



## SEPERAC-F19 EXAM-COMBINED MBE OUTLINE WITH NCBE RULES RELEASE DATE: NOVEMBER 15, 2018

### SEPERAC COMBINED MBE OUTLINE OVERVIEW

According to NCBE, "*MBE scores are highly related to total bar exam scores.*" I have likewise found that if examinees do well on the MBE, they typically pass the exam. The MBE tests both new topics (based on their current MBE questions) and past topics (based on their released MBE questions). This outline is intended to help you with both by merging my MBE Black Letter Law Outline with my MBE NCBE Rules Outline. This 285 page SEPERAC COMBINED MBE OUTLINE is keyed to the 2019 NCBE Subject Matter outlines and broken down into 175 MBE categories that represent the ABC level items in the 2019 NCBE Subject Matter outlines. For each of the 175 categories, this outline contains the black letter law expected to be tested on the F19 MBE along with rules for every past tested NCBE MBE question (1,800+ rule synopses). In addition, the expected number of MBE questions on the upcoming F19 MBE is reported for each of the 175 categories. There are 25 pages of black letter law for each MBE subject and I regard each page of black letter law as representing one expected MBE question. There are an additional 110 pages of MBE rules built into this outline, making this outline a total of 285 pages. There is no outline that will better represent the upcoming F19 MBE – the black letter law sections of the SEPERAC COMBINED MBE OUTLINE efficiently tell you what to expect on the current MBE while the built-in MBE rules concisely categorize what was previously tested.

The majority of my time is spent trying to better understand what is tested on the MBE and making an outline that reflects those beliefs that is proportional to the amounts those items will contribute to your score. The result is 175 pages of black letter law (25 pages per MBE subject) where each page is expected to represent 1 question you will see on the MBE. While most bar outlines suffer from outline bloat (always adding content but never re-balancing), this outline only contains what I expect to be tested and is proportioned accordingly (meaning you are taking calculated risks using my materials). For example, my section on RAP is much smaller than any similarly sized bar outline. Meanwhile, my section on DJ is much larger than similarly sized outlines. However, subscribers should treat this outline as their MBE study bible because it is a very concise outline that pinpoints what will be on the exam, both proportionally and contextually, making it an excellent reflection of the F19 MBE exam. For example, the new areas the MBE currently tests (e.g. Fair Housing Act, broker's commissions, title insurance, zoning/non-conforming uses, voluminous summaries, and many more) are proportionally and contentually covered in the outline. I strongly believe you can pick up 3-6 MBE points just from this outline's coverage of these new MBE areas (which most other outlines fail to cover appropriately). In contrast, if something is not significantly covered in the black letter law sections of this outline, it is not important for the upcoming exam.

The past MBE topics are reflected in the 1,800+ built-in MBE rules. This outline contains synopses of the law for each of the 1,800+ released NCBE MBE questions (these are the same questions in Adaptibar/Strategies & Tactics, Barmax, etc. and includes rules for the recently released 2017 MBE Study Aid questions). This outline distills the 1,800+ MBE questions into rule statements so examinees can get the gist of what was tested on the released MBE questions without having to go through the questions. This means you will see every legal concept that NCBE has tested (and released as a practice question) from 1991 to present. If you answer the released NCBE questions, this serves as a great second perspective, and if you don't answer all the released NCBE questions, this serves as an excellent hedge. More so, these rules are organized by category so you can see the different ways each MBE category has been tested. Furthermore, since knowledge is constructed, seeing the rules associated with the black letter law will make it easier for you to understand the law. Put simply, the better you understand the law in this outline, the better you will score on the F19 MBE and the more likely you will pass the exam.



## **HOW TO USE THE OUTLINE**

Each of the 175 categories in this outline are ordered based on the ABC level of the 2019 NCBE Subject Matter outlines. Each of the 175 categories has a heading that appears as follows:

### **ConLaw; Cat II: Sep of Powers (A. The powers of Congress) – MBE: 1-2 Qs**

The prefix tells you the Subject (e.g. **ConLaw**), the NCBE Category (e.g. **Cat II: Sep of Powers**), and the NCBE ABC level (e.g. **A. The powers of Congress**). The next part of the heading tells you how many graded MBE questions (out of 175 graded MBE questions) you can expect to see on the MBE exam from this category. For example, **MBE: 1-2 Qs** means that the subcategory of Constitutional Law Separation of Powers: Powers of Congress should represent between 1- 2 of the 175 graded questions on the upcoming Feb 2019 MBE.

After each category, I outline what I regard as the relevant black letter law to cover the majority of what you can expect to see tested on the MBE along with any rules I wrote based on the released NCBE MBE questions. Each MBE rule section appears as follows:

### **Seperac Rules for NCBE MBE Issues Tested on Sep of Powers – The powers of Congress**

Underneath this heading is a box containing a rule I wrote for every released NCBE question (from the 1991 (400 Qs), 1992 (570 Qs), 1998 (200 Qs), 2006 OPE 1 (100 Qs), 2008 OPE 2 (100 Qs), 2011 OPE 3 (100 Qs), 2013 OPE 4 (100 Qs), 2017 MBE Study Aid (210 Qs), and 2015-2017 NCBE sample questions (31 Qs). Each rule has a rule number prefix that can be used to follow along if you are listening to MP3s of the rules. At the end of each rule is a parenthetical suffix to tell you from which exam the rule is based on.

