

# CHECKLISTS FOR THE OREGON BAR EXAMINATION

## **Administrative Law**

- I. Statutory Authority
  - a. Who passed the law?
  - b. What law applies?
    - i. FAPA
    - ii. OAPA
    - iii. Federal Constitution (ie, DP)
  - c. Which agency action?
    - i. Rulemaking
    - ii. Investigation
    - iii. Adjudication
- II. Rulemaking
  - a. Enabling legislation
    - i. Proper delegation?
    - ii. Standards?
    - iii. Arbitrary or abusive?
    - iv. Ultra Vires
  - b. Definition
    - i. Statement of general applicability and future effect
  - c. Exclusions from Rulemaking process
  - d. Federal Agencies
    - i. Formal rulemaking
      - 1. “on the record” after hearing; trial-like
    - ii. Informal rulemaking
      - 1. notice: Federal Register
      - 2. comment: writing only
      - 3. publication of final rule: FR
    - iii. Hybrid rulemaking?: look to enabling statute
  - e. Oregon Agencies
    - i. Only Informal Rulemaking
      - 1. notice: SS bulletin; 21 days; appraise public
      - 2. contents of notice
        - a. rule; authority; name; fiscal impact; how to comment in writing; alternative options
      - 3. public comment: 10 or more for oral
      - 4. file final rule with SS
      - 5. Temporary Rule Exception
- III. Adjudication
  - a. Hearing right? Enabling statute or DP clause (5<sup>th</sup> or 14<sup>th</sup>)
    - i. Federal: “on the record”
    - ii. Oregon: “contested case”
    - iii. DP test: denial of interest; adjudicative facts; no emergency
  - b. Federal Formal Hearing
    - i. Written Notice: issues; authority; fact and law asserted
    - ii. Evidence admissible

- 1. any reliable, probative, substantial evidence
      - 2. hearsay standard
    - iii. Trial type witness procedures
    - iv. Ex parte communications and remedy
    - v. ALJ: deference to; bias?
    - vi. Findings: detailed & in writing
  - c. Oregon Formal Hearing (differences only)
    - i. Evidence: if relied upon by reasonably prudent persons in the conduct of their serious affairs
      - 1. hearsay standard
    - ii. Emergency business lic suspension: standard; serving suspension order
  - d. No standard: go to DP
    - i. Reasonable notice;
    - ii. opportunity to be heard (*Mathews* balancing);
    - iii. impartial decisionmaker
  - e. Pre-deprivation hearings? (survival)
- IV. Investigations
  - a. Governed by 4<sup>th</sup> Amendment
  - b. Records
    - i. 5<sup>th</sup> Amend: public vs. other records
  - c. Warrantless Searches and Seizures
    - i. Permitted, except
    - ii. Private areas (less than PC); related to agency biz
    - iii. Heavily regulated; public area; non-intrusive
    - iv. Evidence admissibility balancing
  - d. Subpoenas
    - i. Permitted: in agency's area; not vague
- V. Getting info from agencies
  - a. FOIA
  - b. Sunshine Act
- VI. Judicial Review
  - a. Standing
    - i. Federal: Art III
    - ii. Oregon: adversely affected or aggrieved; organizational standing
  - b. Timeliness
    - i. Oregon: rulemaking (2 years); adjudication (60 days)
    - ii. Final written order
    - iii. Exhaustion of administrative remedies
      - 1. exceptions: futile, inadequate, irreparable harm
  - c. Ripeness
  - d. File in which court?
  - e. Scope of Review
    - i. Factual findings: substantial evidence (formal); abuse of discretion (informal)
    - ii. Legal conclusions when agency interprets its own statute
      - 1. When deference? When de novo?

## Agency

- I. Formation
  - a. Contractual capacity of principal
  - b. Consent of both parties
  - c. No writing or formality
- II. Fiduciary duties of Agent
  - a. Loyalty
  - b. Obedience to reasonable directions
  - c. Reasonable care under circumstance
- III. Fiduciary duties of Principal
  - a. Compensation, reimbursement, indemnification, cooperation
- IV. Contractual liability to 3<sup>rd</sup> Parties
  - a. Principals bound if agent had “authority”
    - i. Actual (express, implied)
      - 1. termination of actual authority
    - ii. Apparent: 3d party perception
    - iii. Ratification
  - b. Agent’s liability
    - i. Fully-disclosed agency: no liability
    - ii. Partially-disclosed
    - iii. undisclosed
- V. Tort liability
  - a. Employees only (not Ind K): “right to control test”
  - b. Respondeat superior
  - c. Course and scope of employment

## PARTNERSHIP

- I. Formation
  - a. Intent
  - b. No writing needed, unless can’t be completed within one year
  - c. No consideration or capital contribution
  - d. NB: *failed attempt to create other entity = partnership*
- II. Duration
  - a. At will
  - b. Definite term
  - c. Particular undertaking
- III. Property
  - a. Owned by partnership
  - b. All partners use only for partnership purposes
- IV. Fiduciary duties owed to partners
  - a. Loyalty
  - b. Care
  - c. Good faith and fair dealing
- V. Rights and Powers of Partners
  - a. Equal rights to (unless agreed otherwise)

