

S296951

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**APPENDIX OF EXHIBITS IN SUPPORT OF
REQUEST THAT THE SUPREME COURT APPROVE
RECOMMENDATIONS FOR CHANGES TO
CALIFORNIA BAR EXAMINATION TO BE
ADMINISTERED STARTING IN JULY 2028
(VOLUME 3 OF 6)**



PREPARED BY
THE STATE BAR OF CALIFORNIA

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EXHIBIT 15

**ROADMAP TO THE FUTURE
CALIFORNIA BAR EXAM
EXAM DEVELOPMENT AND EXAM ADMINISTRATION**

**LOUISE BAHRY, PHD
DANETTE WALLER MCKINLEY, PHD**

AGENDA



Overview to framework



Decision Points



Priorities

**OUR
FRAMEWORK
FOR A
DELIBERATE
DECISION**

The selection of California's next bar exam is not a simple comparison of features.

It is a process of defining **core priorities through a set of decisions.**

Decisions involve critical trade-offs in development, administration, resources, and philosophical approach.

OUR FRAMEWORK FOR A DELIBERATE DECISION: TWO PRIMARY DOMAINS

ASSESSMENT DEVELOPMENT:

What is the priority?

What is the composition?

How is it aligned with
California's needs?

ASSESSMENT ADMINISTRATION AND LOGISTICS:

How will it be delivered?

How will it be scored?

What are the technology
risks and impacts?

ASSESSMENT DESIGN AND DEVELOPMENT

Foundational Goals and Content Scope

- Focus on Skills vs. Knowledge – weighting, minimum competence, transparency
- Fairness and Disparate Impact – gender/race disparity, bias mitigation

Assessment Structure and Psychometric Integrity

- Validation and Job Analysis (Blueprint) – job analysis, content alignment, cognitive complexity
- Development of Question Types and Components – essays, performance tasks, skills assessment
- Reliability and Scoring – reliability, scoring standardization, grading consistency, classification consistency

DECISION POINT 1: IS THERE THE PRIORITY TO DEVELOP A CALIFORNIA- SPECIFIC EXAM?

The Questions:

- Do we prioritize the development of a unique California exam as initially directed by the Supreme Court?
- Is an important goal to avoid the cost and risk of internal exam development?

The Consequences:

- Timeline
 - Recommendation to Supreme Court
 - Development timelines
- Resources
 - Ongoing vs. Temporary
 - Contracts
 - Staff
- Stopgap measure

DECISION POINT 2: WHAT IS THE COMPOSITION AND CONTENT?

The Questions:

- How is the substance of the exam constructed?
- How are question formats aligned with knowledge and skills?
- Should California definitively eliminate essay questions in favor of Performance Tests (PTs)?

The Consequences:

- Alignment with CAPA
- Responsibility for development, validation, scoring, etc.
- Question type
- Weighting
- Administration requirements

DECISION POINT 3: HOW IS IT ALIGNED WITH CALIFORNIA'S NEEDS?

The Questions:

- Must California retain full autonomy over tested subjects and skills to align with state-specific needs?
- Is it high priority to allow California licensees the flexibility to practice elsewhere?

The Consequences:

- Compromise on content, administration
- Negotiation across states re: portability

ASSESSMENT ADMINISTRATION AND LOGISTICS

Exam Delivery, Location, and Security

- Delivery Methods - remote vs in-person
- Physical Site Logistics and Cost
- Security and Vendor Oversight - vendor accountability, security risk, misconduct

Timing, Frequency, and Scoring

- Exam Frequency and Scheduling - increased frequency, scheduling flexibility
- Bifurcated Scoring and Phased Testing - bifurcation, phased testing complexity

Financial, Staffing, and Technology Costs

- Financial Burden on Examinees
- Staffing and Resource Impact
- Technology Infrastructure Development

DECISION POINT 4: WHAT ARE THE PRIORITIES FOR EXAM DELIVERY?

The Questions:

- Where and how can applicants take the exam?
- Is flexibility in administration (i.e., remote or more frequent exams) a priority?

The Consequences:

- Technology procurement or development
 - Timelines
 - Requirements
 - Costs
- Administration tech supports
- Additional test development and validation requirements

DECISION POINT 5: HOW WILL IT BE SCORED?

The Questions:

- What is the approach to scoring?
- Must the exam structure permit applicants to retake only the components they failed (bifurcation)?

The Consequences:

- Question type scoring requirements
- Technology platform development/procurement
 - Timelines
 - Requirements
 - Costs

DECISION POINT 6: WHAT ARE THE TECHNOLOGY RISKS AND IMPACTS?

The Questions:

- What are the trade-offs in technology and risk?
- What is the impact on cost and long-term flexibility?

The Consequences:

- Resources
 - Development/Procurement/Maintenance
 - Internal/External
 - Ongoing/Temporary
- Innovation – Stability spectrum

CURRENT STATE BAR RESOURCES



Committee of Bar Examiners
develops other exams



Exam development contract



Evidence based content
guidelines

CURRENT CHALLENGES

Elimination of MBE

Two-year notice

Unknowns for each option

Technology issues identified
with February 2025 exam

CONTROL

EFFICIENCY

Do we prioritize long-term control and oversight, or the speed of adopting a ready-made or streamlined solution?

CUSTOMIZATION

STANDARDIZATION

Is our primary goal an exam precisely tailored to California law, or alignment with a portable national standard?

FLEXIBILITY

STABILITY

Should we retain maximum flexibility in administration (e.g., remote) and innovation, or choose the stability of an established process?

INNOVATION

RISK

Are we willing to accept uncertainty and higher risk for potential innovation benefits, or prefer an established, minimal-risk process?

PRIORITIZING OUR OBJECTIVES

The optimal choice depends on which fundamental trade-off the State Bar prioritizes for the future of licensure in California.

OPTIONS BASED ON GOALS AND PRIORITIES

CALIFORNIA DEVELOPED

Traditional components: MCQs, essays, PTs administered as early as Feb 2028 (Bridge exam)

Streamlined exam: Shorter length, use MCQs and PTs, eliminate essays.

Streamlined exam: Shorter length, use MCQs and PTs, eliminate essays. Added online skills module.

EXAM ADOPTION

Use NCBE NextGen UBE (alternate bridge)
without California specific component
with California specific component

Adopt the NCBE's NextGen UBE without adding a California-specific component.

Adopt the NCBE's NextGen UBE with a California-specific component.

Adopt Nevada exam

TWO POSSIBLE PATHS FOR CALIFORNIA

State Control

National Alignment

Path 1: The Path of State Control and Innovation



This path prioritizes California's autonomy over exam content, skills, and administration. It allows for unique innovations like remote testing and bifurcated grading, but requires significant state resources for development and forgoes national score portability. It affirms a commitment to a uniquely Californian standard of licensure.

Path 2: The Path of National Alignment and Efficiency



This path prioritizes efficiency and national integration. It provides an integrated possibility of score portability for licensees and eliminates California's financial and operational risks of exam development. The trade-off is a loss of control over tested content, state-specific subjects, and administrative policies like remote testing.

CONSIDERATIONS

EXAMPLES BASED ON GOALS AND PRIORITIES

SUCCESS CRITERIA

Validity

Reliability

Fairness and Equity

Practicality and Scalability

BENEFITS, RISKS, UNKNOWN: STATE CONTROLLED EXAM

Factor	Benefits	Risks	Mitigation	Unknown
Validity	Content maps aligned with MBE	Additional work to update to CAPA findings	Administer bridge exam and update test specifications	Acceptance of scores by other jurisdictions
Reliability	February 2025 exam statistics	Sufficient content representation Scoring and scaling	Continue question development; Improved content validation	Statistics for unused items
Fairness and equity	State Bar has more control of development and administration	Technology may introduce challenges for groups of examinees	Regular review for differential performance; identify potential underlying factors	Performance for different groups Will this improve accessibility and affordability for all test takers?
Practicality and scalability	State Bar has control over administration mode, timing	Insufficient time for development prior to implementation	Extend timeline with other options	Cost Continuous administration? Remote testing?

BENEFITS, RISKS, UNKNOWN: EXAM ADOPTION

SHORT-TERM

Factor	Benefits	Risks	Mitigation	Unknown
Validity	Content scope available CAPA completed	Misalignment with California content scope Content maps needed for CAP	CA developed content scope based on CAPA; alignment with adopted exam	Acceptance of scores by other jurisdictions
Reliability	February 2025 – identify components for CA exam	Sufficient scorable units for a CA component in new doctrinal areas	Design adequate number of tasks, graders	Reliability for components? Scale to adopted exam? Question format
Fairness and equity		Technology may introduce challenges for groups of examinees.	Regular review for differential performance; identify potential underlying factors	Performance for different groups Will this improve accessibility and affordability for all test takers?
Practicality and scalability	Externally developed exam Externally specified administration mode and timing	Insufficient time for review and alignment prior to implementation	Revise timeline for development of CA component	Cost Administration mode Exam timing Pass-fail decisions – bifurcated?

BENEFITS, RISKS, UNKNOWN: EXAM ADOPTION LONG TERM

Factor	Benefits	Risks	Mitigation	Unknown
Validity	Content scope, sample questions published	Content similarities but not completely aligned with CAPA findings	Supplement with CA component	Acceptance of scores by other jurisdictions Content uniformity
Reliability	Exam statistics available by July 2028†			Exam scoring and scaling
Fairness and equity		Technology may introduce challenges for groups of examinees.	Regular review for differential performance; identify potential underlying factors – NCBE managed	Performance for different groups. Standard setting Will this improve accessibility and affordability for all test takers?
Practicality and scalability	Known administration timing	Finding adequate exam sites to meet technology needs and volume		Cost Administration mode* Exam timing*

† National statistics available for NextGen UBE; local for Nevada exam

* Administration mode and timing could vary based on whether there is a California component



The State Bar of California

OPEN SESSION
AGENDA ITEM
4.4 DECEMBER 2025
COMMITTEE OF BAR EXAMINERS

DATE: December 5, 2025

TO: Members, Committee of Bar Examiners

FROM: Donna S. Hershkowitz, Chief of Admissions/Legislative Director
Cody Hounanian, Program Director

SUBJECT: Discussion and Action, if Appropriate, on Roadmap to the Future California Bar Exam

EXECUTIVE SUMMARY

In light of the challenges experienced and criticisms received with both the content and administration of the February 2025 California Bar Examination, the Committee of Bar Examiners (CBE), the Board of Trustees, and the California Supreme Court are revisiting the analysis of what type of bar exam should be administered in 2028 and beyond. This item is a continuation of the discussion started on May 22, 2025, when the Board adopted guiding principles, it wanted to take into consideration in developing recommendations for the future bar exam. The CBE is tasked with developing a recommendation for the Board about the future bar exam to help shape and inform the Board's recommendation to the Supreme Court and the Court's ultimate decision as to whether to continue the path we were on, as set out in the Court's October 10, 2024, order, or to forge a different path.

To assist the CBE and the Board in developing their recommendations, over the next several months, staff will be continuing information about the options initially discussed at the August 14, 2025, joint meeting of the Board and the CBE and discussed in greater detail at the October 10, 2025, CBE meeting and any other options that evolve as these discussions continue. The planned culmination of these conversations will occur in May 2026, when the final recommendation to the Supreme Court will be decided.

The presentation accompanying this staff report will continue the efforts to help CBE grapple with the many decisions that must be made to shape a comprehensive recommendation to the

Supreme Court and provide the statutorily required notice if there are to be changes in the exam.

RECOMMENDED ACTION

Staff do not anticipate the CBE taking action on this item at this time. This item is intended to build on the information previously provided to the CBE to assist in reaching a recommendation about the future bar exam with the hopes that CBE begins developing a consensus around the general direction.

DISCUSSION

With the exception of the February 2025 exam, the California Bar Exam has included multiple-choice questions developed by the National Conference of Bar Examiners (NCBE) for decades.¹ This multiple-choice section of the exam is referred to as the Multistate Bar Exam (MBE) and has been tested in California since 1972. For the 30-year period from 1987 to 2017, the bar exam was unchanged, consisting of:

- The 200-question MBE
- 6 one-hour essays
- 2 three-hour performance tests

Effective July 2017, the bar exam was shortened from three to two days. The number of essays was reduced to five; one performance test was eliminated and the time for the performance test shrank from three hours to 90 minutes.

By July 2028, the State Bar of California must change the bar exam that is administered. The MBE will cease to exist as a standalone product.

Following the challenges experienced with the February 2025 bar exam, the Board and the CBE have begun discussing different options that could serve as the next bar exam to administer in California, or that will be used as the next bar exam following a development effort²:

- A New California Bar Exam
 - A new exam consistent with the October 2024 direction of the Supreme Court. Until the new exam is ready to administer (estimated 5+ year development timeline), return to using Kaplan multiple-choice questions (MCQs) and California

¹ The MBE typically consists of 200 multiple-choice questions. In October 2020, a 100-question version of the MBE was administered. NCBE did not release a 200-question MBE for this first remote administration during the COVID19 pandemic.

² Up until this point these options have been labeled as follows: Option 1: New California-Specific Bar Exam/Use of Kaplan Questions and California-Developed Essays and Performance Tests (PTs) During the Multiyear Development Effort (New Exam); Option 2: NCBE's NextGen Uniform Bar Exam (NextGen); and Option 3: Streamlined Exam: Multiple-Choice Questions (MCQs) and PTs (Nevada Model). In a survey to California law school deans, these options were further disaggregated into seven options. Going forward, staff propose to organize the options in the manner described in this report.

essays and performance tests.⁵

- A new exam consistent with the October 2024 direction of the Supreme Court. Until the new exam is ready to administer (estimated 5 + year development timeline), use the NCBE's NextGen UBE without adding a California-specific component
 - A new exam consistent with the October 2024 direction of the Supreme Court. Until the new exam is ready to administer (estimated 5 + year development timeline), use the NCBE's NextGen UBE with a California-specific component.
 - A new but streamlined California exam similar to the model adopted by Nevada. The exam would be limited to MCQs and PTs and is intended to be ready for administration in July 2028.⁶
 - A new but streamlined California exam similar to the model adopted by Nevada with an online module (or other delivery) to assess skills that are difficult to measure through traditional formats (e.g., client counseling)
- Adoption of the NextGen UBE
 - With a California-specific component
 - Without a California-specific component

The Supreme Court identified some factors to consider in developing the final recommendation, if applicable. Under rule 9.6(b) of the California Rules of Court, these considerations serve as a roadmap for the CBE and the Board⁷:

- The direct and indirect costs and tangible and intangible benefits for the State Bar and examinees of existing practices compared to the proposed changes.
- Any other alternative, existing products or services that are feasible to accomplish the same goals and objectives as the proposed changes and at a comparable or lower cost for the State Bar and the examinees.⁸
- Whether any new technological requirement or new fees to implement the proposed changes would place an undue financial burden on the examinees.
- The estimated number of temporary and non-temporary full-time equivalent positions necessary to implement the proposed changes.

⁵ California has a bank of essays and PTs from its prior development efforts; in addition, that bank will be supplemented by essays and PTs delivered by Kaplan pursuant to its contract with the State Bar, after appropriate content validation processes.

⁶ Depending on the content to be tested, and the CBE's risk tolerance, the CBE may elect to bridge to this option with content aligned with that being administered currently.

⁷ The CBE and the Board are required to conduct an analysis containing these factors, to the extent applicable, for any changes to the bar exam that "require substantial modification to the training or preparation required for passage of the examination or that substantially modify the method by the examination is administered." (Cal. Rules of Court, rule 9.6(b).) Some of these points of analysis or comparison may be more applicable in transitioning the exam driver or exam administration vendor than in transitioning to a new bar exam.

⁸ At its October 10, 2025, meeting, the CBE discussed that this consideration is more appropriate in circumstances such as transitioning to a remote exam. At this time, while there are no other existing bar exam options to select from, this consideration is not relevant to the analysis of what the bar exam of the future should look like. Nonetheless, exploring the goals each option supports is an important step in ultimately developing the recommendation to advance.

- The estimated time frame required to competently implement the proposed changes.
- Whether the proposed changes have previously demonstrated their efficacy under testing conditions similar to those of the bar examination.

PREVIOUS ACTION

November 21, 2025: Presentation to the Board of Trustees, updating the Board on what was presented to CBE on October 10, 2025, and including information learned since the CBE meeting

- [Presentation](#)
- [Staff Report](#)
- [Survey of CA Law School Deans: Preliminary Results](#)

October 10, 2025: More detailed presentation to the CBE of the three options currently under discussion for the future bar exam:

- [Presentation](#)
- [Staff Report](#)
- [Tangible and Intangible Benefits for the State Bar and Examinees](#)
- [Goals and Objectives Accomplished by Each Option](#)
- [Extent to Which Technological Requirements to Implement the Options Impose Undue Financial Burden on Examinees](#)

August 14, 2025: Joint Board of Trustees/CBE Meeting, Development of Recommendations for Future California Bar Exams

- [Presentation](#)
- [Staff Report](#)
- [Pros and Cons of Three Future Bar Exam Options](#)
- [Alignment of Future Bar Exam Options with Board and Supreme Court Guiding Principles](#)

[May 22, 2025](#): The Board adopted guiding principles for making decisions about the kind of bar exam to develop for the future development and administration of a bar exam. Note: On August 14, the CBE ratified the guiding principles adopted by the Board for making decisions about the future of the bar exam, adding to the list of guiding principles: Avoid locking the State Bar into long-term vendor contracts so as to provide flexibility in licensing innovation.

Following discussions at its meetings in December 2024 and [January 2025](#), the CBE developed recommendations for a steering committee to guide the development of the new exam and implement a structure for gathering information from experts and stakeholders and making recommendations to the Board and the Court.

[October 10, 2024](#): The Supreme Court adopted, in part and with modifications, the recommendations of the BRC that the State Bar develop a California-specific bar exam. This order followed the [May 2023](#) adoption of the final recommendations of the BRC to develop its own exam in lieu of transitioning to the NCBE's NextGen exam.

FISCAL/PERSONNEL IMPACT

Future drafts of the cost-benefit analysis required by the Supreme Court will, to the greatest extent possible, seek to identify costs for each of the options under consideration. To the extent dollar figures are unknown, the analysis will describe the different categories of costs that attach to each option.

AMENDMENTS TO RULES

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 2. Protect the Public by Enhancing Access to and Inclusion in the Legal System

- a. 2. Revise admissions requirements to be more relevant to the practice of law in alignment with the recommendations of the Blue Ribbon Commission on the Future of the Bar Exam.

RESOLUTIONS

None

ATTACHMENTS LIST

- A. Materials Related to NextGen UBE
 1. NextGen Overview Presentation
 2. NextGen UBE Blueprint
 3. NextGen UBE Bar Exam Content Score
 4. NextGen Guidance Brief – Recommended Passing Score Range
See also: [What to Expect from the NextGen UBE](#)
[NextGen UBE Exam Tutorial](#)
- B. Materials Related to the Nevada Comprehensive Licensing Exam
 1. Presentation
 2. Nevada Foundational Law Examination: Proposed Content Scope Outline
 3. Nevada Foundational Law Exam (FLE): Drafting Guidelines and Style Guide

ATTACHMENT A1

Attachment A1: NextGen Overview Presentation

STABILITY BY DESIGN

The Research, Development, and Delivery of the NextGen Uniform Bar Examination

California Committee of Bar Examiners • December 5, 2025

The NextGen Uniform Bar Exam

Built for Modern Competency

Bridging Knowledge & Skills

Expert Development

Stable, Reliable, & Accessible

Data to Power Insights

NextGen UBE:

An Exam Built for Modern Competency

The Changing Landscape of Legal Practice

The profession is transforming rapidly – how lawyers work, communicate, and deliver value. Understanding these shifts is essential to defining the competencies tomorrow's attorneys must bring to practice.



Legal Profession

Increasingly interdisciplinary and complex

Faster decision cycles, higher stakes

More judgement, analysis, and synthesis required



Client Engagement

Clients expect clarity, counseling, and options

Resolution and negotiation skills are necessary

Professional and ethical reasoning foreground



Technology

AI and digital tools embedded in daily practice

Virtual hearings, e-filing, online dispute resolution

Tech competence now inseparable from ethical competence



Lawyer Competence

Ability to apply law not just know it

Real-world communication and problem solving

Public protection demands practice-ready skills

NextGen Practice Analysis

In 2018, NCBE launched one of the largest studies of entry-level law practice ever conducted, the results drove the foundation for the NextGen content scope outline and blueprint

15k

More than 15,000 respondents across 56 jurisdictions provided a nationally representative picture of early practice.

179

179 tasks, 77 knowledge areas, 36 skills, and 24 technology competencies were evaluated for entry-level relevance.

77

Of the 77 knowledge areas, 25 were validated as high-importance and recommended for the NextGen blueprint.

6

Six top-priority competencies emerged: issue spotting, legal research, analysis, communication, factual investigation, and ethical judgment.

Guiding Principles of NextGen

Increase emphasis on lawyering skills

Integrate foundational knowledge and skills

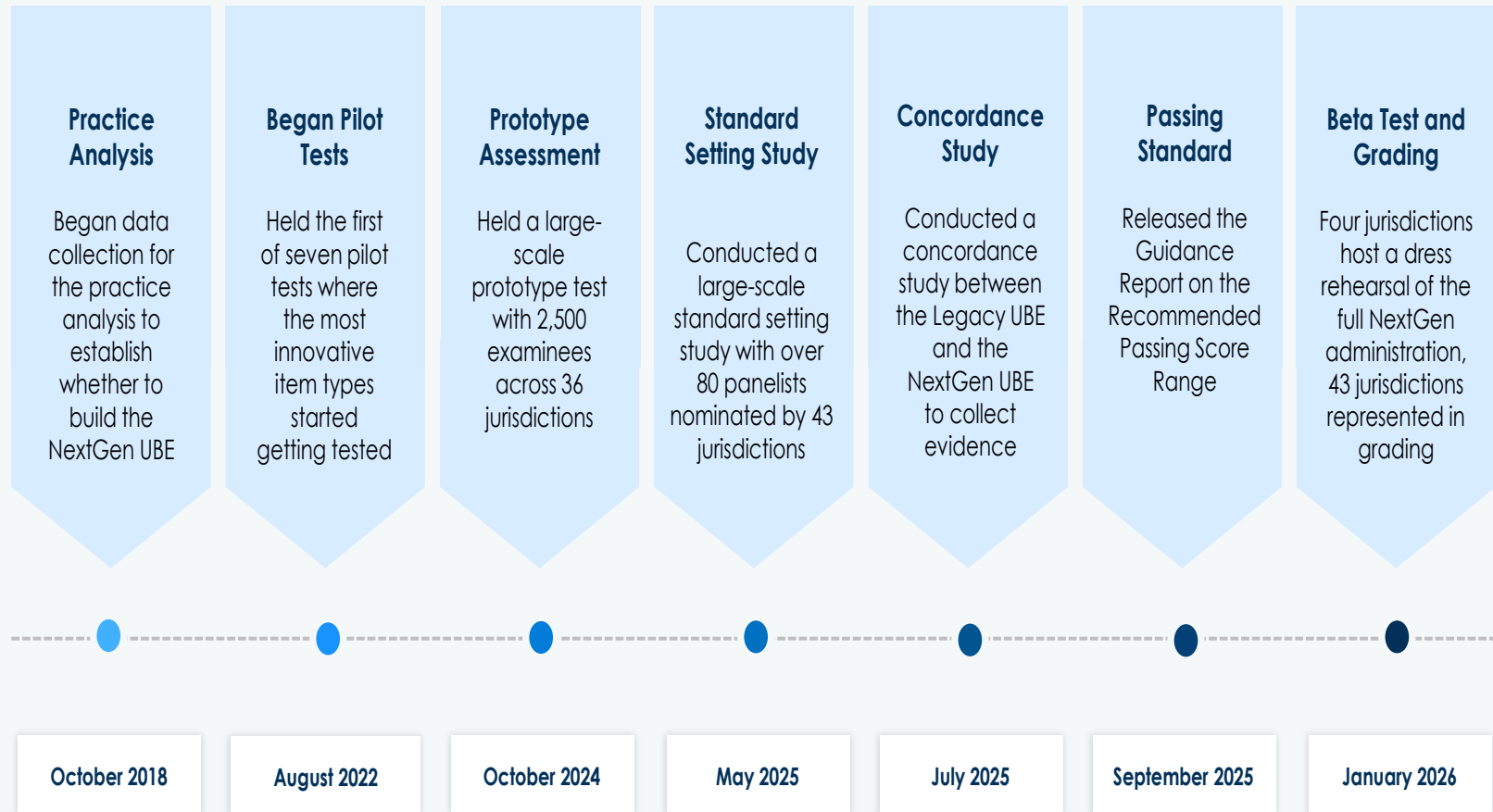
Maintain score portability

Keep the exam affordable

Establish efficiencies for the jurisdictions

Build confidence in candidates

Research and Development Roadmap: 2018-2026



Research and Development Roadmap: 2018-2026

Practice Analysis

Began data collection for the practice analysis to establish whether to build the NextGen UBE

October 2018

Began Pilot Tests

Held the first of seven pilot tests where the most innovative item types started getting tested

August 2022

California participation in the January Beta

- **63 Beta examinees** reside in CA. 57 of the 63 sat for the July administration of the Bar Exam in CA. Will be participating in:
 - 20 New York
 - 19 Texas
 - 12 Massachusetts
 - 5 Florida
- **15 graders** will be participating from CA. They are made up of bar exam graders with at least ten administrations of service

Beta Test and Grading

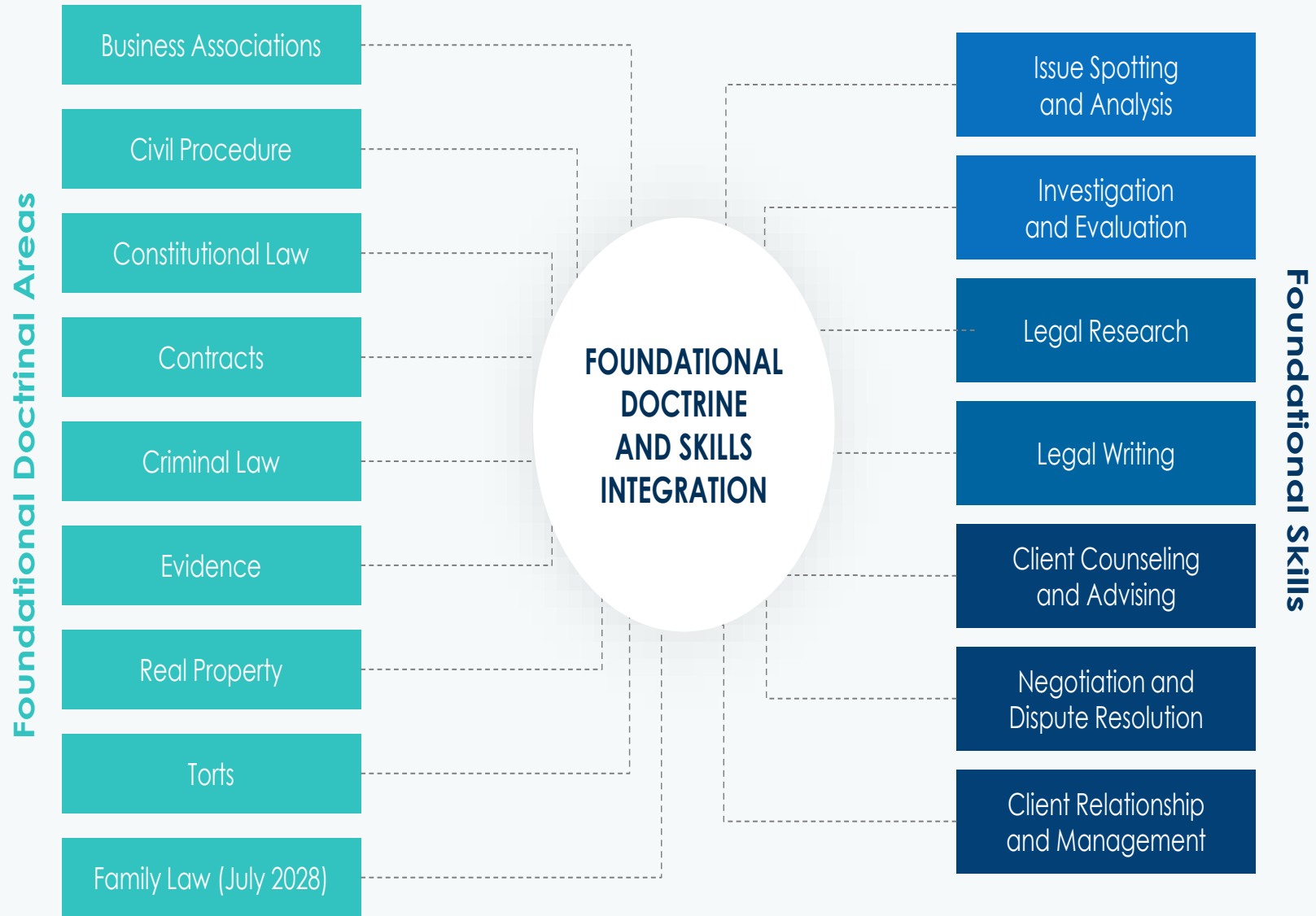
Four jurisdictions host a dress rehearsal of the full NextGen administration, 43 jurisdictions represented in grading

January 2026

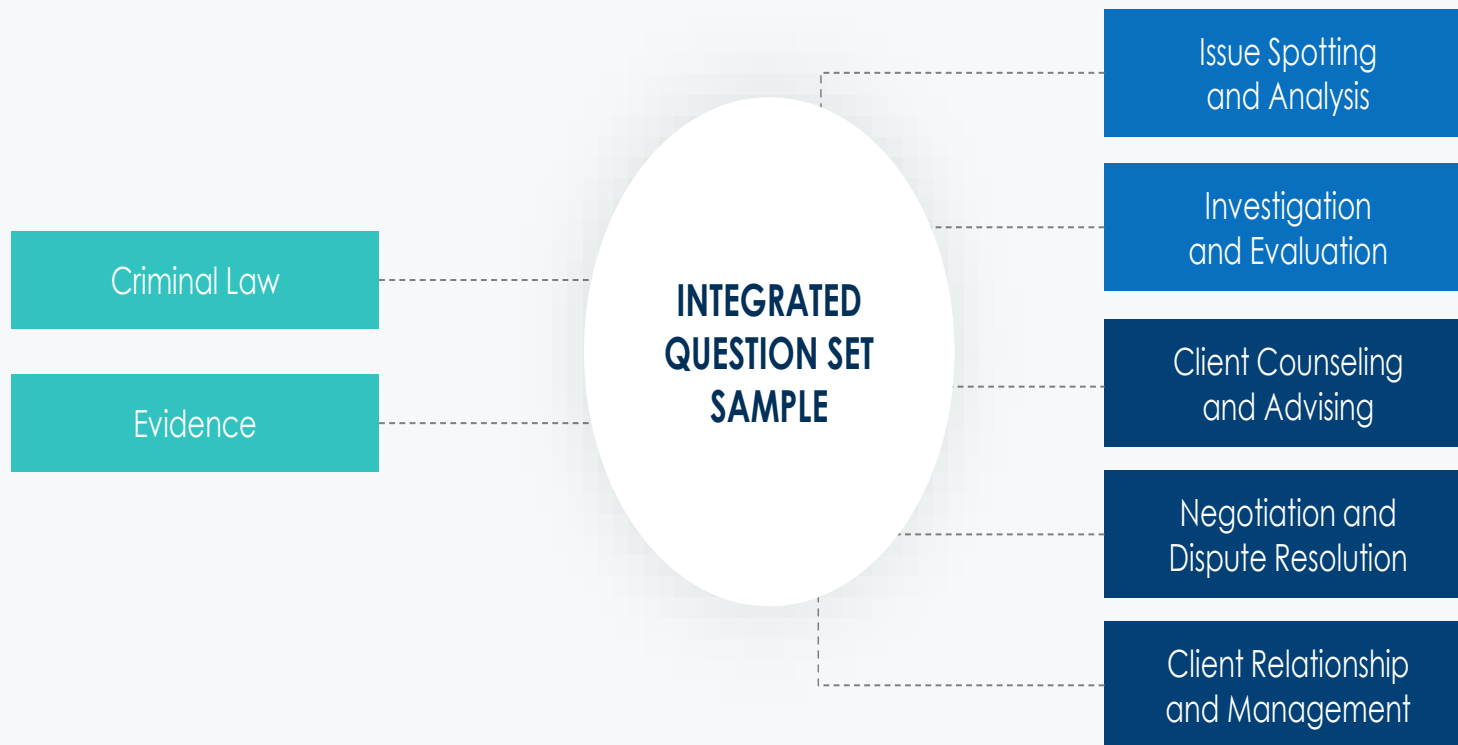
Integrated Design:

Bridging Knowledge and Skills

NextGen Tests Doctrine and Skills



Components of the NextGen UBE Integrated Question Sets



Components of the NextGen UBE Standard Performance Task



*legal writing is the primary skill tested, secondary and tertiary skills tested

Components of the NextGen UBE Legal Research Performance Task



Overall Exam Structure

Three, three-hour sections administered over one and a half days, for all standard candidates

Day One



3 Hours

Morning Section 1



3 Hours

Afternoon Section 2

Day Two

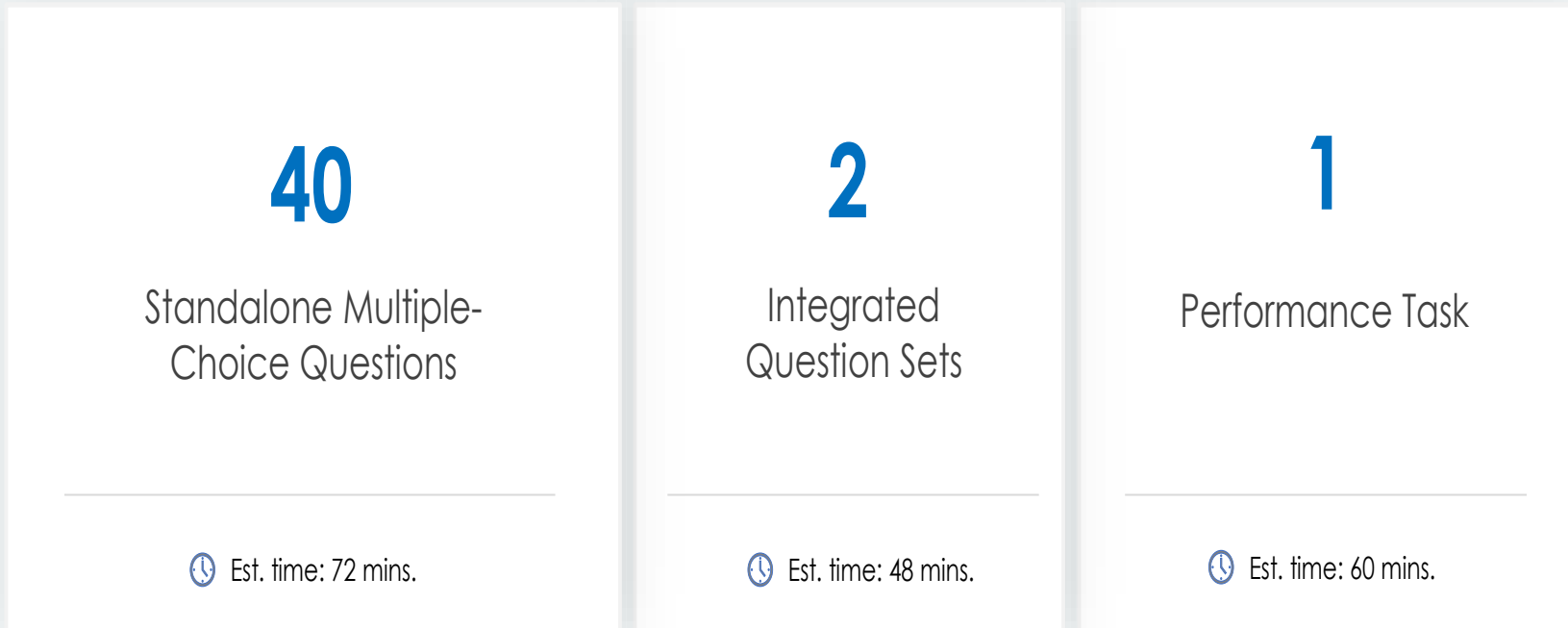


3 Hours

Morning Section 3

NextGen UBE Structure

Each three-hour section will consist of a mix of multiple-choice questions, integrated question sets, and one performance task.



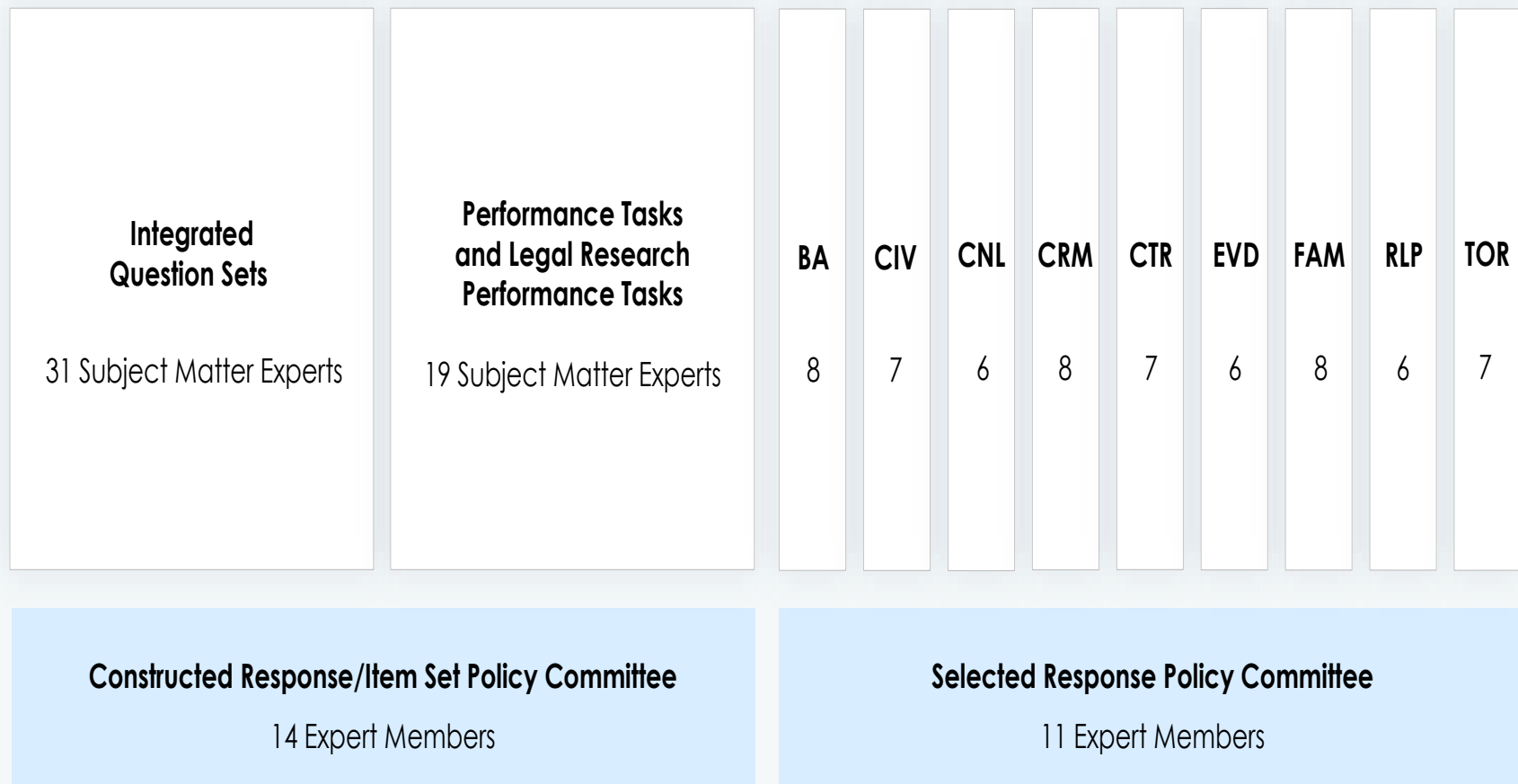
Three Hour Section

Rigorous Development:

Expert Development and Robust Review Process

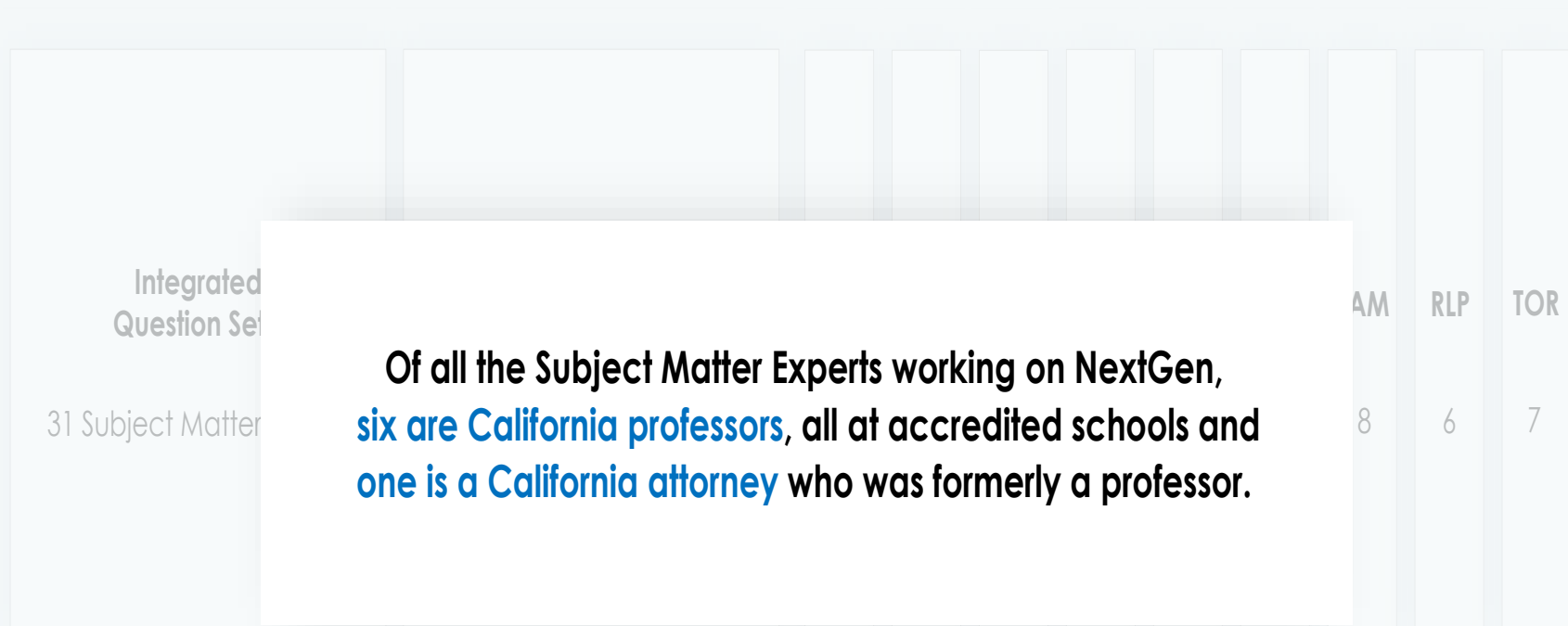
Broad Range of Subject Matter Expertise

Educators, judges, practitioners, and content area specialists contribute to drafting, reviewing, and refining NextGen content. Their collective expertise ensures every item reflects real-world lawyering, ethical judgment, and professional standards.



Broad Range of Subject Matter Expertise

Educators, judges, practitioners, and content area specialists contribute to drafting, reviewing, and refining NextGen content. Their collective expertise ensures every item reflects real-world lawyering, ethical judgment, and professional standards.



Constructed Response/Item Set Policy Committee

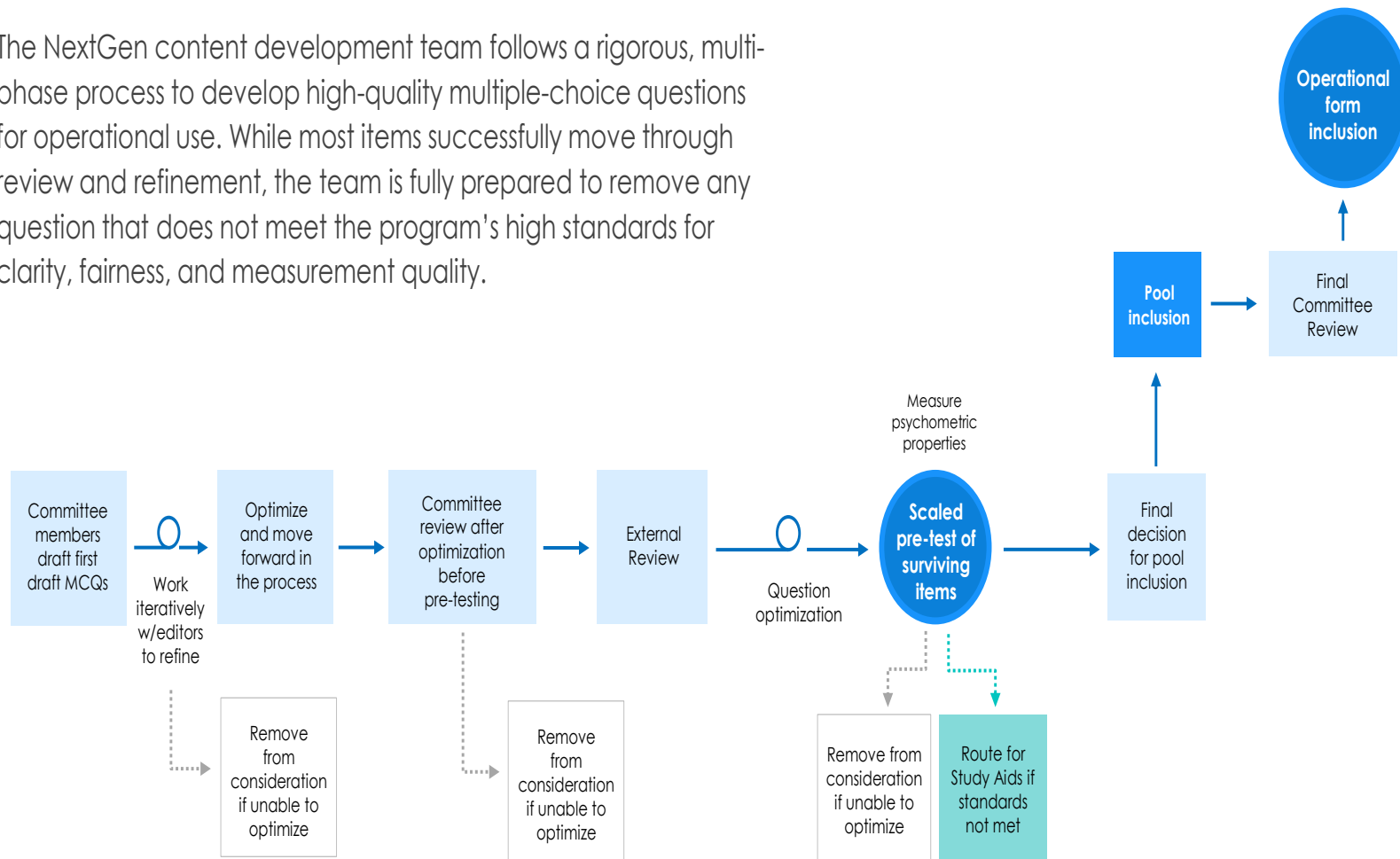
14 Expert Members

Selected Response Policy Committee

11 Expert Members

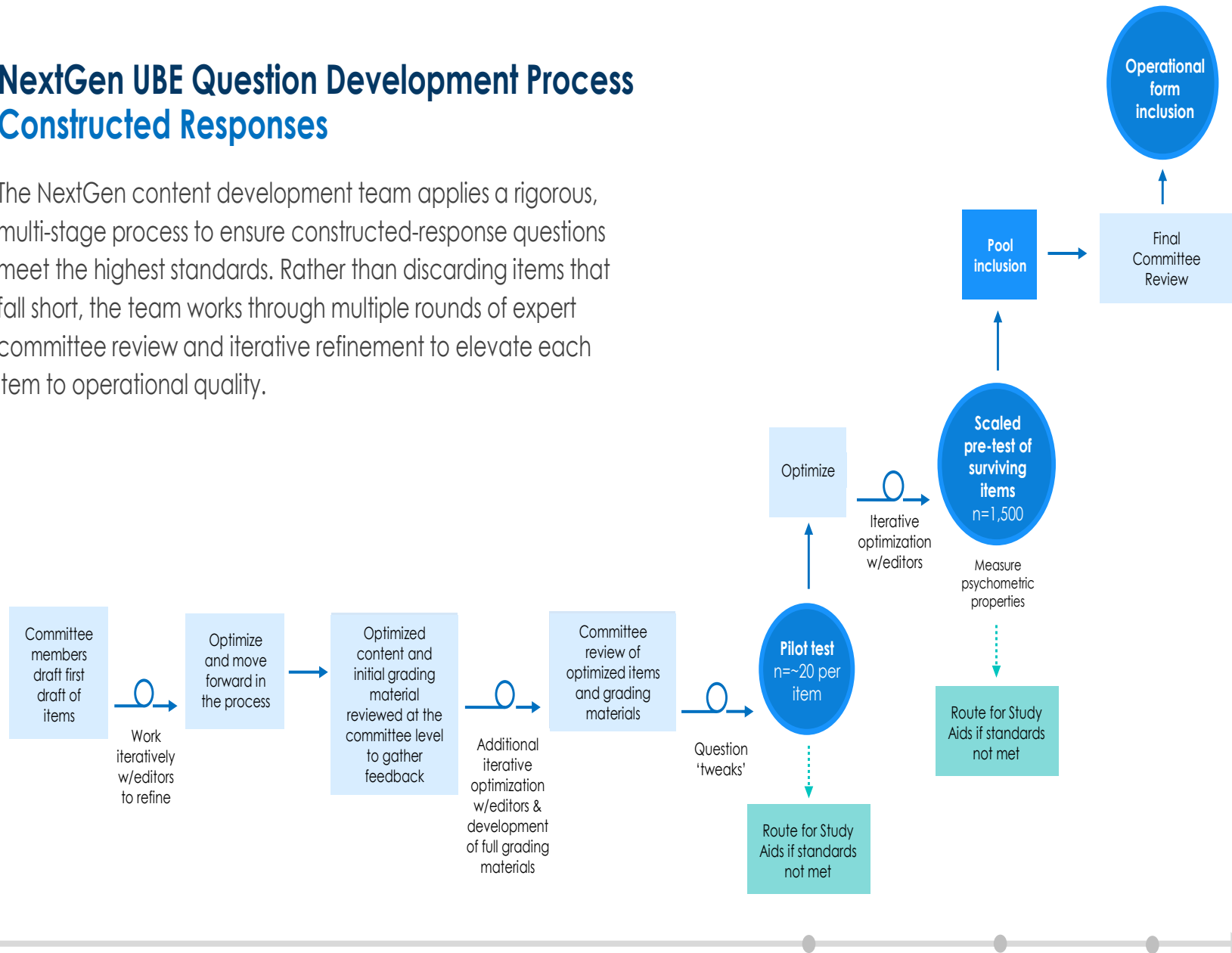
NextGen UBE Question Development Process Multiple-Choice Questions

The NextGen content development team follows a rigorous, multi-phase process to develop high-quality multiple-choice questions for operational use. While most items successfully move through review and refinement, the team is fully prepared to remove any question that does not meet the program's high standards for clarity, fairness, and measurement quality.



