

FREE STUDY GUIDE

The **50** Most-Tested MBE Rules

One page each. The canonical statement, the trap, and the examiner's favorite pattern.

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How to use this guide

These 50 rules appear more frequently on the MBE than any others. Each page gives you the black-letter statement you need to recognize, the conceptual shortcut that makes it stick, and the specific trap the examiners set.

Read one page per day during your commute. Quiz yourself on the canonical statement before flipping. When you can state the rule, the trap, and the examiner pattern from memory, move on.

THE RULE

The canonical black-letter statement — the precise formulation tested on the MBE. Know this cold.

IN PLAIN ENGLISH

What the rule actually means, stripped of legal jargon. Use this to build intuition.

MEMORY HOOK

A mnemonic or mental model to lock the rule in long-term memory.

WORKED EXAMPLE

A concrete fact pattern showing how the rule applies. See the rule in action before you hit exam questions.

COMMON TRAP

The specific mistake examinees make on this rule. The NCBE writes distractors around these.

EXAMINER PATTERN

The typical fact pattern the MBE uses to test this rule. Recognize the setup and you're halfway to the answer.

Rule Against Perpetuities

FUTURE INTERESTS & RAP

THE RULE

No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest. Applies to contingent remainders, executory interests, options, and rights of first refusal. Strict common-law rule; many jurisdictions adopt wait-and-see or USRAP (90 years).

IN PLAIN ENGLISH

The Rule Against Perpetuities prevents property interests from being uncertain for too long. It ensures that future interests in property must become definite within 21 years after the death of a relevant person alive when the interest was created.

MEMORY HOOK

21 and done, or it's none. Interests must vest within 21 years of a life in being to avoid perpetuities issues.

WORKED EXAMPLE

A grants land to B for life, then to B's first child to graduate college. If B's child graduates more than 21 years after B's death, the interest is void under the Rule Against Perpetuities.

COMMON TRAP

⚠ WATCH FOR

Students think: Any future interest is void if it doesn't vest in 21 years. Wrong, because it only applies to contingent remainders, executory interests, options, and rights of first refusal. The actual test is whether they must vest within the period.

EXAMINER PATTERN



HOW THEY TEST IT
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The MBE loves: a will creating a contingent remainder for grandchildren. Trap: assuming it's valid without checking if it must vest within 21 years of a measuring life.

Non-hearsay — opposing party statement

FRE 801(d)(2)

EXEMPTIONS (801(D))

THE RULE

A statement offered against an opposing party is non-hearsay if: (A) made by the party in individual or representative capacity; (B) one the party adopted/manifested belief in; (C) made by authorized agent; (D) made by party's agent/employee on a matter within scope, during employment; (E) made by co-conspirator during and in furtherance of conspiracy.

IN PLAIN ENGLISH

If someone says something that can be used against them in court, it's not considered hearsay if they or someone connected to them made the statement.

MEMORY HOOK

Opposing Party's Own Words: Not Hearsay. If it's their talk, it can walk into court.

WORKED EXAMPLE

During a fraud trial, an email from the defendant's employee admitting to false billing is used as evidence. The email isn't hearsay because it was made by the employee during their job.

COMMON TRAP

⚠ WATCH FOR

Students think: Any statement by a party is non-hearsay. Wrong, because it must be used against them. The actual test is whether it's offered by the opponent.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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Test setup: employee's statement during work. Trap: assuming any employee statement qualifies. Must be within job scope and during employment.

State action doctrine

STATE ACTION DOCTRINE

THE RULE

Most constitutional protections apply only against government. Private conduct is state action when (1) the private actor performs a traditional, exclusive public function, OR (2) there is significant state entanglement (encouragement, joint participation, regulation amounting to compulsion).

IN PLAIN ENGLISH

Constitutional rights usually protect you from the government, not private individuals. But if a private person does something the government usually does, or if the government is deeply involved, those rights might apply.

MEMORY HOOK

PRIVATE PARTY, PUBLIC ROLE: Constitution applies when private actors perform public functions or are deeply entangled with the state.

WORKED EXAMPLE

A private security company hired by the city to manage public parking lots uses excessive force. Because managing public parking is usually a government job, their actions could be considered state action.

COMMON TRAP

⚠ WATCH FOR

Students think: Any regulation of private actors means state action. Wrong, because mere regulation is not enough. The actual test is significant state entanglement or performing a public function.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: private security guards or private schools. Question: state action? Trap: assuming regulation alone suffices. Test for public function or deep state involvement.

Easement creation — PING

EASEMENTS

THE RULE

Easements may arise by: (1) Prescription (adverse, open, continuous for statutory period), (2) Implication (from prior use + reasonable necessity at severance of common ownership), (3) Necessity (strict necessity — landlocked), (4) Grant (express writing). Express easements must satisfy SoF.

IN PLAIN ENGLISH

An easement lets someone use another's land. It can be created by long-term use, past use that was obvious and needed, absolute need for access, or a written agreement.

MEMORY HOOK

PING for Easements: Prescribe, Imply, Necessitate, Grant. Four ways to create, each with unique requirements. Remember, express needs writing!

WORKED EXAMPLE

The defendant has used a path across the buyer's land for 20 years without interruption. This long-term use can create an easement by prescription, allowing continued access.

COMMON TRAP

⚠ WATCH FOR

Students think: any visible use creates an easement. Wrong, because mere use isn't enough for prescription; must be adverse and continuous. The actual test is statutory period and hostility.

EXAMINER PATTERN

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The MBE loves: landlocked parcel + prior owner's access path. Question: easement? Trap: students assume implication is easy, but necessity needs strict proof — not just convenience.

Free Exercise — neutral laws of general applicability

Employment Division v. Smith

1ST AMENDMENT — RELIGION

THE RULE

A neutral law of general applicability that incidentally burdens religious exercise need only meet rational basis (Smith). Laws targeting religious practice get strict scrutiny (Lukumi). Modern trend (Fulton, Tandon) treats secular exemptions as triggering strict scrutiny.

IN PLAIN ENGLISH

If a law applies to everyone equally and isn't aimed at any religion, it usually just needs to be reasonable, even if it affects religious practices.

MEMORY HOOK

Neutral Laws, Low Scrutiny. If a law isn't targeting religion, it just needs a reasonable relation to a legitimate goal.

WORKED EXAMPLE

A city bans loud noises at night to reduce disturbances. A church wants to hold late-night services with loud music. The church's challenge fails because the noise law applies to everyone, not just religious groups.

COMMON TRAP

⚠ WATCH FOR

Students think: any law affecting religion gets strict scrutiny. Wrong, because only laws targeting religion do. Neutral, general laws need only rational basis.

EXAMINER PATTERN

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MBE loves: a law burdens a religious practice but applies to everyone equally. Trap: assuming strict scrutiny. Correct: rational basis unless targeting religion.

Then-existing mental, emotional, physical condition

FRE 803(3)

EXCEPTIONS — AVAILABLE (803)

THE RULE

A statement of declarant's then-existing state of mind (motive, intent, plan) or emotional/physical condition. Does NOT include statements of memory or belief to prove the fact remembered (the Hillmon doctrine extends this to permit statements of future intent to prove conduct).

IN PLAIN ENGLISH

Statements about what someone was thinking or feeling at the time can be used in court, but not if they're just recalling past events.

MEMORY HOOK

State of Mind: Now, Not Then. Admissible if it shows current thoughts or feelings, not past memories or beliefs.

WORKED EXAMPLE

The defendant said, 'I'm planning to visit my sister tomorrow.' This can be used to show they intended to travel, but not to prove they visited last week.

