

Representative Passing Answers

Below are the Multistate Performance Test (MPT), Multistate Essay Examination (MEE), and Indian Law Question (ILQ) questions for the listed South Dakota bar examination and a representative passing answer to each question.

The representative passing answers have been reprinted without change, except for minor formatting. They were written by examinees under time restraints and without access to legal materials. The examinees authorized the Board of Bar Examiners to publish the answers anonymously for the benefit of future South Dakota bar applicants.

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MEE Question 1

Four years ago, Connie, a professional homebuilder, purchased a five-acre, rectangular tract of land. On its western side, the tract was bordered by land owned by Diane. One month after Connie purchased the tract, Diane sued Connie in state court to establish her adverse possession claim to a 12-foot-wide strip immediately inside the western border of Connie's tract, where Diane had maintained a vegetable garden. The court issued a judgment in Diane's favor, which was filed at the county recorder's office.

Three years ago, Connie built a house on the eastern half of the tract. One month after Connie completed the house, she contracted to sell the entire five-acre tract to Bert and convey it by warranty deed. The purchase agreement contained no express warranties regarding the quality of the house's construction. At the closing, Connie delivered to Bert the warranty deed, which excepted from warranties "all titles, covenants, and restrictions on record with the county recorder."

One year ago, Bert conveyed the five-acre tract to Adam by a quitclaim deed that contained no warranties. Adam had never inspected the tract.

Three months ago, a major crack appeared in the foundation of the house due to faulty construction. This resulted in frequent water intrusion and substantial water damage to the house.

Two months ago, when Adam started to construct a fence around the entire five-acre tract, Diane correctly told him that he could not lawfully build a fence that would block her access to the portion that she owned by adverse possession.

A gravel road runs from north to south through the middle of the five-acre tract. The gravel road connects the adjoining northern lot to the highway that abuts the tract to the south. One month ago, during Adam's fence construction on the north side of the tract, Adam's northern neighbor correctly told him that she had an implied easement of necessity over the gravel road, preventing her land from being landlocked.

1. Does Adam have a cause of action against Connie based on the crack in the house's foundation? Explain.
2. Does Adam have a cause of action against Connie based on Diane's ownership of a portion of the tract by adverse possession? Explain.
3. Does Adam have a cause of action against Bert based on Diane's ownership of a portion of the tract by adverse possession? Explain.
4. Does Adam have a cause of action against Connie based on the neighbor's easement over the tract? Explain.

In answering these questions, assume that none of Adam's claims are barred by any statute of limitations.

**MEE 1
ANSWER**

1) Adam v. Connie - crack in foundation

Adam does not have a cause of action against Connie for the crack in the foundation. The main issue here is whether a subsequent owner of a newly constructed house has a workmanship warranty that the original new owner initially had.

When a new house is constructed a warranty of workmanship accompanies it for a few years warranting the house to be free from poor workmanship defects. This warranty is allowed to pass to subsequent owners if no action was undertaken to improve the property by the first owner. Additionally, a warranty deed is the highest form of conveyance that conveys to property to another warranting be free from encumbrances by the current owner and prior owners. These encumbrances include the fact the the grantor owns the property, the fact that they did not encumber it, and the fact there are not claims by third parties to a right in the property (right of quiet enjoyment). Further, a general warranty deed conveys that if a third party lays claim to the title the grantor will defend that claim at their own expense. The general warranty deed does not warrant a particular physical quality of the property or the structures on it. Further, a deed conveying title via a quitclaim deed is the lowest form of conveyance that conveys only the interest one has in the property (if any) and makes no warrants or guarantees.

Here, Adam bought the house and property four years after it was built. Even though he was a subsequent buyer in the new house he is too far removed from its initial construction date to obtain any protections under the workmanship warranty as these warranties generally last no more than two years. However, if the jurisdiction where the house is located has a workmanship quality law that extends for four years Adam would be able to seek refuge under it as no changes to the foundation or the house were made within the four years.

Further, he bought the property from Bert via quitclaim which means that Adam got the property rights that Bert had in the property but that Bert made no warranties or guarantees. Thus, Adam received the rights Connie granted to Bert via the warranty deed. While there are a substantial amount of rights and warranties contained in a general warranty deed none of them contain a warranty to quality of a house.