NextGen UBE Question Development Process Constructed Responses

The NextGen content development team applies a rigorous, multi-stage process to ensure constructed-response questions meet the highest standards. Rather than discarding items that fall short, the team works through multiple rounds of expert committee review and iterative refinement to elevate each item to operational quality.



The Research and Development of Responsible AI

All NextGen exam content is fully human-developed and rigorously reviewed. NCBE is exploring responsible, research-based applications of AI – only where they enhance quality, security, or efficiency, and never replace human judgement.



Human Expertise at the Center

AI may assist but humans create and approve all content

Multi-layer legal, psychometric, and fairness review

Same rigorous review and testing process



Guardrails for Quality, Security, and Fairness

Exploration only in controlled, secure environments

Must enhance – not compromise - validity, fairness, or security

No AI involvement in live exam content



Governance, Accountability & Ethics

Guided by NCBE's Responsible AI Framework

Every AI use requires human sign off and an audit trail

Protect privacy, exam integrity, and standards



Transparency & Partnership

Jurisdictions are partners in decision making

No AI adoption without jurisdiction awareness

Full transparency in any process change

Uninterrupted Delivery:
Stable, Reliable, Accessible



Preparation

- Guided walkthrough of all tools (highlighting, flagging, notes, word count, search)
- Navigation practice across multiple item types
- Interactive timing and break simulations
- Practice with question handling (scrolling, zoom, multiple documents)



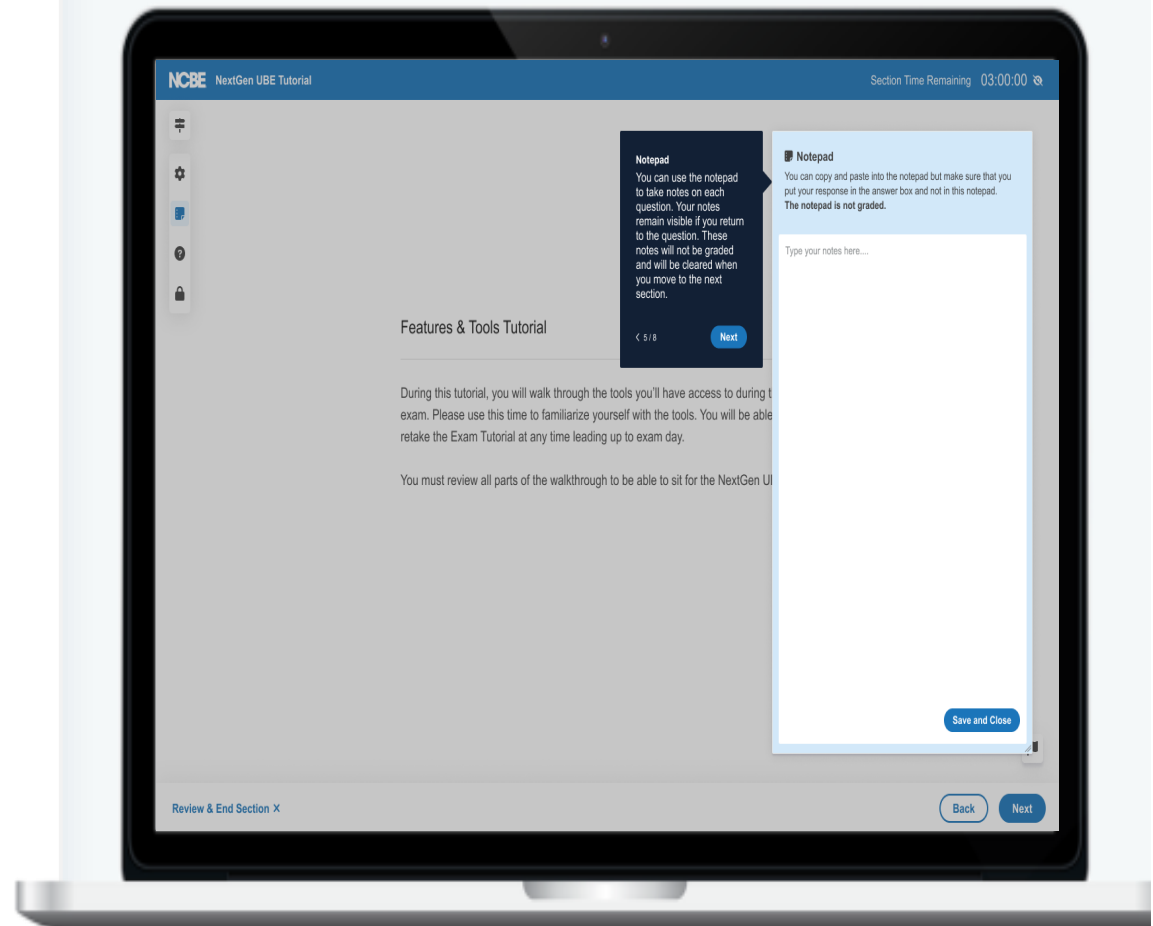
Administration

- Accessibility and accommodations
- Consistent user interface
- Tools that support proficiency demonstration
- Platform stability and load capacity
- Encryption and security



Exam Tutorial: Preparation and Confidence

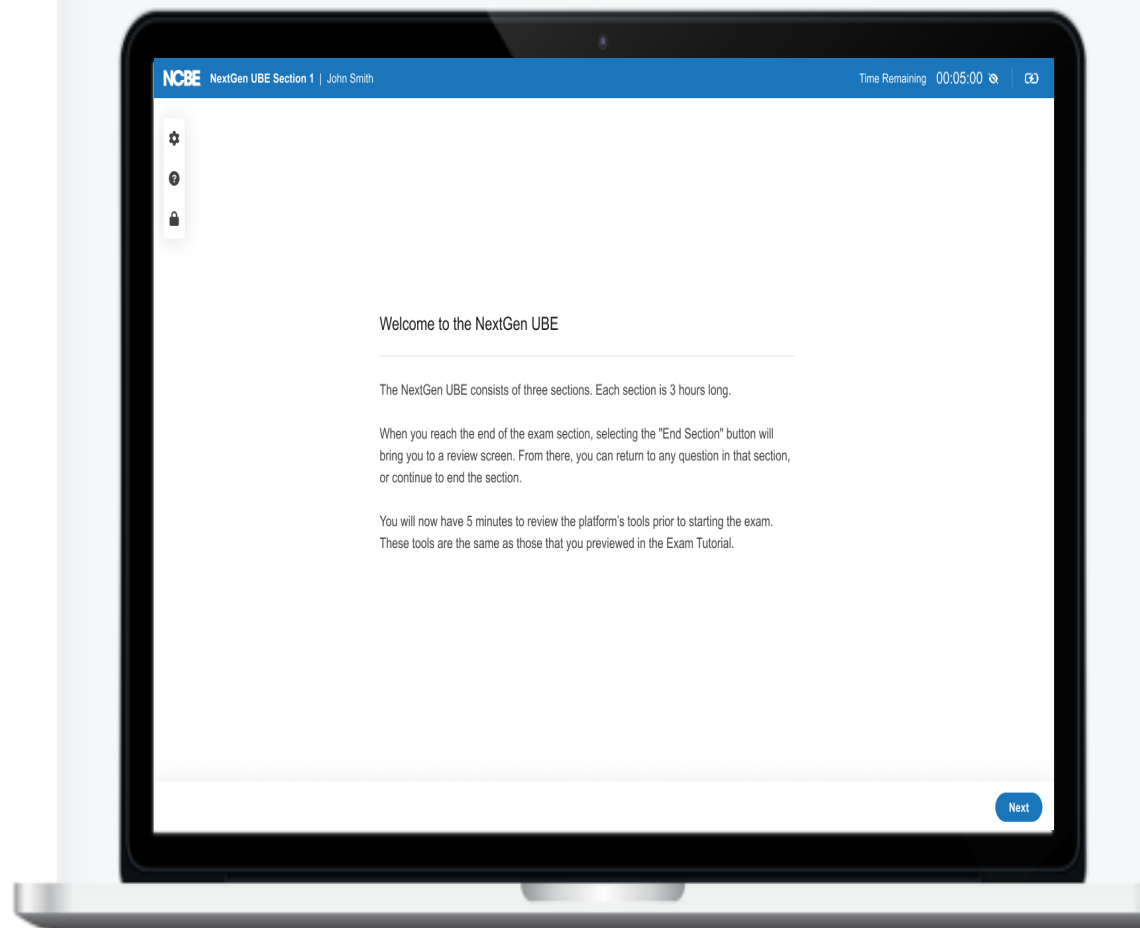
1. Guided walkthrough
2. Feature overview
3. Sample questions





Introductory Collateral: Features and Instructions

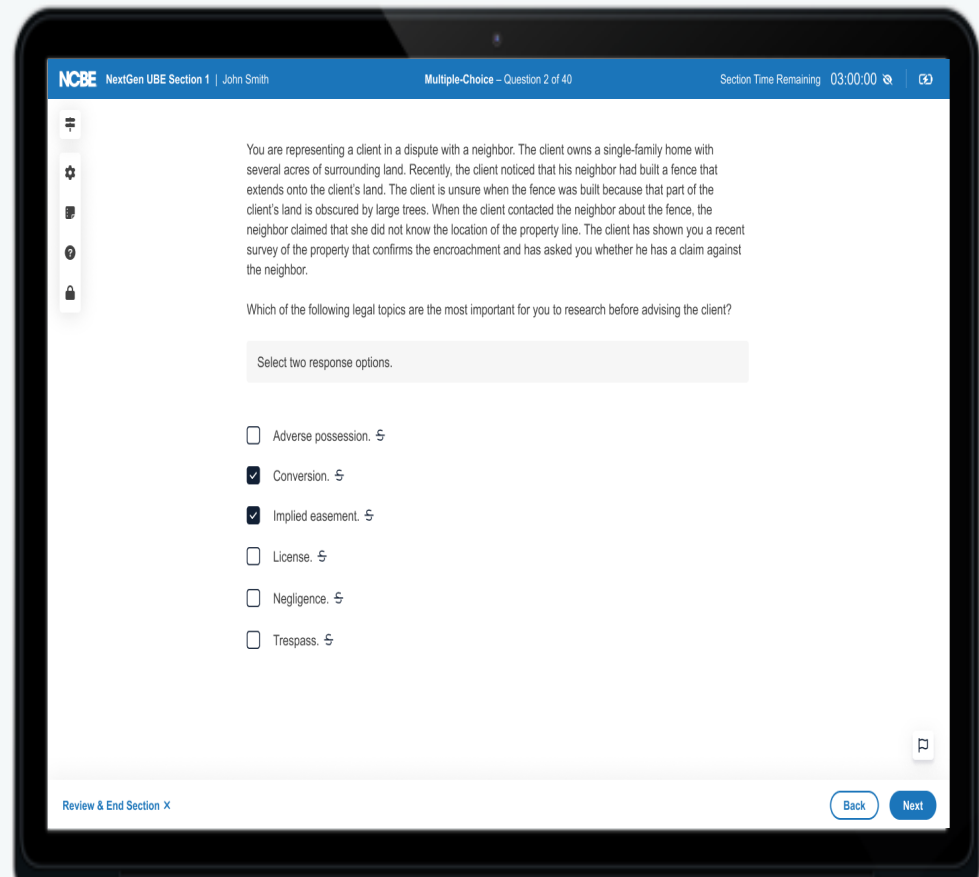
1. Exam overview
2. Feature walkthrough
3. Instructions





Question Types: Multiple-Choice Questions

1. Single and multi-select
2. Global and local strike-through
3. Warning modals





Question Types: Integrated Question Sets

1. Draggable split-screen
2. Static and dynamic
3. Notepad

The screenshot displays the NCBE NextGen UBE Section 1 interface. The top navigation bar includes the NCBE logo, "NextGen UBE Section 1 | John Smith", "Integrated Set 1 - Component 3 of 6", and "Section Time Remaining 03:00:00".

The main content area is titled "Integrated Set 1: Task Materials" and is split into two panes. The left pane contains the following text:

Integrated Set 1: Task Materials

Your law firm encourages you to take on pro bono cases. Recently, you agreed to take on a pro bono case through your local bar's volunteer lawyers program in which you represent a tenant whose apartment has flooded. The following is an excerpt from your notes from the initial interview with the client:

Notes from the Initial Interview

During a recent hurricane, a lot of water entered the client's apartment. The apartment has carpet throughout, which was completely soaked. The property manager refuses to do anything about the flooding and said that the lease the client signed makes this the client's responsibility. The property manager also claims that the client did not take proper precautions before the storm, which made the flooding worse. The client disagrees. After the storm, the property manager recommended that the client buy a water pump and some fans to "dry things out." The client tried this, but it didn't fix the problem. The apartment is still wet and smells "unbearably bad." The client can't afford to try to fix it anymore. The client does not want to move but can't keep on living in these conditions.

The client is in a month-to-month lease. The lease identifies the landlord as "Rentals LLC." The lease was signed by both your client and the property manager, who signed as "the Managing and Sole Member of Rentals LLC." The lease includes the following provision:

Conditions of the Premises

The right pane contains the following text:

Component 3: Section 6-20-5 of the statute does not define the term "habitable." A partner at your firm has asked a law clerk to determine the jurisdiction's meaning of the term for the purposes of potential litigation, and the law clerk has asked you for guidance.

Advise the law clerk on two specific legal sources that are the most likely to provide a controlling definition of the term "habitable."

Provide one answer in each answer field. The length of each answer should be about [X] sentence[s] [or phrase(s)].

Below the text are two answer fields, "Answer 1" and "Answer 2", each with a rich text editor toolbar. At the bottom of the interface are "Review & End Section X" and "Back Next" buttons.



Question Types: Performance Tasks

1. Case File and Library
2. Embedded tabbed resources
3. Writing tools

NCBE NextGen UBE Section 1 | John Smith Performance Task - 1 of 1 Section Time Remaining 03:00:00

Case File Library

Memorandum from... Client Interview N... Excerpt of Interv...

Certificate of... Judgment of Divor...

Memorandum from Supervising Partner

To: [You]
From: [Supervising partner]
Date: February 22, 2021
Re: Jennifer Butler v. Robert Hill

We represent Jennifer Butler in a suit against Robert Hill seeking a divorce and property distribution. Jennifer and Robert have two children; temporary custody and child support orders are in place that are not currently at issue. Robert has challenged the validity of the parties' underlying marriage. If there is no valid marriage, Jennifer cannot pursue a claim for divorce or a share of marital property.

I have attached the relevant material from Jennifer's file. I will meet with her later this week in anticipation of trial.

Please draft a short memo that I may use to prepare for my meeting with Jennifer. In the memo, explain whether Jennifer and Robert were legally married under Franklin Family Code § 301 et seq. Do not write a separate statement of facts, but be sure to incorporate the law and the relevant facts and reach a reasoned conclusion.

Use the reference materials in the case file and library sections above the resource text to complete this task.

This task requires an extended response in the form of an objective memorandum.

Review & End Section X Back Next



A Non-Linear Exam: Navigation

1. Navigate by question types
2. Completion status
3. Flagged item

The screenshot displays the NCBE NextGen UBE Section 1 interface. At the top, it shows 'Performance Task - 1 of 1' and 'Section Time Remaining 03:00:00'. The main content area is divided into several sections:

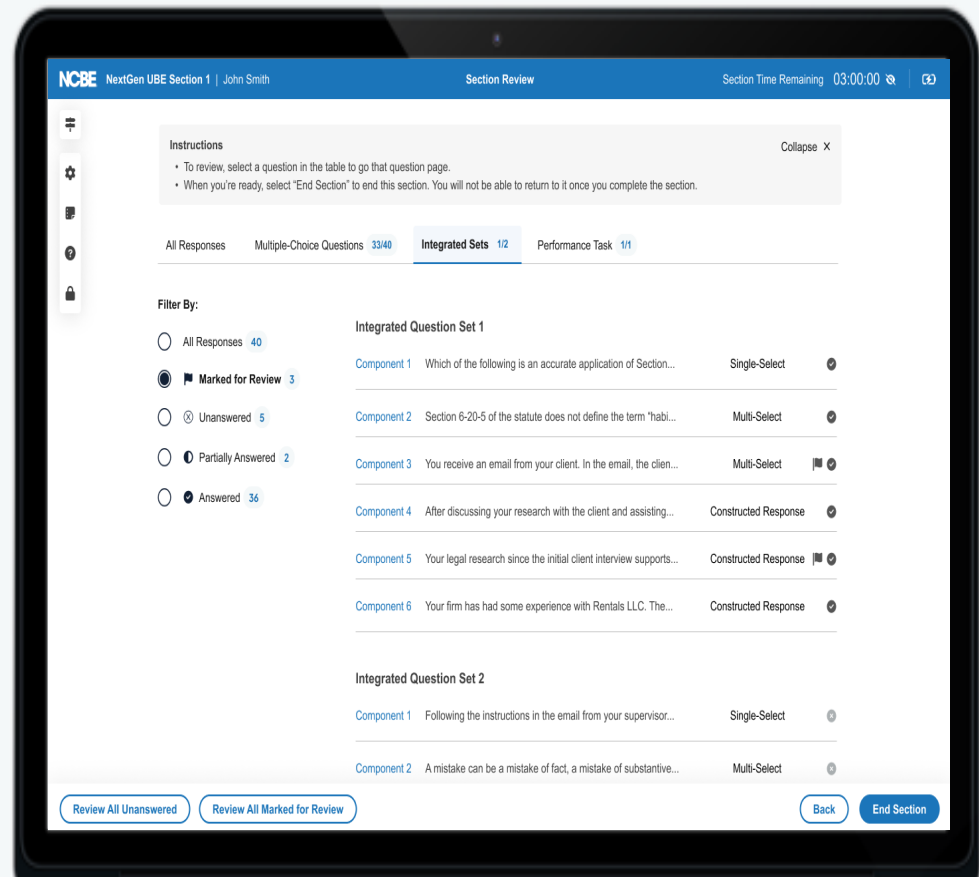
- Multiple Choice:** 32/40 completed.
- Integrated Sets:** 0/2 completed. A dropdown menu is open, showing 'Integrated Set 1' (IN PROGRESS) and 'Integrated Set 2' (NOT STARTED). Each set contains six components: Component 1 (Multiple-Choice), Component 2 (Constructed Response), Component 3 (Multiple-Choice), Component 4 (Constructed Response), Component 5 (Constructed Response), and Component 6 (Multiple-Choice). The status for each component is indicated by a circle with a checkmark or an 'X'.
- Performance Task:** 0/1 completed. The task is titled 'Memorandum from...' and includes a 'Certificate of...' and 'Judgm...'. The 'To:' field is '[You]', 'From:' is '[Supervising]', 'Date:' is 'February 22', and 'Re:' is 'Jennifer Bu...'. The task instructions state: 'Use the reference materials in the case file and statutory sections above the resource text to complete this task. This task requires an extended response in the form of an objective memorandum.' Below the instructions is a rich text editor with a toolbar containing icons for undo, redo, bold, italic, underline, and text color.

At the bottom of the interface, there are 'Review & End Section X' and 'Back' buttons.



Supporting Scaffolding: Review Screens

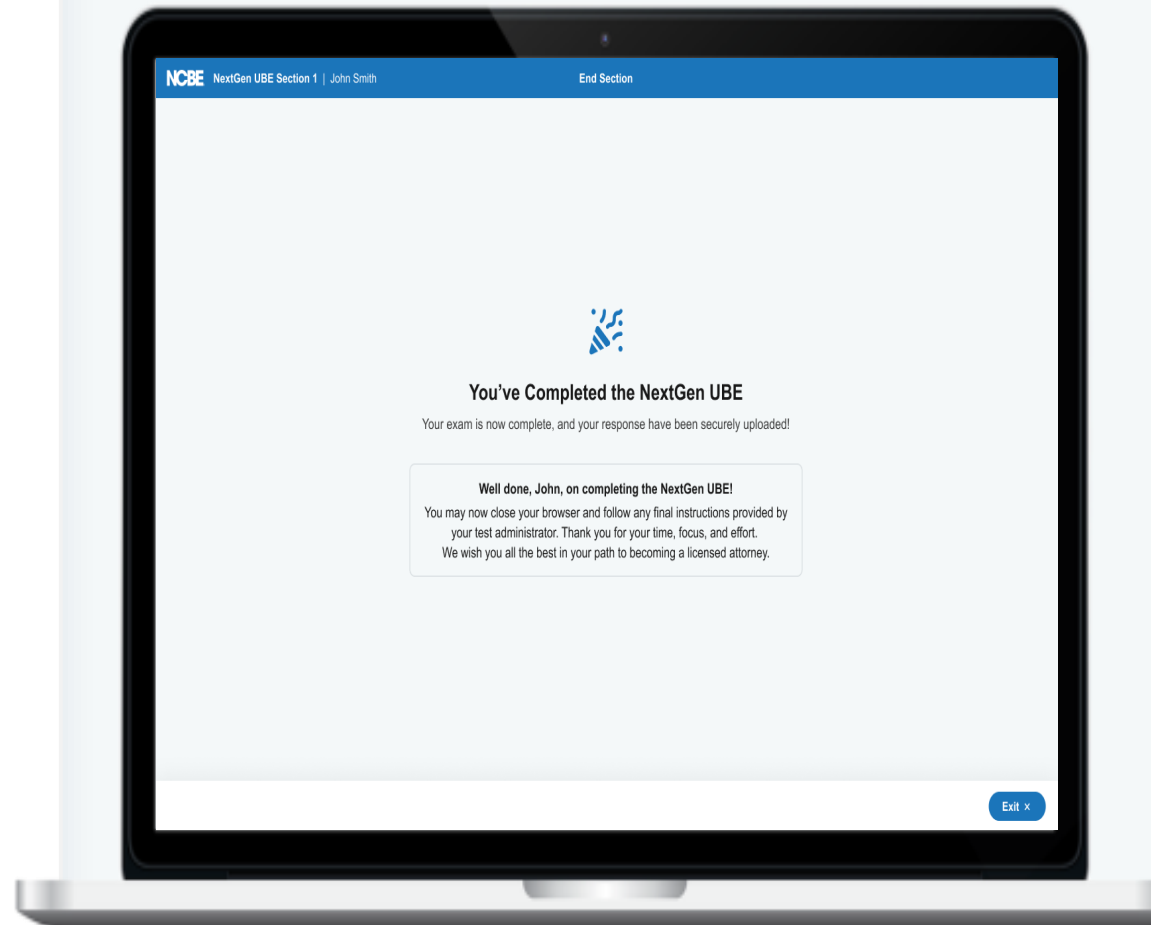
1. A final review of all content
2. Ease of navigation
3. Warning modals pre submission





Candidate Confidence: Data Upload Confirmation

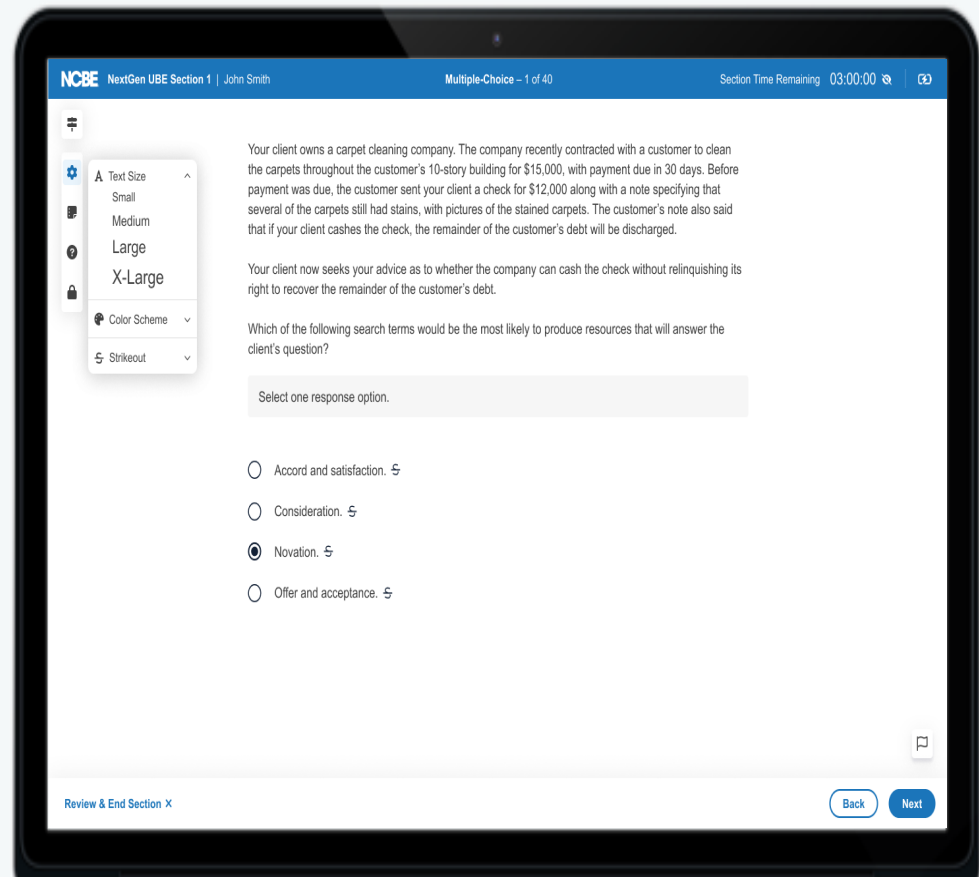
1. Response receipt
2. Notification of Wi-Fi connection
3. Integration with NCBE Account





Built in Accessibility: Tools for all Candidates

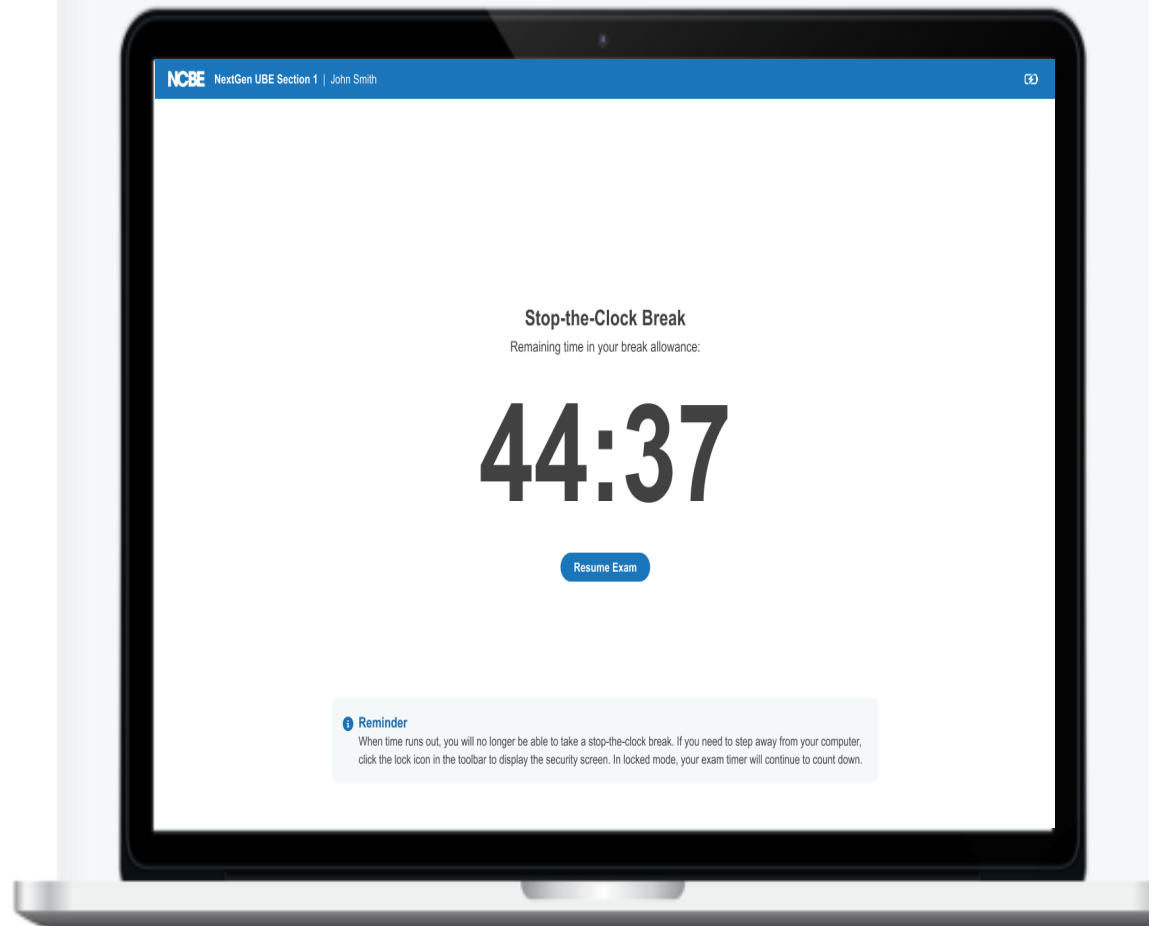
1. Text Zoom
2. Contrast
3. Timer Toggle





Accommodation Design: Platform Delivered Capabilities

1. Stop the Clock Breaks
2. Speech-to-text
3. Text-to-speech



Score Services

Data to Power Insights



Initial Score Send



Score Transfer



Analytics & Insights

Score Services Initial Score Send Individual Report



Individual Report of Bar Exam Performance with National Percent

Applicant's Information:

Name: **John M. Doe**
 Applicant ID: **10001**
 SSN4: **0000**
 NCBE Number: **12345678**

Exam Information:

Exam Type: **NextGen UBE**
 Exam Administration: **July 2026**
 Exam Jurisdiction: **Sample**
 NextGen UBE Total Scaled Score: **690**
 National Percentage Below: **68.3**

Report Run: **10/12/2026**

Applicant information

Question Type National Percent Below

Performance Task	70.8
Legal Research Performance Task	87.8
Counseling Sets	20.0
Drafting Sets	58.7

Multiple-Choice Subject Areas

Business Association	87.8
Civil Procedure	20.0
Constitutional Law	58.7
Contract Law	62.9
Criminal Law	80.5
Evidence	80.5
Family Law	80.5
Real Property	80.5
Torts	48.7

Sub-score percentiles

Legacy UBE and NextGen UBE Recommended Passing Score Range Mapping


Legacy UBE Passing Score Range	NextGen UBE Passing Score Range (Recommended)
260	610
261	611
262	612
263	613
264	614
265	615
266	616
267	617
268	618
269	619
270	620

The information above reflects NCBE's recommended NextGen UBE passing score range and its associated mapping to the Legacy Exam. The decision regarding the passing standard, however, rests solely with each jurisdiction. Please consult your jurisdiction for its adopted NextGen UBE passing standard.

Mapping information

Score Services Initial Score Send Individual Report

Question Type	National Percent Below
Performance Task	70.8
Legal Research Performance Task	87.8
Counseling Sets	20.0
Drafting Sets	58.7
Multiple-Choice Subject Areas	
Business Association	87.8
Civil Procedure	20.0
Constitutional Law	58.7
Contract Law	62.9
Criminal Law	80.5
Evidence	80.5
Family Law	80.5
Real Property	80.5
Torts	48.7



Individual Report of Bar Exam Performance with National Percent

Applicant's Information:
 Name: John M. Doe
 Applicant ID: 10001
 SSN4: 0000
 NCBE Number: 12345678

Exam Information:
 Exam Type: NextGen UBE
 Exam Administration: July 2026
 Exam Jurisdiction: Sample
 NextGen UBE Total Scaled Score: 690
 National Percentage Below: 68.3

Report Run: 10/12/2026


Question Type	National Percent Below
Performance Task	70.8
Legal Research Performance Task	87.8
Counseling Sets	20.0
Drafting Sets	58.7
Multiple-Choice Subject Areas	
Business Association	87.8
Civil Procedure	20.0
Constitutional Law	58.7
Contract Law	62.9
Criminal Law	80.5
Evidence	80.5
Family Law	80.5
Real Property	80.5
Torts	48.7

Legacy UBE and NextGen UBE Recommended Passing Score Range Mapping

Legacy UBE Passing Score Range	NextGen UBE Passing Score Range (Recommended)
260	610
261	611
262	612
263	613
264	614
265	615
266	616
267	617
268	618
269	619
270	620

The information above reflects NCBE's recommended NextGen UBE passing score range and its associated mapping to the Legacy Exam. The decision regarding the passing standard, however, rests solely with each jurisdiction. Please consult your jurisdiction for its adopted NextGen UBE passing standard.

Score Services Official Bar Exam Transcript


Official Bar Exam Score Transcript

Applicant's Information:
 NCBE Number: **12345678**
 Name: **John M Smith**
 DOB: 1/15/1980

Score Transfer:
 Jurisdiction X
 Issued: 12/12/2026

This Official Bar Exam Score Transcript includes a full history of all bar scores, across all jurisdictions and exam dates, in NCBE's record as of December 11, 2026.

Exam Administration	Exam Jurisdiction	Exam Type	Composite Score	MBE Scaled Score	Written Scaled Score
July 2026	California	MBE		134	

Not Authorized: Full jurisdiction does not authorize NCBE to transfer scores.

Unavailable: Full jurisdiction does not authorize release of scores. Contact the jurisdiction directly for more information.

Expired: MBE scores are considered expired after 14 administrations and UBE scores are expired after 5 years.

Incomplete Attempt: NextGen UBE examinee did not complete all three sections of the exam.

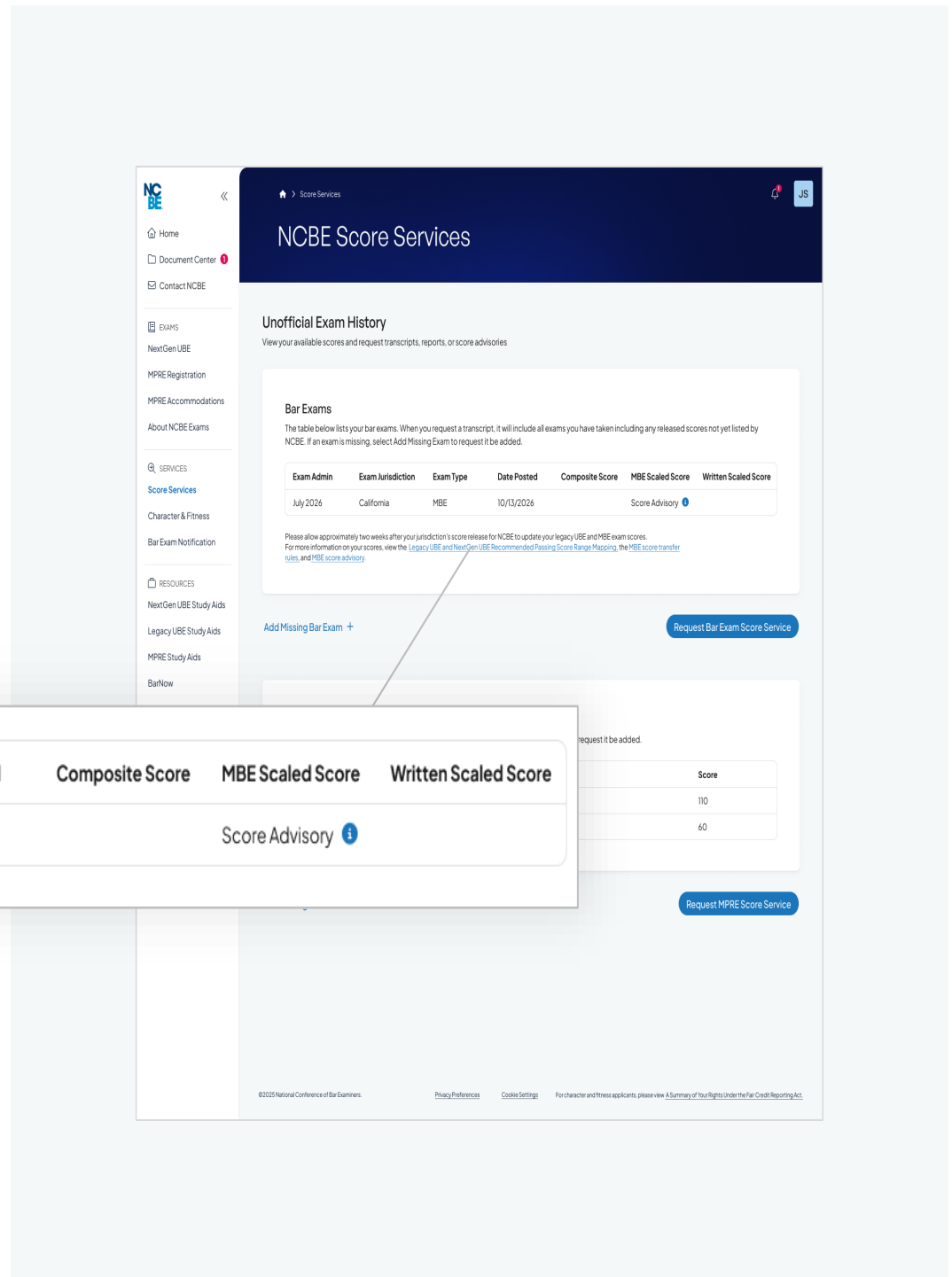
For MBE-only Jurisdictions: The MBE scaled score from a Legacy UBE will be shown for informational purposes only. The score is not valid for MBE transfer.

Exam Administration	Exam Jurisdiction	Exam Type	Composite Score	MBE Scaled Score	Written Scaled Score
July 2026	California	MBE		134	

Missing Score Range Mapping

Legacy UBE Passing Score Range	NextGen UBE Passing Score Range (Recommended)
260	610
261	611
262	612
263	613
264	614
265	615
266	616
267	617
268	618
269	619
270	620

Score Services Unofficial Score Report in the NCBE Account



Score Services Unofficial Bar Exam Transcript



Applicant's Information:
 NCBE Number: 12345678
 Name: John M Smith
 DOB: 1/15/1980

Score Transfer:
 Self
 Issued: 12/12/2026

This Unofficial Bar Exam Score Transcript includes a full history of all Bar scores, across all jurisdictions and exam dates, in NCBE's record as of December 15, 2026.