COMMON TRAP

⚠ WATCH FOR

Students think: Any mental statement is admissible. Wrong, because past memories aren't allowed. The actual test is for current state of mind or future intent only.

EXAMINER PATTERN

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🔗 HOW THEY TEST IT

The MBE loves: declarant describes a future plan. Trap: students assume it's hearsay. But if it shows intent, it's admissible under Hillmon.

Foreclosure and priority

FORECLOSURE & PRIORITY

THE RULE

First in time, first in right — junior interests recorded after the senior mortgage are extinguished by foreclosure of the senior. Senior interests survive. Purchase money mortgage (PMM) takes priority over earlier-recorded judgment liens and after-acquired property mortgages.

IN PLAIN ENGLISH

When a property is foreclosed, the first mortgage recorded usually gets paid first. If someone buys a home with a loan, that loan can sometimes jump ahead of other debts.

MEMORY HOOK

First in time, first in line. Foreclosure extinguishes junior liens, but senior ones survive. PMM jumps the line over judgment liens.

WORKED EXAMPLE

Buyer takes a loan to buy a house, then later gets a credit card debt. If the house is foreclosed, the home loan gets paid first, even if the credit card company recorded their debt before the home loan.

COMMON TRAP

⚠ WATCH FOR

Students think: all recorded interests are wiped out in foreclosure. Wrong, because only junior interests are extinguished. The actual test is senior interests survive.

EXAMINER PATTERN

🔗 [HOW THEY TEST IT](#)
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The MBE loves: foreclosure sale setup with multiple liens. Trap: students forget PMM priority over earlier judgment liens, assuming first-recorded wins.

Modification — UCC §2-209 (good faith)

UCC §2-209

CONSIDERATION

THE RULE

Under the UCC, a modification of a sale-of-goods contract needs no new consideration, provided the modification is made in good faith. A no-oral-modification clause is enforceable; modifications must satisfy the statute of frauds if the modified contract falls within it.

IN PLAIN ENGLISH

When you change a contract for selling goods, you don't need something extra in return if the change is honest. If the contract says changes must be written, then you have to write them down.

MEMORY HOOK

Good Faith, No New Gain: Modify without new consideration, just honesty under UCC.

WORKED EXAMPLE

The buyer and seller agree to change delivery terms for a shipment of furniture. They do it verbally, but the contract requires written changes. The change isn't valid unless they put it in writing.

COMMON TRAP

⚠ WATCH FOR

Students think: Any modification needs consideration. Wrong, because UCC allows good faith mods without it. The actual test is honesty in modification.

EXAMINER PATTERN

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The MBE loves: oral modification attempt + no-oral-mod clause. Trap: assuming oral mods always fail. Remember: enforceable only if in writing & good faith.

Material vs. minor breach

BREACH & REMEDIES

THE RULE

A minor breach entitles the non-breaching party only to damages; the contract continues. A material breach excuses the non-breaching party's performance and gives an immediate right to total damages. Factors: extent of benefit received, adequacy of compensation, willfulness, hardship to breacher, likelihood of cure.

IN PLAIN ENGLISH

If a party breaks a contract in a big way, the other side can stop their part and sue for full damages. If the breach is small, the contract still stands, but the other side can claim damages for the minor issue.

MEMORY HOOK

Material = Major Mess, Minor = Manageable. Major breach halts the contract; minor breach just tweaks damages.

WORKED EXAMPLE

The buyer orders 100 chairs, but the seller delivers 90. This is a minor breach, so the buyer must pay for the 90 chairs but can claim damages for the missing 10. If the seller delivered 50 broken chairs, it's a material breach, and the buyer can cancel the contract and sue for full damages.

COMMON TRAP

⚠ WATCH FOR

Students think: any breach lets you walk away. Wrong, because only material breaches do. The actual test is based on benefit, willfulness, and cure likelihood.

EXAMINER PATTERN

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Scenario: partial performance with a defect. Trap: assuming performance halts. Minor breaches don't stop the contract; look for factors indicating materiality.

Defeasible fees

PRESENT ESTATES

THE RULE

Fee simple determinable: ends AUTOMATICALLY on stated event ("so long as", "until") — followed by possibility of reverter.

Fee simple subject to condition subsequent: grantor must EXERCISE right of entry ("provided that", "but if", "on condition") — followed by right of re-entry. FS subject to executory limitation: vests in 3rd party automatically.

IN PLAIN ENGLISH

Defeasible fees are types of property ownership that can end if certain conditions are met. Some end automatically when a condition occurs, while others require action to end.

MEMORY HOOK

Defeasible = Definite or Delay? Determinable ends automatically; condition subsequent requires action.

WORKED EXAMPLE

A owns land 'so long as' it's used as a park. If A builds a house instead, ownership ends automatically. If B owns land 'provided that' it's used as a school, B must act to reclaim it if it's not.

COMMON TRAP

⚠ WATCH FOR

Students think: all defeasible fees end automatically. Wrong, because only fee simple determinable does. The actual test is whether the grantor must act (condition subsequent) or if it ends on its own (determinable).

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: conveyance with 'so long as' or 'but if' language. Trap: students misidentify fee type. Look for whether action is needed or not to determine fee simple type.

Erie doctrine

Erie

VENUE, REMOVAL & ERIE

THE RULE

In diversity cases, federal courts apply state SUBSTANTIVE law and federal PROCEDURAL law. If a Federal Rule of Civil Procedure is on point and valid under the Rules Enabling Act, it applies (Hanna). For unwritten federal practices conflicting with state law, apply the outcome-determinative / twin-aims test (Hanna, Byrd).

IN PLAIN ENGLISH

In cases where people from different states are suing each other in federal court, the court uses the state's laws for important issues and federal rules for how the court process works.

MEMORY HOOK

ERIE: State substance, Fed procedure. Federal courts blend state law with federal rules in diversity cases.

WORKED EXAMPLE

In a federal court case about a contract dispute between parties from different states, the court uses the state's law to decide if the contract is valid but follows federal rules for how evidence is presented in court.

COMMON TRAP

⚠ WATCH FOR

Students think: Federal law always trumps. Wrong, because state substantive law governs in diversity. The actual test is whether it's outcome-determinative or affects forum shopping.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: conflict between state and federal law in diversity. Setup often includes a federal rule on point. Trap: assume federal always wins. Remember, state law applies if substantive.

Mathews balancing test

Mathews v. Eldridge

PROCEDURAL DUE PROCESS

THE RULE

The process due is determined by balancing (1) the private interest affected, (2) the risk of erroneous deprivation under existing procedures and the value of additional safeguards, and (3) the government's interest, including administrative burden. Generally requires notice and meaningful opportunity to be heard.

IN PLAIN ENGLISH

To decide what kind of process is fair, weigh the person's interest, the chance of mistakes without more rules, and how hard it is for the government to add those rules.

MEMORY HOOK

Mathews Mix: Interest, Risk, Burden. Balance these three to find due process — private interest, error risk, and government burden.

WORKED EXAMPLE

If a city wants to cut off a resident's water for unpaid bills, they must consider the resident's need for water, the risk of error in billing, and how difficult it is for the city to give a hearing before shutting it off.

COMMON TRAP

⚠ WATCH FOR

Students think: any deprivation needs a full hearing. Wrong, because Mathews allows flexibility. The actual test is balancing interest, risk, and burden.

EXAMINER PATTERN



HOW THEY TEST IT
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The MBE loves: government benefits cut-off + minimal procedure. Trap: assume full hearing needed. Correct: balance private interest vs. government's efficiency need.

1A — unprotected speech categories

1ST AMENDMENT — SPEECH

THE RULE

Speech outside 1A protection: (1) incitement to imminent lawless action (Brandenburg), (2) true threats, (3) fighting words, (4) obscenity (Miller — prurient + patently offensive + no serious value), (5) child pornography. Government may regulate these without strict scrutiny but cannot discriminate by viewpoint within them (R.A.V.).

