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EXPLANATORY ANSWERS

ANSWER KEY AND SUBJECT KEY

Answer		Subject
1.	D	Torts
2.	B	Civil Procedure
3.	B	Evidence
4.	B	Evidence
5.	D	Criminal Law & Procedure
6.	B	Torts
7.	B	Contracts
8.	D	Contracts
9.	C	Real Property
10.	A	Constitutional Law
11.	C	Constitutional Law
12.	D	Criminal Law & Procedure
13.	B	Contracts
14.	A	Real Property
15.	D	Criminal Law & Procedure
16.	C	Evidence
17.	C	Constitutional Law
18.	B	Civil Procedure
19.	C	Torts
20.	C	Evidence
21.	B	Torts
22.	D	Constitutional Law
23.	B	Constitutional Law
24.	C	Real Property
25.	C	Evidence
26.	C	Torts
27.	A	Torts
28.	C	Contracts
29.	D	Contracts
30.	D	Criminal Law & Procedure
31.	A	Evidence
32.	A	Civil Procedure
33.	D	Real Property
34.	C	Civil Procedure
35.	B	Criminal Law & Procedure
36.	D	Criminal Law & Procedure
37.	B	Contracts
38.	A	Civil Procedure
39.	A	Constitutional Law
40.	A	Torts
41.	A	Constitutional Law
42.	D	Contracts
43.	C	Contracts
44.	D	Evidence
45.	D	Civil Procedure
46.	D	Criminal Law & Procedure
47.	B	Real Property
48.	D	Real Property
49.	B	Constitutional Law
50.	C	Evidence
51.	B	Torts
52.	A	Real Property
53.	A	Torts
54.	A	Constitutional Law
55.	B	Contracts
56.	D	Contracts
57.	B	Criminal Law & Procedure
58.	A	Torts
59.	D	Civil Procedure
60.	B	Criminal Law & Procedure
61.	B	Real Property
62.	B	Evidence
63.	A	Criminal Law & Procedure
64.	B	Criminal Law & Procedure
65.	B	Constitutional Law
66.	C	Contracts
67.	D	Real Property
68.	A	Real Property
69.	A	Torts
70.	D	Evidence
71.	B	Evidence
72.	D	Constitutional Law
73.	B	Civil Procedure
74.	C	Real Property
75.	A	Civil Procedure
76.	C	Evidence
77.	D	Contracts
78.	D	Contracts
79.	B	Constitutional Law
80.	D	Civil Procedure
81.	D	Criminal Law & Procedure
82.	D	Torts
83.	C	Criminal Law & Procedure
84.	A	Torts
85.	A	Real Property
86.	C	Civil Procedure
87.	D	Civil Procedure
88.	C	Evidence
89.	C	Civil Procedure
90.	D	Constitutional Law
91.	B	Real Property
92.	B	Real Property
93.	C	Evidence
94.	A	Torts
95.	B	Civil Procedure
96.	A	Constitutional Law
97.	A	Torts
98.	A	Contracts
99.	A	Criminal Law & Procedure
100.	C	Contracts

Answer to Question 1

(D) If the mechanic loses, it will be because he does not own or rent the affected property. A private nuisance is a substantial and unreasonable interference with the use and enjoyment of real property. Because the mechanic does not own or rent the property where he works, he may not pursue a claim based on interference with that real property's use and enjoyment. (A public nuisance is an interference with the rights of the community at large—a situation not presented by the fact pattern.) (A) is wrong because sound waves may be a basis for a nuisance action. (C) is wrong because, if 40% of the people are bothered by the sound waves, they probably are a nuisance. It is not necessary for a majority of the population to be affected for there to be a nuisance, but more than one must be affected. The choice between (B) and (D) is a difficult one. Nuisance requires an ***unreasonable*** interference with the property, and if the facts in (B) were true, the defendants could arguably be acting reasonably. However, (D) is more clearly a basis for the mechanic to lose than (B).

Answer to Question 2

(B) The plaintiff is a citizen of Georgia and the defendant is a citizen of Alabama. In addition to an amount in controversy that exceeds $75,000, diversity of citizenship jurisdiction requires complete diversity, meaning that each plaintiff must be a citizen of a different state from every defendant. Whether complete diversity exists is determined when the suit is filed, not when the cause of action arose or when the defendant is served with process. The citizenship of a natural person is the state in which he is domiciled. A new state citizenship may be established by (i) physical presence in a new place; and (ii) the intention to remain there permanently. In this question, the plaintiff was originally from Alabama, but then moved permanently to Georgia ***before*** suit was filed. ***After*** suit was filed, the defendant also moved to Georgia from Alabama. Because the plaintiff's move to Georgia was before he filed suit, he is considered to be a citizen of Georgia for purposes of diversity jurisdiction, whereas the defendant is considered to be a citizen of Alabama because his move did not occur until after suit was filed. Thus, complete diversity exists. Choices (A), (C), and (D) are incorrect for the reasons stated above.

Answer to Question 3

(B) The silence is admissible nonhearsay as a statement by a party-opponent (commonly called an admission). Under the Federal Rules of Evidence, silence in response to an accusatory statement can be considered an implied admission if the party heard and understood the statement, was capable of denying the statement, and a reasonable person would have denied the accusation under the same circumstances. Here, there is nothing to indicate that the defendant did not hear or understand the statement or that she was incapable of denying it, and a reasonable person who was innocent would have in fact denied such an accusation. Thus, the defendant's silence is admissible as an admission, which is nonhearsay under the Federal Rules. (A) is incorrect because an implied admission by silence is not considered hearsay at all, and therefore is not an exception to the hearsay rule. (C) is incorrect because the rule against admissibility applies only if the accusation or statement is made by ***the police***; here, the accusation was made by the employer. (D) is incorrect because the Fifth Amendment right against self-incrimination, which provides that a defendant cannot be compelled to testify against herself, applies only after the initiation of a criminal proceeding. Here, the statement was made prior to the institution of criminal proceedings against the defendant.

Answer to Question 4

(B) The witness's testimony regarding the defendant's conduct would be admissible. The defendant's acts constitute nonassertive conduct. Alternatively, this could be considered an admission

by conduct. Therefore, the testimony is direct, relevant, nonhearsay evidence. Because it is not hearsay, (A) is incorrect. (C) is incorrect because evidence is not limited to testimony regarding spoken words; a witness may testify as to what she saw. (D) is incorrect because the defendant did not intend his conduct to be a substitute for words.

Answer to Question 5

(D) The woman is guilty of arson and burglary. She is guilty of arson because she deliberately set a fire that, in addition to burning the mattress, also burned part of the dwelling house of another, namely the floor. She is also guilty of burglary because she broke and entered into the dwelling house of another during the nighttime to commit a felony. The fact that she was not successful in committing the crime she intended or that she in fact committed another felony is irrelevant to her guilt for burglary; it is the intent to commit a felony at the time of the breaking and entering which is critical. (A) is incorrect. This choice correctly states that the woman is guilty of burglary, but she is also guilty of arson; she deliberately set a fire that, in addition to burning the mattress, also burned part of the dwelling house of another, namely the floor. Therefore, (B) and (C) are incorrect.

Answer to Question 6

(B) If the jury finds for the manufacturer, it will be because the misuse by the consumer was not foreseeable. A manufacturer is liable for a defective product, even if the plaintiff misuses it, as long as that misuse is foreseeable. Foreseeability in this case is an issue for the trier of fact. If the jury finds that the misuse was not foreseeable, the manufacturer will prevail. (A) is incorrect because the consumer's action is based on strict liability. (C) and (D) appear to be true based on the facts, but they ignore the key issue that the jury must decide, which is whether the consumer's misuse was foreseeable.

Answer to Question 7

(B) The company should recover $25,000 only. Contracts for goods for $500 or more must be evidenced by a writing to be enforceable. There are three exceptions to this rule: specially manufactured goods unsuitable for resale in the seller's regular course of business, contracts admitted in court, and contracts partially accepted (enforceable to the extent of the acceptance). Here, the contract was for $50,000 and was oral. Thus, it will be enforceable only if one of the exceptions applies. The buyer's acceptance of the first generator constitutes part acceptance that will make the buyer liable to the extent of the acceptance: $25,000. Therefore, (B) is correct and (A) is incorrect. (C) is incorrect because partial acceptance renders the buyer liable only for the part accepted, not the entire contract. (D) is incorrect because, while the goods were made for the buyer, they were suitable for resale in the company's business, because they were built to standard industry specifications.

Answer to Question 8

(D) If the engine company loses, it will be because it could have sold the motors in the ordinary course of its business. This question concerns the specially manufactured goods exception to the U.C.C.'s Statute of Frauds. In order for the specially manufactured goods exception to apply, there must be all three of the following elements: (i) the goods must be specially manufactured for the buyer, (ii) the seller must have started work on the goods or else entered into a commitment to purchase them from someone else, and (iii) the goods must not be sellable in the seller's ordinary

course of business. If the goods are sellable, as (D) states, this exception does not apply. (A) and (B) are incorrect because the seller need only have started work on the goods, which the engine company had done. (C) is incorrect because the company was entitled to stop work after the manufacturer's repudiation.

Answer to Question 9

(C) The lawyer will likely prevail. When a subdivision is created with similar covenants in all deeds, there is a mutual right of endorsement (each lot owner can enforce against every other lot owner) if two things are satisfied: (i) a common scheme for development existed at the time that sales of parcels in the subdivision began; and (ii) there was notice of the existence of the covenant to the party sued. Here, there was a common scheme evidenced by the recorded plan, and the fact that the covenant was in the architect's chain of title gave her constructive notice of the restriction. Therefore, not only does the covenant apply to the architect's land, but the lawyer (or any other lot owner) can enforce it as a reciprocal negative servitude. (A) is incorrect. While it is true that the architect's deed had no restrictions, those restrictions are binding if they are in her chain of title so as to give her notice of them. The restriction was in the deed from the developer to the investor, so the fact that it was omitted in the deed from the investor to the architect is of no significance. (B) is incorrect. While a covenant is normally only enforceable by the party receiving the promise (here, the developer), this is a situation of mutual rights of enforcement within a geographically defined area, a special situation that gives every lot owner in the area the right of enforcement, even though they did not directly receive the benefit of the promise. (D) is incorrect. The fact that gives the lawyer the right of enforcement is not just the fact that his deed contains the covenant, but that the same covenant was in all of the deeds from the developer, including the one to the architect's predecessor in title.

Answer to Question 10

(A) The strongest ground for supporting this provision is the Necessary and Proper Clause. Congress has the authority to legislate to protect federal parklands. The federal law safeguards wild animals that wander off federal parklands. The Necessary and Proper Clause allows Congress to choose any means to carry out its constitutional powers. Thus, it may regulate hunting to protect the federal interest in safeguarding the wild animals. (B) is wrong because it rests on an unjustified factual statement, that the "animals are moving in the stream of interstate commerce." There are no facts describing the movement patterns of the animals. (C) is wrong because there is no federal police power to protect wild animals. Generally, the federal government lacks the police power; the police power belongs to state and local governments. Although Congress possesses the police power in legislating for federal lands, this choice is not limited to those circumstances. It speaks broadly of a federal police power to protect wild animals, and none exists. (D) is wrong because the Supreme Court has discarded the distinction between rights and privileges as a constitutional principle. Moreover, it is a distinction used to determine when the government must provide procedural due process before deprivations of property or liberty. This question does not involve the Due Process Clause.

Answer to Question 11

(C) The most likely ground for dismissal is lack of standing. Except for very limited exceptions, the traditional rule is that a person has standing only to raise constitutional issues which affect her personally. She cannot claim that a third person's constitutional rights were violated. The husband is the injured party and must assert his own rights. (A) is incorrect. The issue in this question

is not the substance of America's foreign policy, which would be a political question, but the husband's First Amendment right to speak out about it, which is not a political question. Therefore, the court is not barred from litigating this issue under the political question doctrine. (B) is incorrect. There are damages to be assessed if the husband was improperly dismissed. Under *Mt. Healthy Board of Education v. Doyle* (1977), a public employee cannot be fired without a hearing for exercising the right to free speech, even if there is no property right in the job. The case is not moot because the husband has lost his job permanently. The case would be moot only if the husband had been reinstated to his former job at his former pay. (D) is incorrect. The subject matter of the suit—the dismissal of an employee for exercise of his First Amendment rights—presents a federal question.

Answer to Question 12

(D) The defendant should be found not guilty. Larceny is a specific intent crime that requires that the defendant intend to permanently deprive the owner of his property. If the defendant can show that she really believed the property was her own, there is no intent to deprive the owner of his property, and therefore the defendant would not be guilty of larceny. This is true whether or not the mistake was reasonable or whether the mistake was attributable to intoxication. In the instant case, the defendant did not realize that she had taken another's coat, and thus did not have the specific intent to commit larceny. (A) is incorrect. A mistake of fact that negates the state of mind requirement for ***specific*** intent crimes need not be reasonable. ***Any*** mistake of fact, reasonable or unreasonable, that negates specific intent would be a defense. For much the same reason, (B) is incorrect. For specific intent crimes, intoxication may be a defense when it prevents the defendant from formulating the requisite state of mind. (C) is incorrect because it implies that the asportation requirement for larceny must be substantial. It need not be; any movement of the property is sufficient to satisfy the requirement. Here, the defendant walked out of the bar with the fur coat, which is a sufficient asportation.

Exam Note: Reaching a place of temporary safety may be important in a question involving killings committed during the course of a felony because it may cut off liability; it has nothing to do with the asportation requirement for larceny.

