A. **Formation**

   **Creation of Agency Relationship**
   
   - An agent is a *person or entity that acts on behalf of another – the principal*. Agency is a fiduciary relationship, and exists if there is: (1) assent/consent (a formal or informal agreement between the principal and the agent); (2) benefit (the agent’s conduct on behalf of the principal primarily benefits the principal); AND (3) control (the principal has the right to control the agent by being able to supervise the agent’s performance – the degree of control does not need to be significant).

B. **Contractual Liability of Principal and Agent**

   **Authority of Agent: Actual Authority**
   
   - A principal is bound to contracts entered into by its agent if the agent has actual authority. **Actual authority** may be *express or implied*. **Express authority** occurs when the principal has *explicitly told the agent* (either orally or in writing) that he is entitled to act. **Implied authority** occurs when either: (a) the agent believes he is entitled to act because the *action is incidental or necessary* to carry out his express authorized duties; (b) the agent has *acted similarly in prior dealings* between the principal and agent (prior acquiescence of principal); OR (c) it is *customary* for agents in that position to act in that way.

   **Authority of Agent: Apparent Authority**
   
   - A principal is bound to contracts entered into by its agent if the agent has apparent authority. **Apparent authority** arises where: (1) the *principal holds out another as having authority*; AND (2) the third-party *reasonably relies* on that authority.

   A principal holds an agent out as having authority when he: (a) gives the agent a *position or title* indicating certain authority; (b) has *previously held the agent out* as having authority and has not published a revocation of said
AGENCY

authority; **OR (c)** has *cloaked* the agent with the appearance of such authority.

- A principal will be bound to a contract *even if* the agent acted on his own behalf or in violation of specific instructions UNLESS (a) the third party had notice the agent was exceeding his authority, or (b) the contract/transaction was not within the ordinary usages of business (ordinary usage includes purchase of goods at a reasonable price).

**Apparent authority is NOT APPLICABLE if the third-party has actual knowledge that the agent did not have authority.** Additionally, a third-party has a duty to make further inquiry when the situation suggests that it may be unreasonable to believe that the agent has authority.

**Ratification of Agent’s Contracts**

- A principal’s ratification of an agent’s conduct will make the principal liable for those contracts entered into by an agent *without* actual or apparent authority. **Ratification occurs when the principal: (1) has knowledge of all material facts or contract terms; AND (2) thereafter manifests assent (approves) of the same through words or conduct. Approval can be shown through words or inferred from conduct.**

**Employee vs. Owner (Sole-Proprietor, Partner, Member, Shareholder)**

- **Employee:** An *employee* is a person who (1) is *hired to work* for another person or business (the employer), (2) *for compensation* (salary, wage, fee, and/or commission), AND (3) is *subject to the employer’s direction or control* as to the details of how to perform the job. Associates and Non-Equity Partners are typically employees of a firm.

- **Sole-Proprietor:** A *sole-proprietor* is the *owner of a sole proprietorship*. A sole proprietorship is a single owner for-profit business, that operates *without* formally creating a business organization.

- **Partner:** A *partner* is (1) a *co-owner of a partnership*, (2) *shares in the profits* of the business, (3) is a *party to the partnership agreement*, AND (4) has a *capital account* (the individual accounting of each partner’s investment in the
partnership). Typically, partners share profits and losses equally, unless otherwise agreed.

- **Member**: A **member** is (1) an owner or co-owner of an LLC (Limited Liability Company), (2) is a **party to the Operating Agreement**, AND (3) has a capital account (the individual accounting of each member’s investment in the LLC).

- **Shareholder**: A **shareholder** is the owner of one or more shares of stock in a corporation.

C. **Vicarious Tort Liability**

**Vicarious Liability: Doctrine of Respondeat Superior**

- Under the Doctrine of Respondeat Superior, an **employer is vicariously liable for an employee’s negligent acts** if the employee was *acting within the scope of employment*. A party is generally NOT vicariously liable for the torts of an independent contractor.