Exam Administration	Exam Jurisdiction	Exam Type	Composite Score	MBE Scaled Score	Written Scaled Score
July 2026	California	MBE		133-144	

Not Authorized: Exam jurisdiction does not authorize NCBE to transfer scores.
Unavailable: Exam jurisdiction does not authorize release of scores. Contact the jurisdiction directly for more information.
Expired: MBE scores are considered expired after 14 administrations and UBE scores are expired after 5 years.
Incomplete Attempt: NextGen UBE examinee did not complete all three sections of the exam.
MBE Score Advisory: Jurisdiction does not authorize NCBE to release the score to examinees.
Advisory Ranges: Less than 133, 133-144, 145-149, 150 or above

This is not an official bar exam transcript and cannot be used to transfer scores to a jurisdiction, as each jurisdiction sets its own requirements for admission. To transfer certified bar scores to a jurisdiction, you must request an Official Bar Exam Score Transcript from NCBE for a fee. Contact the jurisdiction directly for information on their requirements for accepting scores.

jurisdiction. This score is provided for

Exam Administration	Exam Jurisdiction	Exam Type	Composite Score	MBE Scaled Score	Written Scaled Score
July 2026	California	MBE		133-144	

Legacy UBE and NextGen UBE Recommended Passing Score Range Mapping

Legacy UBE Passing Score Range	NextGen UBE Passing Score Range (Recommended)
260	610
261	611
262	612
263	613
264	614
265	615
266	616
267	617
268	618
269	619
270	620

*all data are dummy data

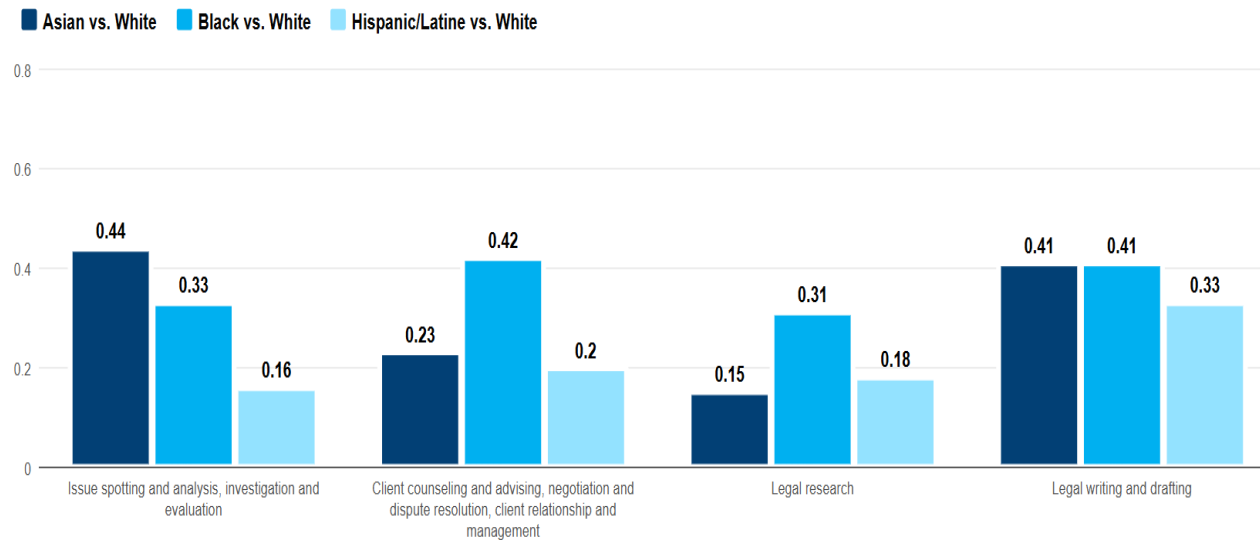
Data Share Candidate, Score, and Percentile Data

Test Administration Date	Jurisdiction Code	Applicant ID	NCBE ID	SSN-4	Last Name	First Name	Middle Name	Suffix	Date of Birth	NextGen UBE Total Score	National Percent Below	Local Scaled Score Percent Below	Performance Task Percent Below	Legal Research Performance Task Percent Below	Counseling Set Percent Below	Drafting Set Percent Below	Stand Alone Multiple Choice Business Associations Questions	Stand Alone Multiple Choice Civil Procedure Questions Percent	Stand Alone Multiple Choice Constitutional Law Questions	Stand Alone Multiple Choice Contract Law Questions	Stand Alone Multiple Choice Criminal Law Questions	Stand Alone Multiple Choice Evidence Questions Percent	Stand Alone Multiple Choice Property Questions Percent	Stand Alone Multiple Choice Tort Questions Percent Below
2026-07-01	1	1	12345678	4474	Silva	Chioma	Ana		2002-08-29	657.1	60.1	54.4	66.9	66.2	65.9	63.9	68.3	61.2	67.3	69.2	63.2	63.2	65.8	68.9
2026-07-01	1	0002	12345679	9944	Haddad	imani			2001-05-18	601.5	44.9	43.2	30.2	30.7	31.8	28.9	28.9	28.7	37.5	32.8	29.9	30.5	28.6	29.2
2026-07-01	1	0003	12345680	9925	Ibrahim	Lella			2001-04-22	686.7	68.6	69.9	85.9	83.2	81.3	86.5	81.2	80.7	84.5	80.5	83.7	89.3	86.5	85.0
2026-07-01	1	0004	12345681	3820	Hassan	Maya			2002-02-15	601.2	41.7	41.7	35.4	26.2	30.9	31.5	31.9	35.5	31.2	28.9	32.3	28.9	28.5	30.3
2026-07-01	1	0005	12345682	9535	Abdi	Ravi	Quin	Jr.	2002-12-17	613.5	45.7	46.4	37.4	36.9	38.3	36.1	34.2	40.8	36.8	39.6	38.7	38.8	36.8	39.6
2026-07-01	1	0006	12345683	8271	Ivanov	Selam	A.		2002-10-03	642.1	55.8	53.1	55.3	55.0	52.6	58.7	61.5	56.0	53.5	52.4	52.0	56.0	50.4	56.3
2026-07-01	1	0007	12345684	6394	Washington	Nikolai			2001-06-20	652.5	54.3	54.6	67.3	60.1	63.6	63.5	66.1	67.0	65.0	64.7	63.7	66.1	61.2	58.7
2026-07-01	1	0008	12345685	8372	Kim	Aisha			2001-03-27	587.9	37.5	37.7	24.4	21.7	23.8	24.6	20.7	22.4	19.6	21.4	24.0	29.7	14.9	25.1
2026-07-01	1	0009	12345686	7662	Patel	Priya	Uzo		1988-08-17	623.1	47.0	46.7	42.7	45.4	47.4	46.7	39.8	41.6	44.4	43.1	45.8	42.6	39.4	42.7
2026-07-01	1	0010	12345687	9758	Bautista	Zara			1988-05-30	568.5	34.4	27.3	11.6	15.7	13.2	7.5	14.1	14.6	8.6	12.1	13.2	8.5	12.3	5.3
2026-07-01	1	0011	12345688	3862	Khan	Lei	Ife		2001-08-20	631.5	49.9	53.5	48.0	49.9	45.3	47.7	49.1	51.1	50.8	50.7	51.9	52.5	51.8	48.1
2026-07-01	1	0012	12345689	0772	Washington	Usman			2001-02-02	696.4	74.5	72.7	88.6	90.8	87.2	92.2	93.7	86.9	91.0	88.9	91.4	92.0	91.3	94.5
2026-07-01	1	0013	12345690	4548	Lee	Hiro			2001-03-09	654.3	63.6	60.5	64.4	63.4	65.2	65.5	58.9	63.1	66.8	67.1	63.5	69.2	60.8	66.2
2026-07-01	1	0014	12345691	3174	Singh	Aaliyah	Ife		2002-09-26	670.1	63.6	61.7	67.8	67.8	75.1	73.5	71.8	70.9	72.0	70.3	68.6	75.3	73.4	72.5
2026-07-01	1	0015	12345692	4871	Hernandez	Amara			2001-01-23	657.1	58.6	58.4	60.2	65.3	67.0	65.8	65.4	61.3	64.6	67.3	66.7	64.3	65.4	64.4
2026-07-01	1	0016	12345693	9195	Khan	Nikolai			1988-09-04	601.5	43.0	39.7	29.0	30.8	42.2	34.5	30.8	33.4	27.7	32.4	31.3	32.4	27.2	29.7
2026-07-01	1	0017	12345694	9655	Adeyemi	Mei	Uzo		1988-05-30	686.7	69.7	67.3	80.9	91.3	85.6	82.2	82.6	89.7	82.6	83.0	84.7	87.3	88.4	90.2
2026-07-01	1	0018	12345695	6758	Rivera	Tariq			2002-01-02	601.2	39.6	42.9	31.4	29.9	33.9	32.1	32.3	26.3	31.6	31.4	26.6	32.9	33.1	31.6
2026-07-01	1	0019	12345696	6356	Abdi	Diego	Rae		2002-10-06	613.5	47.6	44.1	35.4	39.1	41.0	37.5	34.9	39.8	40.4	34.4	34.9	39.7	37.5	39.4
2026-07-01	1	0020	12345697	2858	Park	Kenji			1988-09-12	642.1	61.1	56.5	51.8	55.9	58.0	55.4	55.6	54.1	53.3	58.8	59.2	59.2	56.1	59.1
2026-07-01	1	0021	12345698	0150	Gonzalez	Gianna			1988-10-24	652.5	58.1	59.8	66.9	59.0	61.6	65.8	62.9	61.1	65.1	62.0	62.4	66.0	63.2	63.3
2026-07-01	1	0022	12345699	3895	Khan	Zara	Ren		2001-11-23	587.9	37.6	43.8	21.5	25.6	24.4	24.6	23.7	20.4	26.2	20.6	24.2	26.3	16.0	21.4
2026-07-01	1	0023	12345700	4543	Washington	Nia			2002-09-24	623.1	46.5	45.5	44.4	46.4	41.8	46.6	46.3	41.6	45.4	47.3	44.2	46.1	43.4	43.6
2026-07-01	1	0024	12345701	2302	Okafor	Miguel	Kai	Sr.	2001-11-03	568.5	32.8	34.4	5.7	12.4	9.3	13.9	6.6	10.1	15.6	7.9	10.1	9.5	8.0	9.8
2026-07-01	1	0025	12345702	7948	Haddad	Marcus			2002-02-11	631.5	48.6	51.8	47.8	46.7	47.9	49.5	44.8	46.9	47.1	45.2	52.2	49.8	46.4	49.3
2026-07-01	1	0026	12345703	1669	Kowalski	Sofia			1988-12-01	696.4	69.7	72.8	90.3	94.2	90.2	92.0	93.8	90.8	86.3	85.3	88.5	93.6	89.2	92.2
2026-07-01	1	0027	12345704	4797	Santos	Sunita			2002-11-30	654.3	63.0	55.3	60.2	59.5	70.6	62.7	64.7	63.5	58.3	65.5	64.0	61.2	69.1	63.8
2026-07-01	1	0028	12345705	1534	Kumar	Yara			2002-09-11	670.1	61.9	63.1	74.7	75.3	67.9	74.5	71.3	72.8	78.0	69.7	72.2	74.7	75.5	75.7
2026-07-01	1	0029	12345706	3476	Bautista	Kenji			1988-10-19	657.1	63.3	62.4	63.6	72.0	67.5	65.0	70.1	62.7	67.4	70.7	64.1	64.2	63.7	65.2
2026-07-01	1	0030	12345707	9740	Fischer	Liam			2002-09-28	601.5	46.7	42.2	29.8	27.7	25.8	30.9	31.0	28.9	30.5	24.4	29.7	30.7	32.4	30.9
2026-07-01	1	0031	12345708	6687	Hernandez	Naomi	Quin		2002-11-17	686.7	70.5	70.0	82.1	82.2	82.5	85.7	87.5	86.2	84.8	89.0	84.6	87.8	88.1	77.9
2026-07-01	1	0032	12345709	4238	Park	Elena			1988-11-20	601.2	43.9	41.6	36.0	30.8	33.7	28.0	30.7	32.0	27.1	31.1	29.0	31.0	33.2	33.2
2026-07-01	1	0033	12345710	2198	Kowalski	Liam			2002-07-11	613.5	51.8	49.6	38.1	36.6	38.3	44.4	44.3	35.2	45.5	37.9	41.9	38.3	38.3	39.2
2026-07-01	1	0034	12345711	0631	Lopez	Sunita			2002-10-25	642.1	54.9	55.4	52.9	51.4	52.8	53.0	61.3	56.3	56.4	54.4	53.4	52.0	54.1	59.0

*all data are field test data, used as illustrative

Additional Analyses Trend, Subgroup, Validity

Figure 3: Standardized Mean Differences by Foundational Skill by Race/Ethnicity



0.8 Large Effect | 0.5 Medium Effect | 0.2 Small Effect

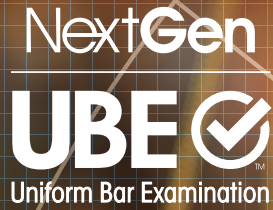
Thank You



Building a competent, ethical, and diverse legal profession.

ATTACHMENT A2

Attachment A2: NextGen UBE Blueprint



NextGen UBE Blueprint

July 2026–February 2027

Prepared by the National Conference of Bar Examiners

Published June 2, 2025

This set of exam specifications covers the July 2026 and February 2027 administrations of the NextGen UBE. Any changes to the Blueprint for future exams will be published one year prior to the date that they take effect.



Building a competent, ethical, and diverse legal profession.



Table of Contents

Introduction	1
Exam Structure	1
Question Types	2
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Introduction

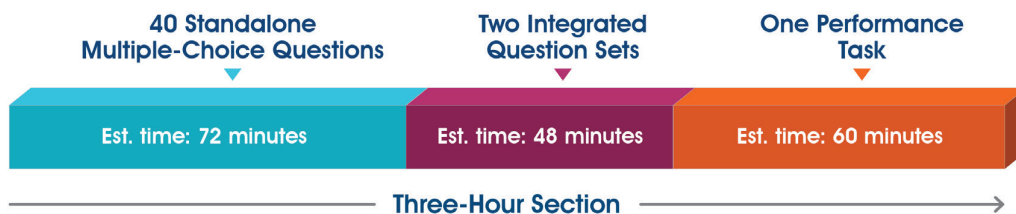
The NextGen Uniform Bar Examination is a summative exam, administered following completion of the examinee’s legal education and prior to licensure as a practicing attorney. It is designed to assess the examinee’s overall competency in the legal knowledge and skills expected of a newly licensed lawyer (defined as a lawyer within the first three years of practice). For information on the research underpinning the development of the NextGen UBE, visit the NextGen Bar Exam Research and Development website at nextgenbarexam.ncbex.org.

Exam Structure

The NextGen UBE is made up of three sections of three hours each, administered over one and a half days, with the second day occurring on the last Wednesday of February and July and the first day occurring on the Tuesday prior to that.¹ The dates for the July 2026 and February 2027 administrations are July 28–29, 2026, and February 23–24, 2027.



Each NextGen exam section contains a combination of standalone multiple-choice questions, integrated question sets, and performance tasks. In each three-hour section, the questions will be arranged in the following order:



Based on research to date, the expectation is that examinees will take on average 1.8 minutes per standalone multiple-choice question; 24 minutes per integrated question set; and 60 minutes per performance task. Questions within each three-hour section may be answered in any order.

¹ Examinees receiving test accommodations should check with their jurisdictions about the schedule established for extended-time administration.



Question Types

Samples of each question type are available on the NCBE website at ncbex.org/exams/nextgen/sample-questions.

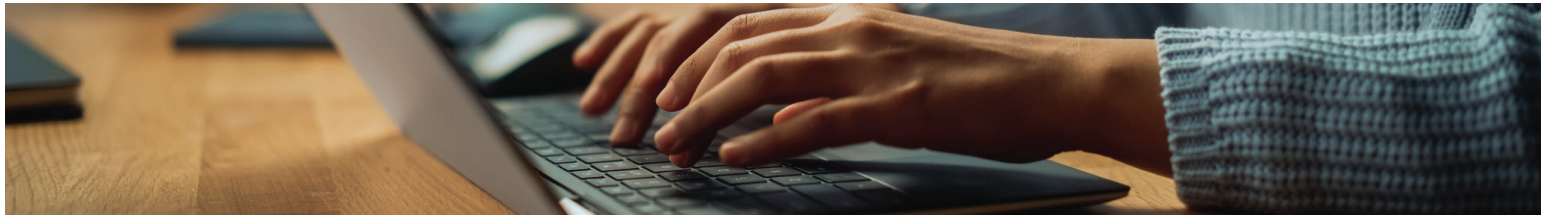
Standalone Multiple-Choice Questions

- Multiple-choice questions in two formats: Select one of four options (select-one multiple-choice questions) and select two of six options (select-two multiple-choice questions)
- 40 questions per section, 120 questions total
- Test eight Foundational Concepts and Principles, presented in approximately equal numbers
- Some questions may test more than one of the Foundational Concepts and Principles
- Questions are independent from each other; the answer for any one question does not rely on information from any other question
- Expected time: approximately 1.8 minutes per question
- Partial credit is available for select-two multiple-choice questions
- Standalone multiple-choice questions make up 49% of the total exam score

Integrated Question Sets

- Question sets based on a common fact scenario, appearing in two formats: drafting sets and counseling sets. Drafting sets contain medium-answer questions; counseling sets contain multiple-choice and short-answer questions
- Two question sets per section, six sets total
- Require examinees to demonstrate their ability to use Foundational Skills in realistic situations, completing tasks that a beginning lawyer should be able to accomplish
- May feature areas of doctrinal law, with accompanying legal resources, not included in the Foundational Concepts and Principles²
- May test more than one of the Foundational Concepts and Principles and/or non-Foundational area of doctrinal law; the Foundational Concepts and Principles are not equally distributed among the integrated question sets
- May include legal resources (e.g., excerpts of statutes or judicial opinions) and/or supplemental documents (e.g., a police report or excerpt from a deposition)

² An explanation of these other areas of doctrinal law is found in the Exam Content section.



Question Types *continued*

Integrated Question Sets *continued*

- Expected time: approximately 24 minutes per question set
 - Partial credit is available for short- and medium-answer responses and for select-two multiple-choice questions
 - Integrated question sets make up 21% of the total exam score
-

Performance Tasks

- Performance tasks in two formats: standard performance tasks focus on a single longer writing assignment; legal research performance tasks include several multiple-choice and short-answer questions followed by a medium-answer writing assignment
 - One performance task per section, three tasks total
 - Require examinees to demonstrate their ability to use Foundational Skills in realistic situations, completing tasks that a beginning lawyer should be able to accomplish
 - Legal resources, in the form of a case file and library, are provided within each task
 - Expected time: approximately one hour per task
 - Partial credit is available for short-, medium-, and longer-answer responses and for select-two multiple-choice questions
 - Performance tasks make up 30% of the total exam score
-

Pretest Questions

- Pretest questions comprise 20 of the 120 standalone multiple-choice questions and one of the six integrated question sets³
 - Pretest questions do not contribute to the examinee's score
 - Pretest questions are not identified as such and are indistinguishable from the scored items
-

³ Performance tasks are pretested independent of the live NextGen exam.

Exam Software

The NextGen UBE will be administered on examinees’ own laptops using a secure testing browser. Examinees will have access to the following tools within the platform:

All Questions

- Section countdown timer with five-minute warning (timer may be toggled off by examinee until the five-minute warning)
- Exam navigation tool, which shows which questions are answered, partially answered, unanswered, or marked for review, and provides easy navigation to each question in the section
- Highlighting in four colors
- Color scheme adjustment (light/dark and differing background and text colors)
- Zoom (resize text)
- Mark questions for review

Multiple-Choice Questions

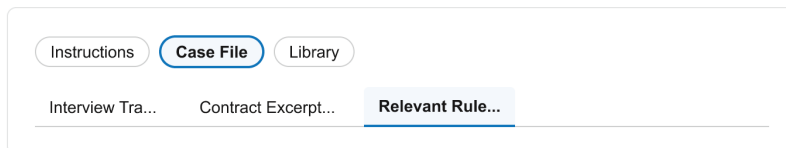
- Answer choice strike-through

Integrated Question Sets and Performance Tasks (written responses)

- Split-screen feature that allows examinees to view question and answer at the same time; mid-screen pull bar can be used to adjust size of question and answer views
- Notepad (text in notepad is not graded)
- Spell check
- Copy-paste from the provided documents to the answer fields and both copy-paste and cut-paste within and between the answer fields and notepad
- Undo/redo
- Bulleted and numbered lists, indent, bold, italics, underline, tab
- Sample toolbar:



- Legal resources, including libraries and case file materials, are presented in-screen in tabbed sections
- Sample document navigation:



In addition, the following assistive technologies are supported by the secure testing browser:⁴

Built-In Tools for Test Accommodations	<ul style="list-style-type: none"> • E-reader integration • Voice-to-text integration
---	---

Laptop technical specifications will be provided to examinees prior to each exam administration. Before exam day, examinees must download the secure testing browser onto the laptop that they will use during the exam and complete a pre-exam tutorial.⁵ The tutorial serves two functions: it confirms that laptops meet the technical specifications for the exam and familiarizes examinees with the exam features and functionalities.



Exam Content

Content scope outlines covering the following periods are available on the NCBE website at ncbex.org/exams/nextgen/content-scope. Updates to the content scope are published no later than one year before the administration in which those updates will first appear.

July 2026–February 2028

From July 2026 to February 2028, the NextGen UBE will test the following Foundational Concepts and Principles and Foundational Skills:

- **Foundational Concepts and Principles:** business associations, civil procedure, constitutional law, contract law, criminal law, evidence, real property, torts
- **Foundational Skills:** legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management

Other areas of legal knowledge will also appear on the NextGen UBE to provide the context for testing one or more Foundational Skills, but examinees are not expected or required to develop a base of knowledge in those areas. For those questions, examinees will be provided with the necessary legal resources (e.g., statutes, regulations, and case law) to demonstrate the skills being tested. **From July 2026 through February 2028, family law and trusts and estates will appear in these skills-focused questions on every exam.**

⁴ All test accommodations are made upon application to and grant by the individual testing jurisdiction.

⁵ Examinees receiving certain test accommodations requiring physical media, such as braille, will not be required to complete the pre-exam tutorial.

Starting July 2028

Starting in July 2028, the NextGen UBE will test the following Foundational Concepts and Principles and Foundational Skills:

- **Foundational Concepts and Principles:** business associations, civil procedure, constitutional law, contract law, criminal law, evidence, family law, real property, torts
- **Foundational Skills:** legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management

Other areas of legal knowledge will also appear on the NextGen UBE to provide the context for testing one or more Foundational Skills, but examinees are not expected or required to develop a base of knowledge in those areas. For those questions, examinees will be provided with the necessary legal resources (e.g., statutes, regulations, and case law) to demonstrate the skills being tested.

Model Rules of Professional Conduct

Issues related to the rules of professional responsibility frequently arise in the context of certain Foundational Skills. Select Model Rules of Professional Conduct will be tested in the context of client counseling and advising, negotiation and dispute resolution, and client relationship and management. Knowledge of those rules (found on pp. 2–3 of the Content Scope Outline) will be assessed with the expectation of recalled knowledge and understanding on the part of the examinee.

Starred and Unstarred Topics

Within the content scope outlines, there are two types of topics:

Topics with a star symbol ★

Topics followed by a star symbol require an examinee to rely solely on recalled knowledge and understanding of the topic; they will be tested without provision of legal resources.

Note: Select Model Rules of Professional Conduct are included in the starred category.

Topics without a star symbol

Topics without a star symbol may be tested with or without provision of legal resources.

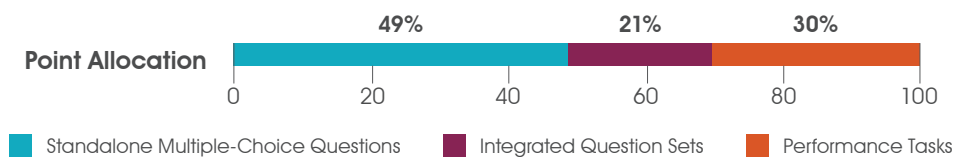
When these topics are tested without legal resources, the examinee is expected to rely on recalled knowledge and understanding that will enable the examinee to demonstrate recognition that the topic is at issue in the fact scenario.

Scores and Grading

Score Scale and Point Values

Official NextGen UBE scores are reported as a single number on a scale from 500 to 750. Each jurisdiction establishes its own passing score within this range.

Standalone multiple-choice questions make up 49%, integrated question sets 21%, and performance tasks 30% of the overall exam score.



Point values for each question type are:

Standalone Multiple-Choice Questions

- Select one of four options: 0–1 points
- Select two of six options: 0–2 points
- Partial credit is available for select-two multiple-choice questions

Integrated Question Sets: Drafting Sets

- Medium-answer responses: 0–8 points
- Partial credit is available for medium-answer responses

Integrated Question Sets: Counseling Sets

- Select one of four options: 0–1 points
- Select two of six options: 0–2 points
- Short-answer responses: 0–2 points
- Partial credit is available for short-answer responses and select-two multiple-choice questions

Standard Performance Tasks

- Longer-answer responses: 0–24 points
- Partial credit is available for longer-answer responses

Legal Research Performance Tasks

- Select one of four options: 0–1 points (double weighted)⁶
- Select two of six options: 0–2 points (double weighted)
- Short-answer responses: 0–2 points (double weighted)
- Medium-answer responses: 0–8 points
- Partial credit is available for short- and medium-answer responses and for select-two multiple-choice questions

Where partial credit is available, credit is given in full-point increments.

⁶ Double weighting refers to the weight of the question within the performance task as a whole. For example, one point earned on a double-weighted question will count as two points toward the total performance task score.

Scoring, Grading, and Equating

Scoring and grading of the NextGen UBE will be performed as follows:

Multiple-Choice Questions

- Scored by NCBE

Integrated Question Sets and Performance Tasks (written responses)

- Graded by jurisdiction-appointed graders on a common grading platform using detailed, uniform grading rubrics provided by NCBE
- Grader training provided by NCBE
- Graders assign points to each response based on guidelines provided by the grading rubrics; responses will not be graded or ranked relative to other examinees' responses
- Jurisdiction graders assess written responses only from examinees within their own jurisdiction
- Monitoring for grading consistency provided by jurisdiction administrators and grading leads
- Responses are dual graded, with grade reconciliation performed by jurisdiction grading leads

Final Score Calculations

- All scaling and equating performed by NCBE
 - Final scores calculated by NCBE and reported to examinees by jurisdictions
 - Official NextGen UBE scores are portable
 - Transfer of official NextGen UBE scores performed by NCBE
-

Since jurisdiction rules and policies change, NCBE strongly advises consulting the jurisdiction's bar admission agency directly for the most current information on acceptance of transferred NextGen UBE scores.



Online Resources

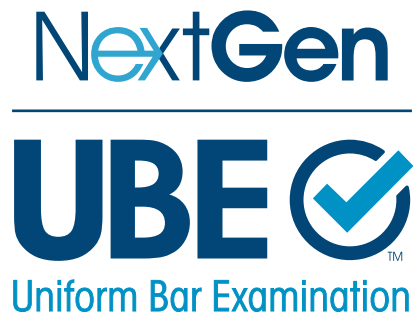
- NextGen UBE on the NCBE website: ncbex.org/exams/nextgen
- NextGen adoption and portability information: reports.ncbex.org/comp-guide/charts/chart-17
- Content Scope outlines: ncbex.org/exams/nextgen/content-scope
- Sample questions: ncbex.org/exams/nextgen/sample-questions
- Official study aids: ncbex.org/study-aids
- NextGen research reports: nextgenbarexam.ncbex.org

Upcoming Resources

- Official Examinees' Guide to the NextGen UBE – August 2025
- Exam software tutorial – August 2025
- Sourcebooks of Law – 2025 to 2026

ATTACHMENT A3

Attachment A3: NextGen UBE Bar Exam Content Scope



Bar Exam Content Scope

July 2026–February 2027



Building a competent, ethical, and diverse legal profession.

AUGUST 1, 2025

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About the NextGen UBE Content Scope

The content scope outlined here applies to the July 2026 and February 2027 administrations of the NextGen Uniform Bar Examination (NextGen UBE). Any updates to the content scope will be announced at least one year in advance of the exam administration in which they will first appear.

From July 2026 through February 2028, the NextGen UBE will assess the following:

- **Foundational Skills:** issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, client relationship and management, legal research, legal writing and drafting
- **Foundational Concepts and Principles:** business associations and relationships, civil procedure, constitutional law, contracts, criminal law and constitutional protections of accused persons, evidence, real property, torts





Other areas of legal knowledge may be included to provide context for testing Foundational Skills, but examinees are not expected or required to develop a base of knowledge in those areas. For these questions, relevant legal resources (e.g., statutes, regulations, and case law) will be provided. Family law and trusts and estates will appear in this way—embedded within skills-focused questions—on every exam from July 2026 through February 2028.



Foundational Skills and Tasks

The Foundational Skills are organized into four groups, as shown below, and are assessed in the context of one or more of the Foundational Concepts and Principles or other areas of doctrinal law.

Each skill is measured through a set of defined tasks (pp. 3–5). While any task may assess skills from any group, the icon accompanying each task indicates the skills group most closely aligned with that task’s primary focus.

 Foundational Skills Group A	 Foundational Skills Group B	 Foundational Skills Group C	 Foundational Skills Group D
Issue Spotting and Analysis, Investigation and Evaluation	Client Counseling and Advising, Negotiation and Dispute Resolution, Client Relationship and Management	Legal Research	Legal Writing and Drafting
<p>The purpose of Foundational Skills Group A is to assess the extent to which an examinee can apply fundamental legal principles and legal reasoning to analyze given fact patterns.</p>	<p>The purpose of Foundational Skills Group B is to assess the extent to which an examinee can identify lawyering strategies within the lawyer-client relationship, based on the relevant rules and standards and consistent with a client’s objectives, interests, and constraints.</p> <p><i>Refer to note on page 5 for additional information.</i></p>	<p>The purpose of Foundational Skills Group C is to assess the extent to which an examinee can identify and implement legal research strategies, including preliminary issue-spotting, working with provided resources, developing and refining a theory of the case, and reaching closure on research questions.</p>	<p>The purpose of Foundational Skills Group D is to assess the extent to which an examinee can complete a legal writing or drafting task based on the relevant rules and standards and consistent with a client’s objectives, interests, and constraints.</p>

Tasks to Measure Foundational Skills

Foundational Skills

Any task may assess skills from any group; the icon accompanying each task indicates the skills group most closely aligned with that task's primary focus.

Group A

Issue Spotting and Analysis, Investigation and Evaluation

Group B














Client Counseling and Advising, Negotiation and Dispute Resolution, Client Relationship and Management

Group C

Legal Research

Group D

Legal Writing and Drafting

1. Identify which legal concepts and principles are likely to affect the outcome of a matter based on the information provided. 
2. Identify which facts are likely to be relevant to or dispositive of a legal issue in a matter. 
3. Identify the applicable standards of review and/or burdens of proof that will apply to legal issues in a matter. 
4. Identify the strengths and weaknesses of a client's position or an opposing party's position based on the relevant legal rules and standards. 
5. In a matter that requires additional factual development, identify which facts need to be investigated, or the best strategy for investigating or eliciting those facts, in order to be able to evaluate the strengths and weaknesses of a client's position or an opposing party's position based on the relevant legal rules and standards. 
6. Assess the probable outcome of a claim, motion, discovery matter, defense, or objection based on the relevant legal rules and standards. 
7. Identify the applicable or dispositive language, standards, elements, or factors of a provided resource (such as a statute, contract, or judicial opinion). 
8. Identify which claims to recommend bringing, which remedies to recommend seeking, which evidence to present, which arguments or defenses to raise, or how to respond to arguments or defenses, and in a transactional matter which provisions to recommend including, based on the relevant legal rules and standards and consistent with a client's objectives, interests, and constraints. 
9. In a matter requiring review of provided materials, such as police reports, interview excerpts, or discovery, identify gaps in information obtained, suggestions for improvement, and/or grounds for objection (if applicable). 
10. Identify two factors that favor a client's position or two factors that favor an opposing party's position in a matter. 
11. Identify two benefits or two drawbacks of a proposed resolution of a dispute, consistent with a client's objectives, interests, and constraints. 
12. Identify potential terms of a contract or settlement agreement that could advance negotiation or resolution. 
13. In a matter in which a client has multiple stated objectives, explain why a legal rule or principle, as applied to the client's situation, may make one of those stated objectives attainable or unattainable. 

Tasks to Measure Foundational Skills (continued)

Foundational Skills

Any task may assess skills from any group; the icon accompanying each task indicates the skills group most closely aligned with that task's primary focus.

Group A

Issue Spotting and Analysis, Investigation and Evaluation

Group B




Client Counseling and Advising, Negotiation and Dispute Resolution, Client Relationship and Management

Group C

Legal Research

Group D

Legal Writing and Drafting

- | | |
|--|---|
| 14. Determine the best strategy to identify the client's needs and achieve the client's stated goals and objectives. |  |
| 15. In a matter that requires legal research, identify the research questions that need to be answered. |  |
| 16. Identify ambiguities in the language, standards, elements, or factors of a provided resource (such as a statute, contract, or judicial opinion). |  |
| 17. Identify efficient legal research strategies, methods, or tools (including appropriate search terms) that are likely to uncover other legal sources or documents to assist in the interpretation of a provided resource (such as a statute, contract, or judicial opinion) to advance your understanding of a client's position. |  |
| 18. Given a collection of legal sources, identify the roles and characteristics of the sources, including their authoritative weight. |  |
| 19. Given one or more judicial opinions, identify the facts in a matter that are analogous to and/or distinct from the dispositive facts in the opinions. |  |
| 20. Given a collection of legal sources, identify other sources, search terms, or research strategies that might be used to update sources or find additional sources. |  |
| 21. Given a collection of legal sources, identify which sources are relevant to or dispositive of a legal issue in the matter. |  |
| 22. Given a collection of legal sources, identify whether the sources are sufficient to complete an assigned research or other lawyering task. |  |
| 23. Draft or edit correspondence to a client explaining the legal implications of a course of action, updating the client on the status of the client's matter, and/or providing advice on the next steps to be taken in the matter. |  |
| 24. Given draft sections of a complaint or an answer to a complaint in a matter, identify language that should be changed, and make suggestions for how that language should change, consistent with the facts, the relevant legal rules and standards, and the client's objectives, interests, and constraints. |  |
| 25. Given draft sections of affidavits that must be submitted to a court or other tribunal in a matter, identify the best affiant and best language to support each element to be proved, consistent with the facts, the relevant legal rules and standards, and the client's objectives, interests, and constraints. |  |

Tasks to Measure Foundational Skills (continued)

Foundational Skills

Any task may assess skills from any group; the icon accompanying each task indicates the skills group most closely aligned with that task's primary focus.

Group A

Issue Spotting and Analysis, Investigation and Evaluation

Group B


Client Counseling and Advising, Negotiation and Dispute Resolution, Client Relationship and Management


Group C


Legal Research


Group D

Legal Writing and Drafting

26. Given draft provisions of a contract or other legal document, identify language that should be changed, explain why it should be changed, and suggest how that language should change, consistent with the facts, the relevant legal rules and standards, and the client's objectives, interests, and constraints. 

27. Given a collection of legal sources, draft specified section(s) of a document, such as a memo, a persuasive brief or letter, or another common document, demonstrating skill at formulating an original legal analysis. 

28. Draft or revise discovery documents consistent with the facts, the relevant legal rules and standards, and the client's objectives, interests, and constraints. 

 **Foundation Skills Group B Note:** Issues related to the rules of professional conduct listed below frequently arise in the context of Group B Foundational Skills (Client Counseling and Advising, Negotiation and Dispute Resolution, and Client Relationship and Management). Knowledge of the following American Bar Association Model Rules of Professional Conduct (MRPC) may be assessed in the context of assessment of Group B Foundational Skills within integrated question sets but will not be assessed in the sections of the exam consisting of standalone multiple-choice questions. Assessment of the MRPC is limited to the application of the following rules and does not include knowledge of comments accompanying the rules. Additionally, references within the rules to other rules or subsections will not be assessed unless the referenced rule or subsection is also enumerated below. Questions assessing knowledge of the MRPC require an examinee to rely solely on recalled knowledge and understanding, without provision of legal resources.

- MRPC Rule 1.0: Terminology
- MRPC Rule 1.1: Competence
- MRPC Rule 1.2(a) and (d): Scope of Representation and Allocation of Authority Between Client and Lawyer
- MRPC Rule 1.3: Diligence
- MRPC Rule 1.4: Communications
- MRPC Rule 1.6(a) and (c): Confidentiality of Information
- MRPC Rule 1.7: Conflict of Interest: Current Clients
- MRPC Rule 3.1: Meritorious Claims and Contentions
- MRPC Rule 3.3(a)(1)–(2): Candor Toward the Tribunal
- MRPC Rule 4.1: Truthfulness in Statements to Others
- MRPC Rule 4.2: Communication with Person Represented by Counsel
- MRPC Rule 4.3: Dealing with Unrepresented Persons



Foundational Concepts and Principles: Business Associations and Relationships

Subject Matter Outline

Topics in this outline will be tested using tasks from the Foundational Skills outline. Questions may test topics from more than one subject area.

Examinees may expect that some questions will be presented with legal resources. When legal resources are provided within the test, the examinee will be expected to demonstrate their ability to efficiently analyze and apply the legal resources to answer the question or questions.

Within this outline, there are two types of topics:

Topics with a star symbol ★

Topics followed by a star symbol ★ require an examinee to rely solely on recalled knowledge and understanding of the topic; they will be tested without provision of legal resources.

Topics without a star symbol

Topics without a star symbol may be tested with or without provision of legal resources. When these topics are tested without legal resources, the examinee is expected to rely on recalled knowledge and understanding that will enable the examinee to demonstrate recognition that the topic is at issue in the fact scenario.

Where the applicable law is noted in this outline, that law is controlling. In all other cases, if specific statutory rights and remedies are tested, the applicable legal resources will be provided.

If a particular topic's scope is described in this outline, that does not indicate greater importance or testing frequency of the topic.

Topics followed by a star symbol ★ require an examinee to rely solely on recalled knowledge and understanding of the topic; they will be tested without provision of legal resources. **Topics without a star symbol** may be tested with or without provision of legal resources. When these topics are tested without legal resources, the examinee is expected to rely on recalled knowledge and understanding that will enable the examinee to demonstrate recognition that the topic is at issue in the fact scenario.

I. Agency and authority

A. Creation ★

B. Agent’s authority to bind principal

1. Actual authority ★

2. Apparent authority ★

C. Agent’s fiduciary duties to principal

1. Duty of care ★

2. Duty of loyalty ★

D. Agent’s duties to third parties

This topic includes an agent’s liability for contracts entered into on behalf of a principal, including the consequences of a principal’s status as disclosed, partially disclosed, or undisclosed.

E. Termination ★

II. Vicarious liability of principal for acts of agent ★

This topic includes the doctrines of respondeat superior and vicarious liability, as well as joint venture liability. This topic also includes distinctions between employees and independent contractors. *See also* Torts II.F. Liability for acts of others.

III. Formation, management, and control of general partnerships

This topic includes the de facto treatment of improperly created corporations and limited liability companies as general partnerships, as well as the authority of general partners to manage the partnership (including acts carried out within the partnership’s ordinary course of business). This topic also includes partnership agreements, partners by estoppel, and partnership dissolution (including dissociations in a “partnership at will” and a “partnership for a definite term or particular undertaking”).

IV. Formation of corporations and limited liability companies

A. Corporations

This topic includes the content and uses of corporate governance documents, as well as de facto corporations and the doctrine of corporation by estoppel.

1. Incorporation documents

This topic includes the corporate charter, characterized as the articles of incorporation for a corporation organized under the Model Business Corporation Act and the certificate of incorporation for a corporation organized under Delaware law.

2. Bylaws

3. Amendments to incorporation documents and bylaws

4. Shareholder agreements

Topics followed by a star symbol ★ require an examinee to rely solely on recalled knowledge and understanding of the topic; they will be tested without provision of legal resources. **Topics without a star symbol** may be tested with or without provision of legal resources. When these topics are tested without legal resources, the examinee is expected to rely on recalled knowledge and understanding that will enable the examinee to demonstrate recognition that the topic is at issue in the fact scenario.

B. Limited liability companies (LLCs)

1. Certificate of organization

This topic includes LLC chartering documents, characterized as certificate of organization, certificate of formation, articles of organization, or as otherwise provided by statute.

2. Operating agreement

This topic includes LLC governance documents, characterized as operating agreements or limited liability company agreements, whether they are written, oral, or manifested by conduct.

3. Amendments to certificate of organization and operating agreement

V. Corporate promoters: pre-organization actions and fiduciary duties

This topic includes the personal liability (to third parties) of promoters who enter into contracts or agreements prior to corporate formation and the fiduciary duties promoters owe to the to-be-formed corporation. This topic also includes the adoption, ratification, assignment, and assumption of pre-organization contracts or agreements. *See also* Contracts V.I.E. Discharge of duties. Discharge of duties: accord and satisfaction, substituted contract, novation, rescission, and release.

VI. Management and control of corporations and limited liability companies

A. Corporations

1. Powers and rights of shareholders

This topic includes classes of shares (preferred and common), the requirements for annual meetings (notice, quorum, and voting rights, including proxy voting), watered stock, preemptive rights, written consents in lieu of meeting, and telephonic and videoconference meetings.

2. Powers and rights of directors

This topic includes the requirement for directors' meetings (notice, quorum, and voting rights) and action by committee. This topic also includes classified or staggered board, indemnification, cumulative voting, written consents in lieu of meeting, and telephonic and videoconference meetings.

3. Powers and rights of officers

This topic includes authority and officer's liability on corporate obligations.

B. Powers and rights of members and managers of limited liability companies

This topic includes member and manager authority and control in member-managed and manager-managed entities under default statutory rules and giving effect to permitted private ordering.

VII. Fiduciary duties within business associations

A. Fiduciary duties of general partners ★

B. Fiduciary duties of corporate officers and directors ★

C. Fiduciary duties of limited liability company members and managers ★

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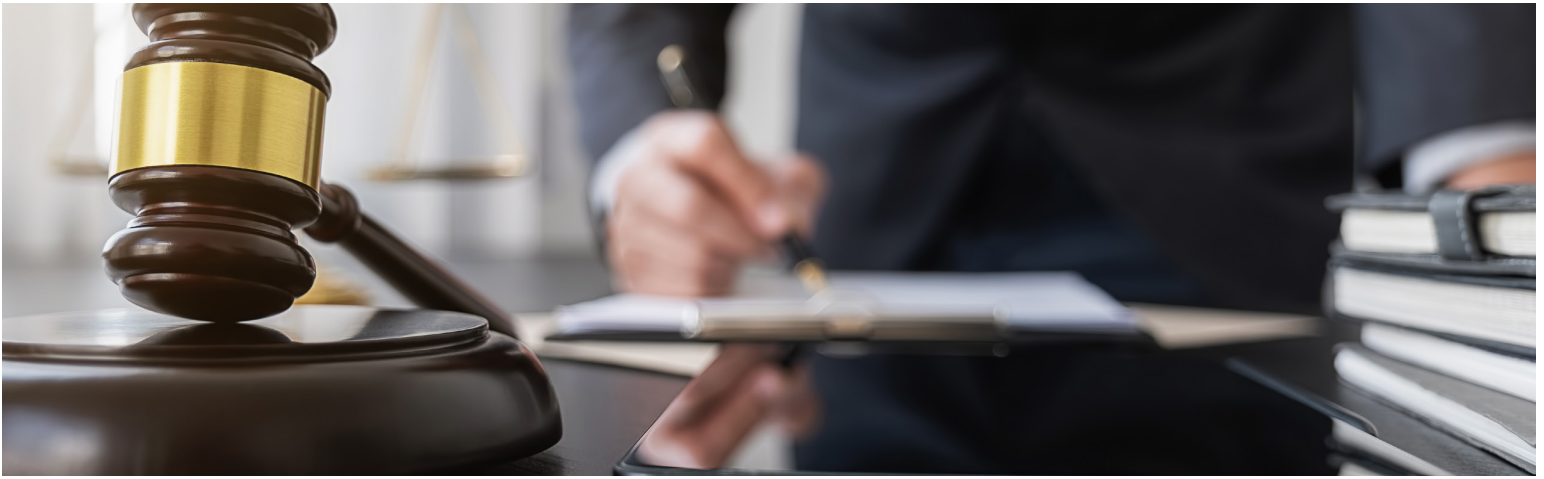
VIII. Shareholder and member litigation

This topic includes understanding who is suing whom in direct and derivative litigation.

IX. Liability rules related to business associations

- A. Liability of general partners under the Revised Uniform Partnership Act (1997) ★**
- B. Liability of corporate officers and directors under the Model Business Corporation Act (2016) ★**
- C. Liability of limited liability company members and managers under the Uniform Limited Liability Company Act (2013) ★**
- D. Piercing the veil ★**

This topic includes piercing the veil of limited liability to hold corporate shareholders or limited liability company members personally liable for the firm's obligations.



Foundational Concepts and Principles: Civil Procedure

Subject Matter Outline

Topics in this outline will be tested using tasks from the Foundational Skills outline. Questions may test topics from more than one subject area.

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Within this outline, there are two types of topics:

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Examinees are to assume the application of (1) the Federal Rules of Civil Procedure and (2) the sections of Title 28 of the US Code pertaining to district court and appellate jurisdiction, venue, and transfer.

If a particular topic's scope is described in this outline, that does not indicate greater importance or testing frequency of the topic.

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I. Jurisdiction and venue

A. Federal subject-matter jurisdiction

1. Federal question jurisdiction ★

This topic includes the well-pleaded complaint rule and the general requirement that the case involve interpretation of the Constitution or laws of the United States or “arise under” the federal law that creates the cause of action.

2. Diversity jurisdiction ★

This topic includes citizenship of individuals, the complete diversity rule, citizenship of entities, the amount-in-controversy requirement, and aggregation of claims.

3. Supplemental jurisdiction

This topic includes the “same case or controversy” requirement, the conditions under which supplemental jurisdiction may not be exercised, and the discretionary factors permitting the court to decline supplemental jurisdiction.

4. Concurrent and removal jurisdiction ★

This topic includes the types of cases that are removable (based on federal question, diversity, or supplemental jurisdiction), the procedure for removing an action, the grounds for remand, and the procedure for seeking remand, as well as the district to which a case must be removed.

B. Personal jurisdiction ★

This topic includes the constitutional standards for specific in personam jurisdiction (minimum contacts, “arising out of,” reasonableness) and general in personam jurisdiction (“at home”). Specific jurisdiction includes application in a variety of contexts, such as intentional torts, contracts, “stream of commerce,” and e-commerce claims. General jurisdiction includes application to both individuals and corporations. This topic also includes the application of long-arm statutes, consent, and waiver.

C. Service of process and notice

This topic includes the constitutional requirement of notice, the different ways to serve individuals and corporations, and waiver of service of process.

D. Venue, forum non conveniens, and transfer

This topic includes the two basic circumstances in which venue is proper: where the defendant (individual or corporation) resides or where a “substantial part of” the events occurred. This topic also includes remedies when venue is improper, rules governing transfer of venue, and rules governing the dismissal of actions on the basis of forum non conveniens.

II. State law in federal court

This topic includes the Erie doctrine as related to the basic difference between substance and procedure and when state law, including state choice-of-law rules, displaces federal procedural rules.

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III. Pretrial procedures

A. Preliminary injunctions and temporary restraining orders

This topic includes familiarity with the purpose of temporary restraining orders and preliminary injunctions as tools to maintain the status quo pending adjudication of a case. This topic also includes understanding that preliminary injunctions can become permanent injunctions.

B. Pleadings and amended pleadings ★

This topic includes the relation-back doctrine.

C. Rule 11 ★

This topic includes the requirements of reasonable inquiry, legal and evidentiary basis, good-faith arguments for changes in the law, and proper purpose, as well as the timing and procedures for Rule 11 sanctions.

D. Joinder of parties and claims

1. Joinder of multiple claims, joinder of parties, counterclaims, crossclaims, third-party practice, and the court's overriding power to sever ★

2. Intervention under Rule 24

This topic includes the permissibility of intervention, the right to intervene, and the circumstances under which intervention may not be permitted.

E. Disclosures and discovery

1. Scope and limits of discovery ★

2. Rule 26(f) conference and planning for discovery ★

This topic includes a general understanding of the parties' obligation to confer to develop a proposed discovery plan.

3. Discovery tools and mechanisms, including e-discovery ★

This topic includes depositions (including corporate representative discovery), interrogatories, requests for admission, requests for production and inspection, and physical and mental examination. This topic also includes how to handle electronically stored information, including metadata and large volumes of e-discovery material.

4. Discovery motions

This topic includes motions for protective orders, the process for claiming privilege, and motions to compel disclosure or response. This topic also includes understanding that a party may be subject to sanctions for failure to comply with discovery rules, but not the particulars of which types of sanctions are appropriate.

IV. Preserving the right to a jury trial

This topic includes the means of preserving the right to a jury trial and the consequences of failing to do so (waiver).

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V. Dispositive motions

A. Motion to dismiss under Rule 12 ★

This topic includes the timing and procedures for asserting a failure to state a claim defense, as well as the standards for prevailing on the defense. This topic also includes motions to dismiss based on subject-matter jurisdiction, personal jurisdiction, venue, and service.

B. Motion for judgment on the pleadings

C. Summary judgment motion ★

This topic includes all matters pertaining to the timing, procedure, and standards associated with a summary judgment motion, as well as the process by which a motion to dismiss for failure to state a claim is converted to a summary judgment motion.

D. Motion for judgment as a matter of law (directed verdict and judgment notwithstanding the verdict)

VI. Judgments

A. Entry of default and default judgment ★

B. Effect of judgment ★

This topic includes the elements of claim and issue preclusion.

VII. Appealability and review

A. Final judgment rule

B. Availability of interlocutory review

C. Standard of review on appeal

This topic includes the distinctions between levels of discretion given to the appeals courts in reviewing trial court findings (de novo, clearly erroneous, abuse of discretion, plain error, and harmless error).



Foundational Concepts and Principles: Constitutional Law

Subject Matter Outline

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I. Federal judicial power

A. Justiciability requirements: case or controversy and standing ★

This topic includes the elements of standing, the broad prohibitions on citizen and taxpayer standing, and aspects of the “case or controversy” requirement related to claims brought against the government to enforce statutes.

B. Other justiciability doctrines: ripeness, mootness, and advisory opinions ★

C. The Eleventh Amendment and state sovereign immunity

This topic includes distinctions between suits against states and suits against local governments, litigation between state and federal governments, claims against government officials, suits for damages and for injunctive relief, state law claims and federal law claims, consent to be sued, and congressional power to abrogate state immunity.

D. Judicial authority to interpret the Constitution and laws

This topic includes congressional power to define and limit the jurisdiction of federal courts.

II. Legislative powers

A. Congress’s commerce, taxing, and spending powers ★

This topic includes the requirement of a “substantial effect” on interstate commerce, regulation of economic and noneconomic activity, and regulation through spending (conditional grants).

B. Congress’s power to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments

III. Executive powers

A. The president’s power as commander in chief

B. The president’s power to appoint and remove officials

This topic includes the president’s appointment and removal power regarding executive branch officials and Congress’s authority to limit the president’s appointment and removal powers.

C. The powers of federal administrative agencies

This topic includes constitutional issues regarding the roles of administrative agencies as executive enforcers of laws and regulations, as “legislators” with rule-making authority, and as “judges” conducting hearings and issuing decisions, as well as Congress’s authority to delegate power to agencies.

IV. The relation of nation and states in a federal system

A. Intergovernmental immunities

1. Prohibition on state taxation of federal entities

2. The Tenth Amendment

This topic includes the reserved powers of the states and the prohibition on federal commandeering of state legislation and enforcement.

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B. Federalism-based limits on state authority

1. Supremacy clause and preemption ★

This topic includes the presumption against federal preemption and the distinction between express and implied preemption.

2. Dormant commerce clause, including congressional authorization of otherwise invalid state action, and the market participant doctrine

V. Individual rights

A. State action requirement and the exception for exclusive government functions

B. Substantive due process

1. The right to privacy

This topic includes the right to reject unwanted medical care, the right to educate one's children, the right to live with whomever one chooses, the right to marriage, the right to contraception, and standards of review.

2. The right to vote

This topic includes voting restrictions (e.g., residency requirements, property ownership, poll taxes, regulations related to party primaries), dilution of the right to vote (the one-person, one-vote principle), racial gerrymandering, and standards of review.

3. The right to travel, including standards of review

4. The right to bear arms, including standards of review

C. Procedural due process, including the constitutional right to process in administrative hearings ★

This topic includes entitlement to due process, the requirements of notice and the right to be heard, waiver of procedural due process rights, and access to courts (e.g., for indigent plaintiffs). This topic also includes welfare and disability benefits, creditors' remedies, and civil forfeiture.

D. Equal protection

1. Classifications subject to strict scrutiny ★

This topic includes suspect classifications (i.e., race, ethnicity, national origin, and alienage) and classifications affecting fundamental rights.

2. Classifications subject to intermediate scrutiny ★

This topic includes quasi-suspect classifications (i.e., gender and nonmarital children).

3. Classifications subject to rational basis review ★

This topic includes classifications that are neither suspect nor quasi-suspect, as well as the deference given to the legislature.

E. Takings

This topic includes the meaning of "taking" and "just compensation," the "public use" limitation, and the distinction between regulatory taking and regulation that is not a taking.

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F. Ex post facto laws

This topic includes the two ex post facto clauses (Article I, §§ 9–10) and due process requirements.

G. First Amendment freedoms: the religion clauses

1. The establishment clause ★

This topic includes the applicability of this doctrine to the states, religious displays on public property, government discrimination among religions, financial benefits to religious entities (e.g., aid to colleges, hospitals, K-12 schools), tax exemptions, curriculum controls, accommodations for religious students, and religious activities in public schools and at school activities off school property.