Answer to Question 13

(B) The bakery will prevail regardless of when it sues. The farmer's statement of August 10 that he would be unable to deliver because he had sold all of his crop to others constitutes a repudiation of the contract, which entitles the bakery to sue at once rather than wait for the September 1 performance date. [*See* U.C.C. §2-610] The bakery will prevail unless there have been some unanticipated circumstances that would excuse performance, but a rise in price due to poor crop performance is not sufficient to excuse performance under the doctrine of commercial impracticality. The farmer appears to have repudiated merely to make a greater profit. (A) is incorrect—because the farmer repudiated, the law does not require the bakery to wait until the due date for performance to arrive. It may sue at once. [*See* U.C.C. §2-610] (C) is incorrect because the facts do not indicate that the farmer has been harmed at all by the price increase, or that he cannot perform the contract with the bakery. As a matter of fact, he is simply attempting to gain a windfall by repudiating the contract with the bakery to sell at a higher price. (D) is incorrect because the facts do not indicate that the circumstances that led to the poor crop were unforeseen. Crop performance is risky and variable, and a poor crop can certainly result in a price increase by virtue of the operation of the law of supply and demand. The farmer must be assumed to have anticipated such possibilities and taken such risks.

Answer to Question 14

(A) The second partner has title free and clear of the mortgage. When the partners bought the property, they took title as joint tenants with right of survivorship. If the joint tenancy continued until the first partner's death, then the property would pass immediately on death to the second partner. Because the second partner did not sign the mortgage, she would not be subject to it, regardless of whether she knew about it. The key to answering this question is to know whether execution of the mortgage by the first partner caused a severance of the joint tenancy. If it did cause a severance, then the first partner's one-half would not pass to the second under right of survivorship but instead would pass to the first's estate, and thus by will would go to the daughter. Whether a mortgage creates a severance or not depends on whether the state follows the lien theory or the title theory of mortgages. Lien theory means no severance; title theory means severance. Because this is a lien theory state ***(majority rule on the MBE)***, there was no severance; thus, the joint tenancy remained intact. On the first partner's death, the joint tenancy ended and the first partner's interest instantly passed to the second partner. The first partner's estate got nothing; hence, the daughter could get nothing. (B) would be the correct answer if the execution of the mortgage had created a severance of the joint tenancy. The severance would have changed the joint tenancy to a tenancy in common. The second partner would keep her one-half, free of the mortgage she did not sign, and the daughter would inherit the first partner's one-half, subject to the mortgage the first partner signed. Because we are told this is a lien theory state, there was no severance when the mortgage was executed so the joint tenancy remained intact until the first partner's death. (C) is incorrect. Not only is the joint tenancy unsevered so that it remains intact to give title to the entire property to the second partner, but also under no circumstances could the second partner be held liable for a mortgage she did not enter into. (D) is incorrect. When the first partner died, the property passed free and clear to the surviving joint tenant. The mortgage signed by the first partner did not sever the joint tenancy because this is a lien theory state. The mortgage can be held only against the property the first partner has; when the first partner died, the right of survivorship operated to end the first partner's interest and automatically vested it in the survivor.

Answer to Question 15

(D) The drug dealer's motion should be denied. The defense of double jeopardy does not apply if the second crime requires an element which is not an element of the first crime and vice versa. In this case, the crime of conspiracy has an element which is not in the possession crime, namely the agreement to commit the crime with another person, and it is lacking an element, namely the actual commission of the crime. (A) is incorrect because it is possible to commit two separate crimes by the same criminal conduct, such as conspiracy and the substantive offense. (B) is incorrect because it is the Double Jeopardy Clause of the Bill of Rights that affords protection against a subsequent prosecution, not the Due Process Clause. (C) is incorrect because even if a lesser included offense to the first crime were contained in a separate statute, the defense of double jeopardy would still apply.

Answer to Question 16

(C) The testimony is inadmissible on public policy grounds. This question involves the admissibility of settlement offers ("I'll settle for a refund of the purchase price plus $50,000") and statements made in the context of settlement negotiations ("Well, maybe it wasn't fraud"). Both settlement offers and statements made during settlement negotiations are ***inadmissible***. [Fed. R. Evid. 408] This is because public policy favors the voluntary settlement of disputes. If a settlement offer has been made in a case that ultimately goes to trial, admission of the offer into evidence would

probably prejudice the party who made the offer. Thus, if such evidence were admissible, there would be a disincentive to parties making settlement offers. Similarly, if statements made during settlement negotiations could be admitted into evidence in cases that ultimately go to trial, then that would be a disincentive to enter into settlement negotiations or to discuss settlement in a freewheeling way. In either event, the public policy favoring settlements bars use of such statements. (A), which asserts the offered testimony is admissible as a statement by a party-opponent (to show plaintiff's recognition of the weakness of his case), is plainly incorrect. Because of the public policy valuing settlements, this type of testimony would not be admissible. (B) is incorrect because it is only half true. Offers to compromise are excluded, as (B) says, but (B) is incorrect in asserting that statements made in the course of settlement negotiations are admissible where relevant. (D) is incorrect. The offered testimony involves a statement made by the plaintiff to the defendant, not a statement made by a party to the party's attorney. Thus, the attorney-client privilege is not involved. Similarly, the attorney work product privilege is inapplicable. A settlement offer made by a party or an opposing party is not attorney work product. (D)'s assertion—that any statement made in the office of an attorney is privileged—is obviously incorrect.

Answer to Question 17

(C) The woman would not prevail in this lawsuit. The Supreme Court consistently has held that the government may restrict aspects of citizenship such as voting and, here, jury service to citizens. In fact, the Court has held that laws discriminating against aliens that are related to attributes of citizenship need only meet a rational basis test. (A) is incorrect because the discrimination is constitutional as long as it is rationally related to a legitimate government purpose. Restricting jury service to citizens would be regarded as such a purpose. (B) is incorrect because, although alienage is generally a suspect classification, only a rational basis test is used for discrimination related to aspects of citizenship. (D) is incorrect because she could claim an injury based on the fact that she was discriminated against. Those who claim a violation of equal protection of the law in that they have been discriminated against have standing to sue.

Answer to Question 18

(B) The contractor may remove the action. A defendant may remove an action that could have originally been brought in the federal courts (because subject matter jurisdiction based on either a federal question or on diversity of citizenship was present). Diversity of citizenship jurisdiction is available when (i) there is complete diversity of citizenship, meaning that each plaintiff is a citizen of a different state from every defendant; and (ii) the amount in controversy exceeds $75,000. Generally speaking, a defendant has 30 days from the date he receives the initial summons or complaint to remove a case. However, if a case becomes removable on the basis of diversity at a later date, he has 30 days to remove the case from the date the defendant is served with the document that first makes the case removable. That said, for cases based on diversity, removal may not take place more than one year after the case was filed. In the instant case, the homebuyer (from Georgia) initially sued the agent (also from Georgia) and the contractor (from Texas) for $150,000. Thus, the case was not initially removable. The case then became removable when the homebuyer dismissed the agent from the case, leaving the Texas corporation as the sole defendant. At this point, the corporation has 30 days to remove the case, and the one-year restriction does not come into play because the facts state that only six months have passed since the case was filed. As a result, (B) is the correct answer. (A) is incorrect because the case was not initially removable. The claim was for a state law breach of contract, so no federal question was presented, and complete diversity was initially lacking, so diversity of citizenship jurisdiction was not available. (C) is incorrect because the 30-day period has been met (since the corporation

immediately filed a notice of removal), and only six months have passed since the case was filed in state court, making the case removable on the basis of diversity of citizenship jurisdiction. (D) is an incorrect statement of the law. The grounds for removal need not exist at the time the case is filed. If grounds for removal come up later, the case may still be removed, subject to certain restrictions.

Answer to Question 19

(C) The hiker will not prevail because strict liability does not apply to a bull, which is a domestic animal. The owner of a domestic animal, including a farm animal, is not strictly liable for injuries it causes, as long as the owner has no knowledge that the animal has abnormally dangerous propensities (*i.e.*, propensities more dangerous than normal for that species). A bull is a domestic animal, and nothing in the facts suggests that the bull was more dangerous than normal for that type of animal. Hence, strict liability will not apply. (A) is incorrect because the rule for trespassing animals does not apply. The owner of a trespassing animal is strictly liable for harm done by the trespass as long as it was reasonably foreseeable. Here, the bolt of lightning caused the fence to break and allowed the bull to escape. This unforeseeable intervening force was the cause of the trespass; hence, the strict liability rule for trespassing animals does not apply here. (B) is incorrect because, as discussed above, strict liability does not apply for domestic animals with normal dangerous propensities. Only domestic animals with propensities more dangerous than normal for the species may subject the owner to strict liability. (D) is incorrect because the hiker's status as a trespasser on the neighbor's land is irrelevant as to the farmer's liability. If the hiker were a trespasser on the ***farmer's*** land, strict liability would not apply even if the bull were abnormally dangerous, but the farmer's liability is not affected by the hiker's status as to the neighbor. Note that if strict liability applied for harm from an animal trespassing on a neighbor's property, the hiker's status as a trespasser might be relevant because strict liability applies only to injured persons who were rightfully on the property. However, as discussed above in (A), that liability is inapplicable here because the bull's trespass was unforeseeable.

Answer to Question 20

(C) The witness's testimony would clearly qualify as hearsay. Because there is no applicable exception to the hearsay rule, his testimony is inadmissible. (A) is incorrect because the statement was not made during and in furtherance of the conspiracy, a requirement for admitting statements by a co-conspirator. (B) is incorrect because the woman has already been acquitted of the crime in question; hence, she is not subject to further prosecution. (D) is an incorrect statement of law.

Answer to Question 21

(B) An assault is committed when the victim is put in reasonable apprehension of an offensive touching. If the farmer believed that the melon grower might shoot him, and the belief was objectively reasonable, then the melon grower's action amounts to assault. The conditional threat, "stop or I'll shoot," is sufficient for an assault. Because the melon grower was pointing a rifle at the farmer at the time the threat was made, the requirement of immediacy was fulfilled. The melon grower cannot claim defense of property because the farmer had a privilege based on private necessity to enter the melon grower's land. (B) is a better answer than (A), because the melon grower would only have committed an assault if the farmer had a reasonable apprehension of a harmful or offensive contact. (C) is a misstatement of the law. Assault is not a lesser included tort within battery. (D) is incorrect because what is contained in the shotgun is irrelevant. The gun created apprehension of a harmful or offensive contact.

Answer to Question 22

(D) The governor's best argument is based on separation of powers principles. Under Article II, Section 2 of the Constitution, the President has the power to "grant reprieves and pardon offenses against the United States, except in cases of impeachments." Thus, the President's pardon power is limited to violations of ***federal*** law. The President has no authority to pardon those convicted of state crimes or held in state custody. Thus, the governor is correct. The President lacks the authority to grant these pardons. Although the President's ability to negotiate treaties only extends to dealing with other nations, (A) is wrong because the President possesses other powers that would allow him to negotiate such deals. For example, the President's powers as Commander in Chief and other inherent powers (such as the ability to negotiate executive agreements) would justify this action. (B) is wrong because, under the doctrine of federal supremacy, federal law will govern state law when there is an inconsistency between the federal and the state laws. Therefore, the governor could be required to do an act that is a violation of state law, but a requirement of federal law. (C) is wrong because the President has the power to grant pardons to those convicted of violations of federal laws. The President's exercise of this authority is part of his faithful execution of the laws of the United States.

Answer to Question 23

(B) The Court should hear the case on the merits. A state can sue another state to protect its natural resources for the benefit of its own citizens. [Pennsylvania v. West Virginia (1923)] The ice cutter's state is suing the state operating the power plant under this doctrine. Under Article III, the Supreme Court has original and exclusive jurisdiction over controversies between two states. Because this is a controversy between two states, Supreme Court jurisdiction is proper. (A) is incorrect. The ice cutter's state is a real party in interest, and the Eleventh Amendment, which bars suits by citizens of one state against another state in federal court, is inapplicable. (C) is incorrect. Article III, Section 2(2) of the Constitution confers exclusive original jurisdiction to the Supreme Court over all controversies between two or more states. (D) is incorrect. Article III, Section 2 of the Constitution confers exclusive original jurisdiction on the Supreme Court in cases between two or more states. In such cases, the Court must serve as a trial court and even Congress may not limit that jurisdiction. [*See* Marbury v. Madison (1803)]

Answer to Question 24

(C) The doctor can sue the homeowner but can recover only $86,000. The homeowner gave a warranty of title to the accountant when he gave her a general warranty deed. This warranty runs with the land and can be enforced by any subsequent purchaser. Damages are limited, however, to the purchase price received by the warrantor. Because the homeowner received only $86,000 from the accountant, that is all that the doctor can recover. The doctor gets nothing from the accountant because she gave only a quitclaim deed, which gives no warranty of title. (A) is incorrect because the doctor cannot prevail over the accountant at all, and he can recover only $86,000 against the homeowner. (B) is incorrect. While the doctor can win over the homeowner and not the accountant, he is limited to the money the homeowner received from the accountant—$86,000. (D) is incorrect. Because the homeowner gave a general warranty deed, that warranty for title runs with the land and can be enforced by any subsequent purchaser. There are two (sometimes three) future covenants contained in a general warranty deed—the covenants of quiet enjoyment, warranty, and (sometimes) further assurances. Quiet enjoyment is a covenant that the grantee will not be disturbed in her possession or enjoyment of the property by a third party's lawful claim of title. Warranty is a covenant that the grantor agrees to defend on behalf of the grantee any

lawful or reasonable claims of title by a third party. Further assurances is a covenant to perform whatever acts are reasonably necessary to perfect the title conveyed if it turns out to be imperfect. These three covenants are future covenants that are breached, if at all, only on interference with the possession of the grantee or her successors; thus, they "run" with the grantee's estate. Here, the future covenants contained in the accountant's deed from the homeowner run with the land, allowing the doctor to seek recourse against the homeowner, the original grantor, for the disturbance in possession.