Therefore, Adam will not have a cause of action against Connie because she did not warrant the house to be free from structural defects when she conveyed the property to Bert (who's rights Adam received under the quitclaim deed).

2) Adam v. Connie - Diane's ownership via adverse possession

Adam does not have a cause of action against Connie for Diane's ownership of a portion of the tract by adverse possession.

Generally, a warranty deeds guarantees a property to be free from claims of adverse possessors. However, if mentioned in the deed this can be altered. Here, in the warranty deed Connie gave to Bert she stated that the property was conveyed via a warranty deed "except from warranties 'all titles covenants, and restrictions on record with the county recorder.'"

Four years ago Diana claimed adverse possession on Connie's parcel of land and the court ruled in Diana's favor which this judgment was placed on the land's title at the county recorder's office. This all occurred before Connie transferred the land via warranty deed. While this normally would be a problem under a warranty deed Connie place dthe above mentioned clause in the deed thus negating the warrant for restrictions on the land that were of record. Here the restriction of adverse possession claim was on record and thus does not fall under the normal warranty grant.

Therefore, Adam has no cause of action against Connie because of the exception noted on the deed to Bert.

3) Adam v. Bert - Diane's ownership via adverse possession

Adam does not have a cause of action against Bert for Daina's ownership via adverse possession. The issue here is can their be a claim against a grantor who gave title via quitclaim deed for a mark on the title of the property.

When a buyer buys a property via a quitclaim deed they take only the property ownership the grantor had in the property (if any) and no warrants or guarantees are made by the grantor.

Here, Adam took received a quitclaim deed from Bert. Thus, Adam took with property from Bert free of any grants or warranties. This means that if anything is wrong with the property such as someone else having an ownership interest in it the grantee cannot attack the grantor. Further, the warranty of marketability is implied in all land sales unless otherwise waived. Here, the quitclaim deed waives this warranty.

Therefore, Adam has no cause of action against against Bert because he acquired the property from him via a quitclaim deed.

4) Adam v. Connie - neighbor's easement

Adam has a cause of action against Connie for the neighbors easement. The main issue here is whether a warranty deed conveys title assuring that there are no easements on the property.

The warranty of marketability is implied in all land sales unless otherwise waived. Further, a deed by warranty conveys the property guaranteeing that there are no existing easements on it.

Here, Adam received the warrants and grants under the warranty deed. Thus, he received the right of quiet enjoyment. However, he cannot quietly enjoy his property

because of the existing mark on title created by the neighbor's easement. Thus, under the warranty grants Connie is responsible for defending the right to the property and compensation if this cannot be negated. Further, this easement was not recorded when Connie transferred to Bert and thus does not fit under the exception.

Therefore, Adam has a cause of action against Connie because a third party has a claim of right in the property via the easement.

END OF EXAM

MEE Question 2

XYZ Corp owns all the common stock of CruiseCo, which operates a fleet of 24 oceangoing passenger cruise ships. In addition, XYZ owns 90% of the common stock of ResortCo, which operates several large hotels and marinas on ocean coastlines. As a result of its share ownership, XYZ has the power to choose all members of the boards of directors for both ResortCo and CruiseCo, and it has voted its shares so as to elect XYZ employees for all seats on each board. All three corporations are incorporated in State A, which has adopted a corporate statute identical in substance to the Model Business Corporation Act.

During the past two years, CruiseCo's profits have steadily declined because fewer people have booked cruises. Moreover, many of the marinas where CruiseCo's ships stop to refuel have increased their docking fees. CruiseCo's ships frequently dock at ResortCo-owned marinas as part of their ordinary operations. ResortCo charges CruiseCo the same docking fees as it charges other cruise lines.

Last year, XYZ demanded that ResortCo stop charging CruiseCo's ships docking fees. At a board meeting to consider this demand, ResortCo's directors voted unanimously to acquiesce to XYZ's demand, even though ResortCo was contractually entitled to those fees. Eliminating the fees would help CruiseCo by reducing its operating costs and hurt ResortCo by lowering ResortCo's revenues.

Six months ago, at a board meeting, ResortCo's directors voted unanimously not to declare or pay the usual yearly dividend. The directors' rationale for this decision was to retain funds to construct new hotels and increase ResortCo's market share. The board reached its dividend decision after considering for several hours a report on the financial implications of the potential dividend from the company's chief financial officer and its independent accountant, as well as an advisory opinion prepared by an outside law firm.