2. The free-exercise clause ★

This topic includes the applicability of this doctrine to the states, the meaning of “religious belief,” the right not to work on the Sabbath, exemptions from antidiscrimination and other laws, and punishment of religious conduct because it is religious.

H. First Amendment freedoms: the free-speech clause

1. Content-based regulation of protected expression ★

This topic includes regulation of expression based on its content and the applicable standards of review.

2. Content-neutral regulation of protected expression and forum designations ★

This topic includes regulation of expression that is not based on its content and the applicable standards of review. This topic also includes time, place, and manner restrictions, as well as distinctions among public forums, limited public forums, and nonpublic forums.

3. Regulation of expressive conduct ★

This topic includes regulation of conduct that is tantamount to speech, including the use of symbols as expression.

4. Regulation of unprotected expression ★

This topic includes regulation of “fighting words,” obscenity, incitement of illegal activity, and defamatory speech.

5. Regulation of commercial speech ★

This topic includes regulation of commercial signs and commercial advertising.

6. Regulation of, or impositions upon, public school students and public employees, licenses, or benefits based upon exercise of expressive or associational rights

This topic includes distinctions between speech by government employees pursuant to their official duties and speech by such employees not pursuant to their official duties, government employees’ participation in political campaigns, issuance of permits, and the unconstitutional conditions doctrine.

7. Prior restraint, vagueness, and overbreadth

This topic includes facial invalidity, as-applied invalidity, procedural safeguards, the amount of discretion given to officials, and the sufficiency of the government interest.

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I. Freedom of the press

This topic includes the publication of truthful information, press access to court proceedings (including pretrial proceedings, the need to protect children, and protective orders for discovery materials), and press access to prisons to interview prisoners.

J. Freedom of association

This topic includes aspects of freedom of association related to the electoral process (e.g., ballot regulation, party regulation, limits on contributions, limits on expenditures), bar membership, and laws prohibiting or punishing membership in associations.



Foundational Concepts and Principles: Contracts

Subject Matter Outline

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I. Identification of governing law ★

This topic includes understanding whether a transaction at issue in a test question raises issues governed by the common law or the Uniform Commercial Code Article 2 (UCC), or whether it is a hybrid transaction. With respect to hybrid transactions as defined by UCC § 2-102, resources may be provided.

II. Formation of contracts

A. Mutual assent (offer and acceptance, and unilateral, bilateral, and implied-in-fact contracts)

This topic includes what constitutes an offer and an acceptance, how an offeror can control the manner of acceptance, when the offer and acceptance establish mutual assent, and when an offer terminates (e.g., revocation, lapse, rejection, death, counteroffer). This topic also includes the mirror image rule, limitations on the offeror's power to revoke (e.g., option contracts, reliance), and when an offer can be accepted only by a return promise, only by performance, or by either a promise or performance. This topic also includes sale advertisements and offers made to the public (e.g., offers of reward money).

1. **Manifestation of assent ★**
2. **Offers ★**
3. **Limitations on the power of acceptance ★**
4. **Acceptance ★**

B. Consideration (bargained-for exchange) ★

This topic includes what constitutes a bargained-for exchange and adequacy of consideration, past consideration, and moral obligation. This topic also includes the preexisting duty rule and forbearance to sue as consideration.

C. Obligations enforceable without a bargained-for exchange ★

This topic includes promissory estoppel and restitution.

D. Modification of contracts ★

This topic includes requirements for modification; distinctions between modification, waiver, and course of performance; and the effect of no-oral-modification clauses.

E. Contract formation and modification under the UCC

This topic includes contract formation and modification principles under UCC Article 2 and the use of default rules to fill gaps in contract terms.

III. Defenses to enforceability

A. Incapacity to contract

This topic includes contracts entered into by minors or individuals who are mentally impaired, under guardianship, or under the influence of drugs or alcohol. This topic also includes disaffirmance and ratification.

B. Duress and undue influence

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C. Mistake and misunderstanding ★

This topic includes mutual mistake and unilateral mistake, including when a party bears the risk of the mistake. This topic also includes misunderstanding in meaning and scrivener's error (leading to reformation).

D. Fraud, misrepresentation, and nondisclosure ★

This topic includes fraudulent misrepresentation, material misrepresentation, concealment, and nondisclosure, as well as the different remedies available for each.

E. Illegality and public policy

F. Unconscionability under the common law and under the UCC

This topic includes procedural unconscionability and substantive unconscionability.

G. Statute of frauds

1. Contracts covered by the statute of frauds ★

2. Satisfaction of the statute of frauds ★

3. Exceptions to the writing requirement ★

4. Statute of frauds under the UCC ★

This topic includes the UCC's statute-of-frauds requirements, including the exceptions that remove the statute of frauds as a bar to enforcement of a contract.

5. Electronic transactions

This topic includes the scope of the Uniform Electronic Transactions Act and when an electronic signature or an electronic record is effective.

IV. Contract content and meaning

A. Parol evidence rule ★

This topic includes the application of the parol evidence rule, including the effect of a partially or completely integrated agreement on the admissibility of evidence, and exceptions to the parol evidence rule. This topic also includes differences in application of the rule depending on whether evidence is proffered to supplement, explain, or contradict a written agreement.

B. Parol evidence under the UCC

C. Interpretation ★

This topic includes the basic rules of contract interpretation and their relative priority with respect to contract language and ambiguities.

D. Usage, course of dealing, and course of performance ★

E. Usage, course of dealing, and course of performance under the UCC

F. Omitted and implied terms ★

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V. Performance

A. Conditions ★

This topic includes distinctions between promises and conditions. This topic also includes the nonoccurrence and excuse of conditions, as well as conditions of satisfaction.

B. Obligation of good faith and fair dealing ★

C. Performance under the UCC

This topic includes tender, risk of loss, title, delivery terms, rejection, cure, acceptance, and revocation of acceptance.

D. Warranties and disclaimers under the UCC ★

This topic includes creation and breach of express warranties, warranties of title and against infringement, implied warranties of merchantability and fitness for a particular purpose, what constitutes a breach of warranty, and sellers' defenses to breach of warranty, including warranty disclaimers and failure to provide notice.

VI. Breach and discharge

A. Material breach, partial breach, and substantial performance ★

B. Anticipatory repudiation under the common law and under the UCC ★

This topic includes anticipatory repudiation, retraction of repudiation, and demand for adequate assurance.

C. Impossibility, impracticability, frustration of purpose, and risk of loss ★

This topic includes the requirements for establishing impracticability or frustration of purpose, the appropriate uses of these defenses, and their effect on each party's performance obligations. This topic also includes the effects of partial and temporary excuse and force majeure provisions.

D. Impracticability and frustration of purpose under the UCC

E. Discharge of duties: accord and satisfaction, substituted contract, novation, rescission, and release ★

F. Breach of employment contracts

This topic includes the distinction between at-will contracts and contracts for a definite term.

VII. Remedies

A. Expectation interest ★

This topic includes the standard measure of expectation damages and the categories of expectation damages (i.e., direct, incidental, and consequential).

B. Causation, certainty, and foreseeability ★

This topic includes causation and certainty requirements for all expectation damages, the foreseeability requirement for consequential damages, and recognition of different ways to calculate an appropriate damages award.

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C. Liquidated damages and penalties ★

This topic includes how to distinguish between liquidated damages clauses and penalties.

D. Avoidable consequences and mitigation of damages ★

E. Reformation

This topic includes the requirements for obtaining reformation of a contract when the parties inadvertently omit an agreed-upon term from the writing.

F. Specific performance and injunction ★

This topic includes when specific performance is an available remedy and when a court might issue an injunction instead.

G. Reliance and restitution interests

This topic includes reliance damages and restitution as alternatives to expectation damages. This topic also includes reliance damages as a remedy for promissory estoppel actions. This topic also includes restitution for the party in breach; for parties who have partially performed a void, voidable, or unenforceable contract; and in other circumstances where restitutionary recovery is appropriate to prevent unjust enrichment.

H. Remedies under the UCC

VIII. Third-party rights and obligations

A. Third-party beneficiaries

This topic includes distinctions between intended and incidental third-party beneficiaries, as well as defenses against claims asserted by intended beneficiaries.

B. Assignment of rights and delegation of duties

This topic includes the types of contractual rights that can be assigned and the types of contractual duties that can be delegated, requirements for assignment or delegation, and the effect of assignment or delegation on who can enforce the underlying contractual obligations against whom (including available defenses). This topic also includes the effect of clauses prohibiting assignment or delegation and the requirements for revocation of gratuitous assignments.

C. Assignment of rights and delegation of duties under the UCC



Foundational Concepts and Principles: Criminal Law and Constitutional Protections of Accused Persons

Subject Matter Outline

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Elements of crimes and defenses will be tested on the basis of provided statutes.

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I. General principles

A. Acts and omissions

This topic includes voluntariness, omission as an act, and possession as an act.

B. State of mind

This topic includes the distinction between specific and general intent, the distinction between motive and intent, and the different levels of culpability for the listed subtopics. Examinees should understand different mental states and recognize them when they are presented in the language of specific statutes.

1. Intent or purpose

2. Knowledge

3. Recklessness

4. Criminal negligence

5. Mistake of fact or law

C. Defenses

1. Provocation

This topic includes cooling time and rekindling.

2. Intoxication

This topic includes voluntary and involuntary intoxication.

3. Self-defense

This topic includes lethal and nonlethal threat, stand your ground, duty to retreat, castle doctrine, and initial aggressor.

4. Defense of others

5. Defense of property

D. Jurisdiction

This topic includes federal criminal jurisdiction and state criminal jurisdiction as specified by statute.

E. Burdens of proof and persuasion ★

This topic includes the presumption of innocence and the differences between reasonable suspicion, probable cause, and proof beyond a reasonable doubt. This topic also includes prosecution and defense burdens of proof and a defendant's right to present evidence.

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II. Statutory crimes

A. Homicide (including felony murder)

This topic includes the distinctions in levels of intent (described in section I) for homicide charges, felony murder, and vehicular manslaughter. This topic also includes distinctions in homicide offenses, including between intentional murder (premeditated and impulsive killings) and manslaughter (provocation or extreme emotional disturbance doctrine); unintentional murder (depraved indifference), manslaughter (recklessness), and negligent homicide; and felony murder and vehicular manslaughter.

B. Theft

This topic includes statutory theft, aggravated theft, and defenses to these crimes.

C. Burglary

This topic includes statutory burglary, aggravated burglary, and defenses to these crimes.

D. Robbery

This topic includes statutory robbery, aggravated robbery, and defenses to these crimes.

E. Assault and battery

This topic includes statutory assault and battery, aggravated assault and battery, and defenses to these crimes.

F. Possession and trafficking offenses

This topic includes statutory possession crimes (e.g., possession of drugs, guns, or contraband), possession with intent to distribute, contraband trafficking crimes, and defenses to these crimes.

G. Operating a motor vehicle while impaired or under the influence and vehicular manslaughter

This topic includes driving while impaired or under the influence, vehicular manslaughter, and defenses to these crimes.

III. Inchoate crimes and parties to a crime

A. Attempt

This topic includes the elements of attempt, defenses to attempt, different formulations of the actus reus requirement (including the “substantial step” test), and general vs. specific intent, as well as lesser included offenses and the merger doctrine.

B. Conspiracy

This topic includes the elements of conspiracy, defenses to conspiracy, and liability of coconspirators for a substantive crime.

C. Parties to crime

This topic includes accomplices and accessories before and after the fact.

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IV. Constitutional protections of accused persons

Note: Examinees should answer questions based on protections provided by the US Constitution only.

A. Arrest, search, and seizure [Fourth Amendment]

1. Search ★

This topic includes the concept of a reasonable expectation of privacy as applied to certain circumstances, including open fields, surveillance, technological information gathering, false friends, dog sniffs, and curtilage.

2. Reasonable suspicion and probable cause ★

3. Search warrant and exceptions ★

This topic includes requirements for obtaining a valid search warrant, exceptions to the warrant requirement (e.g., search incident to lawful arrest, automobile exception, plain view, consent, stop-and-frisk, hot pursuit, exigent circumstances, community caretaking), and requirements for proper execution of a search warrant (e.g., “knock and announce” and exceptions, proper scope of search, methods that “shock the conscience”).

4. Seizure of persons (Terry stop and arrest) ★

5. Administrative and suspicionless searches ★

This topic includes border searches, inventory searches, airport searches, checkpoints, searches of government offices, and searches in public schools.

6. Exclusionary rule and exceptions ★

This topic includes application of the exclusionary rule and exceptions to the rule (e.g., fruits doctrine, independent source, inevitable discovery, good-faith doctrine, “knock and announce” exception, use of evidence for impeachment).

7. Standing to object, including coconspirators and third parties, and state action doctrine ★

B. Confession and privilege against self-incrimination [Fifth Amendment]

1. Triggering the Fifth Amendment privilege against self-incrimination (including “testimonial” versus “nontestimonial” standard and incrimination standard) ★

2. Triggering Miranda rights ★

This topic includes custody, interrogation, and custodial statements.

3. Adequacy of Miranda warnings ★

4. Invoking and waiving Miranda rights ★

This topic includes the differences between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel, how a person must assert Miranda rights, when the rights are properly waived, and what types of subsequent law-enforcement conduct are allowed (e.g., resuming questioning after a lapse of time, questioning about other crimes, questioning after custody has ended, questioning by informants).

5. Involuntariness under the Fifth and Fourteenth Amendments ★

6. Exclusionary rule and exceptions ★

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C. Right to counsel (including ineffective assistance of counsel) [Sixth Amendment]

1. **When the right attaches ★**
2. **Waiver of the right to counsel ★**
3. **Ineffective assistance of counsel ★**
4. **Right to counsel of one's choice**
5. **Exclusionary rule**

D. Right to disclosure of exculpatory and impeachment evidence ★

E. Due process implications related to identification ★

This topic includes the due process implications of lineups, showups, voice exemplars, and photo arrays.

F. Right to trial by jury ★



Foundational Concepts and Principles: Evidence

Subject Matter Outline

Topics in this outline will be tested using tasks from the Foundational Skills outline. Questions may test topics from more than one subject area.

Examinees may expect that some questions will be presented with legal resources. When legal resources are provided within the test, the examinee will be expected to demonstrate their ability to efficiently analyze and apply the legal resources to answer the question or questions.

Within this outline, there are two types of topics:

Topics with a star symbol ★

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Examinees should assume that the Federal Rules of Evidence (FRE) are in effect.

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I. Relevance and reasons for excluding relevant evidence

A. Probative value

1. Relevance ★

This topic includes understanding that evidence remains relevant and may be admitted even if an opposing party offers to stipulate to it. However, a court may consider an offer to stipulate when judging the evidence’s probative value.

2. Exclusion for unfair prejudice, confusion, or waste of time ★

B. Character and related concepts

1. Admissibility of character evidence ★

2. Crimes, wrongs, or other acts ★

3. Methods of proving character ★

4. Habit and routine practice ★

C. Opinions and expert testimony

1. Lay opinion ★

2. Qualification of expert witness ★

3. Proper subject matter for expert testimony ★

4. Reliability of expert testimony ★

5. Bases of expert opinion testimony ★

6. Ultimate issue rule ★

II. Presentation of evidence

A. Foundation, authentication, and identification, including the best evidence rule ★

This topic includes understanding that evidence needs to be authenticated and familiarity with the four primary examples set out in FRE 901(b)(1)-(4) of evidence that meets the authentication requirement. This topic also includes what it means to “prove the content” of a writing, as well as understanding how the rules define “writing” and the rules with respect to duplicates.

B. Competency of witness

C. Juror’s competency as a witness

D. Refreshing recollection

E. Objections and offers of proof

F. Judicial notice

G. Limited admissibility

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III. Privileges and other policy exclusions

- A. Spousal immunity and marital communications ★
- B. Attorney-client and work product ★
- C. Physician/psychotherapist-patient
- D. Insurance coverage
- E. Subsequent remedial measures ★
- F. Compromise and payment of medical expenses

IV. Hearsay and circumstances of its admissibility

- A. Definition of hearsay ★
- B. Statements that are not hearsay
 - 1. Declarant-witness's prior statement ★
 - 2. Opposing party's statement ★
- C. Right to confront witnesses ★

This topic includes the right to confront witnesses and limitations on testimonial hearsay pursuant to the confrontation clause of the Sixth Amendment in criminal cases.
- D. Hearsay within hearsay

V. Exceptions to the rule against hearsay

- A. Hearsay exceptions—regardless of whether the declarant is available as a witness
 - 1. Present sense impression and excited utterance ★
 - 2. Statement of then-existing mental, emotional, or physical condition ★
 - 3. Statement made for medical diagnosis or treatment
 - 4. Recorded recollection ★
 - 5. Business records; absence of business record ★
 - 6. Public records and reports; absence of public record ★

This topic includes understanding that when a record or statement of a public office is offered to prove “factual findings” from a legally authorized investigation, in a civil case or against the government in a criminal case, “factual findings” include conclusions and opinions.
 - 7. Statement in learned treatise, periodical, or pamphlet
 - 8. Reputation concerning character

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B. Hearsay exceptions—when the declarant is unavailable as a witness

1. **Former testimony ★**
2. **Statement under the belief of imminent death**
3. **Statement against interest ★**
4. **Statement offered against a party that wrongfully caused the declarant’s unavailability**

VI. Impeachment, contradiction, and rehabilitation

- A. **Ability to observe, remember, or relate accurately ★**
- B. **Contradiction ★**
- C. **Inconsistent statements and conduct ★**
- D. **Bias and interest ★**
- E. **Character for truthfulness or untruthfulness**
 1. **Impeachment with bad acts ★**
 2. **Impeachment with convictions ★**
- F. **Religious belief or opinion ★**
- G. **Rehabilitation of impeached witness ★**
- H. **Impeachment of hearsay declarant ★**



Foundational Concepts and Principles: Real Property

Subject Matter Outline

Topics in this outline will be tested using tasks from the Foundational Skills outline. Questions may test topics from more than one subject area.

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I. Ownership of real property

A. Present estates

1. Fee simple absolute (fee simple) ★

This topic includes the language used in conveyance and the basic attributes of the fee simple absolute.

2. Defeasible fee

This topic includes the language used in conveyance and the basic attributes of the fee simple determinable, the fee simple subject to condition subsequent, and the fee simple subject to an executory interest.

3. Life estate and life estate pur autre vie

This topic includes the language used in a conveyance or devise, the rights and duties of life tenants, and the basic attributes of the life estate (for the life of the life tenant) and the life estate pur autre vie (for the life of someone other than the life tenant).

B. Future interests

1. Reversion

This topic includes the language used in conveyance and the basic attributes of reversion.

2. Remainder, vested and contingent

This topic includes the language used in conveyance and the basic attributes of an indefeasibly vested remainder, a vested remainder subject to open, a vested remainder subject to total divestment, and a contingent remainder (subject to condition precedent, or unborn or unascertained person). This topic also includes the effect of remainders on the marketability of title and the transferability of remainders.

3. Executory interest

This topic includes the language used in conveyance, the effect of executory interests on the marketability of title, and the transferability of executory interests.

4. Possibility of reverter and right of entry for condition broken

This topic includes the basic attributes of two reversionary interests that are associated with a defeasible fee: possibility of reverter and right of entry for condition broken (also referred to as right of entry or power of termination).

5. Rules affecting future interests: survivorship, class gifts, and waste

This topic includes the language used in conveyance (children, heirs, issue); class members not yet born; when the class closes; conditions on disposition; contingency of survival (express and implied); and affirmative waste, permissive waste, and ameliorative waste.

C. Cotenancy

1. Joint tenancy (the four unities), tenancy in common (some unities), and tenancy by the entirety (the five unities) ★

This topic includes the language used in the creation of cotenancies, the unities required to create the various types of cotenancies, and distinctions among them.

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2. **Partition ★**
This topic includes the remedy of partition, limitations on partition, and methods of partition.
 3. **Severance ★**
This topic includes aspects of severance related to conveyance, judgment liens, mortgages, and leases.
 4. **Relations among cotenants**
This topic includes possession, rent and profits, cotenant's encumbrance, ouster, and contribution for expenses.
- D. Landlord-tenant law**
1. **Tenancy for years, periodic tenancy, tenancy at will, and tenancy at sufferance ★**
This topic includes distinctions among the various types of tenancies, breach of covenants, and creation of leasehold (e.g., express or implied, by operation of law, tenant holdover, invalid lease).
 2. **Possession, rent, and actual and constructive eviction ★**
This topic includes failure to pay rent, when rent accrues, security deposits, landlord's duty to deliver possession, actual and constructive eviction, quiet enjoyment, and landlord and tenant remedies pursuant to a lease.
 3. **Assignment and sublease ★**
This topic includes assignment by landlord and tenant, covenants that run with the land, reassignment by assignee, original tenant's liability, sublessee's liability for covenants, sublessee's assumption of the lease, covenant against assignment and sublease, waiver of covenant against assignment and sublease, and transfer in violation of a covenant.
 4. **Early termination of lease ★**
This topic includes surrender, acceptance of surrender, mitigation of damages, anticipatory breach, and abandonment/repossession.
 5. **Habitability and suitability ★**
This topic includes independent and dependent lease covenants, duty to repair, ordinary wear and tear, destruction of premises, and implied warranty of habitability.
- E. Alienability, descendibility, and devisability of present and future interests**
This topic includes total vs. partial restraints, reasonableness of restraints, restraints on future interests, and options and rights of first refusal. This topic does not include the rule against perpetuities.
- F. Fair housing/discrimination ★**
This topic includes discriminatory restraints and discrimination in sales and leases (Fourteenth Amendment, Fair Housing Act), retaliatory eviction, racially restrictive covenants, and a basic understanding of reasonable accommodations for tenants with disabilities.

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II. Rights in real property

A. Easements and licenses

1. Nature and type of easements and licenses ★

This topic includes affirmative easement, negative easement, easement appurtenant (and judicial preference for this type), easement in gross, and the differences between an easement and a license.

2. Creation of easements and licenses ★

This topic includes easement expressly granted or reserved, easement implied from prior use (reasonable necessity arising in an implied grant or reservation) or by strict necessity, easement implied from subdivision plat, prescriptive easement, and easement arising by estoppel. This topic also includes license expressly created and license created by failing to create an easement.

3. Scope and apportionment ★

This topic includes rules of construction, the consequences flowing from a change in use or use outside the scope of an easement, duties to repair, and the effect of subdivision of the dominant estate.

4. Effect of transfer of the dominant or servient estate and the assignability of easements and licenses ★

5. Termination of easements and licenses ★

This topic includes termination of easement by stated conditions, unity of ownership, release (and statute-of-frauds requirement), abandonment, estoppel, prescription, absence of necessity, condemnation, and destruction of the servient estate. This topic also includes termination of license by revocation (e.g., breach of contract) and license that becomes irrevocable (e.g., estoppel, license coupled with an interest).

B. Restrictive covenants

1. Nature and type of restrictive covenants ★

This topic includes affirmative covenant, negative covenant, and equitable servitude.

2. Creation and enforceability of restrictive covenants and equitable servitudes

This topic includes the requirements for covenants and servitudes to be enforceable between the original parties and the requirements for the benefit/burden to run with the land (e.g., intent, notice, “touch and concern” requirement, horizontal and vertical privity for covenant but not servitude). This topic also includes servitude implied from a common scheme.

3. Transfer of restrictive covenants and equitable servitudes

4. Termination of restrictive covenants and equitable servitudes ★

This topic includes termination of covenants and equitable servitudes, as well as remedies for breach. For equitable servitude, this topic also includes the defenses of unclean hands, acquiescence, estoppel, and changed neighborhood conditions.

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III. Real estate sales contracts

A. Creation and construction of real estate contracts

1. Statute of frauds and exceptions ★

2. Essential terms ★

3. Time for performance ★

This topic includes the presumption that time is not of the essence (and how the presumption can be overcome), as well as liability issues related to when time is/is not of the essence.

4. Remedies for breach ★

This topic includes specific performance as a remedy for breach; the doctrine of part performance; when tender of performance is excused; liability for defects; damages (including liquidated damages); distinctions between builders and sellers of existing property as to misrepresentation, fraud, active concealment, and failure to disclose; and disclaimers of liability.

B. Marketability of title ★

This topic includes when a title is “reasonably free from risk of litigation,” defects in the record chain of title, encumbrances, waiver, timing of marketability requirement, merger, and remedies (e.g., rescission, damages, specific performance).

IV. Mortgages and foreclosure

A. Mortgages and deeds of trust

1. Definition of mortgage and deed of trust

2. Purchase money

3. Future advance

B. Mortgage theories: title, lien, and intermediate ★

C. Foreclosure

1. Judicial and nonjudicial

This topic includes defenses to foreclosure and possession before foreclosure.

2. Acceleration

3. Parties to the process

This topic includes priorities of senior and junior interests, the effect of foreclosure on junior interests, and modification of priorities (e.g., for failure to record, by subordination agreement).

4. Deficiency and surplus

This topic includes distribution of the proceeds of the foreclosure sale and deficiency judgments.

5. Equitable and statutory redemption

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V. Titles

A. Adverse possession

This topic includes the elements of adverse possession, issues affecting the running of the statutory period, and tacking.

B. Transfer by deed

1. Requirements for deed ★

This topic includes the rules of construction related to deeds, the statute-of-frauds requirement, the use of parol evidence (e.g., to resolve an ambiguity, to prove grantor's intent, but not to show conditional delivery), proper description of the land and parties, words of intent, the signature requirement, the fact that consideration is not required, distinctions between void and voidable deeds, and delivery and acceptance issues (including conditional delivery and relation back of acceptance).

2. Types of deeds ★

This topic includes general warranty deed, covenants of title (i.e., seisin, right to convey, against encumbrances, warranty, quiet enjoyment, and further assurances), breach of covenant (and damages), statutory special warranty deed, and quitclaim deed.

C. Recording acts

1. Types of recording acts ★

This topic includes notice statutes, race statutes, race-notice statutes, and who is protected (e.g., purchaser for value).

2. Indexes

This topic includes title searches, grantor and grantee indexes, tract indexes, the effect of recordation, issues related to mistakes by the recorder, and issues related to recording an unacknowledged instrument.

3. Chain of title

4. Forged deeds



Foundational Concepts and Principles: Torts

Subject Matter Outline

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I. Intentional torts

A. Harms to the person

This topic includes all elements of each intentional tort, including the defendant’s act, intent (including knowledge to a substantial certainty, transferred intent, the distinction between intent and motive, and who can form intent [e.g., minor children]), causation, and harm/damages (as required).

1. Assault ★
2. Battery ★
3. False imprisonment ★
4. Intentional infliction of emotional distress ★

B. Interference with property interests

1. Trespass to land ★
2. Trespass to chattels ★
3. Conversion ★

C. Defenses to intentional torts

1. Consent ★

This topic includes distinctions among different types of consent (e.g., actual vs. apparent), when an action exceeds the scope of the consent, when consent is validly given, and when consent is unnecessary (e.g., life-saving surgery on an unconscious injured party with no available representative).

2. Other defenses to intentional torts

This topic includes self-defense, defense of others, defense of property, recapture of chattels (including the shopkeeper’s privilege), public and private necessity, parental discipline, and privilege of arrest in the context of law enforcement activity.

II. Negligence

A. Duty of care to foreseeable and unforeseeable plaintiffs

1. Nonfeasance and affirmative duties of care ★

This topic includes nonfeasance—the failure to act—which generally does not result in a duty of care, and major exceptions to the rule of no duty, such as special relationships, previous actions exacerbating a risk of harm, and voluntary undertakings. The duty to control third parties is also covered.

2. Duty of owners and occupiers of land

This topic includes distinctions between natural and artificial conditions on land, as well as duties owed to entrants and passersby (under both the traditional and modern approaches).

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3. **Duty to avoid unreasonable risk of causing emotional distress**
This topic includes “zone of danger” requirements and exceptions for “bystander” cases, requirements related to physical symptoms of distress, special relationships between the parties, and negligent reporting of a family member’s death.
 4. **Economic loss**
This topic includes pure economic loss, defined as economic harm caused without corresponding personal injuries or property damage.
- B. Standard of care**
1. **The reasonably prudent person and the standards applied to children, physically and mentally impaired individuals, professionals, and persons acting in emergency situations ★**
 2. **Rules of conduct derived from statutes; relevance of custom ★**
This topic includes the requirements for negligence per se (e.g., the plaintiff is within the class of people the statute was designed to protect, the incident resulting in injury was the type of injury that the statute aimed to prevent), how the use of negligence per se affects the plaintiff’s case, the defendant’s use of a statute to defend against a negligence claim, and how this use of a statute affects the defendant’s case. This topic also includes the relevance of custom in establishing the standard of care, the weight to be given to statutes and customs when they are used to establish standards of care, and the use of rebuttal evidence by the opposing party.
- C. The use of direct and circumstantial evidence to prove fault, including res ipsa loquitur ★**
This topic includes the use of direct evidence, the use of circumstantial evidence, and the conditions for the use of res ipsa loquitur (e.g., the incident was the type of incident that does not ordinarily occur without someone having been negligent, the harm was caused by an instrumentality under the exclusive control of the defendant).
- D. Actual causation ★**
This topic includes the but-for test, the substantial factor test, multiple necessary causes, and multiple sufficient causes.
- E. Proximate causation ★**
This topic includes foreseeability, the “scope of the risk” test, and intervening and superseding causes.
- F. Liability for acts of others**
This topic includes parental responsibility for the negligence of minor children and the exception for nondelegable duties. *See also* Business Associations II. Vicarious liability of principal for acts of agents.
- G. Pure and modified comparative negligence, including secondary implied assumption of risk ★**
- H. Express assumption of risk**

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III. **Common-law strict liability for abnormally dangerous activities and defenses to such claims ★**

This topic includes the common types of abnormally dangerous activities and who may sue, the use of comparative negligence as a defense, and the common test that the harm must arise from the risk that made the activity abnormally dangerous.

IV. **Products liability based on the design, manufacture, and distribution of products and defenses to such claims ★**

This topic includes the different theories of liability in products liability cases, the different types of defects (manufacturing defect, design defect, and failure to warn), who may sue, who may be sued, and defenses to such claims.

V. **Nuisance and defenses to such claims**

A. **Private nuisance ★**

This topic includes the elements of private nuisance (e.g., unreasonable interference with another's use and enjoyment of land), the locality rule for determining when an interference is unreasonable, and the distinctions between private nuisance, trespass, and public nuisance.

B. **Public nuisance**

VI. **Misrepresentation and defenses to such claims**

A. **Fraudulent misrepresentation**

B. **Negligent misrepresentation**

VII. **Defamation and privacy, and defenses to such claims**

This topic includes both common law and constitutional aspects to defamation, and the various privacy torts, including intrusion upon seclusion, public disclosure of private facts, appropriation of name or likeness, and false light publicity. Defenses to such claims are also covered.

VIII. **Damages**

A. **Apportionment of responsibility among multiple tortfeasors**

This topic includes joint and several liability and apportionment of responsibility and damages among tortfeasors.

B. **Categories of damages recoverable in tort actions**

This topic includes the availability and proper roles of compensatory damages (general and special, e.g., medical expenses, pain and suffering, emotional distress, property damage, loss of enjoyment, loss of consortium), punitive damages, and nominal damages in tort actions. This topic also includes the "thin skin" rule, failure to mitigate, attorney's fees, and statutory limitations on recovery.

NextGen UBE Key Words and Phrases

Each question contained in the NextGen UBE may include, among others, one of the following words or phrases:

1. An **“argument”** supports a particular position by setting forth a reason why something is true or untrue, right or wrong, or better or worse.

A **“legal argument”** is an application of fact to law that supports a particular position.
2. A **“dispositive fact”** is a fact that affects the outcome of a matter because of its relationship to a legal test or rule.
3. **“Explain”** means to expound, to interpret, or to give reasons.
4. A **“factor”** is either a component of a factor test or a fact, inference, or legal conclusion that contributes to a particular result.
5. An **“implication”** is an inference or a potential consequence drawn from a set of facts, circumstances, legal standards, or a combination thereof.
6. An **“issue”** is a question to be resolved. An issue may be either factual or legal. Some questions will specify which type of issue is being requested.
7. A **“reason”** is a cause of or a justification for a particular conclusion, decision, recommendation, plan of action, or outcome.
8. **“Specific”** means particular to the distinct facts or circumstances provided in the factual scenario.
9. **“Support”** means to favor or bolster the client’s or another party’s position; “support” does not require that a particular fact or argument be dispositive of an issue.



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The National Conference of Bar Examiners, founded in 1931, is a not-for-profit corporation that develops licensing tests for bar admission and provides character and fitness investigation services. NCBE also provides testing, research, and educational services to jurisdictions; provides services to bar applicants on behalf of jurisdictions; and acts as a national clearinghouse for information about the bar examination and bar admissions.

Our Mission

NCBE promotes fairness, integrity, and best practices in admission to the legal profession for the benefit and protection of the public. We serve admission authorities, courts, the legal education community, and candidates by providing high-quality

- assessment products, services, and research
- character investigations
- informational and educational resources and programs

Our Vision

A competent, ethical, and diverse legal profession.



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nextgenbarexam.ncbex.org/subscribe/

ATTACHMENT A4

Attachment A4: NextGen Guidance Brief - Recommended Passing Score Range

Guidance Brief on the Recommended NextGen UBE Passing Score Range

Introduction

As part of its commitment to supporting jurisdictions through the transition to the NextGen Uniform Bar Examination, NCBE has established a recommended passing score range for the new exam. In addition, NCBE has developed a recommended mapping between the legacy UBE passing score range and the corresponding passing score range for NextGen. Jurisdictions will continue to establish their own passing scores.

Consistent with best practices in assessment, the recommended range is based on multiple sources of evidence: data from the 2024 prototype exam, psychometric scaling, a statistical concordance study, standard-setting outcomes, and passing rate outcome analyses.

Evidence Gathering

1. Base Scale: 500–750

Results from the multiple-choice, counseling-set, drafting-set, and performance-task items were combined—using appropriate weighting—to create overall composite scores on the NextGen UBE scale. The scale ranges from 500 to 750. The minimum and maximum points of the scale were established to accommodate future administrations without compromising the integrity of the score distribution. As with the legacy exam scale, the new base scale will ensure consistency across administrations.

2. Concordance Study

As jurisdictions prepare to transition from the current bar exam to the NextGen UBE, NCBE conducted research on examinee performance on the July 2024 bar exam and NextGen prototype exam to inform the development of a concordance between the two. This tool used data from examinees who took both exams and helped NCBE understand how performance on one exam compares to the other.

National Conference of Bar Examiners Recommended Passing Score Mapping from Legacy UBE to NextGen UBE

This recommended passing score mapping was developed by NCBE’s psychometric experts through a process that combined multiple pieces of evidence including results from statistical setting of the base scale; a concordance study; a large-scale, national, standard-setting study; and passage-rate outcome analyses.

Legacy UBE Passing Score Range	NextGen UBE Passing Score Range (Recommended)
260	610
261	611
262	612
263	613
264	614
265	615
266	616
267	617
268	618
269	619
270	620

The information in this table is for use by jurisdictions that currently participate in the legacy UBE program; other jurisdictions should reach out to NCBE with any questions about the relevance of this table to their own passing score decisions.

3. Standard-Setting Study

To support a valid standard setting process, NCBE convened a diverse panel of over 80 participants from 43 jurisdictions. Panelists received two days of training to understand the characteristics of a “minimally qualified candidate” and were given early access to the digital delivery platform to familiarize themselves with the test experience. Their judgments helped identify a passing-score range for the NextGen UBE.

4. Outcome Analysis

As jurisdictions make passing score decisions for the NextGen UBE, they may wish to understand how different passing score options could affect bar passage outcomes. NCBE conducted an outcome analysis using data from the prototype exam to model how various passing standards might influence pass rates. While prototype data will not perfectly reflect operational performance, the analysis gives jurisdictions insight into how higher or lower passing score decisions could impact candidate performance. This analysis helps support informed, evidence-based policymaking.

Passing Score Recommendation Development

To support jurisdictions in setting policy, NCBE convened a national panel of experts from across the legal and bar administration community to review the full body of evidence. This included psychometric research, prototype data, and policy considerations. The Passing Score Advisory Panel helped synthesize these inputs into a recommended passing score range that reflects professional expectations and supports a fair and evidence-based transition to the NextGen UBE. The recommended passing score range and mapping to the legacy UBE were also reviewed and approved by the NCBE Board of Trustees.



Building a competent, ethical, and diverse legal profession.

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nextgenbarexam.ncbex.org

ATTACHMENT B.1

ATTACHMENT B.1

Nevada Comprehensive Licensing Exam

California Committee of Law Examiners, Dec. 5th, 2025

Richard Trachok, Chair, Nevada Board of Bar Examiners; Lecturer, UC Berkeley Law; Lecturer, Stanford Law; Senior Counsel, McDonald Carano

Joan Howarth, Professor Emerita, Boyd School of Law, UNLV; Dean Emerita, MSU Law; Member, Nevada Board of Bar Examiners

Deborah J. Merritt, Distinguished University Professor and John Deaver Drinko/Baker & Hostetler Chair in Law Emerita, The Ohio State University Moritz College of Law

Nevada Comprehensive Licensing Exam

Three-part assessment:

- **Foundational Law Exam**, multiple choice, taken during law school (like MPRE)
- **Lawyering Performance Exam**, performance tests after graduation (June & Jan.)
- 40-60 hours of **supervised practice** (in law school or after, instead of bar prep).





START LAW SCHOOL



Open online application with Bar Admissions Department

any time after starting law school



Multistate Professional Responsibility Exam

offered 3 times per year; eligible to take during law school



Foundational Law Exam (FLE)

offered 4 times a year; eligible to take after 42 credits (about 3 semesters)



Supervised Practice Requirement

complete during or after law school; eligible for student lawyer certification after 42 credits



Character & Fitness Review

timing under Admissions Department policy & Supreme Court rules



LAW SCHOOL GRADUATION



Lawyering Performance Exam (LPE)

take any time after graduation; offered June & January



ADMITTED TO BAR

when each component completed successfully

Nevada Foundational Law Exam (FLE)

100 multiple-choice questions, providing sufficient reliability

MBE subjects (Civ Pro, Contracts, Crim & Crim Pro, Con Law, Evidence, Property, & Torts)

Public outline of 20 concepts to be tested for each subject, with detailed rules

Offered in testing centers 4 times a year

Can be taken during law school (after 3 semesters) or after graduation

Nevada
Lawyering
Performance
Exam (LPE)

Three 2-hour performance tests

One day, post-graduation

Twice a year, January & June

Authentic & valid

Rubrics & calibration for reliability

Nevada Supervised Practice Requirement: 2 parts

1) Client Work

- 40-60 hours
- Certified under student practice rule
- Law school clinics, externships, or pro bono work with supervising lawyers
- Most law schools can accommodate with current courses
- Timed to be done instead of bar prep if not done in law school
- Legal aid organizations, public defenders, and nonprofits eager to provide supervision

2) Several self-directed learning explorations

- Relating to the practice of law in Nevada
- From Nevada's currently required mentoring program

Better Public
Protection
Against
Incompetent
Future
Lawyers

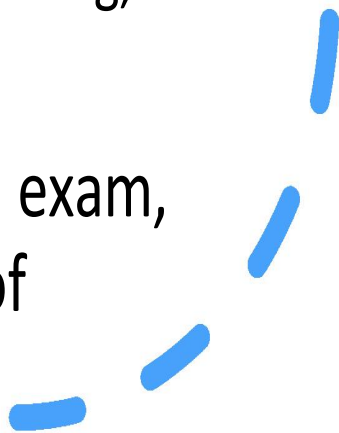
- Assesses foundational knowledge and actual lawyering skills
- Based on best contemporary research on attorney competence, assessment & cognition
- Psychometrically sound—valid, reliable, fair, educationally effective, and feasible
- Requires live client & case management experience instead of attempting to assess those skills in a written test

Benefits of Staged Licensing

- Staged licensing, from foundational to advanced, is consistent with cognitive science & other professions
- Foundational Law Exam (FLE) multiple-choice test requires appropriate but not excessive memorization
- Lawyering Performance Exam (LPE) requires more advanced writing, analysis, & strategic competence




Better Timing

- Early multiple-choice exam (FLE)
 - Reinforces knowledge at optimum time
 - Provides crucial feedback to students while still in school
 - Frees up time after graduation for supervised practice, if not done during law school
 - Does not require time-consuming, expensive cramming
 - Less time to licensure (June exam, results in summer instead of October)
- 



Fairness & Feasibility

- Better alignment of licensing with law school and legal practice
 - Less time & expense for candidates
 - Reduced barriers unrelated to competence to practice law (excessive memorization, bar prep costs, inflexible schedules)
 - Use of staged exam and testing centers can reduce State Bar costs
- 

NCBE NextGen UBE	Nevada Comprehensive Licensing Exam
Valid, reliable, fair	Valid, reliable, fair
Careful planning, evidence based	Careful planning, evidence based
9 hours of testing	10 hours of testing + supervised practice
120 multiple-choice questions	100 multiple-choice questions
Three 60-minute performance tests	Three 2-hour performance tests
Integrated question sets	Not needed
Client skills tested only on paper	Live client contact required for licensing
All exam components administered together	Exam components are staged
Exam administered twice per year	Exam components available 2-4 times per year
Candidates cannot retake portions of exam	Candidates may retake portions of exam
Exam cannot be administered in test centers	Exam can be administered in test centers



Developing Nevada's Foundational Law Exam (FLE)

Exam Blueprint

- Set by the Nevada Supreme Court
- 100 MCQ's in four hours
- Cover seven MBE subjects, weighted equally
- Focus on federal law and majority rules
- Test application and analysis of rules
- Equate forms using common questions

Content Scope Outline

- Developed by a small team of subject-matter experts
 - Law professors with deep content knowledge, clinical/practice experience, and assessment expertise
 - Included two Nevada bar examiners
 - Presented to Nevada Supreme Court

Key Points

Limited to 20 foundational concepts within each subject

Outline spells out rules that test-takers need to know

Full outline is public

Drafting Questions

- We chose subject matter experts with deep content knowledge, practice experience, and expertise in assessment or learning theory
- The team included two-three experts in each subject
- Team members received training on question drafting and worked from a detailed Style Guide

Initial Drafting Process

Subject matter expert creates question

Option to use AI (lightly and wisely)

Expert reviews question with another expert in that subject

Team leaders conduct substantive and technical review

Experts in other subjects review question

Final check by team leaders

Pre-Testing

All questions pre-tested

Psychometrician provides feedback

Questions revised or discarded

Bias review of questions, including data from pre-test analysis

Second technical review

Final check by proofreaders

Keys to Successful Drafting

- Start with a detailed outline, not just a list of topics
- Choose subject matter experts who combine expertise in content and assessment
- Choose subject matter experts who are collaborative
- Use a proprietary AI platform to kick start drafting



How Can California Benefit from Nevada's Experience?

Adopt the Nevada Plan

- The Foundational Law Exam is ready for use as a test of foundational concepts
- California has expertise to develop a one-day exam consisting of three performance tests
- Nevada can provide guidance on developing a supervised practice component

Benefits of the Nevada Plan for California

FLE is ready to deploy and tests 7 of the 12 subjects designated by the Court

The FLE deemphasizes memorization, as ordered by the CA Supreme Court

The FLE is fully transparent and reduces the need for expensive bar prep

CA can design its performance tests to cover the other 5 subjects

CA can return to the longer performance tests it pioneered

Benefits of the Nevada Plan for California

Staged components allow candidates to retake just portions they fail

Components offered multiple times per year increase access and fairness

Staging components and administering them in test centers also saves \$\$\$

Requiring 40-60 hours of supervised practice is feasible to achieve

Most candidates will fill that requirement with existing coursework

Adopt a Staged Exam

- California can use Nevada's approach, while designing its own components
- Components could be developed over time
- Supervised practice need not be implemented immediately

Borrow from Nevada's Exam-Drafting Process

- Create a detailed content scope outline before drafting questions
- Choose subject matter experts who combine content knowledge with assessment knowledge, and who are collaborative
- Use small, highly-qualified teams

Nevada Comprehensive Licensing Exam

Resources Provided

Content Outline

Style Guide

Further resources:

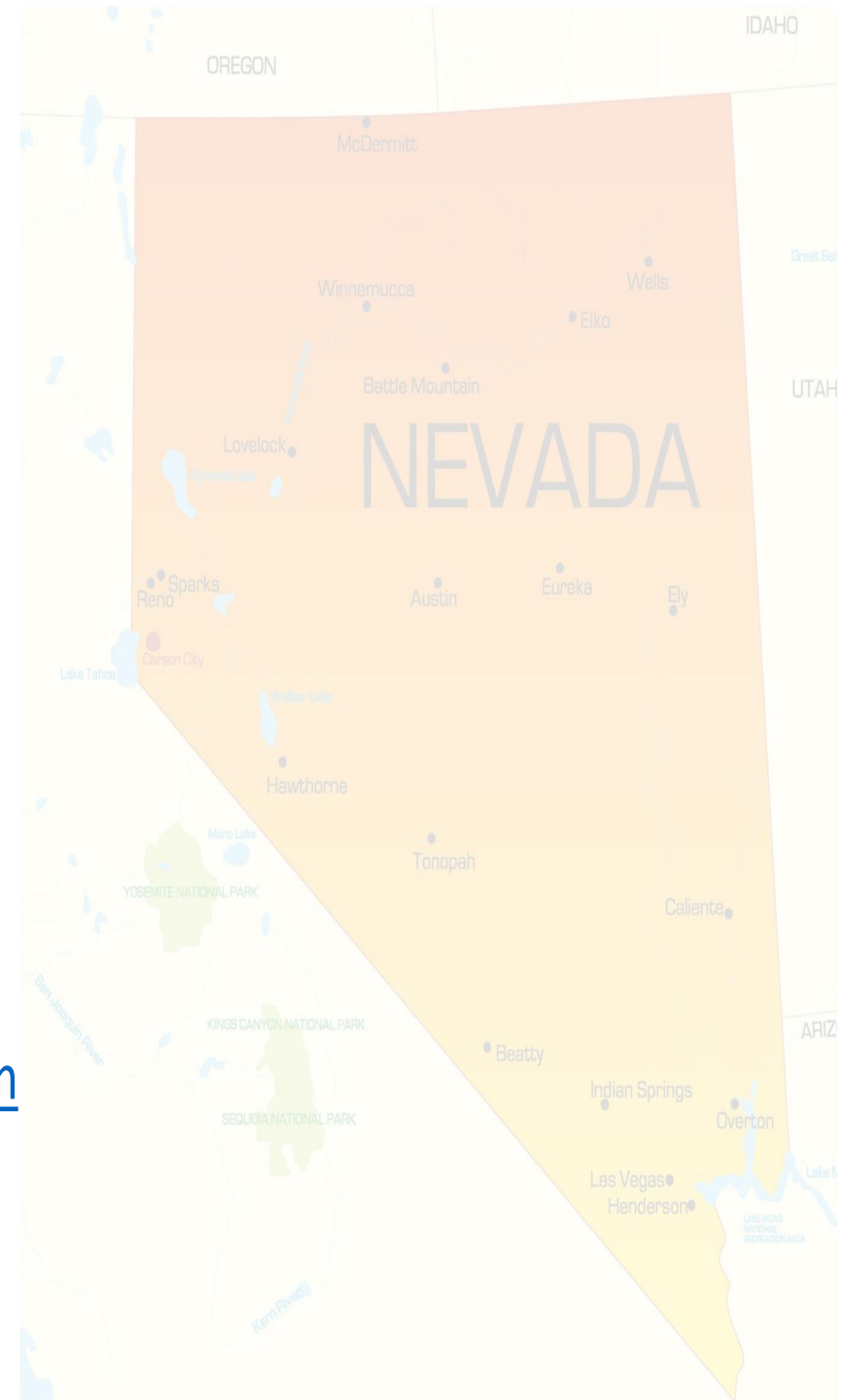
<https://nvbar.org/nvplan/>

Questions?