Answer to Question 25

(C) The testimony should be found inadmissible. Extrinsic evidence of a prior inconsistent statement may not be used to impeach a witness upon a collateral matter. The clerk testified that he could recognize the defendant's face, and so the color of the gun is not material to any issue in the case under the facts given. (A) and (B) are incorrect because, even if the evidence does have some bearing on the clerk's credibility as a witness, it will be excluded because it will possibly confuse the issues or because it is a waste of time. (D) is not correct because the defendant is not seeking evidence to prove the truth of any material issue, but to impeach the clerk. The hearsay rule does not apply.

Answer to Question 26

(C) If the lodge owner prevails, it will be because he made a reasonable inspection without discovering the danger. A landowner owes a duty to invitees to warn of or otherwise make safe dangerous natural conditions of which he knows or could reasonably discover by inspection. (A) is wrong because the fact that the tree limb was a natural condition does not relieve the lodge owner of this duty. (B) is wrong because actual knowledge is not necessary; it is sufficient to impose liability if the dangerous natural condition would have been discovered by a reasonable inspection. (D) is wrong because the fact that other factors contributed to the danger does not negate the landowner's liability because those factors were foreseeable.

Answer to Question 27

(A) The best basis for recovery is a battery action. The facts in this case indicate that the actions of the Guard were intentional. The facts also state that it was not necessary to use weapons. If it was not necessary to use weapons, it would follow that the Guard had no privilege to use deadly force, and the state would be liable to the strikers for battery. (C) is wrong because this is clearly an intentional tort. Both (D), strict liability, and (B), abnormally dangerous activities, are torts based on unintentional injuries, so even if the plaintiffs could apply these torts to this action, it would not be the best basis for recovery since, as stated above, this is an intentional tort.

Answer to Question 28

(C) The hotelier will prevail. Ice buckets are movable goods; therefore, Article 2 of the U.C.C. applies. The June 8 letter from the supply company is a firm offer under U.C.C. section 2-205. No consideration is required, because the company is a "merchant" (*i.e.*, one who ordinarily deals in goods of the kind sold) of ice buckets. Where a time period for the offer is stated, the period of irrevocability is that period, except that the period cannot exceed three months. Here, the three-month period would end on September 8. The company's fax stating that it had only 50 ice buckets left to sell constitutes an invalid attempt at revocation, because it is within the three-month period of irrevocability. (A) is incorrect because section 2-205 does not require that the ***offeree*** of a firm offer be a

merchant; it requires that the ***offeror*** be a merchant, and the company is (*see* above). (B) is incorrect because a firm offer that states a period longer than three months is still firm for the first three months. (D) is incorrect because the hotelier's knowledge, or lack thereof, of the "revocation" of the company's offer is irrelevant because it was invalid; the fact that the company made a firm offer prevents it from revoking the offer within the stated time, not to exceed three months.

Answer to Question 29

(D) The developer must accept the 24 sets and is not entitled to cancel the rest of the contract. The ground for rejection of an installment contract is U.C.C. section 2-612(2), which provides that the buyer may reject any installment that is nonconforming only if it substantially impairs the value of that installment and cannot be cured. If the nonconformity can be cured and the seller gives adequate assurances of its cure, the shipment must be accepted by the buyer, provided that the defect is not such as to constitute a breach of the whole contract. (A) is incorrect. Under U.C.C. section 2-601, if defective goods arrive, the buyer normally has every right to reject them as unsatisfactory. But this is not the case if the defective shipment was part of an installment contract, as is the case here. (B) is incorrect for the reasons stated above. (C) is incorrect. Under U.C.C. section 2-612(3), there is a breach of the entire contract only when the nonconformity or default with respect to a single installment substantially impairs the value of the whole contract. Here, this is clearly not so, and the developer may not repudiate the second shipment based upon the single incomplete set.

Answer to Question 30

(D) None of these people would be guilty of attempted murder because, on these facts, they did not possess the specific intent to kill necessary for the crime of attempted murder. At common law, all attempts were specific intent crimes. Thus, before a criminal conviction for ***attempt*** would lie, it had to be established that the actor had the specific intent to engage in the behavior or to cause the harm prohibited by the criminal statute that the actor was charged with attempting to violate. Thus, before someone could be guilty of attempted murder, he had to possess the specific intent to kill. In this question, it is clear that the mechanic and the doctor did not have the specific intent to kill. Their intent was only to place a smoke bomb on the owner's porch. The situation with respect to the army veteran's intent is not quite as clear, but a fair reading of the facts indicates that he did not have a specific intent to kill. It is true that he made a bomb containing a lethal quantity of explosives, but the question goes on to state that he only intended to scare the slovenly owner. Had someone died in the blast, the army veteran could be found guilty of manslaughter due to his recklessness, or perhaps he could be found guilty of murder under the depraved heart theory. However, since no one died, he will not be guilty of attempted murder because there was no specific intent to kill. Thus (D) is correct, and (A), (B), and (C) are wrong.

Answer to Question 31

(A) The judge should overrule the objection because the statement falls within the exception for statements of present state of mind. Under that exception, declarations of existing state of mind are admissible as circumstantial evidence to show subsequent acts of the declarant in conformity with that intent. Here, an issue in this case is whether the cousin confronted the defendant at his office, as the prosecution alleges. His statement that he was intending to do so is circumstantial evidence that he did so. It should therefore be admissible under the present state of mind exception. (B) is incorrect. While the cousin's confrontation with the defendant may have triggered the murder, the prosecution is offering the statement in the letter for its truth (*i.e.,* that the cousin planned to

confront the defendant and subsequently did so), in large part to rebut the defendant's assertion that he had not seen the cousin in several weeks. (C) is incorrect because, as discussed above, the statement falls within the hearsay exception for statements of present state of mind. (D) is incorrect because, while the cousin's state of mind is not directly in issue, it is relevant to show that he acted in conformity with that state of mind.

Answer to Question 32

(A) The court should deny the motion. The question provides that service was made pursuant to the Utah long arm statute. The assertion of personal jurisdiction is statutorily authorized, in that it is consistent with Utah's long arm statute, and the exercise of personal jurisdiction is constitutional, given that the claim arises from the defendant's purposeful activities (driving in and using roads) in Utah. Thus, a court in Utah may properly exercise personal jurisdiction over the defendant from Nevada, even if the defendant does not consent to personal jurisdiction and is not domiciled there. (B) is incorrect because personal jurisdiction cannot be exercised against a defendant based on the ***plaintiff's*** domicile. (C) is incorrect, as the answer choice describes the exercise of general jurisdiction (*i.e.*, personal jurisdiction over the defendant for all causes of action). The facts do not indicate that the defendant has such contacts with Utah. (D) is incorrect because consent is not necessary to assert personal jurisdiction over a defendant, as explained above. Consent is one basis for exercising personal jurisdiction over a defendant, but not the only basis.

Answer to Question 33

(D) Their request for specific performance will be denied. With a future interests question that may raise the Rule Against Perpetuities, you must first label the interests granted. The landowner attempted to give a fee simple determinable to his sister ("to my sister and her heirs so long as it is used for residential purposes") followed by an executory interest in the community center ("but if it is ever used for other than residential purposes, then to the local community center"). If the grant to the community center is valid, the landowner would have retained nothing. But the grant over to the community center is void under the Rule Against Perpetuities. It will not vest until the property is used for nonresidential purposes, an event that could occur outside lives in being plus 21 years. If the interest in the community center is void, that leaves only the sister's fee simple determinable. That means the landowner must have kept a possibility of reverter, which always accompanies a fee simple determinable that is not followed by an executory interest. The landowner's possibility of reverter was devised to the friend under the landowner's will. Thus, both the sister and the friend have interests in the property, and the failure of the friend to join in the contract means no specific performance of it. (A) is incorrect. The sister has a fee simple determinable. When the Rule Against Perpetuities voided the attempted executory interest in the community center, it struck all the language following the comma: "but if . . ."; that left "to my sister and her heirs so long as it is used for residential purposes." The fee simple determinable is not a fee simple absolute; it is accompanied by the possibility of reverter in the grantor, and that person (or his successor) must join in the conveyance for the grantee to get a fee simple absolute. (B) is incorrect. The daughter owns nothing; the landowner devised his real property interests to the friend, so his heir takes none of it. The sister has a fee simple determinable, not a fee simple absolute. (C) is incorrect. The Rule Against Perpetuities voided the attempted executory interest in the local community center; it has nothing.

Answer to Question 34

(C) The defendant does not need to produce the passenger's statement. Work product prepared in anticipation of litigation is discoverable only on a showing of substantial need and undue hardship

in obtaining the substantial equivalent of the work product. Here, there is no indication that the passenger is unavailable or cannot recall the accident. Thus, it is unlikely that the plaintiff will be able to show substantial need and undue hardship in obtaining a statement from the passenger as to her recollection of the accident. As a result, the statement is protected from discovery. (Note that this analysis is applicable to the statement only; the existence of the passenger as a witness must be disclosed either as an initial disclosure—assuming the defendant is going to use passenger to support her claim or defense—or in response to a properly submitted interrogatory.) (A) is an overbroad statement of the requirements for discovery. Federal Rule 26(c)(3) specifically exempts documents prepared in the anticipation of litigation from discovery, and the passenger's statement falls into this category. (B) is an incorrect statement of the law; the fact that the statement was electronic does not prevent it from becoming protected under the work product doctrine. (D) is incorrect because the statement is not "privileged" per se (such as the doctor-patient evidentiary privilege), but rather is exempt from discovery under the work product doctrine under Federal Rule 26(c)(3). As described above, there are exceptions to the work product doctrine.

Answer to Question 35

(B) The teen's motion should be granted. A search is valid if the police reasonably believe that they obtained valid consent for the search. Generally, a homeowner has authority to consent to a search of her own home, as long as she has apparent access to the place searched. Here, nothing indicates that the teen's bedroom door was locked. Thus, the mother had apparent authority to search the teen's room. However, it appears unreasonable for the police to believe that the mother had authority to consent to a search of the suitcase because it was locked, and the police had to break the lock to open it (indicating that the mother did not have a key for the lock and so likely did not have access to the contents of the suitcase). The parent-child relationship does nothing to change this analysis. A parent of an adult teenager does not have automatic authority to search the adult teen's locked things (the rule probably is different for young children). (A) is incorrect. To be effective, a consent to search must be voluntary and given under no threat or compulsion. However, the police are under no obligation to inform the defendant or other person of the right to refuse entry. Therefore, this search is not invalid because the mother was not informed of her right to refuse entry. The issue is whether her consent was sufficient to allow the police to search the son's suitcase. (C) is incorrect because, as explained above, a homeowner does not necessarily have authority to consent to a search of everything in her home. Where it is apparent that she does not have access (*e.g.*, when something is locked and she does not have a key), the police may not reasonably believe she may consent to the search of the locked area. (D) is incorrect. The doctrine of in loco parentis is a tort doctrine under which the state is charged with a parent's responsibilities over a child in its care. The doctrine does not apply here.

Answer to Question 36

(D) The passenger should be acquitted. Robbery is larceny from a person by violence or intimidation. Larceny requires a specific intent to take personal property from the possession of another with intent to permanently deprive the other of his possessory interest. Because the passenger thought that the property belonged to him, his mistake of fact is a valid defense to the crimes of larceny and robbery. This is because the mistake negates the existence of a mental state (specific intent to steal) essential to the charged crime. (C) is incorrect. Robbery is larceny by either violence or intimidation. Knocking the owner to the floor constitutes the necessary violence, whether or not the passenger used intimidation. Even though voluntary intoxication may be a defense to a specific intent crime (in those circumstances where the intoxication negates the specific intent),

the better answer is (D), because the passenger's mistake of fact is a defense to the specific intent crime charged since he did not have the specific intent to steal. (A) is incorrect. As discussed above, although voluntary intoxication can be a defense to a specific intent crime, (D) is the better answer because the question does not establish that the mistake of fact was a product of the intoxication. (B) is incorrect. The passenger's mistake of fact negates the specific intent to steal required to convict him of robbery.

Answer to Question 37

(B) The gardener is entitled to receive the fee. The common law rule is that a promise to modify a contract must be supported by consideration. Here, the gardener agreed to work an extra year in return for the landowner's promise to pay extra money. In the absence of facts indicating duress or unconscionability (facts not present here), courts will not inquire into the adequacy of the consideration. There is no indication that the landowner had no "meaningful choice" but to accept the price increase, and because the landowner received a year's extension in exchange, there was adequate consideration to support a modification. (A) is incorrect because, as discussed above, the modification is valid and the price increase can take effect as agreed. (C) is incorrect for two reasons: First, economic duress generally is not a good defense to contract unless caused by the party seeking to enforce the contract. Second, as mentioned above, there are no facts indicating that the landowner had no "meaningful choice" but to accept the proposed modification; nothing indicates that the landowner could not have found another gardener or could not have sued the gardener for breach if she had not performed the original contract in the absence of modification. (D) is incorrect because the gardener did not merely promise to perform a preexisting duty in exchange for the promise to pay $200 a month more. She promised a year's extension of services, and this is additional and valuable consideration.