- An employee acts **within the scope of employment** when: 
  (a) performing work assigned by the employer; (b) engaging in a course of conduct subject to the employer’s control; OR (c) the conduct is of the same general nature as that authorized or incidental to the conduct authorized.

- Conduct is NOT outside the scope of employment merely because an employee disregards the employer’s instructions.

- An employee’s act is **NOT within the scope of employment** when: (1) it occurs within an independent course of conduct; AND (2) is **not intended** by the employee to serve any purpose of the employer.

- An employee’s **intentional torts** are NOT generally within the scope of employment UNLESS the act: (a) was specifically authorized by the employer; (b) was driven by a desire to serve the employer; OR (c) was the result of naturally occurring friction from the type of employment.
Vicarious Liability: Employee vs. Independent Contractor

- A party is generally NOT vicariously liable for the torts of an independent contractor. An independent contractor is a person who contracts with another to do something for him, but who is not controlled nor subject to the other’s right to control with respect to his performance. The contractor may or may not be an agent.

- Generally, if the principal has the right to control the manner and method in which the job is performed, then the person is deemed to be an employee of the principal. In contrast, a person subject to less extensive control is considered an independent contractor. Other important factors include: (1) the degree of the employer’s control; (2) whether the pay was hourly or by the job; (3) whether the employer furnished the tools or other items needed for the job; (4) whether the job was for the benefit of the employer’s business; AND (5) the length of the working relationship.

Employee Liability for Negligent Conduct & Indemnification

- Generally, a person is liable for his own negligent conduct. However, if an employee acts within the scope of his employment in order to further the goals of the employer, the employee may seek indemnification from the employer for damages resulting from his negligent conduct.
How to Use This Study Guide

Each rule in the SmartBarPrep Essay Priority Outline is presented as shown in the sample below.

SAMPLE

C. Negligence
   ■ Negligence Elements
     • A prima facie case for negligence requires: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) the breach was the actual and proximate cause of the plaintiff’s injuries; AND (4) damages. To make a prima facie case, a party must offer sufficient evidence so that the trier of fact could reasonably find that ALL of the above elements have been met.

The title of the rule will be in bold (ex: Negligence Elements). The Rule Statement (ex: A prima facie case for negligence…) will be in one or more bullet points under the Rule Title.

Guide to the Frequency and Priority Ratings

Frequency Ratings

To the left of the Rule Statement is the frequency with which the rule was tested on past California Bar Exam essays (ex: 1 of 38 exams).

Priority Ratings

In addition, a priority rating (HIGH, MED, or LOW) will be listed in the color-coded circle next to each rule.

HIGH = High Priority (these are the most important and frequently tested rules)
MED = Medium Priority (these rules are tested slightly less frequently, but are still important)
LOW = Low Priority (these rules have been tested the least)
The purpose of providing the **HIGH/MED/LOW** priority rating and the frequency is so you can see how often each rule has been tested compared to the other rules at a glance, and prioritize your studying to focus on the most important and frequently tested rules first and foremost before moving onto the less important ones.

The priority ratings are based upon how often that rule has been tested in the past, and are based on the following methodology:

<table>
<thead>
<tr>
<th>Priority</th>
<th>Frequency of Occurrence</th>
</tr>
</thead>
<tbody>
<tr>
<td>HIGH</td>
<td>4+ exams</td>
</tr>
<tr>
<td>MEDIUM</td>
<td>2 or 3 exams</td>
</tr>
<tr>
<td>LOW</td>
<td>0 or 1 exams</td>
</tr>
</tbody>
</table>

Although a rule with the rating of **LOW** or **MED** has shown up only once or a few times in the past, that rule may still show up on future bar examinations. Therefore, such rules should NOT be ignored, and if you have enough time it should be memorized.

The **HIGH**, **MED**, or **LOW** designation is NOT A PREDICTION OF WHAT RULES WILL APPEAR ON ANY GIVEN EXAM. Instead, we have given each rule a designation depending on how often that particular rule has shown up on past California Bar Exam essays.