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ATTACHMENT B.2

ATTACHMENT B.2

The Nevada Foundational Law Examination Proposed Content Scope Outline

November 2025

This content scope outline is subject to revision. The concepts listed on the outline will not change before the May 2026 administration of the Foundational Law Exam, but the drafters may clarify some of the bullet points explaining tested concepts. A final content scope outline for the May 2026 Foundational Law Exam will be published in late December 2025.

This document summarizes the foundational concepts that will be tested on the Nevada Foundational Law Examination. That exam will include concepts from the seven subjects currently tested on the National Conference of Bar Examiners' Multistate Bar Exam (MBE): Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts.

Like the MBE, the Foundational Law Exam will be a closed-book, multiple-choice exam. Questions will require test-takers to recall foundational concepts and apply them to hypothetical fact patterns. The only materials provided during the exam will be the criminal law statutes listed in the Criminal Law and Procedure portion of this outline. As explained there, application of statutes (rather than recall of common-law elements) is a key element of contemporary criminal law practice. The NextGen exam will also provide statutory text for criminal law questions.

The Foundational Law Exam will test twenty foundational concepts within each of the tested subject areas, although many of these concepts include subrules and related concepts. Arranging the material conceptually, and limiting the number of concepts tested, will promote better long-term recall as test-takers move into practice.

A group of subject-matter experts, with expertise in both legal doctrine and assessment, developed the concepts in this content scope outline. Experts continue to refine the outline as they draft questions testing the concepts in each subject. A final outline for use with the May 2026 Foundational Law Exam will be published by late December 2025. After that date, experts will continue to update the outline as needed and the State Bar will publish those updates.

Foundational Concepts of Civil Procedure Tested on the Nevada Foundational Law Exam

Introduction: Test-takers will be expected to recall the 20 concepts listed below and to apply them to hypothetical fact patterns. Except as explicitly noted, all the concepts on this list refer to civil procedure in federal court. Citations to specific rule numbers refer to the Federal Rules of Civil Procedure. Test-takers, however, do not need to memorize rule numbers or statutory sections; those are cited here only for reference.

The 20 tested concepts embody four foundational principles that all lawyers must understand about civil procedure:

- Courts have power to hear only specified cases.
- Lawsuits are initiated through complaints that satisfy specified standards.
- Parties obtain information before trial through discovery.
- Parties may obtain different types of judgments on the merits in civil trials.

Principle One: A court may hear a dispute only if the court has personal jurisdiction over the defendant(s) and the court has subject matter jurisdiction over the claims.

- 1. Personal Jurisdiction—General Principle:** To adjudicate a claim against an individual or corporate defendant, a court must have personal jurisdiction over that defendant. Personal jurisdiction has two components. First, the exercise of jurisdiction must be proper under the Constitution’s Due Process clause. Second, a statute or rule must empower the court to exercise jurisdiction over the defendant. These general principles apply to all courts, state and federal.
 - Reasons for Inclusion: It is essential for litigators to determine whether a court has personal jurisdiction over a defendant. This is a key component of the decision on whether and where to file a lawsuit. Both the MBE and NextGen exams require recall of this foundational concept.
 - Scope of Required Knowledge:
 - Test-takers should understand that personal jurisdiction is subject to both constitutional and statutory constraints.
 - They should also understand that these constraints apply to state and federal courts of all types.
 - Test-takers will not be tested on personal jurisdiction rules related to non-corporate organizations. The civil procedure section of the Nevada Foundational Law Exam focuses on individual and corporate defendants.
 - Test-takers will not be tested on other types of territorial jurisdiction (in rem and quasi-in-rem jurisdiction). Like the MBE and NextGen exams, the Nevada Foundational Law Exam focuses on personal jurisdiction.

- 2. Personal Jurisdiction—Presence:** One of the most common grounds for exercising personal jurisdiction is physical presence within the jurisdiction. All states recognize this ground through governing statutes or regulations, and this ground satisfies constitutional requirements.

- Reasons for Inclusion: Physical presence is a core concept when assessing personal jurisdiction. Both the MBE and NextGen exams require recall of this foundational concept.
 - Scope of Required Knowledge:
 - Test-takers should know that an individual is “present” in the place where they reside and intend to remain indefinitely. This is known as the individual’s “domicile.”
 - Similarly, they should know that corporations are “present” in both their place of incorporation and their primary place of business (headquarters).
 - Test-takers should understand that personal jurisdiction based on presence is sufficient to support personal jurisdiction with respect to any type of claim. The claim itself need not be related to the jurisdiction in which the court sits—as long as the defendant is present in that jurisdiction (as defined above).
- 3. Personal Jurisdiction—Consent:** Another common ground for exercising personal jurisdiction is the defendant’s consent. All states recognize this ground through governing statutes or regulations, and this ground satisfies constitutional requirements.
- Reasons for Inclusion: Consent is a core mechanism for establishing personal jurisdiction. Both the MBE and NextGen exams require recall of this foundational concept.
 - Scope of Required Knowledge:
 - Test-takers should know that an individual or corporation may consent to personal jurisdiction by defending against the complaint without moving to dismiss for lack of personal jurisdiction.
 - They should also know that it is possible for individuals or corporations to consent to personal jurisdiction before any claim arises. Some contracts specify that the parties have agreed to submit to a particular court’s jurisdiction. And many states require corporations to consent to jurisdiction within that state when the corporation registers to do business in the state.
 - Test-takers, finally, should understand that consent may apply to any type of claim. Neither the claim nor defendant need have any particular relationship to the jurisdiction in which the court sits, as long as the defendant consents to jurisdiction.
- 4. Personal Jurisdiction—Long Arm Statutes:** When neither presence nor consent establish personal jurisdiction, courts turn to long-arm statutes as the basis for statutory jurisdiction. These statutes allow courts to extend their jurisdiction to hear some claims against defendants who are not present within the court’s jurisdiction and who have not consented to the court’s jurisdiction. Attempts to exercise long-arm jurisdiction can raise difficult issues of constitutional law.
- Reasons for Inclusion: Although the law in this area is complex, a general understanding of long-arm statutes is a foundational concept. Both the MBE and NextGen exams require recall of this foundational concept.
 - Scope of Required Knowledge:
 - Test-takers should understand that, when personal jurisdiction rests on neither presence nor consent, the Due Process Clause requires courts to consider the defendant’s contacts with the jurisdiction and whether those contacts make the exercise of jurisdiction reasonable and fair.

- Test-takers should know the simplest application of this constitutional inquiry: If the defendant's actions in the state gave rise to the cause of action, then the exercise of personal jurisdiction is constitutional. It is fair and reasonable to require the defendant to answer for its actions within the jurisdiction.
- Test-takers should also understand that personal jurisdiction based on the defendant's actions within the state (rather than its presence or consent) provides personal jurisdiction only with respect to those actions. Presence gives rise to personal jurisdiction over any claim; the defendant's actions (short of presence) support only jurisdiction over claims related to those actions.
- As noted in Concept 1 above, test-takers should understand that compliance with the Constitution is not sufficient to provide personal jurisdiction based on a defendant's actions. A statute or rule must also confer that jurisdiction.
- Test-takers, finally, should know that more complex rules govern the exercise of personal jurisdiction when a defendant is not present within the state, the defendant has not consented to personal jurisdiction, and the claim does not arise from the defendant's actions in the state. Other contacts may support both statutory and constitutional jurisdiction, although test-takers will not be examined on the details of that analysis.
- Test-takers will not be asked to recall particular statutes or rules that courts use to determine their personal jurisdiction. For the Foundational Law Exam it is sufficient to know that some statutory (or rule-based) authority is necessary.

5. Subject Matter Jurisdiction: Not all courts have the power to hear all claims; instead, courts must have subject matter jurisdiction over the claims they adjudicate. This principle applies to all courts, state and federal.

- Reasons for Inclusion: Subject matter jurisdiction is a foundational concept in the judicial system. Both the MBE and NextGen exams require recall of this foundational concept.
- Scope of Required Knowledge:
 - Test-takers should know that the concept of subject matter jurisdiction applies to all courts.
 - They should also know that constitutions, statutes, and court rules may all contribute to defining a court's subject matter jurisdiction. Before filing a claim, a lawyer should consult those sources to ascertain the court's subject matter jurisdiction.
 - Test-takers should be able to distinguish between subject matter jurisdiction and personal jurisdiction.
 - In particular, test-takers should know that subject matter jurisdiction (unlike personal jurisdiction) cannot be conferred through consent of the parties. If a court lacks subject matter jurisdiction, it will dismiss the claim sua sponte.
 - Test-takers, finally, should know that a court can dismiss for lack of subject matter jurisdiction at any time, even after a judgment has been entered and the case is on appeal.

6. Diversity Jurisdiction in Federal Courts: Federal district courts exercise two types of subject matter jurisdiction. The first is diversity jurisdiction, which allows courts to hear disputes between citizens of different states if the amount-in-controversy requirement is met. 28 USC §1332.

- Reasons for Inclusion: The rules of diversity jurisdiction give content to the general concept of subject matter jurisdiction. These rules are widely studied in law school and are tested on both the MBE and NextGen exams.
 - Scope of Required Knowledge:
 - Test-takers should understand the rationale for diversity jurisdiction: that state courts might favor the claims of their own citizens over those of citizens from other states.
 - They should know that, in order to invoke diversity jurisdiction, diversity must be complete. In other words, no party on one side of the case may be a citizen of the same state as a party on the other side of the case.
 - Test-takers should know that citizenship for diversity purposes is determined in the same manner as presence for personal jurisdiction (Concept 2 above). Individuals are residents of the state in which they are domiciled; corporations are residents of both their state of incorporation and the state in which they have their headquarters.
 - Test-takers should know that diversity jurisdiction requires a specified amount in controversy, which eliminates small claims from federal court. Federal law currently requires that amount to be more than \$75,000. The exam will not require test-takers to recall that specific amount, which is likely to change over the course of a lawyer's career and should be checked whenever a lawyer commences a diversity suit. To respond to questions on the FLE, however, test-takers should be able to recognize that small amounts (like \$20,000) will not satisfy that requirement, while large ones (\$100,000 or more) clearly will.
 - Test-takers, finally, should know that plaintiffs may aggregate claims against a defendant in a single suit (see Concept 9) to meet the amount-in-controversy requirement. The claims do not have to be related to meet that requirement.
- 7. Federal Question Jurisdiction in Federal Courts:** Federal question jurisdiction is the second type of subject matter jurisdiction exercised by federal courts. 28 USC §1331. This jurisdiction includes all cases arising under federal law.
- Reasons for Inclusion: This second basis for federal subject matter jurisdiction is also studied widely in law school. Both the MBE and NextGen exams require recall of these concepts.
 - Scope of Required Knowledge:
 - Test-takers should understand that federal question jurisdiction exists when a plaintiff bases their claim on a federal statute, regulation, or constitutional provision.
 - They should also know that federal question jurisdiction will exist when adjudicating the plaintiff's claim requires the court to answer a substantial question of federal law (such as whether a statute violates the US Constitution).
 - The Foundational Law Exam will not require test-takers to recall details of federal court subject matter jurisdiction beyond the two basics of diversity and federal question jurisdiction. E.g., the exam will not cover the Class Action Fairness Act.

Principle Two: A complaint initiates a lawsuit. The complaint may include multiple claims against the defendant, but each claim must have a basis in law and fact; must be brought within the statute of limitations; and must identify the relief sought.

- 8. Basic Elements of the Complaint:** A complaint gives the defendant notice of the plaintiff's claim. In federal court, the complaint must contain a short and plain statement of the court's subject matter jurisdiction, a short and plain statement of the claim, and a demand for the relief sought. Rule 8(a).
- Reasons for Inclusion: The elements of a complaint are foundational knowledge that every lawyer should know. Both the MBE and NextGen exams require recall of these concepts.
 - Scope of Required Knowledge:
 - Test-takers should know that a complaint must state the grounds for the court's subject matter jurisdiction. The court will not assume that it has jurisdiction.
 - Conversely, they should know that the complaint need not set out the grounds for personal jurisdiction. If the defendant contests personal jurisdiction, then the plaintiff must respond.
 - Test-takers should know that federal judges use the following analysis to determine whether the plaintiff has provided a "short and plain statement" of a claim. The judge will first set aside all allegations that are legal conclusions. The judge will then determine whether the remaining factual allegations, if accepted as true, provide sufficient facts to support each element of the claim. A plaintiff, in other words, cannot simply assert legal conclusions. They must instead show that their claim is plausible.
 - Test-takers should know that the complaint must specify the relief sought for the claim.
 - Test-takers, finally, should understand that complaints should be drafted with claim preclusion (Concept 20 below) in mind. Claims that arise from the same transaction or occurrence may be barred if they are not included in the original lawsuit.
- 9. Multiple Claims:** A complaint filed in federal court may include as many claims as a plaintiff has against a defendant, as long as the court has subject matter jurisdiction over each claim. Rule 18.
- Reasons for Inclusion: This concept is an essential part of judicial efficiency. Both the MBE and NextGen exams require recall of this concept.
 - Scope of Required Knowledge:
 - Test-takers should understand that although this rule allows plaintiffs to join multiple claims against a defendant, the rule does not provide an escape from the requirement of subject matter jurisdiction. The court must have subject matter jurisdiction over each claim.
 - An individual plaintiff, however, may aggregate their claims against an individual defendant to satisfy the amount-in-controversy requirement for diversity jurisdiction.
 - Test-takers should know that claims against a single defendant need not relate to the same incident; they can be completely unrelated as long as the court has subject jurisdiction over each claim.
 - Test-takers should also know that plaintiffs may allege inconsistent claims as alternative bases for relief.
 - Test-takers should know the basic rule of supplemental jurisdiction: If a federal court has jurisdiction over one claim by a plaintiff against a defendant, it may exercise

jurisdiction over any additional claim by the plaintiff against the same defendant that is part of the same case or controversy, even if that claim would not satisfy subject matter jurisdiction standing alone. Courts often use the phrase “common nucleus of operative fact” to designate claims that are part of the same case or controversy.

- The Foundational Law Exam, however, will not test understanding of the situations in which courts may exercise their discretion to decline supplemental jurisdiction; those principles are difficult to test through multiple-choice questions.
- Nor will the FLE test application of supplemental jurisdiction in the context of multiple plaintiffs or defendants.

10. Statutes of Limitations: All civil claims have a deadline by which they must be filed. That deadline, set by a statute of limitations, varies by claim and jurisdiction. Statutes set out these deadlines.

- Reasons for Inclusion: Statutes of limitations apply to every civil claim; they are a key consideration for civil litigators. Neither the MBE nor the NextGen exam test statutes of limitations, but respondents to NCBE’s practice analysis indicated that statutes of limitations were the sixth most important area of knowledge for newly licensed attorneys.
- Scope of Required Knowledge:
 - Test-takers should understand that all claims (federal and state) have statutes of limitations.
 - They should also understand that the limitations period varies by claim and jurisdiction. The statute of limitations for a contract claim in State A may differ from the statute of limitations for a tort claim in that state. Similarly, the statute of limitations for a contract claim in State B may differ from the statute in State A.
 - Test-takers, therefore, should understand the need to research the statute of limitations for each claim they file. The limitations period may vary even by the type of tort or contract claim.
 - Test-takers should also know that, in addition to researching the statute of limitations for each claim, they must ascertain how the jurisdiction counts time. *E.g.*, does the day on which the claim arose count? These counting rules are also set by statute.
 - Test-takers should also know that the statute of limitations imposes a deadline only on the time during which a claim may be filed. The claim may be resolved after the deadline has passed.
 - Test-takers, finally, should know that statutes of limitations may be tolled: time that passes while the statute is tolled does not count towards the limitations period. They should be familiar with two common reasons for tolling a statute of limitations: while the plaintiff is a minor, and while a claim was hidden from the plaintiff and could not be discovered.
 - The Foundational Law Exam will not require test-takers to recall the length of any particular statute of limitations.

11. Frivolous or Improper Pleadings: All information contained in pleadings (complaints, answers, and motions) must have a basis in law and fact, and pleadings must not be filed for an improper purpose. Rule 11.

- Reasons for Inclusion: All lawyers must know their obligation to research the law and facts before filing a civil claim. They must also know their duty to use the courts only for proper purposes. Both the MBE and NextGen exams require recall of these obligations.
- Scope of Required Knowledge:
 - Test-takers should know that the Federal Rules of Civil Procedure require lawyers to base their pleadings on viable legal and factual theories.
 - Test-takers should also know that, despite this general requirement, the rules allow lawyers to present novel legal theories and arguments to expand the law if there is a good faith basis for the theories or arguments.
 - They should know that the rules require lawyers to perform a reasonable investigation under the circumstances when drafting pleadings.
 - They should also know that the rules recognize that parties do not always have all the information they need when drafting a pleading; the rules allow for discovery.
 - Test-takers should know that the improper purposes forbidden by the rules are harassment, causing unnecessary delay, and needlessly increasing the cost of litigation.
 - Test-takers, finally, should know that the rules allow the judge to impose a range of sanctions for violating these requirements.

Principle Three: The Federal Rules of Civil Procedure provide for extensive pre-trial discovery. Discovery helps parties hone their claims and defenses, promotes settlement, and narrows the issues for trial.

- 12. Discovery Planning:** Even before discovery begins, parties must disclose to one another basic information specified by the rules. They must then confer and develop a discovery plan for the case. Rule 26(f). The court will consider this plan and develop a discovery scheduling order that imposes deadlines for various aspects of discovery Rule 16.
- Reasons for Inclusion: Discovery is a central aspect of civil litigation. Lawyers must understand both their obligation to cooperate in that process and the court’s role in setting a discovery scheduling order. Both the MBE and NextGen exams require recall of these concepts.
 - Scope of Required Knowledge:
 - Test-takers should understand that, even before discovery begins, parties have an obligation to disclose basic information to one another. Test-takers do not have to recall the specifics of that information; they need only know that the rules list the specifics.
 - Test-takers should know that parties have an obligation to confer and develop a plan for discovery.
 - They should also understand that parties present this plan to the court, which then issues an order dictating the scope and timing of discovery.
 - Test-takers should know that parties cannot conduct discovery outside the dates in the scheduling order unless the court modifies the order. Failure to comply with the court ordered plan (or to get an extension) prevents further discovery.
- 13. Scope of Discovery:** Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and that is proportional to the needs of the case

- Reasons for Inclusion: All lawyers should understand the breadth of civil discovery. Both the MBE and NextGen exams require recall of these concepts.
- Scope of Required Knowledge:
 - Test-takers should understand that the purpose of discovery is to help narrow the issues for trial and possibly end the litigation through settlement or summary judgment. Those purposes support broad discovery.
 - Test-takers should know that the complaint and answer define the parameters of permissible discovery: any matter relevant to a claim or defense is subject to discovery.
 - Test-takers, however, should also know that privilege rules apply to discovery. Parties may not obtain any type of privileged matter.
 - Finally, test-takers should understand that the rules impose a limit of “proportionality” on discovery. This limit seeks to avoid unduly burdensome discovery and control the costs of discovery.

14. Discovery Tools: The primary discovery tools are oral depositions, interrogatories, and requests for production of documents.

- Reasons for Inclusion: Discovery is a fundamental component of every civil action. Test-takers need not recall detailed rules governing each discovery tool, but they should understand how three key tools operate. Both the MBE and NextGen exams require understanding of these discovery tools.
- Scope of Required Knowledge:
 - Test-takers should know that oral depositions involve one party examining a witness under oath.
 - Similarly, they should know that interrogatories are written questions posed to parties. Parties answer these questions under oath and must respond as completely as possible based on a reasonable investigation.
 - Test-takers should know that requests for production of documents include electronically stored documents.
 - Test-takers should know that, when responding to any of these forms of discovery, parties must raise any objections based on privilege and withhold the information until a judge adjudicates the privilege claim. If they provide information without asserting a privilege, they waive the privilege.
 - The Foundational Law Exam will not require recall of details related to other discovery tools (written depositions, requests for production of tangible items other than documents, requests for inspection, requests for mental or physical examination, and admissions). Although these play an important role in some lawsuits, they are not as foundational as the three methods described above.

15. Work Product Protection: Although the discovery rules require extensive disclosure, parties may withhold materials that they or their attorneys have prepared for litigation or in anticipation of litigation.

- Reasons for Inclusion: Work product protection imposes a critical limit on discovery. Lawyers need to know about this limit and understand how it differs from the attorney-client privilege (tested as a concept of evidence law). Both the MBE and NextGen exams require recall of rules related to work product protection.

- Scope of Required Knowledge:
 - Test-takers should understand that work product protection is broader than the attorney-client privilege in an important way. The doctrine doesn't just shield communications between the attorney and client; it applies to materials prepared by either the attorney or client (including their representatives) regardless of whether they are shared.
 - At the same time, test-takers should understand an important way in which work product protection is narrower than the attorney-client privilege. The work product doctrine protects only materials prepared for litigation or in anticipation of litigation. It does not protect other types of materials that lawyers or clients produce.
 - The Foundational Law Exam will not require test-takers to recall the specific tests that different circuits use to determine whether a document was produced for or in anticipation of litigation. Test-takers only need to know that the limit exists.

16. Overcoming Work Product Protection: Under limited circumstances, a party can overcome a claim of work product protection. Those circumstances depend on whether the work product consists of facts about the dispute or an attorney's mental impressions, conclusions, or theories about the dispute.

- Reasons for Inclusion: Understanding the circumstances in which a party may overcome work product protection is essential to understanding the scope of that protection. Both the MBE and NextGen exams require recall of those circumstances.
- Scope of Required Knowledge
 - Test-takers should know that, when work product consists merely of facts about the dispute, a party may obtain access to another party's work product by showing that it has a substantial need for the materials and that it cannot get access to substantially equivalent facts without undue hardship. For these materials, the work product doctrine establishes a qualified privilege (one that can be overcome by a sufficient showing).
 - Test-takers, however, should also know that the work product doctrine creates an absolute privilege for mental impressions, conclusions, or theories about the dispute. Parties cannot obtain access to those materials from another party's attorney—no matter what showing they make. Parties and their representatives (including attorneys and consultants) must be free to work on their cases without fear that opposing counsel will be able to access their thought processes.
 - Test-takers, finally, should know that when work product includes both facts and mental impressions, and when a party demonstrates sufficient need for access to the former, the court may require redaction of the document to provide only the former type of information.

Principle Four: Although some lawsuits end after a full trial, many end short of that stage. There are multiple ways for parties to obtain a judgment on the merits in a civil lawsuit in federal court.

17. Dismissal for Failure to State a Claim: A defendant may move to dismiss the lawsuit for failure to state a claim. Rule 12(b)(6).

- Reasons for Inclusion: Motions to dismiss are common in civil practice. These motions are also fundamental to understanding the elements that constitute a plausible legal claim. Both the MBE and NextGen exams require recall of motions to dismiss for failure to state a claim.
- Scope of Required Knowledge:
 - Test-takers should understand that a motion to dismiss for failure to state a claim may allege that the complaint lacks a valid legal premise and/or that the factual allegations in the complaint do not support a plausible claim.
 - Test-takers should understand that a motion to dismiss for failure to state a claim focuses solely on the complaint; it cannot refer to evidence outside the complaint.
 - Thus, test-takers should understand that a motion to dismiss is the way that defendants test the sufficiency of a complaint.
 - Test-takers should know that a dismissal for failure to state a claim is a judgment on the merits that may give rise to claim preclusion. Rule 41(b).
 - They should also know that if the court dismisses for failure to plead a sufficient *factual* basis for the claim, the court may give the party leave to amend the complaint. This gives the party a chance to add facts to their complaint and potentially avoid a final judgment on the merits.

18. Default Judgment: If a defendant does not file an answer or pre-answer motion within the required time, the plaintiff may move for a default judgment. Rule 55.

- Reasons for Inclusion: Default judgments are a fundamental element of the adversary system. Lawyers must understand both the potential for obtaining a default judgment (when representing plaintiffs) and the danger of allowing a default judgment (when representing defendants). Both the MBE and NextGen exams require recall of default judgments.
- Scope of Required Knowledge:
 - Test-takers should understand that failure to respond timely to a complaint means that a judgment may be entered against the defendant without any exploration of the merits of the claim.
 - They should also know that a default judgment constitutes a judgment on the merits that will support claim preclusion.

19. Summary Judgment: Any party can move for summary judgment on any claim or defense. The court shall grant summary judgment if there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Rule 56.

- Reasons for Inclusion: Summary judgment is a foundational concept in procedural rules and is used frequently in civil litigation. Both the MBE and NextGen exams require recall of rules governing summary judgment.
- Scope of Required Knowledge:
 - Test-takers should know that any party may move for summary judgment on any claim or defense.
 - Test-takers should also know that parties may support a motion for summary judgment with affidavits, products of discovery, and other factual materials. Unlike the motion to dismiss for failure to state a claim, a motion for summary judgment is not limited to the allegations of the complaint or answer.

- Test-takers should know that, when resolving a summary judgment motion, the court will consider only evidence that would be admissible at trial.
- Test-takers should also know that a court will construe all factual matters in the light most favorable to the party opposing summary judgment.
- Test-takers should know that a court will grant summary judgment if, after construing all factual matters in the light most favorable to the opposing party, “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
- Test-takers, finally, should understand that there are two ways to meet this standard. A party may point to affidavits, products of discovery, and other factual materials showing that the standard has been met. Alternatively, a party may point to the record and demonstrate that the opposing party lacks admissible evidence to support an element of their claim or defense.

20. Claim Preclusion: A party may not relitigate a claim that has been resolved by a final judgment on the merits. Nor may a party file a new claim arising from the same transaction or occurrence as the original claim.

- Reasons for Inclusion: The basic concept of claim preclusion is a fundamental aspect of adversary litigation and judicial efficiency. Both the MBE and NextGen exams require recall of the basic concept of claim preclusion.
- Scope of Required Knowledge:
 - Test-takers should know that claim preclusion requires a final judgment on the merits.
 - They should also know that the dismissal of a complaint for failure to state a claim, a default judgment, and a summary judgment are all final judgments on the merits.
 - Test-takers should understand that the rule applies to claims filed in any court. If A sues B for negligence arising out of an auto collision and loses, A cannot raise the same claim against B in *any* court—not just the court where A lost.
 - Test-takers should also understand that the rule precludes all claims arising from the same transaction or occurrence, even if those claims were not asserted in the first lawsuit. If A sues B for negligence arising out of an auto collision and loses, A cannot then sue B for battery based on the same collision.
 - Test-takers should know that claim preclusion binds parties who participated in the prior lawsuit. It does not bind parties who had no relationship to the prior lawsuit.

Foundational Concepts of Constitutional Law Tested on the Nevada Foundational Law Exam

Introduction: Test-takers will be expected to know these Constitutional Law concepts and to apply them to hypothetical fact patterns. Test-takers will not need to know the authorities cited here, which are only for reference.

The concepts tested on this exam fall into four foundational categories:

- Federal Judicial Power
- Congressional Authority
- Federalism
- Individual rights

Category One: Art. III – Federal Judicial Power

- 1. Justiciability – Standing:** Federal courts require plaintiffs to show a sufficient stake in the controversy by establishing that they have standing, meaning that they can show an injury in fact, caused by the defendant, that will be remedied by a decision in their favor (i.e., causation and redressability).
 - Reasons for Inclusion: Standing is a foundational principle limiting federal judicial authority and access to federal courts. Both the MBE and NextGen exams require recall of this principle.
 - Scope of Required Knowledge:
 - Test-takers should know that federal court standing requirements are largely grounded in the Article III limitation of federal courts to adjudication of “cases or controversies.”
 - Test-takers should know that an injury in fact requires both: (1) a particularized injury—an injury that affects the plaintiff in a personal and individual way (not a generalized grievance shared by all); and (2) a concrete injury—one that exists in fact and is not “conjectural” or “hypothetical.” It is not enough to show merely that a federal statute or constitutional provision has been violated (and that we all suffer when that happens). *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).
 - Test-takers should know that there must be a causal connection between the injury and the conduct complained of—i.e., the injury must be traceable to the challenged conduct of the defendant and not be attributable to some independent third party not before the court.
 - Test-takers should know that the redressability requirement asks whether a ruling favorable to the litigant would eliminate or reduce the harm to him. If a court order declaring an action to be illegal or unconstitutional and ending that action would not eliminate or significantly reduce the harm to the plaintiff, that individual does not have the type of specific injury that would grant him standing to challenge the action. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992) (internal citations omitted); *Mass. v. EPA*, 549 U.S. 497, 526-27 (2007).
 - Test-takers should know that the Article III case or controversy requirement has been held to mean that people have no standing merely “as citizens” or as members of the public at large to claim that government action violates federal law or the

Constitution. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74, 112 S. Ct. 2130, 2143 (1992).

- Rules about taxpayer standing will not be tested.

2. Justiciability – Advisory Opinions: Federal courts have no authority to issue advisory opinions.

- Reasons for Inclusion: The Article III prohibition on advisory opinions is a fundamental restriction on federal court authority. Recall of the rule against advisory opinions is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that the Supreme Court has interpreted the “case or controversy” requirement in Article III to bar rendition of “advisory” opinions.
 - Test-takers should know that, by contrast, state courts routinely issue advisory opinions, including when requested by federal courts to supply the state court’s interpretation of a state law question that the federal court must apply in a federal case.

3. Ripeness: Federal courts will dismiss on ripeness grounds actions that are considered premature because the injury is speculative and may not occur. *Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

- Reasons for Inclusion: The requirement of ripeness is a fundamental restriction on federal court authority. Recall of the rules regarding ripeness are tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that to avoid issuing advisory opinions or addressing abstract disagreements over government policies, federal courts will dismiss actions that are considered not yet ripe.
 - Test-takers should know that federal courts use two main factors to determine ripeness: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983).

4. Mootness: Federal courts will dismiss actions that are found to be moot.

- Reasons for Inclusion: The restriction against moot actions is a fundamental restriction on federal court authority. Recall of the rules regarding mootness is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that a federal court will not hear a case that has become moot, meaning that a real, live controversy no longer exists. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974).
 - Test-takers should know that an important exception to the mootness prohibition is where there is a reasonable expectation that the same complaining party will be subjected to the same action again and would again be unable to resolve the issue because of the short duration of the action, that is, where the controversy is capable of repetition yet evading review. See *Weinstein v. Bradford*, 423 U.S. 147 (1975).

- Test-takers should know that another important exception to the mootness prohibition is where a defendant in the case has voluntarily ceased the allegedly unlawful activity but the court cannot be certain that the defendant will not resume that activity in the future. See *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982).
- Test-takers should know that another important limitation on the mootness prohibition is when a secondary or collateral injury survives although the primary injury has been resolved, such as when a defendant has completed a criminal sentence but still faces collateral consequences from the conviction being challenged. See *Sibron v. New York*, 392 U.S. 40 (1968).

Category Two: Congressional Authority

5. **Limited Congressional Authority:** Congress is generally limited to enumerated powers, including regulation of commerce, taxing, treaty, and spending powers.
 - **Reasons for Inclusion:** Limitations on Congress’s power to act are foundational and tested for recall on the MBE and NextGen exams.
 - **Scope of Required Knowledge:**
 - Test-takers should know that the Constitution grants Congress a number of specific powers, many of which are enumerated in Article I, Section 8, including the powers to tax, borrow money, regulate commerce, and spend.
 - Test-takers should know that the Constitution restrains Congress as having limited powers.
 - Test-takers should know that the fact that Congress has limited powers under the Constitution is a crucial aspect of the balance of power between Congress and the states.
 - Test-takers should understand that, by contrast, the states have broad “police powers” to legislate for the public good, health, safety, and welfare.

6. **Necessary and Proper Clause:** Test-takers should know that the Necessary and Proper Clause grants Congress the power to make all laws necessary and proper (i.e., appropriate) for carrying into execution any power granted to any branch of the federal government.
 - **Reasons for Inclusion:** The Necessary and Proper Clause is a foundational aspect of Congressional authority. Recall of the Necessary and Proper Clause is tested on the MBE and NextGen exams.
 - **Scope of Required Knowledge:**
 - Test-takers should know that the Necessary and Proper Clause has been interpreted to broaden the reach for Congressional powers. For example, Congress has the power to charter banks since that power is appropriate to executing Congress’s enumerated powers to tax, borrow money, and regulate commerce. *McCulloch v. Maryland*, 17 U.S. 316 (1819).
 - Test-takers should know that the Necessary and Proper Clause is not an independent source of Congressional authority to act beyond other identified powers.

7. **Substantial Effect on Interstate Commerce:** The Commerce Clause authorizes regulation of economic and noneconomic activity with a “substantial effect” on interstate commerce,

including activity that meets that threshold when aggregated with others doing the same thing.

- Reason for Inclusion: Commerce Clause authority is a fundamental principle of Constitutional Law. Recall of Commerce Clause concepts is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that to be within Congress’s power under the Commerce Clause, a federal law must either: (i) Regulate the channels of interstate commerce; (ii) Regulate the instrumentalities of interstate commerce and persons and things in interstate commerce; or (iii) Regulate activities that have a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549 (1995).
 - Test-takers should know that when Congress attempts to regulate intrastate activity under the third prong, above, the Court will uphold the regulation if it is of economic or commercial activity and the court can conceive of a rational basis on which Congress could conclude that the activity in aggregate substantially affects interstate commerce. *Gonzales v. Raich*, 545 U.S. 1 (2005).
 - Test-takers should know that if the regulated intrastate activity is not commercial or economic, the Court generally will not aggregate the effects and the regulation will be upheld only if Congress can show a direct substantial economic effect on interstate commerce, which it generally will not be able to do. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (federal statute barring possession of a gun in a school zone is invalid); *United States v. Morrison*, 529 U.S. 598 (2000) (federal civil remedy for victims of gender-motivated violence is invalid).
 - Test-takers should know that the classic aggregation case is the Court’s holding that Congress can control a farmer’s production of wheat for home consumption because the cumulative effect of many instances of such production could be felt on the supply and demand of the interstate commodity market. *Wickard v. Filburn*, 317 U.S. 111 (1942).

8. Supremacy Clause: The Supremacy Clause of Article VI establishes that the Constitution, U.S. laws, and treaties made under the authority of the United States are the nation’s supreme law and are binding on state judges notwithstanding any state constitution or law.

- Reasons for Inclusion: The Supremacy Clause is a foundational aspect of federalism and is tested for recall on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that the Supremacy Clause makes the Constitution, U.S. laws, and treaties, “the supreme Law of the Land.”
 - Test-takers should know that the Supremacy Clause means that state judges cannot ignore lawfully enacted federal Constitutional provisions, laws, or treaties.
 - Test-takers should understand that most government power is concurrent, belonging to both the states and the federal government.
 - Test-takers should understand that this concurrent power makes it possible for states and the federal government to lawfully pass legislation on the same subject matter, and that when this happens, the Supremacy Clause means that any conflict between the state and federal law is resolved in favor of the federal law.

- Test-takers should know that the most important mechanism for enforcing the Supremacy Clause is the preemption doctrine.

9. Express Preemption: The Supremacy Clause gives Congress the ability to include in federal legislation explicit language prohibiting the states from adopting laws concerning the subject matter of the legislation.

- Reasons for Inclusion: Express preemption is a foundational aspect of federalism and is tested for recall on both the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that the preemption doctrine, which limits the state from action that would directly or indirectly interfere with Congressional legislation, is key to how the Supremacy Clause is given effect.
 - Test-takers should understand that state laws may be preempted expressly or impliedly.
 - Test-takers should understand that preemption analysis is largely a matter of interpreting Congressional statements or silence about the preemptive effect of the federal legislation in question.
 - Test-takers should know that a federal law may expressly provide that the states may not adopt laws concerning the subject matter of the federal legislation.
 - Test-takers should know that an express preemption clause will be narrowly construed. See *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008).

10. Implied Preemption: Even when Congress does not explicitly preempt state law, the doctrine of implied preemption may override state laws. This is necessary to give full effect to the Supremacy Clause of Article VI, which declares federal law to be the “supreme law of the land.”

- Reasons for Inclusion: Implied preemption is a foundational aspect of federalism and is tested for recall on both the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that a valid act of Congress or federal regulation supersedes any state or local action that conflicts with the federal rule, whether by commanding conduct inconsistent with that required by the federal rule, or by forbidding conduct that the federal rule is designed to foster.
 - Test-takers should understand that implied preemption analysis is largely a matter of interpreting Congressional statements or silence about the preemptive effect of the federal legislation in question.
 - Test-takers should know the two important types of implied preemption: (1) where the state law prevents achievement of a federal objective and (2) where Congress intends to “occupy the field.”
 - Test-takers should know that state law will be held to be impliedly preempted if it interferes with achievement of a federal objective, even if the state or local law was enacted for a valid purpose and not merely to frustrate the federal government. For example, a state law providing for suspension of the driver’s license of persons who have failed to pay off auto accident judgments, regardless of the judgment debtor’s discharge in bankruptcy, was held to be preempted because it interfered with the

objective of the federal bankruptcy laws to give bankrupts a fresh start, free of their old debts. *Perez v. Campbell*, 402 U.S. 637 (1971).

- Test-takers should know that under “field preemption,” a state or local law may also be found to be preempted if it appears that Congress intended to “occupy” the entire field, thus precluding any state or local regulation.
- Test-takers should know that to analyze field preemption, the courts will look at the federal regulatory scheme to deduce Congress’s intent, often finding preemption if the federal laws are comprehensive or a federal agency is created to oversee the field.
- Test-takers should know that in all preemption cases, especially any involving a field traditionally within the power of the states (e.g., regulations involving health, safety, or welfare), there is a presumption against preemption, meaning that the historic state police powers are not to be superseded unless that was the clear and manifest purpose of Congress. *Wyeth v. Levine*, 555 U.S. 555 (2009).

Category Three: Individual Rights

11. Procedural Due Process: The due process clause provides procedural protections of notice and opportunity to be heard before adverse action taken by courts, government employers, or government agencies or any governmental entity that threatens to take away property or liberty interests.

- **Reasons for Inclusion:** Procedural due process protection is a fundamental Constitutional right that applies to a broad swath of government action. Recall of the concepts regarding procedural due process is tested on the MBE and NextGen exams.
- **Scope of Required Knowledge:**
 - Test-takers should know that the Due Process Clauses of the Fifth Amendment (applicable to the federal government) and the Fourteenth Amendment (applicable to the states) provide that the government shall not take a person’s life, liberty, or property without due process of law.
 - Test-takers should know that procedural due process analysis asks first whether there is a potential deprivation of a protected liberty or property interest.
 - Test-takers should know that protected property interests include employment (unless probationary), and real and personal property.
 - Test-takers should know that the specific procedural protections (process) that is due depends on balancing three factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976).
 - Test-takers should know that the primary elements of fair procedure that may be required are notice; an opportunity to be heard; and a fair, neutral decisionmaker (not necessarily a judge).
 - The Nevada Foundational Law Exam does not test rules related to substantive due process, whether related to privacy, familial relationships, economic interests, or other subjects.

12. Equal Protection – Strict Scrutiny: Government classifications of race, ethnicity, and national origin, as well as classifications affecting fundamental rights, are said to be suspect classifications and therefore subject to strict scrutiny, meaning they will be upheld only upon a showing that they are necessary for a compelling governmental interest.

- Reasons for Inclusion: strict scrutiny for suspect classifications is a foundational concept for which recall is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that classifications based on race, ethnicity, and national origin are presumptively unconstitutional, meaning that the government has the burden to show that they are permissible.
 - Test-takers should know that the highest level of review, or “strict scrutiny,” is invoked where the law that is the subject of an equal protection challenge results in classifications based on suspect factors such as race, national origin, or ethnicity.
 - Test-takers should know that the courts will closely scrutinize statutes involving such suspect classifications and uphold only statutes that are necessary to serve a compelling state interest.” *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 274 (1986); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).
 - Test-takers should know that surviving the “necessary” requirement of strict scrutiny requires a showing that the classification is the least restrictive means to achieve the government interest. *Grutter v. Bollinger*, 539 U.S. 306, (2003).
 - Test-takers should know that strict scrutiny applies to racial classifications whether they burden or benefit racial minorities. *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995).

13. Equal Protection – Intermediate Scrutiny: Quasi-suspect government classifications of gender and non-marital children are subject to intermediate scrutiny, meaning that they will be upheld only if they are substantially related to an important governmental interest.

- Reasons for Inclusion: Intermediate scrutiny for quasi-suspect classifications is a foundational concept for which recall is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that government classifications based on gender or non-marital children are presumptively unconstitutional and subject to intermediate scrutiny. *Clark v. Jeter*, 486 U.S. 456, (1988) (nonmarital children); *U.S. v. Virginia*, 518 U.S. 515, (1996) (gender).
 - Test-takers should know that to survive intermediate scrutiny, the government classification must be substantially related to an important governmental objective.
 - Test-takers should know that justifications for classifications based on gender must not rely on overbroad generalizations, stereotypes, or “tendencies” of males and females. *U.S. v. Virginia*, 581 U.S. 515, 541 (1996).
 - Test-takers should know that courts use heightened scrutiny for gender classifications whether they benefit men or women. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
 - Test-takers should know that, in striking down laws that distinguish between marital and nonmarital children, the court has said that burdening a child for its birth status is illogical and unjust. *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 175–176 (1972).

14. Equal Protection – Rational Basis: Government classifications that are neither suspect nor quasi-suspect are subject to a highly deferential rational basis standard of review, meaning that they will be upheld if they are rationally related to a legitimate governmental interest. *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

- Reasons for Inclusion: Rational basis review is a foundational concept for which recall is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that classifications that do not involve suspect or quasi-suspect criteria or fundamental rights are examined under a relaxed rational basis standard that requires only that the classification reasonably further a legitimate governmental purpose, objective, or interest.
 - Test-takers should know that the rational basis standard applies to most government action.
 - Test-takers should know that the rational basis standard is highly deferential to the government, that government action subject to the rational basis test is presumptively lawful, and that the burden is on the challenger to establish the unconstitutionality of any government action evaluated by the rational basis test.
 - Test-takers should know that the legitimate state purpose need not have been the main objective of the statute or be readily ascertainable upon the face of the statute, and, indeed, a plausible governmental purpose may be raised successfully after the law has been challenged.
 - Test-takers should know that a facially neutral classification with a discriminatory impact does not trigger heightened scrutiny unless a discriminatory purpose also exists. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (gender). See also *Washington v. Davis*, 426 U.S. 229 (1976) (race).

15. Free Speech – Content- or Viewpoint-based Regulation: Government content-based regulation of protected expression is strongly presumed to be invalid, and viewpoint-based regulation, a sub-category of content-based regulation, is even more highly scrutinized. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

- Reasons for Inclusion: the limits on content-based and viewpoint-based regulations of protected speech are foundational concepts for which recall is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know the distinctions among viewpoint-based, content-based, and content-neutral regulations of protected expression.
 - Test-takers should know that viewpoint-based regulations of protected expression are highly disfavored and typically subject to the highest scrutiny.
 - Test-takers should know that content-based regulations of protected expression are also disfavored and that strict scrutiny is used to determine the constitutionality of a content-based regulation of protected speech, meaning that the government's interest must be compelling and the regulation must be narrowly drawn and the least intrusive method to achieve the government's interest.
 - Test-takers should know that heightened scrutiny in favor of freedom of expression does not apply to lesser-protected speech, like commercial speech, or to categories of

speech that receive almost no First Amendment protection, like obscenity, fighting words, threats, or incitement to imminent lawlessness, except that viewpoint-based restrictions are heavily disfavored even for categories of speech that otherwise receive little or no protection.

16. Free Speech – Content-Neutral Regulations: Content-neutral government regulations are typically subject to intermediate levels of scrutiny whether they are (1) laws of general application with incidental or indirect infringements on expression, such as taxes, or (2) direct infringements, such as time, place, or manner limitations on speech.

- Reasons for Inclusion: The limits on content-neutral restrictions, including time, place, or manner limitations, are foundational concepts for which recall is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that to be found content-neutral, a restriction must be neither content-based nor viewpoint based. *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622 (1994) (law requiring cable companies to carry local broadcast stations was content-neutral because it applied to all stations, whatever the subject or viewpoint).
 - Test-takers should know that a content-neutral law of general application that imposes only an incidental or indirect burden on speech will be upheld if it furthers an important or substantial governmental interest that is unrelated to the suppression of free expression *Leathers v. Medlock*, 499 U.S. 439 (1991) (a general sales tax could be applied to cable television, even when print media was exempted, because there was no evidence of a purpose of suppression of ideas).
 - Test-takers should know that the government may also impose direct burdens on speech in the form of reasonable, content-neutral restrictions on the time, place, or manner of protected speech (1) if the restrictions are justified without reference to the content of the regulated speech; (2) if they are narrowly tailored to serve a significant governmental interest; and (3) if they leave open ample alternative channels to communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
 - Test-takers should know that permissible time, place, or manner restrictions do not need to be the least restrictive alternative, as they will be found to be “narrowly tailored” as long as they are not substantially broader than the least restrictive alternative. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-900 (1989).
 - Test-takers should know that typical justifications for time, place, and manner restrictions include avoiding nuisance, preserving safety, and managing traffic flow.

17. Free Speech – Minimal Protection: Some categories of speech, including fighting words, incitement of illegal activity, obscenity, and true threats, receive almost no First Amendment protection.

- Reasons for Inclusion: Categories of unprotected speech are foundational knowledge that are tested for recall on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that some categories of speech are considered of such little value that they receive little First Amendment protection.

- Test-takers should know that the government can infringe, prohibit, and even criminalize speech that falls within one of these categories of unprotected speech.
- Test-takers should know, however, that viewpoint discrimination, for example an ordinance that prohibited fighting words on only one side of a heated dispute, is impermissible even for categories of otherwise unprotected speech.
- Test-takers should know that these categories need to be well-defined and narrowly limited to protect First Amendment values.
- Test-takers should know that the obscenity means that “the average person, applying contemporary community standards, would find that the dominant theme of the material taken as a whole appeals to prurient interest,” and that “prurient interest” means “a shameful or morbid interest in nudity, sex, or excretion.” *Roth v. United States*, 354 U.S. 476, 487 n. 20, 489 (1957); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).
- Test-takers should know that obscenity is defined much more narrowly than pornography, such that most pornography is not obscenity.
- Test-takers should know that “true threats” are contrasted with mere exaggeration for effect, and that “true threats” are where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *Virginia v. Black*, 538 U.S. 343, 360 (2003).
- Test-takers should know that “fighting words” are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1932).
- Test-takers should know that offensive speech and hate speech are not necessarily “fighting words,” a category that has been interpreted extremely narrowly.
- Test-takers should know that the government is permitted to prohibit speech that is “directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).
- Test-takers will not be required to know other categories of no- or low-value speech, including fraud, child pornography, or defamation.

18. Free Speech – Commercial Speech: Commercial speech is “lesser valued” speech, **government** restriction of which is subjected to intermediate scrutiny.

- Reasons for Inclusion: Concepts related to commercial speech are foundational and tested for recall on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that commercial speech has been defined as speech that “does ‘no more than propose a commercial transaction’” and as “expression related solely to the economic interests of the speaker and its audience.” *Va. State Bd. of Pharm.*, 425 U.S. at 748, 762 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980).
 - Test-takers should know that, because the first Amendment protection for commercial speech is based on the informational value of advertising, commercial speech that is misleading or related to illegal activity receives no First Amendment protection.
 - Test-takers should know that to be permissible, government regulation of protected commercial speech must survive intermediate scrutiny, meaning that the government

must prove that its interest is “substantial,” that the regulation “directly advances” that interest, and that the regulation is “not more extensive than is necessary to serve that interest.” *Central Hudson*.

- Test-takers should know that under this intermediate scrutiny, the government regulation need not be the least restrictive means to achieve its objective; instead, there must be a reasonable fit between means and ends, with the means “narrowly tailored to achieve the desired result.” *Board of Trustees v. Fox*, [492 U.S. 469](#), 480 (1989).