Answer to Question 38

(A) The federal court does not have jurisdiction because neither diversity of citizenship jurisdiction nor federal question jurisdiction exists. Diversity of citizenship jurisdiction is available when (i) there is complete diversity of citizenship, meaning that each plaintiff is a citizen of a different state from every defendant; and (ii) the amount in controversy exceeds $75,000. A natural person's citizenship is the state that is the person's domicile. A partnership is a citizen of each state of which its partners, both limited and general, are citizens. Here, the writer is a citizen of Tennessee, and the advertiser's partners are citizens of California, New York, and Tennessee. Given the Tennessee-Tennessee connection, complete diversity does not exist. Hence, (B) is an incorrect answer choice as to diversity jurisdiction. Federal question jurisdiction is available when the plaintiff, in his well-pleaded complaint, alleges a claim that arises under federal law. Anticipation of a federal defense or the fact that federal law is implicated by the plaintiff's claim do not give rise to federal question jurisdiction; the plaintiff's claim must arise under federal law. Here, although federal copyright law is peripherally involved, the writer's cause of action is actually based on state contract law. As a result, no federal question has been presented by the writer's complaint, making (C) incorrect. Note too that federal question jurisdiction does not have a complete diversity requirement, making (B) incorrect as to federal question jurisdiction. (D) is incorrect because federal question jurisdiction does not arise merely because interstate commerce is affected.

Answer to Question 39

(A) The law should be held constitutional. Congress has very broad power over interstate commerce, and it may enact laws that regulate commerce. (B) is a misstatement of the law, because Congress

is not required to find that there exists some burden on interstate commerce before it enacts laws regulating commerce. (C) is wrong because it is Congress that is empowered to regulate commerce between the states. Current state laws have no effect on whether Congress can, or cannot, regulate. (D) is wrong because the federal statute did not ***reverse*** the decision of the Supreme Court. It merely enacted a requirement as a matter of ***federal*** law, while the Supreme Court had ruled that a ***state*** law on the subject was invalid.

Answer to Question 40

(A) If the son can prove that "most doctors" would not have used this drug to treat a pregnant woman, then he has probably shown that the doctor has failed to comply with the required standard of care. The mother's doctor owes a duty to both mother and child not to act in a negligent manner. If a family practitioner practicing according to the standard of care required in this jurisdiction would not have treated an obviously pregnant woman with the drug, then the doctor's treatment of the pregnant woman was negligent. (B) is incorrect. The doctor can only prevail if he can prove that treating the pregnant woman with the drug was in accord with prevailing medical procedure as practiced by a physician of ordinary care and skill. The fact that the doctor was not personally aware that the treatment he prescribed would cause injury will not allow him to avoid liability if his conduct was not in accord with the standard of care required of doctors in this jurisdiction. If he needed to read certain journals to acquire the knowledge and skill of a competent physician, then failure to do so is failure to exercise reasonable care. (C) is incorrect because the "learned intermediary" rule would protect the pharmaceutical company from being sued for failure to warn the mother about the risks (because it provided a warning to the prescribing physician); it does not affect the doctor's liability. (D) is incorrect because a fetus who is born alive has a cause of action against those who negligently cause prenatal injuries.

Answer to Question 41

(A) The best defense is that First Amendment rights do not apply to the organization. First Amendment rights are made enforceable against a state through the Fourteenth Amendment. However, the amendments do not prevent private individuals or organizations from encroaching upon individual civil liberties. Because there is nothing in the facts to indicate significant state involvement (state action) with the organization (granting corporate status does not suffice), the amendments do not apply to their actions in expelling one of their members. (B) is incorrect because such membership may be protected by the First and Fourteenth Amendments. (C) and (D) would have no bearing on the alleged violation of the member's rights.

Answer to Question 42

(D) The written agreement is enforceable in its entirety. The initial contract had two components: the sale of the smaller company's refining facilities to the oil producer, and the oil producer's option to purchase the smaller company's output. Normally, the option provision would be illusory, because the oil producer's promise to purchase, ***at its option,*** 100% of the smaller company's output is not a promise to do anything and therefore is not consideration. However, there is other consideration here—the oil producer's purchase of the smaller company's refining facilities. The contract must be considered as a whole, and here the oil producer promised to purchase the smaller company's refining facilities. Moreover, the specification of the quantity of 100% of output is sufficiently certain and can be enforced because the quantity of output can be estimated from prior output. The specification of the price of "current market prices" is also sufficient. Thus, the written agreement is enforceable in its entirety, and (A), (B), and (C) are incorrect.

Answer to Question 43

(C) The stockbroker and developer would prevail. The rights of the newlyweds, as intended beneficiaries, would have vested if they had learned of the contract made for their benefit and either accepted it at the request of the contracting parties or changed their position in reliance on it. In this case, they did neither before the donors rescinded the contract, and therefore they have no right to enforce it. (A) is incorrect. This choice correctly states that the newlyweds are intended third-party beneficiaries of the contract made by their fathers. However, their rights do not vest as of the formation of the contract. Rather, they must at least assent to the contract at the request of the contracting parties or must change their position in reliance on the contract. Thus, rescission of the contract by the stockbroker and the developer was sufficient to terminate the rights of the newlyweds. (B) is incorrect. However, their rights do not vest merely because they have received notice of the contract. They must either accept the contract at the request of the contracting parties or must substantially rely on the contract to their detriment before they would be able to prevent the original contracting parties from rescinding the contract. (D) is incorrect. Because the parties to the contract contemplated that the newlyweds would receive a benefit under the terms of the agreement, the newlyweds were intended, and not incidental, beneficiaries.

Answer to Question 44

(D) The testimony is admissible. The best evidence rule requires the production of the original document ***when attempting to prove the contents of the document***. [Fed. R. Evid. 1002] The director of the tool producer's order department seeks to testify that the price of the hardware store's order was $5,500. It appears that this testimony is based solely on the director having seen the standard tool producer's form on which the hardware store placed their order. Thus, the testimony is about the contents of a document—the tool producer's form that the store owner completed to order hammers. At first glance, therefore, it would appear that (B) is the correct answer, that the director's testimony would be inadmissible because of the best evidence rule. However, that rule does not require production of the original ***if the original has been lost or destroyed in good faith.*** [Fed. R. Evid. 104(1)] It appears that the order form was destroyed in good faith in a fire at the tool producer's headquarters. Thus, (B) is incorrect. (C) is also incorrect. If the original of a document cannot be produced to prove its contents, ***any form of secondary evidence*** can be substituted for the original. There is no requirement, for example, that a copy of the original be produced. Testimony as to the contents of the document is equally permissible. From the standpoint of the best evidence rule, then, (D) is the correct answer. The proposed testimony of the director of the tool producer's order department is admissible. (A) is incorrect because it confuses the question of ***admissibility*** of evidence with that of the ***weight*** that a fact finder should give to the evidence. That the proposed testimony is self-serving may render it ***unpersuasive,*** but not ***inadmissible***. Also, if the self-serving nature of testimony rendered it inadmissible, then virtually any time a party testified in support of his proposition, the testimony would have to be excluded. The law of evidence has for centuries rejected such a broad rule requiring disqualification of witnesses. In addition, (A) states that the proposed testimony of the director of the tool producer's order department is untrustworthy. There is no factual basis in the question for reaching that conclusion.

Answer to Question 45

(D) The defendant may plead both defenses regardless of how they are labeled. The Federal Rules of Civil Procedure expressly permit inconsistent pleadings in the alternative or hypothetically, reasoning that the discovery process will operate to sort out the viable pleadings. For this reason,

(A) and (B) are incorrect. (C) is incorrect because the Rules do not limit inconsistent claims or defenses to "affirmative" defenses.

Answer to Question 46

(D) The imperfect self-defense doctrine applies to these facts. In states that apply the doctrine, murder is reduced to voluntary manslaughter when the defendant unreasonably, but honestly, believed in the necessity of responding with deadly force. In the instant case, the performer unreasonably, but apparently honestly, believed that the pedestrian would kill him. Thus, the performer would be guilty of voluntary manslaughter in such a jurisdiction. (A) is wrong. In order to have murder reduced to voluntary manslaughter based on a "heat of passion" theory, it must be shown that: (i) the provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person such as to cause him to lose self-control; (ii) the defendant was in fact provoked; (iii) there must not have been sufficient time to cool off; and (iv) the defendant did not in fact cool off. Adequate provocation generally consists of being subjected to a serious battery or threat of deadly force, or of discovering one's spouse in bed with another person. In the instant case, not only is it unlikely that a slap on the face would be considered a serious battery such that would provoke one to murder, the facts do not indicate that the performer acted in a fit of rage. (B) is wrong because there is no evidence of any diminution of the defendant's ability to reason. (C) is wrong. Although some states would call a killing committed during a misdemeanor "manslaughter," in the instant case there are no facts to indicate that the performer was in the process of committing a misdemeanor when he killed the pedestrian.

Answer to Question 47

(B) The strongest argument is based on merger. When the cousin bought both parcels from the owner and the buyer, the dominant (buyer) and servient (owner) estates came together in the same owner and the easement was terminated by merger. Once terminated by merger, the easement does not revive when the ownership is later split. (A) is incorrect. An easement may be terminated by abandonment, but mere nonuse is not enough. The holder of the dominant estate must physically manifest an intent to abandon. The facts do not show that any holder of the western parcel did anything to indicate this intent. (C) is incorrect. The easement granted in the deed from the owner to the buyer was a valid express easement. No implied easement arose because there was no necessity for one. The later construction of the public road can have no effect if there had been no valid implied easement in the first place. (D) is incorrect. The fact that the easement was not included in the subsequent deeds is irrelevant because the easement was in the owner-buyer deed, which was recorded properly in the chain of title. That puts all subsequent purchasers on notice of the easement, and it need not be put in subsequent deeds to be given effect.

Exam Tip: Multiple transfers can be confusing on the exam. A technique to aid analysis is to make a quick chart in the margin of the exam booklet. This would have clearly shown the merger and unity of ownership:

West	*East*
Owner	**Owner**
Buyer	**Owner**
Cousin	**Cousin**
Lawyer	**Doctor**
Dev. Co.	**Doctor**

Answer to Question 48

(D) The neighbor will not prevail. The owner has made an adverse use of the neighbor's land since the sewer line was first constructed across it. The fact that the owner tore down the house on his property does not stop the prescriptive period from running, because the mere existence of the sewer line was an adverse use and there was no intent to abandon it. Therefore, the owner's use ripened into a prescriptive easement 20 years after that use first began. Moreover, the use of the line to service the new house is within the scope of the easement by prescription because the same pipe in the same location will be used for the new house. (A) is incorrect. By the time the owner constructed the new house, he had maintained the sewer line across the neighbor's property for the statutory period and therefore had acquired an easement by prescription to continue to use that line. Once the owner obtained an easement by prescription over the neighbor's property, that property right persists despite any actions by the municipal authorities with regard to the neighbor's property, or any actions by the owner with regard to the authorities. (B) is incorrect. An easement is not terminated merely because it is not used for a long period of time. It can only be extinguished when the owner clearly demonstrates by physical action an intent to permanently abandon it. Here, abandonment could have arisen if the owner had been able to connect to a new sewer line, but that did not happen. (C) is incorrect. The owner never had a license. A license is a permissive use of property. The owner placed the sewer line across the neighbor's property without her permission. Moreover, the use never ripened into an implied easement. Such an easement can only occur when there is a division of a large parcel of property into smaller parcels and there is a reasonable necessity for the owner of one of the parcels to continue to use rights over another part of the larger parcel. There is no such division of property here. Instead, the adverse use by the owner ripened into an easement by prescription.

Answer to Question 49

(B) The best argument is based on the Privileges and Immunities Clause. State laws that discriminate against out-of-state residents in terms of the right to earn a living trigger the Privileges and Immunities Clause of Article IV and are almost always unconstitutional. (A) is incorrect. A Bill of Attainder requires, inter alia, a legislative act which is intended to "punish" an identifiable group. Punishment is an unlikely motive of the statute. (C) is incorrect. Out-of-state residents are not considered a protected class under the Fourteenth Amendment Equal Protection Clause. This would more than likely be a Fourteenth Amendment Due Process Clause violation because the government may not take a recognized "liberty" or "property" interest of a person without some procedural due process. (D) is incorrect. Only retroactive criminal laws can violate the ex post facto clause.

Answer to Question 50

(C) Lack of a proper foundation is the most likely reason for this evidence to be held inadmissible. No single facet of the law of evidence provides a ready answer to this question. Thus, it is useful to analyze each choice and arrive at the correct answer by a process of elimination. (A) is incorrect because the videotape showing the defendant offering a television set to one of the police officers is not hearsay evidence. Even if the defendant's conduct on the videotape is considered assertive conduct and is thus a "statement" within the meaning of the hearsay rule (much like nodding one's head to indicate "yes" is a statement), under the Federal Rules a statement of a party-opponent is admissible nonhearsay. [Fed. R. Evid. 801(d)(2)] Because the defendant is a party to this criminal prosecution, his conduct, if considered a statement, would be admissible. It is not clear, however, that the defendant's conduct on the videotape is assertive conduct. If it is considered nonassertive conduct—conduct that is not intended to communicate a thought—it would not

be a statement within the meaning of the hearsay rule. [Fed. R. Evid. 80l(a)] Thus, this is an alternative reason, albeit a less clear one, why (A) is incorrect. (B) is incorrect because the privilege against self-incrimination applies to compulsory self-incrimination. The defendant was not forced to incriminate himself. He voluntarily took an action (offering to sell a television set to one of the police officers) that helps establish that he is guilty of receiving stolen property. Such an act is not covered by the self-incrimination privilege. (D) is also incorrect because specific instances of misconduct pertaining to an event (here, the receipt of stolen property) are frequently used to prove criminality. If (D) said that specific instances of past misconduct pertaining to a defendant's character (*i.e.*, propensity evidence) were inadmissible, that would be true as an abstract statement of law, but (D) does not say that, nor do the facts in the question remotely relate to propensity evidence. Thus, (A), (B), and (D) are clearly incorrect. (C), on the other hand, is a plausible answer. If the videotape is held to be inadmissible, one reason could be that a proper foundation had not been established for its introduction into evidence. A videotape, like other forms of tangible evidence, must be ***authenticated*** before it can be admitted. The failure to properly authenticate the videotape is one reason why it could have been held inadmissible.

