

Reference Sheets

APPENDIX A

The following Reference Sheets are intended to serve as a quick review of the rules of law needed for the questions contained in this book. For a more complete review of these subjects, see the Mini Sheets, located in Appendix C.

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Agency Reference Sheet

APPENDIX A-1

I. AGENCY RELATIONSHIPS

- A. Under the law of agency, the agent must intend to act on behalf of the principal, to benefit the principal, and to be controlled by the principal.
- B. Agency relationships are inherent in contract and tort law. Under contract law, agents usually perform acts of negotiation and make contracts with third persons. On the other hand, tort law focuses on the vicarious liability that attached to a principal for torts (or crimes) committed by the agent.
- C. When a principal and an agent have an agency agreement, it is based on the principal granting the agent authority to do certain things within a certain scope.
- D. When a principal holds out that their agent has certain power and a third party believes the agent has the power to bind the principal, public policy and common law aim to protect the third party from loss.
- E. If an agent exceeds the scope of their authority, a principal can still ratify the action by approving it or knowingly benefitting from it.

II. ACTUAL AUTHORITY

- A. Actual authority exists when there is an express or implied authority to work on behalf of the principal. For express authority to exist, the principal's manifestations must cause the agent to believe that the agent is doing what the principal wants to be done, and the agent's belief must be reasonable. Express authority can be created by oral or written words; clear, direct, and definitive language; or specific detailed terms and instructions.
- B. Implied actual authority allows the agent to take whatever actions are necessary to achieve the goals of the principal, based on the reasonable understanding of how the principal has manifested their goals.
- C. When an agent has actual authority to enter into contracts on the business's behalf, they must not exceed the bounds of their agency.

III. APPARENT AUTHORITY

- A. Apparent authority exists if, based on the principal's conduct, a third party could reasonably believe that the agent has actual authority.
- B. The key is the principal's behavior and the third party's perception that results from that behavior.

IV. VICARIOUS LIABILITY

- A. A principal is vicariously liable to a third party harmed by an agent's conduct if the conduct either is tortious or enables the agent to conceal a tort's commission, and is within the agent's apparent authority.
- B. Under agency law, while an employer is not typically liable for the torts or negligence of their independent contractors, the employer may be liable for injuries caused if they did not exercise due care when hiring the independent contractor.
 - 1. To prove negligence, there must have been a duty owed, a breach of that duty, actual or proximate cause resulting in the harm, and recoverable damages.

V. SOLE PROPRIETORSHIPS

- A. Under sole proprietorships, the owner may be held personally liable for damages.

Corporations Reference Sheet

APPENDIX A-2

I. DUTY OF LOYALTY

A. **Directors:** The duty of loyalty requires a director to act in a manner that the director reasonably believes is in the best interest of the corporation. Typically, a director breaches this duty by:

1. Engaging in Self-Dealing

- a. Generally, the person seeking to justify a self-dealing transaction has the burden of proving its fairness to the corporation.
- b. The Model Business Corporation Act has described “fairness,” in connection with directors’ conflicting-interest transactions, to include not only “the market fairness of the terms of the deal—whether it is comparable to what might have been obtainable in an arm’s-length transaction—but also . . . whether the transaction was one that was reasonably likely to yield favorable results (or reduce detrimental results)” for the corporation. Official Comment to MBCA § 8.61.
- c. A controlling shareholder, officer, or director can avoid having to prove that the transaction is fair if they have a majority of disinterested directors or a majority of disinterested shareholders approve the transaction.
- d. The business judgment rule (BJR) does not apply to conflict-of-interest transactions and thus is no defense to a claim that the defendant breached its duty of loyalty. No credit will be given to an examinee who seeks to apply the BJR in the context of a discussion of the duty of loyalty.

2. Usurpation of a Corporate Opportunity

- a. Courts look at various factors in determining whether an opportunity belongs to the corporation.

3. Competing with the Corporation

- a. A director who engages in a business venture that competes with the corporation has breached their duty of loyalty, but the director may engage in unrelated business that does not compete with the corporation.
- B. **Officers:** The duties of care and loyalty that are imposed on the directors of a corporation are usually owed by the officers of a corporation. Corporate officers engage in the breach of loyalty concerning competition with a corporation more frequently than directors do.
- C. **Shareholders:** Shareholders are not normally subject to fiduciary duties, because a shareholder acts as an owner and not a representative. However, a controlling shareholder does owe a duty of loyalty by indirectly acting in a managerial capacity.

II. SHAREHOLDERS

- A. The board of directors, not the shareholders or the corporation, has the authority to make distributions to shareholders, subject to any constraints in the articles of incorporation or governing law.
- B. A shareholder who controls the majority of shares of a corporation owes fiduciary duties to the minority shareholders.
 1. Actions by majority shareholders “may be reviewable by a court under its inherent equity power to review transactions for good faith and fair dealing to minority shareholders.” Official Comment, MBCA § 10.01.
 2. Shareholders have no right to dictate the day-to-day running of the corporation or the corporation’s governance, other than through voting for the directors to be named to the board of directors.
 3. A shareholder has a right to inspect and copy corporate records.
 4. Shareholders have the right to bring both direct action suits to enforce their own rights and derivative action suits where the shareholder is suing on behalf of the corporation.

III. DIRECTORS

- A. Directors must make informed decisions and actively pay attention in overseeing the corporation’s business and affairs.
- B. **Duty of Loyalty:** A director has a duty to put the interests of the corporation and shareholders above their own and avoid conflicts of interest.
- C. **Business Judgment Rule**
 1. The BJR is a rebuttable presumption that a director reasonably believed that their actions were in the best interest of the corporation.
 2. The BJR may insulate a director from liability for a breach of the duty of care but not of the duty of loyalty.
 3. Under the BJR, a court will presume that:
 - a. The director acted in good faith;

- b. The director based their decision upon reasonable information; and
 - c. The director based their decision in the honest belief that the act was in the corporation's best interest.
4. Unless the presumption is rebutted, a director will not be liable for honest mistakes or poor judgment, regardless of the damage to the corporation or shareholders.
- D. **Corporate Opportunity Doctrine:** Under the doctrine, a director may violate the duty of loyalty by usurping a corporate opportunity rather than first offering the opportunity to the corporation.
- 1. In determining whether the opportunity is one that must be first offered to the corporation, there are various factors that courts may consider:
 - a. Whether the corporation has an existing interest or expectancy in the opportunity or the corporation is actively seeking a similar opportunity;
 - b. Whether the opportunity may be within the corporation's current line of business.
 - 2. Additional general factors the court may consider in determining whether the opportunity belongs to the corporation:
 - a. The relationship between the person offering the opportunity and the director and corporation;
 - b. How and when the director acquired knowledge of the opportunity; and
 - c. The relationship of the director to the corporation.

IV. PARENT CORPORATION

- A. A parent company-subsidary relationship exists when the parent company controls the subsidiary by owning a majority of voting stock.
- B. A parent company owes fiduciary duties of care to the subsidiary and its minority stockholders. Unless there is good reason, a parent corporation cannot favor one subsidiary to the detriment of another subsidiary.
- C. Generally, courts have examined business dealings between a controlling shareholder (such as a parent corporation) and the controlled corporation using a fairness test. But when the transaction does not involve self-dealing, then the "business judgment" standard applies.

V. FIDUCIARY DUTIES

- A. An agent's general fiduciary obligation is to act for the principal's benefit, placing the principal's interest over their own, in all matters concerning the agency relationship.
- B. The directors and officers of a corporation owe fiduciary duties to the corporation and its shareholders.
- C. This obligation requires a duty of loyalty, a duty of obedience, and a duty of care.



Civil Procedure Reference Sheet

APPENDIX A-3

I. PERSONAL JURISDICTION

A. Personal jurisdiction is the power that the court has over a party.

B. Two-Step Analysis

1. Satisfy the state long arm statute AND

2. Satisfy the Constitution (due process)

- a. Does the defendant (D) have such minimum contacts with the forum so jurisdiction does not offend traditional notions of fair play and substantial justice? *International Shoe v. State of Washington*, 326 U.S. 310 (1945).

C. Contact, Relatedness, and Fairness

1. **Contact:** There must be a relevant contact between D and the forum state. There are two factors to be addressed here.

a. Purposeful Availment

b. Foreseeability

2. **Relatedness:** Between this contact and Plaintiff's (P) claim

- a. A corporation is subject to general personal jurisdiction (PJ) when the company's activities are so systematic and continuous that the company is "at home" in the forum state.

3. **Fairness:** Whether jurisdiction would be fair (or reasonable) under the circumstances

a. Must Consider

- i. Burden on D and witnesses.

- ii. State's interest: The forum state may want to provide a courtroom for its citizens, who are allegedly being harmed by out-of-staters.
- iii. Plaintiff's interest: P may be injured and wants to sue at home.

II. NOTICE AND SERVICE OF PROCESS

A. A plaintiff is responsible for serving the summons and complaint upon the defendant. As a constitutional matter, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

B. Types of Service

1. **Personal Service:** Papers are given to D personally.
2. **Substituted Service:** Process is left with D's butler at D's summer home.
3. **Service on D's Agent:** Process can be delivered to D's agent.
4. **State Law Methods:** In addition, methods are available for serving process that are *permitted by state law* of the state (1) where the federal court sits *or* (2) where service is made.

C. Service on a Business or Organization in the United States

1. **Officer, Managing Agent, or General Agent:** Deliver a copy of the summons and of the complaint to such a person.
2. **State Law Methods**

D. **Service in a Foreign Country:** May use a method allowed by international agreement (e.g., Hague Convention).

III. SUBJECT MATTER JURISDICTION

A. Subject matter jurisdiction (SMJ) is about the court's power over the case (not over the parties). Federal courts can only hear certain kinds of cases.