At ResortCo's properly called board meeting last week, the board considered an offer that had been presented to ResortCo's president half an hour before the meeting. The offer was from Ava, the owner of 1,000 acres of coastal land well suited for commercial property development, to sell her land to ResortCo for \$50 million. Ava, who had no previous connection to ResortCo, had told the president that she would hold the offer open for only 48 hours. Citing the time-sensitive nature of the offer and the attractiveness of the property, ResortCo's directors discussed Ava's offer for only 15 minutes before unanimously voting to accept it. ResortCo's directors did not obtain any guidance about the transaction's fairness or potential impact on the company's financial condition from outside experts or from ResortCo's chief financial officer before voting. In fact, the price was above the property's fair market value.

1. Did XYZ, as a controlling shareholder of ResortCo, breach a fiduciary duty of loyalty to ResortCo or ResortCo's minority shareholders by causing ResortCo to stop charging CruiseCo docking fees? Explain.
2. If ResortCo's minority shareholders challenge the board's decision not to declare a dividend this year, are they likely to prevail? Explain.
3. Is the ResortCo board of directors' decision to purchase Ava's land protected by the business judgment rule? Explain.

**MEE 2
ANSWER**

1. XYZ's alleged breach of fiduciary duty of loyalty to ResortCo:

The issue here is whether XYZ's causing of ResortCo to stop charging CruiseCo for docking fees violated XYZ's fiduciary duty of loyalty to ResortCo or Resort Co's minority shareholders. Controlling shareholders of a corporation owe a fiduciary duty to the corporation and its minority shareholders. Included in the fiduciary duties are the duty of loyalty. The duty of loyalty forbids self dealing transactions. When a breach of the duty of loyalty action is brought, the burden of proof rests on the defendant to show that the transaction was fair to the corporation. A transaction is fair if it does not undermine the transaction wholly for the benefit of the self-dealer. The issue becomes whether forcing Resort Co to stop charging cruise co was fair. It likely wasn't.

First, CruiseCo and ResortCo are separate entities. Through their dealings, ResortCo has never gave CruiseCo special treatment because resort always charged cruise the same amount that it charged other cruise lines. The effect of this transaction is that it hurts resort co for the sole benefit of cruise co. It matters not that Resort is largely owned by XYZ, the transaction is purely self dealing and XYZ will have a hard time proving that this self dealing transaction is fair to resortco and especially the minority shareholders who have no stake in the success of cruiseCo.

Thus, XYZ most likely breached the fiduciary duty of loyalty to resortco and the minority shareholders by causing resort to stop charging cruiseCo docking fees because it was a self dealing transaction and XYZ has no defense.

2. The Board's decision not to declare a dividend this year.

The issue here is whether resortco's minority shareholders can successfully challenge the board of director's decision not to declare a dividend this year. They cannot.

When a plaintiff brings an action against a board of directors alleging they made a bad business decision to the detriment of the company, the burden of proof rests on the plaintiff. Certain matters, such as the choice whether or not to declare a dividend, rests with the board of directors. It was within the board of director's ability to make such a decision and if the minority shareholders challenge this decision they will have to provide proof that the board acted unreasonably in making this decision. The board has the business judgment rule in its favor which gives rise to the presumption that such a decision was reasonable.

Further, the minority shareholders will not be able to prove that the board made this decision on an improper basis: the director's had a business goal in mind to retain funds to construct new hotels and increase the company's market share. Further, they reached this decision after considering for hours a report on the financial implications of the potential dividend from the company's CFO and an independent accountant, as well as an

advisory opinion prepared by an outside law firm. Clearly the board of directors was diligent in making this call and the minority shareholders will not be able to offer proof to overcome the presumption that the board of directors acted prudentially in making this business decision.

3. Decision to purchase land from Ava.

The issue here is whether the board of director's decision to purchase land from Ava will be protected under the business judgment rule. It probably will not. Again, the business judgment rule provides that when a plaintiff brings a claim for the breach of the duty of care the plaintiff must overcome a presumption that a business decision was prudentially made. A plaintiff can overcome the business judgment rule's presumption by providing a strong showing of unreasonableness on behalf of the directors.