Answer to Question 51

(B) The homeowner is likely to recover from the construction company. The general rule of proximate cause is that the defendant is liable for all harmful results that are the normal incidents of and within the increased risk caused by his acts. In indirect cause cases, an independent intervening force may be foreseeable where the defendant's negligence increased the risk that these forces would cause harm to the plaintiff. Even a criminal act by a third party will not cut off the defendant's liability if the defendant's negligence created a foreseeable risk that a third person would commit the crime. Here, the construction company negligently cut the power in a high crime neighborhood, increasing the risk of criminal conduct occurring. But for the power being cut, the homeowner's valuables would not have been stolen. A jury is likely to find that the burglar's intervening act was sufficiently foreseeable that the construction company will be held liable for at least some of the damages suffered by the homeowner. (A) is incorrect because, under pure comparative negligence rules, the homeowner could recover some of her damages even if her negligence was deemed to be greater than that of the defendant. (C) is incorrect because superseding cause analysis does not apply to the plaintiff's negligence. The homeowner's failure to have the security system reset is an issue of contributory negligence, which under the jurisdiction's pure comparative negligence rules is not a complete defense. (D) is incorrect because, as discussed above, the burglar's conduct probably would be deemed foreseeable and therefore not a superseding force that cuts off the construction company's liability.

Answer to Question 52

(A) The son will probably prevail. Under the husband's will, the sister-in-law's interest will terminate upon the wife's death. Regardless of whether the court determines it to be a life estate per autre vie (*i.e.*, a life estate with another's life as the measuring life) or a fee simple determinable (the wife's death being the terminating event), the sister-in-law's interest will end when the wife dies and the property will go automatically to the son. Because the sister-in-law's estate will end on the wife's death, she cannot affect any rights of any holder of a future interest that will become possessory on that event. Any lease purporting to continue after the wife's death is simply invalid as of that event. When the wife dies, the son has a fee simple and the tenant has nothing. Thus (A) is correct. (B) is incorrect. The son received a fee simple on the wife's death, and he is not bound by any actions of the holder of the life estate purporting to lease the property for any period that would extend beyond the terminating event. (C) is incorrect because the son's right to possession begins on the instant of the wife's death. The life tenant can do nothing to extend that date. (D) is

incorrect. The tenant's right to possession ends on the wife's death, regardless of what the tenant's lease from the sister-in-law may say. She could give no more than she had, and her interest ended on the wife's death.

Answer to Question 53

(A) The classmate is likely to prevail. The motorcyclist intended to assault the classmate, because he drove at the classmate with the intent to scare him. Under the doctrine of transferred intent, the intent to assault is sufficient to establish a battery if a touching results. A battery requires: (i) a harmful or offensive touching to the plaintiff's person; (ii) intent; and (iii) causation. The causation element is satisfied here because the motorcyclist set in motion the force which brought about the assault and subsequent battery. (C) is incorrect because the motorcyclist's intent to commit an assault is sufficient. (B) is incorrect because the motorcyclist's potential negligence in hitting the accelerator would not be sufficient to cut off liability for his battery. (D) is incorrect because the fact that the tire may have been defective would not qualify as an intervening force sufficient to cut off the motorcyclist's liability. The classmate may have a separate claim against the motorcycle manufacturer on a products liability theory, but the motorcyclist remains liable for the battery.

Answer to Question 54

(A) The speaker's conviction will be reversed. A park is a public forum. The government can limit rights of speech in such a forum only when there is a serious and imminent threat to the public order. It can restrict the speech of a speaker because of an unruly audience only in the rare case when the police are absolutely unable to control the crowd. [*See* Feiner v. New York (1951)] In this question, the conditions under which the police can prevent a speaker from continuing because of an unruly crowd have not been met. There were 50 police officers who would have been able to restrain or subdue anyone who appeared to be intent on committing violence. Hence, (C) is incorrect. (B) is incorrect. No one in the audience has raised any constitutional argument. The speaker probably cannot raise the audience members' First Amendment rights in this situation. (D) is incorrect. The state may not limit access to a public forum on the sole basis that there are other times and places where the right of free speech can be exercised. The state must show a more substantial reason.

Answer to Question 55

(B) The mechanic is bound to pay the neighbor the additional $50. A contract for the sale of goods may be modified without consideration to support the modification if the modification was sought in good faith. No writing is required under the Statute of Frauds unless the contract, as modified, is within the Statute. Here, the parties formed a contract for the sale of goods (a car) when the mechanic agreed to buy the car for $400. (B) is correct because the contract as modified is under $500, so it is enforceable, even though it is not evidenced by a writing. (A) is incorrect because the fact that the original contract was not in writing is irrelevant. The original contract was for the sale of goods under $500 in value, and the Statute of Frauds does not apply. Thus, the mechanic could have enforced the original oral contract if he had not agreed to the modification. (C) is incorrect because under U.C.C. section 2-209, no consideration is needed for the modification of a contract for the sale of goods. (D) is incorrect because all Article 2 contracts can be modified, if done in good faith.

Answer to Question 56

(D) The contractor will prevail because the buyer received the substantial benefit of her bargain. The failure to perform on time is a breach of contract, but in this case, it was a minor breach. Unless

the nature of the contract is such as to make performance on the exact day agreed upon of vital importance, or the contract provides that time is of the essence, failure to perform at the stated time is not a material breach. Here, the home was nearly complete, and the delay was relatively short. The contract did not specify that time was of the essence; thus, the breach was minor. The remedy for a minor breach is damages; the aggrieved party is not relieved of her duty to perform. (A) is incorrect because merely stating a date for performance does not indicate that time is of the essence. There must be some explicit statement indicating that time is of the essence. (B) is incorrect. Although the delivery on March 1 is a condition precedent to the buyer's duty to pay, the condition is excused by substantial performance. The test for whether a party has substantially performed is the same as the one for assessing whether a breach is minor or material. Here the breach is minor, the contractor substantially performed, and the condition is excused. (C) is incorrect because an unforeseeable event does not discharge a party's duty to perform. A strike at the contractor's supplier does not rise to the level of impossibility or impracticability, which would discharge his duty to perform. The contractor could have procured the supplies elsewhere.

Answer to Question 57

(B) The hunter can be convicted of murder. Conviction for common law murder requires malice. At common law, malice is: (i) the intent to kill (express malice); (ii) intent to inflict great bodily injury; (iii) reckless indifference to an unjustifiably high risk to human life ("depraved heart"); or (iv) intent to commit a felony ("felony murder"). The hunter did not intend to kill a child when he fired at the target, so he did not meet the specific intent test. Thus, (A) is incorrect. Malice is also shown when a person acts with a wanton and reckless disregard for human life. Based on these facts, the hunter clearly acted with malice by firing a high-powered gun in front of an occupied playground; thus, (B) is the correct answer. (C) is incorrect, given that specific intent is not the only way to show malice. (D) is incorrect because the hunter's actions go far beyond simple negligence.

Answer to Question 58

(A) Because the shopper was falsely imprisoned, she can recover damages for the humiliation she suffered. False imprisonment requires an act or omission that confines or restrains the plaintiff to a bounded area, intent, and causation. The shopkeeper's privilege does not apply because the length of detention must be for a reasonable period of time only, for the purpose of making an investigation, and here the detention of an hour to check her name on a list was clearly unreasonable. Hence, the store is vicariously liable for the actions of its security guard. (B) is not quite an accurate statement. The fact that the shopper was falsely imprisoned may be attributable to the fact that the grocery store was negligent in identifying her, but her cause of action arises out of the fact that she was falsely imprisoned, regardless of how it came about. (C) is incorrect; once the tort of false imprisonment is established, humiliation is a type of actual damages that can be recovered. (D) is an incorrect statement because, while the grocery store's outrageous conduct might be important with regard to the shopper's right to recover for intentional infliction of emotional distress, she can recover humiliation damages because of the false imprisonment even without that showing.

Answer to Question 59

(D) The court should deny the consumer's motion. The plaintiff must prove the elements of the prima facie case for her claim. Absent proof of an element of the prima facie case, summary judgment for the plaintiff is not appropriate. Thus, (A) is incorrect and (D) is correct. Furthermore, although a party is generally required to respond to a motion for summary judgment with affidavits, the

facts here indicate that the consumer has not come forward with any evidence pertaining to the manufacturer's fault for the damage and injury. Thus, because the consumer has not properly supported his motion for summary judgment with relevant, admissible information, there is no need for manufacturer to produce any evidence to survive a motion for summary judgment. This makes (B) incorrect. (C) is an incorrect statement of the law. A motion for summary judgment may be granted even though the motion addresses an ultimate issue in the case.

Answer to Question 60

(B) The best argument is that the burglar made the statements spontaneously. Prior to a suspect's being charged with a crime, the Fifth Amendment privilege against compelled self-incrimination is the usual basis for ruling on the admissibility of a confession. [Miranda v. Arizona (1966)] Under *Miranda*, statements made during custodial interrogations are inadmissible unless the defendant is first warned of his right to remain silent and his right to an attorney. Thus, *Miranda* applies only when the defendant is in custody and only when the defendant's statements are the result of interrogation. Although almost ***any*** words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response qualify as interrogation, *Miranda* does not apply to spontaneous statements not made in response to interrogation. Here, the police did nothing to solicit the statement from the burglar; it was spontaneous. Thus, (B) is correct. (A) is incorrect because the defendant need not yet be charged for *Miranda* rights to apply as long as he is in custody (*i.e.,* not free to leave). Being in jail on another charge (as the burglar was) satisfies the custody requirement. (C) is incorrect because the fact that the officer who took the burglar's admission had nothing to do with the investigation of the burglary does not alter the rules of *Miranda*—questioning that is totally unrelated to the matter for which the accused is in custody may still violate the accused's *Miranda* rights. (D) is incorrect. Due process requires that a confession be voluntary (*i.e.,* not the product of police coercion). The *Miranda* rule, however, goes beyond voluntariness. It makes inadmissible all statements obtained without *Miranda* warnings or without a valid waiver of *Miranda* rights, not just statements actually coerced by the police.

Answer to Question 61

(B) The proctologist will likely win. When the proctologist bought the property from the homeowner, he was a bona fide purchaser who gave value and who had no notice of the earlier sale to the buyer. Not only did the proctologist not have actual notice of the earlier sale, he did not have constructive notice either because the buyer did not record before the proctologist bought. The recording statute in the jurisdiction is a notice statute. In a jurisdiction with a notice recording statute, a subsequent purchaser who gives value and takes without notice wins over the earlier grantee. If the facts had shown a jurisdiction with a race-notice recording act, the proctologist would have been in trouble. With race-notice, the proctologist would not only have to take without notice, he would have to be the first to record. Because the facts do not show that the proctologist recorded at all, he would lose. But because this is a notice act jurisdiction, the fact that the buyer finally recorded before the proctologist is irrelevant. (A) is incorrect. Simply because a tenant pays rent to someone who the tenant thinks owns the property does not create an estoppel requiring the tenant to continue paying rent to that person. The proctologist will win, but not for this reason. (C) is incorrect because it is not necessary for a grantee to record a deed to give the grantee legal title to the property. Recordation is necessary only to protect against subsequent purchasers from the same grantor. Unrecorded deeds are perfectly valid as long as the recording act does not dictate otherwise. (D) is incorrect. The proctologist did in fact have good title to the property because, as a bona fide purchaser, he was protected by the notice recording act.

Answer to Question 62

(B) The court should grant the motion. This question involves the interrelationship between the exercise of testimonial privilege (the privilege against self-incrimination) and the right to cross-examine a witness claiming such a privilege. Should the witness's direct testimony be stricken because he refused to answer a question on cross-examination? The answer is yes, at least in the context of this case. Here, the question on cross-examination ("Isn't it true that on the day of the accident you were 300 miles away from the scene attempting to extract protection money from the owner of a seaside restaurant?") is centrally relevant to the witness's direct testimony (pertaining to his supposed observation of the accident). Every party has a right to adequate cross-examination of a witness who has testified for an opposing party. If adequate cross-examination cannot be obtained, the remedy is to strike the direct testimony of the witness. For this reason, (B) is correct, and (D) is an incorrect answer. (C) is incorrect, although it correctly states that the witness has a right to refuse to answer. The allegation of criminal activity contained in the question he declined to answer is very clear. There is thus no doubt that it is proper for the witness to "take the Fifth Amendment" in response to the question. However, (C) is incorrect in its conclusion, that the request to strike the witness's direct testimony should be denied. It does not logically follow that, because a witness has a right to refrain from answering a question, he has a corresponding right to have his direct testimony admitted into evidence. No such "right" exists, particularly where the invocation of a testimonial privilege has the effect of depriving a party of the right to adequately cross-examine the witness claiming the privilege. (A) is incorrect because the privilege against self-incrimination is applicable ***in any setting*** (civil case, legislative hearing, custodial interrogation of a suspect, etc.). As long as the information requested of a person could then be used against him in a subsequent criminal proceeding, that person has a right to invoke the privilege against self-incrimination.