B. Diversity of Citizenship Cases

1. Usually presents as between citizens of different U.S. states (diversity).
 - a. **Complete Diversity Rule:** No good if any P is a citizen of the same state as any D.
 - b. **Citizenship of Decedents, Minors, or Incompetents:** Such persons must sue or be sued through a representative. However, the representative's citizenship is irrelevant.
2. The case may also be between a citizen of a U.S. state and a citizen of a foreign country (alienage) where the amount in controversy exceeds \$75,000.
 - a. **Aggregation:** Aggregation means adding two or more claims to meet the amount requirement.

C. **Federal Question:** The claim in P's complaint "arises under" federal law (e.g., federal constitution, legislation). "Well pleaded complaint" rule: It is not enough that some federal issue is raised by the complaint. P's claim itself must "arise under" federal law.

D. **Removal Jurisdiction:** P has sued D in state court. D would prefer to litigate in federal court. D might be able to "remove" the case to federal court. Removal transfers the case from a state trial court to a federal trial court. If removal was improper, the federal court can "remand" the case back to state court.

1. **Black Letter Rule:** Plaintiffs can never remove. Even if D files a counterclaim against P, so P is a defendant on the counterclaim, P can never, never, never remove.

2. What Cases Can Be Removed

a. D can remove a case that meets the requirements for diversity of citizenship or federal question.

b. Two exceptions to removal on the basis of diversity of citizenship:

i. No removal if any D is a citizen of the forum (in-state D rule).

ii. No removal more than one year after the case was filed in state court.

3. **Remand to State Court:** If P thinks the case should not have been removed, she moves to remand to state court.

IV. SUBJECT MATTER JURISDICTION — SUPPLEMENTAL JURISDICTION

A. **Definition:** Supplemental jurisdiction allows claims to be brought into federal court even though the claims do not invoke diversity of citizenship or federal question.

1. Applies to a case already in federal court.

2. Additional claims might be asserted in that case; e.g., maybe P has additional claims, or maybe there's a counterclaim or cross-claim, etc.

3. Each claim must have federal subject matter jurisdiction.

B. **The Test:** The claim being brought must have a common nucleus of operative fact with the claim that invoked federal SMJ.

C. **The Limitation:** In a diversity case, claims brought by plaintiffs cannot invoke supplemental jurisdiction except if there are multiple plaintiffs and one of their claims does not meet the amount in controversy requirement.

V. LAW APPLIED IN FEDERAL COURT

A. The Erie Doctrine

1. **Step 1.** Ask whether there is some federal law that directly conflicts with state law.

2. **Step 2.** If there is no federal law on point, the federal judge must determine whether the issue is "substantive" (bound up with state created rights and obligations).

3. **Step 3.** If there is no federal law on point, and the federal judge determines the issue is “substantive,” then the federal judge must apply state law.

VI. VENUE, TRANSFER, AND FORUM NON CONVENIENS

- A. Plaintiff may lay venue in any district where:
 1. All defendants reside; or
 2. A substantial part of the claim arose.
 3. The provisions above do NOT apply if the case was REMOVED from state to federal court.
- B. **Transfer of Venue:** The transferee (court being transferred to) must be a proper venue and have PJ over the defendant.
 1. If the original district is a proper venue, that court can order transfer based on convenience of parties and witnesses and in the interest of justice.
 2. **Forum Selection Clause:** A provision in which the parties agree that a dispute between them will be litigated in a particular place.
 3. **Improper Venue:** The court will usually transfer. When it does, the transferee applies the choice-of-law rules of the state in which it sits (in a diversity case), and NOT the choice-of-law rules of the transferor district.

VII. PLEADINGS

A. Requirements

1. A statement of grounds of subject matter jurisdiction;
2. A short and plain statement of the claim, showing entitlement to relief;
3. A demand for relief sought (e.g., damages, injunction, declaratory judgment).

B. Defendant’s Response

1. Rule 12 requires D to respond in one of two ways:
 - a. By motion or
 - b. By answer.
2. To avoid default, D must do one of these two things no later than 21 days after being served with process. If D waived service, D has 60 days from when P mailed the waiver form.

C. Motions (Rule 12)

1. **12(e) motion for more definite statement:** The complaint is so vague or ambiguous D simply cannot respond; must make this motion before answering;

2. **12(f) motion to strike:** Asks the court to remove redundant or immaterial things from pleadings; any party may move for this.
- D. **Rule 12(b) Defenses (Motion to Dismiss):** Usually used when filing a motion to dismiss.
1. Waivable defenses must be in the first motion or answer or else they are waived.
 2. **General Defenses:**
 - a. Lack of SMJ
 - b. Lack of PJ
 - c. Improper venue
 - d. Improper process (problem with the papers)
 - e. Improper service of process
 - f. Failure to state a claim
 - g. Failure to join indispensable party
- E. **The Answer May Raise Affirmative Defenses:** Affirmative defenses inject a new fact into the case, which will allow D to win. Classic affirmative defenses are statute of limitations, Statute of Frauds, res judicata, self-defense. All Rule 12(b) defenses are also affirmative defenses.
- F. **Right to Amend:** *Plaintiff* has a right to amend their complaint *once* no later than 21 days after serving it, or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. *Defendant* has a right to amend their answer *once* no later than 21 days after serving her answer.

VIII. JOINDER

- A. **Joinder by Plaintiff:** Plaintiff (in fact, anyone asserting a claim) may join any additional claim—even if the additional claim is unrelated to the original claim.
- B. **Necessary and Indispensable Parties:** The court might force some nonparty (“absentee”) to join in the case.
1. Without A, the court cannot accord complete relief among existing parties (worried about multiple suits); or
 2. A’s interest may be harmed if A is not joined (practical harm); or
 3. A claims an interest that subjects a party (usually D) to a risk of multiple obligations.
- C. **Joinder by Defendant**
1. **Counterclaim:** A claim against an opposing party. Once somebody asserts a claim against you, you are opposing parties. Your claim back against that person is a counterclaim.

- a. **Subject Matter Jurisdiction:** We must assess whether the counterclaim invokes diversity or federal question jurisdiction. If so, it's okay in federal court. If not, we try supplemental jurisdiction.
- b. There are two types of counterclaims:
 - i. **Compulsory:** Arises from the same transaction or occurrence as P's claim.
 - ii. **Permissive:** Does not arise from same transaction or occurrence as P's claim. Permissive means you are not required to file it in this case. You may sue on it in a separate case.
2. **Cross-claim:** This is a claim against a co-party. It must arise from the same T/O as the underlying action. But it is not compulsory—you may assert it here or sue separately.
3. **Impleader:** A defending party (usually D) is bringing in someone new. The new party is the third-party defendant.
4. **Intervention:** A nonparty brings itself into the case. May choose to come in either as P (to assert a claim) or as D (to defend a claim).
 - a. **Permissive Intervention:** Intervening party's claim or defense and the pending case have at least one common question.
- D. **Class Action:** Representative(s) ("Rep") sues on behalf of group.
 1. **Requirements:** Must demonstrate numerosity, commonality, typicality, and that representative is adequate to represent the class.
 2. **Subject Matter Jurisdiction:** A class action might assert rights under federal law, which would invoke federal question.
 3. **Diversity Jurisdiction:** For citizenship, we consider only the Rep. For amount in controversy, the Rep's claim must exceed \$75,000.

IX. DISCOVERY

- A. **Depositions:** The deposition is recorded by sound or video or stenographically and a transcript can be made.
- B. **Interrogatories:** Written questions, to be answered in writing under oath.
- C. **Request to Produce:** Request that someone make available for review and copying documents or things within 30 days, including electronically stored information, or to permit you to enter designated property to inspect, measure, etc.
- D. **Medical Exam:** Must be by court order and must show that the person's health is in actual controversy, and need good cause.
- E. **Qualified Work Product:** Work product or "trial preparation materials" (material prepared in *anticipation of litigation*).
- F. **Absolute Work Product:** Cannot be discovered (e.g., mental impressions, opinions, conclusions, legal theories).

G. Enforcement of Discovery Rules

1. **Disputes:** Responding party responds but not fully or no response to discovery request.
2. **Enforcement:** By protective order or sanctions against party.
3. **Litigation Hold:** When litigation is reasonably anticipated, parties must preserve discoverable information.

X. ADJUDICATION WITHOUT TRIAL

- A. **Temporary Restraining Order:** To have TRO issue without notice to defendant the plaintiff must show they will suffer immediate and irreparable harm without the order.
- B. **Preliminary Injunction:** Maintains status quo until the court can adjudicate the underlying claim on the merits.
- C. **Voluntary Dismissal:** Plaintiff can make a motion for voluntary dismissal any time, which the court has discretion to grant.
- D. **Default Judgment:** Defendant does not respond to the complaint, the claim is for a sum of money, plaintiff provides a sworn affidavit for the sum owed, and the defendant is not a minor.
- E. **Motion for Summary Judgment:** There is no genuine dispute on a material fact and the plaintiff is entitled to judgment as a matter of law.