19. Free Speech – Commercial Speech of Lawyers: The First Amendment constrains state bars, legislators, and other government entities from prohibiting certain types of attorney advertising, but more readily permits limitations on in-person solicitation, which is more likely to be coercive.

- Reason for Inclusion: First Amendment protections for commercial speech are tested for recall on both the MBE and NextGen exams. The implications of these concepts for attorneys are highlighted in Nevada’s Foundational Law Exam because the intersection between First Amendment protection and the legal profession is foundational for practicing lawyers.
- Scope of Required Knowledge:
 - Test-takers should know that the state cannot forbid lawyers from advertising the prices they charge for performing routine legal services because of the private and societal interest in the free exchange of this form of speech. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).
 - Test-takers should know that a state may not categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems, but the state can impose limitations, such as a thirty-day waiting period after an accident. *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466 (1988); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).
 - Test-takers should know that the state cannot prohibit an attorney from holding themselves out as a certified civil trial specialist, just as the state cannot prohibit a certified public accountant (CPA) from holding herself out as a certified financial planner. *Peel v. Il. Att’y Disciplinary Comm’n*, 496 U.S. 91 (1990); *Ibanez v. Fl. Bd. of Acct.*, 512 U.S. 136 (1994).
 - Test-takers should know that limitations on in-person solicitation by lawyers is more easily prohibited than mailings because of the inherent pressure and the risk that trained advocates (lawyers) will unduly pressure potential clients. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Edenfield v. Fane*, 507 U.S. 761, 775-76 (1993).
 - Test-takers should know that the First Amendment offers protection for attorneys soliciting clients with an offer of representation without charge because expressive rights are implicated and the non-commercial aspect lessens the possibility of deception. *In re Primus*, 436 U.S. 412 (1978).

20. State Constitutions: State constitutions, like Nevada’s, may expand individual rights beyond those provided by the U.S. Constitution, but cannot diminish someone’s U.S. constitutional rights.

- Reasons for Inclusion: State constitutions, like Nevada's, offer foundational protections of individual rights, although concepts related to state constitutions are not tested on the MBE or NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that the constitutions of many states, including Nevada's, include some provisions that parallel protections of the U.S. Constitution, and some that are unique to the state constitution.
 - Test-takers should know that state constitutions may provide broader protections than the U.S. Constitution but cannot diminish someone's U.S. Constitutional rights.
 - Test-takers should know that state laws cannot violate the state's constitution unless the state constitutional provision at issue itself violates the U.S. Constitution, and therefore is invalid.

Foundational Concepts of Contract Law Tested on the Nevada Foundational Law Exam

Introduction: Test-takers will be expected to recall the foundational concepts of contract law that are listed below and to apply them to hypothetical fact patterns. Some of these concepts derive from the common law; others draw from the Uniform Commercial Code (UCC). Test-takers should apply the contract concepts expressed in this document, without reference to variations in individual jurisdictions.

Test-takers do not need to memorize statutory sections or restatement rule numbers. Those are cited here only for reference.

The concepts tested on the exam fall into six categories:

- Understanding sources of contract law
- Demonstrating that the parties have made enforceable promises
- Determining whether there are any defenses to contract enforcement
- Interpreting and applying contract terms
- Determining the consequences of breach of contract
- Determining the remedies available for breach

Category One: Understanding sources of contract law

1. Common Law and Statutes. Much of contract law derives from the common law, and the Nevada Foundational Law Exam (FLE) tests primarily those concepts. Statutes and regulations, however, sometimes modify common-law rules. The most important of those statutes for contract law is Article 2 of the Uniform Commercial Code (UCC), which governs sales. The FLE tests knowledge of some concepts from Article 2, as well as some definitions from Article 1 of the UCC.

- Reasons for Inclusion: Understanding different sources of contract law is critical for practicing lawyers. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know that the UCC supersedes common-law rules whenever it applies to the transaction and addresses the issue. But common-law principles apply when UCC provisions do not displace them.
 - Test-takers should know that portions of the Uniform Commercial Code (UCC) have been enacted in all 50 states and the District of Columbia, although some jurisdictions have modified particular provisions.
 - They should also know that Article 2 of the UCC governs (a) contracts that are exclusively for the sale of goods, and (b) the sale-of-goods aspects of hybrid contracts when the sale of goods predominates.¹ When Article 2 applies, UCC provisions take precedence over the common law.
 - Test-takers should know the basic definition of “goods” under the UCC: things

¹ Although the 2022 amendments to Article 2 change aspects of the treatment of hybrid contracts, both before and after those amendments the rule articulated in the text is correct.

that are movable at the time of identification to the contract (not counting the money with which the price will be paid).

- They should also know the basic definition of “sale” under the UCC: the transfer of title from seller to buyer for a price.
- They should know that the UCC governs the sale of goods between “persons,” which means individuals, corporations, governments and government subdivisions, and any other legal or commercial entity.
- They should know, finally, that the UCC governs the sale of goods even if neither party is a merchant. The Code distinguishes merchants from other parties in some of its provisions (see concept 12 below), but contracts for sales of goods between non-merchants fall within the UCC.
- For hybrid transactions, test-takers do not need to recall how Article 2 applies if the sale of goods does not predominate. Nor do they need to recall what law governs non-sale-of-goods aspects if the sale of goods does predominate. The law related to those aspects of hybrid transactions is in flux across jurisdictions.
- Test-takers do not need to know special provisions refining the definition of “goods,” such as provisions governing the treatment of investment securities, the unborn young of animals, and growing crops.
- Test-takers should understand that statutes other than the UCC may also modify the common-law of contracts, but the Nevada Foundational Law Exam will not test any of those statutes. Test-takers may assume that, if the UCC does not govern a question, then the common law (as articulated in this list of concepts) applies.

Category Two: Demonstrating that the parties have made enforceable promises

2. **Offer:** Most contracts originate from an offer. Under the common law, an offer is a proposal that communicates intent to enter a contract if the offer is accepted, and that is sufficiently definite so that an agreement could be enforced if the other party responds simply “I accept.”
- **Reasons for Inclusion:** Identifying an offer is essential when determining assent for most contracts. The concept of offer is critical for understanding and applying the principle of mutual assent that underlies contract law. Both the MBE and NextGen exams require recall of the common-law concept of an offer.
 - **Scope of Required Knowledge:**
 - Test-takers should know that the person making an offer is called the “offeror.” The person receiving the offer is called the “offeree.”
 - Test-takers should also know that the existence of an offer is judged by an objective standard. An offer exists only if a reasonable person in the offeree’s position would understand the offeror’s language as an offer. The objective standard, however, takes into account any existing relationship between the offeror and offeree, as well as the context of the alleged offer.
 - Test-takers should know that parties often engage in preliminary discussions that fall short of an offer. To constitute an offer, the offeror’s language must make reasonably clear to the offeree that the parties will be bound if the offeree accepts the offer.
 - Test-takers, finally, should know that advertisements, price lists, and catalogs do not usually constitute offers because of the risk of “over-acceptance.” In other words, the audience for the offer is so large, that a reasonable person would not be

justified in thinking that their assent would conclude the deal. But an advertisement that requests specific action and limits the advertiser's potential obligation is likely to be treated as an offer.

- 3. Acceptance:** A contract arises if the offeree accepts the offer. To accept the offer, the offeree must manifest their intent to be bound by the offeror's terms.
- Reasons for Inclusion: The concept of acceptance complements the concept of offer as a basic building block of contract law. Both the MBE and NextGen exams require knowledge of the concept of acceptance.
 - Scope of Required Knowledge:
 - Test-takers should understand that the existence of an acceptance, like the existence of an offer, is judged by an objective standard. A reasonable person in the offeror's position must understand the offeree's communication as an acceptance. The existing relationship between the parties and the context of the transaction, however, will inform that determination.
 - Test-takers should know that silence does not constitute acceptance, unless there is a prior course of dealing that indicates otherwise.
 - For the Nevada Foundational Law Exam, test-takers do not need to recall the rules governing acceptance of an offer through performance. New lawyers should research those rules when the situation arises in practice, but the FLE will focus on the more common acceptances by promise.
 - Except as provided below (Concept 4), test-takers do not need to know the UCC provisions governing acceptance.
- 4. The Mirror-Image Rule:** Under the common law, an acceptance must accept all the terms of the offer and cannot attempt to add or vary any terms. This is known as the "mirror-image rule." The UCC has abolished this rule with respect to contracts for the sale of goods.
- Reasons for Inclusion: The mirror-image rule is central to the common-law concept of contract; The UCC takes a more pragmatic approach. Understanding both approaches is important for practicing lawyers. Both the MBE and NextGen exams require recall of these concepts.
 - Scope of Required Knowledge:
 - Test-takers should understand that, under the common-law's mirror-image rule, an acceptance cannot vary or add to the terms of the offer. If an offeree manifests an intent to accept the offer with new or different terms, that communication is a counteroffer rather than an acceptance.
 - Test-takers should also know that the UCC overturns this strict rule for the sale of goods. A contract between the parties may arise even if the offeree's communication includes terms that add to or modify the terms of the offer.
 - Test-takers should know that the UCC approach focuses on determining whether the offeror reasonably believed the response was an acceptance rather than whether the terms of the offer and acceptance are the same.
 - Test-takers do not need to know the various approaches that courts use to determine under the UCC when a party may be held to a term in the other party's writing. These approaches vary by jurisdiction.

- 5. Consideration:** Under both the UCC and common law, consideration is required for the creation of an enforceable contract.
- Reasons for Inclusion: The concept of consideration is fundamental to contract law. Both the MBE and NextGen exams require recall of this concept.
 - Scope of Required Knowledge:
 - Test-takers should know that under the common law, consideration can be a promise; an act; a forbearance; or the creation, modification, or destruction of a legal relationship. The UCC has no separate definition of consideration, so the common law rule is applied when the UCC governs.
 - Test-takers should also know that, to constitute consideration, a performance or promise must be bargained for. In other words, each party must seek the performance or promise of the other in exchange for their own performance or promise.
 - Test-takers, finally, should understand that a benefit received in the past cannot serve as consideration for a later promise because the promise did not induce the promisee to provide the benefit.
 - For the Foundational Law Exam, test-takers do not need to know the rules governing consideration for contract modifications.
 - Nor do test-takers need to know the rules governing conditional gifts.
- 6. Promissory Estoppel.** “A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy for breach may be limited as justice requires.” Restatement (Second) of Contracts § 90.
- Reasons for Inclusion: Promissory estoppel has become an important alternative means for enforcing some promises. Both the MBE and NextGen exams require recall of the concept of promissory estoppel.
 - Scope of Required Knowledge:
 - Test-takers need not recall the precise words of the Restatement provision, but they should know the four elements a party must establish to recover under this theory: (1) the existence of a promise; (2) that the promisor should have reasonably expected the promise to induce action or forbearance by the promisee; (3) that the promisee did induce action or forbearance; and (4) that injustice would result from failure to enforce the promise.
 - Test-takers should also know that this method of enforcing a promise is called “promissory estoppel.”
 - Test-takers, finally, should know that the factors considered in determining whether injustice would result include (1) the reasonableness of the recipient’s reliance, (2) the extent of the reliance, and (3) the clarity and certainty of the promise made.

Category Three: Determining whether there are any defenses to contract enforcement.

- 7. Statute of Frauds.** Some contracts cannot be enforced unless there is a written memorandum of the contract signed by the party opposing enforcement.
- Reasons for Inclusion: The statute of frauds is a central concept in both contract and property law. Both the MBE and NextGen exams require recall of this concept.

- Scope of Required Knowledge:
 - Test-takers should know that the statute of frauds applies to any contract that, by its terms, cannot be fully performed within a year from the time the contract is made.
 - They should understand that the one-year period is measured from the time the contract is made, not from when performance is promised.
 - Test-takers should also know that the statute of frauds applies to any contract for the sale of an interest in land.
 - They should understand that, although a lease is a contract for the sale of an interest in land, most states exclude short-term leases (a year or less) from the requirement of a writing.
 - Finally, they should know that the UCC statute of frauds applies to a contract for the sale of goods if the price is \$500 or more.
 - The Foundational Law Exam does not require recall of other categories of contract governed by the statute of frauds, such as a contract of an executor to answer for a duty of the decedent. Nor does the Exam require knowledge of the different rules on how much information about the contract must be in the writing to satisfy the statute. Test-takers should understand the general concept and the three primary categories of contracts affected by Statutes of Frauds.
 - The Foundational Law Exam does not require knowledge of when promissory estoppel may be used to enforce a promise despite a valid statute of frauds defense.

8. Mutual Mistake. If both parties held a mistaken belief at the time the contract was made, the contract is voidable by the adversely affected party if (a) the mistake relates to facts in existence at the time the contract was made; (b) the mistake relates to a basic assumption underlying the contract; (c) the mistake has a material effect on the agreed exchange of performances; and (d) the adversely affected party does not bear the risk of the mistake.

- Reasons for Inclusion: Mutual mistake is an important concept under the common law although the defense is rarely available in practice. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should understand that the mutual mistake must involve a fact in existence when the contract was made. The doctrine does not void contracts based on mistaken predictions about the future.
 - Test-takers should also know that the mistake must affect a basic assumption underlying the contract and have a material effect on the agreed exchange of performances. The mistake cannot relate to a peripheral contract term or have a minor effect on performance.
 - Test-takers should know that a party bears the risk that an assumption on which the contract is made will turn out to be false when the agreement allocates that risk to them or when they are aware the assumption may be false (“conscious ignorance”).
 - Test-takers should understand that the UCC rule governing the existence or non-existence of an implied warranty of merchantability (concept 12) allocates the risk of unknown defects in goods to the seller when the seller is a merchant.
 - Test-takers, finally, should know that a “scrivener’s error” (a clerical mistake in recording the parties’ agreement) does not void the contract. Instead, the written contract is reformed to reflect the parties’ agreement.

- The Foundational Law Exam does not require knowledge of the doctrines of impossibility, impracticability, and frustration of purpose, which cover unexpected future events rather than mistake.

9. Misrepresentation. If a party's assent to a contract is induced by either a fraudulent misrepresentation or an innocent material misrepresentation by the other party, upon which the recipient is justified in relying, the contract is voidable by the recipient.

- Reasons for Inclusion: Misrepresentation is an essential contract defense; a misrepresentation undermines the assumption of mutual agreement lying at the heart of contract law. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should understand that a contract is voidable if assent was induced by either a fraudulent misrepresentation or a material one. Fraud is not necessary if the misrepresentation was material. Conversely, a fraudulent misrepresentation makes a contract voidable even if the misrepresentation was not material.
 - Test-takers should know that a misrepresentation of fact is fraudulent if the maker intends the assertion to influence the other party's decision to enter the contract and the maker knows or believes the assertion is not true.
 - Test-takers are not expected to know other grounds for establishing culpable scienter with respect to the falsity of a representation, such as that the maker knows the assertion might be false.
 - Test-takers should know that a misrepresentation is not fraudulent if the maker believes it to be true even if this belief is wrong.
 - Test-takers should know that a misrepresentation is material if (a) it would be likely to induce a reasonable person to manifest assent or (b) if the maker knows it would be likely to induce the particular recipient to do so.
 - Test-takers, finally, should know that the usual remedy for misrepresentation is voiding the contract.
 - Test-takers are not expected to know when an expression of opinion or intent may constitute misrepresentation.

Category Four: Interpreting and applying contract terms

10. General Rules of Contract Interpretation: Courts will enforce contract terms as articulated by the parties. If a term is ambiguous a court will consider all relevant and admissible evidence to determine the term's meaning, including evidence about the meaning intended by the parties, trade practice, and what is sensible in light of the agreed exchange.

- Reasons for Inclusion: Contract interpretation is an essential part of any transactional law practice and is central to most litigation seeking to enforce a contract. Both the MBE and NextGen exams require knowledge of general rules of contract interpretation.
- Scope of Required Knowledge:
 - Test-takers should understand the importance of contract language, especially when terms are put in writing. Courts that apply the "plain meaning" rule, will enforce terms that are clear and unambiguous as written. Those courts will not consider extrinsic evidence to vary the meaning of a clear and unambiguous term.
 - Test-takers should also understand that, if language is ambiguous, courts will consider extrinsic evidence to resolve the ambiguity. This extrinsic evidence may

include evidence of communications between the parties, their course of performance, prior course of dealings, and trade usage. A court will also consider whether a meaning is sensible in light of the agreed exchange.

- Test-takers should know that parties' expressions regarding the existence or terms of a contract are usually interpreted objectively. If parties attach different meanings to an expression, the more reasonable meaning prevails.
- Test-takers, however, should also know that this objective principle is qualified. If a party attaches an unreasonable meaning to a term, but the other party knows or has reason to know of this, a court will give effect to the unreasonable meaning.

11. Parol Evidence: The parol evidence rule prohibits the admission of "parol evidence" to contradict or supplement the terms of certain written agreements.

- Reasons for Inclusion: The parol evidence rule arises frequently in disputes over the meaning of a contract. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know that the term "parol evidence" includes prior written agreements, prior oral agreements, and contemporaneous oral agreements. Written agreements that are executed contemporaneously are not considered parol evidence.
 - Test-takers should know that the parol evidence rule distinguishes between integrated agreements and completely integrated agreements.
 - An integrated agreement is a writing the parties adopt as an expression of the terms contained in the writing but may not include all terms of the agreement. The parol evidence rule allows parties to supplement the terms of an integrated agreement with additional terms, but it does not allow them to contradict the terms of the integrated agreement.
 - A completely integrated writing is one that the parties adopt as the complete and exclusive statement of the terms of their agreement. Parties often signal this by including a clause declaring that the writing represents the parties' full agreement. Parties may not use parol evidence to contradict or supplement the terms of a completely integrated agreement.
 - They should also know that the parol evidence rule only bars parol evidence under the circumstances described above. Parol evidence is admissible to explain an unclear or ambiguous contract term. If a court applies the plain meaning rule described in concept 10, however, parol agreements (like other extrinsic evidence) are not admissible to alter the meaning of a term that is clear and unambiguous.
 - Test-takers should also know that the parol evidence rule does not preclude admissibility of extrinsic evidence related to the defenses discussed above (fraud and mistake) or to show that no contract was entered because there was no assent.
 - Test-takers, finally, should know that both the UCC and common law recognize the parol evidence rule.
 - Test-takers are not expected to know that the UCC always allows courts to consider evidence of course of performance, course of dealing, and trade usage in interpreting a writing.

12. Implied Warranty of Merchantability: In a contract governed by the UCC, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. §§ 2-314, 2-316.

- Reasons for Inclusion: The implied warranty of merchantability is a key protection for buyers of goods. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should understand that the implied warranty of merchantability applies only to sellers who qualify as “merchants” under the UCC.
 - They should also know that a merchant for this rule is “one who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the . . . goods involved in the transaction.” UCC § 2–104(1). Test-takers need not memorize this language but should understand the meaning of “merchant” under the UCC.
 - Test-takers should know the two most common aspects of merchantability. Merchantable goods must (a) pass without objection in the trade under the contract description; and (b) be fit for the ordinary purpose for which such goods are used.
 - Test-takers should know the general rule for excluding or modifying the implied warranty of merchantability under the UCC: the language of exclusion or modification must explicitly mention merchantability and, in the case of a writing, must be conspicuous.
 - Test-takers should also know that, despite that general rule, the warranty of merchantability may also be excluded by expressions like “as is” or “with all faults.”
 - Test-takers, finally, should also know that the warranty of merchantability may be excluded with respect to defects that examination of the goods ought to have revealed, if the buyer had an opportunity to examine the goods before entering into the contract.

13. Third Parties to a Contract: Third-Party Beneficiaries and Assignment. Under some circumstances, third parties may enforce the terms of a contract.

- Reasons for Inclusion: Third-party rights form the basis of all secured credit transactions. The MBE exam requires recall of rules governing third-party beneficiaries and assignment.
- Scope of Required Knowledge:
 - Test-takers should know that under the common law, an intended third-party beneficiary may enforce a contract even though they were not party to the contract and provided no consideration.
 - A third party is an intended beneficiary if the contracting parties manifested an intent to create rights in that person. The contracting parties may manifest that intent expressly, or it may be implied because it is necessary to effectuate the intent of the contracting parties.
 - Test-takers should be able to distinguish these intended beneficiaries from incidental third-party beneficiaries. An incidental beneficiary is a party who benefits from performance of a contract, but who does not qualify as an intended beneficiary. Incidental beneficiaries have no enforceable contract rights.
 - Test-takers should know that a third-party beneficiary’s rights are subject to the same defenses the promisor has against the promisee in the underlying contract.
 - Test-takers should know that under both the common law and the UCC, contractual rights are assignable. The party making the assignment is the assignor and the party receiving the contract right is the assignee. The assignee may enforce the contract against the obligor (the remaining party to the original contract).

- Test-takers should know that the obligor retains the same defenses against the assignee as it has against the assignor.
- Test-takers should know that contractual provisions prohibiting assignment usually are not enforceable.
- The FLE will not test the rules that govern vesting of a third-party beneficiary's rights. Those rules are difficult to test on a multiple-choice exam.

Category Five: The power to withhold performance and terminate a contract in response to breach

14. Perfect Tender Rule. Under the UCC, a buyer may reject goods that do not conform in every respect to the contract.

- Reasons for Inclusion: The UCC's adoption of the perfect tender rule is important both for analyzing sales of goods and to understand the contrasting rule at common law. It is not clear whether the MBE and NextGen exams require recall of this concept, but it is a foundational one.
- Scope of Required Knowledge:
 - Test-takers should know that, when goods do not conform completely with the contract, the buyer has the option of rejecting the goods, accepting the goods, or accepting some commercial units and rejecting the rest.
 - Test-takers should also know that the UCC gives sellers some opportunity to cure a nonconforming delivery.
 - Test-takers are not expected to know that the perfect tender rule does not apply to an installment contract.

15. Material Breach and Substantial Performance. Contracts governed by the common law are not subject to the perfect tender rule. A party may withhold performance only if the other party's breach is "material." Similarly, a party remains responsible for paying the contract price if the other party's performance is "substantial." A party may terminate a contract only if the other party's breach is "total."

- Reasons for Inclusion: The concepts of material breach, substantial performance, and total breach are essential when enforcing contracts that are not governed by the UCC. Both the MBE and NextGen exams require recall of these concepts.
- Scope of Required Knowledge:
 - Test-takers should know that the common law does not permit a party to withhold performance if the other party's performance is not perfect. Instead, the breach must be material.
 - They should know that the doctrine of substantial performance determines when a party who renders imperfect performance may recover the contract price (less damages).
 - Similarly, they should know that the doctrine of material breach determines when a party may withhold (or suspend) performance in response to the other party's non-performance or failure to provide substantial performance.
 - Test-takers should also know that the doctrine of total breach determines when a party may terminate a contract based on breach by the other party.
 - Test-takers should be familiar with the five factors that courts consider when deciding whether a breach is material or performance is substantial:

- the extent of harm to the aggrieved party from the breach;
- the extent to which the aggrieved party can be adequately compensated for the harm by damages;
- the extent to which the breaching party will suffer a forfeiture if the aggrieved party does not perform;
- the likelihood that the breaching party will cure the failure to perform; and
- the extent to which the behavior of the breaching party comports with standards of good faith and fair dealing.
- Test-takers should know the additional factors that courts consider when determining whether a breach is total:
 - the extent to which delay in performance may further injure the aggrieved party; and
 - the extent to which the contract provides for performance without delay (e.g., a “time is of the essence” clause)
- Test-takers, finally, should understand that a party who does not have the power to withhold performance and terminate a contract under these rules still has a right to recover damages for nonperformance.

16. Conditions. Contract law treats the breach of a promise differently than the failure of a condition precedent. The former may give rise to a claim for damages if there has not been substantial performance; the failure of a condition excuses the obligor’s performance.

- Reasons for Inclusion: It is essential for lawyers to know the difference between a promise and a condition, as well as the operative effect of a condition. Both the MBE and NextGen exams require recall of these rules.
- Scope of Required Knowledge:
 - Test-takers should know the difference between a promise and a condition. Promises are commitments that parties make to one another. Conditions are circumstances that the parties agree will affect performance of one or more of their promises.
 - If A agrees to buy B’s guitar for \$500, those are promises. A has promised to give B \$500, and B has promised to give A the guitar.
 - If A agrees to buy B’s guitar for \$500 *if the guitar is appraised to be worth at least \$450*, the parties have attached a condition to their promises.
 - Test-takers should also know that the failure of a condition usually discharges the obligor’s obligation to perform.
 - But if a condition is designed to protect one contracting party, that party may waive the condition. In the above example, A may decide to waive the condition if the guitar is appraised to be worth \$445.
 - Test-takers should know that rules of construction disfavor interpreting a term as a condition precedent, particularly when that would result in forfeiture.
 - Test-takers should know that substantial performance will not satisfy a condition precedent. The condition must be fully satisfied.
 - Test-takers do not need to recall the rules governing conditions subsequent, constructive conditions, or contract provisions that create both promises and conditions.

Category Six: Determining the remedies available for breach

17. Expectation Damages. Expectation damages aim to put the nonbreaching party in the

position they would have been in had the contract been fully performed.

- Reasons for Inclusion: Expectation damages are the most common remedy for breach of a contract that does not include a provision for liquidated damages. Both the MBE and NextGen exams require recall of the concept of expectation damages.
- Scope of Required Knowledge:
 - Test-takers should understand that expectation damages are a common remedy for breach of contract.
 - They should know that the basic measure of expectation damages for a buyer is the difference in value between the performance promised and the performance delivered. This is often measured by the cost the buyer incurs obtaining substitute performance, less the unpaid contract price.
 - Test-takers should also know that the basic measure of expectation damages for a seller is the unpaid contract price minus expenses saved as a result of the breach.
 - They should know that expectation damages for a buyer may also include consequential damages (concept 18).
 - They should also know that the breaching party is not responsible for damages that could have been avoided by the nonbreaching party taking reasonable steps to minimize losses.
 - They should know that expectation damages can be recovered only if the loss is provable with “reasonable certainty.”
 - Test-takers, finally, should know that expectation damages generally are not available for non-financial losses.

18. Consequential Damages. Consequential damages are recoverable as part of expectation damages if the consequential damages were foreseeable to the breaching party and the nonbreaching party can prove them with reasonable certainty.

- Reasons for Inclusion: It is important for lawyers to understand the difference between consequential damages and other expectation damages. Both the MBE and NextGen exams require recall of the concept of consequential damages.
- Scope of Required Knowledge:
 - Test-takers should understand the difference between consequential damages and other expectation damages.
 - They should also know that consequential damages are recoverable only if the breaching party could have reasonably foreseen the damages at the time the contract was made.
 - They should know that consequential damages may be foreseeable either because (1) they would follow “in the ordinary course of events” from a contract of the type executed, or (2) there were special circumstances that the breaching party had reason to know at the time the contract was made that would produce the kind of damages suffered.
 - Test-takers also should know that consequential damages can be recovered only if they are provable with “reasonable certainty.”
 - They should know, finally, that lost profits from a new business are one example of consequential damages that are often too difficult to prove with reasonable certainty.

19. Specific Performance. Specific performance is an unusual remedy for breach of contract, but it may be available when monetary damages are inadequate to compensate the injured party.

- Reasons for Inclusion: Although specific performance is a less common remedy than the award of expectation damages, it is an essential remedy for certain contract breaches. The contrast with expectation damages also reinforces understanding of the underlying principles of contract law. Both the MBE and NextGen exams require recall of the concept of specific performance.
- Scope of Required Knowledge:
 - Test-takers should know that, when a court orders specific performance, the breaching party must comply with the court order or face the possibility of punitive sanctions for contempt of court.
 - Test-takers should know that specific performance is available only when monetary damages will not adequately compensate the nonbreaching party.
 - They should also know that specific performance is discretionary with the court. Any award will be based on the court's consideration of the equity of awarding the relief.
 - Test-takers should know that specific performance is most common when a party breaches a contract for the sale of land or for the sale of unique goods, or when damages cannot be proved with sufficient certainty. The uniqueness of land or goods (or the inability to quantify damages) can make monetary damages inadequate to compensate the nonbreaching party.
 - Test-takers, finally, should know that courts rarely order specific performance of a personal service. Although these services may be unique, courts are reluctant to order a form of involuntary servitude or to compel a personal relationship after a breach.

20. Liquidated Damages. Parties may specify in their contract the damages due in the event of breach, as long as the damages are compensatory rather than punitive.

- Reasons for Inclusion: Liquidated damages are common in many contemporary contracts. The distinction between proper (compensatory) damages and improper (punitive) ones also reinforces basic principles of contract law. Both the MBE and NextGen exams require recall of the concept of liquidated damages.
- Scope of Required Knowledge:
 - Test-takers should know that “liquidated damages” are damages that parties specify in a contract in the event of breach.
 - They should also know that liquidated damages may either set a specific monetary amount as compensation for breach or establish a formula for determining that amount.
 - Test-takers should understand the advantages of liquidated damages: they promote certainty, avoid litigation expense, and provide compensation for losses that might be difficult to prove in court.
 - Test-takers, however, should know that a liquidated damage term will not be enforced if a court concludes that it is an impermissible penalty. In determining whether a liquidated damages term is a penalty, a court will consider whether the amount is reasonable in light of the anticipated or actual loss stemming from the breach and the difficulties in proving that loss.

Foundational Concepts of Criminal Law and Procedure Tested on the Nevada Foundational Law Exam

Introduction: The Nevada Foundational Law Exam will test 20 foundational concepts related to criminal law and procedure. Like the NextGen exam, the Nevada exam will no longer require test-takers to recall elements of common law crimes or provisions of the Model Penal Code. Instead, consistent with contemporary criminal law practice, the exam will provide specific criminal statutes for test-takers to interpret and apply. Interpretation will require test-takers to recall basic principles of criminal law (such as different varieties of intent), but they will always have statutes to work with.

NCBE does not plan to draw those statutes from any particular state or set of states; the statutes may even be hypothetical ones. The Nevada Foundational Law Exam will use actual Nevada criminal statutes, provided to test-takers both in advance and on the exam. The chosen statutes track many of the crimes specified by NCBE for testing. In that way, preparation for the Nevada exam will also prepare test-takers for NextGen—and vice versa.

The full text of statutory sections that will be tested on the Nevada Foundational Law Exam appears at the end of this section of the outline.

This section of the outline also notes some judicial interpretations of the tested statutes. Test-takers are required to recall those interpretations (which will not be provided on the exam), but do not need to do other research into judicial interpretations.

Criminal procedure concepts tested on the Nevada Foundational Law Exam, like those tested on the MBE and NextGen exams, will be based on the United States Constitution. Nevada's Constitution provides parallel protections, but there are no distinctive criminal procedure provisions that warrant testing.

Test-takers do not have to recall any of the case names or citations in this outline. Those are provided simply for reference.

Criminal Law

The criminal law concepts tested on the Nevada Foundational Law Exam fall into five categories:

- Crimes Against the Person
- Crimes Against Property
- Defenses
- Inchoate Crimes
- Liability for Conduct of Another

Category One: Crimes Against the Person

1. **Assault:** The Foundational Law Exam will test Nevada’s basic definition of criminal assault: “unlawfully attempting to use physical force against another person” or “intentionally placing another person in reasonable apprehension of immediate bodily harm.” N.R.S. §200.471.
 - **Reasons for Inclusion:** Assault is a frequently charged crime, embodying foundational elements of criminal law. Both the MBE and NextGen exams test knowledge of assault.
 - **Scope of Required Knowledge:**
 - Test-takers should understand the two bases of liability for assault: (a) an unlawful attempt to use physical force against another person or (b) intentionally placing another person in reasonable apprehension of immediate bodily harm.
 - Test-takers should understand that an “unlawful attempt” is one that lacks legal justification (such as self-defense).
 - Test-takers should understand that the type of intent required for each basis of the crime. E.g., for the first basis, the defendant must attempt to use physical force *against another person*. It is not sufficient that the defendant attempts to use physical force in a manner that might have accidentally or negligently affected another person. Similarly, for the second basis, the defendant must intend to place the other person *in reasonable apprehension of immediate bodily harm*. It is not sufficient that the defendant did an act that happened to invoke that apprehension in another person.
 - Test-takers should understand and be able to apply the concepts of “reasonable apprehension” and “imminent bodily harm.”

2. **Battery:** Nevada defines criminal battery as “any willful and unlawful use of force or violence upon the person of another.” N.R.S. §200.481(1)(a).
 - **Reasons for Inclusion:** Battery, like assault, is a frequently charged crime that embodies foundational elements of criminal law. Both the MBE and NextGen exams test knowledge of battery.
 - **Scope of Required Knowledge:**
 - Test-takers should understand that the phrase “willful and unlawful” establishes that battery is a general intent crime: The defendant need only intend some use of force or violence against the other person.
 - Test-takers should know that this basic definition of battery does not require that the force or violence cause bodily harm. The intentional use of any “force or violence” is sufficient. Test-takers should know that any unwanted touching or “offensive contact” can constitute the “use of force or violence.” *Hobbs v. State*, 127 Nev. 234, 238-239, 251 P.3d 177, 179-180 (2011).
 - Test-takers should understand that the defendant need not touch the complainant directly. Striking another person with a thrown object, for example, is sufficient to establish a “use of force or violence” against that person.

3. **Substantial Bodily Harm:** Nevada distinguishes between batteries that cause substantial bodily harm and those that do not, with more severe penalties imposed when substantial bodily harm occurs. N.R.S. §200.481(2). Another statutory section, N.R.S. §0.060, defines substantial bodily harm as “Bodily injury which creates a substantial risk of death or which

causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ” or “Prolonged physical pain.”

- Reasons for Inclusion: Criminal statutes often vary punishment based on the degree of harm caused. The concept of “substantial bodily harm” is a foundational one supporting that variation. Testing this distinction also requires test-takers to demonstrate their ability to read statutes closely. Both the MBE and NextGen exams test understanding of substantial bodily harm.
 - Scope of Required Knowledge:
 - Test-takers should be able to read these two statutory provisions closely and to classify hypothetical fact patterns correctly.
 - Similarly, test-takers should be able to read the definition of “substantial bodily harm” closely to understand and apply the three types of harm satisfying that definition.
- 4. Use of a Deadly Weapon:** Punishments for criminal assault and battery depend on whether the crime was committed with a “deadly weapon.” N.R.S. §200.471(2)(a)-(b); N.R.S. §200.481(2)(a)-(b), (e). Nevada statutes do not define “deadly weapon,” but the Nevada Supreme Court has held that a weapon qualifies as a “deadly weapon” if it meets either of two definitions:
- a. The weapon is “inherently dangerous,” meaning that it “is any instrument which, if used in the ordinary manner contemplated by its design or construction, will, or is likely to cause a life-threatening injury or death.”
 - b. The weapon fits a “functional” definition of deadliness, meaning that it is “any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.”
- Rodriguez v. State*, 133 Nev. 905, 906, 407 P.3d 771, 774 (2017).
- Reasons for Inclusion: This distinction, like the previous one, tests a foundational concept that legislatures use to distinguish degrees of criminal punishment. Both the MBE and NextGen exams test understanding of use of a deadly weapon.
 - Scope of Required Knowledge:
 - Test-takers should understand the two types of deadly weapons, although they need not memorize the precise language used by the Nevada Supreme Court. They should be able to categorize hypothetical fact patterns correctly.
 - Test-takers should know that these definitions are governed by case law, rather than by statutory sections.
 - Test-takers should be able to combine their understanding of “deadly weapon” with close reading of the assault and battery statutes to classify hypothetical fact patterns correctly.
- 5. Vehicular Manslaughter:** Nevada punishes negligent operation of a vehicle that causes the death of another person as vehicular manslaughter. N.R.S. §484B.657(1). Conviction for this crime is punished as a misdemeanor.
- Reasons for Inclusion: Vehicular manslaughter is the only type of homicide that new lawyers regularly prosecute or defend. The statute also represents a criminal statute

punishing negligence rather than intentional or reckless conduct. Both the MBE and NextGen exams test understanding of vehicular manslaughter.

- Scope of Required Knowledge:
 - Test-takers should understand that this statute punishes negligent behavior.
 - They should also understand that the statute requires only proof of “simple negligence,” which is akin to the negligence standard applied under tort law.
 - Test-takers should know, however, that the Nevada Supreme Court has construed the phrase “act or omission” to require an *unlawful* act or omission that would warrant a traffic violation. *Cornella v. Just. Ct.*, 132 Nev. 587, 593, 377 P.3d 97, 102 (2016).
 - Test-takers should be able to read the statute closely and apply its language to a variety of hypothetical fact patterns.

Category Two: Crimes Against Property

6. Grand Larceny: Nevada defines several categories of theft as grand larceny. N.R.S. §205.220. The Foundational Law Exam will test three of those categories, while omitting others. The statutory sections attached to this outline include only the categories that will be tested.

- Reasons for Inclusion: Grand larceny is the most frequently charged crime in Nevada, and it is a core part of the criminal law in other states. Both the MBE and NextGen exams test understanding of grand larceny.
- Scope of Required Knowledge:
 - Test-takers should understand that the grand larceny statute requires proof of specific intent. The defendant must intend to deprive another person of the *types of property* listed in the statute. The defendant, however, does not need to know how much the property was worth.
 - Test-takers should be able to read the statute closely and apply its provisions to hypothetical fact patterns. The sections of the grand larceny statute tested on the Foundational Law Exam include a classic definition of grand larceny, a provision related to livestock, and a modern provision related to withdrawing or transferring money from a financial institution. Each section requires close reading.
 - Some sections of the grand larceny statute specify a minimum value of the stolen property. Test-takers should know that Nevada, like most jurisdictions, has held that for purposes of larceny, the value of property is the fair market value. *Romero v. State*, 116 Nev. 344, 347, 996 P.2d 894, 897-897 (2000).

7. Residential Burglary: Nevada criminalizes several types of burglary. The Foundational Law Exam will test the most foundational of those crimes, residential burglary. N.R.S. §205.060(1)(a).

- Reasons for Inclusion: Burglary is another commonly charged crime, dating back to the common law. States, however, vary in their modern definitions of burglary, so testing this statute requires test-takers to read a statute closely. Both the MBE and NextGen exams test understanding of residential burglary.
- Scope of Required Knowledge:
 - Test-takers should be able to read the burglary statute closely and apply its language to hypothetical fact patterns.

- They should understand that, unlike the common law, Nevada does not limit burglary to actions that occur at night. The statute punishes behavior that occurs “by day or night.” *State v. White*, 130 Nev. 533, 537, 330 P.3d 482, 485 (2014).
- Similarly, test-takers should understand that Nevada does not require proof of the common-law element of “breaking” to establish burglary. Proof of unlawfully entering or remaining on the property is sufficient. *State v. White*, 130 Nev. 533, 537, 330 P.3d 482, 485 (2014).
- Test-takers should be able to read closely the statute’s definitions of “dwelling” and “unlawfully enters or unlawfully remains” and to apply those definitions to hypothetical fact patterns.
- Test-takers should understand that Nevada requires intent to commit specified crimes (including misdemeanors) or the intent to commit any felony as an element of burglary. This element is somewhat broader than the common-law one, which focused exclusively on felonies.
- Test-takers should understand that burglary can be based on either an unlawful entry or unlawfully remaining in property (after an initially lawful entry). A burglary based on an unlawful entry requires specific intent to commit one of the specified crimes at the time of entry. Formulating that intent after entry is not sufficient to support conviction for burglary based on unlawful entry. But a defendant who “remains in” a structure after an initially lawful entry can then form the specific intent to commit a target crime at any point while “remaining in” the structure unlawfully.

Category Three: Defenses

- 8. Voluntary Intoxication as a Defense:** Voluntary intoxication is not a defense to any criminal charge, although the fact of intoxication may be considered in determining whether the defendant had the purpose, motive, or intent required for conviction of the charged crime. N.R.S. §193.220.
- Reasons for Inclusion: Defenses form an important part of criminal law, but several of Nevada’s defenses (such as its law of self-defense) draw upon a medley of statutes and common-law decisions that are difficult to test on a Foundational Law Exam. For that reason, this exam focuses on voluntary intoxication as an example of a criminal law defense. That defense appears in a single statute, and it has become increasingly common given the intersection of substance abuse and criminal actions. Applying this statute also requires test-takers to discern the purpose, motive, or intent required for the crimes listed above. The NextGen exam will require test-takers to be familiar with several defenses, including intoxication.
 - Scope of Required Knowledge:
 - Test-takers should understand that this statute applies only to voluntary intoxication. Involuntary intoxication (when a person is administered intoxicants without their knowledge or against their will) is not governed by this statute.
 - Test-takers should also understand that voluntary intoxication does not itself eliminate criminal liability. Liability is lessened or eliminated only if the intoxication affects a required element of the crime—such as the ability to form a particular purpose, motive, or intent.

- Test-takers need not know how the Nevada courts have ruled on the intersection of this defense with various crimes and fact patterns. They need only to be able to identify how the defense might affect liability in hypothetical fact patterns.

Category Four: Inchoate Crimes

- 9. Attempt to Commit a Crime:** Under Nevada law, a criminal attempt is “an act done with intent to commit a crime, and tending but failing to accomplish it.” N.R.S. §193.153.
- **Reasons for Inclusion:** Attempt is a fundamental concept in criminal law, applicable to a wide variety of crimes. Both the MBE and NextGen exams test understanding of attempt. States vary in the way they define attempt; the Nevada Foundational Law Exam will test Nevada’s definition.
 - **Scope of Required Knowledge:**
 - Test-takers should know that the Nevada Supreme Court has held that an attempt requires some acts beyond preparation, but that these can be “slight acts” if the intent is clear. *Van Bell v. State*, 105 Nev. 352, 355, 775 P.2d 1273, 1275 (1989).
 - Test-takers should understand that attempt requires proof of specific intent: the defendant must have intended to commit a specified crime.
 - Test-takers should know that an attempt may exist even if it would have been physically impossible for the defendant to commit the crime. The requisite intent and some acts beyond preparation are sufficient to establish intent.
 - Test-takers will not be expected to know Nevada case law discussing attempt in the context of particular crimes.

Category Five: Liability for the Conduct of Another

- 10. Aiding and Abetting.** Nevada imposes criminal liability on a person who “aids and abets” the commission of a crime. N.R.S. § 195.020.
- **Reasons for Inclusion:** Doctrines that impose criminal liability on one person for the conduct of another person (typically called complicity, accomplice liability, or aiding and abetting) are a core component of criminal law and frequently used by prosecutors in practice. Both the MBE and NextGen exams test these concepts.
 - **Scope of Required Knowledge:**
 - Test-takers should know that an accomplice, or aider and abettor, can be convicted of the same offense as the person who directly commits the crime.
 - Test-takers should know that the mental state required for liability as an aider or abettor depends on the mental state requirement of the underlying offense. To be convicted of a specific intent crime, an aider or abettor “must have knowingly aided the other person with the intent that the other person commit the charged crime.” *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). Nevada has rejected the more expansive “natural and probable consequences” doctrine adopted in some other jurisdictions. *Id.*
 - To be convicted of a crime of recklessness or negligence, “an aider or abettor must act with awareness of the [other person’s] reckless or negligent conduct and with the intent to promote or further that conduct.” *Desai for Desai v. State*, 133 Nev. 339, 343, 398 P.3d 889, 893 (2017).

Criminal Procedure

The criminal procedure concepts tested on the Foundational Law Exam include a wide variety of protections provided by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.²

11. Government Action Required for Unreasonable Searches and Seizures: The Fourth Amendment’s prohibition of “unreasonable searches and seizures” applies only to government actors. The Constitution does not constrain searches or seizures by private citizens—even if the private citizen turns over the fruits of a search or seizure to the government. Government agents, however, may not circumvent the constitutional protection by intentionally enlisting a private person to conduct a search or seizure.

- Reasons for Inclusion: The requirement of governmental action is a core principle of Fourth Amendment law. It is not clear whether the NextGen exam will require recall of this principle, but it is a fundamental one for understanding constitutional law.
- Scope of Required Knowledge:
 - Test-takers should be able to distinguish searches or seizures conducted by government actors from those conducted by private parties.
 - Test-takers should know that the government may use the fruits of private searches and seizures in a criminal prosecution—even if a government agent could not have constitutionally conducted the same search or seizure.
 - Test-takers should know that government agents may not circumvent the constitutional protection by intentionally enlisting the help of private actors to conduct a search or seizure. Test-takers should be able to recognize this type of enlistment in a hypothetical fact pattern.

12. Automobile Searches: The Fourth Amendment allows warrantless searches of automobiles if the police have probable cause to believe that the fruits, instrumentalities, or evidence of a crime are in the car.

- Reasons for Inclusion: An extensive body of case law explores when police may conduct warrantless searches, but knowledge of that full body of law would extend far beyond foundational knowledge. Automobile searches are among the most common warrantless searches, providing an appropriate part of Fourth Amendment law to test. Both the MBE and NextGen exams require test-takers to recall the rules governing the automobile exception.
- Scope of Required Knowledge:
 - Test-takers should understand the bases for the automobile exception offered by the Supreme Court: individuals have a diminished expectation of privacy in cars, and the mobility of automobiles justifies police in acting quickly.

² The Fourth, Fifth, and Sixth Amendments apply directly only to the federal government. The Supreme Court, however, has applied most protections in those amendments to state and local governments through its Fourteenth Amendment incorporation doctrine. The Nevada Foundational Law Exam will not test knowledge of the incorporation doctrine. Instead, the exam will test only criminal procedure protections that have been applied to the states. For simplicity, this outline refers only to the Fourth, Fifth, and Sixth Amendments, rather than noting Fourteenth Amendment incorporation with respect to each tested principle.

- Test-takers should also understand that police may search any portion of the car—including closed containers in the car—that might harbor the suspected evidence.
- Test-takers should understand the concept of probable cause, including that police must use all of the available information to establish clear facts or observations that would lead an objective observer to conclude that evidence of a crime will be found in the vehicle.
- Finally, test-takers should understand that police may not search beyond the bounds of their probable cause. If they have probable cause to believe that a large suitcase containing contraband is in the car, they may only search areas where that suitcase could be stored. And once they find and seize that suitcase, they may not search the automobile further—unless another exception to the warrant requirement (such as the “plain view” exception discussed below) has arisen.

13. Stop and Frisk: Although any detention constitutes a “seizure” under the Fourth Amendment, police are allowed to detain a person without a warrant if (a) the detention is brief, (b) the officer has a reasonable suspicion of criminal activity, and (c) the suspicion is based on articulable facts. This type of detention is known as a *Terry* stop. If the officer also has a reasonable belief that the stopped person is armed and dangerous, they may conduct a pat down (known as a “frisk”) incident to that stop.

- Reasons for Inclusion: *Terry* stops and associated pat downs are among the most common exceptions to the Fourth Amendment’s warrant requirement. Both the MBE and NextGen exams require test-takers to recall the rules governing *Terry* stops and associated frisks.
- Scope of Required Knowledge:
 - Test-takers should know the three elements of a valid *Terry* stop and should be able to recognize those elements in hypothetical fact patterns.
 - They should also know that the standard of “reasonable suspicion” is lower than that of “probable cause.”
 - Test-takers should know that police may not detain the person longer than needed to effectuate the purpose of the original stop.
 - Test-takers should understand that a reasonable suspicion of involvement in criminal activity does *not* justify a frisk. For a frisk, police must have a separate reasonable belief that a weapon is present and that the individual is dangerous.
 - Test-takers should be able to recognize when a hypothetical fact pattern supports a frisk in addition to a stop.

14. Plain View Exception to the Warrant Requirement: When police conduct a search pursuant to a warrant (or an exception to the warrant requirement), they may seize any incriminating evidence or contraband that is in plain view. This principle also allows police to conduct warrantless surveillance from public places, such as while standing on a public sidewalk.

- Reasons for Inclusion: Police and prosecutors often rely upon the plain view exception to the warrant requirement. The exception embodies a core concept of Fourth Amendment law: that the Amendment applies only to circumstances in which an individual has a reasonable expectation of privacy. The exception also illuminates how the Supreme Court

has approached technological innovations. Both the MBE and NextGen exams require test-takers to recall rules governing the plain view exception.