IN PLAIN ENGLISH

Certain types of speech, like inciting violence or making true threats, aren't protected by the First Amendment, so the government can regulate them more easily.

MEMORY HOOK

Unprotected Speech: Incite, Threaten, Fight, Obscene, Child Pics. No 1A shield for these five — but no viewpoint bias allowed.

WORKED EXAMPLE

If someone tells a crowd to attack a building immediately, this incitement to imminent lawless action isn't protected speech, and the government can punish it without needing to meet strict scrutiny.

COMMON TRAP

⚠ WATCH FOR

Students think: All offensive speech is unprotected. Wrong, because only specific categories like incitement and obscenity are. The actual test is whether speech fits one of the five categories.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: speech that shocks or offends but doesn't fit a category. Trap: students assume offensiveness equals unprotected. Focus on whether it meets criteria like imminent lawless action or obscenity.

Double jeopardy

DOUBLE JEOPARDY

THE RULE

Bars (1) retrial after acquittal, (2) retrial after conviction (unless reversed on appeal for trial error, not insufficient evidence), (3) multiple punishments for the same offense. "Same offense" = same elements (Blockburger). Dual sovereignty allows separate state and federal prosecutions.

IN PLAIN ENGLISH

Double jeopardy means you can't be tried twice for the same crime once you've been found not guilty or guilty, with some exceptions for appeals or different governments prosecuting.

MEMORY HOOK

Double Jeopardy: No Double Dipping. Once acquitted or convicted, no repeat trials for the same crime. Exceptions for appeals and dual sovereignty.

WORKED EXAMPLE

After being acquitted of theft in state court, the defendant can't be retried for that theft in the same state. However, if new evidence emerges, federal authorities could prosecute for a related federal offense.

COMMON TRAP

⚠ WATCH FOR

Students think: Any retrial is barred. Wrong, because appeals can lead to retrial if due to trial error. The actual test is if the appeal was for trial error, not insufficient evidence.

EXAMINER PATTERN

 [HOW THEY TEST IT](https://www.vrenberg.com)
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Test setup: defendant acquitted in state court, then charged federally. Trap: students assume double jeopardy applies. Correct answer: dual sovereignty allows federal trial.

Collateral estoppel (issue preclusion)

CLAIM & ISSUE PRECLUSION

THE RULE

A party is precluded from re-litigating an ISSUE that was (1) actually litigated, (2) actually determined, (3) essential to the prior judgment, and (4) the party had a full and fair opportunity to litigate. Modern rule allows non-mutual offensive use against a defendant who litigated and lost (Parklane Hosiery).

IN PLAIN ENGLISH

Once a court decides an important issue in a case, you can't argue about that same issue again in a different case if you had a fair chance to argue it the first time.

MEMORY HOOK

Issue déjà vu: litigate once, skip twice. If you fought and lost on an issue, you can't fight it again in new suits.

WORKED EXAMPLE

In a car accident case, the court decides Driver A was speeding. In a later lawsuit about damages, Driver A can't argue they weren't speeding because that issue was already decided.

COMMON TRAP

⚠ WATCH FOR

Students think: any issue can be reused. Wrong, because it must be essential to the judgment. The actual test is whether the issue was necessary to the prior decision.

EXAMINER PATTERN



HOW THEY TEST IT
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Test setup: defendant lost on an issue before, new plaintiff tries to use it. Trap: students miss that it must have been essential to the first judgment to apply non-mutual offensive collateral estoppel.

Work product doctrine

FRCP 26(b)(3)

SCOPE & PRIVILEGE

THE RULE

Documents and tangible things prepared in anticipation of litigation by a party or its representative are protected. Discoverable only on showing substantial need AND inability to obtain equivalent without undue hardship. Opinion work product (mental impressions, conclusions) gets near-absolute protection.

IN PLAIN ENGLISH

If a party prepares documents for an upcoming lawsuit, those documents are usually protected from being shared with the other side unless the other side really needs them and can't get similar info elsewhere.

MEMORY HOOK

Work Product: Protecting Prep. Docs for litigation stay secret unless need is great and hardship is heavy.

WORKED EXAMPLE

The defendant prepares a report about a car accident for their lawyer. The plaintiff wants it, but must show they can't get similar info from other sources and really need it. If the report includes the lawyer's thoughts, it's even harder to get.

COMMON TRAP

⚠ WATCH FOR

Students think: Any work product can be discovered with need. Wrong, because opinion work product is nearly untouchable. The actual test is substantial need and undue hardship only for factual work product.

EXAMINER PATTERN

 HOW THEY TEST IT
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The MBE loves: party requests documents prepared by attorney. Trap: assuming all can be disclosed with need. Key: differentiate between factual work product (need + hardship) and opinion work product (almost never disclosed).

Express vs. constructive conditions

CONDITIONS & DISCHARGE

THE RULE

An express condition must be **STRICTLY** satisfied (substantial performance does not suffice). A constructive condition (one implied by law) is satisfied by substantial performance. Courts construe doubtful provisions as promises rather than express conditions to avoid forfeiture.

IN PLAIN ENGLISH

An express condition is a specific requirement that must be fully met for a contract obligation to arise. A constructive condition is implied and can be met if the main purpose is mostly fulfilled.

MEMORY HOOK

Express = Exact, Constructive = Close. Express demands perfection; constructive gives leeway with substantial performance.

WORKED EXAMPLE

The buyer agrees to pay only if the house is painted blue (express condition). The painter paints it light blue. The buyer can refuse payment. If the contract just said 'paint the house,' the buyer must pay if the job is mostly done.

COMMON TRAP

⚠ WATCH FOR

Students think: All conditions need strict compliance. Wrong, because constructive conditions only need substantial performance. The actual test is whether it is express or constructive.

EXAMINER PATTERN



HOW THEY TEST IT
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The MBE loves: ambiguous contract language. Question: express or constructive? Trap: assuming strict compliance is always needed — courts prefer promises to avoid forfeiture.

Spending power conditions

South Dakota v. Dole

TAXING & SPENDING

THE RULE

Congress may attach conditions to federal spending if (1) the spending is for the general welfare, (2) the condition is unambiguous, (3) the condition is related to the federal interest in the program, (4) the condition does not violate another constitutional provision, AND (5) it is not so coercive as to compel acceptance (NFIB v. Sebelius).

IN PLAIN ENGLISH

Congress can give money to states with strings attached, but those strings must be clear, related to the money's purpose, not force states to comply, and not break other constitutional rules.

MEMORY HOOK

Spend Wisely, Condition Clearly. Congress's purse strings come with strings attached—clear, related, and non-coercive.

WORKED EXAMPLE

Congress offers states funding for highway repairs but requires them to raise the legal drinking age to 21. The condition is clear and related to highway safety, so it's allowed.

COMMON TRAP

⚠ WATCH FOR

Students think: Any condition is allowed. Wrong, because it must be related and not coercive. The actual test is clear, related, and non-coercive conditions.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: Congress offers states funding with strings. Trap: students miss that conditions must be clear and related, not just beneficial.

Stream of commerce

Asahi / J. McIntyre

PERSONAL JURISDICTION

THE RULE

Placing a product into the stream of commerce alone does not establish purposeful availment. Plurality opinions (O'Connor in Asahi; Kennedy in McIntyre) require additional conduct showing intent to serve the forum. Brennan plurality (Asahi) would accept awareness alone. Bar tests the stricter view.

IN PLAIN ENGLISH

Just selling a product that ends up in a state isn't enough to be sued there. You need to show the seller intended to do business in that state.