Answer to Question 63

(A) The motion to suppress will be granted unless the officer had probable cause to believe that the car contained seizeable items. The ***automobile exception*** to the warrant requirement permits a stopped vehicle to be searched in the absence of a warrant if the police have probable cause to believe that the vehicle contains seizeable evidence. (B) is incorrect. A search incident to arrest may not include the passenger compartment of a vehicle from which the person was arrested unless (i) the person has not been secured or (ii) the arresting officer has reason to believe that the vehicle contains evidence of the crime for which the arrest was made. [Arizona v. Gant (2009)] Here, the officer was able to secure the driver and the arrest was for speeding, so neither justification applies. However, even though the evidence is not admissible under the exception for a search incident to arrest, it is admissible under the automobile exception (as discussed above) if the officer had probable cause to believe that the car contained seizeable items, as stated by choice (A). (C) is incorrect because it is too broad. The passenger compartment of a vehicle cannot be searched incident to arrest unless one of the two criteria stated above are met. (D) is incorrect because "reasonable fear" is not a ground for searching a vehicle. A vehicle may be searched incident to arrest under the circumstances detailed above. It may also be searched under the automobile exception if the police have probable cause to believe that the vehicle contains seizeable evidence. Finally, a vehicle can be searched without a warrant pursuant to an investigative stop (*i.e.,* a *Terry* stop) if the police have reason to believe that the person stopped is armed and dangerous. But simple "fear" is not enough.

Answer to Question 64

(B) Because of a lessened expectation of privacy in a car (as compared to a home) and because of the inherent mobility of a car which can prevent the police from easily obtaining a search warrant

and searching it, the police are permitted to make a complete search of an automobile if there is probable cause to believe that the car contains the fruits, evidence, or instrumentalities of a crime. [Carroll v. United States (1925)] When the police have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents. [United States v. Ross (1982)] While it is doubtful that the marijuana joints provided sufficient probable cause to search the entire vehicle, this is the best reason to deny the motion, because all of the other choices are clearly incorrect. (A) is incorrect because a lawful search of a vehicle incident to an arrest includes a search of the defendant and, in limited circumstances, the area of the vehicle within the defendant's control. [Arizona v. Gant (2009)] In this case, as the trunk is outside the defendant's area of control, the search went beyond the scope of a proper search incident to an arrest. Therefore, this was an invalid search incident to arrest and the driver's motion would be granted on this basis. (C) is incorrect. Technically, there is no such thing as a custody search. "Custody" here may refer to custody of the person, in which case it is a search incident to arrest discussed above, or custody of the vehicle, which is an inventory search. An inventory search occurs when the officers properly impound a car and search it while it is in their control to make sure that the assets of the owner of the car are fully accounted for. [South Dakota v. Opperman (1976)] This choice is incorrect because it does not articulate a legal basis to conduct the search, as the car was not impounded. (D) is incorrect. In this case, the police did not take possession of the car, so this is not the best reason to deny the motion.

Answer to Question 65

(B) The court should rule that the expenditure is unconstitutional. The federal power to tax and spend includes the power to attach conditions to the expenditures, and to the extent the university research program conflicts with the federal legislation, the state action is superseded by the federal statute. Here, because the federal program expressly limited use of the distributed funds to development of synthetic materials to replace petroleum, the university projects involving solar, geothermal, biomass, and fusion energy would be in conflict with the statutory prescription. "Substantial" conformity is not enough, so (C) is incorrect. (D) is an incorrect statement of the law. The supremacy doctrine permits Congress to effectively control the actions of a state in spending money provided by the federal government. (A) is incorrect. There is nothing unconstitutional about the means by which the funds are disbursed.

Answer to Question 66

(C) The sister will likely prevail. While an obligor (the stepson here) may raise defenses on the obligation he owes to the assignor (the brother), he may not raise defenses that the assignor might have had against the assignee (the sister-creditor) on a different obligation as a means of avoiding his own obligation. Here, there are no apparent defenses to the stepson's liability to the brother for the $2,000 debt, and the stepson is not entitled to assert the brother's statute of limitations defense against the sister because the debt that the brother owed to his sister was a different obligation. (B) is incorrect for the reason discussed above—she is suing the stepson on a different obligation. (A) is incorrect because the assignment of the stepson's debt to the brother is of the stepson's ***entire*** debt to him, even though it will only partially repay the money that the brother had owed to his sister. In any event, partial assignments are not invalid. Assignors may transfer some rights under the contract and retain others. (D) is incorrect because the assignment was not a novation. A novation substitutes a new party for an original party to the contract and requires the assent of all parties. If valid, it completely releases the original party. Here, the stepson did not assent to anything and no one was released, so there was no novation.

Answer to Question 67

(D) The bank will be successful in obtaining a judgment against both the landowner and the attorney, although it may only collect once. When a grantee assumes the mortgage, the grantee expressly promises the grantor-mortgagor that he will pay the mortgage obligation as it becomes due. The mortgagee then becomes a third-party beneficiary of the grantee's promise to pay and can sue the grantee directly if the grantee fails to pay. After the assumption, the grantor-mortgagor becomes a surety who is secondarily liable to the mortgagee on the note if the grantee fails to pay. The landowner and the attorney are jointly liable, even though the attorney is primarily liable and the landowner is secondarily liable as a surety. Therefore, (A) and (B) are incorrect. (C) is incorrect. The bank is not required to choose between the landowner and the attorney and can obtain a judgment against both, although it may only collect once. Because the attorney assumed the mortgage obligation, the bank can sue the attorney, but it can also sue the landowner in the same action as a surety. The landowner and the attorney are jointly liable, even though the attorney is primarily liable and the landowner is secondarily liable as a surety.

Answer to Question 68

(A) The creditor will be successful against the developer only. The developer initiated an agreement with the creditor to convey the property to the creditor in satisfaction of the developer's obligation to the creditor. The deed was meant to convey absolute title to the creditor, and was not intended to be another form of the mortgage that already existed. Therefore, the developer has no further interest in the property. (B) is incorrect. The creditor will not prevail over the bank. The conveyance from the developer to the creditor discharged the first mortgage on the property because the conveyance was in satisfaction of the mortgage obligation. The first mortgage, however, was never foreclosed and therefore did not wipe out the second mortgage. When the first mortgage was discharged by the conveyance, the second mortgage became a first mortgage and is still a valid encumbrance on the property. (C) and (D) are incorrect because the creditor will prevail against the developer but not against the bank.

Answer to Question 69

(A) The farmer should recover all of his damages against the chemical plant. To establish the element of actual cause in a negligence action, the "but for" test is ordinarily used. However, when several causes commingle and bring about an injury, and any one alone would have been sufficient to cause the injury, the "but for" test is inadequate to determine actual cause. In these cases, it is sufficient if the defendant's conduct was a "substantial factor" in causing the injury. Here, the farmer cannot establish that, but for the chemical plant's negligence, he would not have suffered damage, because either discharge was sufficient to cause his injury. However, he can establish actual cause because the chemical plant's negligence was a substantial factor in causing his injury; hence, he can recover against the chemical plant. (B) is incorrect because the farmer does not need to present evidence to apportion damages. Under joint and several liability, when two or more tortious acts combine to proximately cause an indivisible injury to a plaintiff, each tortfeasor is liable to the plaintiff for the entire damage incurred. Thus, he can collect all of his damages from the chemical plant; it will be up to the chemical plant to seek apportionment of damages in a contribution action against the steel mill. (C) is similarly incorrect. The farmer does not need to join the steel mill in the litigation to recover. (D) is incorrect because that choice applies the "but for" test. As discussed above, the appropriate test in this case is the "substantial factor" test.

Answer to Question 70

(D) The court should admit the evidence if it was used to refresh the witness's recollection. Because the witness read the notes, and then had an independent recollection of events, this qualifies as a present recollection refreshed. Normally a writing used to refresh is ***not*** placed into evidence. However, under Federal Rule of Evidence 612, if a writing is used to refresh the recollection of a witness, ***the opposing party*** has a right to introduce the document into evidence. Thus, (A) and (B) are incorrect. (C) is incorrect because, if the witness's memory was not refreshed, the memorandum would have to be introduced as a past recollection recorded. The proper foundation has not been laid for admission of a past recollection recorded.

Answer to Question 71

(B) The summary of the accident may be read into evidence. If the witness on the stand has insufficient recollection to testify to a relevant event fully and accurately, Federal Rule 803(5) permits the introduction of an out-of-court written record of the event made by the witness at a time when the witness's memory of the event was fresh. The fact that the witness's memory of the actual event is insufficient even after reviewing the summary would satisfy that standard, assuming a proper foundation has been laid for reading the statement into evidence. If the past recollection recorded is admissible, the record itself may not be admitted; unless it is offered into evidence by the adverse party, the offering party may only read the record to the jury, as here. (A) is incorrect. There is no question that the document which is read must satisfy the best evidence rule and be either the original or a duplicate, or there must be a satisfactory excuse for nonproduction of an original. There is no indication in this case that the summary in the witness's possession would fail to satisfy the best evidence rule. It appears to be her original notes. The real question here is whether the document in question is admissible despite the hearsay rule. (C) is incorrect. If a written record is used to refresh the memory of a witness who then proceeds to testify from her own memory as to the matter, then the memorandum is not evidence coming within the past recollection recorded exception under Federal Rule 803(5). A document which is used to refresh a witness's memory may not be read to the jury. Instead, the witness will testify from her refreshed memory. (D) is incorrect. The hearsay rule applies in general to any out-of-court statement, whether or not the declarant is available for cross-examination. However, this statement comes within the hearsay exception for a past recollection recorded under Federal Rule 803(5). Under that Rule, the contents of the memorandum may be read to the jury.

Exam Tip: The difference between present recollection refreshed and past recollection recorded is a recurring exam favorite.

Answer to Question 72

(D) The enactment appears to be an unconstitutional infringement on the President's authority as Commander in Chief. The President's role as Commander in Chief of the armed forces includes extensive power to deploy the military against any enemy, foreign or domestic. Congress lacks such power. Therefore, this enactment directly infringes on the President's authority as Commander in Chief to make such orders as he deems proper with respect to the armed forces, and thus violates the doctrine of separation of powers. (A) is incorrect. Congress does have the power to raise and support an army, but the enactment here does not result in the appropriation of money to support the armed forces. Rather, it seeks to control their activities, and Congress has no such power. (B) is incorrect. Congress does have the power to regulate commerce, and when that power is combined with the Necessary and Proper Clause, Congress would have the power to enact legislation protecting the toy shipments at issue here. Nevertheless, the Commerce

Clause, even when combined with the Necessary and Proper Clause, does not give Congress the power to violate other aspects of the Constitution. Ordering the President to send military troops violates the separation of powers doctrine because the Constitution gives the President the power as Commander in Chief of the armed forces. (C) states the correct result but is based on an incorrect rationale—the duty to execute the laws of the United States is an obligation, not a grant of authority.

Answer to Question 73

(B) The federal court may not hear these claims together because there is no supplemental jurisdiction over the negligence claim. Generally, every claim in federal court must have a basis for federal subject matter jurisdiction. There are two main bases for federal subject matter jurisdiction—diversity of citizenship jurisdiction and federal question jurisdiction. Once a claim is in federal court, supplemental jurisdiction sometimes may be used to have a claim heard. Diversity of citizenship jurisdiction is available when (i) there is complete diversity of citizenship, meaning that each plaintiff is a citizen of a different state from every defendant; and (ii) the amount in controversy exceeds $75,000. A natural person's citizenship is the state that is the person's domicile. In the instant case, the facts state that the broker and customer are from the same state. As a result, complete diversity does not exist. Furthermore, although the customer may aggregate all the claims he has against the broker, the aggregate amount ($74,000) does not meet the minimum amount in controversy requirement. For these reasons, subject matter based on diversity is not available. Federal question jurisdiction is available when the plaintiff, in his well-pleaded complaint, alleges a claim that arises under federal law. Anticipation of a federal defense or the fact that federal law is implicated by the plaintiff's claim do not give rise to federal question jurisdiction; the plaintiff's claim must arise under federal law. Here, the customer alleges that the broker violated federal securities law. That is sufficient to invoke federal question jurisdiction over the securities claim (which does not have an amount in controversy requirement or a complete diversity requirement). However, the claim for damages to the customer's car is a state law claim, and federal question jurisdiction is not available. Thus, to be heard, the negligence claim must invoke supplemental jurisdiction. When the federal court has subject matter jurisdiction over one claim, it has discretion to exercise supplemental jurisdiction over related claims that derive from the same common nucleus of fact and are such that a plaintiff would ordinarily be expected to try them in a single judicial proceeding. Here, though, the customer's negligence claim is not related in any way to the customer's claim for violating federal securities law. As a result, supplemental jurisdiction is not available. Thus, (B) is the correct choice and (D) is incorrect. (C) is incorrect even though it contains a true statement of law because there is no supplemental jurisdiction and thus no federal subject matter jurisdiction. (A) is too broad of a statement. When dealing with a single plaintiff against a single defendant, the plaintiff is allowed to join any number and type of claims against the defendant. Thus, if subject matter jurisdiction requirements could have been satisfied, the customer here could have joined all the claims he has against the broker. (When multiple plaintiffs or multiple defendants are involved, it is essential only that at least one of the claims arise out of a transaction in which all were involved.)