- i. Manage
    - ii. Profits/Losses
    - iii. Access to books and information
    - iv. Distributions
  - b. Bind partnership to contracts
    - i. Same analysis as Agency (partners are both agents and principals of the partnership)
  - c. Liability for torts
    - i. If committed in scope of partnership business
  - d. No right to remuneration
  - e. Debts
    - i. Personal, but secondary, liability (joint and several)
- VI. Ending a partnership
  - a. Dissociation
    - i. Rightful
    - ii. Wrongful
  - b. Dissolution
    - i. At will: waiver
    - ii. Definite term/undertaking
      - 1. unanimous
      - 2. by term in partnership agreement
      - 3. 90 days/majority vote
  - c. Winding up
    - i. Finish all pending business
  - d. Termination
    - i. Distribution of assets
- VII. Distribution of assets
  - a. Debts to outside creditors
  - b. Debts to partners
  - c. Return of partners' capital
  - d. Profits
  - e. Losses
- VIII. Additional Entities (all require filing; ID in name)
  - a. Limited Liability Partnership
    - i. Liability for indiv debts & torts
    - ii. Not liable for partnership debts
  - b. Limited Partnership
    - i. General partners: manage and personal liability for debts
    - ii. Limited partners: no manage and no liability
  - c. **Limited Liability Company [REVIEW HANDOUT DETAILS]**
    - i. All members protected from liability
    - ii. All members manage, unless file docs electing *manager managed*
    - iii. Unanimous vote for new members

## **Civil Procedure**

### **I. SUBJECT MATTER JURISDICTION**

- a. Constitutional limitations
- b. Federal question
- c. Diversity
- d. Amount in controversy
- e. Removal
- f. Concurrent
- g. Supplemental

### **II. VENUE**

- a. Federal rules
- b. Local actions
- c. Change of venue
- d. Forum non conveniens

### **III. PERSONAL JURISDICTION**

- a. In-state defendant
- b. Out-of-state defendant
  - i. Long-arm statute
  - ii. Minimum contacts

### **IV. NOTICE (SERVICE OF PROCESS)**

- a. Service within Oregon
  - i. Personal service
  - ii. Substituted service
  - iii. Office service
  - iv. Mail service

### **V. PRETRIAL PROCEEDINGS**

- a. Pleadings
  - i. Complaint
  - ii. Answer
  - iii. Reply
  - iv. Rule 11
  - v. Objections to pleadings
  - vi. Amendments
- b. Joinder of parties
  - i. Permissive joinder
  - ii. Compulsory joinder – necessary and indispensable parties
  - iii. Intervention
  - iv. Impleader
- c. Joinder of claims
  - i. Original claims
  - ii. Counterclaims
  - iii. Cross-claims/Impleader claims
- d. Class actions
  - i. Prerequisites (Commonality, Adequacy, Numerosity, Typicality – CANT)
  - ii. Types

## VI. DISCOVERY

- a. Scope
- b. Limits
  - i. Work product
  - ii. Experts (Oregon rule)
  - iii. Protective orders
- c. Discovery devices
  - i. Depositions
  - ii. Interrogatories (Not available in Oregon)
  - iii. Request for production of documents
  - iv. Requests for admission
  - v. Mental and physical exams
- d. Sanctions
- e. Certification
- f. Pretrial conference and Order (no pre-trial conf rule in Oregon)

## VII. TRIAL

- a. Disposition without trial
  - i. Motions attacking pleadings
  - ii. Voluntary dismissal
  - iii. Involuntary dismissal
  - iv. Summary judgment
- b. Right to jury trial
- c. Jury selection
- d. Post-judgment motions
  - i. JMOL (Oregon: “directed verdict”)
  - ii. RJMOL (Oregon: “JNOV”)
  - iii. New trial
  - iv. Relief from judgment

## VIII. APPEAL

- a. Basis for appeal – final order
- b. Scope of appellate review
- c. Time for appeal

## IX. EFFECT OF JUDGMENT

- a. Res judicata (claim preclusion)
- b. Collateral estoppel (issue preclusion)

## Constitutional Law

- I. Steps In Con Law analysis
  - a. **Threshold Issues**
    - i. Standing, mootness, ripeness, state action (abstention)
  - b. **Applicable Amendment**
    - i. Look for issue pairings
    - ii. If this a property right or an liberty right?
  - c. **Applicable Elements for Claim**
    - i. If element missing, facial challenge
    - ii. If all elements addressed in statute, as applied challenge
  - d. **Level of Judicial Review**
    - i. Strict scrutiny, intermediate scrutiny, rational basis, or a special test
  - e. **Closing Issues (sometimes)**
    - i. Vagueness, overbreadth, excessive discretion
- II. THRESHOLD ISSUES
  - a. Standing
    - i. Associational Standing
    - ii. Third-party standing
    - iii. zone of interests
    - iv. Abstention
  - b. Mootness
  - c. Ripeness
  - d. State Action
- III. LEVELS OF JUDICIAL REVIEW
  - a. **Rational Basis (RBR)**
  - b. **Intermediate Scrutiny (IS)**
  - c. **Strict Scrutiny (SS)**
- IV. PROPERTY RIGHTS GUARANTEES: TAKINGS & CONTRACT CLAUSE
  - a. Takings: 5<sup>th</sup> amend (feds) and 14<sup>th</sup> Amend (states)
  - b. Contracts Clause
    - i. Judicial Review
      - 1. private contracts: intermediate scrutiny
      - 2. public contracts: strict scrutiny
- V. PROPERTY/LIBERTY RIGHTS: SUBSTANTIVE AND PROCEDURAL DP
  - a. Substantive DP
    - i. Abortion
      - 1. Undue Burden Test
    - ii. Right to Interstate Travel
    - iii. Fundamental Right to Vote
    - iv. Economic Activities
  - b. Procedural DP
    - i. Property
    - ii. Liberty
      - 1. intentional govt action req
    - iii. What process is due?



