of the details such as tacking, tolling, and how courts deal with the issue of vacation or seasonal property.

Review the requirements for a valid conveyance. This topic seems possible since it also hasn't been tested for some time. Review the issue of delivery. Watch out for the situation where the owner hands the deed over to an agent. Make sure you understand the six covenants contained in a general warranty deed. When a question involves conveyancing, it may also test your knowledge of recording statutes. Usually, but not always, the Examiners will provide you with a recording statute in the fact pattern. You need to be able to read the statute

and determine whether it is a notice statute or a race-notice statute. Remember that recording statutes change the common law rule of first in time, first in right. Recording statutes protect the subsequent party who takes without notice. You should also understand that a subsequent party might have actual notice, record notice or inquiry notice.

While the topic of mortgages is tested more frequently on the multiple choice portion of the exam, you should have a basic understanding of mortgages for the essay portion. Easements and covenants were recently tested, but the issues are favorite topics of the Examiners. Make sure you understand the different ways easements can be created especially easements by reservation, easements by prescription and easements by necessity. Review the difference between an easement appurtenant and an easement in gross. You should also understand the requirements for the burden of a covenant to run with the land.

Nuisance was recently tested, but it is often tested in the context of a Real Property/Remedies cross-over question. Review the difference between public and private nuisance. When nuisance is tested, you will often need to discuss injunctive relief. The most recent Real Property question involved landlord-tenant law, but it is a very common topic. The Examiners can easily give you a question involving a joint tenancy where one joint tenant leases out the property. Review the different types of leases. Also, make sure you understand the implied warranty of habitability, the covenant of quiet enjoyment and the repair-and-deduct remedy. Be prepared for a question involving a sublease or an assignment.

Assignment was recently tested but the Examiners haven't given a question involving a sublease for some time. Review the concepts of privity of estate and privity of contract.

Don't forget to review the rules regarding lateral and subjacent support. These issues aren't tested often, but when they appear in a question they may be a significant part of your score.

Remedies

If you've read my predictions in the past, you know that I don't like Remedies. Unfortunately, it is a frequently tested topic. It has appeared in some fashion on seven of the last nine exams. A number of those questions were cross-over questions. On the last bar, the question was almost exclusively a Remedies question, but the issues arose in the context of a contract. While I hope Remedies is not on the exam, I'm putting it in the Possible category simply because it is so easy to add a Remedies issue to a question testing another subject. Plus, Contracts is likely and Contracts questions often have at least one issue related to Remedies.

I wouldn't be surprised by a question involving a temporary restraining order or an injunction. Make sure you understand the differences between a TRO and a preliminary injunction, including the time limits for TROs. Also, make sure you know the requirements for a permanent injunction. When an equitable remedy like injunctive relief is tested, the Examiners often raise defenses to equitable relief such as laches or unclean hands.

When the Examiners test Contracts remedies, you should generally start with money damages.

But first, make sure you explain that the nonbreaching party has an obligation to take reasonable steps to mitigate their damages. When discussing money damages, you need be able to differentiate between expectation damages and consequential damages. Occasionally the Examiners test on incidental or liquidated damages. You should always be prepared for a question involving specific performance. Review the requirements for rescission and

reformation, although rescission was tested on the last exam so it is less likely to appear.

When a Torts question raises Remedies issues, you may need to simply explain the basic requirements that damages need to be: 1. foreseeable, 2. caused by the defendant's conduct, 3. reasonably certain and 4. unavoidable. The certainty requirement means that damages cannot be speculative. On several occasions, the Examiners have raised situations where a plaintiff suffers lost profits from a new venture or potential losses because the plaintiff can't participate in a contest or competition. These types of damages are generally not recoverable because they are too speculative. The notion that damages have to be unavoidable requires the injured party to take reasonable steps to mitigate his or her losses.