XI. CONFERENCES, TRIAL, JUDGMENT, AND POST-TRIAL MOTIONS

- A. **Jury Trial:** Determines the facts and returns the verdict.
- B. **Bench Trial:** No jury, case decided by a judge.
- C. **Motions for Judgment as a Matter of Law:** Applies in jury trial. If the judge grants JMOL, the case will not go to the jury—the judge grants the motion and enters judgment.
- D. **Motion for a New Trial:** Judgment is entered, but some error at trial requires that parties should start over and have a new trial.
 1. **Remittitur and Additur:** One ground for new trial is that the jury's damages figure is excessive or inadequate.
- E. **Motion for Relief from Judgment:** May ask to set aside an order or judgment for:
 1. Clerical errors;
 2. Mistake, excusable neglect;
 3. Fraud, misrepresentation, or misconduct by opposing party;
 4. New evidence that could not have been discovered with due diligence for a new trial motion; and
 5. Judgment is void.

XII. APPELLATE REVIEW

- A. **Final Judgment Rule:** Losing party can appeal if the order is a final judgment. A final judgment is one that determines the merits of the entire case.
- B. **Interlocutory Review:** If the district court's order is not a final judgment, it might be appealable based upon a critical question of law which can affect the final decision on a case. Examples usually involve injunctions.

XIII. PRECLUSION

- A. **Definition:** Whenever there has been an earlier case, watch for claim preclusion and issue preclusion, which concern the preclusive effect of a prior judgment on the merits.
 - 1. The question is whether a judgment already entered (Case 1) precludes litigation of any matters in another case (Case 2).
- B. **Claim Preclusion (Res Judicata):** You only get to sue on a claim once.
 - 1. **Requirements:**
 - a. Case 1 and Case 2 were brought by the same claimant against the same defendant.
 - b. Case 1 ended in a valid final judgment on the merits.
- C. **Issue Preclusion (Collateral Estoppel):** An *issue* was litigated in Case 1. The same *issue* is presented in Case 2. But if issue preclusion applies, we will not allow the issue to be relitigated in Case 2.
 - 1. **Requirements:**
 - a. Case 1 ended in a valid, final judgment on the merits;
 - b. The same issue was *actually litigated* and determined in Case 1; and
 - c. The issue was essential to the judgment in Case 1.

Conflict of Laws Reference Sheet

APPENDIX A-4

I. CHOICE OF LAW

- A. When an individual dies testate, the state law that will govern the distribution of their will is the state where the testator was domiciled when the testator died.
- B. Domicile is determined by an individual's presence within the state and their intent to remain, which can be shown by ownership of property in the state.



Constitutional Law Reference Sheet

APPENDIX A-5

I. FEDERAL JUDICIAL POWER

A. **Article III:** Whether a lawsuit is capable of judicial resolution as a case or controversy depends on what it requests, when it is brought, and who brings it.

1. **No Advisory Opinions:** Federal courts may not render advisory opinions, which lack an actual dispute between adverse parties, or any legally binding effect on the parties.

2. **Ripeness and Mootness:**

a. **Ripeness:** Federal courts may only decide controversies that are ripe for judicial review. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

b. **Mootness:** Federal courts may only decide live controversies. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law.

3. **Standing:** Plaintiff must show injury, causation, and redressability.

a. **Injury:** Third Party Standing Exceptions:

i. Close relationship

ii. Organizations

iii. Free speech overbreadth

b. **Causation:** Plaintiff must show that the injury is fairly traceable to the defendant.

c. **Redressability:** Plaintiff must show that a favorable court decision can remedy the harm.

B. **Sovereign Immunity:** Government cannot be sued without its consent.

1. **Exceptions:** Waiver, the state is the plaintiff, bankruptcy proceedings, clear abrogation by Congress to prevent discrimination.
2. **Not Barred:** State officers for injunctive relief or money damages from their own pocket. Local governments.

C. **Supreme Court Review:** Court will only hear a case after final judgment by the highest court capable of rendering a decision or a federal court of appeals.

1. **Independent and Adequate State Grounds:** Court will not review a federal question if the state court decision rests on independent and adequate state law ground.

II. FEDERAL LEGISLATIVE POWER

A. **Article I, Section 8:** Congress has no general police power to pass laws. Enumerated powers. Exceptions: Federal land, Indian reservations, D.C.

1. Necessary and Proper Clause:

- a. Allows Congress to choose any rational means to carry out an enumerated power, as long as the means are not prohibited by Constitution. Note: This does not mean that Congress may pass any laws it wishes; the statute it passes still must fall under one of the powers listed below.

2. Taxing and Spending Powers:

- a. Congress may tax and spend to provide for the general welfare. Includes public purpose not prohibited by the Constitution, even if not within enumerated power.
- b. Note: There is no “power to provide for the general welfare” without taxing and spending.

3. Commerce Power:

- a. Congress may regulate commerce with foreign nations, Indian tribes, and among states.
- b. Interstate commerce includes channels (highways, waterways), instrumentalities (planes, trains), and substantial effect on interstate commerce (even purely local activities).
- c. Limits:
 - i. Non-economic activity in area traditionally regulated by states.
 - ii. Compelling participation in commerce even if lack of participation substantially affects interstate commerce.

4. Enforcement Power:

- a. Congress can indirectly ban private discrimination under the Fourteenth Amendment to enforce equal protection.

5. Delegation of Power:

- a. To agencies: May broadly delegate legislative power as long as some intelligible principle guides exercise of delegated power.

III. FEDERAL EXECUTIVE POWER**A. Article II**

1. **Domestic Powers:** President has powers to execute laws.
2. **Foreign Powers:** Congress alone has power to declare war. President has broad discretion to deploy troops internationally.
3. **Treaties:**
 - a. Senate requires two-thirds vote to approve.
 - b. Trumps existing and future state law.
 - c. Trumps existing but not future federal law.
4. **Executive Agreements:**
 - a. President negotiates.
 - b. Trumps existing and future state law.
 - c. Federal law always supersedes other law.

IV. FEDERALISM

- A. **Tenth Amendment:** Powers not granted to the United States, or prohibited to the states, are reserved to the states or the people.
 1. General police powers are reserved to the states.
 2. Congress cannot compel states to enact or administer federal programs.
- B. **Supremacy Clause:** Makes federal law preempt inconsistent state and local laws.
- C. **Preemption**
 1. **Express:** Congress expressly says so.
 2. **Implied:**
 - a. Conflict between federal and state; or state law impedes federal.
 - b. Extensive federal regulation indicates congressional intent.
 3. **Dormant Commerce Clause:** Prohibits state laws that discriminate against or unduly burden interstate commerce.

4. **Privileges and Immunities of Article IV:** Prohibits state laws that discriminate against out-of-state U.S. citizens.

- a. Fundamental right to interstate travel.

V. CONSTITUTIONAL FRAMEWORK FOR PROTECTION OF INDIVIDUAL LIBERTIES

A. **Levels of Scrutiny:** Supreme Court often employs levels of scrutiny when laws are challenged as violations of equal protection, due process, or free speech.

1. **Rational Basis:** Must be rationally related to a legitimate state interest.
2. **Intermediate Scrutiny:** Must be substantially related to an important government interest.
3. **Strict Scrutiny:** Must be narrowly tailored to a compelling government interest.

VI. PROCEDURAL DUE PROCESS

A. **Definition:** Individuals have a right to fair process when the government acts to deprive them of life, liberty, or property.

1. Fifth Amendment Due Process Clause applies to the federal government.
2. Fourteenth Amendment Due Process Clause applies to states (and localities).
3. **Balancing Test:** Determines the nature and extent of procedures; importance of interest to individual; risk of error through procedures used; accuracy gain from additional procedures; and burden on government.

VII. SUBSTANTIVE DUE PROCESS

A. Rights

1. **Enumerated Rights:** Specified in the Constitution or the amendments.
2. **Unenumerated Rights:** Substantive component of liberty protected by Fifth and Fourteenth Amendment Due Process Clauses.
 - a. Marriage (divorce)
 - b. Procreation
 - c. Contraception
 - d. Parental rights
 - e. Living with extended family
 - f. Fundamental right to interstate travel
 - g. Right to vote
 - h. Abortion (*undue burden test*)

B. Levels of Scrutiny of Rights

1. **Fundamental Rights** = Strict scrutiny
2. **Non-fundamental Rights** = Rational basis

VIII. EQUAL PROTECTION CLAUSE**A. Applications**

1. The Fourteenth Amendment Equal Protection Clause applies to states and localities.

B. Equal Protection Analysis

1. **Classification:** Determined by whether the discrimination is facial, or disparate impact and discriminatory intent. See chart in Appendix B for categories and levels of scrutiny.
 - a. Race, alienage, national origin: Strict scrutiny
 - b. Gender, children of illegal aliens: Intermediate scrutiny

IX. TAKINGS**A. Federal government and states may not take private property unless:**

1. For public use; and
2. Just compensation is given.

B. Regulatory Taking

1. **Bright-Line Rule:** Taking if regulation on use does not merely diminish property value but leaves no economically viable use.

C. Public Purpose: Any legitimate public purpose, any purpose that the government reasonably believes will benefit the public.**D. Just Compensation:** Fair market value at time of taking (benefit to government is irrelevant).**X. RETROACTIVE LEGISLATION****A. Contract Clause:** "No State shall pass any law impairing the Obligations of Contracts."

1. Applies to state and local laws only.

B. Ex Post Facto Laws: Neither state nor federal government may pass legislation that retroactively alters criminal liability.**C. Bills of Attainder:** Neither state nor federal government may pass legislation that designates particular individuals for punishment without judicial trial.