- iv. Use *Mathews* balancing test for type and timing:
- VI. EQUAL PROTECTION (5<sup>th</sup> and 14<sup>th</sup> Amends)
  - a. For all claims, must prove **intentional** discrimination. Test?
  - b. Race or National Origin: Suspect
    - i. Affirmative Action Cases:
  - c. Alienage: Sometimes suspect
    - i. Federal vs. State Govt
  - d. Gender: Quasi-Suspect
  - e. Illegitimacy: Quasi-suspect
  - f. Fundamental Rights Restrictions: Suspect
  - g. Non-Suspect
- VII. EXPRESSIVE FREEDOMS: SPEECH, PRESS, ASSOCIATION, RELIGION
  - a. Analytical Steps
  - b. Content-based vs. content-neutral
    - i. Content-based restrictions on subject matter or viewpoint
    - ii. Content-neutral laws that burden expressive conduct
  - c. Prior restraints
  - d. Vague, Overbroad, Unduly Discretionary
- VIII. UNPROTECTED/LESS PROTECTED SPEECH
  - a. Incitement of Illegal Conduct
  - b. Fighting Words
  - c. True Threat
  - d. Obscenity and Sexually-oriented speech
    - i. Miller test
    - ii. Child porn
    - iii. Zoning adult businesses
  - e. Defamation
  - f. Commercial Speech
- IX. FREEDOM OF SPEECH: TIME, PLACE, MANNER
  - a. Forum Rules
    - i. Public or limited forums
    - ii. Nonpublic forums
    - iii. Private property
- X. OTHER EXPRESSIVE ACTIVITIES
  - a. Freedom of Press
    - i. Publication of Unlawfully Obtained Information
  - b. Freedom of Association
    - i. Association for political activities is a fundamental right:
    - ii. Association for Illegal Activities
    - iii. Anonymous Association
    - iv. Discriminatory Membership
    - v. Govt Employees
    - vi. Loyalty oaths
  - c. Freedom of Religion
    - i. Free Exercise Clause
    - ii. Establishment Clause

1. *Lemon* test:

- XI. FEDERAL EXECUTIVE POWERS; Article II
  - a. Conflict of laws hierarchy
  - b. Warmaking Power
  - c. Appointment and Removal of Officers
  - d. Impeachment, conviction, removal:
  - e. Executive Immunity and Privilege
  - f. Pardon power
- XII. FEDERAL LEGISLATIVE POWERS: Article I
  - a. Enumerated Powers and Necessary and Proper
  - b. Commerce Power
  - c. Taxing and Spending Power
  - d. Civil Rights Enforcement (14<sup>th</sup> Amend, sec 5)
  - e. TENTH AMEND
  - f. ELEVENTH AMEND limits on Congressional Powers
  - g. Legislative and Line item veto
- XIII. PREEMPTION, DORMANT COMMERCE CLAUSE, P&I DOCTRINES
  - a. Preemption (from Supremacy Clause)
  - b. Dormant Commerce Clause
  - c. Privileges & Immunities Clause (Article IV, sec2)

## **Contracts**

- I. Which law governs?
  - a. UCC
  - b. CL
  - c. Gravamen
- II. Formation of Contract
  - a. Mutual Assent
    - i. Offer
    - ii. Acceptance
  - b. Consideration
    - i. Bargained for exchange
    - ii. Promissory estoppel
- III. Defenses to formation
  - a. Statute of frauds
  - b. Mistake/ambiguity
  - c. Illegality
  - d. Incapacity
  - e. Unconscionable
  - f. Fraud, duress
- IV. Contract terms
  - a. Interpretation of terms
  - b. Modification
  - c. Parol evidence rule
- V. Third Parties
  - a. Third party beneficiaries
  - b. Assignment/delegation
- VI. Performance
  - a. Conditions
    - i. Types
    - ii. Excuse
    - iii. Satisfaction
  - b. Discharge of duty
    - i. Impossibility, impracticability
    - ii. Frustration of purpose
    - iii. Modification
    - iv. Mutual rescission
    - v. Novation
    - vi. Accord & Satisfaction
  - c. Breach
    - i. Anticipatory repudiation
    - ii. Major vs. Minor breach
- VII. Remedies
  - a. Expectation interest
  - b. Compensatory damages
  - c. Consequential damages

- d. Restitution
- e. Rescission
- f. Reformation
- g. Specific performance
- h. Quasi-contract

## Corporations

### I. Attributes

- a. Separate personality
- b. Perpetual life
- c. Power granted by State Statute
  - i. Lawful purpose only
  - ii. Ultra vires?
- d. Centralized management and control
- e. Transferability of interest
  - i. Issuing stock
    - 1. Board must authorize
    - 2. Sufficient consideration
  - ii. Dividends
    - 1. payment in Board's discretion
    - 2. shareholder's can't compel
    - 3. corp must still be able to pay debts & assets must exceed liabilities
  - iii. Share repurchase
    - 1. valid if
      - a. can pay debts & assets > liabilities
    - 2. repurchased shares are retired
- f. Limited liability for shareholders
  - i. Piercing the veil if:
    - 1. 3d party injured by corp
    - 2. formalities not followed
    - 3. grossly undercapitalized
    - 4. injustice would otherwise result