- Scope of Required Knowledge:
 - Test-takers should understand the interaction of the plain view exception with both searches based on a warrant and those permitted by the automobile exception. I.e., when police search an area pursuant to a warrant, they may seize incriminating evidence or contraband that is in plain view—even if not contemplated by the warrant. Similarly, if police have probable cause to search a car for particular evidence, they may seize any other contraband or incriminating evidence that is in plain view.
 - Test-takers should understand that police must have a lawful right of access to seize evidence observed through plain view. I.e., when police see incriminating evidence through a window, they must get a warrant or identify a second warrant exception to enter the building to seize the evidence.
 - Test-takers should also understand that the exception supports police surveillance in public spaces. Police may even surveil private spaces (such as the interior of a home) if those spaces are within plain sight of a public space (such as the public sidewalk).
 - Test-takers should know that the Supreme Court also allows police to enhance their surveillance in public spaces with technologies that are readily available to the public (such as binoculars or cameras with telephoto lenses). But police may not enhance their surveillance with technologies that are not readily available to the public. E.g., the Supreme Court held that surveillance of a private home with a thermal imaging device was an unreasonable search even though police wielding the device were in public airspace.
 - Test-takers, finally, should understand that the incriminating nature of evidence must be “immediately apparent” for the plain view exception to apply.

15. Privilege Against Self Incrimination: The Fifth Amendment protects an individual from being “compelled in any criminal case to be a witness against himself.”

- Reasons for Inclusion: The privilege against self-incrimination is a bedrock principle of U.S. criminal procedure. Both the MBE and NextGen exams require test-takers to recall elements of this protection.
- Scope of Required Knowledge:
 - Test-takers should understand that the privilege against self-incrimination applies only to persons, not to corporations or organizations.
 - They should also understand that the privilege applies to police investigations and pretrial proceedings, not just during a criminal trial. It also applies to testimony solicited in civil or administrative proceedings if answers would provide a reasonable possibility of incriminating the person in a future criminal prosecution.
 - The privilege, however, applies only to testimonial evidence, not to physical evidence like blood samples or handwriting exemplars.
 - Test-takers, finally, should understand that the defendant in a criminal case waives the privilege by taking the stand. Similarly, any voluntary statements made by an individual to police or others may be used against the individual in a criminal prosecution.

16. Right to Government-Paid Counsel: The Supreme Court has held that indigent individuals have a right to government-paid counsel at various stages of criminal proceedings against them.

- Reasons for Inclusion: The right to paid counsel for indigent defendants is another basic principle of criminal procedure. According to government reports, more than 80% of criminal defendants are indigent. The MBE and NextGen exams both require test-takers to recall this principle.
- Scope of Required Knowledge:
 - Test-takers should know that all criminal suspects have a right to government-paid counsel during custodial police interrogation.
 - They should also know that defendants charged with felonies have a right to counsel from the start of adversary proceedings (i.e., their first appearance before a judicial officer where charges are read) through sentencing. This right includes a right of counsel for the entry of guilty pleas.
 - Defendants charged with misdemeanors enjoy the same rights as felony defendants, but only if they are ultimately sentenced to time in jail. The mere potential for jail-time does not confer this right on misdemeanor defendants.
 - Test-takers need not recall the status of an indigent's right to counsel at other stages (such as during line-ups, blood tests, probation or parole hearings, appeals, or post-conviction proceedings). The Supreme Court has issued numerous rulings in those contexts that move beyond foundational knowledge.
 - Nor do test-takers have to recall the specific constitutional provisions supporting aspects of this right. The Court has tied the right to government-paid counsel to different provisions depending on the stage of the criminal proceeding.

17. *Miranda* Warnings: Before interrogating a suspect who is in custody, police must warn the suspect that they have the right to remain silent; that any statement they make may be used in court; that they have a right to an attorney who will be present during the interrogation; and that an attorney will be appointed if they are indigent.

- Reasons for Inclusion: *Miranda* warnings (and the rights they mention) are an essential protection for the accused. Both the MBE and NextGen exams require test-takers to recall the content and purpose of these warnings.
- Scope of Required Knowledge:
 - Test-takers should understand the role of *Miranda* warnings in protecting the right to counsel and right against self-incrimination (both discussed above).
 - Test-takers should also know the four elements of the warning.
 - Test-takers should understand that *Miranda* warnings are only required for custodial interrogation.
 - They should know that “custodial” includes a formal arrest, as well as a less formal encounter in which a reasonable person would not feel free to leave. Traffic stops, however, are not considered custodial.
 - Test-takers should know that “interrogation” includes not just questioning, but any words or actions that the police should know are reasonably likely to elicit an incriminating response.

18. Right to Jury Trial: The Constitution guarantees a right to trial by jury in all cases where the authorized sentence is more than six months, as well as in cases where other authorized penalties are “severe.” Juries must be composed of at least six jurors, and the verdict must be unanimous.

- Reasons for Inclusion: The right to trial by jury is a fundamental guarantee in the U.S. criminal justice system. The NextGen exam will require only familiarity with this concept, but recall of some aspects of the principle is part of a lawyer’s fundamental knowledge.
- Scope of Required Knowledge:
 - Test-takers should understand that this right applies to any crime that carries a possible penalty of more than six months imprisonment. Unlike the right to counsel cases, the actual penalty is irrelevant. If more than six months imprisonment is authorized, then the right to a jury trial arises.
 - On the other hand, test-takers should understand that this right applies almost exclusively to crimes with an authorized penalty of more than six months imprisonment. Although the Court has acknowledged the possibility that other penalties might be sufficiently severe to support the right to a jury trial, it has construed that possibility very narrowly.
 - Test-takers should know that the Supreme Court now interprets the Constitution to require juries with at least six members in criminal trials.
 - They should also know that the Court has interpreted the Constitution to require unanimous verdicts for a criminal conviction.
 - Test-takers need not be familiar with the case law distinguishing the issues that must be decided by juries from those that may be decided by the judge. Nor need they know about the rules governing the use of presumptions in criminal cases. Those bodies of case law are detailed and exceed the fundamental principles tested by the Nevada Foundational Law Exam.

19. Batson Challenges: The Equal Protection Clause forbids both the prosecution and defense from using peremptory challenges to intentionally exclude jurors based on their race, ethnicity, or gender.

- Reasons for Inclusion: *Batson* challenges are an integral part of guaranteeing fair trials to criminal defendants, as well as honoring our constitutional commitment to equal protection of the laws. The NextGen exam will not test this principle, but it is fundamental to administering criminal law in a diverse society.
- Scope of Required Knowledge:
 - Test-takers should understand the context in which *Batson* applies: the exercise of peremptory juror challenges at a criminal trial.
 - They should also understand that *Batson* restricts both the prosecution and the defense. Neither side may use peremptory challenges in a way that discriminates based on race, ethnicity, or gender.
 - They should also understand that *Batson* challenges need not match the defendant’s demographic characteristics. E.g., a white defendant may object that the prosecution has intentionally excluded jurors of color.
 - Test-takers should know that the Supreme Court has recognized the *Batson* rule only with respect to race, ethnicity, and gender. It is possible that the rule would apply to

peremptory strikes based on religion, sexual orientation, age, or other characteristics, but the law is not yet clear on that.

- Test-takers should understand the basic framework for addressing a *Batson* challenge: (1) The challenger presents evidence that supports an inference of intentional discrimination by the opposing party. (2) The opposing party has an opportunity to articulate permissible reasons for the pattern of challenges. (3) The trial judge decides whether the pattern of peremptory challenges constituted intentional discrimination. Test-takers need not know other details about this process.

20. Exculpatory Evidence: The prosecution has a constitutional obligation to disclose exculpatory evidence to the defense. “Exculpatory” evidence includes any evidence that is material to either guilt or punishment; it includes evidence that would help impeach a government witness. Courts will overturn a conviction obtained in violation of this obligation if there was “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”

- Reasons for Inclusion: The government’s obligation to disclose exculpatory information is a foundational element of the criminal justice system. This obligation underscores the fact that criminal prosecutions are not pure adversary contests. Instead, the prosecution has an ethical obligation to seek justice. The NextGen exam will require test-takers to be familiar with this concept, but not recall it. The Nevada Foundational Law Exam requires recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know the basic elements of this concept, including the fact that it includes evidence related to either guilt or punishment and that it includes impeachment evidence.
 - They should also know the standard that courts apply when reviewing a conviction obtained in violation of this concept.
 - Test-takers, finally, should know that courts may overturn a conviction obtained in violation of this principle even if the prosecutor acted in good faith or the failure to disclose was inadvertent. The critical question is prejudice to the defendant, not the prosecutor’s mental state.

Statutory Sections for the Criminal Law Portion of the Nevada Foundational Law Examination

As noted above, the criminal law portion of the Nevada Foundational Law Exam will test interpretation and application of specific statutory sections. The text of these statutes will be provided during the exam, but test-takers should familiarize themselves with the text (and the concepts outlined above) before taking the exam.

Test-takers should be aware that the Foundational Law Exam includes only portions of some statutes. In practice, they will need to examine the full text of any statutes related to a client matter.

N.R.S. § 200.471. Assault: Definitions; penalties.

1. As used in this section:

(a) “Assault” means:

- (1) Unlawfully attempting to use physical force against another person; or
- (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm.

[Subsections (b)-(j), which identify different categories of people who may be assaulted, have been omitted.]

2. A person convicted of an assault shall be punished:

- (a) If . . . the assault is not made with the use of a deadly weapon or the present ability to use a deadly weapon, for a misdemeanor.
- (b) If the assault is made with the use of a deadly weapon or the present ability to use a deadly weapon, for a category B felony

[Subsections (c)-(d), which specify different penalties depending on the nature of the person assaulted, have been omitted].

N.R.S. § 200.481. Battery: Definitions; penalties.

1. As used in this section:

(a) “Battery” means any willful and unlawful use of force or violence upon the person of another.

[Subsections (b)-(l), which identify different categories of people who may be victims of battery, have been omitted.]

2. . . . a person convicted of a battery . . . shall be punished:

- (a) If the battery is not committed with a deadly weapon, and no substantial bodily harm to the victim results, . . . for a misdemeanor.
- (b) If the battery is not committed with a deadly weapon, and either substantial bodily harm to the victim results or the battery is committed by strangulation, for a category C felony

[Subsections (c)-(d), which specify penalties for batteries committed against particular categories of people, have been omitted.]

(e) If the battery is committed with the use of a deadly weapon, and:

(1) No substantial bodily harm to the victim results, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, and may be further punished by a fine of not more than \$10,000.

(2) Substantial bodily harm to the victim results or the battery is committed by strangulation, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than \$10,000.

[Subsections (f)-(g), which specify penalties for batteries committed by probationers, prisoners, or parolees, are omitted.]

N.R.S. § 0.060. “Substantial bodily harm” defined.

Unless the context otherwise requires, “substantial bodily harm” means:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
2. Prolonged physical pain.

NRS 484B.657. Vehicular manslaughter; penalty

1. A person who, while driving or in actual physical control of any vehicle on a highway or premises to which the public has access, proximately causes the death of another person through an act or omission that constitutes simple negligence is guilty of vehicular manslaughter and shall be punished for a misdemeanor.

[Section 2, which provides for additional penalties under certain circumstances, has been omitted. Sections 3-4, which require entry of any conviction on the defendant’s driving record, have also been omitted.]

N.R.S. §205.220 Grand Larceny: Definition.

. . . a person commits grand larceny if the person:

1. Intentionally steals, takes and carries away, leads away or drives away:

(a) Personal goods or property, with a value of \$1,200 or more, owned by another person;

(b) Bedding, furniture or other property, with a value of \$1,200 or more, which the person, as a lodger, is to use in or with his or her lodging and which is owned by another person; or

(c) Real property, with a value of \$1,200 or more, that the person has converted into personal property by severing it from real property owned by another person.

2. Uses a card or other device for automatically withdrawing or transferring money in a financial institution to obtain intentionally money to which the person knows he or she is not entitled.

3. Intentionally steals, takes and carries away, leads away, drives away or entices away:

(a) One or more head of livestock owned by another person; or

(b) One or more domesticated animals or domesticated birds, with an aggregate value of \$1,200 or more, owned by another person.

[Portions of the statute referring to theft of firearms or motor vehicles, as well as additional provisions related to livestock, have been omitted.]

N.R.S. § 205.060. Residential burglary . . . : Definitions

1. A person who, by day or night, unlawfully enters or unlawfully remains in any:

(a) Dwelling with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of residential burglary.

[Subsections (b)-(d), which define other types of burglary, have been omitted.]

[Sections 2-5, which relate to penalties and venue, have been omitted.]

6. As used in this section:

. . . .

(b) "Dwelling" means any structure, building, house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle, house trailer, travel trailer, motor home or railroad car, including, without limitation, any part thereof that is divided into a separately occupied unit:

(1) In which any person lives; or

(2) Which is customarily used by a person for overnight accommodations, regardless of whether the person is inside at the time of the offense.

. . . .

(d) "Unlawfully enters or unlawfully remains" means for a person to enter or remain in a dwelling . . . or any part thereof, including, without limitation, under false pretenses, when the person is not licensed or privileged to do so. For purposes of this definition, a license or privilege to enter or remain in a part of a dwelling . . . that is open to the public is not a license or privilege to enter or remain in a part of the dwelling . . . that is not open to the public.

[Language and subsections related to other types of burglary have been omitted.]

NRS § 193.220 When voluntary intoxication may be considered. No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a

necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

NRS § 193.153 Punishment for attempts.

1. An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.

NRS § 195.020 Principals.

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether the person directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him or her.

Foundational Concepts of Evidence Law Tested on the Nevada Foundational Law Exam

Introduction: Test-takers will be expected to recall the twenty concepts listed below and to apply them to hypothetical fact patterns. Except as explicitly noted, all the concepts on this list draw from the Federal Rules of Evidence. Evidentiary rules in state courts are quite similar to the federal rules, but (except for concept 17 below), the Nevada Foundational Law Exam does not test state law.

Test-takers do not need to memorize rule numbers or statutory sections; those are cited here only for reference.

The twenty tested concepts embody five foundational principles that all lawyers should understand about rules of evidence:

- Evidence is admissible only if it is relevant.
- The rules exclude some evidence, even though it is relevant, because it might mislead the jury or needlessly prolong the trial.
- Second-hand statements (hearsay) are one type of evidence that may mislead jurors. The rules exclude many, but not all, of those statements. The admissibility of hearsay depends largely on the potential for a category of statements to mislead the jury.
- The rules exclude some evidence—even though it is relevant, and jurors would find it helpful—to advance policy objectives.
- Lawyers must lay a proper foundation for the evidence they offer.

Principle One: Evidence is admissible only if it is relevant.

1. **Definition of Relevance.** “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.
 - Reasons for Inclusion: The definition of relevance is critical for lawyers planning a trial or presenting a case in court. Both the MBE and NextGen exams require recall of this concept.
 - Scope of Required Knowledge:
 - Test-takers should understand that this standard is quite lenient. A piece of relevant evidence does not have to prove (or disprove) a fact conclusively; it merely needs to contribute to proving or disproving that fact.
 - Test-takers need not recall the specific phrases in this rule. Some lawyers and judges refer to facts “of consequence,” as the rule does; others refer to “material facts” or “disputed facts.” Test-takers only need to understand the rule’s thrust: evidence is relevant if its proponent can point to a link between the evidence and a disputed matter.
2. **Only Relevant Evidence Is Admissible.** “Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or

other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.” Fed. R. Evid. 402.

- Reasons for Inclusion: This is the most fundamental concept of evidence law. Both the MBE and NextGen exams require recall of this definition.
- Scope of Required Knowledge:
 - Test-takers should understand the relationship between this rule and the other rules of evidence. Irrelevant evidence is never admissible—even if it is admissible under other rules. Relevant evidence, on the other hand, is admissible only if it also satisfies the other rules.
 - Test-takers should know that constitutional provisions, statutes, or other rules may exclude relevant evidence. They do not, however, need to know any of those specific provisions or rules beyond the ones in this content scope outline.

Principle Two: The rules exclude some evidence, even though it is relevant, because it might mislead the jury or needlessly prolong the trial.

3. General Rule Excluding Relevant Evidence for Unfair Prejudice, Confusion, or Delay.

“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

- Reasons for Inclusion: This rule articulates the second fundamental concept of evidence law. Although the rules give parties significant discretion to choose the evidence they offer at trial, the judge will exclude evidence that poses too much danger of unfairly prejudicing the jury, confusing the jury, or wasting time. Both the MBE and NextGen exams require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should know these three phrases: “probative value,” “substantially outweighed,” and “unfair prejudice.” Those phrases are terms of art that lawyers use in the courtroom.
 - They should understand that the rule favors admission. I.e., one of the enumerated factors must “substantially outweigh” probative value.
 - Test-takers should know that, although the rule is most often used to exclude unfairly prejudicial evidence, it can be used to exclude evidence that is misleading in other ways or unduly repetitive.
 - Test-takers should understand the difference between “prejudicial” evidence and “unfair prejudice.” Almost all evidence offered at trial prejudices the opposing party. An advocate urging exclusion must be able to explain why the prejudice is “unfair.”
 - Test-takers should know the most common example of unfairly prejudicial evidence: photos, videos, or other evidence that might inflame the jurors’ passions so much that they reflexively punish the defendant without carefully considering whether the defendant is responsible for the alleged wrongdoing.
 - Test-takers should understand that application of this rule lies within the discretion of the trial judge. Parties have wide latitude to argue for (or against) application of this rule, and appellate courts rarely reverse these determinations.

- Test-takers should be aware that application of this rule requires sensitivity to variations among cultures and populations. Evidence that a suspect fled from the police, for example, may be probative of the suspect’s knowledge of guilt. But if the suspect is a Black man, that probative value falls: Black men may flee the police because they fear harassment or abuse. The unfairness of any prejudice, similarly, may vary depending on cultural and other circumstances.
- Test-takers should understand that parties often combine an objection under this rule with an objection under another, more specific rule.
- Test-takers, finally, should understand that this rule may exclude evidence that is admissible under other rules but it cannot admit evidence that is excluded by other rules. A hearsay statement, for example, cannot be admitted because a judge finds that any unfair prejudice does not outweigh the probative value.

4. Other Crimes, Wrongs, or Acts: Prohibited Uses. “Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Fed. R. Evid. 404(b)(1). In other words, these acts cannot be used to show the person’s propensity to act in a particular way.

- Reasons for Inclusion: This rule represents a particular application of the general concept prohibiting unfairly prejudicial evidence. Jurors should not be tempted to reward parties for their good character or punish them for a bad character; instead, trials focus on specific acts by the parties. Both the MBE and NextGen exams require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should know that lawyers and judges often refer to the evidence excluded by this rule as “propensity” evidence, “character evidence,” or “evidence of other acts.”
 - They should understand that this rule maintains a trial’s focus on specific disputed acts, rather than on the general character of the parties.
 - Test-takers should know that this prohibition applies to crimes, wrongs, or acts that occur before or after the disputed acts. There is no temporal limit.
 - Test-takers should also understand that the prohibition applies to good acts as well as bad ones.

5. Other Crimes, Wrongs, or Acts: Permitted Uses. Although Rule 404(b)(1) prohibits evidence of other crimes, wrongs, or acts to show propensity, Rule 404(b)(2) contains an important exception: “This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

- Reasons for Inclusion: This rule provision offers an essential complement to the previous one, and litigants frequently invoke it. When other crimes, wrongs, or acts are offered for a non-propensity purpose, they may not be unfairly prejudicial. Both the MBE and NextGen exams require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers do not need to memorize the “other purposes” listed in this rule, but they should be able to identify other purposes when they arise in a hypothetical. They should also understand that permissible “other purposes” are not limited to the ones listed in the rule.

- Test-takers should understand that judges apply the “unfair prejudice” provision of Rule 403 with special care to evidence proffered under Rule 404(b)(2). Jurors will struggle to confine evidence to the purpose specified under 404(b)(2); it is very tempting to use that evidence to make forbidden propensity inferences. Judges, therefore, sometimes find that the unfair prejudice of the evidence outweighs its probative value—even though the evidence would be admissible under 404(b)(2).

6. Lay Opinion. Speculative testimony from lay witnesses can mislead the jurors. For that reason, the rules limit the scope of opinions offered by a witness who has not been qualified as an expert: “If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [the rule governing expert testimony.]” Fed. R. Evid. 701.

- Reasons for Inclusion: The limits on lay opinions, as well as the distinction between lay and expert testimony, are fundamental. Both the MBE and NextGen exams require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should understand that the rules distinguish between lay and expert witnesses.
 - They should also understand how to apply the three foundational elements for expression of a lay opinion: (1) rationally based on the witness’s perception, (2) helpful to the decisionmaker, and (3) not requiring specialized knowledge.
 - Finally, test-takers should know some examples of opinions that judges regularly allow lay witnesses to offer. E.g., that an individual was happy, sad, frightened, or drunk.

7. Subject Matter for Expert Testimony. Testimony from expert witnesses may also mislead jurors, especially if the science behind their opinions is unfounded. Trial judges, therefore, serve as gatekeepers for expert testimony. Fed. R. Evid. 702 provides in part: “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that . . . (c) the testimony is the product of reliable principles and methods.” When making that determination, trial judges consider the factors set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

- Reasons for Inclusion: Expert testimony plays a significant role in both civil and criminal trials, and the trial judge’s role as gatekeeper is critical for lawyers to understand. Both the MBE and NextGen exams require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should understand the policy behind the rule: Jurors may place too much faith in expert witnesses, even if the bases of their testimony are unsound. Trial judges therefore play an important role as gatekeepers for expert testimony.
 - Test-takers do not need to recall all the *Daubert* factors or the name of that case. But they should understand that a court may find subject matter sufficiently reliable even if the expert’s technique or theory is not generally accepted in the scientific

community. Meeting that criterion is neither necessary nor sufficient for admission of the expert's testimony.

- Test-takers should also have some sense of the other factors that courts will weigh: (1) whether the theory or technique has been tested; (2) whether it has been subject to peer review and publication; (3) the technique's error rate; (4) the existence of standards controlling the technique's application; and (5) any other factor useful in determining the scientific validity of the principles underlying the expert's testimony. Again, though, test-takers need not recall all those factors.
- Test-takers should know that the party offering expert testimony bears the burden of proving (by a preponderance of the evidence) the reliability of that evidence.
- Test-takers are not responsible for knowing other requirements related to the subject matter of expert testimony. Those requirements are complex, reaching far beyond foundational knowledge. The concept of reliability is the core element of those requirements, appropriate for testing on the Foundational Law Exam.

Principle Three: Second-hand statements (hearsay) are one type of evidence that may mislead jurors. The rules exclude many, but not all, of those statements. The admissibility of hearsay depends largely on the potential for a category of statements to mislead the jury.

8. **Definition of "Statement."** The rule against hearsay applies only to statements, not actions. A statement is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a).
- **Reasons for Inclusion:** To apply the rule against hearsay properly, litigants must understand the rule's definition of "statement." Both the MBE and NextGen exams require recall of this rule.
 - **Scope of Required Knowledge:**
 - Test-takers should be able to identify different forms of communication that qualify as statements.
 - Test-takers should also be able to identify when audiotapes, photographs, social media, or movies constitute (or contain) hearsay.
 - The exam, however, will not test application of the rule to machine readouts. Treatment of those readouts can be complex, especially given the development of new technologies.
9. **The Rule Against Hearsay.** Hearsay is any "statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). "Hearsay is not admissible" unless it falls within one of the exceptions specified by the rules. Fed. R. Evid. 802.
- **Reasons for Inclusion:** The rule against hearsay is a foundational evidentiary concept that excludes potentially misleading evidence from the courtroom. Jurors may give too much credence to second-hand statements. Both the MBE and NextGen exams require recall of this rule.
 - **Scope of Required Knowledge:**
 - Test-takers should be able to distinguish between out-of-court statements that are offered for the truth of the matter asserted and those that are offered for a different

purpose (such as showing notice, knowledge, or effect on the speaker). When a witness repeats an out-of-court statement simply to show that the statement was made (rather than to establish the truth of the matter asserted), there is little chance of misleading the jury. The witness has personal knowledge that the statement was made and can be cross-examined on that knowledge.

- Test-takers should also understand that the latter statements are admissible without the need to identify a hearsay exception. Unless it is offered for the truth of the matter asserted, an out-of-court statement is not hearsay.
- Test-takers should understand that the rule against hearsay applies to a witness's recounting of their own out-of-court statements. Unless an exception applies, those statements are hearsay.

10. Admissibility of an Opposing Party's Statement. An out-of-court statement is admissible if it "is offered against an opposing party and (A) was made by the party in an individual or representative capacity; [or] (B) is one the party manifested that it adopted or believed to be true." Fed. R. Evid. 801(d)(2).

- Reasons for Inclusion: This is the most frequently used exception to the rule against hearsay. It represents the policy judgment that parties should not be able to disavow their own words. In addition, these out-of-court statements are unlikely to mislead jurors: the party can take the stand to clarify or refute the previous statement. The MBE and NextGen exams both require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should understand that this rule applies only when a statement is offered *against* the party who made it. Parties may not introduce their own out-of-court statements, which may be self-serving.
 - Test-takers should be able to apply this rule both to statements made directly by a party and to statements that a party adopted.
 - Test-takers should know that the statement of an opposing party is admissible even if the opposing party lacked personal knowledge of the truth of the matter asserted in the statement.
 - Test-takers need not recall that the federal rule defines these statements as "not hearsay" rather than as statements excepted from the rule. Lawyers and judges still refer to this as an opposing party "exception."

Note About the Sixth Amendment: The Supreme Court has developed a complex body of case law analyzing Sixth Amendment constraints on the admission of statements under some hearsay exceptions. For the Foundational Law Exam, test-takers will not need to recall that case law, which continues to evolve. Questions will be constructed to avoid raising any possible Sixth Amendment concerns.

11. Admissibility of Present Sense Impression. A hearsay statement is admissible if it is one "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1).

- Reasons for Inclusion: This is a classic exception to the rule against hearsay, which has assumed increasing importance in the age of cell phones and social media. These present-sense impressions are less likely to mislead jurors when repeated in the courtroom

because the out-of-court speaker had little time to formulate a lie. In addition, the statements are often useful to jurors. The MBE and NextGen exams both require recall of this rule.

- Scope of Required Knowledge:
 - Test-takers should understand that this exception includes only descriptions, not opinions or analysis.
 - They should also understand that the description must be made while perceiving the event or immediately thereafter.

12. Admissibility of Excited Utterances. A hearsay statement is admissible if it is one “relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” Fed. R. Evid. 803(2).

- Reasons for Inclusion: This is another classic hearsay exception, frequently used in both criminal and civil cases. Once again, these utterances are unlikely to mislead jurors because of the circumstances surrounding them. In addition, they often assist jurors. The MBE and NextGen exams both require recall of this rule.
- Scope of Required Knowledge:
 - Test-takers should understand the difference between this exception and the one for present-sense impressions. This exception admits opinions and analyses (not just descriptions) if they meet the “excitement” condition. Similarly, excited utterances need not be made while perceiving the exciting event or immediately thereafter.
 - Statements are admissible as excited utterances, however, only if the declarant was genuinely excited when the statement was made. Test-takers should understand that this is a subjective test focused on the declarant’s own state of excitement.

13. Admissibility of Recorded Recollection. A hearsay statement is admissible if it is based on a “record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness’s memory; and (C) accurately reflects the witness’s knowledge.” Fed. R. Evid. 803(5).

- Reasons for Inclusion: Litigants frequently rely upon this exception in both civil and criminal lawsuits. This is yet another category of out-of-court statements that are unlikely to mislead jurors. The MBE and NextGen exams both require recall of this principle.
- Scope of Required Knowledge:
 - Test-takers should know and be able to apply the requirements for admitting a statement under this exception. This includes the requirement that the witness must testify that they cannot recall the matter well enough to testify fully and accurately.
 - Test-takers should also know that recordings subject to this exception are not admitted directly into evidence. Instead, they are read into evidence. This prevents the hearsay statements from having more effect than oral testimony. An adverse party, however, may have the recording admitted into evidence.

14. Unavailable Declarants. “A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies; (2) refuses to testify about the subject matter despite a court order to do so; (3) testifies to not remembering the subject

matter; (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance" Fed. R. Evid. 804(a).

- Reasons for Inclusion: Knowledge of this definition is essential to apply the hearsay exception for former testimony (below). Both the MBE and NextGen exams require recall of the concept of unavailability.
- Scope of Required Knowledge:
 - Test-takers should be familiar with the five types of unavailability noted above. Each of these categories represents a situation in which a party might be unfairly hampered by the unavailability of a witness.
 - Test-takers should know that the "reasonable means" referred to in subsection (5) includes offering to pay an out-of-state witness's expenses.
 - The exam will not test knowledge of the final provision in Rule 804(a), that the rule "does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying." The case law under this provision is complex, exceeding foundational knowledge.

15. Admissibility of Former Testimony. When a witness is unavailable (as defined by Rule 804(a) above), then this type of hearsay is admissible: "Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1).

- Reasons for Inclusion: Litigants frequently use this hearsay exception to admit deposition testimony in civil trials. Knowledge of this rule connects test-takers' understanding of depositions (tested on the Civil Procedure portion of the exam) with their understanding of evidentiary concepts. The MBE and NextGen exams both require recall of this rule.
- Scope of Required Knowledge:
 - This rule will be tested only in the context of civil trials. Test-takers will not be asked to apply this rule in the context of a criminal trial or to recall the Sixth Amendment's relationship to this rule.
 - Test-takers should know the proceedings from which prior testimony may be drawn (trials, hearings, or lawful depositions).
 - They should also know that these proceedings could have occurred in the same matter or a different matter, as long as the rule's criteria are met.
 - Test-takers should understand that "an opportunity" to develop testimony requires only *opportunity*: testimony may be admitted against a party even if they did not exercise that opportunity.
 - Test-takers should also understand the concept of a "similar motive" in the context of civil cases.
 - Test-takers should know that former testimony may be admitted regardless of the proponent's role (direct examination or cross-examination) in the prior proceeding: It is only necessary to show that the opposing party had an opportunity to develop the testimony.

Principle Four: The rules exclude some evidence—even though it is relevant, and jurors would find it helpful—to advance policy objectives.

16. Subsequent Remedial Measures. “When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence” Fed. R. Evid. 407.

- Reasons for Inclusion: This rule arises frequently in civil cases, and it provides an excellent example of evidence that is excluded to advance a policy objective. The MBE and Nevada Foundational Law Exam test the rule for those reasons, although the NextGen exam will not require recall of the rule.
- Scope of Required Knowledge:
 - Test-takers should understand that the evidence excluded by this rule is relevant; it often provides strong evidence that a defendant was negligent. They should also understand that the evidence may not be unfairly prejudicial. Instead, the rules exclude this evidence for a distinctive policy reason: to encourage defendants to remedy harms before additional parties are injured.
 - Test-takers should know that remedial “measures” include any actions taken by the defendant. These may include physical repairs, warnings, product recalls, and policy changes.
 - They should also understand that the remedial measure must have been taken after the plaintiff was injured. That time limit stems from the rule’s policy objective—although it sometimes produces contradictory results in lawsuits brought by different parties.
 - Test-takers, finally, should know that evidence of subsequent remedial measures may be introduced for a purpose other than proving negligence. These measures, for example, may be introduced to impeach a witness. The measures may also be introduced to prove ownership, control, or the feasibility of precautionary measures—but only if those facts are disputed.
 - The Nevada Foundational Law Exam will test only application of this rule to negligence claims. It will not test application of the rule to products liability, actions for breach of contract, or other types of claims. Those portions of the rule have been omitted from the language quoted above.

17. Attorney-Client Privilege. Communications protected by the attorney-client privilege are inadmissible. For the privilege to exist, the communication must have been made confidentially between a lawyer and client for the purpose of obtaining or providing professional legal services.³

- Reasons for Inclusion: The attorney-client privilege is central to any lawyer’s practice, and it represents a second type of relevant evidence that courts exclude to advance a policy objective (encouraging candid discussions between clients and their lawyers). The MPRE extensively tests knowledge of this privilege, so the Nevada Foundational Law Exam focuses just on the core elements of the privilege. The MBE and NextGen exams similarly require recall of those core elements.

³The Federal Rules of Evidence do not codify any attorney-client privilege, so the Nevada Foundational Knowledge Exam tests Nevada’s definition of the privilege in NRS §§ 49.045-49.095. This definition is consistent with the privilege recognized in other states and under federal common law.

- Scope of Required Knowledge:
 - Test-takers should understand that communications are privileged only if they are confidential. Communications made in the presence of third parties are not privileged.
 - Test-takers should know that the presence of a third party won't defeat the privilege if that third party is essential to facilitate the attorney-client communication. Interpreters, assistants who take notes of the conversation, and consulting experts are common examples of third parties whose presence does not defeat the privilege.
 - Test-takers should know that the privilege does not cover pre-existing documents or other evidence that a client discusses with their attorney. The discussion falls within the privilege, but not the pre-existing evidence.
 - Test-takers should also understand that the communication must be made for the purpose of facilitating professional legal services.
 - Test-takers, finally, should understand that the privilege applies to communications with lawyers authorized to practice in any jurisdiction—and even to nonlawyers that the client reasonably believes are authorized to practice.
 - The Nevada Foundational Law Exam focuses only on communications between an individual client and an attorney, which are the core elements of the privilege. The MPRE tests other concepts related to clients who are organizations or corporations; the rules governing representatives of the client or lawyer; and the rules governing clients with common interests.

Principle Five: Lawyers must lay a proper foundation for the evidence they offer.

18. Foundation for Lay Witness Testimony. The foundation for a lay witness's testimony consists of the witness's personal knowledge: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602.

- Reasons for Inclusion: The NextGen exam will not require recall of this rule, but it is a fundamental one for all lay witness testimony. This is also a logical companion for the rule governing authentication, which NextGen will test. For those reasons, the MBE and Nevada Foundational Law Exam include this rule.
- Scope of Required Knowledge:
 - Test-takers should be able to identify personal knowledge and second-hand knowledge in hypotheticals. This ability is particularly important when applying the rule against hearsay and its exceptions.
 - Test-takers should understand that a witness may establish their own personal knowledge through testimony. It is not necessary to provide independent evidence of a witness's personal knowledge.
 - Test-takers should understand, finally, that some types of lay witness testimony require a further foundation. Admitting an out-of-court statement as an excited utterance, for example, requires the party to establish the criteria for that exception. The requirement of personal knowledge, however, applies to all lay witness testimony: it is the basic foundation that must be laid.

19. Foundation for Expert Witness Testimony. Expert witnesses may testify beyond their personal knowledge. The rule requiring personal knowledge for lay witnesses (above) concludes: “This rule does not apply to a witness’s expert testimony.” Fed. R. Evid. 602. Instead, an essential part of laying the foundation for expert testimony is showing that the witness “is qualified as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702.

- Reasons for Inclusion: Expert testimony plays a significant role in both civil and criminal trials. Lawyers should understand that, although experts may testify to matters beyond their personal knowledge, they must demonstrate their qualifications as an expert. The MBE requires recall of this rule, although the NextGen exam will not. The Nevada Foundational Law Exam follows the MBE by requiring recall of this rule, but which is a foundational one.
- Scope of Required Knowledge:
 - Test-takers should know that expert witnesses are allowed to base their opinions on matters outside their personal knowledge.
 - Test-takers should understand that the expert’s qualifications form an essential part of laying the foundation for expert testimony.
 - They should also understand that formal education and training are not essential to qualify a witness as an expert. Knowledge, skills, and experience gained in less formal ways may suffice.
 - Test-takers, finally, should understand that witnesses who would qualify as experts may also testify from a lay perspective; a party does not have to qualify these witnesses as experts. If a witness testifies as a lay witness, however, the witness is bound by the rules governing lay witnesses.

20. Authentication. Parties lay the foundation for non-testimonial evidence by authenticating the evidence. “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Two common methods for authenticating evidence are: (1) Testimony by a “witness with knowledge” that the “item is what it is claimed to be,” and (2) “The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” Fed. R. Evid. 901(a)(1) & (4).

- Reasons for Inclusion: Authentication provides the essential foundation for admitting non-testimonial evidence. The MBE and NextGen exams both require recall of this principle.
- Scope of Required Knowledge:
 - Test-takers should know the standard applied to authentication, “evidence sufficient to support a finding that the item is what the proponent claims it is,” although they need not recall those exact words.
 - They should also understand that this standard is quite low. A proponent clears this bar simply by providing some evidence that the evidence is what the proponent claims.
 - Test-takers should know that witness testimony is sufficient to authenticate pieces of evidence.

- They should also know that a common method of authenticating evidence is to point to the distinctive characteristics of that evidence.
- Test-takers, finally, should understand that an opponent may dispute the authenticity of evidence that has been admitted. Authentication simply gets evidence in the door; opponents may still challenge the veracity of the evidence.
- For the Foundational Law Exam, test-takers need not recall other means of authentication described in Rule 901. Nor need they recall what types of evidence are self-authenticating under Rule 902. The points identified above are sufficient for foundational knowledge.

Foundational Concepts of Real Property Law Tested on the Nevada Foundational Law Exam

Test-takers will be expected to know these concepts of real property law and to apply them to hypothetical fact patterns. Any citations provided are included here only for reference. Test-takers will not be expected to cite statutes or secondary sources.

The concepts tested on the exam fall into six foundational categories:

- Ownership and Co-ownership
- Leasehold Rights and Duties
- Title Conveyance
- Sales and Financing
- Possessory and Non-Possessory Rights
- Interference with the Rights of Others

Category One: Ownership and Co-ownership

- 1. Fee Simple Ownership:** Fee simple ownership (also known as fee simple absolute ownership) is the highest and most complete form of real property ownership.
 - **Reasons for Inclusion:** The fee simple estate is the most common form of property ownership. Recall of fee simple ownership is tested on the MBE and NextGen exams.
 - **Scope of Required Knowledge:**
 - Test-takers should recognize words of conveyance that create fee simple ownership, such as “to A and her heirs,” or “to A.”
 - Test-takers should understand that fee simple ownership may be granted by conveyance, will, or inheritance.
 - Test-takers should understand that the fee simple absolute has perpetual duration and is fully alienable.
 - Test-takers should understand that the estate of a fee simple owner who dies intestate will escheat to the state.
 - Test-takers should understand that, despite its name, fee simple ownership is not “absolute.” The law allows many limits on fee simple ownership, including zoning restrictions, taxation, and debt obligations. Test-takers, however, need not be familiar with the specifics of those restrictions except as noted on this outline.
 - Nor do test-takers need to know about future interests that may modify the fee simple or make it defeasible. These doctrines are no longer common in entry-level practice; they will not be tested on the NextGen exam.

- 2. Tenancy in Common:** A tenancy in common is a present estate in real property that is simultaneously owned by two or more persons who each hold the right to concurrent possession.
 - **Reasons for Inclusion:** The tenancy in common is the most common form of co-tenancy. *See* 2 AM. L. PROP. §7.1-7.36. It is also the default concurrent estate: All U.S. jurisdictions have statutorily created a presumption of a tenancy in common whenever two or more persons have a current and equal right to possession and use of property. *See*

AM. L. PROP. §6.3, note 1. Recall of tenancy in common is tested on the MBE and NextGen exams.

- Scope of Required Knowledge:
 - Test-takers should recognize that any conveyance to two or more persons will establish a tenancy in common unless both the intent and legal elements to create another recognized co-tenancy are present.
 - Test-takers should know that a tenancy in common may arise involuntarily through intestate succession.
 - Test-takers should understand that each tenant in common owns an undivided fractional share of the entire property that is fully alienable.
 - Test-takers should know that each tenant in common is entitled to simultaneous possession and use of the entire property.
 - Test-takers should know that a tenant in common has the power to sell, give, devise, or otherwise dispose of her undivided share in the same manner as if she were the sole owner of the property.

- 3. Joint Tenancy:** “Joint tenancy” or “joint tenants” describes a relationship in which two or more owners simultaneously hold identical interests in real property conveyed by the same instrument and with the same right of possession, and in which a joint tenant has a right of survivorship to the other joint tenants’ share.
 - Reasons for Inclusion: Understanding the operation of survivorship principles is foundational for new lawyers in several practice areas. Both the MBE and NextGen exams test recall of joint tenancy principles.
 - Scope of Required Knowledge:
 - Test-takers should know that the law disfavors joint tenancies. Express language is necessary to create a joint tenancy, such as “to A and B as joint tenants with right of survivorship.”
 - Test-takers should know that an owner may create a joint tenancy by self-conveyance to themselves and at least one other owner.
 - Test-takers should know that all joint tenants have equal rights to possession and use of the entire property.
 - Test-takers should understand that the fractional interest of each joint tenant is freely alienable, but conveying the fractional interest converts the relationship into a tenancy in common.
 - Test-takers should know that upon the death of one joint tenant their interest remains with the surviving joint tenants, and that a sole surviving joint tenant owns the full property in fee simple absolute.
 - Test-takers should know that a joint tenancy terminates when the full interests of all joint tenants are transferred in a single conveyance, unless the conveyance itself creates a new joint tenancy.

- 4. Severance:** Severance is the act of converting all or a fractional portion of a joint tenancy into a tenancy in common.
 - Reasons for Inclusion: New lawyers should understand the acts that may terminate a joint tenancy. Both the MBE and NextGen test recall of severance principles.
 - Scope of Required Knowledge:

- Test-takers should know that a joint tenancy can be terminated by a suit for partition. Any joint tenant may bring such a suit.
- Test-takers should know that a unilateral inter vivos conveyance by any joint tenant severs the joint tenancy and creates a tenancy in common as to that interest, but that the joint tenancy remains intact as to the unsevered joint interests.
- Test-takers should know that in most states, one joint tenant’s execution of a mortgage on their interest does not sever the tenancy.

5. Tenancy by the Entirety: A tenancy by the entirety is a type of real property ownership available only to spouses. The estate is similar to a joint tenancy because it has a right of survivorship.

- Reasons for Inclusion: Tenancies by the entirety are common types of land ownership. Understanding the details of these tenancies is fundamental to both property and family law. The MBE and NextGen exams both require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know that most states presume that a conveyance of real property to both spouses creates a tenancy by the entirety. A conveyance must use express language to create a different type of co-ownership.
 - Test-takers should know that a tenancy by the entirety includes a right of survivorship. In this respect, it resembles a joint tenancy.
 - Test-takers should know that severance is more limited for a tenancy by the entirety than for a joint tenancy. A tenancy by the entirety cannot be severed by petition or by the action of just one spouse.
 - Test-takers should understand that in most states, divorce will convert a tenancy by the entirety to a co-tenancy—unless the spouses mutually agree to a different disposition.
 - Test-takers should know that, in most states, an individual spouse cannot convey or encumber property that is held as a tenancy by the entirety. A deed or mortgage executed by just one spouse is ineffective.

Category Two: Landlord-Tenant Law

6. The Landlord-Tenant Relationship: A property owner may grant another person a present possessory interest in their property, while retaining a future interest. The grantor is the landlord, the grantee is the tenant, and the interest conveyed to the tenant is a leasehold interest.

- Reasons for Inclusion: Landlord-tenant relationships are common for both residential and commercial properties. Both the UBE and the NextGen exams require recall of basic concepts related to leasehold interests.
- Scope of Required Knowledge:
 - Test-takers should know that most modern leaseholds are created through written leases.
 - Test-takers should know that most states, including Nevada, require leaseholds of more than one year to be conveyed in writing. This requirement is part of the Statute of Frauds.
 - Test takers should know that a lease renewal creates a new term for purposes of the

Statute of Frauds.

- Test-takers should know that, when a lease term is ambiguous, courts will construe the term against the drafter of the lease (which is usually the landlord).

- 7. Holdover Tenancy:** Holdover tenancy, also referred to as tenancy at sufferance, arises when a tenant remains in possession after the termination of the agreed lease term.
- Reasons for Inclusion: Holdover tenancy is a foundational concept. Both the UBE and the NextGen exams require recall of rules related to a holdover tenancy.
 - Scope of Required Knowledge:
 - Test-takers should understand that the landlord holds the power to create a holdover tenancy by not taking actions to evict the holdover tenant.
 - Test-takers should know that the terms of the holdover tenancy will be identical to the terms of the expired lease unless the landlord has provided written notice of new terms prior to the holdover.
 - Test-takers should know that the term of a holdover tenancy will not exceed one year unless the landlord gives written notice of a longer term.
 - Test-takers should know that a landlord has the option to treat a holdover tenant as a trespasser and evict the holdover tenant. The landlord, however, may exercise this option only if the landlord has not accepted rent or knowingly allowed the tenant to remain on the premises after the expiration of the prior lease term.
- 8. Assignments:** An assignment occurs when a tenant conveys their entire leasehold interest or all that remains of it to a third party. Every tenant has the power of alienation and may convey all or part of their leasehold interest, including the obligation to pay rent, unless the lease terms specify otherwise.
- Reasons for Inclusion: Assignment is a foundational concept. Both the UBE and NextGen exams require recall of this concept.
 - Scope of Required Knowledge:
 - Test-takers should know that, absent a contradictory provision in a lease agreement, a tenant has the right to assign their interest in the property to a third party without the landlord's knowledge or consent.
 - Test-takers should know that an assignment surrenders the full interest and rights of the tenant to the assignee.
 - Test-takers should know that, once a lease has been assigned, the landlord may proceed directly against the assignee to enforce terms of the lease (including the payment of rent).
 - Test-takers should know that even after assigning their rights, a tenant remains liable to the landlord for all the obligations under the lease agreement unless the parties have agreed otherwise. The landlord, in other words, may proceed against both the original tenant and the assignee to enforce the terms of the lease.
- 9. Implied Warranty of Habitability:** Every residential lease contains an implied warranty of habitability that requires a landlord to deliver and maintain premises in a fit and habitable condition.
- Reasons for Inclusion: Every jurisdiction in the United States offers protection to residential lessees through either a statutory or judicially imposed implied warranty of

habitability. This protection is a foundational part of modern property law. Both the MBE and NextGen exams require recall of this concept.

- Scope of Required Knowledge:
 - Test-takers should know that a residential landlord has an obligation to deliver and maintain premises in a condition that is safe and suitable for human habitation.
 - Test-takers should know that this warranty cannot be waived.
 - Test-takers should know that there is no implied warranty of habitability applicable to commercial leases.
 - Test-takers should know that fit and habitable conditions are, generally, those materially affecting the life, health, and safety of an occupant.
 - Test-takers should know that the remedies available to tenants under the implied warranty include self-repair and deducting those costs from the rent, withholding rent until the condition is remedied, and termination of the lease.

10. Constructive Eviction: Constructive eviction occurs when a landlord's actions or inaction interferes so substantially with the tenant's use and enjoyment of the premises that the tenant has effectively lost use of the leased premises. The doctrine of constructive eviction is based on a breach of the covenant of quiet enjoyment.

- Reasons for Inclusion: A covenant of quiet enjoyment is an implied term in every lease, including both residential and commercial leases. Both the MBE and NextGen exams require recall of the concepts of quiet enjoyment and constructive eviction.
- Scope of Required Knowledge:
 - Test-takers should understand that a breach of the covenant of quiet enjoyment occurs when a tenant is substantially and materially deprived of use and enjoyment of the premises. Examples include flooding and loss of heat in the winter.
 - Test-takers should know that the tenant must give the landlord notice and a reasonable time to repair before claiming breach of the covenant of quiet enjoyment.
 - Test-takers should know that a tenant must demonstrate full or partial constructive eviction before recovering under a claim of breach of the covenant of quiet enjoyment.
 - Test-takers should know that "loss of use" of residential property typically requires that the tenant move out.
 - Test-takers should know that a tenant who has been constructively evicted may terminate the lease and also seek damages.
 - Test-takers should understand that tenants often raise constructive eviction as a defense against a landlord's suit to recover rent.