MEMORY HOOK

Stream needs steering, not just floating. Just shipping isn't enough; show intent to target the forum.

WORKED EXAMPLE

A French bike maker sells bikes in Europe. One bike ends up in Texas. Without ads or sales in Texas, they can't be sued there just because the bike got there.

COMMON TRAP

⚠ WATCH FOR

Students think: shipping to U.S. suffices. Wrong, because awareness isn't enough. The actual test is intent to target the forum (strict view).

EXAMINER PATTERN

 **HOW THEY TEST IT**
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MBE loves: foreign manufacturer + product ends up in forum. Trap: students assume awareness suffices, but need conduct showing intent to serve forum.

Non-hearsay — prior statements of witness

FRE 801(d)(1)

EXEMPTIONS (801(D))

THE RULE

A declarant-witness's prior statement is NON-hearsay if declarant testifies and is subject to cross AND: (A) prior inconsistent statement given under oath at prior proceeding (used substantively); (B) prior consistent statement to rebut fabrication charge OR to rehabilitate credibility; (C) prior identification of a person.

IN PLAIN ENGLISH

A witness's earlier statements can be used in court if they testify and can be questioned. These include statements made under oath that contradict their current testimony, statements that support their credibility, or previous identifications.

MEMORY HOOK

Witness words, not whispers. Prior statements can speak if witness is present, cross-examined, and statement fits A, B, or C.

WORKED EXAMPLE

At trial, the defendant claims they weren't at the scene. Officer A testifies and is cross-examined, and their earlier sworn statement identifying the defendant at the scene is used to challenge the defendant's claim.

COMMON TRAP

⚠ WATCH FOR

Students think: Any prior statement is non-hearsay if the witness is present. Wrong, because it must also fit under specific criteria A, B, or C. The actual test is whether it meets these conditions.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: witness testifies, prior statement under oath. Trap: students forget it must be inconsistent to use substantively (A). Question often hinges on whether conditions A, B, or C are satisfied.

Substantive due process — fundamental rights

SUBSTANTIVE DUE PROCESS

THE RULE

Strict scrutiny applies to regulations burdening fundamental rights (privacy/marriage/contraception/childrearing/voting/interstate travel/refusal of life-sustaining treatment). Government must show the law is narrowly tailored to a compelling interest.

IN PLAIN ENGLISH

If a law limits a basic right like privacy or voting, it must be extremely necessary and serve an important purpose to be allowed.

MEMORY HOOK

FUNDAMENTAL RIGHTS: Protect the core, scrutinize more. Strict scrutiny for privacy, marriage, voting, travel, and life choices—government must justify its compelling need.

WORKED EXAMPLE

A city bans all protests in parks to reduce noise. This impacts free speech, a fundamental right. The city must prove this ban is crucial and the only way to achieve peace, or the law will be struck down.

COMMON TRAP

⚠ WATCH FOR

Students think: Any important right is fundamental. Wrong, because only rights deeply rooted in tradition are. The actual test is if the right is 'implicit in the concept of ordered liberty.'

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: law limiting a fundamental right, like voting or marriage. Trap: students think any governmental interest suffices. Remember: it must be compelling and narrowly tailored.

Good faith exception

Leon

EXCLUSIONARY RULE & GOOD FAITH

THE RULE

Evidence obtained by officers in objectively reasonable reliance on a facially valid warrant later found defective is admissible. Exception does not apply if (1) magistrate misled by knowingly false affidavit, (2) magistrate abandoned neutral role, (3) affidavit so lacking in PC that reliance was unreasonable, OR (4) warrant facially deficient.

IN PLAIN ENGLISH

If police act on a warrant they believe is valid, but it turns out to be flawed, the evidence might still be used in court unless the warrant was obviously bad or obtained dishonestly.

MEMORY HOOK

Good Faith Grace: Warrant Wrong, Evidence Strong. If cops rely on a valid-looking warrant, evidence stays unless deceit or glaring errors exist.

WORKED EXAMPLE

Officer A searches a house based on a warrant that later turns out to have a typo in the address. Since the officer reasonably thought the warrant was valid, the evidence found can still be used in court.

COMMON TRAP

⚠ WATCH FOR

Students think: Any defective warrant leads to exclusion. Wrong, because good faith reliance can save evidence unless the warrant is obviously flawed or deceitful. The actual test is objective reasonableness of reliance.

EXAMINER PATTERN

 **HOW THEY TEST IT** VRENBURG.BAR VRENBURG.COM

The MBE loves: warrant later deemed invalid, but officer followed procedure. Trap: students assume automatic exclusion. Key: was reliance on the warrant objectively reasonable? Focus on exceptions like false affidavits or magistrate bias.

Products liability — strict liability

PRODUCTS LIABILITY

THE RULE

Manufacturer or seller in the business is strictly liable for harm caused by a product that is (1) defective (manufacturing, design, or warning), (2) defect existed when it left defendant's control, AND (3) caused plaintiff's harm in foreseeable use. Plaintiff need not be in privity.

IN PLAIN ENGLISH

If a product is faulty and causes harm, the maker or seller can be held responsible, even if the buyer wasn't directly dealing with them and the product was used as expected.

MEMORY HOOK

Defect + Deliver = Damage. If it's defective at departure, you're on the hook for the harm.

WORKED EXAMPLE

A coffee maker explodes due to a design flaw while being used normally, injuring a customer. The manufacturer is liable for the injuries, even though the customer bought it from a store, not directly from them.

COMMON TRAP

⚠ WATCH FOR

Students think: Privity is required for liability. Wrong, because strict liability applies without privity. The actual test is defect, control, and causation.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBURG BAR · VRENBURG.COM

Test setup: product sold by reputable company, defect harms user. Trap: students focus on negligence or privity. Key is proving defect existed when product left defendant.

UCC §2-207 — additional terms between merchants

UCC §2-207(2)

ACCEPTANCE

THE RULE

Between merchants, additional terms in an acceptance become part of the contract unless: (1) the offer expressly limits acceptance to its terms, (2) the new term materially alters the contract, OR (3) the offeror objects within a reasonable time. Material alteration paradigm: arbitration clauses, warranty disclaimers, limitation of remedies.

IN PLAIN ENGLISH

When two businesses make a deal, new terms in a reply can become part of the contract unless the original offer says no changes, the new terms are a big change, or the other party quickly says no.

MEMORY HOOK

Merchants' Mix: Added terms stick unless blocked. Between merchants, extra terms join unless limited, material, or timely objected.

WORKED EXAMPLE

Company A offers to sell goods to Company B. B replies, adding a clause for delivery insurance. A doesn't object. The insurance term becomes part of their contract because A didn't limit changes or object.

COMMON TRAP

⚠ WATCH FOR

Students think: Any new term is automatically in. Wrong, because material alteration or objection stops them. The actual test is if the offer limits terms, material change, or objection.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: merchant accepts with extra term like arbitration. Question: is it in? Trap: assuming all terms stick. Check for material alteration or quick objection.

Commerce Clause — Lopez framework

Lopez / Morrison

COMMERCE CLAUSE

THE RULE

Congress may regulate (1) channels of interstate commerce, (2) instrumentalities of interstate commerce and persons/things in it, OR (3) activities that substantially affect interstate commerce. Non-economic activities cannot be aggregated to reach the substantial-effects prong (Lopez, Morrison).

IN PLAIN ENGLISH

Congress can make laws about things that cross state lines, things used in crossing state lines, or activities that have a big impact on the economy across states. But, they can't group small, non-economic actions to claim a big impact.

MEMORY HOOK

Commerce Clause: Channels, Things, Impact. Regulate roads, goods, or big effects on trade.