XI. FREEDOM OF SPEECH

- A. **Protects words, symbols, and expressive conduct**
- B. **Partially Protected Speech:** Defamation and commercial speech.
- C. **Unprotected Speech:** Incitement (hate groups), obscenity, defamation with actual malice, true threats.
- D. **Content-Based:** Speech restrictions facially target certain topics or messages or are justified by reference to potential harms produced by certain topics or messages.
- E. **Content-Neutral:** Speech restrictions do not target certain topics or messages; and they suppress speech for reasons unrelated to any topics or messages.
- F. **Student Speech:** Cannot be censored absent evidence of substantial disruption.
 - 1. Speech promoting illegal drug use is not protected.
 - 2. Can be censored if reasonably interferes with teaching.
- G. **Public Employee Speech**
 - 1. **Unprotected:** Private concern at workplace and public concern but pursuant to official duties.
 - 2. **Protected:** Public concern outside of the workplace and public concern as citizen rather than pursuant to official duties, at or outside workplace.

XII. FREEDOM OF RELIGION

- A. **Free Exercise Clause:** Protects the free exercise of religion. Laws of general applicability do not violate the Free Exercise Clause.
- B. **Establishment Clause**
 - 1. **Neutrality Test:** Government must remain neutral with respect to religion.
 - 2. **Coercion Test:** Government may not directly or indirectly coerce individuals to exercise religion.
 - 3. **Endorsement Test:** From the standpoint of a reasonable and informed observer, the government must not appear to endorse or disapprove of religion, making it seem relevant to a person's standing in the political community.

Contracts Reference Sheet

APPENDIX A-6

I. UCC VERSUS COMMON LAW

- A. Article 2 of the UCC applies to contracts involving the sale of goods.
 - 1. Goods are tangible, moveable items.
- B. The common law governs all other contracts, including contracts for services, the sale of land, leases, intellectual property, and so forth.
- C. Transactions involving both sale of goods and sale of service will use one of the two tests below:
 - 1. **Predominant purpose test:** What was the primary purpose for the contract?
 - 2. **Gravamen test:** What is the disagreement primarily about?

II. FORMATION

- A. **Offer:** A valid offer contains clear and definite terms and must convey power of acceptance to the offeree.
 - 1. Offers made in jest, preliminary negotiations, statements of future intent, price quotes, and solicitations of offers are not considered to be valid offers.
 - 2. **Common Law Option Contract:** If an offeror states that they will keep the offer open for a certain duration of time, it is not revocable IF the offeree has given consideration.
 - 3. **Merchant's Firm Offer Under Article 2**
 - a. If a merchant offers to buy or sell goods in a signed writing and the writing gives assurances that it will be held open, the offer is not revocable during the time stated, or if no time is stated, for a reasonable time (may never exceed three months).
 - b. *Consideration is not required.*

B. **Acceptance:** The acceptance must be in accord with the substantive terms and the procedural requirements of the offer. If no particular method of offer is specified, we will look to what is “reasonable.”

1. **Bilateral Contract:** A promise in exchange for a promise. So, a return promise is a typical acceptance.

a. Most contracts are bilateral, unless otherwise specified.

2. **Acceptance Made by Performance**

a. When acceptance is done through performance, the acceptance is not valid until performance has begun.

b. An offeror may not revoke the offer once performance has begun.

c. **Unilateral Contract:** Means that the ONLY reasonable means of acceptance is through performance.

3. **Mailbox Rule**

a. For communication through mail or by another means that involves a time delay, acceptance is valid upon dispatch.

b. If the offeree sends a rejection and then sends an acceptance, whichever arrives first is effective.

c. **Exam Note:** If the offeror specifies a certain mode of acceptance (e.g., specifies “acceptance must be received by June 5 at 5 p.m.”), look to the terms of the offer, not the mailbox rule.

4. **Acceptance Under Common Law:** Must be a “mirror image” of the offer, meaning it must not offer additional or contradictory terms.

5. **Acceptance Under the UCC:** The UCC does not follow the mirror image rule. Instead, UCC § 2-207 allows a contract to be formed even if there are extra or competing terms, unless acceptance is expressly made conditional on the assent to the additional or different terms.

a. Additional terms are to be construed as proposals for addition to the contract.

b. Between merchants additional terms become part of the contract unless:

i. The offer expressly limits acceptance to the terms of the offer;

ii. The additional terms materially alter the contract; or

iii. Notification of objection to the terms has already been given or is given within a reasonable time after notice of them is received.

C. **Consideration:** A bargained-for legal exchange, required for all contracts.

III. PAROL EVIDENCE RULE

A. The parol evidence rule bars any other expressions (written or oral) made prior to the writing, as well as any oral expressions contemporaneous with the writing, which are inadmissible to vary the terms of the writing.

1. Extrinsic evidence is not parol evidence if it does not speak to a term of the contract, such as:
 - a. Evidence that goes to the validity of the contract (such as evidence of fraud, mutual mistake, etc., or a condition that was not met);
 - b. If there is uncertainty or ambiguity in the written agreement's terms or a dispute as to the meaning of those terms, parol evidence can be received to aid the fact finder in reaching a correct interpretation of the agreement;
 - c. A showing of true consideration; or
 - d. Facts entitling a party to reformation.
- B. **Integration:** When the parties to a contract express their agreement in a writing with the intent that it embodies the final expression of their bargain.
 1. To determine whether a writing is an integration, consider:
 - a. Whether the writing was intended as the final expression of the agreement, and
 - b. Whether the integration was intended to be complete or partial.
 - i. If an integration is complete, the writing cannot be contradicted or supplemented.
 - ii. If the integration is partial, the writing may not be contradicted but may be supplemented by proving consistent additional terms.

IV. PERFORMANCE, BREACH, AND DISCHARGE

- A. **Condition:** An event that creates, limits, or discharges a contractual obligation.
 1. **Condition Precedent:** A condition that creates a future obligation.
 2. **Conditions Concurrent:** Simultaneous conditions that create simultaneous obligations.
 3. **Condition Subsequent:** A condition that negates a preexisting obligation.
 4. **Express Condition:** A contract term that is articulated as a condition through the use of "conditional language," e.g., subject to, conditional upon.
 5. **Implied Condition:** A condition inferred by the court from the facts of the case, based on the intent of the parties.
- B. **Breach**
 1. **Material Breach:** A substantial violation of a contractual obligation, such that the non-breaching party does not receive a substantial benefit of the bargain.
 - a. The breaching party has no claim to damages under the contract.
 2. **Minor Breach:** Under common law, if a party has substantially performed, the breach is only minor.

3. Breach Under the UCC

- a. **Perfect Tender Rule:** If goods fail in any aspect to conform to the contract, the buyer may reject them. Unless cured, it constitutes a breach.
- C. **Adequate Assurances:** A party to a contract with reasonable grounds to worry that the other party might not be able to perform can request adequate assurances of performance, according to UCC § 2-609.
1. Occurs when a party has reasonable grounds to believe that the other party will be unable or unwilling to perform when performance is due.
 2. Involves conduct or words that merely raise doubts that the party will perform.
 3. Allows the “insecure” party to suspend further performance on their side until they receive adequate assurances that performance will be forthcoming.
 - a. If the other party fails to provide adequate assurances, the “insecure” party may be excused from their own performance and may treat the failure to provide assurances as a repudiation.

V. REMEDIES

A. Damages

1. **Expectation Damages:** Meant to make the non-breaching party whole, or put them back in the position they were in prior to the breach.
 - a. The formula for expectation damages is what the non-breaching party expected to have, minus what they actually have.
 - b. This is the most common type of damage. When in doubt, if there is a contract and a breach, apply expectation damages.
2. **Consequential Damages:** Damages arising as a foreseeable consequence of the breach, such as lost profits.
3. **Incidental Damages:** Costs incurred in coping with the breach of contract, e.g., arranging for alternative performance, etc.
4. **Seller’s Damages (a.k.a. Lost Profits):** If a seller can provide an indefinite amount of product (i.e., the seller can obtain all the goods they can sell), they are a lost volume seller, and are entitled to lost profits.
5. **Note on Construction/Contract Work and Damages:** When there has been substantial performance of the contract and the cost of replacement or completion would be disproportionately high compared to the economic benefit it confers, courts have instead measured damages by the difference between the value of the property if construction had been properly completed and the value as constructed.

B. Mitigation

1. Damages that result from the non-breaching party’s failure to mitigate are not recoverable.
2. Mitigation has to be reasonable.

Criminal Law Reference Sheet

APPENDIX A-7

I. INCHOATE CRIMES

A. Solicitation

1. The act of enticing, advising, or encouraging another to commit a crime. Essentially, asking another to commit a crime.
2. The crime of solicitation is complete upon the asking, and if the other party agrees, it will merge with conspiracy.

B. Conspiracy

1. An agreement between two or more persons to commit a crime and intent to achieve the criminal objective.
2. Merely agreeing to commit a crime will suffice for a conspiracy charge, and the crime is complete upon the agreement.
3. If the conspiracy is successful, a conspirator may be subject to conviction for both the conspiracy and the actual crime.
4. A co-conspirator is guilty of all crimes carried out in furtherance of the conspiracy.
5. Withdrawal is a defense if the defendant thwarts the success of the conspiracy.

C. Attempt

1. Need the INTENT (this is key) to commit a crime AND an act in furtherance of the crime.

II. HOMICIDE

All homicide requires a death of a person. This also means that the person needs to be born.

A. Murder

1. Murder is the unlawful killing of another human with malice aforethought.

2. **Malice:**

a. *Premeditated and Deliberated.* Only need ONE second of planning.

Example: Planning to buy a gun and kill someone.

b. *Intent to cause serious bodily harm.*

Example: Beating someone over the head with a bat.

c. *Felony Murder:* The killing in conjunction with the commission of an inherently dangerous felony.

i. Has to be inherently dangerous: **BARRK** (burglary, arson, rape, robbery, kidnapping).