Answer to Question 74

(C) The nurse is only an assignee of the tenant. The nurse is not directly contractually obligated to the landlord. Once an assignee of the nurse goes into possession of the premises (especially with the consent of the landlord), the privity of estate between the landlord and the nurse, the prior assignee, is terminated. An assignee has no contractual obligation under the original lease and is only liable for rent during the period of his estate, *i.e.*, his possession. Thus, in this case, there is

no longer any privity of estate between the nurse and the landlord, and the landlord cannot sue the nurse on the rent covenant. (A) is incorrect. The covenant of quiet enjoyment was not breached here because no one with superior title interfered with possession of the apartment. Moreover, the duty to provide quiet enjoyment is owed by the landlord only to the tenant and his successors in interest (*i.e.*, those in privity of estate). Here, there is no privity of estate between the landlord and the nurse because the nurse is an assignee who is no longer in possession at the time of his brother's abandonment, and that is the nurse's best defense. (B) is incorrect. The defense of estoppel may be invoked where a party, acting in good faith, has been induced by the conduct of the adverse party to do something that it otherwise would not have done, that resulted in his harm, and that the adverse party had cause to know would so result in harm. These facts do not support the use of the theory of estoppel to avoid the application of landlord-tenant law, because the landlord has made no representations which were relied upon by the nurse to his detriment. (D) is incorrect, if only because there is a better defense available to the nurse. The defense of constructive eviction might be available to the nurse's brother, who was in privity of estate with the landlord during the month in question. However, it is less clear that it would be derivatively available to the nurse. Moreover, it is a difficult factual defense. The landlord must be shown to have the ability to control the noise and to have failed to exercise that control. The noise must be of sufficient magnitude to deprive the nurse's brother of the reasonable beneficial use of the apartment. The defense of lack of privity of estate is clear-cut and much more beneficial to the nurse.

Answer to Question 75

(A) Venue is proper only in the Northern District of Georgia. Federal venue in diversity actions is proper in (i) the district in which any defendant resides ***if*** all defendants reside in the same state; and (ii) the district in which a substantial part of the events or omissions giving rise to the claim occurred. Here, the accident occurred in the Northern District of Georgia, making that district a proper venue under prong (ii). However, given that the defendants here reside in different states, venue cannot be based on the residence of the defendants. Thus, choices (B), (C), and (D) are incorrect. Choice (D) is also incorrect because venue is not based on the residence of the plaintiff.

Answer to Question 76

(C) The judge should rule for the state. This question is ***not*** about propensity evidence. Rather, it is about evidence of prior bad acts to help prove something ***other than*** a person's propensity to act in a manner consistent with a character trait. Under Federal Rule 404(b), it is permissible to use evidence of a criminal defendant's prior bad acts to establish a motive for committing the crime, to help to identify him as the perpetrator of a crime, or, as here, to show opportunity to commit the crime. The defendant claims that she could not have committed the murder because she was on a business trip the day it occurred. The witness's testimony, however, pertaining to his encounter with the defendant in a crosstown bar on the day of the murder, is clearly relevant to show that the defendant had the opportunity to commit the murder. For this reason, (C) is correct. All the other answers are wrong because they mistakenly assume that the witness's testimony involves propensity evidence rather than prior bad acts evidence. (A) correctly states that the defendant did not place her character at issue by testifying that she was across the country when the murder occurred. That would be a reason for excluding the witness's testimony ***if*** his testimony amounted to an attack on the defendant's character (*i.e.,* propensity evidence). However, his testimony is to show opportunity; thus, it may be admitted. (B) correctly implies that propensity evidence can be used to impeach the testimony of a witness only if it addresses the ***witness's character for truth and veracity***. The defendant was a witness in the trial. ***If*** the purpose of the witness's testimony had been to impeach her testimony by attacking her character for something

other than truth or veracity, the testimony would be inadmissible. Because this evidence was admitted not to impeach but to show opportunity, (B) is incorrect. (D) correctly implies that the prosecution cannot introduce propensity evidence establishing a defendant's bad character until the defendant has placed her character in issue. The defendant's testimony did not place her character in issue. Thus, ***if*** the witness's testimony amounted to an attack on the defendant's character, the testimony would be inadmissible. Because the testimony was not an attack on the defendant's character, however, (D) is incorrect.

Answer to Question 77

(D) The electrician will not succeed because there was an express condition precedent that the repairs had to be performed on a day when the homeowner would be home, and the homeowner was unable to honor that commitment due to an unforeseeable supervening event. (C) is not the best answer. Although the electrician did nothing between April 4 and April 26, he did confirm the repair date of April 29 with the homeowner. The electrician would have honored the contract but for the supervening impossibility of the homeowner being unable to stay home. (A) is a false statement. The promise to make the house available was an express condition, not an implied-in-fact contract. (B) is wrong because impossibility discharges duties on both sides.

Answer to Question 78

(D) The trustee will probably recover nothing. Destruction of a building being built under a construction contract does not render the contract impossible or impracticable to perform and therefore does not discharge the contractor from his duties. The original construction company could not continue to perform because the loss of its equipment rendered it bankrupt. Therefore, it was in breach and not entitled to any contractual remedy. Neither could it recover in restitution or quasi-contract. Unlike a contract to repair or remodel, no restitutionary or quasi-contract remedy is available when the subject matter of a construction contract is destroyed.

Answer to Question 79

(B) The court should rule that the statute is constitutional. A state has the right, under its police power, to enact legislation for the health, safety, and welfare of its citizens, provided that such legislation is not in areas reserved to the federal government or preempted by federal legislation, and provided that a state does not unduly restrain interstate commerce. The legislation in question affects only that state's banks and does not discriminate against other banks. The political process is considered the adequate method for bringing such statutes as the anti-usury statute in line with contemporary conditions. (A) is incorrect because even if a state statute does not actually conflict with a federal statute, the state statute may still fail under the Supremacy Clause if it prevents achievement of federal objectives or Congress has indicated an intent to preempt an entire field. Thus, (B) is a better answer than (A). (C) is incorrect because income level is not a "suspect" category, and the fact that the super-rich can purchase homes while everyone else cannot is an incidental result of economic conditions. Regardless of the interest rate, there will always be some citizens who cannot obtain mortgages. (D) is incorrect because the legislation affects only that state's banks. There may be a slight incidental effect on interstate commerce, but the legislation in no way discriminates in favor of that state's banks.

Answer to Question 80

(D) The driver must disclose the identity of the witness in response to an appropriate interrogatory. Federal Rule 26(a) requires, as an initial disclosure, a party to reveal the name and contact information of individuals who are likely to have discoverable information and who the disclosing

party may use to support his claims or defenses (unless the use would be solely for impeachment). After initial disclosures are made, discovery proceeds, and the parties may continue with discovery of nonprivileged information that is relevant to any party's claim or defense, including the names and contact information of any person who knows of any discoverable matter. Here, the eyewitness would not need to be disclosed as an initial disclosure because the driver obviously will not use the eyewitness to support the driver's claim or defense. However, the identity of the eyewitness would need to be disclosed eventually, assuming the pedestrian submits a proper discovery request. This makes (D) correct and (B) incorrect. (A) is incorrect because the work product doctrine does not prevent the disclosure of the existence of the eyewitness. Any materials generated by the attorney would probably be protected under the work product doctrine (unless a showing of substantial need and undue hardship can be made); however, the eyewitness's name and contact information would not be protected. (C) is an overbroad description of the initial disclosure requirements and is, thus, incorrect.

Answer to Question 81

(D) The strongest argument is that the shopkeeper was reacting to a sufficient provocation. ***This is a very commonly tested MBE issue.*** (A) is incorrect. It is clear from the facts that the shopkeeper manifestly intended to kill or seriously injure the gangster, and this intent is transferred to the delivery person, who was killed by mistake. (B) is incorrect because any imminent threat of death or serious injury to the shopkeeper had passed at the time he shot at the gangster. (C) is incorrect because there is nothing in the facts that indicates duress. Therefore, (D) presents the strongest argument—that the gangster's intentional near miss with the knife was sufficient provocation to mitigate the intended homicide from murder to voluntary manslaughter.

Answer to Question 82

(D) Either the pilot's or the son's conduct may reduce the pilot's recovery in a jurisdiction applying pure comparative negligence. Recovery in a wrongful death claim is allowed only to the extent that the deceased could have recovered in the action had he lived. Because the pilot's wrongful death claim derives from her son's death, either the son's or the pilot's contributory negligence will diminish the claim. Thus, although (A) and (B) are correct statements, they are not as good as (D), which is more complete. (D) states that the negligence of ***either*** the pilot or the son will reduce recovery, and this is the correct rule. (C) is wrong because only one person need be negligent to reduce recovery.

Answer to Question 83

(C) The neighbor should be found not guilty of larceny because he did not have the requisite intent. Larceny consists of a taking and carrying away of tangible personal property of another by trespass, with intent to permanently deprive the person of his interest in the property. If the defendant intends to return the property within a reasonable time and at the time of the taking has a substantial ability to do so, the unauthorized borrowing does not constitute larceny. Hence, the neighbor is not guilty of larceny because he planned to return the mulcher. (A) is incorrect because the fact that the neighbor had not yet used the mulcher would be irrelevant if he had formed the intent to steal it. (B) is incorrect because the fact that the garage door was open is irrelevant. The act of breaking into a dwelling is an element of burglary, not larceny. (D) is incorrect because the neighbor had taken possession of the mulcher and started to carry it away, which satisfies the asportation requirement. It is irrelevant that he had not yet exited the garage.

Answer to Question 84

(A) The court should deny the motion because the nursing home could be found liable under the doctrine of res ipsa loquitur. This doctrine would apply because the injury ordinarily would not have occurred in the absence of negligence on the part of the nursing home, such as by accepting violent patients without providing adequate security for other patients. The nursing home has assumed the duty of ordinary care for the safety and security of its patients. Because the doors were locked, the injury occurred as a result of either a nursing home employee or a patient, and the nursing home would be liable in either case. Admitting patients known for their violent behavior created a foreseeable risk of injury to all the patients, and the exercise of ordinary care would require that the nursing home provide adequate security to protect the patients. The patient's beating establishes enough evidence of the breach of duty by the nursing home here to withstand the motion and send the case to the jury. (B) is incorrect. There is no rule of law that imposes a high degree of care in this situation—just ordinary care under the circumstances. Thus, the nursing home is only liable because it has breached its duty of ordinary care for the safety and security of the patients. (C) is incorrect. The patient need not prove that the beating was caused by an employee in order to impose liability on the nursing home, because violence by another patient was foreseeable. The nursing home has assumed the duty of ordinary care for the safety and security of its patients. (D) is incorrect. An intervening criminal act of a third party will not cut off liability if it was foreseeable and the defendant owed a duty of care to the plaintiff. The nursing home has assumed the duty of ordinary care for the safety and security of its patients, and here criminal acts were foreseeable because the nursing home accepted violent patients.

Answer to Question 85

(A) The court should order specific performance by the buyer. Because land is considered unique, specific performance is always appropriate for the enforcement of a valid land sale contract. This option is available to either the buyer or the seller. The contract gave the seller the option of using the liquidated damages provision if the seller wished, but the seller has sued for specific performance. Because that is appropriate, it will be granted. It is not of significance that the house burned to the ground. When a contract for the sale of land is signed, equitable conversion takes place and it is, for all practical purposes, the buyer's land and the buyer's risk. Here, the risk of loss shifted to the buyer upon the signing of the contract. (B) is incorrect because frustration of purpose is not applicable. The doctrine of equitable conversion shifted the risk of loss to the buyer when the contract of sale was signed. The fact that an improvement on the property (the house) is no longer present is not relevant to the grant of specific performance. (C) is incorrect. Based upon these facts, the seller could request as a remedy either specific performance or liquidated damages of $6,000. Because the seller elected the specific performance remedy, the court will not award liquidated damages. (D) is also incorrect because there are no facts which would indicate mutual mistake. The burning down of the house would not qualify.

Answer to Question 86

(C) The court may not transfer the action. Federal venue in diversity actions is proper in (i) the district in which any defendant resides ***if*** all defendants reside in the same state; and (ii) the district in which a substantial part of the events or omissions giving rise to the claim occurred. The Southern District of New York is not a proper venue because it is neither the defendant's residence nor a place where substantial events occurred giving rise to the action. As a result, the court must either dismiss, or in the interests of justice, transfer the case to a district in which the action could have been brought on the defendant's timely objection to venue. Here, however, the court may not

transfer to the Northern District of New York because that district also is improper, as it is also neither the defendant's residence nor a place where substantial events occurred giving rise to the action, and thus the action could not have been brought there. Thus, (B) is incorrect. (A) is incorrect because, in federal court, venue may not be based on the ***plaintiff's*** residence. (D) is incorrect because the venue statute does not allow the judge to make such a discretionary call; rather, the district to which venue is transferred ordinarily must be a place of proper venue.

Answer to Question 87

(D) The Connecticut citizen must assert her claim. Because the Connecticut citizen's claim arises from the same transaction or occurrence as the claim asserted against her in the pending action, the Connecticut citizen's claim is a compulsory counterclaim which must be asserted in the pending action, or it is lost. As a result, (D) is correct and (A) is incorrect. (B) is incorrect in that it is not a discretionary call with the judge whether the claim may be filed as a counterclaim. (C) is incorrect because the claim may not be asserted as an independent action. FRCP 13 states that the pleader need not state a compulsory counterclaim if the subject matter of the compulsory counterclaim was ***already pending*** in another court. However, if the pleader has not filed suit on the subject matter of the compulsory counterclaim (which she has evidently not done here), she must file the compulsory counterclaim.