WORKED EXAMPLE

A law banning guns in school zones is challenged. The defendant argues that carrying a gun in a school zone isn't an economic activity and doesn't affect interstate commerce. The court agrees, striking down the law under the Commerce Clause.

COMMON TRAP

⚠ WATCH FOR

Students think: Any activity affecting commerce is regulable. Wrong, because non-economic activities can't be aggregated. The actual test is economic impact (Lopez, Morrison).

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: federal law targets non-economic crime (e.g., violence against women). Trap: students assume substantial effect on commerce. Remember: no aggregation for non-economic activity (Morrison).

1A — content-based vs. content-neutral

1ST AMENDMENT — SPEECH

THE RULE

Content-based restrictions on protected speech receive strict scrutiny (Reed v. Town of Gilbert). Content-neutral time-place-manner restrictions in a public forum get intermediate scrutiny: (1) serves significant government interest, (2) narrowly tailored, AND (3) leaves open ample alternative channels.

IN PLAIN ENGLISH

If a law targets the message of speech, it's harder for the government to justify. If it just regulates when, where, or how speech happens without focusing on the message, it's easier to justify.

MEMORY HOOK

Content Calls for Scrutiny: Content-based gets strict scrutiny; content-neutral gets intermediate scrutiny. Know the difference!

WORKED EXAMPLE

A city bans protests only criticizing the mayor. This is content-based, so it's very hard to justify. If the city limits all protests to certain hours, regardless of message, it's content-neutral and easier to justify.

COMMON TRAP

⚠ WATCH FOR

Students think: all speech restrictions get strict scrutiny. Wrong, because content-neutral ones only need intermediate scrutiny. The actual test is the type of restriction.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: city ordinance regulates speech, with unclear if it's content-based or neutral. Trap: assume all get strict scrutiny. Check if it's time-place-manner for intermediate scrutiny.

Affirmative duty to act

DUTY (FORESEEABLE PLAINTIFFS)

THE RULE

Generally no duty to rescue or aid. Exceptions: (1) special relationship (parent-child, employer-employee, common carrier-passenger, custodian), (2) defendant created the peril (even non-negligently), (3) voluntarily undertook to help (must use reasonable care; cannot worsen plaintiff's position), (4) by contract or statute.

IN PLAIN ENGLISH

Usually, people aren't required to help others in danger unless there's a special relationship, they caused the danger, they started helping, or a law says they must.

MEMORY HOOK

No Duty, No Rescue! Exceptions: Relationships, Peril, Voluntary, Contract.

WORKED EXAMPLE

Officer A sees a car accident and starts helping an injured driver. Officer A must now act carefully and can't make the driver's situation worse.

COMMON TRAP

⚠ WATCH FOR

Students think: Any danger creates a duty. Wrong, because only specific exceptions apply. The actual test is a special relationship, creation of peril, voluntary aid, or legal obligation.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: bystander sees someone in danger. Question: duty to rescue? Trap: assuming duty exists without exceptions like relationship or creation of peril.

Dormant Commerce Clause — discriminatory laws

DORMANT COMMERCE CLAUSE

THE RULE

A state law that discriminates against out-of-state commerce on its face, in purpose, or in effect is per se invalid unless the state shows (1) no reasonable non-discriminatory alternative AND (2) the law furthers an important non-economic interest.

IN PLAIN ENGLISH

If a state law unfairly targets businesses from other states, it's usually not allowed unless the state can prove there's no other way to achieve an important goal.

MEMORY HOOK

Discriminate = Doom. State laws targeting outsiders fail unless no alternatives and vital interests.

WORKED EXAMPLE

A state passes a law taxing only out-of-state apple sellers. This is likely invalid because it unfairly targets non-local businesses, and the state can't show it's the only way to protect local health.

COMMON TRAP

⚠ WATCH FOR

Students think: any discrimination is fine if it benefits locals. Wrong, because protectionism is per se invalid unless strict criteria met.

EXAMINER PATTERN



HOW THEY TEST IT
VRENBORG BAR · VRENBORG.COM

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Exam loves: state law limits out-of-state goods. Trap: assuming economic benefits justify it. Must show no alternative and important non-economic interest.

Warrant exception — search incident to arrest

Chimel / Gant

WARRANT EXCEPTIONS

THE RULE

On a lawful custodial arrest, police may search the arrestee's person and area within immediate control (wingspan, Chimel). For vehicles (Gant), only if (1) arrestee unsecured and within reaching distance OR (2) reasonable to believe evidence of the offense of arrest is in the vehicle. Cell phones require a warrant (Riley).

IN PLAIN ENGLISH

When someone is arrested, police can search them and nearby areas they could reach. For cars, they can search if the person can still reach inside or if they think they'll find evidence related to the arrest.

MEMORY HOOK

ARREST = wingspan + wheels. Wingspan for people, wheels for cars (Gant limits).

WORKED EXAMPLE

Officer A arrests the defendant for theft while the defendant is standing next to their car. The officer can search the car if the defendant isn't secured and could grab something or if they think the stolen goods are inside.

COMMON TRAP

⚠ WATCH FOR

Students think: any arrest means full car search. Wrong, because Gant restricts it to unsecured arrestees or evidence relevance. Cars need specific conditions.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBORG BAR · VRENBORG.COM

The MBE loves: suspect arrested near vehicle. Trap: assuming search is always okay. Key: check if suspect is unsecured or if evidence related to arrest might be in car.

Anticipatory repudiation

BREACH & REMEDIES

THE RULE

An unequivocal statement or voluntary act before performance is due that the party will not perform constitutes anticipatory repudiation. The non-breaching party may (1) sue immediately, (2) suspend performance, OR (3) wait and urge performance.

Mere doubt or insolvency is not repudiation — but may justify a demand for assurances under UCC §2-609.

IN PLAIN ENGLISH

If one party clearly says or shows they won't fulfill their future contract duties, the other party can take action like suing or waiting to see if they change their mind.

MEMORY HOOK

Repudiate? Act or Assert, not Assume. Clear refusal before due date lets you sue, pause, or persuade.

WORKED EXAMPLE

The buyer tells the seller they won't pay for the goods due next month. The seller can sue now, stop delivering, or wait to see if the buyer changes their mind.

COMMON TRAP

⚠ WATCH FOR

Students think: mere doubt or financial trouble equals repudiation. Wrong, because doubt allows for assurance demands, not immediate breach action. The actual test is unequivocal refusal.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBURG BAR · VRENBURG.COM

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The MBE loves: party expresses doubt or faces financial issues before contract date. Trap: students assume this is repudiation. Key: look for clear refusal or act indicating non-performance.

Parol evidence — admissibility exceptions

INTERPRETATION & PAROL EVIDENCE

THE RULE

Even with a fully integrated writing, extrinsic evidence is admissible to: (1) clarify ambiguity, (2) prove formation defects (fraud, duress, mistake, lack of consideration), (3) prove a condition precedent to formation, (4) prove a subsequent modification, or (5) interpret terms (with restrictions on plain meaning).

IN PLAIN ENGLISH

Even if a contract seems complete, outside evidence can be used to explain unclear terms, show issues with how the contract was made, prove later changes, or clarify what the terms mean.

MEMORY HOOK

Parol Evidence: Peek Past the Page! Clarify, correct, condition, change, or clarify terms with exceptions.

WORKED EXAMPLE

The defendant claims a contract term is unclear. They introduce emails showing both parties agreed the term meant delivery in 30 days. The court allows this evidence to clarify the term's meaning.