Example: Robbing a bank and shooting the teller.

d. *Depraved Heart Murder:* Unintentional killing that results from defendant's extremely negligent (or reckless) conduct; essentially, recklessness that shows indifference to who lives or dies.

Example: Firing a gun into a crowded theater; Russian roulette.

3. Duty to Others

a. Generally there is no duty to help others, or prevent their death, unless:

i. There is a special relationship, such as parent/child, spouse, doctor/patient, etc., or

ii. There is a contractual relationship.

b. Violating this duty will result in a murder charge.

Example: Wife knows that hitman is coming to shoot her husband. She could warn her husband with a simple text, but doesn't. Hitman shoots husband; wife is guilty of murder.

B. Manslaughter

1. **Voluntary Manslaughter**

Remember that voluntary manslaughter is VOLUNTARY, meaning intentional. Voluntary manslaughter is first-degree murder that is mitigated to manslaughter due to adequate provocation or heat of passion.

- a. *Adequate Provocation*: A reasonable person would be provoked. Usually, mere words are not enough. Adequate provocation can sometimes be a failed defense, if, for example, someone believes their life is in danger, but that belief is not reasonable.
- b. *Heat of Passion*: One type of adequate provocation is heat of passion or finding your spouse in bed with another. You can NOT plan for even a second.

2. Involuntary Manslaughter

Remember that involuntary manslaughter is ACCIDENTAL, meaning it is involuntary.

- a. Misdemeanor Manslaughter: The killing in conjunction with a misdemeanor.
- b. *Gross/Criminal Negligence*: This is different than mere negligence. It's GROSS negligence.

Example: Drunk driving (note, this and depraved heart murder are on a spectrum).

III. THEFT CRIMES

A. Burglary

- 1. The breaking and entering of the dwelling of another at night, with the intent to commit a felony therein.
 - a. The “felony therein” can be any felony.
 - b. Breaking is any movement of the threshold, i.e., must move a door or window—that is the “breaking.”
 - c. Entering can be a body part or an extension of the body part.

B. Larceny

- 1. The trespassory taking and carrying away of personal property of another with intent to permanently deprive the true owner of the property.
- 2. The crime is complete upon the taking and carrying away, even if the item is returned.

C. Robbery

- 1. Larceny committed when property is taken from the person or in the presence of the owner by using force or putting the owner in fear.

IV. OTHER CRIMES

A. Arson

- 1. The malicious burning of a dwelling of another.
 - a. Burning means structural damage, not smoke damage.

V. DEFENSES**A. Self-Defense**

1. Self-defense provides a defense when a person reasonably believes that force is necessary to protect themselves from what they reasonably believe to be unlawful physical harm about to be inflicted by another.
2. To establish a claim of self-defense based upon the use of non-lethal force, a defendant must prove that they:
 - a. Reasonably believed that the force was necessary to protect them from another person's imminent use or attempted use of unlawful force, and
 - b. Used an amount of force proportionate to the force encountered.
3. In some jurisdictions, a defendant *also* must prove either:
 - a. That they were not the initial aggressor, or
 - b. If they were the initial aggressor, that they withdrew from or abandoned the conflict before acting in self-defense.

Criminal Procedure Reference Sheet

APPENDIX A-8

I. FOURTH AMENDMENT

The Fourth Amendment protects against unreasonable searches and seizures. For the Fourth Amendment to apply, there must be a government actor and a right to privacy. If the Fourth Amendment applies, a government officer needs probable cause to obtain a warrant OR they need an exception.

A. **Government Actor:** The Fourth Amendment only applies to government action. In the case of private individuals conducting a search, if they are acting on their own behalf, there is no Fourth Amendment issue. If they are acting at the request of the government, then they are considered a government actor.

B. Right to Privacy

1. Privacy expectation must be both objective and subjective.
2. There is a right to privacy in your house and its curtilage, but not things you put out (like garbage) or in open fields.
3. *Standing:* The person with the expectation of privacy is the one with standing to challenge a claim. Note: If the house or car, or office, being searched doesn't belong to the defendant, there is no standing to challenge the Fourth Amendment claim.
4. *Records and Files:* If a business holds records or files on their clients, the expectation of privacy in those records belongs to the business, not the client.

C. Warrant Requirement

1. If the Fourth Amendment applies, the government actor must obtain a warrant prior to conducting a search or seizing items.

2. In order to obtain a search warrant, the government officer must show probable cause to a neutral magistrate.
3. The warrant must state with particularity in the description the place to be searched and the things to be seized.

D. Exceptions to the Warrant Requirement

1. *Plain View*: If the officer is lawfully in a place, and sees something that is **OBVIOUSLY** illegal, they may seize it. If the officer has to investigate or search to determine if something is illegal, it's not in plain view.
2. *Consent*: If an individual consents to a search, no warrant is required. However, the individual consenting must have authority to consent. *Note: The authority to consent is judged by what a reasonable officer would think.*
3. *Stop and Frisk*: If an officer has **reasonable suspicion** to believe that a person is carrying a concealed weapon, they may "pat down" or stop and frisk the person, searching for weapons. It must be evident based on feel that something is illegal.
4. *Search Incident to a Lawful Arrest*: When a party is lawfully arrested, the arresting officer may search the person's wingspan. The arrest requires probable cause. *Note: If the party is arrested in a car, the wingspan is the entire car, but not the trunk.*
5. *Automobile Exception*: If there is **probable cause** to believe there is illegal contraband in an automobile, the officer may search the entire auto, including the trunk.
6. *Hot Pursuit*: If an officer is pursuing an individual and has probable cause to suspect that the person has committed a crime, they may arrest and search.
7. *Exigent Circumstances*: If an officer believes the evidence will be moved, or if it is easy to disappear (e.g., flushing drugs down the toilet), this constitutes an exigent circumstance, as does an emergency.

II. FIFTH AMENDMENT

The Fifth Amendment Miranda rights apply when there is a custodial interrogation.

A. Custody

1. Custody means that a reasonable person would not feel free to leave.
2. An arrest is custody, but there are circumstances that fall short of an arrest that are also considered to be custody.

B. Interrogation

1. Interrogation means the government actor is doing something that a reasonable person would expect to elicit a response.
2. Interrogation doesn't have to be a literal question.
3. If a defendant offers up information on their own, or before an officer can act, it is not an interrogation.

C. Invoking Right to Counsel

1. If a suspect clearly and unequivocally invokes their right to counsel after being informed of their Miranda rights, the police must cease the custodial interrogation.
2. After invocation, counsel must be provided before a suspect can be questioned *unless* the suspect (1) initiates contact with law enforcement, (2) is given a fresh set of Miranda warnings, and (3) executes a knowing and intelligent waiver.
3. After 14 days, law enforcement may approach a suspect who has previously invoked the right to counsel and (assuming new Miranda warnings and a valid waiver) reinstate custodial interrogation even without a lawyer present.
4. Requests for an attorney must not be ambiguous.
 - a. Merely mentioning the word “lawyer” or “attorney” does not invoke Miranda rights. Invocation of the right to counsel requires some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. This means it must be unambiguously requested, and a suspect must articulate the desire to have counsel present clearly enough that a reasonable officer in the circumstances would understand the statement to be a request for an attorney.
 - b. An ambiguous request is one in which a reasonable officer in the circumstances would have understood that the suspect *MIGHT* want an attorney. If the request is ambiguous, officers are not required to assess the likelihood that a suspect would wish counsel to be present.

D. Language of Miranda Warnings

1. Law enforcement must inform a suspect that they have the right to the presence of an attorney and that if they cannot afford an attorney one will be appointed for them prior to any questioning if they so desire.
2. However, perfect adherence to the language is not required. The warnings must reasonably convey to the suspect the rights required by *Miranda*.



Evidence Reference Sheet

APPENDIX A-9

I. RELEVANCE

- A. Evidence is relevant if it tends to make the existence of any fact of consequence to the determination of the action more or less probable than without the evidence.
 - 1. **Materiality:** Proposition must be “of consequence.” Need not be an ultimate issue.
 - 2. **Probativeness:** “Any tendency” to make the proposition more or less likely.
- B. Relevant evidence is usually admissible unless it is barred by a public policy exclusion or the court uses Rule 403 discretion to keep it out.

II. WHEN RELEVANT EVIDENCE MAY BE EXCLUDED

- A. **Rule 403—Judicial Discretion:** Court has the discretion to exclude relevant evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time.
- B. **Similar Occurrences:** Evidence involves a time, event, or person OTHER than the one involved in the case at hand.
 - 1. Exceptions: Comparable sales on issues of value; industrial custom as standard of care.
- C. **Public Policy:** Evidence that a person has, or does not have, liability insurance is inadmissible to prove fault or absence of fault.
 - 1. May be admissible to prove ownership, control, or impeachment.
- D. **Subsequent Remedial Measures:** Inadmissible to prove negligence, culpable conduct, or defect in a product or design.
 - 1. May be admissible to prove ownership or control, or feasibility of a precautionary measure.

- E. **Settlement Offers:** In a civil case, evidence of settlements, offers to settle, and related statements are inadmissible to prove liability, validity, or amount of a disputed claim.
1. May be admissible to impeach a witness on the grounds of bias.
 2. There must be an actual dispute.
- F. **Plea Discussions in Criminal Cases:** In a criminal case, offers to plead guilty, withdrawn guilty pleas, plea of nolo contendere (no contest), and statements of fact are inadmissible.
- G. **Offers to Pay Medical Expenses:** Inadmissible to prove liability for the injuries in question.
1. Accompanying statements that may be construed as admissions, such as “I am sorry you broke your leg,” may be severed and are admissible.