Here, much of the board's decision was done haphazardly. The offer from Ava--someone who had zero connection with resortco-- was presented to the president a mere half hour before the meeting. While the offer was sensitive, the option left the offer open for 48 hours. Despite this, the board discussed Ava's offer for a mere 15 minutes (despite it being a \$50 million transaction) before unanimously accepting it. Further, Resortco did not obtain any financial guidance on whether the transaction was fair or how it would effect their business from outside experts nor resortco's CFO. On top of that, the price was above the property's fair market value. From this, it is clear that resortco did not do their due diligence (ie they did zero homework on the transaction and just jumped in) on the transaction. The fact the offer was only open for 48 hours cannot justify this because much can be accomplished in 48 hours as opposed to 15 minutes. This procedure is in stark contract to the board's decision to withhold dividends, which would be protected under the business judgment rule.

Therefore, the board's decision to purchase the land is likely not protected by the business judgment rule.

END OF EXAM

The Boards of Bar Examiners did not select a representative passing answer for this question.

MEE Question 4

Wanda, who had been married to Harvey for 15 years, filed a complaint for divorce from Harvey shortly after she learned that he was having an affair with their married neighbor, Patrice. In the divorce proceeding, both Wanda and Harvey sought sole custody of their 13-year-old daughter.

Because Harvey and Wanda bitterly argued about and were highly critical of each other's parenting, the trial court appointed a neutral child-custody evaluator to investigate the family dynamics and provide an informed custody recommendation to the court. Both Wanda and Harvey told the evaluator that they were unwilling to share custody. The daughter told the evaluator that she was very upset because her parents were divorcing. She blamed her mother for the divorce and wanted to live with her father. The evaluator found that both parents were devoted to their daughter and recommended that the trial court grant Harvey sole physical and legal custody of the daughter, with Wanda to have liberal visitation with the daughter. The trial court granted the divorce and entered a custody order consistent with the evaluator's recommendation. Neither parent appealed this order.

Two months after the trial court entered the divorce decree and custody order, Patrice moved into Harvey's home. Wanda immediately petitioned the trial court to modify the custody order. She sought sole physical and legal custody of the daughter because of Harvey's nonmarital cohabitation with Patrice. Harvey opposed Wanda's petition, arguing that there was no justification for modifying the custody order. Neither Wanda nor Harvey requested joint custody, and the relationship between Wanda and Harvey remained bitter and acrimonious.

The trial court held a hearing on Wanda's petition to modify custody. The daughter testified, "I am still angry that my parents got divorced, but I do miss my mom and wouldn't mind seeing her more. Patrice is fine." Harvey testified that there had been no change in the daughter's behavior since Patrice moved into his home and that she and the daughter "get along well."

Wanda testified that the daughter should not be exposed to the nonmarital cohabitation of Harvey and Patrice. There was no other testimony.

1. Are the facts legally sufficient to authorize the trial court to consider whether to modify the existing custody order? Explain.
2. Assuming that the facts are legally sufficient to authorize the trial court to consider whether to modify custody, should the trial court modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter? Explain.

**MEE 4
ANSWER**

1. The issue is whether the facts present a legally sufficient basis for the trial court to consider whether to modify the existing custody order.

Child custody orders are intended to create consistency and predictability for the care of the child. Therefore, once a child custody order has been entered, it is generally unmodifiable for a statutorily prescribed period, 1 year in most jurisdictions. If a party seeks to modify the order prior to that expiration of that period, they must show that there has been a substantial change in circumstances since the entry of the order presenting a risk to the well-being or health of the child.

Here, Wanda petitioned to modify custody two months after the initial entry of the custody order. Wanda based her petition on the fact that Patrice moved into Harvey's house and Wanda's belief that the daughter should not be exposed to non-marital cohabitation. There is no indication that daughter has been harmed by Patrice moving in through physical harm, a lack of attention and care from Harvey, animosity towards or from Patrice, etc. There are no other facts to indicate that any other circumstances have changed in the daughter's life as a result of Patrice moving in and Wanda provided no additional support for her motion. Therefore, the facts are likely legally insufficient to allow a court to consider whether to modify the existing custody order only two months after it was initially entered.