For example, whenever an Evidence question appeared, we found that approximately 80% of the time a component of the question dealt with the General Hearsay Rule. Since this rule is tested frequently, it makes sense to spend more time memorizing it than, say, the rule of Prohibition Against Jury Investigations, which appeared only once in the last 19 years.

Again, the purpose of providing the **HIGH/MED/LOW** priority rating and the frequency with which rules have appeared is so you can see how often each rule has been tested as compared to the other rules at a glance, and prioritize your studying to focus on the most important and frequently tested rules first before moving onto the less important ones. Ultimately, this method promotes efficiency in studying for California Bar Exam.

Best of luck on the exam!

– The SmartBarPrep Team
Smart Bar Prep

Smart Sheets
For the Multistate Bar Exam (MBE)

July/Fall 2020 Edition
A. Constitutional Limits on Federal Court Jurisdiction

State Sovereign Immunity (11th Amendment)
11th Amend. prohibits a party from suing a state (or state agency) in Federal Court UNLESS:
   a) State explicitly consents to waive protection;
   b) Lawsuit pertains to federal laws adopted under Section 5 of the 14th Amendment;
   c) Lawsuit seeks only injunctive relief against a state official; OR
   d) Lawsuit seeks money damages from a state official.

11th Amend. DOES NOT apply to:
   a) Local governments;
   b) A federal lawsuit by a state against another state; OR
   c) A lawsuit by the federal govt. against a state.

B. Justiciability

Art. III of the U.S. Constitution limits federal courts to hearing actual cases and controversies.

Standing – P must have standing to sue in court. Exists when:
   1) P personally suffered an injury in fact (concrete and particularized injury);
   2) There is causation; AND
   3) The injury is redressable by court order.

Injunctive/Declaratory Relief – P must show a concrete, imminent threat of future injury.

Third-Party Standing – Generally not permitted UNLESS:
   a) A close relationship exists;
   b) It’s difficult or unlikely for the third-party to assert their rights on their own; OR
   c) The third-party is an organization.

Organization Standing – Allowed to sue on behalf of the members if:
   1) The suit is related to an issue germane to the organization’s purpose;
   2) Members would have standing to sue; AND
   3) Members’ participation is not necessary.

Taxpayer Standing – P may bring a lawsuit regarding specific amounts owed under their tax bill.
   But, a party DOES NOT have standing solely for being a taxpayer (i.e. challenging govt. expenditures).

Advisory Opinions, Ripeness, & Mootness – Courts CANNOT give advisory opinions or address hypothetical disputes.

Ripeness – whether the case is ready to be litigated. A case is ripe → when actual harm or an immediate threat of harm exists.
   - Court may grant pre-enforcement review of a statute/law after considering: (1) hardship of the parties if no review; AND (2) fitness of the record.

Mootness – when a dispute has ended or was resolved before review.
   - Exceptions → (a) case is capable of being repeated but escapes review; (b) voluntary cessation, but it can resume any time; OR (c) class actions, where at least one member has an ongoing injury.

C. Powers of Congress

Commerce Clause – Under the commerce clause, Congress can regulate:
   1) Channels of interstate commerce (highways, phone lines)
   2) People and instrumentalities of interstate commerce (cars, airplanes, pilots);
   3) Economic/commercial activity that has a substantial effect on interstate commerce.

Federal regulations regarding intrastate commerce will be upheld when (1) there is a rational basis, (2) to conclude that the cumulative impact (aggregation), (3) has a substantial effect on interstate commerce.
   - Aggregation CANNOT be used when the activity is not commercial/economic in nature.

Power to Enforce the 13th, 14th, & 15th Amendments
Congress has the power to enforce:
   • 13th Amend. – abolition of slavery.
   • 14th Amend. – privileges and immunities, due process, equal protection, apportionment of representatives.
   • 15th Amend. – right to vote cannot be denied because of race.

Congress MAY ONLY prohibit behavior that is likely to involve a constitutional violation. There must be congruence and proportionality between the injury to be prevented and the legislative means adopted.
   - Congress CANNOT define Constitutional rights or change substantive law.