III. CHARACTER EVIDENCE

- A. **Definition:** Character evidence refers to a person’s behavior—such as being a bad driver, a mean sibling, a criminal—and is usually inadmissible.

1. Inadmissible to prove that a person acted in accordance with a particular character trait or to show propensity to commit a certain act or crime.
2. Character evidence is admissible when character is an essential element of a claim or defense, such as in defamation cases (character of the plaintiff) or negligent hiring/entrustment cases.

B. Criminal Cases

1. The prosecution may show evidence of defendant’s bad character in its case in chief.
2. A defendant is permitted to introduce evidence of their relevant good character as being inconsistent with the type of crime charged.
3. When a defendant “opens the door” to their relevant good character, it may be done only via reputation or opinion evidence. The prosecution can then rebut the defendant’s good character.
4. Prosecution Rebuttal:
 - a. By cross examining the character witness about specific acts of the defendant to demonstrate that the witness does not know the defendant.
 - b. By calling reputation or opinion witness to contradict the defendant’s witness.

5. Victim’s Character

- a. By a defendant regarding victim’s bad character: A criminal defendant may introduce reputation or opinion evidence of the alleged victim’s character when it is relevant to the defense asserted.
- b. By the prosecution regarding victim’s good character: The prosecution may offer rebuttal evidence of the alleged victim’s good character only after the defendant has introduced evidence of the victim’s bad character.

C. Civil Cases

1. Generally **inadmissible** to prove conduct in conformity.
2. **Admissible** when character is an essential element of the claim or defense, such as negligent hiring, defamation, or child custody.

D. Defendant's Other Crimes or Acts Admissible for Non-Character Purposes

1. Evidence of a defendant's conduct is admissible for purposes other than to show character, and it may be brought in during the prosecution's case in chief.
2. **Not admissible to prove character, but may be offered to show:**
 - a. Identity
 - b. Motive
 - c. Opportunity
 - d. Plan
 - e. Knowledge
 - f. Intent
 - g. Absence of Mistake
3. **Methods of Proof:**
 - a. By conviction
 - b. By evidence that proves the crime or act occurred, such as from witnesses

E. Other Sexual Misconduct to Show Propensity in Criminal/Civil Sex Crime Cases

1. In cases of sexual assault or child molestation, prior specific sexual misconduct of the defendant is admissible.

IV. HABIT EVIDENCE

- A. Evidence of a person's habit or a company's routine is admissible to prove that the person or organization acted in accordance with the habit or routine on a particular occasion.
- B. Unlike character evidence, which is generally inadmissible, habit evidence describes a person's particular routine reaction as opposed to the person's disposition.

V. WRITINGS**A. Authentication of Writings**

1. **Must show the writing is genuine.**

2. Methods of Authentication:

- a. Witness's personal knowledge
- b. Proof of handwriting (lay witness may testify based on opinion)
- c. Expert comparison opinion
- d. Jury comparison
- e. Ancient document rule: documents at least 20 years old, facially free of suspicion, and found in place of natural custody
- f. Solicited reply doctrine: received in reply to prior communication

B. Self-Authenticating Documents**1. Official Publications:**

- a. Certified copies of public/private records
- b. Newspapers or periodicals
- c. Trade inscriptions and labels
- d. Acknowledged documents
- e. Commercial paper
- f. Certified business records

C. Best Evidence Rule

1. In order to prove contents of a writing, recording, or photograph, the original must be produced.
2. **When BER applies:**
 - a. The writing is a legally operative document.
 - b. Witness testifies to facts learned solely from reading about them in a writing.
3. **When BER does NOT apply:**
 - a. Witness with personal knowledge testifies to a fact that exists independently of a writing that records the fact.
4. **Considered Original:**
 - a. Writing itself, any counterpart with the same effect, any negative of film, computer print-out
 - b. Duplicates
5. **Excuses for Non-Production of Original:**
 - a. Lost or cannot be found with due diligence

- b. Destroyed in bad faith
- c. Cannot be obtained with legal process

VI. WITNESSES

A. Competency

1. Competency is presumed if there is personal knowledge, and the witness swears an oath to tell the truth.
2. **Dead Man Acts:** Interested party cannot testify to a transaction or communication with the deceased. **(No dead man's rule under FRE.)**

B. Use of Documents While Testifying

1. **Refreshing Recollection:** Witness may not read from prepared memo; must testify on basis of current recollection but if memory fails, may be shown memo to jog memory.
2. **Past Recollection Recorded**—Hearsay exception.
 - a. Witness once had personal knowledge
 - b. Made or adopted by witness
 - c. Making was when event was fresh in witness's memory
 - d. Accurate when made

C. Opinion Testimony

1. **Lay opinion:** Admissible if rationally based on witness's perception and helpful to jury in deciding a fact. Not based on specialized knowledge.
2. **Expert opinion:** Requires:
 - a. Education and/or experience
 - b. Scientific, technical, or specialized knowledge
 - c. Reasonable certainty and based on personal knowledge; or other evidence in the trial record, such as exhibits; or facts outside the record reasonably relied on by experts in the field
 - d. Testing of principle/method:
 - i. Rate of error
 - ii. Acceptance by experts
 - iii. Peer review/publication

VII. IMPEACHMENT

- A. **Definition:** Any party may impeach, including the party calling the witness, once credibility has been attacked.

B. Methods

1. **Prior Inconsistent Statement:** **NOT** hearsay if given under oath at trial, deposition, or hearing. Extrinsic evidence is admissible only if the witness is given the opportunity to explain or deny before introduction.
2. **Impeachment with Evidence of Bias, Interest, or Motive:** To suggest testimony is false, slanted, or mistaken in party's favor.
3. **Sensory Deficiencies:** Anything that could affect the witness's perception or memory.
4. **Contradiction:** Through confrontation of witness, may try to obtain admission of mistake or lie.
5. **Bad Reputation or Opinion About Witness's Character for Truthfulness:** Call character witness to testify that target witness has bad reputation for truthfulness.
6. **Criminal Convictions:** To suggest testimony is false.
7. **Prior Bad Acts Involving Untruthfulness:** Confrontation on cross examination is the only permissible means. No extrinsic evidence.

VIII. HEARSAY

A. **Definition:** Out-of-court statement of a person and offered to prove the truth of the matter asserted.

1. Not allowed unless an exception applies.
2. Not hearsay if *not* offered to prove the truth of the matter asserted in the statement.

B. Hearsay Exclusions

1. Prior inconsistent or consistent statements of testifying witness made under oath in a prior judicial-like proceeding.
2. Party Admissions

C. Hearsay Exceptions

1. Former Testimony
2. Dying Declarations
3. Excited Utterance
4. Present Sense Impression
5. Then-Existing Mental or Physical Condition (Present State of Mind)
6. Statement for Purposes of Medical Diagnosis or Treatment
7. Records of Regularly Conducted Activity

8. Public Records

9. Recorded Recollections

10. Learned Treatise

D. **Confrontation Clause:** Applies in criminal cases. Statements are hearsay if declarant is unavailable and the defendant has no opportunity for cross examination.



Family Law Reference Sheet

APPENDIX A-10

I. SPOUSAL SUPPORT

- A. In all states, marriage establishes a mutual support obligation between spouses. However, the spousal support obligation is limited by the common law doctrine of nonintervention, which disallows judicial intervention in an intact family.
- B. **Maintenance (aka alimony):** The transfer of money from one ex-spouse to the other for a period of time after the divorce decree is entered. Based on economic need, but this is not the sole factor.

II. CHILD CUSTODY

- A. **Standard for Decision:** Courts use the best interest of the child.

1. Common Factors:

- a. Child preferences (courts are not bound by this)
- b. Parental caretaking abilities
- c. Emotional bonds
- d. Caretaking duties performed by each parent seeking custody
- e. Child relationships
- f. Willingness to co-parent
- g. History of drug use and/or domestic violence

- B. **Procedural Issues:** Procedural issues in custody determinations include jurisdiction to decide custody, assessing the child's preferences, and providing counsel for the child.

- 1. **Home-State Jurisdiction:** The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) gives jurisdictional priority to the child's home state, which is the state in which

the child has lived with at least one parent for the six months immediately preceding the initial custody determination.

- a. Applies even if the child is not present in that state at the time.
- b. Does not require that the home state have personal jurisdiction over the respondent parent.
- c. *Child Under Six Months*: If parents cannot agree, then the home state can be any state the child lived from birth with a parent or person acting as parent.

C. **Non-Parental Rights**: Non-parents have standing to seek custody rights with respect to a child in the presence of extraordinary circumstances. However, the parent is always given a preference.

1. **Extraordinary circumstances include:**

- a. Surrender
- b. Abandonment
- c. Persistent neglect
- d. Unfitness
- e. Unfortunate or involuntary disruption of custody over an extended period of time
- f. Other equivalent but rare, extraordinary circumstances that drastically affect the welfare of the child

III. CONSTITUTIONAL LIMITATIONS

- A. The Supreme Court has held that the parental right to the care, custody, and control of a child is constitutionally protected under the Fourteenth Amendment. However, this is not absolute, and may be subject to limitation where the child's health or safety might be jeopardized.
- B. The parent has a constitutional right to raise their child; for a court to pull the child away from their parents, it is not just "best interest" that is required, but that the parent is unfit.
- C. **State Action**: The Supreme Court has held that things like vaccine mandates are lawful and within the state's police power to protect the public health.