The Examiners have given several questions like the one on the last exam where a wrongdoer acquires someone else's property through conversion, larceny, embezzlement or fraud. This type of question requires you to discuss the remedies of constructive trust and equitable lien. Make sure you review tracing. You should understand what happens when the wrongdoer commingles funds acquired from wrongdoing with his personal funds. In this context, you may need to discuss the lowest intermediate balance rule, although that issue was just raised on the last exam.

When Remedies is tested along with Real Property, the question either involves a trespass or, more commonly, a nuisance. With this type of question you will typically be expected to discuss the requirements for injunctive relief.

Torts

Torts was tested on the last exam, but it has only been tested twice in the last seven exams. This is unusual because Torts has always been a favorite subject for the Examiners. I'm tempted to put Torts in the Likely category, but I'm putting it in the Possible category since it was just tested. The Examiners, however, often repeat a subject from the previous exam, so don't be surprised if you see Torts on this exam.

Don't be surprised by a question involving defamation or invasion of privacy. These topics were last tested in February 2020. Make sure you go through the elements of defamation and understand what they mean. Also, review colloquium and innuendo. Make sure you know the constitutional limitations on defamation, especially for public officials and public figures, as well as the limitations when a defamatory statement involves a matter of public concern.

You should be prepared for a question involving intentional torts. The Examiners have given several questions involving trespass to land, trespass to chattels and conversion. Also, be prepared for a question involving false imprisonment with the shopkeeper's privilege defense.

Don't be surprised by a basic assault and battery question involving a defendant who is mentally ill. When battery is tested, the Examiners often throw in the transferred intent doctrine. Review the defenses of consent, self-defense, defense of others and necessity.

You should always be prepared for a negligence question. Watch out for questions involving special duties. The Examiners tested the special obligations of landowners in February 2019. In

July 2021, the Examiners tested the doctrine of negligence per se. The Examiners could easily test on the standard for professionals or on situations where there is an affirmative duty to act. Make sure you understand the special subjective standard of care for children except when they are engaged in adult activities. You should also review the standards for people with

physical disabilities and people with mental disabilities under negligence law. Don't forget to review the doctrine of *res ipsa loquitur*. Make sure you can discuss both actual and proximate cause.

Fraud was tested on the last exam as part of a Remedies question. You should be prepared to set forth the elements for a fraud or misrepresentation claim. Products liability was just tested so it seems unlikely. You should still review the different theories plaintiffs can assert when they have been injured by a defective product, including strict products liability, negligence, breach of implied warranty and breach of express warranty. Make sure you understand the difference between a strict liability claim which focuses more on the product and a negligence claim which focuses more on the conduct of the defendant.

Malicious prosecution and abuse of process aren't tested often. But when those topics are tested, they are typically worth at least one third of the points for the question. You should have a working knowledge of these torts.

Finally, don't forget strict liability for abnormally dangerous activities and for maintaining wild animals. These topics aren't tested frequently, but they are certainly testable issues.

LESS LIKELY SUBJECTS

Community Property

Community Property didn't appear on the February 2023 or July 2023 essays, but it was tested on the July 2023 Performance Test. The issue involved a separate property business which was enhanced with community labor. Since the issue appeared on the Performance Test, the Examiners obviously gave you the relevant law, but it certainly helped if you already had a good understanding of Community Property. Prior to 2023, Community Property was tested on the previous four exams. Two of those questions were cross-over questions with Wills. Community Property seems somewhat less likely simply because of how frequently it has appeared.

If Community Property gets tested, you should be prepared for a question involving some of the special rules. For instance, make sure you understand how California treats education and training, especially the reimbursement remedy and the exceptions to reimbursement. Remember that outstanding student loans are assigned entirely to the educated spouse without offset. You should also review the treatment of various employment related benefits such as pensions, bonuses, and stock options. For pensions, you should understand that pensions earned before marriage and during marriage will be apportioned between the SP and CP estates using the time rule. Make sure you review the rules regarding personal injury awards. If the cause of action arose during marriage, any settlement or recovery is community property, but it is treated specially upon divorce. If the cause of action arose before marriage or after permanent separation, any recovery is SP. Also, if one spouse sues the other spouse for personal injuries, any recovery is SP.