### II. Formation

- a. Pre-incorporation period
  - i. Promoters owe fiduciary duties
    - 1. full disclosure
    - 2. promote corp's interest
    - 3. good faith
  - ii. Liability of promoters
    - 1. personal for debts
    - 2. joint and several
- b. Proper formation
  - i. File with Sec of State:
    - 1. Articles of Incorporation
      - a. Incorporators' names and addresses
      - b. Corp's name
      - c. Classes of share and # authorized
      - d. Registered agent and office
      - e. Number of directors
    - 2. Copy of Articles
    - 3. Agents' Consent to Act

- 4. Filing Fee
- c. Beginning of Corp Existence
  - i. Close of business on day of *proper* filing
  - ii. Filing error
    - 1. Sec of State does NOT notice = corp
    - 2. Sec of State does notice = NOT corp
- III. Maintain Corp Existence
  - a. Hold timely organizational meeting
    - i. w/in 120 days filing
    - ii. Select officers, directors, and by-laws
  - b. Maintain Required Records
  - c. Prepare Annual Balance Sheet and Income Statement
  - d. File Annual Report
  - e. Pay license fees
  - f. Hold *annual meeting*
    - i. Written notice to shareholders 10(20) – 60 days prior
      - 1. time, place, and date
    - ii. Notice errors:
      - 1. meeting invalid unless waived by
        - a. attending meeting or in writing
  - g. Special Meetings
    - i. Called by Board, 10% owners, or court
    - ii. Notice must also contain purpose of meeting
- IV. Shareholders
  - a. Generally, no duties
    - i. Controlling shareholder
      - 1. More than 50% stock
      - 2. Treat like officer & director
  - b. Rights of Shareholders
    - i. Voting
      - 1. elect directors
      - 2. approve by-law amendments (2/3 or 50%)
      - 3. Fundamental changes (2/3 or 50%)
    - ii. Mechanics of voting
      - 1. meeting: quorum
      - 2. no meeting: unanimous or near unanimous
    - iii. inspection of books and records
    - iv. Preemptive rights
    - v. Dissenter's rights
    - vi. Litigation Rights
      - 1. direct actions: shareholder recovers
      - 2. derivative actions *after demand*
        - a. for breach of care or loyalty
- V. Directors
  - a. Action at meetings
    - i. 2-day written or oral notice

- ii. Quorum (majority) to begin
  - iii. Majority must be present at meeting
  - iv. Yes vote presumed
    - 1. dissent must be on record and written
- b. Action without meeting
  - i. Unanimous written consent
- c. Fiduciary Duties
  - i. Loyalty
    - 1. place corporation's interest above your own
    - 2. no self-dealing
    - 3. COI transactions
      - a. "Corporate opportunity doctrine"
      - b. Must fully disclose to Board
      - c. Majority of disinterested directors may permit
      - d. FAILURE of disclosure
        - i. Rescind unless "fair to corp"
  - ii. Care
    - 1. do not be negligent ("ordinarily prudent person")
    - 2. this duty can be limited or eliminated in Articles
- d. Liability
  - i. Personal for corp losses caused by breach of fiduciary duty
  - ii. Defenses:
    - 1. dissent from Board action
    - 2. absent from meeting
    - 3. unanimous shareholder ratification
    - 4. good faith reliance on expert advice
    - 5. *Business Judgment Rule*
      - a. Rebuttable that directors act in conformance with their duties

## VI. Officers

- a. Powers of agent to the corporate principal
- b. Election and Removal
  - i. In Board's discretion
- c. At least one must be record keeper
- d. Duty and Liability
  - i. Same as directors

## VII. Fundamental Changes

- a. Merger or Share Exchange
  - i. Merger: both board and shareholders vote
  - ii. Share Exchange: both Boards, but only disappearing company's shareholders
  - iii. Dissenter's rights for voting shareholder
- b. Sale of Assets
  - i. Approval: both boards; sellers shareholders only
- c. Dissolution
  - i. Voluntary

1. before shares issued: majority of promoters or initial directors
  2. after shares issued: Board recommends and 2/3 approval
- ii. Involuntary
1. By Sec of State for failure to follow corp law
    - a. Req:
      - i. Notice
      - ii. 60 days to cure
      - iii. (corp still has 5 years to seek reinstate)
  2. By Court
    - a. Fraud or abuse of authority
    - b. Shareholder suit to break deadlock or oppression
    - c. Suit by creditor and corp insolvent



## **Criminal Procedure**

- I. EXCLUSIONARY RULE
  - a. 4<sup>th</sup> Amendment
  - b. Exceptions to Fruit of Poisonous Tree
- II. 4<sup>TH</sup> AMENDMENT
  - a. Arrest
    - i. PC required
  - b. Search and Seizure
    - i. Governmental conduct
    - ii. Reasonable expectation of privacy
    - iii. Search warrant
    - iv. Exceptions to search warrant requirement:
      - 1. search incident to lawful arrest
      - 2. “automobile” exception
      - 3. plain view
      - 4. consent
      - 5. stop and frisk
      - 6. hot pursuit, emergencies
    - v. Administrative inspections and searches
    - vi. Searches in foreign countries and at the border
    - vii. Wiretapping and eavesdropping
- III. 5<sup>TH</sup> AMENDMENT
  - a. Self-incrimination/Miranda warnings
    - i. When required
    - ii. Right to terminate interrogation
    - iii. Effect of violation
    - iv. Public safety exception
  - b. Double Jeopardy
- IV. 6<sup>TH</sup> AMENDMENT
  - a. Right to counsel
  - b. Right to speedy trial
  - c. Right to jury trial
  - d. Right to confront witnesses
- V. 8<sup>TH</sup> AMENDMENT
  - a. Cruel and unusual punishment
- VI. 14<sup>TH</sup> AMENDMENT
  - a. Due Process
  - b. Pre-trial ID