Real Property Reference Sheet

APPENDIX A-11

I. ESTATES AND FUTURE INTERESTS

A. Fee Simple Absolute

1. Conveyancing Language: O to A and his heirs, O to A
2. Future Interest: None.
3. Notes: This is the highest interest you can have. Most estates are fee simple.

B. Life Estate

1. Conveyancing Language: To A for life
2. Future Interest: Remainder or Reversion
 - a. Remainder: In a third person, can be vested or contingent.
 - i. Vested: Third party doesn't have to do anything.
 - ii. Contingent: Third party must do something.
 - b. Reversion: Held in grantor.
3. Notes:
 - a. The estate terminates at the end of A's life.
 - b. A life tenant is obligated to pay only the interest on a loan owed for the tenancy. The remainderman is liable for the principal. Further, a life tenant is liable to pay taxes on the property but not insurance.

C. Fee Simple Determinable

1. Conveyancing Language: O to A so long as . . . ; O to A during . . . ; O to A until . . . ; O to A while . . .
2. Future Interest: Possibility of Reverter
3. Note: The estate terminates AUTOMATICALLY when the condition or specified event fails to happen.

D. Fee Simple Subject to Condition Subsequent

1. Conveyancing Language: O to A and his heirs, but if the land is not used as a shoe store, O may reenter the land.
2. Future Interest: Right of Reentry
3. Note: Termination is not automatic; the grantor must take judicial action.

E. Fee Simple Subject to Executory Interest

1. Conveyancing Language: To A and his heirs, so long as . . . THEN to B
2. Future Interest: Executory Interest
3. Note: This is created in a third party.

II. RULE AGAINST PERPETUITIES

- A. No interest in land is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

B. Does It Apply?

1. RAP doesn't apply to everything. It applies to:
 - a. Contingent Remainders
 - b. Vested Remainders Subject to Open
 - c. Executory Interests
 - d. Rights of First Refusal

C. Find a Measuring Life

1. *Life in Being*: The measuring life must be a life in being, meaning they must be born.
2. *Known and Ascertained*: The measuring life must be known and ascertained, meaning we must know who they are. If they are not named, this can be tricky. For example, we don't know "youngest daughter" unless the conveyance is in a will.

- D. **Time of Measurement**: You measure at the time of conveyance. If the conveyance is in a will, you measure at the time the will is probated.

III. TYPES OF SHARED ESTATES

A. Joint Tenants

1. Joint tenants have rights of survivorship, meaning that they both have an undivided interest in the whole. This means that a joint tenancy does not get probated or “transferred.”
2. *Creating Joint Tenancies*: Must be created by the same title, at the same time, with the same interest and the same possession (TTIP).
3. *Destroying Joint Tenancies*: Joint tenancies are destroyed if one party transfers titles. If the JT is destroyed, then it becomes a tenancy in common.
 - a. Mortgages: If one party takes out a mortgage on their interest in a JT, whether that severs the JT depends on the jurisdiction.
 - i. *Title Theory*: If the jurisdiction follows title theory, then the mortgage severs the JT and it becomes a tenancy in common.
 - ii. *Lien Theory*: If the jurisdiction follows lien theory, the JT is not destroyed, and the lien only stays on one party’s interest. This means that if that party dies, so does the mortgage.

B. Tenancy in Common

1. Two or more parties share an interest in the tenancy.
2. Doesn’t have to be equal interest.

C. **Landlord/Tenant**: When the parties to a contract express their agreement in a writing with the intent that it embody the final expression of their bargain.

1. Sublease Versus Assignment

- a. **Sublease**: A tenant who has transferred less than all of their interest has created a sublease.
 - i. A true sublessee is not in privity of estate with the landlord, so may not be liable for the tenant’s failure to pay the rent or fulfill other obligations.
- b. **Assignment**: A transfer by a tenant of all of their interest in a leasehold is an assignment, despite any words to the contrary.
 - i. An assignment creates privity of estate between the landlord and the assignee. Therefore, the assignee is liable to the tenant’s landlord for rent, although the tenant is also liable as a surety.

IV. STATUTE OF FRAUDS

A. ALL land sale contracts must:

1. Be in writing,
2. Be signed by the party to be charged, and

3. Contain all of the essential terms:

- a. Parties;
- b. Property description;
- c. Terms of price; and
- d. Payment.

B. Exceptions to Statute of Frauds

1. **Part Performance:** Under the doctrine of part performance, either party may seek specific performance when the acts of performance constitute persuasive evidence of the existence of a contract.

a. Acts that may constitute such evidence are:

- i. Payment of all or part of the purchase price;
- ii. Possession by the purchaser; or
- iii. Substantial improvement of the property by the purchaser.

b. **Note:** Most jurisdictions require at least two of the above three acts to establish sufficient part performance.2. **Full Performance:** When a party to an oral contract who has promised to convey real property performs, that party can enforce the other party's oral promise unless the promise is itself the transfer of a real property interest.

- a. *Example:* During an in-person conversation, a seller agrees to transfer land to a buyer in exchange for the buyer's promise to pay \$150,000 to the seller. The seller tenders the deed to the buyer and the buyer accepts the deed. The seller can enforce the buyer's oral promise to pay \$150,000 to the seller.

3. **Detrimental Reliance:** Specific performance may also be permitted when the party seeking enforcement has reasonably relied on the contract and would suffer such undue hardship that the other party will be estopped from asserting the Statute of Frauds as a defense.4. **Admission of Contract:** A party may be able to enforce an oral land sales contract when the other party admits to the existence of the contract.

V. RECORDING ACTS

A. When They Apply

1. Designed to protect subsequent bona fide purchasers (so second purchasers, for value, without notice).
2. Make sure the recording act actually APPLIES before looking at the types of acts below. For example, many questions will ask about recording acts, but there will be NO subsequent purchaser, so the recording act doesn't apply.

- B. **Notice Act:** No conveyance of an interest in real property shall be valid against subsequent bona fide purchasers until the same is recorded according to law.
1. Subsequent purchaser wins if they didn't have notice.
- C. **Race Act:** No conveyance of an interest in real property shall be valid against third parties until it is recorded according to law.
1. Subsequent purchaser wins if they recorded first.
 2. Least common.
- D. **Race Notice Act:** No conveyance of an interest in real property shall be valid against subsequent bona fide purchasers whose conveyance is first duly recorded.
1. Subsequent purchaser wins if they are bona fide (paid value, no notice) AND record first.



Secured Transactions Reference Sheet

APPENDIX A-12

I. SECURITY INTEREST

- A. A transaction will fall under Article 9 of the Uniform Commercial Code if it involves financing a transaction for purchase of a particular item or general loan. The agreement will create a collateral agreement, giving rights in an item to a lender.
- B. A security interest is a right, or interest, in personal property or fixtures. It is not an ownership but a consensual encumbrance that secures an obligation's payment or performance.
- C. The security interest protects creditors, in case the debt is not paid when due, by allowing the creditor to repossess the collateral, retain the collateral, or sell the collateral and apply the proceeds to the debt.

II. ATTACHMENT

- A. An enforceable security interest exists in the debtor's personal property, or the creditor that holds the security interest is a secured creditor with rights in the debtor's personal property.
- B. For security to attach:
 - 1. The credit must provide some value to the debtor;
 - 2. The debtor must have rights in the collateral or the power to transfer rights in the collateral to a third party; and
 - 3. The debtor must authenticate a written agreement that grants the creditor rights in specific collateral and reasonably describes the collateral.

III. PERFECTION

A. Perfecting a security interest provides notice to third parties that the perfecting secured creditor has an enforceable security interest in the debtor's personal property.

B. Five Ways to Perfect

1. Secured party may file a properly completed financing statement with the appropriate office;
2. Secured party may take possession of the collateral;
3. Secured party may take control of the collateral;
4. Secured party may be automatically perfected upon attachment, without further action (rare); and
5. Secured party must use the state's certificate-of-title system (for specific types of collateral).

IV. ASSIGNMENT OF RIGHTS AND DUTIES TO SECONDARY OBLIGORS

A. A secondary obligor may become obligated to perform the secured party's duties, relieving the secured party of said duties if:

1. The secured party assigns its rights to the secondary obligor;
2. The secured party transfers the collateral to the secondary obligor, and the secondary obligor agrees to accept and assume its duties; or
3. The secured party subrogates its rights to the collateral to the secondary obligor.

Torts Reference Sheet

APPENDIX A-13

I. INTENTIONAL TORTS

A. Intentional Infliction of Emotional Distress requires

1. An act by D amounting to extreme and outrageous conduct;
2. Intent or recklessness;
3. Causation; and
4. Damages: Severe emotional distress/actual damages required

Note: This doesn't mean physical injury or physical damages are required. It means that actually severe emotional distress occurred.

II. NEGLIGENCE

A. Negligence is defined as duty, breach, causation (actual and proximate) and injury.

B. Duty

1. Generally, a person has no duty to act, or rescue. However, if a person begins a rescue, they must do so reasonably. This means they may not leave the victim in a worse position.
2. Once a person begins to act (driving, walking, etc.), they must act as a reasonably prudent person would.
3. Duties owed by landowners:
 - a. **Duty to invitee:** An invitee is someone on the land for the mutual advantage of the landowner and the invitee. They are also referred to as "business guests."
 - i. A landowner has a duty to an invitee to generally make things safe and warn of all known dangers. This means that there is an affirmative duty to protect the invitee against all dangers of which the invitor knew or should be aware.