Answer to Question 88

(C) The testimony is inadmissible. For purposes of the hearsay rule, a statement is defined by Federal Rule 801(a) as an oral or written assertion, or nonverbal conduct which is intended as an assertion. In this case, the witness's pointing at the defendant is a statement because it was intended by the witness to assert that the defendant was the criminal. The sergeant's testimony concerning the witness's identification is testimony concerning an out-of-court statement and is therefore hearsay. Because the statement comes within no exception to the hearsay rule, it is inadmissible. The evidence is not evidence of a prior identification because the witness is not present on the witness stand. (A) is incorrect. Evidence of a prior identification is nonhearsay under Federal Rule 801(d)(1)(c) in only a very narrow range of cases. For a prior identification to be nonhearsay, a witness on the stand must have made a prior statement identifying the defendant as someone he perceived earlier. The offered evidence does not come within that definition of nonhearsay because the witness is not present on the witness stand. The sergeant's testimony of the witness's assertive conduct is inadmissible hearsay. (B) is incorrect. The evidence is inadmissible because it is hearsay and comes within no hearsay exception. The evidence is not evidence of a prior identification because the witness is not present on the witness stand to testify to the prior identification. (D) is incorrect. The choice correctly states that the evidence is inadmissible. But it is inadmissible because it is hearsay, not because the defendant's counsel was not present at the lineup. Under constitutional principles, the defendant's counsel would not need to be present at a preindictment lineup such as this in order to have the prior identification be admitted at trial.

Answer to Question 89

(C) The lawyer has violated Rule 11. By "presenting" a document to the court, Rule 11 provides that a lawyer certifies that he believes the denials of factual contentions in the document are warranted on the evidence and that his belief is formed after a reasonable inquiry. One "presents" a document not only by signing or filing it, but also by "later advocating" it. Thus, Rule 11 imposes a continuing certification requirement, applicable any time a matter is presented to the court. At the time he signed the complaint, the lawyer believed there was evidence that the individual did

not sign the contract based on the individual's own statement. When the lawyer referred to the answer in the motion hearing, the lawyer "presented" the answer to the court anew and renewed his certification, despite the fact that he never discussed the signature. At that time, the lawyer no longer believed that all the facts in the answer had evidentiary support. He knew that he lacked evidence to support the answer's denial that the signature on the contract was that of the individual. Thus, (C) is correct and (B) is incorrect. (A) is incorrect because it does not take into consideration the "later advocated" basis for presenting a document under Rule 11. (D) is incorrect because an attorney need not have his client sign a sworn statement for every fact that the client tells the attorney.

Answer to Question 90

(D) The President's order is unconstitutional because it is too broad a limit on the freedom of speech and association of government employees. No government employees were allowed to have even a conversation with the press without the permission of a supervisor. Thus, it is unconstitutional. (A) is incorrect because the President's plenary power to control executive employees is limited by the Constitution. For example, the President cannot violate the First Amendment (or other constitutional guarantees) in regulating federal employees. (B) is incorrect because the Court no longer draws a distinction between rights and privileges. Furthermore, government employees would retain their First Amendment rights even if government employment were termed a "privilege." (C) is incorrect because the President has authority to enact some regulations for federal employees. The problem with this regulation is that it unduly restricts freedom of speech.

Answer to Question 91

(B) The animal shelter will lose on both farms. As to the deed to the son conveying the 590-acre farm, delivery is presumed because the deed was validly recorded, even though the son did not physically receive it and does not seem to have known of its existence. As to the deed to the daughter conveying the 640-acre farm, the fact that she did not physically keep the deed when it was presented to her does not show lack of delivery under the circumstances. The key to delivery is the grantor's intent to pass all legal controls. Because the daughter simply asked her mother to safeguard the deed, we can presume delivery under these circumstances. But because the deed to the daughter was never recorded, we cannot rely on the rule that provided valid delivery in the son's case. (A) is incorrect. Both deliveries were valid. The son's deed was valid by reliance on the presumption that recordation shows a valid delivery, and the daughter's deed on the circumstances of the gift that show proper intent. (C) is incorrect. The animal shelter does lose on the 590-acre farm, but does not win on the 640-acre farm because the daughter's having her mother keep the deed does not show lack of delivery. (D) is incorrect. The animal shelter does lose on the 640-acre farm, but does not win on the 590-acre farm because the recordation of the son's deed gives a presumption of valid delivery.

Answer to Question 92

(B) The court should rule for the telephone company. This question turns simply on whether or not there was a valid easement. The easement granted by the owner to the telephone company 30 years ago was properly recorded. That alone would put subsequent purchasers of the property on constructive notice of the easement. The fact that the easement was not in the deed from the owner to the buyer is irrelevant. A valid easement passes with title whether or not it is mentioned in the conveyance. For the subsequent purchaser to avoid the easement, that person must have taken without notice of it. Although there was no actual notice of the easement, a proper title search would have disclosed the easement, and the buyer is bound as if he knew. (A) is incorrect.

If an easement is valid, there is no need to balance the hardships in order to determine whether the holder of the easement may make proper use of it. An easement to lay cables underground reasonably carries with it the right to inspect those cables or make replacements as is necessary. Hardship to the holder of the servient estate is not relevant if the easement is proper and the excavation is considered reasonable use of that easement. (C) is incorrect because the telephone company was under no obligation to mention its underground cable easement, and its failure to do so is meaningless. (D) is incorrect. Valid easements are conveyed along with the servient estate, regardless of whether they are mentioned in the conveyance or not. Because the easement was recorded, a title search would have disclosed it, and thus the buyer will be held to have constructive knowledge of it.

Answer to Question 93

(C) The judge should rule the witness's testimony inadmissible. This question involves the admissibility of propensity evidence. The driver's witness is prepared to testify that the driver has a reputation for being a safe and prudent driver, which the driver plans to use to prove that, because he has a propensity for driving safely, he was in fact driving safely at the time of the accident. This is a classic case of the impermissible use of propensity evidence. The general rule is that evidence of character traits (here, safety and prudence) is ***inadmissible in a civil case*** to prove that a party acted in conformity with those traits on a particular occasion. [Fed. R. Evid. 404(a)] This case fits squarely within that general rule. Thus, (C) is correct. All the other answers are wrong because they each assume that propensity evidence is admissible under some circumstances in a wrongful death action. (A) indicates that such evidence is admissible if there are no unbiased eyewitnesses to the accident. (B) indicates that such evidence is admissible because the witness has personal knowledge of the character traits (the driver's propensity for safety and prudence) that are the subject of his testimony. (D) indicates that such evidence is admissible if the plaintiff has attacked the character of the defendant. All of these answers miss the basic point—that propensity evidence is inadmissible in civil cases. Furthermore, (A) is wrong because it presumes that there are no unbiased witnesses to the accident, but the question makes clear that there was an unbiased witness: the bystander. (B) is also wrong because it indicates that the witness must first testify that he has personal knowledge of the driver's driving habits before testifying about the driver's reputation for safety and prudence. This answer confuses ***reputation*** testimony with ***opinion*** testimony. The witness's testimony pertained to the driver's reputation. To be a competent witness, the witness would have to have personal knowledge of the driver's reputation. He would not have to have personal knowledge of the driver's actual driving habits. Although perhaps not as nonsensical as (A) and (B), (D) is just as inaccurate, as it bears no similarity to anything in the rules of evidence pertaining to propensity evidence.

Answer to Question 94

(A) The court should rule for the driver. This question is best approached by the process of elimination, and a preliminary examination of (A) suggests that it is a correct answer. The homeowner's negligence in burning leaves during a period of relatively high winds resulted in a fire, and it is foreseeable that third persons will attempt to rescue the victims of the tortfeasor's negligent acts. To the extent that the emergency vehicle was an intervening force, it was a dependent one (also responding to the fire) and was not abnormal or unforeseeable. Thus, the homeowner's negligence was a proximate cause of the driver's injuries. (B) is incorrect. The issue upon which the homeowner's liability to the driver turns is proximate cause; it is immaterial to that analysis whether the homeowner's negligence is established by a showing that he failed to exercise due care (indicated by the facts) or that his conduct violated a statute and constituted negligence per

se (also established by the facts), which still leaves causation and damages to be established. Even if no statute were applicable to the circumstances, the homeowner would still be liable to the driver, thus (B) is not as good an answer as (A). (C) is incorrect. The homeowner's negligence was a cause in fact of the driver's injuries, because it was the homeowner's negligence which both prompted the driver to attempt a rescue of the occupants of the burning residence, and brought the emergency vehicle onto the scene. It is possible for the separate actions of two independently operating actors to combine to injure the plaintiff, and whether either of them is liable for those injuries depends on the elements of the negligence analysis, including proximate cause. Here, the homeowner breached the duty of due care, and that breach was an actual and a proximate cause of the injury to the driver. (C) is therefore inaccurate. (D) is incorrect because there is no evidence that the driver assumed the risk of being struck by the emergency vehicle. Note that the "firefighter's rule" may bar a firefighter on assumption of risk or public policy grounds from recovering for injuries while responding to a negligently caused fire; however, the rule does not apply to the driver here.

Answer to Question 95

(B) The defendant may amend with leave of the court. A party may amend a responsive pleading of right within 21 days after serving it. Thereafter, according to Federal Rule 15, the party may amend only with consent of all parties or with leave of the court, but the "court should freely grant leave when justice so requires." With so much time left for discovery and before trial, a court would almost certainly grant leave to amend. (A) is incorrect because, as stated, the time for amendment as of right is 21 days after serving it, not any time before trial as (A) implies. (C) is incorrect in that due diligence in discovering the defense need not be shown. (D) is incorrect. The 21-day period applies to amendment as of right, but a court may grant leave to amend after that period.

Answer to Question 96

(A) The Constitution is inapplicable because the bus company is a private company. The Supreme Court has ruled that the grant of a franchise is not sufficient to create state action. [Jackson v. Metropolitan Edison (1974)] Thus, there is no basis for a First Amendment claim against the bus company. (B) is wrong; the Constitution is inapplicable because of the lack of state action. Also, (B) is wrong based on the facts of the question. The speech restricted was political, not commercial. Thus, even though commercial speech receives less protection than political speech, this speech cannot properly be characterized as speech that seeks to induce business transactions. (C) is wrong because the audience's opposition to a message does not justify otherwise impermissible censorship. Also, (C) wrongly assumes that the Constitution applies. (D) is wrong because the availability of alternative avenues of expression does not justify otherwise impermissible censorship. Moreover, it also wrongly assumes that the Constitution applies.

Answer to Question 97

(A) The programmer is likely to prevail if the statement is true. A defamatory statement is actionable only if it is false. The programmer has a complete defense if her statement about the designer is true. (B) is incorrect. There likely was publication of the statement because it was made at a crowded party and overheard by a third party; ***negligence*** is sufficient to establish this element. (C) is incorrect for the same reason. The programmer could also be liable if she was negligent in allowing third persons to overhear her statement. (D) is incorrect because the programmer's statement disparaging the designer's competence in his profession is slander per se, and therefore actionable, even without a showing of pecuniary loss.

Answer to Question 98

(A) The entire debt is discharged. The initial contract was for $30,000. By cashing the check in light of the letter, the wholesaler has accepted the new payment terms. An accord and satisfaction occurs when there is a contract dispute or some slight alteration of the debtor's consideration, and here the debtor (the retailer) paid the entire contract price immediately on receipt of the coats. The acceptance of the new terms constitutes an accord; the cashing of the check represents the satisfaction. (B) is incorrect because discharge of a debt on the basis of account stated occurs when one payment is made to pay for a number of earlier invoices; that has not occurred here. (C) is incorrect because the accord is a new contract. The letter is the offer inviting acceptance by cashing the check. By cashing the check, the wholesaler accepted the discount provision. (D) is incorrect. Although an accord and satisfaction may occur through the use of such wording on a check, those words are not required when the offer of accord is communicated in another way.

Answer to Question 99

(A) The court should rule the writing to be admissible. The handwriting sample is relevant to the issue of the identity of the bank robber and is admissible because it was properly obtained and violated no rule of privilege. A handwriting sample is not testimonial in nature and, therefore, does not require Fifth or Sixth Amendment protections. (B) is incorrect. The handwriting sample is evidence of physical characteristics and not testimonial in nature and, therefore, not subject to Fifth Amendment protections. Therefore, there is no requirement that *Miranda* warnings be given, advising the defendant that the sample could be used against him. (C) is incorrect. Because the privilege against self-incrimination does not apply, there is no right to refuse to give the handwriting sample, provided that the content of the writing is not used against the defendant. (D) is incorrect. The presence of counsel is not required at a scientific identification made by the police for the purposes of investigation, such as taking a handwriting sample. [Gilbert v. California (1967)]

Answer to Question 100

(C) The court should find for the corporation. Under the U.C.C., a seller may obtain specific performance (*i.e.,* force the goods on the buyer) where the buyer has not yet accepted the goods only if the seller is unable to resell the goods at a reasonable price or the goods have been lost or damaged after risk of loss has passed to the buyer. Because the first farm has plenty of time to find another buyer and its apples are of a high quality, it will be able to resell the apples and obtain damages, but it cannot obtain specific performance. (A) is incorrect because mere breach of contract is not a sufficient basis for specific performance. (B) is evidence of a breach, namely that the corporation had an existing contract with the first farm at the time it signed the contract with the rival farm, but it does not address the issue of specific performance. (D) is an incorrect statement of the law. Specific performance is an equitable remedy that is available when the legal remedy is inadequate. However, because the first farm can easily resell its products, monetary damages are sufficient.