Taxing Power – Congress has the power to lay and collect taxes, duties, imposts, and excises.
   - Duties, imposts, and excises MUST be geographically uniform throughout the U.S.
   - Under 16th Amend., Congress has the power to collect taxes on income from any source.
CONSTITUTIONAL LAW

M Spending Power – Congress has the power to spend for the common defense and general welfare.

Congress MAY attach restrictions or conditions on States receiving federal funds, BUT must satisfy the following:
1) Spending must be for the general welfare;
2) Condition must be imposed unambiguously;
3) Condition must be related to the federal interest in national projects or programs;
4) Condition cannot induce unconstitutional activity; AND
5) Condition cannot be so coercive as to turn pressure into compulsion.

D. Powers of the President

M Domestic Powers – President has the power to:
1) Execute the law;
2) Appoint ambassadors, consuls, federal judges, and officers (with senate advice and consent);
3) Appoint inferior officers (when such power is given by Congress);
4) Remove cabinet level appointees (without cause);
5) Remove independent regulatory agency appointees (without cause unless Congress passes a law requiring good cause);
6) Pardon federal crimes; and
7) Act as Commander-in-Chief of the military (control and deploy U.S. troops).

M Treaty & Foreign Affairs Powers – President shares treaty powers with Congress. Treaties may be negotiated by the President, but must be ratified by the Senate.

- But, the President has the power to enter into Executive Agreements (agreements between the President and a head of a foreign country) without Senate approval.

M Treaty & Foreign Affairs Powers – President shares treaty powers with Congress. Treaties may be negotiated by the President, but must be ratified by the Senate.

President has the power to control and deploy U.S. troops in foreign countries.

E. Federal Interbranch Relationships

M Delegation of Congressional Powers – Congress may delegate legislative powers, so long as:
1) The powers are delegable under the Constitution; AND
2) Congress provides reasonably intelligible standards to guide the delegation.

Non-Delegation Doctrine – Congress CANNOT delegate powers it does not have.

F. Intergovernmental Immunities

H State Immunity from Federal Law (10th Amendment)
All powers not granted to the Fed Govt. are reserved to the States (unless prohibited by the Constitution).

Congress CANNOT compel a State Govt. to implement legislation.
- BUT, Congress MAY induce state gov't action by attaching restrictions and conditions on federal funding pursuant to its spending power.

H Negative Commerce Clause – A state MAY regulate commerce so long as Congress has NOT enacted laws on the subject matter.
- If such laws are enacted, then any state/local law would be pre-empted by federal law.

Notwithstanding the above, States CANNOT pass laws that:
- Discriminate against out-of-state commerce; OR
- Place an undue burden on interstate commerce.

Discriminatory Regulations – Laws that are facially discriminatory or have a discriminatory impact are unconstitutional UNLESS:
- The burden is narrowly tailored to achieve a legitimate, non-protectionist state objective (no less-discriminatory alternatives are available); OR
- The state is a market participant rather than a regulator of economic activity.

Unduly Burdensome Regulations – Laws that are not discriminatory, but place an undue burden on interstate commerce are UNCONSTITUTIONAL when:
1) the burden on interstate commerce,
2) is clearly excessive to the putative benefits to the state/local govt.

*Courts apply this balancing test on a case-by-case basis.

M Supremacy Clause & Preemption – Under the Supremacy Clause, a validly enacted federal law will always preempt conflicting state law.
- Express Preemption – occurs when the federal law specifically states it is exclusive.
- Implied Preemption – occurs when: (a) direct conflict with state law; (b) field preemption (appears from the law itself or legislative history); OR (c) state law substantially interferes with the objective of the federal law.
## H. Incorporation Doctrine

**Incorporation Doctrine** – Most Amendments are *applicable to the States* by incorporation through the 14th Amend. Due Process Clause.

**Exceptions:**
- 3rd Amend. – freedom from quartering soldiers.
- 5th Amend. – indictment by a grand jury.
- 7th Amend. – jury trial in civil cases.