Category Three: Title Conveyance

11. Deeds and Recording: A deed is a written document or electronic record that is legally recognized to symbolize title ownership in land. Recording provides notice to future purchasers that title to property has been transferred.

- Reasons for Inclusion: Conveyance by deed is the most common manner of transferring interest in property. A deed affects the ultimate transfer of legal title, and it is of vast practical importance. Recording has similar practical importance. Both the UBE and the NextGen exams require recall of these concepts.

- Scope of Required Knowledge:
 - Test-takers should know that the basic requirements for a valid deed under the Statute of Frauds include identification of the grantor and grantee, a present intent to convey, the signature of the grantor, and a legal description of the property.
 - Test-takers should know that a deed transferring real property does not require the price of the property to appear on the deed.
 - Test-takers should know that a buyer of real property can no longer enforce the terms of the contract for sale once the deed for the property is executed and delivered.
 - Test-takers should know that delivery of a deed occurs when the grantor manifests by words or conduct that they intend title to transfer immediately and irrevocably. Delivery may be made to an agent of the grantee, such as the grantee's attorney.
 - Test-takers should understand that recording the conveyance is not necessary to secure the grantee's rights against the grantor. Transfer of title occurs when the deed is delivered.
 - Test-takers should understand the importance of recording for the grantee. Recording provides notice of the transfer to all subsequent purchasers. If a grantee does not record the deed, then they may lose title to subsequent bona fide purchasers.

12. Warranty Deeds: Warranty deeds provide assurances to the grantee of property as to the quality of title conveyed. Through a warranty deed, the grantor covenants that they are the legal owner of the property with the right to transfer it to the grantee, that the property has no undisclosed encumbrances, and that they will defend the grantee against any competing claims to title.

- Reasons for Inclusion: Warranty deeds provide important protections to grantees/buyers in a real estate transaction. Both the UBE and the NextGen exams require recall of these rules.
- Scope of Required Knowledge:
 - Test-takers should know that there are two types of warranty deeds: general warranty deeds and special warranty deeds.
 - Test-takers should know that a general warranty deed offers the assurances listed above for the full chain of title.
 - Test-takers should know that a special warranty deed offers the assurances listed above only for the period of the grantor's possession.

13. Quitclaim Deed: A quitclaim deed provides no assurances about the quality of title conveyed to the grantee.

- Reasons for Inclusion: Not all deeds provide warranty protections. A foundational skill for a new lawyer is the ability to identify the range of protection available to subsequent title holders based on the type of deed conveyance in the chain of title. Both the UBE and the NextGen exams require recall of quitclaim deeds.
- Scope of Required Knowledge:
 - Test-takers should know that a quitclaim deed contains no assurances regarding title.
 - Test takers should know that a grantee of a quitclaim deed generally has no recourse against the grantor for defects in the title, unless the deed itself was induced by fraud, misrepresentation, or other misconduct.

- Test-takers should understand that a person who acquires title by adverse possession should convey the property by quitclaim deed.

14. Adverse Possession: Adverse possession allows one who wrongfully occupies another's land to gain legally enforceable title to the property.

- Reasons for Inclusion: Adverse possession is a counter-intuitive but fundamental principle of property law that is vital to curing many title defects and to structuring the legal relationships among neighbors. Recall of adverse possession is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know the elements of adverse possession: (1) actual entry upon the land that is (2) hostile or by claim of right, (3) open and notorious, (4) exclusive, and (5) continuous throughout the statutory period.
 - Test-takers should understand that "hostile" possession means without the owner's permission; it does not require anger or animosity.
 - Test-takers should know that the statutory period varies by jurisdiction. They are not required to know the length of the period in any particular jurisdiction.
 - Test-takers should know that an adverse possessor takes subject to the same encumbrances that burdened the property under the record owner's control.
 - Test-takers should know that the property of a legally incapacitated person cannot be adversely possessed.

Category Four: Sales and Financing

15. Specific Performance: Specific performance is an equitable remedy that is equally available to the buyer and the seller in a real estate transaction. When awarded by a court, specific performance compels the breaching party to fulfill the contract by purchasing or selling the property. *See* Restatement (Second) of Contracts §360, Comments a – e (1981).

- Reasons for Inclusion: Understanding the available remedies for the breach of a real estate sales contract is foundational knowledge for a new attorney. Both the MBE and NextGen exams require recall of rules related to specific performance of a real estate contract.
- Scope of Required Knowledge:
 - Test-takers should know that specific performance is an equitable remedy available only when there is no adequate remedy at law.
 - Test-takers should know that the inherently unique nature of real property means that money damages or a replacement parcel cannot fully substitute for the contracted property.
 - Test-takers should know that specific performance is available to both the buyer and the seller of real property.
 - Test-takers should know that a party who recovers under a theory of specific performance may also be entitled to seek money damages for losses suffered due to the delays associated with obtaining the decree.

16. Mortgage Financing: A mortgage is the most common form of security for a loan for the purchase of real property. Through mortgage lending, a land purchaser pledges their acquired

interest in the purchased property as collateral for the loan financing the purchase. The mortgage provides an enforceable remedy to the lender if the borrower (property purchaser) fails to repay the loan as agreed.

- Reasons for Inclusion: Some understanding of mortgages is foundational because almost all real property transactions are financed by borrowed money. Basic mortgage concepts are tested for recall on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know that a mortgage is a mechanism to provide security to a lender that finances a real estate loan.
 - Test-takers should know that a mortgage holder (lender) may recoup losses by selling the property in a process known as foreclosure or a foreclosure sale.
 - Test-takers should know that proceeds in excess of the debt owed to the mortgage holder and the costs of the foreclosure procedure must be returned to the debtor.
 - Test-takers should know that a mortgage holder may foreclose if the debtor fails to satisfy nonmonetary obligations such as keeping the property in good repair, maintaining insurance on the property, or paying taxes.
 - Test takers should know that creditors without a security interest in the property receive nothing from a foreclosure.

Category Five: Possessory and Non-Possessory Rights

17. Easements: An easement is a nonpossessory property interest that allows the holder of the easement the right to use property for a particular purpose without giving them any greater interest in the land. *See* Restatement of Property §450.

- Reasons for Inclusion: An easement is a vital tool for the productive use of land. Both the UBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know some common examples of easements: driveways, roads, rights of way, railroads, pipelines, sewers, and utility lines.
 - Test-takers should know the difference between an appurtenant easement and an easement in gross.
 - Test-takers should know that, unless the easement states otherwise, easements are perpetual in duration and cannot be revoked by the owner of the land burdened by the easement.
 - Test-takers should know that an easement transfers automatically to successor owners of the land. In other words, an easement “runs with the land.”
 - Test-takers should know that an easement may be created by express written agreement or by prescription.
 - Test-takers should know that a prescriptive easement requires generally the same elements as adverse possession.

18. Fixtures: A fixture is a personal property item that becomes part of real property due to permanent attachment.

- Reasons for Inclusion: Fixtures are a foundational concept that is tested for recall on the MBE. The content scope outline for the NextGen exam does not explicitly mention

fixtures, but understanding this concept is essential to understanding real estate conveyances.

- Scope of Required Knowledge:
 - Test-takers should understand that some personal property items may be legally classified as real property if they are fixtures.
 - Test-takers should know that typical fixtures include chandeliers, ceiling fans, and faucets.
 - Test-takers should understand that in a real property sales transaction all fixtures are included with the realty sold, unless specifically exempted.
 - Test takers should know that the modern American rule generally allows a tenant to remove fixtures that the tenant added during the lease term without regard to whether they are trade or agricultural or ornamental.

Category Six: Interference with the Rights of Others

19. Private Nuisance: An owner or occupier of land has a duty to avoid unreasonable interference with the use or enjoyment of the land of others. Breach of this duty constitutes a private nuisance.

- Reasons for Inclusion: Nuisance is an important concept in regulating the rights of neighboring property owners/occupiers. Both the MBE and NextGen exams require recall of the concept of nuisance, although those exams categorize the concept under torts.
- Scope of Required Knowledge:
 - Test-takers should understand that private nuisance is a tort (now usually embodied in a statutory right of action) brought by one landowner/occupier against another.
 - Test-takers should know that a nuisance does not require trespass upon the land; it need only interfere with the plaintiff's use or enjoyment of their land. Typical nuisances include obnoxious smells, noise, or sights.
 - Test-takers should know that only an unreasonable interference will constitute a nuisance. An interference is unreasonable if the plaintiff's harm outweighs any interest the defendant has in creation of that harm.
 - Test-takers should know that one factor courts consider in striking this balance is whether the defendant's activity predated the plaintiff's ownership or occupation of the land. "Coming to the nuisance" may defeat a claim.
 - Test-takers should know that most nuisances result from intentional acts.
 - Test-takers should know that remedies include both damages and (if the nuisance is continuing) an injunction.

20. Fair Housing Act: The Federal Fair Housing Act ("FHA") is Title VIII of the Civil Rights Act of 1968. 28 U.S.C. § 3603 *et seq.* The FHA makes certain discriminatory practices illegal in the sale, lease, or advertising of housing.

- Reasons for Inclusion: The FHA applies to both the sale and rental of real property. It limits a property owner's power to exclude others from the property, and it provides a remedy for those who are victims of housing discrimination. The MBE and NextGen exams test recall of the Fair Housing Act.
- Scope of Required Knowledge:
 - Test-takers should know that the FHA applies to discrimination on the basis of race,

color, religion, sex (including gender identity and sexual orientation), family status, national origin, and disability.

- Test-takers should know that the FHA applies to a wide range of actions related to the sale or rental of housing. These include refusals to rent or sell, pricing, advertising, and performing maintenance or repairs.
- Test-takers should know that the FHA provides civil remedies for injured parties in federal court.
- Test-takers should know that property owners, real estate agents, and advertisers are all subject to liability under the FHA.
- Test-takers should know that the FHA does not apply to the sale or rental of a single family home that is sold or rented by the owner without the use of an agent.
- Test-takers should know that the FHA does not apply to dwellings with no more than four units as long as the landowner resides in one of the units.

Foundational Concepts of Tort Law
Tested on the Nevada Foundational Law Exam

Introduction: Test-takers will be expected to know these tort concepts and to apply them to hypothetical fact patterns. The citations are included here only for reference; test-takers will not need to remember them.

The concepts tested on the exam fall into four foundational categories:

- Negligence
- Intentional torts
- Strict liability
- Damages

Category One: Negligence

- 1. Elements of Negligence.** A successful negligence claim requires evidence that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, that the breach was the legal cause (cause in fact and proximate cause) of the plaintiff’s injuries, and that the plaintiff suffered damages.
 - Reasons for Inclusion: This is foundational knowledge about the most important tort. Both the MBE and NextGen tests require recall of the elements of negligence.
 - Scope of Required Knowledge:
 - Test-takers should understand that support for each of these elements is required for a prima facie case of negligence.
 - Test-takers should know how to distinguish the showing of fault required for a negligence claim from either intentional torts or strict liability (no fault) theories.

- 2. Negligence: Duty of Care and Breach.** The duty of care element of negligence is a legal standard based on reasonableness under the circumstances unless special rules apply, such as for professionals or people with physical disabilities (concepts 3 and 5 below). A defendant who fails to meet that duty has breached it. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 7-12 (2010).
 - Reasons for Inclusion: This is foundational knowledge about the most important tort. Both the MBE and NextGen tests require recall of this concept.
 - Scope of Required Knowledge:
 - Test-takers should know that the duty and breach elements of a negligence claim typically hold the defendant to the standard of a reasonably prudent person in the same circumstances as the defendant.
 - Test-takers should know that courts refer interchangeably to “the reasonably prudent person” and the “exercise of reasonable care.”

- 3. Negligence: Duty of Care – Special Rules for People with Physical Disabilities.** The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably prudent person with the same disability. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11 (a) (2010).

- Reasons for Inclusion: The special rules for the duty of care expected of people with disabilities is foundational knowledge. Both the MBE and the NextGen tests require recall of these rules.
 - Scope of Required Knowledge:
 - Test-takers should know that defendants with a physical disability are held to the standard of a reasonably prudent person with that disability (e.g., “reasonably prudent blind person”).
- 4. Negligence: Duty of Care – Special Rules for People with Mental or Emotional Disabilities.** An actor's mental or emotional disability is not considered in determining whether conduct is negligent. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 11 (c) (2010); DAN B. DOBBS, ET AL., THE LAW OF TORTS §§ 129-30 (2d ed.).
- Reasons for Inclusion: The lack of special rules for the duty of care expected of people with mental or emotional disabilities is foundational knowledge. Both the MBE and the NextGen tests require recall of this rule.
 - Scope of Required Knowledge:
 - Test-takers should know that defendants with mental or emotional disabilities are generally held to the standard of a reasonably prudent person without special allowance for the mental or emotional disability.
- 5. Negligence: Duty of Care--Professional Malpractice.** The Nevada FLE tests knowledge of two types of professional malpractice:
- A. Medical malpractice is the failure of a physician, hospital, or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care. RESTATEMENT (SECOND) OF TORTS § 299A (1965); DAN B. DOBBS, ET AL., THE LAW OF TORTS § 283 (2d ed.); NRS 41A.015.
- B. Attorney malpractice is the failure of an attorney to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise. *Charleston v. Hardesty*, 108 Nev. 878, 883-84 (1992).
- Reasons for Inclusion: Professional malpractice is a foundational legal principle, and the standards for medical and attorney malpractice are the most widely studied. Recall of this concept is tested on both the MBE and NextGen exams.
 - Scope of Required Knowledge:
 - Test-takers should remember and understand the key phrases delineating the negligence duty for medical professionals, who are expected to use “the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care.”
 - Test-takers should remember and understand the key phrases delineating the negligence duty for attorneys, who are expected to use “such skill, prudence, and diligence as other members of the profession commonly possess and exercise.”
 - Test-takers are expected to know these rules but are not expected to recall or use other formulations of the professional malpractice standards.
 - Test-takers are expected to understand that these are special rules holding professionals to the standard of what is customary, although what is customary is

typically not conclusive evidence of the standard of care outside of professional malpractice.

- Test-takers should know that a doctor's duty of care includes informing the patient of known risks, benefits, and alternatives to any course of action prior to obtaining the patient's consent to proceed.
 - Test-takers do not need to know more specifics about informed consent, such as specialized causation approaches or other rule variations.
- Test-takers are expected to know that the standard elements of actual cause, proximate cause, and damages also apply to professional malpractice.

6. Negligence: Duty of Care – Limited Liability for Failure to Act. Individuals have no duty to act to save another person from harm unless a special relationship exists or the individual caused the peril to the other person.

- Reasons for Inclusion: The common law doctrine of no liability for failure to act is a foundational concept. Both the MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should understand the common law concept that failure to act, even to save another in peril, is not a breach of the duty of care in the absence of (1) a special relationship or (2) circumstances in which the defendant caused the peril to the plaintiff.
 - Test-takers should know that special relationships include the dependency relationships between parent/child, teacher/student, custodial relationships like prison/prisoner, and contractual relationships where a party has agreed to provide aid.

7. Negligence Per Se. A violation of statute or ordinance establishes the duty and breach elements of negligence if the law was enacted for safety, the injured party belongs to the *class* of persons that the law was intended to protect, and the injury is of the *type* that the law was intended to prevent. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (2010).

- Reasons for Inclusion: Negligence per se is a foundational legal concept. The MBE and NextGen exams require recall of this concept.
- Scope of Required Knowledge:
 - Test-takers should know that ordinances and statutes can provide the basis for negligence per se.
 - Test-takers should know that, when established, negligence per se establishes both the duty and breach elements of negligence.
 - Test-takers should know that negligence per se is typically limited to safety statutes.
 - Test-takers should know that negligence per se does not operate in reverse. In other words, a person who complied with a statute or ordinance may still be found to have breached the duty of care.

8. Negligence: Cause in Fact. The causation element for negligence requires a showing that the defendant's conduct is an actual cause (cause in fact) of the harm to the plaintiff.

- Reasons for Inclusion: Actual cause is a fundamental concept of negligence liability. Recall of cause in fact is tested both on the MBE and NextGen exams.

- Scope of Required Knowledge:
 - Test-takers should know that actual cause (cause in fact) is a required element of negligence liability. This element is also required for intentional torts and strict liability (discussed further below in concepts 13-19).
 - Test-takers should know that the but-for test is the usual manner in which actual cause is established, meaning that the injury would not have happened but for the defendant's conduct (or, said differently, in the absence of the defendant's conduct the injury would not have happened anyway).
 - Test-takers should know that an alternative test of actual causation, the substantial factor test, permits cause-in-fact to be established even in the absence of "but for" causation.
 - Test-takers should know that the substantial factor test may be used in situations of multiple causes, including successive causes and multiple causes in which any one of the causes would have been sufficient.

9. Proximate Cause. The causation element of negligence also requires that the defendant's conduct be the proximate cause of the plaintiff's injury. This means that liability is usually limited to foreseeable plaintiffs or foreseeable injuries. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 29-36 (2010); DAN B. DOBBS, ET AL., THE LAW OF TORTS §§ 198-217 (2d ed.).

- Reasons for Inclusion: Proximate cause is a foundational concept in tort law. Recall of proximate cause is tested on both the MBE and the NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should understand that proximate cause is a policy determination that limits the scope of liability based primarily on concepts of foreseeability.
 - Test-takers should understand that the precise manner that injury occurs need not be foreseeable as long as some injury is foreseeable.
 - They should also understand the concept of an "intervening cause," an action that occurs after the defendant's negligent act and contributes to the plaintiff's injury.
 - Test-takers should know that foreseeable intervening causes do not cut off a defendant's liability.
 - Conversely, they should understand that unforeseeable intervening causes usually eliminate the defendant's liability for lack of proximate cause. These unforeseeable intervening causes are called "superseding causes."

10. Proximate Cause: Special Rules. Although proximate cause is usually a circumstance-dependent question of foreseeability, three special rules establish proximate cause: (1) The original tortfeasor is typically liable for any injuries to a rescuer because "danger invites rescue." (2) The original tortfeasor is typically liable for injuries sustained or exacerbated by medical malpractice in treating the original injury. (3) Under the "thin skull rule" tortfeasors are liable for unusually extensive injuries or damages due to the plaintiff's pre-existing situation, weaknesses, or susceptibility, even when unforeseen. In other words, defendants are said to take the plaintiffs as they find them.

- Reasons for Inclusion: These special rules regarding proximate cause are foundational principles in tort law. Recall of these rules is tested on both the MBE and the NextGen exams.

- Scope of Required Knowledge:
 - Test-takers should know the special proximate cause rules for rescuers, subsequent medical malpractice, and unusual conditions (thin skull rule) that substitute for typical proximate cause foreseeability analysis.

11. Res Ipsa Loquitur. A plaintiff can prove the duty, breach, and causation elements of negligence through the doctrine of res ipsa loquitur, which applies if the incident was the type of incident that does not ordinarily occur without someone having been negligent and the harm was caused by an instrumentality under the exclusive control of the defendant at the time the negligence took place. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 17 (2010); DAN B. DOBBS, ET AL., THE LAW OF TORTS §§ 169-76 (2d ed.)

- Reasons for Inclusion: Res ipsa loquitur is a foundational doctrine for establishing the prima facie case of negligence. Recall of res ipsa loquitur is required on both the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should understand the circumstances in which a plaintiff can use res ipsa loquitur to establish the prima facie case of negligence in the absence of evidence to establish exactly what happened.
 - Test-takers are not expected to recall any of the variety of approaches to the procedural effect of res ipsa loquitur. Jurisdictions vary on those approaches.

12. Comparative Fault. Nevada has adopted partial comparative negligence, allowing recovery so long as the plaintiff's own negligence is *not greater than* that of the defendant or that of the combined negligence of multiple defendants. Nev. Rev. Stat. § 41.141; *Joynt v. California Hotel & Casino*, 108 Nev. 539, 544, 835 P.2d 799, 802 (1992).

- Reasons for Inclusion: Comparative fault is a foundational concept, recall of which is tested on the MBE and will be on the NextGen exam. The Nevada Foundational Law Exam tests Nevada's version of comparative fault (one that has been adopted by many states) as a way of testing this foundational concept.
- Scope of Required Knowledge:
 - Test-takers should know that most jurisdictions have replaced traditional contributory negligence with some form of comparative fault. This allows some plaintiffs to recover even if their own negligence contributed to the injury.
 - Test-takers should know that Nevada has adopted a version of comparative fault in which recovery is permitted when the plaintiff's own negligence is not greater than the negligence of the defendant or of the combined negligence of multiple defendants. In other words, plaintiffs may recover if the factfinder sets their negligence at 50% or less.
 - Test-takers should be able to apply Nevada's comparative fault rule to scenarios provided with percentage fault determinations of multiple tortfeasors and the plaintiff.
 - Test-takers should know that Nevada and most other states now use comparative fault instead of the traditional rule of contributory negligence, under which any negligence by the plaintiff constituted a complete bar to recovery. Test-takers should understand what contributory negligence is but should not apply it unless instructed to do so.

Category Two: Intentional Torts

13. Battery. An actor is subject to liability to another for battery if they act intending to cause a harmful or offensive bodily contact with another person, and a harmful or offensive bodily contact results. Restatement (Second) of Torts § 13 (1965).

- Reasons for Inclusion: Battery is a foundational intentional tort. Recall of the elements of battery is required for the MBE and NextGen exams.
- Scope of Knowledge Required:
 - Test-takers should know the elements of battery: (1) intent to cause a harmful or offensive bodily contact with another person; (2) a harmful or offensive bodily contact occurs; and (3) the defendant's action caused the contact.
 - Test-takers should know that the defendant's act must be voluntary.
 - Test-takers should know that the intent requirement includes either purpose (desire) or knowledge to a substantial certainty that a harmful or offensive contact will occur.
 - Test-takers should know the majority rule that whether the contact that was intended is harmful is determined by the subjective intent of the defendant. For example, a delusional patient who believed that she was handing a vase to her nurse but who actually threw the vase at the nurse did not have the requisite intent for a battery.
 - Test-takers should know that, by contrast, the offensiveness of an intended contact can be evaluated objectively, not by the subjective judgment of the actor.
 - Test-takers should know that evidence of a harmless motivation, such as that the action was taken in good-natured tomfoolery, or as a joke, does not negate the potential finding of the requisite intent.
 - Test-takers should know that, as with negligence (concept 8), causation is typically established by showing that the defendant's action was a "but for" cause of the contact. The contact may occur directly or indirectly if the defendant's action was a but-for cause.

14. Assault. An actor is subject to liability to another for assault if (a) they act intending to cause an apprehension of an imminent harmful or offensive contact with the person of the other, and (b) the other person experiences that apprehension. Restatement (Second) of Torts § 21 (1965).

- Reasons for Inclusion: Assault is a foundational intentional tort. Recall of the elements of assault is required for the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know the elements of assault: (1) intent to cause an apprehension of an imminent harmful or offensive contact in another person; (2) the other person reasonably suffers that apprehension; and (3) the defendant caused the apprehension.
 - Test-takers should know that the defendant's act must be voluntary.
 - Test-takers should know that the intent requirement includes either purpose (desire) or knowledge to a substantial certainty that the apprehension of an imminent harmful or offensive contact will occur.
 - Test-takers should know that the defendant is liable if they (1) intend to cause the apprehension of a harmful or offensive contact that a reasonable person would find offensive, or (2) intend to cause apprehension of a contact that they know the other person would find harmful or offensive.

- Test-takers should know that the apprehension must be reasonable, meaning that the actor had the apparent (not necessarily actual) ability to accomplish the threatened contact.
- Test-takers should know that a harmless motivation, such as that the action was taken in good-natured tomfoolery, or as a joke, does not negate the potential finding of the requisite intent.
- Test-takers should know that, as with negligence (concept 8), causation is typically established by showing that the defendant’s action was a “but for” cause of the apprehension.
- Test-takers should know that apprehension is not synonymous with fear, but rather means recognition or anticipation.

15. Trespass to Land. One is subject to liability to another for trespass if they intentionally enter or cause an entry of land in the possession of another. Restatement (Second) of Torts § 158 (1965).

- Reasons for Inclusion: Trespass to Land is a foundational common law tort. Recall of trespass to land is tested on the MBE and the NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know the elements of trespass to land: intentionally entering or causing an entry of land in the possession of another.
 - Test-takers should understand that the tort of trespass to land does not require that the tortfeasor know that they are trespassing, but only that they intentionally enter the land or otherwise cause entry on the land of another.
 - Test-takers should know that, as with negligence (concept 8), causation is typically established by showing that the defendant’s action was a “but for” cause of the entry. The entry may occur directly or indirectly, if the defendant’s action was a but-for cause of the entry upon another’s land.
 - Test-takers should know that no actual harm or injury to the land is required.

16. Transferred Intent. For the intentional torts of battery, assault, and trespass to land, intent may “transfer.”

- Reasons for Inclusion: Transferred intent is a foundational concept that applies to several intentional torts. Recall of this concept is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should understand that transferred intent may operate in two different ways. First, the intent to commit an assault, battery, or trespass to land can support liability for either of the other two torts. For example, a person who intends only to create an apprehension of a harmful or offensive contact, but causes a harmful or offensive contact, is liable for battery. Conversely, a person who intends to cause a harmful or offensive contact, but causes only an apprehension of a harmful or offensive contact, is liable for assault.
 - Second, the intent to commit one of these torts with respect to one person can transfer to another person who suffers the contact, apprehension, or land entry. A person who intends to cause a contact with or apprehension in X, and who succeeds in causing a contact with or apprehension in Y, is liable to Y.

- Test-takers should know that transferred intent applies between battery, assault, and trespass to land.

17. Intentional Infliction of Emotional Distress. Claims of intentional infliction of emotional distress are limited to rare cases where (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to cause the plaintiff emotional distress or demonstrated reckless disregard for the probability of causing emotional distress; (3) the plaintiff actually suffered severe or extreme emotional distress; and (4) the defendant's conduct caused the distress. See RESTATEMENT (SECOND) OF TORTS § 46 (1965); DAN B. DOBBS, ET AL., THE LAW OF TORTS § 385 (2d ed.).

- Reasons for Inclusion: The tort of intentional infliction of emotional distress is foundational. Recall is tested on the MBE and NextGen exams.
- Scope of Required Knowledge:
 - Test-takers should know the elements of the tort of intentional infliction of emotional distress: (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to cause the plaintiff emotional distress or demonstrated reckless disregard for the probability of causing emotional distress; (3) the plaintiff actually suffered severe or extreme emotional distress; and (4) the defendant's conduct caused the distress.
 - Test-takers should understand that courts use a variety of phrases to describe conduct that is “extreme and outrageous.” One common formulation is conduct that is “outside all possible bounds of decency and is regarded as utterly intolerable in a civilized society.” *Maduikie v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998). Test-takers do not have to recall this precise language, but should understand its tenor.
 - Test-takers should know that targeting someone’s known weakness is relevant both to whether the action is extreme and outrageous and to the intent element.
 - Test-takers should know that the actual causation element for this and other intentional torts is that the defendant’s conduct must be a but-for cause of the plaintiff’s distress.
 - Test-takers, finally, should understand that this intentional tort requires actual harm. Indeed, the plaintiff must suffer severe or extreme distress to recover.

18. Consent. Consent provides a defense to actions for battery, assault, trespass to land, or intentional infliction of emotional distress.

- Reasons for Inclusion: The privilege or defense of consent is foundational. Recall of consent is tested on the MBE and NextGen exams.
- Scope of Required Knowledge Required:
 - Test-takers should know that if consent is established, it either negates intent (as when the contact intended was consented to and therefore was not offensive) or operates as a complete defense.
 - Test-takers should know that consent can be express or reasonably implied, as when the plaintiff has used words or conduct that a reasonable person would interpret as consent or when engaging in certain activities implies consent to conduct that otherwise could be tortious.

- Test-takers should know that consent is invalid if given without capacity, such as by a child or a person with limited cognitive capacity.
- Test-takers should know that consent is invalid if the action is beyond the scope of consent.
- Test-takers should know that consent to great bodily injury or death is invalid.

19. Strict Liability. Strict liability, or liability without fault, may be available for harm caused by abnormally dangerous activities (such as dynamite blasting, crop dusting, commercial pesticide spraying, transportation and storage of hazardous waste), wild animals, and intruding livestock.

- Reasons for Inclusion: Strict liability is an essential category of tort liability. The NextGen exam will not require recall of this concept but, given its foundational nature both the MBE and Nevada Foundational Law Exam do.
- Scope of Required Knowledge:
 - Test-takers should know the difference between strict liability for abnormally dangerous conditions (defendant took all reasonable precautions but is still liable for injuries) and negligence claims (defendant failed to take reasonable precautions).
 - Test-takers should know that strict liability is limited to harm caused by the abnormally dangerous aspect of the activity or wild animal. E.g., there is no strict liability for bruises from tripping over a box of dynamite or a sleeping tiger.
 - Test-takers should know that many jurisdictions extend strict liability to injuries from any pet known to its owner to have dangerous propensities. Nevada uses a negligence standard in these circumstances, not strict liability, so negligence is the applicable claim for these situations on this exam.
 - Test-takers should know that recovery for strict liability requires proof of damages. In this respect, liability for strict liability resembles liability for negligence.
 - Test-takers should also know that the defendant's actions must be a but-for cause of the plaintiff's harm.

Category Four: Damages

20. Damages. Tort damages are typically compensatory, with nominal or punitive damages available in limited situations. RESTATEMENT (SECOND) OF TORTS §§ 901-10 (1979); DAN B. DOBBS, ET AL., THE LAW OF TORTS § 479-86 (2d ed.).

- Reasons for Inclusion: The MBE requires recall of rules related to damages, but the NextGen exam will not require that recall. Fundamental damages rules are included on the Nevada Foundational Law Exam because the availability of damages is central in any tort practice.
- Scope of Required Knowledge:
 - Test-takers should understand that most torts damages are compensatory.
 - Test-takers should understand that compensatory damages may be general or special, including medical expenses, pain and suffering, emotional distress, property damage, loss of enjoyment, and loss of consortium.
 - Test-takers should know that nominal damages may be available in limited circumstances, such as to vindicate rights in some intentional torts actions without actual injury.

- Test-takers should know that punitive damages may be available to punish tortfeasors for egregious, malicious, reckless, or intentional misconduct.
- Test-takers should know that punitive damages are not typically available by themselves, but instead must be added to nominal or compensatory damages.
- Test-takers should know that the amount of punitive damages is tied to the amount of compensatory or nominal damages and that the amount of punitive damages may be limited by statute or constitutional law.
- Test-takers should know that many jurisdictions today, including Nevada, limit common law damages rules with statutory caps on various types of damage awards. Test-takers, however, need not recall specific caps from Nevada or any other state.

ATTACHMENT B.3

ATTACHMENT B. 3

Nevada Foundational Law Exam (FLE)
Drafting Guidelines and
Style Guide

November 2025

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Introduction

This handbook outlines best practices for drafting multiple-choice questions.¹ Except as noted, you should follow these practices when drafting. Complying with these guidelines will achieve two key goals: (1) producing a uniform style across the exam, and (2) ensuring that questions assess a test-taker's ability to recall and apply foundational legal principles, rather than their test-taking ability.

Following these guidelines can be challenging. Writing good multiple-choice questions requires a different type of writing style than subject-matter experts use in other contexts. To assist you, technical editors will review your questions at several stages in the writing process and will suggest edits implementing these guidelines. If a suggested edit would compromise the substantive correctness of the question, you should let the editor know and work out a resolution. Otherwise, you should accept these technical edits as important in creating a reliable exam.

Theoretical Background

Test-takers answer multiple-choice questions quickly, with little time for reflection. They must also move quickly among subjects. On the Nevada Foundational Law Exam, test-takers will have just over 2 minutes to answer each of 100 questions. Those questions will appear in random order, requiring test-takers to shift rapidly among 7 subjects, focus on novel fact patterns, recall applicable legal principles, and apply those principles to the fact patterns within a very short timeframe.

Test-takers accomplish these tasks by using working memory, the part of the human brain that manipulates information to solve problems. Cognitive science research has shown that this working memory is quite limited. Most people can hold just 3-5 chunks of information in working memory at one time.²

The type of multiple-choice questions that appear on a bar exam strain that capacity. Test-takers must absorb relevant facts from the question stem, recall detailed legal principles from memory, and apply the principles to the facts. They must also consider which of four options best answers the question. The wrong options literally distract the test-taker by

¹ We have drawn these guidelines from multiple sources, including THOMAS M. HALADYNA & MICHAEL C. RODRIGUEZ, *DEVELOPING AND VALIDATING TEST ITEMS* (Routledge 2013); SUZANNE LANE, MARK R. RAYMOND, & THOMAS M. HALADYNA, *HANDBOOK OF TEST DEVELOPMENT* (2015); and Susan M. Case & Beth E. Donahue, *Developing High-Quality Multiple-Choice Questions for Assessment in Legal Education*, 58 J. LEGAL EDUC. 372 (2008).

² See, e.g., Nelson Cowan, *The Magical Mystery Four: How Is Working Memory Capacity Limited, and Why?*, 19 CURRENT DIRECTIONS PSYCH. SCI. 51 (2010).

demanding space in working memory. Answering multiple-choice questions on a bar exam is a challenging mental task.

To facilitate this task, it is important to eliminate unnecessary distractions from questions drafted for the Foundational Law Exam. Many of the rules in this handbook have that goal: They reduce unneeded ambiguities or distractions that might burden working memory. By doing that, the exam more reliably assesses a test-taker's recall of fundamental concepts and ability to apply those concepts to new fact patterns.

Parts of a Multiple-Choice Question

These are the terms that test developers use to identify parts of a multiple-choice question:

- Stem or prompt: the fact pattern that sets up the question
- Call or question: the question at the end of the stem
- Key or correct answer: the correct answer to the question
- Distractors: the answers that are incorrect.
- Options: the key (correct answer) plus the distractors

Basic Structure of Nevada FLE Questions

All questions for the Nevada FLE must have:

- A stem
 - take questions on most law-related exams, most legal stems will describe a fact pattern that requires the test-taker to apply a legal principle to a novel set of facts. Occasional questions may deviate from this pattern, but that deviation will be rare. When it occurs, the question should require both recall and application in a different manner.
- A question or call
 - The question or call tells the test-taker what issue they must address.
- A single correct answer or key
- Three distractors

Each question should also stand on its own. Some multiple-choice exams base several questions on a common fact pattern, but this makes the question bank less flexible. You should create a distinct stem for each question you draft.

The Golden Rule

The most important rule for drafting multiple-choice questions is: Keep it simple. Test-takers have limited time to answer each question, and they must move rapidly from one legal problem to another. The FLE tests (a) recall of foundational concepts listed in the content scope outline, and (b) the ability to apply those concepts to novel fact patterns. Straightforward questions test those competencies most effectively. Other components of Nevada's Comprehensive Licensing System will test other types of knowledge and skills.

Drafting the Stem

The stem should outline a fact pattern that requires recall and application of one or more concepts from the content scope outline. Most questions should require recall of details from a single outline concept. We will use some questions that draw from two or more concepts simultaneously, but those questions will constitute a minority of questions on the exam. The other two parts of Nevada's Comprehensive Licensing Exam require candidates to juggle multiple issues.

Some stems may refer to concepts other than the one being tested. Testing evidence or civil procedure concepts, for example, usually requires describing a lawsuit based on contracts, torts, or other concepts. Those references, however, will not test the additional concepts. They will merely provide essential context.

In addition, follow these rules for drafting the stem:

1. Use as few actors as possible. Remember that a licensing exam tests minimum competence, not the ability to analyze complex fact patterns quickly.
2. Use generic descriptors rather than names for actors. E.g., a pedestrian, a bank, a tenant, a landlord.
 - Do not capitalize these generic descriptors. That distracts readers.
 - Avoid questions that have multiple actors with the same description. Rather than drafting a question with two friends, for example, use a brother and a sister or a student and their friend.
 - If it is essential to have two actors with the same identity, use numbers to distinguish them. E.g., "the first officer," "the second officer."
 - Although it is helpful to give actors identities, avoid unusual identities that may distract the test-taker. Identities should either relate directly to the tested concept (e.g., landlord and tenant) or use identities that are familiar to test-takers (brother, sister, friend, student, homeowner, tenant, neighbor).

3. Use “defendant” and “plaintiff” as the sole descriptors for actors only when essential. In most questions, the actor should have an identity other than simply plaintiff or defendant. Legal experts readily process questions about faceless plaintiffs and defendants, but new lawyers are more comfortable with plaintiffs and defendants who have an identity relevant to the problem. Referring simply to a plaintiff or defendant, moreover, can be confusing on an exam that mixes questions about both civil and criminal law concepts.
4. Use pronouns sparingly. Test-takers read questions quickly, so they may confuse actors who are referred to simply by pronoun.
5. When pronouns are necessary, use gendered ones. Gender neutral pronouns can be confusing on a multiple-choice exam. When using pronouns, vary the genders and try to avoid stereotypes. If you have two actors with pronouns, make one actor female and the other male. Those pronouns can help the test-taker distinguish the actors.
6. Do not use the names of actual geographic locations, unless that is essential for the meaning of the question. Instead, use letters to designate those locations. E.g., “State A,” “Town B.”
7. Omit unnecessary detail. Stems should be realistic but should include only enough detail to raise the concept that is being tested.
8. Omit irrelevant facts. Attorneys must distinguish relevant facts from irrelevant ones, but other parts of Nevada’s Comprehensive Licensing Exam will test that skill. On a multiple-choice exam, irrelevant facts burden working memory and reduce reliability. Note, though, that sometimes an “irrelevant” fact is necessary to assess the test-taker’s ability to distinguish two rules. Under those circumstances, the “irrelevant” fact is relevant to the assessment and should be included.
9. Omit humor. Humorous comments sometimes diminish stress when the test-taker knows the test designer (as on a classroom exam) but humor is distracting on a licensing exam and can introduce biases.
10. Replace complex words with simpler ones. This rule doesn’t apply to legal terms and phrases, which should follow the content scope outline. But use simple words elsewhere.
11. Eliminate double negatives. These pose unnecessary hurdles for test-takers and can create ambiguities. Here are some examples:
 - “The homeowner did not unlock the door.” What did the homeowner do? Clarify this sentence with a substitute like “The homeowner left the door locked.”

- “The witness did not deny that they saw the thief.” What did the witness do? Did the witness admit seeing the thief? Or did they refuse to answer the question? In practice, a lawyer may need to resolve ambiguities like this, but FLE questions are not designed to test that skill. Clarify the ambiguity with a sentence like “The witness admitted seeing the thief” or “The witness refused to answer questions about whether she saw the thief.”
12. Use even simple negatives (including words like “except”) sparingly. If you use negatives, place them in all caps:
 - The banker did NOT open the letter.
 - The camper ate all the dinner EXCEPT the potatoes.
 13. Use active voice whenever possible.
 14. Pare words mercilessly. The stem should use complete sentences, but as few words as possible.
 15. Avoid idioms and slang terms. These may be unfamiliar to some test-takers.
 16. Avoid stems that may unfairly trigger some test-takers. Lawyers must learn to handle emotionally challenging fact patterns, but testing that capacity is inappropriate on a timed multiple-choice exam. Instead, triggers will reduce the exam’s reliability. Triggers to avoid include:
 - Rape
 - Domestic violence
 - Actors with undocumented status or other immigration concerns
 - Hot-button political issues. These may seem timely, but they trigger some test-takers and give an unfair advantage to others who have studied the issue in depth. Both outcomes reduce the exam’s reliability.
 17. Be sensitive to cultural, class, and other biases. Choose settings and actions that will be familiar to law students from any background. Also be thoughtful about the generic descriptions you provide for parties. You may unconsciously choose descriptions that describe you and your peers (e.g., “homeowner,” “book collector,” “foreign traveler”). Overusing those descriptions will make it harder for test-takers from less privileged backgrounds to identify with the questions.
 18. Draft most stems in the third person. Refer to “an attorney” and “a client” rather than “you” and “your client.” Performance tests often ask the test-taker to assume the role of an attorney, but that format usually adds to the length and complexity of multiple-choice questions. Note, though, that some concepts may be easier to test with a

succinct question that puts the test-taker in the attorney's role. Use this format when appropriate, and be thoughtful about using it.

19. In most contexts, refer simply to a party rather than the lawyer who acts on behalf of the party. E.g., "the farmer objected to the testimony" rather than "the farmer's lawyer objected to the testimony." Refer to the attorney only when the action seems particularly complex and a test-taker might be confused by reference to the party.
20. Write questions with the focus on the party who is the focus of the call. For example, if the call asks whether a buyer is likely to succeed on a contract claim, the stem should describe the facts from the buyer's perspective. This is not possible for some fact patterns, but it is a best practice when possible.

Drafting the Call or Question

1. Place the call on a separate line. Do not attach it to the end of the stem.
2. Pose the call as a question. This focuses attention better than an open-ended sentence. For example:
 - Use "Which of these claims is most likely to succeed in court?"
 - NOT "Select the claim that is most likely to succeed in court" or "The claim that is most likely to succeed in court is"
3. Keep the call as short as possible. Move facts or caveats to the stem rather than including them in the call.
4. The call, however, should include the issue that the question tests. Ask, for example, "Can the witness successfully invoke the privilege against self incrimination?" not "Will the witness have to testify?"
5. Use simple words and straightforward grammatical constructions.
6. As in the stem, eliminate double negatives.
7. Use negative constructions sparingly. If you use negatives, place them in all caps:
 - Which of these pieces of evidence is the court LEAST likely to admit?
8. Do not use compound questions. Remember that most multiple-choice questions should address a single legal concept.
9. Creative thinkers may imagine answers that do not appear in the options. For that reason, draft the call with words that direct the test-taker to the options:
 - Which of these claims is most likely to succeed in court?
 - Which of these facts is most important to investigate?

Drafting the Options

1. Keep options as short as possible. Options do not have to be complete sentences.
 - If you find yourself repeating words in each option, consider moving those words to the stem or call.
2. All four options should be similar in length and grammatical style. Options that differ significantly offer clues to savvy test-takers.
3. Each option should stand independently. Do not use combinations like “both a and b.” These options can assess test-taking strategy rather than knowledge.
4. Do not use “all of the above” as an option. If a test-taker can rule out one of the other options, they can automatically rule out this option as well. That makes these questions easier than others.
5. Use “none of the above” sparingly. Again, a test-taker can easily rule out this option even if they are unsure which of the other options is best.
6. Avoid words like “always,” “never,” “all,” and “none.” Test-wise candidates often use these words to identify distractors. And when used in connection with a correct answer, they may raise doubts about that option’s correctness. Is the option really true all the time or none of the time? In law, it is often possible to imagine an exception.
7. Also avoid vague terms like “rarely” or “usually.” These may be necessary when testing some legal concepts but try to avoid them.
8. Avoid options that depend upon the addition of facts or a condition. E.g., “Yes, if the judge also finds....” Adding new material as part of an option creates additional burdens on working memory.
9. Avoid overlapping content. Make sure that one question doesn’t provide the answer for a different question. If that happens, tag the two questions so that they will not be used on the same exam.
10. Make distractors plausible. Think back to answers students have given in class or on essay exams to identify plausible distractors.
11. Place options in logical order.
 - If you use options that begin “Yes because” or “No because,” group the “Yes” and “No” answers together. Do not mix them.
 - If options include numbers or percentages, arrange them in ascending order.
12. Vary the placement of correct answers.

13. Do not use distractors that require knowledge outside the Nevada content scope outline. This is unfair to test-takers and will reduce the exam’s reliability.

Providing Rationales

You will write a brief rationale for each of the options associated with a question. The question banking platform provides space for these rationales. Test-takers will not see these rationales, but they will help other team members review your question for accuracy. Each rationale should begin by identifying whether the option is correct or incorrect. Using rationales that confirm the correctness or incorrectness of an option will allow team members and technical editors to doublecheck the accuracy of your key and distractors.

Checking the Content Scope Outline

After you compose a question and write rationales for each option, check the outline to be sure that the question and options fit within the concepts and bulleted explanations included there.

Common Question Patterns

This section discusses some common patterns in exams that test knowledge and application of legal concepts. The patterns embody the rules listed above and may help you formulate questions. Other question patterns are permissible; you are not limited to these patterns. As we develop new patterns, we will add them to this handbook.

Predicting Courtroom Outcomes

Many questions on law-related exams ask the test-taker to predict an outcome in court. Questions like these include:

- Which of these claims is most likely to succeed in court?
- Which of these defenses is most likely to succeed?
- Is the plaintiff likely to prevail on the battery claim?
- Is the statute banning widgets constitutional under existing precedent?
- Should the judge admit the testimony about the bystander’s statement?

Note that three of these questions use the word “likely,” the fourth refers to existing precedent, and the fifth uses the word “should.” These caveats recognize that factors other than legal principles affect success in the courtroom. Judges misapply some rules, and juries reject sound claims. Some areas of law are evolving quickly, so any prediction is uncertain. Using these caveats will help test-takers focus on the legal principles being tested, rather than on other factors that affect outcomes.

The reference to existing precedent is most appropriate for constitutional law questions, because the current Supreme Court has been revising many precedents. For other subjects, that phrase usually is not necessary.

Advising Clients

Some questions may ask the test-taker to advise a client about a legal issue. For these questions, it is best to avoid the word “should” in the call. Many factors, not just legal principles, affect a client’s decision about whether to pursue a claim, which defendants to sue, etc. If you draft a question focused on advising a client, create a call that focuses the test-taker on the legal principles you are testing rather than asking generally what the client “should” do.

“Because” Options

Many questions on law-related exams use this structure:

- a. Yes, because
- b. Yes, because
- c. No, because
- d. No, because

This is a useful format, but it can be difficult to balance the “yes” and “no” answers. There may be many reasons why a plaintiff will not prevail, but only one reason why they will. In situations like that, do not give a nonsense reason. Instead, create three “no” options and just one “yes” option (or the reverse). Or rephrase the call and options.

Question Difficulty

Psychometricians measure question difficulty by calculating the percentage of test-takers who answered the question correctly. We aim for an average difficulty level of 70%, with difficulty ranging from 50% to 90%. In other words, about half of test-takers should get our hardest questions correct and 90% should answer the easiest questions correctly. On average, 70% of test-takers will answer a question correctly.

On law school exams, some professors use multiple-choice questions that have a higher degree of difficulty, in part to create a wider range of scores. In line with the psychometric literature, Nevada’s psychometrician has advised us that 70% is the appropriate average for a licensing exam that covers multiple subjects and is designed to test minimum competence.

These outcomes should flow naturally from the content scope outline. We have adopted an outline that narrows the tested material to fundamental concepts that are appropriate for

students to recall from law school courses. We have already eliminated many of the exceptions to exceptions that are difficult to recall (and that new lawyers should look up rather than attempt to recall from memory).

But as you draft questions, keep this target difficulty level in mind. The correct answer to many of your questions may seem obvious to you as an expert. Rules that are obvious and easy to recall for an expert, however, are sufficiently difficult for a law student or recent graduate. You do not need to think of ingenious exceptions to the rules we are testing to make them harder.

Copy-Editing Guidelines

A copy editor will review all questions for the Nevada FLE, but it is helpful to follow these guidelines from the beginning.

1. Avoid contractions except when appropriate for dialogue. E.g., use “is not” rather than “isn’t.”
2. Use the Oxford comma when referring to items in a series. E.g., “the farmer raised wheat, corn, and soybeans.”
3. Use one space after periods.
4. Use a period at the end of each option, even if it is not a complete sentence.
5. Do not use rule or statute numbers unless necessary. The FLE outline requires test-takers to recall concepts rather than rule or statute numbers.
6. Spell out numbers that are less than 10, and use numerals for numbers that are 10 or higher. But you should always spell out numbers that start a sentence (or restructure the sentence so that the number appears later).
7. Use a comma for four-digit numbers. E.g., 1,000.
8. When quoting an oral or written statement, use a comma to introduce short quotations and a colon to introduce longer ones. E.g.,
 - The buyer said, “I accept.”
 - The witness testified: “I saw the car speed through the intersection. It looked to me like it was going more than 50 miles per hour.”