## **Criminal Law**

- I. GENERAL PRINCIPLES
  - a. Actus reus
  - b. Mens rea
  - c. Concurrence
  - d. Causation
- II. ACCOMPLICE LIABILITY
  - a. Elements
  - b. Defenses
- III. PRELIMINARY (INCHOATE) OFFENSES
  - a. Solicitation
  - b. Conspiracy (no merger)
  - c. Attempt
- IV. CRIMES AGAINST THE PERSON
  - a. Homicide
    - i. Murder
    - ii. Voluntary manslaughter
    - iii. Involuntary manslaughter
  - b. Assault and Battery
  - c. Rape
  - d. Kidnapping
  - e. Mayhem
- V. CRIMES AGAINST PROPERTY – THEFT
  - a. Larceny
  - b. Embezzlement
  - c. False pretenses
  - d. Receiving stolen property
- VI. CRIMES AGAINST PROPERTY & PERSON
  - a. Robbery
  - b. Extortion
- VII. CRIMES AGAINST REAL PROPERTY
  - a. Arson
  - b. Burglary
- VIII. CRIMES AGAINST THE PUBLIC
  - a. Forgery
  - b. Malicious mischief
- IX. CRIMES INVOLVING JUDICIAL PROCEDURE
  - a. Perjury and Subornation of perjury
  - b. Bribery
  - c. Compounding a crime
  - d. Misprision of a felony
- X. DEFENSES
  - a. Defenses negating Capacity
    - i. Insanity (4 tests)
    - ii. Intoxication

- iii. Infancy
  - iv. Diminished capacity
- b. Justification defenses
  - i. Defensive force (eg, self-defense)
  - ii. Crime prevention
  - iii. Effectuating or Resisting arrest
  - iv. Necessity
- c. Exculpatory Defenses
  - i. Duress
  - ii. Mistake
  - iii. Consent
  - iv. Entrapment

## **Ethics**

### **I. Conflicts of Interest**

- a. Client vs. Client
  - i. Current client
    - 1. duty of confidentiality
    - 2. duty of loyalty
  - ii. Former client
    - 1. duty of confidentiality
  - iii. Consent
    - 1. former client = always
    - 2. current client = loyalty, yes; confidentiality, no
    - 3. Requirements:
      - a. In writing discuss
        - i. Identify all clients and lawyer's role;
        - ii. Discuss risks of going forward to zeal and adverse use of information; AND
        - iii. Recommend consult with independent counsel
  - iv. Specialized conflicts issues
    - 1. Screens
      - a. former firm; active client of lawyer
      - b. affidavits needed
- b. Client vs. Lawyer conflicts
  - i. Almost always consentable
  - ii. Business transactions
    - 1. professional judgment
    - 2. fair and reasonable
    - 3. fully disclosed and understood
    - 4. seek independent counsel
    - 5. client consent
  - iii. Use of client's information by lawyer
  - iv. Gifts from client
  - v. Media rights
  - vi. Advancing money to client
  - vii. Fees paid by 3<sup>rd</sup> party
  - viii. Acquire interest in litigation
- c. Lawyer as witness
  - i. Called by client
  - ii. Called by opponent

### **II. Confidential Information**

- a. Rules of evidence are
  - i. Atty-client privilege
  - ii. Work product
- b. Rule of ethics: duty to maintain confidences
  - i. Requested to be held in confidence
  - ii. Embarrassing to client

- iii. Detrimental to client
  - c. Problem areas
    - i. Documents: look to time and purpose of creation
    - ii. Crime exception
    - iii. Disclosure to prevent bodily injury
    - iv. Disclosure for lawyer's self-defense
    - v. Duty to Report child abuse
- III. Lawyer Trust Accounts
- IV. Dishonesty
  - a. Always mention
  - b. Good faith investigation exception
- V. Client who intends to lie as witness
- VI. Other Areas
  - a. Advertising
    - i. Not false and misleading
    - ii. Direct mail rule**
  - b. In-person solicitation
    - i. Exceptions
  - c. Fees
    - i. Factors to determine reasonableness
    - ii. Contingent fees
      - 1. writing
      - 2. not in criminal or domestic relations
  - d. No-contact rule
    - i. Represented parties
    - ii. Un-represented parties
  - e. Threatening criminal prosecution
  - f. Paying witnesses
  - g. Trial publicity
  - h. Unauthorized practice
  - i. Supervisory & Subordinate lawyers
  - j. General duties to clients
    - i. Diligence; competence; communication
  - k. Termination of representation
    - i. Protect client; return property/fees
    - ii. Mandatory withdrawal
    - iii. Permissive withdrawal
  - l. Duty to report misconduct
- VII. Judicial Ethics

## **Evidence**

- I. Form
  - a. Sequence of witness examination
  - b. Objections to questions and answers
- II. Purpose
  - a. Logical relevance
    - i. Tendency to make more or less probable
    - ii. Special relevancy problems
  - b. Legal relevance
    - i. Extrinsic policy exclusions
    - ii. Prejudicial impact
  - c. Character
  - d. Habit
  - e. Public policy exceptions
- III. Presentation
  - a. Witness
    - i. Competency (age, stupidity)
    - ii. Personal knowledge
    - iii. Impeachment
  - b. Document or tangible object
    - i. Authentication
    - ii. Best evidence rule
  - c. Opinion
    - i. Lay
    - ii. Expert
  - d. Judicial notice
  - e. Presumptions
  - f. Burdens of proof
- IV. Hearsay
  - a. Definition
  - b. Exclusions and Exceptions
    - i. Admissions
    - ii. Unavailability exceptions
    - iii. Reliability exceptions
    - iv. Documentary exceptions
    - v. Others
- V. Privileges
  - a. Privileged relationship
    - i. Professional
    - ii. Marital
  - b. Confidential communication
  - c. Holder
  - d. Exception