2. The issue is whether the trial court should modify the existing custody order to grant Harvey and Wanda joint physical and legal custody of their daughter, if the court is authorized to consider whether to modify custody.

Child custody determinations are based on the best interests of the child. Legal custody refers to the right to make major decisions for a child, including education, medical, and religion. Physical custody is the right to have the child stay in your home and to take responsibility for the day-to-day care of the child. Some jurisdictions impose a rebuttable presumption that joint legal custody is in the best interests of the child. Courts hesitate to award joint physical custody unless both parents agree to the arrangement. When determining the best interests of the child, courts consider several factors including: the age and needs of the child, the primary caregiver during the marriage, the preferences of the child if the child is of sufficient age and maturity, the ability for the parents to work together, and the existence of any history of domestic abuse.

The initial custody order awarded Harvey sole legal and sole physical custody of the daughter and gave Wanda "liberal visitation." At the time of the initial order, the daughter expressed a preference to live with her dad, but has since stated that she misses her mom and would like to see her more. The daughter said that Patrice is "fine" and Harvey testified that there had been no change in the daughter's behavior since Patrice moved in, believing that the two "get along well." However, the relationship between Harvey and

Wanda remains "bitter and acrimonious" and Wanda vehemently objects to Patrice living in the home with Harvey and daughter. The continuing animus between Harvey and Wanda is likely to be a significant factor in the court's decision regarding modification because joint legal and joint physical custody requires that the parents work together to some degree to participate in both the major and daily decisions regarding their child. Particularly, neither Harvey or Wanda appear to agree to joint physical or legal custody because Harvey initially petitioned for sole legal and sole physical custody and Wanda's recent petition to modify asserts that she wants sole legal and sole physical custody. The factors supporting a modification to joint legal and physical (daughter's preference) are likely to continue to be outweighed by the animus between the parties indicating an unwillingness or inability to work together for the benefit of their child.

Therefore, a court is unlikely to modify the custody order to grant Harvey and Wanda joint physical and joint legal custody of their daughter.

END OF EXAM

The Boards of Bar Examiners did not select a representative passing answer for this question.

INDIAN LAW QUESTION

John Star Eagle is a member of the Cheyenne River Sioux Tribe and a resident of the Cheyenne River Sioux Reservation in South Dakota. Mr. Star Eagle is the biological father of twin girls, Vanessa and Felicity Star Eagle, who were born in Sioux Falls. Mary Johnson, a non-Indian resident of Sioux Falls, is the twins' biological mother. The twins are enrolled members of the Cheyenne River Sioux Tribe.

Mr. Star Eagle has had significant contact with the twins since their birth, despite the fact that they have continually lived in Sioux Falls with their mother. He visits them frequently and pays monthly child support. On one recent visit to Sioux Falls, Mr. Star Eagle became concerned about the twins' care while in their mother's custody. Ms. Johnson's home had fallen into disrepair, and she appeared to be under the influence of drugs or alcohol while caring for and supervising the children. Once Mr. Star Eagle returned home, he called the Sioux Falls Police Department and asked them to perform a wellbeing check on the twins.

When the police officers arrived at Ms. Johnson's home, they found the home in disrepair and Ms. Johnson to be suffering from paranoid delusions. They found methamphetamine and drug paraphernalia throughout the home, easily within reach of the twins. The police contacted the local child protection office of the state Department of Social Services (DSS) and asked that the twins be removed from the home and custody of their mother. DSS removed the twins and placed them in temporary foster care.

A temporary custody hearing was then held in Second Judicial Circuit Court in Minnehaha County, at which both Mr. Star Eagle and Ms. Johnson appeared with court-appointed counsel. Temporary custody (for 14 days) was awarded to DSS, which has since filed a Petition alleging abuse and neglect. In the Petition, DSS alleges that the twins qualify as "abused and neglected" children as that phrase is defined under South Dakota law. The Petition seeks continued custody of the twins and continued placement in foster care while DSS works with the family toward reunification.

Citing the Indian Child Welfare Act, Mr. Star Eagle filed a motion in circuit court to transfer the case to the Cheyenne River Sioux Tribal Court. The Cheyenne River Sioux Tribe filed a motion to intervene in the circuit court matter. The Cheyenne River Sioux Tribal Court has expressed its willingness to accept the transfer. Ms. Johnson has filed a motion objecting to both the proposed transfer to tribal court and the Tribe's intervention in the circuit court matter.