COMMON TRAP

⚠ WATCH FOR

Students think: Any extrinsic evidence is barred if writing is fully integrated. Wrong, because exceptions allow it for ambiguity, defects, conditions, modifications, or interpretation.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBURG BAR · VRENBURG.COM

The MBE loves: contract has ambiguous term or alleged oral agreement. Trap: students forget exceptions like ambiguity or condition precedent can allow parol evidence.

Attempt

ATTEMPT

THE RULE

Specific intent to commit a target crime PLUS a substantial step (MPC) or dangerous proximity (common law) toward its commission. Abandonment is generally NOT a defense at common law; MPC §5.01 allows voluntary and complete renunciation as defense. Factual impossibility is no defense; legal impossibility is.

IN PLAIN ENGLISH

Attempt means you tried to commit a crime and took a big step toward doing it, even if you didn't finish. You can't back out later to avoid charges, unless under certain rules you truly changed your mind.

MEMORY HOOK

Attempt: try hard, step closer. Intent + action, not just thoughts, make an attempt.

WORKED EXAMPLE

The defendant planned to rob a store and was caught inside with a mask and gun. Even though he didn't take any money, his actions show a clear attempt to commit robbery.

COMMON TRAP

⚠ WATCH FOR

Students think: Any preparation counts. Wrong, because mere preparation isn't enough. Actual test is substantial step (MPC) or dangerous proximity (common law).

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBORG BAR · VRENBORG.COM

The MBE loves: defendant planned, took steps, but crime failed. Question: Is it attempt? Trap: confusing mere preparation with substantial step or dangerous proximity.

Miranda — interrogation

Innis

MIRANDA

THE RULE

Interrogation includes express questioning and any words or actions police should know are reasonably likely to elicit an incriminating response. Spontaneous statements not in response to interrogation are admissible. Routine booking questions are not interrogation (Muniz).

IN PLAIN ENGLISH

Interrogation isn't just direct questioning; it's anything police say or do that they should know might make someone confess. If someone blurts out something on their own, it's fair game.

MEMORY HOOK

Interrogation: words or actions = response. If likely to get a confession, it's interrogation.

WORKED EXAMPLE

Officer A mentions finding a weapon near a crime scene while driving the defendant to the station. The defendant, without being asked, admits to owning it. This admission can be used because it wasn't prompted by direct questioning.

COMMON TRAP

⚠ WATCH FOR

Students think: any police question is interrogation. Wrong, because routine booking questions aren't. The actual test is if it's likely to elicit an incriminating response.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBURG BAR · VRENBURG.COM

The MBE loves: suspect makes a statement after casual police remarks. Trap: students assume it's spontaneous. Check if police words/actions were likely to elicit a response.

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Products liability — design defect

PRODUCTS LIABILITY

THE RULE

Two tests: (1) Consumer-expectation: product more dangerous than ordinary consumer would expect. (2) Risk-utility: a reasonable alternative design existed and the failure to adopt it made the product not reasonably safe. Modern Restatement (Third) favors risk-utility.

IN PLAIN ENGLISH

A product is defective if it's more dangerous than expected or if there's a safer design that wasn't used.

MEMORY HOOK

Design Defect: Expectation vs. Utility. Consumer wants safety; utility weighs alternatives.

WORKED EXAMPLE

A new blender model explodes when used as intended. There was a safer design available that wasn't used. The blender is considered defectively designed.

COMMON TRAP

⚠ WATCH FOR

Students think: Consumer-expectation always applies. Wrong, because modern preference is risk-utility. The actual test often hinges on reasonable alternative design.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBORG BAR · VRENBORG.COM

The MBE loves: product fails in unexpected way, but safer design exists. Trap: focusing only on consumer surprise. Correct: consider if safer design was feasible.

Final judgment rule

28 U.S.C. §1291

APPELLATE REVIEW

THE RULE

Appellate jurisdiction generally lies only over final judgments — those that end the litigation on the merits, leaving nothing for the court to do but execute the judgment. Exceptions: collateral order doctrine, certified questions, interlocutory injunctions (§1292(a)), §1292(b) certification, Rule 54(b) certification.

IN PLAIN ENGLISH

You can usually only appeal a case after the trial court has made a final decision on everything involved in the case.

MEMORY HOOK

FINAL JUDGMENT: Case closed, appeal door opens. Appeals need a full stop, not just a pause, except for a few special detours.

WORKED EXAMPLE

The defendant wants to appeal a judge's decision to exclude evidence, but since the trial isn't over yet, they must wait until the final verdict before appealing.

COMMON TRAP

⚠ WATCH FOR

Students think: Any order can be appealed. Wrong, because only final judgments qualify unless exceptions apply. The actual test is whether the order ends the litigation on the merits.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: order resolves an issue but not the entire case. Question: appealable? Trap: assuming appealable without finality. Exceptions like collateral orders or injunctions are key.

Miranda — invocation and waiver

Edwards / Davis

MIRANDA

THE RULE

Invocation of right to counsel must be unambiguous (Davis); once invoked, police must cease all interrogation about any offense until counsel present or suspect re-initiates (Edwards). Right to silence may be re-approached after a reasonable time. Waiver must be knowing, intelligent, voluntary.

IN PLAIN ENGLISH

If someone clearly asks for a lawyer, the police have to stop questioning them until the lawyer is there, unless the person starts talking again on their own.

MEMORY HOOK

Silence is golden; counsel is ironclad. Unambiguous request stops all police chatter until lawyer's ladder.

WORKED EXAMPLE

During questioning, the defendant says, 'I think I need a lawyer.' The police must stop asking questions until a lawyer is present or the defendant decides to talk without one.

COMMON TRAP

⚠ WATCH FOR

Students think: Any mention of a lawyer stops questioning. Wrong, because it must be clear and unambiguous. The actual test is Davis: suspect must clearly request counsel.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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MBE loves: suspect says 'maybe I need a lawyer' during questioning. Trap: students think this invokes right to counsel. It's ambiguous, so questioning continues unless clearly invoked.

Terry stop and frisk

Terry v. Ohio

STOPS, FRISKS & ARRESTS

THE RULE

Police may stop a person briefly for investigation based on reasonable, articulable suspicion of criminal activity. May frisk for weapons if reasonable suspicion the person is armed and dangerous. Frisk limited to outer clothing for weapons; plain feel of contraband may justify seizure (Dickerson).

IN PLAIN ENGLISH

Police can stop someone if they have a good reason to think the person is up to something illegal. If they think the person might have a weapon, they can pat them down to check.

MEMORY HOOK

Stop, frisk, but not a full search. Brief stop if reasonable suspicion, frisk only for weapons.

WORKED EXAMPLE

Officer A sees the defendant pacing nervously near a store late at night. Thinking the defendant might be planning a robbery and could be armed, Officer A stops him and pats down his jacket, finding a knife.

COMMON TRAP

⚠ WATCH FOR

Students think: any suspicion justifies a frisk. Wrong, because suspicion must be specific to weapons. The actual test is reasonable suspicion of being armed and dangerous.

EXAMINER PATTERN

 **HOW THEY TEST IT**
VRENBORG BAR · VRENBORG.COM

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The MBE loves: suspect in high-crime area, acting nervously. Trap: assuming frisk is valid without specific suspicion of weapons. Focus on articulable facts for suspicion.

Miranda — custody

Berkemer / Mathiason

MIRANDA

THE RULE

Custody exists when a reasonable person in the suspect's position would not feel free to terminate the encounter and leave. Voluntary station-house interviews, traffic stops, and brief Terry stops generally are NOT custody. Formal arrest or its functional equivalent IS custody.

IN PLAIN ENGLISH

You're considered 'in custody' if you feel you can't just walk away from the police. A quick chat or traffic stop usually doesn't count, but being arrested does.