The 14th Amend. (equal protection) is incorporated into the 5th Amend. Due Process Clause, making it *applicable to the Federal Govt.*

### I. Government Action (“State Action”)

**Governmental Action** – P must show that a violation is *attributable to govt. action*, which applies to all levels of local, state, and federal govt.
- The conduct of private actors is NOT protected by the U.S. Constitution.

**Exception** – Courts will find govt. action of a *private actor* when:
- a) It is a *traditional public function* (powers traditionally and exclusively reserved to the govt.); OR
- b) *Significant govt. involvement* exists to authorize, encourage, or facilitate private unconstitutional conduct.

### J. Due Process (5th & 14th Amendments)

**Due Process Clause** – No person shall be denied *life, liberty, or property* without due process of law.
- Applicable to the States → 14th Amendment
- Applicable to Fed. Govt. → 5th Amendment

**Substantive Due Process** – the govt.’s power to regulate certain activities.

**Fundamental Rights Test** – When regulating fundamental rights, it must satisfy **strict scrutiny** → Govt. must show the law is *necessary to serve a compelling governmental interest*.
- Fundamental Rights = right to vote, interstate travel, and privacy (marry, procreate, use contraceptives, raise one’s child, keep family together, maintain custody over children).

**Non-Fundamental Rights Test** – When regulating activities that do not constitute a fundamental right, it must meet the **rational basis test** → Plaintiff must show the law is *not rationally related to a legitimate govt. interest.*

**Procedural Due Process** – Certain procedures are required when the govt. deprives a person of life, liberty (freedom), or property (an entitlement that is not fulfilled).

**Matthews v. Eldridge Factors** → To determine the procedure required, the court balances the:
1) Importance of the *private interests*;
2) *Risk of error* under current procedures and the *value of additional procedures*; and
3) Importance of *state interests* and the burden that arises from additional safeguards.

*Due process usually requires notice and an unbiased hearing.*

### K. Equal Protection (5th & 14th Amendments)

**Equal Protection Analysis** – Prohibits the govt. from denying citizens equal protection of the laws.
- Applicable to the States → 14th Amendment
- Applicable to Fed. Govt. → 5th Amendment

**Discriminatory Classification** – exists when:
- a) a law is discriminatory on its face;
- b) a law is facially neutral, but is applied in a discriminatory manner; OR
- c) a discriminatory motive exists.

When laws classify people into groups, apply the appropriate test below based on the type of class:
- **Strict Scrutiny** → *suspect class* (race, nationality, alienage classification under state law) or infringes on a *fundamental right*.
  - Govt. must show the classification is *necessary to serve a compelling government interest*.
- **Intermediate Scrutiny** → *quasi-suspect class* (gender, non-marital child, undocumented alien).
  - Govt. must show the classification is *substantially related to an important governmental interest*.
- **Rational Basis** → *all other classes*.
  - Plaintiff must show the classification is *not rationally related to a legitimate governmental interest* (any conceivable interest is sufficient).
### L. Takings (5th Amendment)

**Takings** – Govt. MAY take private property for public use if it provides just compensation.
- Public use = there is a reasonable belief that it will benefit the public.
- Just compensation = fair market value at the time of the taking.

**Possessory (Per Se) Taking** – Govt. physically occupies the property (even if it’s just a small portion).

**Regulatory Taking** – Property becomes economically unviable due to a regulation. Courts determine whether a regulatory taking occurs by analyzing:
- **Penn Central factors** → (1) economic impact of regulation on claimant; (2) extent of interference with the investment-backed expectations; and (3) character of regulation.

*Sup. Ct. has upheld zoning laws when the gov’t reasonably concluded that the health, safety, morals, or general welfare would be promoted.

**Conditions on Approval of Permits** → DO NOT constitute a taking if:
1) Essential nexus between state interest and permit condition exists; AND
2) Govt. makes an individualized determination that the condition is roughly proportional to advancing the state interest.