## Federal Income Taxation

- I. Gross Income
  - a. What is it?
- II. Exclusions from GI
  - a. Fringe benefits for employees
  - b. Gifts
  - c. Life Insurance proceeds
  - d. Damages/Settlements
  - e. Scholarships
  - f. Loans
- III. Inclusions
  - a. Alimony received
  - b. Stolen items
  - c. Illegal Income
  - d. Tax Benefit Rule
- IV. Gains from Dealings in Property
  - a. Realizing event
    - i.  $\text{Gain} = \text{amount realized} - \text{adjusted basis}$
  - b. Adjusted basis
    - i. Gift property
      - 1. live donor
      - 2. deceased donor
  - c. Loans and Property
    - i. Borrowed money adds to basis
    - ii. Mortgage and sale
    - iii. Depreciation
    - iv. Exclusion
      - 1. principal residence
- V. When is GI reportable?
  - a. Accounting methods
    - i. Cash method
      - 1. actual/constructive receipt
    - ii. Accrual method
    - iii. Installment method
  - b. Claim of right doctrine
  - c. *Nonrecognition on Property Transactions*
    - i. Elements:
      - 1. Business/investment property
      - 2. Exchanged
      - 3. For like-kind
    - ii. Disqualified assets
    - iii. Basis
    - iv. Boot
      - 1. mortgages
    - v. Involuntary conversion “rollover”

- VI. How is GI taxed?
  - a. Capital gains
    - i. Long-term vs. short-term
  - b. Capital losses
    - i. \$3,000 and carry-forward
- VII. Whose GI is it?
  - a. Personal service income
  - b. Income from property
  - c. Kiddie tax
- VIII. DEDUCTIONS
  - a. Classifying
    - i. Above the line
    - ii. Below the line
  - b. Personal deductions
    - i. Personal exemption
    - ii. Alimony paid
    - iii. Casualty loss
    - iv. Medical expenses
    - v. Charitable deductions
    - vi. Interest
      - 1. mortgage (below the line)
      - 2. student loans (above the line)
    - vii. State and local taxes
  - c. Profit-motivated deductions
    - i. Hobbies
    - ii. Attorney fees
      - 1. nature of claim
      - 2. everyday advice
      - 3. tax advice
    - iii. Home office
    - iv. Vacation homes
    - v. Child/elder care
    - vi. Travel
    - vii. Business meals
    - viii. Business entertainment
    - ix. Work clothes
    - x. Education
  - d. Business and investment deductions
    - i. Everything ordinary and necessary, but not
      - 1. lobbying; illegal payments; highly unusual expenses
- IX. Corporate Tax
  - a. C-corp: double taxation – profits and dividends
  - b. S-corp: pass-thru
  - c. Partnership/LLC: pass-thru
  - d. Formation
    - i. Nonrecognition transaction



## Real Property

- I. Estates: possessory estates and future interests
  - a. Fee Simple Absolute
  - b. Life Estate
    - i. Rights and Duties of Life Tenant:
      - 1. voluntary waste
      - 2. permissive waste
      - 3. ameliorative waste
  - c. Class Gifts
    - i. *Rule of Convenience*: class closes when any one of class entitled to distribution [a rule of construction only; T's intent can override]
- II. FUTURE INTERESTS
  - a. To Grantor
    - i. Reversion
    - ii. Possibility of reverter: FSD
    - iii. Right of entry: FSCS
  - b. To Grantee
    - i. Remainder
      - 1. Vested vs. Contingent
    - ii. Executory Interest
      - 1. Shifting vs. Springing
  - c. Rule Against Perpetuities
    - i. watch for fertile octogenarian
    - ii. 1Unborn spouse
    - iii. Options and Rights of First Refusal subject
    - iv. Charity to Charity EXCEPTION
- III. CONCURRENT OWNERSHIP
  - a. JTWROS
  - b. Tenancy in common
    - i. Ouster
    - ii. Contribution
- IV. NON-FREEHOLD ESTATES (ie, landlord-tenant)
  - a. Tenancy for years
  - b. Periodic tenancy
  - c. Tenancy at will
  - d. Tenancy at sufferance
- V. DUTIES OF LANDLORD AND TENANT
  - a. Tenant's duties – L's remedies
  - b. Landlord's duties – T's remedies
    - i. implied warranty of habitability
    - ii. Implied covenant of quiet enjoyment
- VI. ASSIGNMENTS AND SUBLEASES
  - a. Assignments
    - i. POE; POC
    - ii. Covenants in lease *run with the land* if the **touch and concern** the land