Make sure you understand the rules regarding creditors' rights. This topic is tested in a fair amount of detail. Review the specific rules for different types of debts such as premarital debts, child and spousal support obligations and debts for necessities. Also review the order of priority for satisfying tort liabilities. Make sure you understand how outstanding debts are divided upon divorce.

Review when the anti-Lucas rules apply. Almost all of the recent questions testing this issue have involved jointly-titled property acquired after 1987 so the second version of the anti Lucas statute applies. Any jointly-titled property acquired after 1987 is presumed community property at divorce. The separate property contributed to the purchase price is entitled to simple reimbursement unless reimbursement is waived in writing. The separate property gets a share of ownership only when there is a written agreement or clear indication in the deed of title. Of course, these rules only apply to assets which are jointly-titled. If an asset is acquired and title is taken in one spouse's name alone, the character of the asset is determined by the source of funds. If both community and separate funds were used, the asset will be owned by the CP and SP in proportion to their contributions.

The Examiners have tested antenuptial agreements in some detail. They expect you to understand the specific statutory requirements, especially the requirements for waiver of spousal support. You should also understand what is needed for a valid transmutation. Make sure you know the exception to the writing requirement for interspousal gifts of a personal nature which are relatively insubstantial in value.

Be prepared for a question where a spouse makes an unauthorized gift of community property or where the spouse violates their fiduciary duty. You should also understand that a spouse cannot transfer or encumber real property without the written consent of the other spouse.

While Community Property questions typically involve divorce, sometimes the Examiners test the subject by giving a cross-over question with Wills. Make sure you understand when the spousal election arises.

Review the situations where California courts are preempted from treating assets as community property. This includes Social Security benefits, military life insurance policies and U.S. Savings Bonds.

The Examiners frequently test how business interests are treated in a marital dissolution action. Make sure you understand how courts treat business and professional goodwill at divorce. Remember that courts can use any legitimate method for calculating goodwill. Although the issue was recently test, you should also understand the Pereira/Van Camp situation where CP labor is contributed to an SP business. The community is entitled to a share of any increase in value of a separate property business when community labor is contributed to the business. You should be able to explain how the community's share is calculated under both the Pereira and the Van Camp formulas. You should also understand that reverse-Pereira or reverse-Van Camp will be applied when there is post-separation labor contributed to a Community Property business.

The Examiners haven't tested the putative spouse doctrine and quasi-marital property for some time. This issue is usually tested when one of the parties thought their first marriage was terminated by divorce, but the person is mistaken and they are still legally married to their first spouse. Thus, their second and current "marriage" is actually a putative marriage.

The Examiners have tested the issue of quasi-community property numerous times since 2019. While this is an important topic for the Examiners, it doesn't seem likely. But make sure you understand how quasi-CP is treated at death, including the surviving spouse's ability to set aside one-half of certain pre-death transfers of quasi-community property. **Business Associations (Corporations, Partnership, Agency)**

Business Associations was on the last exam, and it was tested on both the February 2022 and the July 2022 exams. Thus, it has been tested on three of the last four exams. It is time for the Examiners to give this subject a rest.

If Business Associations is tested, a question involving Agency seems more likely than a question testing Partnership or Corporations. When Agency is tested, it is typically in a cross over question. Agency questions sometimes focus on the requirements for the creation of an agency. Another common question involves a corporation or partnership where there is an issue about the authority of an officer or partner to enter into contracts on behalf of the entity. Review the issue of lingering authority where an agency is terminated but third parties are not aware of the termination.

The Examiners can easily raise an Agency issue in the context of a Torts question. This type of question usually involves an individual who commits a tort while working for the defendant. The question requires you to address whether the person who committed the tort is an employee or an independent contractor. The Examiners could easily give you a question in which an employee is arguably acting outside the scope of employment. The Examiners have also given questions involving torts committed by a partner in a partnership, but this issue was just tested.