### M. Other Protections

**Privileges & Immunities Clause** – Under the P&I Clause (Art. IV, Sec. 2), States CANNOT intentionally discriminate against non-residents concerning:
- **Civil liberties** (i.e. right to vote, travel interstate); OR
- **Important economic activities** (i.e. ability to earn a livelihood).

*The P&I Clause DOES NOT protect aliens or corporations.

Regulations will be UPHELD if the State is justified, when:
1) a substantial reason exists; AND
2) the discriminatory law has a substantial relationship to that reason.

### N. Freedom of Religion (1st Amendment)

**Establishment Clause** – Prohibits the gov’t from establishing a religion OR endorsing/supporting religion.

Laws that discriminate against a religion MUST satisfy **strict scrutiny** → Govt. must show that:
1) the law is narrowly tailored,
2) to achieve a compelling govt. interest, AND
3) that the least restrictive means was used.

Laws that DO NOT discriminate (but that have some relationship to religion) will be upheld if:
1) it has a secular purpose;
2) it’s primary effect does not advance or inhibit religion; AND
3) it does not excessively entangle the gov’t with religion.

**Free Exercise Clause** – Prohibits the gov’t from interfering with the exercise of religion.

Laws designed to interfere with religion are subject to **strict scrutiny** → Govt. must show that:
1) the law is narrowly tailored,
2) to achieve a compelling govt. interest, AND
3) that the least restrictive means was used.

Laws of general applicability that cause unintentional burdens on religion are CONSTITUTIONAL, and do not offend the Free Exercise Clause.
- Examples → illegal drug use, animal sacrifice.

### O. Freedom of Speech (1st Amendment)

1st Amendment protects the right to **freedom of speech** and expressive activities that constitute speech.
- Applicable to gov’t. by incorporation through the 14th Amendment.

The right to anonymous speech and the right not to speak is protected under the 1st Amendment.
- Conduct that has no communicative value is NOT protected.

**Content-Based vs. Content Neutral Restrictions**

Content-Based Restrictions – Govt. regulations regarding the content of speech (subject matter or viewpoint) are subject to strict scrutiny.
- **Strict Scrutiny** → Govt. must show (1) the regulation is narrowly tailored, (2) to achieve a compelling govt. interest, AND (3) the least restrictive means was used.
CONSTITUTIONAL LAW

Content-Neutral Restrictions – Govt. MAY regulate the time, place, and manner of content-neutral speech if it satisfies intermediate scrutiny.
- Intermediate Scrutiny: Govt. must show that (1) the regulation is narrowly tailored, (2) to achieve a significant government interest, AND (3) it leaves open alternative channels of communication.

Public Forums for Speech

Public Forum = Place traditionally available to the public for speech (i.e. parks, streets, public sidewalks).
- Content-Based Restriction → Must satisfy Strict Scrutiny.
- Content Neutral Restriction → Govt. MAY regulate time, place, and manner if it satisfies Intermediate Scrutiny.

Designated Forum = A place not traditionally made available to the public for speech, but the govt. chose to make it available (i.e. school makes a classroom open for club meetings).
- Treated the same as a Public Forum.

Limited Forum = Non-public forums that were specifically designated by the government as open to certain groups or topics (i.e. municipal meeting meeting rooms).
- Treated the same as a Non-Public Forum.

Non-Public Forum = Public places traditionally limited for speech (i.e. military bases, schools, jails, airports).
- Government may regulate speech if: (1) reasonable, AND (2) viewpoint neutral.

Private Property = No right to access another’s private property for speech.

Fighting Words → Not protected
Fighting words = words which by their very utterance:
- a) Inflict injury; OR
- b) Tend to incite an immediate breach of the peace.

Incitement of Imminent Lawless Action → Not protected
May be outlawed if the speech:
1) Advocates the use of force or illegality;
2) Directed to inciting/producing imminent lawless action (intent); AND
3) Likely to incite/produce such action (there is a clear and present danger that a listener will act).