- iii. Non-Assignment clauses
- VII. CONDEMNATION OF LEASEHOLD
  - i. Partial taking vs. Full taking
- VIII. LANDLORD'S TORT LIABILITY
  - a. General Rule: No duty; therefore, no liability
  - b. 5 EXCEPTIONS
- IX. FIXTURES
  - a. Intent
  - b. Trade fixture
  - c. Timing of removal
- X. EASEMENTS
  - a. Easement appurtenant:
  - b. Easement in gross
  - c. Creation of easements
    - i. Express agreement
    - ii. By Implication
    - iii. By Prescription
  - d. Transfer of Easements
  - e. Use of easements
  - f. Repair of Easements
  - g. Termination of Easements
- XI. LICENSES & PROFITS
  - a. License
    - i. Failed easement
    - ii. irrevocable license
  - b. Profits
- XII. RESTRICTIVE COVENANTS
  - a. Covenants running with the land at LAW
    - i. Four reqs for a covenant to run with the land at law:
  - b. Equitable Servitudes
    - i. Three reqs to enforce equitable servitude:
    - ii. ES's in subdivisions (aka reciprocal negative servitudes)
    - iii. Equitable defenses to enforcement
    - iv. Termination of ES
- XIII. ADVERSE POSSESSION
  - a. Elements
  - b. Constructive adverse possession
  - c. AP against cotenants
  - d. Future interest issues
  - e. Tacking
  - f. Disability
- XIV. CONVEYANCING
  - a. **Contract of sale**
    - i. SF applies: note part performance exception
    - ii. equitable conversion
    - iii. implied warranty of Marketable title

- iv. Time for performance
- v. Defects on property
- b. **Deed**
  - i. Execution of Deed
  - ii. Delivery of Deed
  - iii. Estoppel by deed (aka “doctrine of after-acquired title”)
  - iv. Deed to dead person

#### XV. COVENANTS OF TITLE

- a. Present covenants: personal to grantee; don’t run with land
- b. Future covenants: arise when grantee disturbed in possession; run with land
- c. Damages for breach of covenants

#### XVI. RECORDING OF INTERESTS

- a. CL RULE: first in time, first in right (recording irrelevant)
- b. Recording Statutes
  - i. **Notice**: give value and take without notice, it is yours and no need to record
  - ii. **Race-Notice**: BFP without notice AND first to record
  - iii. **Pure Race**: Notice irrelevant; record first and you win
- c. Shelter Rule Exception

#### XVII. SECURITY INTERESTS

- a. Mortgage:
  - i. *absolute deed* with promise to reconvey
  - ii. *sale/leaseback* with option to repurchase
- b. Deed of trust
- c. Installment land K
- d. Equity of redemption
- e. Multiple mortgages
  - i. Priorities
  - ii. Foreclosure effects
- f. Transfers of Security Interests
  - i. Holder in Due Course Rule

#### XVIII. SPECIAL RIGHTS

- a. Right of Support
  - i. Lateral support
  - ii. Subjacent support
- b. Water rights
  - i. Rivers and Lakes
    - 1. Riparian
    - 2. Prior appropriation
  - ii. Underground water
  - iii. Surface water
    - 1. natural flow
    - 2. common enemy

## Secured Transactions

- I. Scope of Article 9
- II. Attachment
  - a. Elements
    - i. Value
    - ii. Rights
    - iii. Security agreement/pledge
  - b. Security Agreement
  - c. Class of collateral
    - i. Farm products
    - ii. Consumer goods
    - iii. Inventory
    - iv. Equipment
  - d. After-acquired property clause
  - e. PMSI
    - i. Seller
    - ii. Lender
- III. Perfection
  - a. Attachment PLUS notice
  - b. Ways to perfect
    - i. Automatic
    - ii. Possession
    - iii. Endorsement on vehicle title
    - iv. Filing
      - 1. financing statement reqs
      - 2. where to file
  - c. Post-perfection events
    - i. Name change
    - ii. Use of collateral change
- IV. Priority
  - a. Unperfected vs. unperfected
  - b. Perfected vs. unperfected
  - c. Perfected vs. perfected
    - i. PMSI?
  - d. Perfected vs. PMSI
    - i. Non-inventory collateral
    - ii. Inventory collateral (ie, floating lien)
  - e. Consignments
- V. Buyers of Collateral
  - a. BFP
    - i. Free of unperfected SI
    - ii. Subject to perfected SI
  - b. PMSI gap BFP
  - c. BIOCB
  - d. Consumer-to-Consumer

- VI. Proceeds
  - a. Automatic attachment
  - b. Cash proceeds
    - i. identifiable
  - c. Non-cash (20 days)
- VII. Default and Enforcement
  - a. Default not defined in Art 9; look to SA
  - b. Repossession
    - i. Self-help or replevin
    - ii. No breach of peace
  - c. Sale of Collateral
    - i. Public sale
    - ii. Private sale
    - iii. Notice
    - iv. Commercially reasonable
  - d. Failure to follow Art9 rules
  - e. Allocation of Proceeds from sale
  - f. Deficiency judgment
    - i. Presumption if A9 violation

## **Torts**

### **I. Intentional Torts**

- a. to the Person
  - i. Battery
  - ii. Assault
  - iii. False imprisonment
  - iv. Intentional infliction of emotional distress
- b. to Property
  - i. Trespass to land
  - ii. Trespass to chattels
  - iii. Conversion
- c. Defenses
  - i. Consent
  - ii. Self-defense, defense of 3<sup>rd</sup> persons, defense of property
  - iii. Necessity: public and private
  - iv. NO incapacity defense to intentional torts
  - v. IGNORE hypersensitive Ps
  - vi. Assumption of risk NO defense