- b. **Duty to licensee:** A licensee is someone on the land with the permission of the landowner, but who does not bestow any benefit upon the landowner.
 - i. Landowners must warn licensees of known, hidden dangers.
- c. **Duty to trespasser:** A trespasser is someone on the land without permission.
 - i. There is no duty of care owed to unknown trespassers. If a trespasser is known to the landowner, the landowner must warn of known, dangerous conditions.
- d. **Child trespassers and attractive nuisance:**
 - i. An attractive nuisance is an artificial condition on one's property that may attract children and subsequently injure them.
 - ii. The elements are (1) a dangerous condition on one's land of which one should be aware, (2) the knowledge that children frequent the area, (3) the fact that children are unable to appreciate the risk, and (4) the expense of remedying the danger is slight when compared to the risk.

C. Breach

- 1. A breach occurs when the defendant acts below the standard of care. This means that in judging whether an actor's conduct is reasonable, the trier of fact will consider the burden of taking precautions as compared to the risks inherent in the actor's conduct and the probability that those risks will materialize.

D. Actual Causation

- 1. A defendant actually causes a plaintiff's injury if the defendant's action is a "but-for" cause of the injury, meaning that the injury would not have occurred "but for" (had it not been for) the defendant's action.

E. Proximate Causation

- 1. Proximate cause is the legal cause, or whether an injury is "foreseeable."
- 2. Liability typically extends only to individuals within the zone of risk. If an actor's conduct "creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured." Restatement (Second) of Torts § 281, comment c.
- 3. Liability also typically extends only to foreseeable hazards. The actor whose conduct is responsible for an altogether unexpected type of injury usually escapes liability. See *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928).
- 4. Injuries established from running from the danger are foreseeable.

F. Injury

- 1. In order for a plaintiff to have a claim for negligence, the plaintiff must be actually injured or damaged in some way.

G. Parents and Children

1. Parents are not vicariously liable (see below) for torts of their children but may be liable if they are negligent in their supervision of their children.

III. DEFAMATION

- A. Defamation is the act of damaging a person's reputation. It requires that there be a published, defamatory statement, and some degree of fault.

B. Defamatory Statement

1. The statement must be false.
2. The statement must be something that a reasonable person would find to be an injury to their reputation.
3. The statement has to be understood as being of and concerning the plaintiff.

C. Published

1. The statement must be published to a third party and understood by that third party.
2. This doesn't mean "published" in a traditional sense, but rather communicated, in some fashion, to at least one third party.

D. Fault

1. *Public Figure*: If the plaintiff is a public figure, they must prove the defendant acted with actual malice.
2. *Private Figure*: If the plaintiff is a private figure, they merely prove the defendant was negligent.

E. Libel Versus Slander

1. **Libel** is written, or permanently fixed, defamation.
 - a. No requirement for actual damages.
2. **Slander** is spoken, or unfixed, defamation.
 - a. Must prove actual damages, unless slander per se.
 - b. Slander per se is a statement that relates to someone's profession (or employment), imputes unchastity to a woman, or accuses someone of having a loathsome disease.
 - i. No need to prove actual damages.

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

- A. Defendant creates foreseeable risk of physical injury to Plaintiff,

- B. Plaintiff must be within zone of danger, and
- C. Plaintiff must suffer physical symptoms from distress.
- D. A bystander outside zone of danger (P) who sees D negligently injuring another can recover damage for their own distress as long as P and the injured person are closely related, P was recently at scene, and P personally observed or perceived event; P can also recover where D's negligence creates great likelihood of emotional distress.

V. Strict Liability

In general, strict liability means that there is no "fault." If the defendant engages in the activity, they are strictly liable for any injuries that result from that activity. The defendant will be liable when they damage another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.

A. Wild Animals

- 1. A wild animal is an animal not normally kept as a pet.
- 2. A wild animal is something with "dangerous propensities."
- 3. The owner is strictly liable for injuries resulting from the animal's dangerous propensities, including injuries that result from running away from, or being frightened by, the animal.
- 4. **Note on domestic animals:** *There is no strict liability for domestic animals, unless the owner knows the animal has a history of being dangerous. For example, if a dog has bitten people before, the owner may become strictly liable for future bites.*

B. Ultra-Hazardous Activities

- 1. Strict liability also applies to those engaged in ultra-hazardous activities, such as blasting.
- 2. Under the Second and Third Restatements, strict liability applies to an "abnormally dangerous activity."
- 3. The Restatement (Second) lists six factors that are to be considered in determining whether an activity is abnormally dangerous:
 - a. Existence of a high degree of risk of some harm to the person, land, or chattels of others;
 - b. Likelihood that the harm that results from it will be great;
 - c. Inability to eliminate the risk by the exercise of reasonable care;
 - d. Extent to which the activity is not a matter of common usage;
 - e. Inappropriateness of the activity to the place where it is carried on; and
 - f. Extent to which its value to the community is outweighed by its dangerous attributes.
- 4. The essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.

5. Under the Third Restatement, the strict liability determination is based on only two factors:
 - a. The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
 - b. The activity is not one of common usage.

C. Strict Products Liability

1. A manufacturer or distributor of a defective product will owe an injured person compensation even if the defendant took reasonable steps to prevent the defect. In strict product liability cases, it will not matter whether the defendant was negligent.
2. *Manufacturing Defect*: The defect was not intended, i.e., it's part of the manufacturing process.
3. *Design Defect*: A design defect exists when a defect is inherent in the design of the product itself.
 - a. In a products liability case, a plaintiff can establish the existence of a design defect only when they prove there is a hypothetical alternative design that would be safer than the original design, as economically feasible as the original design, and as practical as the original design, retaining the primary purpose behind the original design despite the changes made.
4. *Failure to Warn*: The product is designed as safely as it can be, while still carrying out its purpose, but the manufacturer failed to warn of a danger.

VI. NUISANCE

- A. **Private Nuisance**: When the plaintiff's use and enjoyment of their land is interfered with substantially and unreasonably through defendant's activity. Generally we use a balancing test and look to what a reasonable person would find to be an interference.
- B. **Public Nuisance**: When a person unreasonably interferes with a right that the general public shares in common.

VII. DEFENSES

A. Assumption of the Risk

1. The plaintiff voluntarily and knowingly assumed the risk at issue to the dangerous activity in which the plaintiff was participating.
2. Essentially, when the plaintiff knows about a particular risk and, through words or conduct, accepts that risk.

VIII. OTHER TORT CONCEPTS

A. Joint and Several Liability

1. Generally, two or more parties are both liable for the same tort.
2. When two or more parties are *jointly and severally liable* for a tortious act, each party is independently liable for the full extent of the injuries stemming from the tortious act.

B. Vicarious Liability

1. An employer is liable for the acts of its employee, if the employee is acting within the scope of employment.
2. *Employee Versus Independent Contractor*: An independent contractor is one who, by virtue of their contract, possesses independence in the manner and method of performing the work they have contracted to perform for the other party to the contract. Independent contractors are usually paid by the job instead of receiving ongoing salaries; the individual who hires an independent contractor typically does not supervise the contractor's activities or retain a right to control their activities.
 - a. Typically, one who employs an independent contractor is not vicariously liable for the contractor's acts or omissions. But when an actor "employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work . . . [they are] subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Restatement (Second) of Torts § 427.

Decedents' Estates Reference Sheet

APPENDIX A-14

I. HOLOGRAPHIC WILLS

- A. A holographic will is handwritten by the testator.
- B. **Admissibility:** Admissible in probate if it evidences testamentary intent (intent to dispose of property after death) and is entirely handwritten by the testator, signed by the testator, and dated by the testator.
- C. **Validity:** Under the Uniform Probate Code, a holographic will is valid if the signature and the material portions of the will are in the testator's handwriting. The material portions are the provisions that dispose property and identify the recipients. The UPC does not have dating requirements.
- D. **Incorporation by Reference:** A holographic will may validly incorporate by reference a writing that is not in the testator's handwriting. This applies to unattested and attested holographic wills.

II. CONTINGENT OR CONDITIONAL WILLS

- A. In determining whether a will is conditional or contingent, a court must first determine whether the happening of the possibility referred to is a condition to the operation of the will, or whether the happening of the possibility was only a statement of the motive or inducement that led to the preparation and execution of the instrument.
- B. A number of factors can be considered in resolving this issue, including where the will was kept after the purported condition lapsed, whether there were any other testamentary documents, whether setting aside the will would result in intestacy, and whether effectuating the terms of the will would result in an inequitable distribution.

III. EXTRINSIC EVIDENCE

- A. When interpreting a will, a court is only permitted to consider extrinsic evidence when the terms of a will are ambiguous.
- B. Upon a finding of ambiguity, a court may consider both direct and circumstantial evidence in an effort to best determine the intent of the testator.

IV. PREDECEASED BENEFICIARIES

- A. When a beneficiary to a will predeceases the testator, the beneficiary's devise will lapse into the residuary of the will or, in the absence of a residuary, into the intestate estate.
- B. As an exception to the harshness of this general rule, most states have enacted **anti-lapse statutes**, which permit a beneficiary's heirs to take the beneficiary's share of the estate.

V. OMITTED HEIRS

- A. The UPC and most courts attempt to limit the possibility of an accidental disinheritance by allowing a child who is born after the execution of a will to take in equal share to the other children included in the will. All states have a statute providing a forced share of an estate for a child who was born after the will was signed but was not provided for in the will.
- B. If a child was born before the execution of the will, the probate court should follow the face of the will and omit the child from distribution unless it is clear that the omission was accidental.