Obscenity → Not protected
Material is obscene when it:
1) Appeals to prurient interest (sexual interest) of an avg. person under today’s community standards;
2) Is patently offensive; AND
3) Lacks any serious artistic, literary, or scientific value.
Mere private possession of obscene material by an adult inside the home CANNOT be made criminal.
- Exception → child pornography

Commercial Speech → Given fewer protection
Govt. MAY regulate truthful, non-misleading commercial speech if the regulation:
1) Directly advances,
2) A substantial governmental interest, AND
3) Is no more extensive than necessary (reasonably tailored) to serve that interest.

False/Misleading Commercial Speech → Not protected

Public School Students – Students DO NOT lose their 1st Amendment free speech rights at school, BUT schools are given great latitude to regulate speech.
- A school MAY regulate speech if it shows that the conduct regulated would materially and substantially interfere with the operation of the school.

Government Employees

Two-Step Test to determine if their speech is protected:
- Step 1: Did employee speak as a citizen on a matter of public concern?
  o If no → speech is not protected
  o If yes → go to Step 2
- Step 2: Did the govt. entity have an adequate justification for treating the employee differently from any other member of the general public (based on the govt. interests as an employer)?
  o The court must balance the employee’s rights vs. the govt. employer’s interests.

If a govt. employee speaks pursuant to their official duties, then the speech is NOT protected.

Expressive Conduct / Symbolic Speech = the expression of ideas through non-verbal actions.
- Treated the same as verbal speech.
Prior Restraint – occurs when the govt. attempts to prohibit speech before it happens through a court order or licensing requirement.
- Generally disfavored and unconstitutional, except in very limited circumstances (i.e. where national security is at stake).
- Court orders preventing speech must satisfy Strict Scrutiny.

Procedural Safeguards for Licensing – Are permitted if:
1) Govt. has an important reason;  
2) Specific, articulated standards to remove discretion; AND  
3) Procedural safeguards are in place, including a prompt final judicial decision when a license is denied.

Vague & Overbroad Laws → are unconstitutional
- Unduly Vague = does not put the public on reasonable notice as to what is prohibited.  
- Overbroad = regulates more speech than is constitutionally permitted.

Disclosure of Private Facts & Generally Applicable Laws – 1st Amend. protects the press from liability when:
1) publishing truthful private facts,  
2) regarding a matter of public concern,  
3) where info was legally obtained by the publisher, AND  
4) there is no knowledge that the info was obtained illegally (if illegally obtained info was published).

1st Amend. DOES NOT protect the press from liability for violating generally applicable laws.

Q. Freedom of Association (1st Amendment)

Freedom of Association – Is a fundamental right under the 1st Amendment.

The govt. may only regulate the right to freely associate in a group if it satisfies Strict Scrutiny.
- Strict Scrutiny → Govt. must show (1) regulation is necessary, (2) to achieve a compelling govt. interest, AND (3) the least restrictive means was used.

The govt. may punish a person’s membership in a group if it proves the:
1) Group is actively engaged in illegal activity or incites imminent lawless action;  
2) Person has knowledge of the group’s illegal activities; AND  
3) Person has the specific intent of furthering those activities.

P. Freedom of the Press (1st Amendment)

Defamation & Actual Malice Standard – The press is afforded heightened protection under the 1st Amendment for Defamation lawsuits depending on the type of person.

Defamation Elements – P must prove:
1) a false defamatory statement (a statement that tends to harm the reputation of another);  
2) of and concerning the P made by D;  
3) publication by D to a third-party; AND  
4) damages.

Public Official or Public Figure → P must also prove actual malice to be successful; that Defendant spoke with either:
a) Recklessness; OR  
b) Knowledge of its falsity.  
*Proof of negligence is insufficient.

Private Citizen speaking on a matter of public concern → To be successful, P must also prove that the speaker was negligent.
# HOW TO USE THE SMART SHEETS

**Priority Ratings Guide**

A priority rating (H or M) will be listed in the color-coded circle next to each rule.