MEMORY HOOK

Not free to flee? That's custody! If a reasonable person feels stuck, it's Miranda time.

WORKED EXAMPLE

Officer A pulls the defendant over for speeding and asks a few questions. The defendant feels free to leave after the stop, so it's not custody. If Officer A handcuffs the defendant and takes them to the station, that's custody.

COMMON TRAP

⚠ WATCH FOR

Students think: any police interaction is custody. Wrong, because Miranda only applies if a reasonable person wouldn't feel free to leave. The actual test is whether there's formal arrest or its equivalent.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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MBE loves: suspect is questioned at the station but told they're free to go. Trap: assuming station = custody. Test: voluntary interview means no custody unless arrest-like restraints.

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Parol evidence rule

INTERPRETATION & PAROL EVIDENCE

THE RULE

When parties have a fully integrated written agreement, prior or contemporaneous oral statements that contradict or vary the writing are inadmissible. A merger clause is strong (but not conclusive) evidence of full integration. Partial integrations may be supplemented by consistent additional terms.

IN PLAIN ENGLISH

If you have a complete written contract, you can't use earlier spoken agreements to change it. Sometimes, you can add details that don't conflict with the written terms.

MEMORY HOOK

If it's in writing, no rewriting! Full integration means no oral changes—what's written rules.

WORKED EXAMPLE

The buyer and seller sign a contract for a car sale. The buyer can't later claim an oral promise for free servicing was part of the deal, as it wasn't in the written contract.

COMMON TRAP

⚠ WATCH FOR

Students think: any oral statement is inadmissible. Wrong, because consistent additional terms can supplement partial integrations. The actual test is whether the writing is fully integrated.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: a contract with a merger clause + prior oral agreement. Trap: assuming merger clause is conclusive. Must determine if writing is fully integrated or partial.

UCC §2-206 (acceptance in sale of goods)

UCC §2-206

ACCEPTANCE

THE RULE

Unless the offer unambiguously requires otherwise, an offer to buy goods for prompt shipment is accepted EITHER by a prompt promise to ship OR by prompt shipment of conforming goods. Shipment of non-conforming goods is BOTH acceptance AND breach, unless the seller seasonably notifies the buyer that the shipment is offered only as accommodation.

IN PLAIN ENGLISH

If someone offers to buy goods, you can accept by either promising to ship the goods soon or by actually shipping them. If you ship the wrong goods, it's both an acceptance and a breach unless you say it's just a favor.

MEMORY HOOK

Ship or Say: Two Ways to Play. Accept by promising to ship or by shipping the goods. Non-conforming goods? Accept but breach, unless it's an accommodation.

WORKED EXAMPLE

A buyer orders 100 blue shirts from a seller. The seller ships 100 red shirts without notifying the buyer that it's an accommodation. This counts as accepting the order, but also breaching it by sending the wrong color.

COMMON TRAP

⚠ WATCH FOR

Students think: Any shipment = acceptance. Wrong, because non-conforming goods need notice for accommodation. The actual test is if seller seasonably notifies buyer.

EXAMINER PATTERN

 **HOW THEY TEST IT** VRENBURG BAR VRENBURG.COM

42

The MBE loves: seller ships wrong goods without notice. Trap: students miss that without notification, it's both acceptance and breach, not accommodation.

Fruit of the poisonous tree

Wong Sun

FRUIT OF POISONOUS TREE & STANDING

THE RULE

Evidence derived from a constitutional violation is generally also excluded. Exceptions: (1) independent source, (2) inevitable discovery (Nix), (3) attenuation of the taint (free will of the defendant, time, intervening circumstances).

IN PLAIN ENGLISH

If the police gather evidence illegally, anything they find because of that evidence is usually not allowed in court. But there are exceptions if the evidence would have been found anyway or if time and events break the connection.

MEMORY HOOK

Bad tree, bad fruit. Evidence from a rights violation is tainted unless exceptions apply: independent source, inevitable discovery, or attenuation.

WORKED EXAMPLE

Officer A illegally searches a car and finds a map leading to stolen goods. Later, a witness independently tells the police about the goods' location. The map is excluded, but the goods can be used because of the witness.

COMMON TRAP

⚠ WATCH FOR

Students think: Any evidence linked to a violation is out. Wrong, because exceptions can cleanse the taint. The actual test is whether an exception like attenuation applies.

EXAMINER PATTERN



HOW THEY TEST IT
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The MBE loves: illegal search leads to new evidence. Trap: students exclude all evidence. Look for exceptions like attenuation (e.g., long time lapse, intervening acts) to admit evidence.

11th Amendment sovereign immunity

11th Amendment

JUSTICIABILITY (STANDING, RIPENESS, MOOTNESS, POLQ)

THE RULE

States may not be sued in federal court by individuals (own citizens or others) for damages. Exceptions: (1) consent/waiver, (2) Ex parte Young — suit against state officer for prospective injunctive relief, (3) Congress abrogation under 14A §5 (with clear statement and valid §5 basis).

IN PLAIN ENGLISH

You can't sue a state for money in federal court unless the state agrees, you're suing a state official to stop them from doing something illegal, or Congress specifically allows it under certain conditions.

MEMORY HOOK

Sovereign Shield: States safe from suits. Federal courts can't hear damages claims against states unless consent, Ex parte Young, or Congress says so under 14A.

WORKED EXAMPLE

A resident sues State X in federal court for damages after a state agency wrongly denied benefits. The court dismisses the case because State X didn't consent, and it's not about stopping ongoing illegal action.

COMMON TRAP

⚠ WATCH FOR

Students think: Any federal law can abrogate immunity. Wrong, because only Congress under 14A §5 with clear intent can do so. The actual test is specific 14A authorization.

EXAMINER PATTERN



HOW THEY TEST IT
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The MBE loves: private citizen sues a state for damages in federal court. Trap: students miss exceptions like Ex parte Young or valid 14A abrogation — focus on these exceptions.

Other-act evidence — MIMIC

FRE 404(b)

CHARACTER — PROPENSITY (404)

THE RULE

Evidence of other crimes/wrongs/acts is not admissible to show propensity. Admissible for non-propensity purposes: Motive, Intent, Mistake (absence of), Identity, Common plan/scheme (MIMIC). Plus opportunity, preparation, knowledge. Must give prior notice in criminal cases and survive Rule 403.

IN PLAIN ENGLISH

You can't use someone's past actions to prove they're likely to do it again, but you can use them to show things like motive or intent if it's relevant to the case.

MEMORY HOOK

MIMIC: Motive, Intent, Mistake, Identity, Common plan. Not character!

WORKED EXAMPLE

In a theft trial, evidence of the defendant's past thefts can't be used to show they're a thief by nature, but it can be used to show they had a plan or method similar to the current crime.

COMMON TRAP

⚠ WATCH FOR

Students think: Other acts always show character. Wrong, because MIMIC allows non-propensity uses. The actual test is whether it fits MIMIC and passes Rule 403.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: evidence of past crime offered to show identity. Trap: assuming it's for character. Correct: check if it fits MIMIC and Rule 403.

Aggregation in commerce clause

Wickard / Raich

COMMERCE CLAUSE

THE RULE

For ECONOMIC activities, even purely intrastate conduct may be reached if the aggregate effect on interstate commerce is substantial. Applies to home-grown wheat (Wickard), home-grown marijuana (Raich). Does NOT apply to non-economic activity (Lopez).

IN PLAIN ENGLISH

If an activity is economic, even if it happens entirely within one state, it can be regulated by the federal government if, when combined with similar activities, it significantly impacts trade between states.

MEMORY HOOK

Small scale, big impact. Even local acts can be regulated if their collective effect hits interstate commerce hard.