- 1) Does the Indian Child Welfare Act apply to this factual scenario?
 - 2) How should the Circuit Court rule on Mr. Star Eagle's Motion to Transfer to Tribal Court?
 - 3) How should the Circuit Court rule on the Tribe's Motion to Intervene?
- Please explain your answers in detail.

**ILQ
ANSWER**

1. Whether the Indian Child Welfare Act applies to this scenario.

The Indian Child Welfare Act ("ICWA") applies to this factual scenario. At issue is whether ICWA applies to foster care proceedings and whether there are Indian children involved.

Congress passed ICWA to prevent the removal of Indian children from their Indian families and from their tribes. As such, ICWA applies to custody proceedings involving Indian children that includes: (1) foster care placements, (2) terminations of parental rights, (3) pre-adoptive placements, and (4) adoption placements. Under ICWA, an "Indian Child" is a child under 18 years of age who (1) is an enrolled member of a Tribe, or (2) is eligible to become a member of a Tribe based upon the Tribe's set mandates.

Here, both of the twin girls, Vanessa and Felicity Star Eagle, are considered an "Indian Child" under ICWA because both are under the age of 18 and are enrolled members of the Cheyenne River Sioux Tribe. Additionally, ICWA applies to the Department of Social Services' ("DSS") proceedings because this is a proceeding for foster care placement. DSS is essentially seeking to continue their custody of the twins and find a placement in foster care for the twins while DSS works toward reunification.

Thus, because the twin girls are both considered an "Indian Child" and this is a foster care placement proceeding, ICWA applies to this factual scenario.

2. Whether the Circuit Court should grant or deny Mr. Star Eagle's motion to transfer to Tribal Court.

The Circuit Court should deny Mr. Star Eagle's motion to transfer the foster care proceeding to Tribal Court. At issue is who may bring a transfer petition and what are the conditions for transfer to tribal court under ICWA.

Under ICWA, a Tribe, parent, or Indian custodian may move to transfer a foster care placement or termination of parental rights proceedings from state court to tribal court. The motion to transfer must be granted unless (1) one parent refuses transfer, (2) the tribal court refuses jurisdiction, or (3) other good cause exists. Here, because the twins' mother, Mary Johnson, objects to the proposed transfer to tribal court, the Circuit Court should deny the motion to transfer. In the absence of Ms. Johnson's objection to transfer to tribal court, the motion to transfer should be granted because the Cheyenne River Sioux Tribal Court has expressed its willingness to accept the transfer and no good cause exists to not grant the transfer. However, in the face of Ms. Johnson's objection to transfer to tribal court, the Circuit Court should deny Mr. Star Eagle's motion to transfer.

Additionally, this is not a case where the tribal court has exclusive jurisdiction over the girls. Under ICWA, a tribal court has exclusive jurisdiction over a custody proceeding of an Indian Child where (1) the Indian child resides on the reservation, or (2) the Indian Child is

a ward of the Tribe. In all other cases, the tribal court and state court share concurrent jurisdiction over the custody proceedings. Here, the twin girls reside in Sioux Falls, not on the Cheyenne River Sioux Reservation, and both girls are not wards of the Cheyenne River Sioux Tribe. Instead, both the tribal court and state court have concurrent jurisdiction over the case.

Because one of the parents has objected to the transfer from state court to tribal court, the Circuit Court should deny Mr. Star Eagle's motion to transfer to the Cheyenne River Sioux Tribal Court.

3. Whether the Circuit Court should grant or deny the Tribe's motion to intervene.

The court should grant the Tribe's motion to intervene. At issue is whether ICWA allows a Tribe to intervene in foster care proceedings.

Under ICWA, a Tribe, parent, or Indian custodian of an Indian child may intervene at any point in a foster care or termination of parental rights proceeding. Because the Cheyenne River Sioux Tribe has properly filed a motion to intervene in the foster care proceeding, the Circuit Court must grant the motion to intervene. Ms. Johnson's objections to the Tribe's intervention have no effect on the Circuit Court's decision as the Tribe must be allowed to intervene because Indian children are involved and it is a foster care proceeding.

The Circuit Court should grant the Tribe's motion to intervene as provided for under ICWA.

END OF EXAM