<table>
<thead>
<tr>
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<td><img src="high_priority.png" alt="High Priority" /></td>
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The priority ratings are based upon two primary factors:

- The testing frequency for each topic in the official MBE Subject Matter Outline released by the National Conference of Bar Examiners.
- How often that rule has been tested in the past on the MEE essays for that particular subject area. This testing frequency data is also useful for prioritizing the MBE rules because both the MBE and MEE sections are drafted by the same entity (the National Conference of Bar Examiners).

There are no LOW priority rules because all MBE rules are important and may be tested on any given exam. As such, we felt many important rules would receive an unwarranted LOW designation.

The purpose of providing the **HIGH/MEDIUM** priority rating is so you can see how important each rule is compared to the other rules at a glance, and **prioritize your studying to focus on the most important and frequently tested rules first and foremost** before moving onto the less important ones.
The **HIGH** or **MEDIUM** designation is not a prediction of what rules will appear on any given exam.

Instead, it is meant to help you prioritize your studying to focus on the most important and frequently tested rules. Ultimately, this method promotes efficiency in studying for the bar exam.

Best of luck on the exam!

– The SmartBarPrep Team
Smart Flashcards
California & MBE - Screenshots

20 Cards Studied!
14 uniques + 6 repeats

23 %Mastery

Unique Cards Rated This Session

5
4
3
2
1
New

Continue
What law governs contracts for the Sale of Goods?

Article 2 of the Uniform Commercial Code.

*Under the UCC, a contract may be made in any manner sufficient to show agreement (i.e. conduct showing parties recognize existence of a contract).

*For mixed contracts, the predominant purpose determines which law governs.

Priority: HIGH
When is a general partnership created?

When:
1. Two or more persons;
2. As co-owners;
3. Carry on a business for profit.

*No written agreement or intent is needed.

Priority: HIGH


# HOW TO PRINT THE FLASHCARDS

**Printing Instructions**

1. Download the "PDF" file of the flashcards to your computer.

2. Open the PDF file (Adobe Acrobat Reader can be downloaded for free at https://get.adobe.com/reader/).

3. Print the PDF file. In Adobe Acrobat Reader, print as “Actual size” for the best results.

4. After printing the PDF, cut on the solid lines and fold on the dotted line.

5. That’s it!

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Best of luck on the exam!

– The SmartBarPrep Team
| When does an Agency Relationship exist? | If there is:  
1) Assent;  
2) Benefit; **AND**  
3) Control.  
Priority: Medium |
|---------------------------------------|---------------------------------------------------|
| **What is an Agent?**                 | An agent is a person or entity that acts on behalf of another – the principal.  
Priority: Medium |
| **When does Express Actual Authority exist?** | When the principal has *explicitly told the agent* that he is entitled to act (either orally or in writing).  
Priority: **HIGH** |
| **When does Implied Actual Authority exist?** | When either:  
a) The agent believes he is entitled to act to carry out his express authorized duties;  
b) The agent has acted similarly in prior dealings; **OR**  
c) It is customary for agents in that position to act in that way.  
Priority: **HIGH** |
When does Apparent Authority exist?

When:
1) The principal holds out another as having authority;  
   AND  
2) A third-party reasonably relies on that authority.

Priority: HIGH

How does a principal hold out an agent as having authority?

When he:
a) Gives the agent a position/title indicating such authority;  
b) Has previously held the agent out as having authority and has *not* published a revocation;  
   OR  
c) Has cloaked the agent with the appearance of authority.

Priority: HIGH

When does Ratification occur?

When the principal:
1) Has knowledge of all material facts or contract terms;  
   AND  
2) Thereafter manifests assent (approval) of the same through words or conduct.

Priority: Medium

Under *respondeat superior*, an employer is vicariously liable for an employee’s negligent act if the employee was acting within the scope of employment.

When is an employee deemed to be acting within that scope?

When:
a) Performing work assigned by the employer;  
b) Engaging in a course of conduct subject to the employer’s control;  
   OR  
c) The conduct is of the same general nature as that authorized or incidental to that authorized.

**Conduct is not outside the scope merely because an employee disregards the employer’s instructions.**

Priority: HIGH