### **II. Dignitary and Economic Torts**

- a. Defamation
  - i. Damages: proof required
  - ii. First amendment issues
  - iii. Defenses
    - 1. consent, truth, privilege (absolute/qualified)
- b. Invasion of Right to Privacy
  - i. Appropriation
  - ii. Intrusion
  - iii. False Light
    - 1. NB: recovery for emotional damages
  - iv. Public disclosure of private facts
  - v. Defenses to Privacy Torts
    - 1. consent
    - 2. privilege ONLY for false light and disclosure
- c. Fraud
- d. Inducing breach of contract
- e. Malicious prosecution
- f. Abuse of process

### **III. Negligence**

- a. Duty
  - i. Foreseeability
  - ii. Standard of care
    - 1. reasonably prudent person under circumstances
  - iii. Special standards of care

1. children
2. professionals
3. owner/occupier of land
  - a. undiscovered trespasser
  - b. discovered/anticipated trespasser
  - c. licensee
  - d. invitee
- iv. Statutory standards of care: negligence per se
- v. Negligent Infliction of Emotional Distress
- b. Breach
  - i. NB: res ipsa loquitur: must have physical injury
- c. Causation
  - i. Actual/factual cause
    1. but for
    2. substantial factor
    3. unascertainable cause
  - ii. Proximate/legal cause
- d. Damages
  - i. Take P as you find him: Eggshell skull
- e. Defenses
  - i. Traditional contributory negligence
  - ii. Implied assumption of the risk
  - iii. Comparative fault: pure vs. partial/modified

#### IV. Strict Liability

- a. Injuries caused by animals
- b. Ultrahazardous activities
- c. Products Liability
  - i. Other actions: negligence, warranty, battery, fraud
  - ii. Physical injury required; mere economic injury not enough

#### V. Nuisance

#### VI. Miscellaneous

- a. Vicarious liability
  - i. Certain relationships
  - ii. Always a 2<sup>nd</sup> choice theory; party must be totally passive
- b. Making Ds pay
  - i. Comparative contribution
  - ii. Indemnification
- c. Loss of consortium
  - i. Loss of services; society; sex

## Wills and Trusts

### WILLS

#### I. Validity of Will

- a. Testamentary Capacity
  - i. Age
  - ii. Sound mind
- b. Execution
  - i. Formal will
    - 1. signed writing
    - 2. properly witnessed
  - ii. Holographic will (1/2 states)
    - 1. handwriting and signed
    - 2. no witnesses
- c. Interested witnesses
  - i. CL: void
  - ii. Modern: purging statutes
  - iii. Modern: irrelevant
- d. Testamentary intent
- e. Undue influence
  - i. Elements
  - ii. Presumptions
    - 1. confidential relationship; active participation
  - iii. Effect of UI on will
- f. Fraud
  - i. Elements
  - ii. Fraud in execution
  - iii. Fraud in inducement
  - iv. Effect of Fraud on will

#### II. Effect of Will

- a. Identify probate property
- b. Status of Children
  - i. Nonmarital: CL vs. modern
  - ii. Adopted: CL vs. modern
  - iii. Posthumous
- c. Pretermitted child
- d. SS elective share
- e. Codicil
  - i. Written; meets all will formalities
  - ii. Republish effect
- f. Revocation
  - i. By operation of law
    - 1. marriage
    - 2. divorce
  - ii. Intentional revocation



1. intent to revoke
  2. strict compliance with statute
  3. Ways to intentionally revoke:
    - a. By subsequent will (or codicil)
    - b. By physical act
  - g. Revival
    - i. Reexecution
    - ii. Republication by codicil
    - iii. Revival of the revoking instrument (RRI) – some states
      1. CL
      2. UPC
      3. Oregon and others: no RRI
    - iv. Dependent relative revocation (DRR) – all states
      1. three main situations
        - a. defection will #2
        - b. cross-out and substitution
        - c. where RRI not available
- III. Events subsequent to will
- a. Marriage may revoke
    - i. CL
    - ii. Oregon/few states
    - iii. Modern
  - b. Divorce
    - i. Civil death
  - c. Satisfaction of a devise
    - i. Applies to general or residuary devises
    - ii. CL vs. Modern
  - d. Ademption by Extinction
    - i. Specific devise
    - ii. Form but not substance
    - iii. Nonademption statutes
  - e. Death of devisee
    - i. CL lapse vs. Modern antilapse statute

## TRUSTS

### I. Elements

- a. Settler
- b. Manifestation of intent
- c. Trustee
  - i. If 3d party trustee, at least one piece of property officially transferred to trust
- d. Trust property
- e. Beneficiary
- f. Lawful purpose

### II. Revocation of Trusts

- a. Silence = irrevocable

- i. Modern statute/case law
  - b. Procedure
- III. Spendthrift trust
  - a. Creditor vs. settler
  - b. Creditor vs. beneficiary
- IV. Charitable trust
  - a. Charitable purpose
  - b. RAP inapplicable
  - c. Cy press doctrine
- V. Trust distribution provisions
  - a. Analyze and apply
    - i. Income, principal, termination, remainder B
  - b. Objective vs. subjective stds
- VI. Fiduciary duties of Trustee
  - a. 8 duties
    - i. Prudent investor rule
  - b. Remedies for breach

#### MISCELLANEOUS

- I. Contract to make or not revoke a will
  - a. Can it be proved?
  - b. If proved, trumps law of wills
- II. Intestate succession
  - a. SS
    - i. Children with decedent?
  - b. Decedent's issue
- III. RAP
  - a. CL: gift fails
  - b. Modern:
    - i. Wait and see
    - ii. Cy pres
    - iii. Uniform statutory RAP
- IV. Inter vivos gift
  - a. Intent; delivery; acceptance
- V. Advancement
  - a. Intestate issue
- VI. Duties of PR