WORKED EXAMPLE

A farmer grows a large amount of corn for personal use. If many farmers did the same, it could affect national corn prices, so the federal government can regulate this activity.

COMMON TRAP

⚠ WATCH FOR

Students think: Intrastate acts are safe from federal reach. Wrong, because aggregation can show a substantial effect on commerce. The actual test is substantial aggregate impact on interstate commerce.

EXAMINER PATTERN

 **HOW THEY TEST IT**
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The MBE loves: individual growing/producing something locally. Trap: students forget aggregation principle. Focus on whether the activity is economic and if its cumulative impact affects interstate commerce.

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Confrontation Clause

Crawford

CONFRONTATION CLAUSE

THE RULE

Testimonial out-of-court statements are inadmissible against a criminal defendant unless (1) the declarant is unavailable AND (2) the defendant had a prior opportunity to cross-examine (Crawford). Testimonial = statements made under circumstances objectively indicating later use at trial.

IN PLAIN ENGLISH

If someone says something outside of court that could be used against a defendant, the defendant must have a chance to question them unless the person can't come to court.

MEMORY HOOK

Crawford's Confrontation: Cross or Cut. No cross-exam means no testimonial statement allowed.

WORKED EXAMPLE

Officer A interviews a witness who describes the crime. If the witness can't testify at trial, the defendant must have had a chance to question the witness earlier for the statement to be used.

COMMON TRAP

⚠ WATCH FOR

Students think: Any out-of-court statement violates the Confrontation Clause. Wrong, because it's only testimonial statements without cross-exam. The actual test is unavailability and prior cross-examination opportunity.

EXAMINER PATTERN

 HOW THEY TEST IT
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The MBE loves: witness statement to police, witness now unavailable. Trap: assuming all such statements are inadmissible. Key: focus on whether there was a chance for prior cross-examination.

Former testimony

FRE 804(b)(1)

EXCEPTIONS — UNAVAILABLE (804)

THE RULE

Declarant unavailable. Testimony given at a prior trial, hearing, or deposition where the party against whom now offered (or in a civil case, a predecessor in interest) had an opportunity AND similar motive to develop the testimony.

IN PLAIN ENGLISH

If a witness can't testify now but did in a past legal setting, their previous testimony can be used if the current opposing party had a fair chance to question them back then.

MEMORY HOOK

Unavailable witness? Use past whispers. Prior testimony flies if same party had a chance to grill.

WORKED EXAMPLE

At a previous hearing, the defendant's lawyer cross-examined a witness. Now, the witness is unavailable, so their earlier testimony can be used in the current trial.

COMMON TRAP

⚠ WATCH FOR

Students think: Any prior testimony works. Wrong, because the party must have had a similar motive to develop it. The actual test is opportunity plus motive.

EXAMINER PATTERN



HOW THEY TEST IT
VRENBORG BAR VRENBORG.COM

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MBE setup: declarant unavailable, past civil deposition. Trap: students miss 'similar motive' requirement, assuming opportunity alone is enough.

Specific performance

BREACH & REMEDIES

THE RULE

An equitable remedy compelling actual performance. Available when (1) damages are inadequate (unique subject matter — all land, unique goods), (2) terms are sufficiently definite, (3) mutuality of remedy, and (4) feasibility of enforcement. Not available for personal service contracts.

IN PLAIN ENGLISH

Specific performance is when a court orders someone to do what they promised in a contract, instead of just paying money. This happens when money can't replace what's being promised, like a rare item or land.

MEMORY HOOK

Specific Performance: Unique, Definite, Feasible. When money can't fix it, think unique goods or land. Terms must be clear and enforceable.

WORKED EXAMPLE

A buyer contracts to purchase a rare painting from a seller. The seller refuses to deliver it. Since the painting is unique and money can't replace it, the court orders the seller to hand over the painting to the buyer.

COMMON TRAP

⚠ WATCH FOR

Students think: Any breach allows specific performance. Wrong, because it's only for unique items or land. The actual test is uniqueness and inadequacy of damages.

EXAMINER PATTERN



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Test setup: breach of land sale or rare item contract. Trap: students forget mutuality or feasibility. Ensure terms are clear and remedy is mutual.

Recording acts

RECORDING ACTS

THE RULE

Race: first to record wins, regardless of notice. Notice: subsequent BFP without notice wins (even if records later). Race-notice: subsequent BFP without notice wins ONLY IF records first. Notice = actual, constructive (recorded), or inquiry. BFP must take for value (not a donee).

IN PLAIN ENGLISH

Recording acts determine who gets ownership of property when multiple people claim it. Depending on the type, the first to record, or the buyer without notice who records first, might win.

MEMORY HOOK

Record to Win the Race! First to record prevails, unless notice changes the pace.

WORKED EXAMPLE

Buyer A buys a house from Seller and records the deed. Later, Buyer B buys the same house without knowing about Buyer A and records their deed. In a race state, Buyer A keeps the house because they recorded first.

COMMON TRAP

⚠ WATCH FOR

Students think: Notice always protects. Wrong, because race and race-notice require recording first. The actual test is the jurisdiction's specific statute.

EXAMINER PATTERN

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Test setup: two parties claim title, one records first, the other a BFP. Trap: assuming BFP always wins. Check if jurisdiction is race, notice, or race-notice.

Proximate cause

CAUSATION (ACTUAL & PROXIMATE)

THE RULE

Liability limited to harms that are the foreseeable consequence of defendant's conduct. Intervening causes that are foreseeable (rescuers, subsequent medical malpractice, normal weather) do NOT cut off liability; unforeseeable superseding causes (criminal acts, extraordinary natural events) DO cut off liability.

IN PLAIN ENGLISH

You're only responsible for harm that you could reasonably predict your actions might cause. If something unexpected happens that causes more harm, you might not be liable.

MEMORY HOOK

Foreseeable Follows, Freaky Frees. Liability sticks if harm's predictable; breaks if bizarre.

WORKED EXAMPLE

A driver runs a red light and hits a pedestrian. The pedestrian is then hit by a falling tree branch. The driver is liable for the initial injury but not for the injuries from the branch, as it was an unforeseeable event.

COMMON TRAP

⚠ WATCH FOR

Students think: any intervening cause breaks the chain. Wrong, because foreseeability matters. The actual test is whether the intervening cause was foreseeable.

EXAMINER PATTERN

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The MBE loves: chain of events leading to harm, with an intervening act. Trap: assuming all intervening acts cut off liability. Focus on whether the act was foreseeable to determine liability.

Remainders — vested vs contingent

FUTURE INTERESTS & RAP

THE RULE

Vested: (1) held by ascertained person AND (2) not subject to condition precedent. Subtypes: indefeasibly vested, vested subject to open (class members may join), vested subject to total divestment. Contingent: holder unascertained OR subject to condition precedent (other than termination of preceding estate).

IN PLAIN ENGLISH

A vested remainder is a future interest that is certain to go to someone known, without any extra conditions. A contingent remainder is uncertain because it depends on meeting a condition or identifying the person who will get it.

MEMORY HOOK

Vested is guaranteed, contingent is conditional. Vested: known owner, no strings. Contingent: unknown or iffy conditions.

WORKED EXAMPLE

In a will, if a house is left to the first child of the owner who graduates college, the remainder is contingent. If the house is left to a specific child when they turn 18, it's vested.

COMMON TRAP

⚠ WATCH FOR

Students think: any future interest is contingent. Wrong, because vested remainders have no conditions precedent and are held by known individuals. The actual test is if the remainder is ascertained and unconditional.

EXAMINER PATTERN



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The MBE loves: person has future interest but unknown heirs or conditions. Question: vested or contingent? Trap: students forget vested requires ascertained person and no conditions.

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