If Corporations is tested, be prepared for a standard question testing the duty of loyalty and the duty of care owed by officers and directors of corporations. Review the different ways a director or officer could breach the duty of loyalty: the director could usurp a corporate opportunity; engage in an interested director transaction; or compete with the corporation. Make sure you understand how the business judgment rule acts as a defense when a director is accused of breaching the duty of care.

Review the requirements for corporate formation. Be prepared to explain the requirements for a valid de jure corporation as well as the related issues of a de facto corporation and corporation by estoppel. The Examiners frequently test issues involving pre incorporation contracts. You should understand when a corporation can be held liable for contracts entered into by promoters. Also, make sure you know when creditors can pierce the corporate veil and hold the shareholders personally liable.

You should understand the basics of corporate governance. You should know that the governing documents of a corporation are the Articles of Incorporation and the Bylaws. Make sure you know who has the authority to call a special meeting of the board. Be prepared to explain the requirements for a derivative suit. You should also review the requirements for fundamental corporate changes and the issues involving the dissolution of a corporation. The issue of ultra vires acts was recently tested so it seems less likely to reappear.

The Examiners frequently test the authority of a director or officer to bind the corporation. In addition to understanding when a director has authority, make sure you review the rules regarding indemnification of officers and directors, specifically when the corporation must indemnify, when the corporation may indemnify and when the corporation is prohibited from indemnifying a director or officer.

Partnership was tested on the last exam so it seems unlikely to be tested if Business Associations is on the exam. You should still make sure you understand the different types of partnerships and how they are formed. Review the differences between a limited partnership and a general partnership. Also, make sure you understand the obligations that partners owe to

one another especially the obligation to make the books and records available to other partners for inspection. You should always be prepared for a question involving the liability of the partnership for a contract entered into by a partner or for a tort committed by a partner. You should also understand what rights a partner has when he withdraws from the partnership.

Whether a question involves Corporations, Partnership or Agency, don't be surprised by a cross-over question with Professional Responsibility. On several occasions, the Examiners have given a question where one of the board members of a corporation or one of the partners in a partnership is also acting as an attorney for the entity. Business Associations has also been crossed over with Contracts on several occasions.

Final Thoughts

It's been an extremely challenging couple of years. Some of you started law school during a pandemic. You should congratulate yourself on your perseverance and your resilience. Despite all the hardship, deprivation and devastation you've experienced over the last three or four years, you survived law school. That's an incredible accomplishment. You should be proud of yourself. But remember to be grateful as well. Remember how fortunate you are. Despite all the challenges you are facing, despite all the problems and burdens you've been juggling, and despite how difficult it is to study for the bar exam, you are among the most highly-educated people in the world. In the United States, only 7% of the population earns a graduate degree. And globally, your education puts you in a very rare group. Many people in the world do not have access to basic education because it isn't provided to them because of their ethnicity or because they are female. In some parts of the world, basic education is not available because parents cannot afford to pay required school fees. Because of this, an estimated 773 million people in the world lack basic literacy. That's right, 773,000,000 people cannot read or write.

Most of them are women in the developing world. More than 100 million people would immediately be lifted out of poverty if they only had the ability to read and write.

Take a moment to be grateful for your abilities and the opportunities you've had. And remember to thank your family members and friends who have supported you in this journey. Some of you, like me, may have been helped by strangers who provided scholarships and financial support to help you complete your education. Before you take the bar, thank the people in your life who have supported you and encouraged you to be the person you are today.

I know you have a long list of things to do: topics to review; practice essays to write; multiple choice questions to tackle. Before you jump into the ever expanding list of things you need to do, take a moment to remind yourself that you can do this. You have a history of succeeding academically. You graduated from college. You got accepted to law school. You completed 3 or maybe 4 years of law school. You've always found a way to get over every academic hurdle. You can get over this one too.

To those of you who have been my students, thank you for your questions and your insights. I look forward to your success, not only on the bar exam, but in your future practice of law. To those of you I don't know personally, I hope we get an opportunity to meet at some point in the future. To all of you, best of luck on the exam!

Finally, if you find these predictions helpful, please share them with other people who may benefit from them.