## **OTHER SERVICES I PROVIDE TO SUBSCRIBERS**

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If you failed the UBE exam, I can provide you with a free 15 page confidential analysis of your scoring:  
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If you also have your written MEE/MPT answers, I can provide you with a free 40-page MEE/MPT Analysis. More information regarding this report is here: <http://www.seperac.com/#RETAKERS>

If you are in a non-UBE state (e.g. California), while I can't send you a score report, I can give you a breakdown of your MBE subscores and percentiles: <http://seperac.com/subscoreform.php>

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## CivPro: Cat I: Jurisdiction (A. Federal SMJ) – MBE: 1-2 Qs

### 1. Federal SMJ Overview

- a. **Jurisdiction** – the power of a court to adjudicate particular types of claims
- b. To initiate a lawsuit against a defendant, there must be (1) subject matter jurisdiction (SMJ); (2) personal jurisdiction (PJ); and (3) service of process/notice.
  - (i) Any person (including the court) can raise challenges to SMJ at any time (if a case is improperly brought before the court, it is being heard in violation of the Constitution and can be dismissed at any time, even on appeal).
  - (ii) Even if fed court makes a mistaken judgment on SMJ or a party fails to challenge SMJ, it does not waive the inquiry (i.e. you can always object)

c. Fed courts are courts of limited jurisdiction (2) cases: (1) Fed question; OR (2) diversity

d. NOTE: alien = outside US, foreign

### 2. Federal Question (FQ) – Art III pe

- a. If a claim turns on a substantial federal question:
  - (i) Must be directly arising under the Constitution, laws, or treaties of the US
  - (ii) Complaint must show a substantial federal question (interest) – citizenship is irrelevant
  - (iii) Well-pleaded complaint rule – the federal question must be asserted in the complaint – ask whether P is enforcing a fed right. D's claims in answer or counterclaim are irrelevant.
- b. BUT if the federal law in question does not provide a remedy and was not intended to provide a claim, then no FQ jux (e.g. Negligence claim based on violation of FDA regulation)
- c. Some FQ cases have exclusive fed jurisdiction (e.g. patent infringement, fed securities laws, etc.)
- d. If state law creates a cause of action, fed court can still exercise FQ jux if the complaint raises a real and substantial issue of fed law & the outcome necessarily depends on resolving this fed issue.

### 3. Diversity – Amount in controversy **must exceed 75K**, AND the action must be between (i) **citizens of different states**, OR (ii) **a citizen of a state & a citizen or subject of a foreign country**

- a. **Complete diversity rule** – there is no diversity of citizenship if any P is a citizen of the same state as any D (though, there can be co-Ps or co-Ds from the same state)
  - (a) Test for diversity **when the case is filed** – subsequent change in a party's citizenship is irrelevant
  - (b) All aliens are considered of the same "state," meaning two party was joined later and was not an indispensable party (court under alienage/diversity).
- b. **Individuals** – citizen if **domiciled** in a state, which is established by:
  - (i) **Presence in state at some point** WITH
  - (ii) **Intent** (subjective) to make it a permanent or fixed home
    - (a) Alien admitted to the US for **permanent residence** is treated as a citizen (e.g. Japanese citizen with a green card is living in NY car)
    - (b) US citizen permanently domiciled abroad is neither a citizen nor a resident (cannot sue or be sued under diversity jurisdiction rules).
      - (1) An American domiciled in France is not a *citizen of a state*
    - (c) Determining **domicile** is primarily a finding of fact, which is **erroneous**.
- c. **Corporations** – citizenship equals: (i) all states where **incorporated**, AND (ii) the one state where the company has its **principal place of business** (PPB) (a corp, unlike a natural person, can be a citizen of more than one state at a time)
  - (i) PPB is determined in 2 ways – (i) **nerve center** (headquarters – where decisions are made) & (ii) **muscle center** (major production or service activity)
  - (ii) Generally, courts consider nerve center as the PPB
- d. **Unincorporated associations** (e.g. partnership, labor union, etc.) – look to the citizenship/domicile of **all** members (for partnerships, that includes **general & limited partners**; so a partnership can be a citizen of all 50 states), so if any partner lives in the same state as the other party, diversity is defeated
  - (i) NOTE – **LLC treated as unincorporated association so LLC is citizen of all states its members are citizens**
- e. **Decedents, minors, & incompetents** – look to **their** citizenship, NOT the citizenship of their representative
  - (i) the legal representative is deemed to be a citizen **only** of the same state as the decedent/infant/incompetent
  - (ii) You can't create diversity by appointing a representative who has a different citizenship than the decedent/infant/incompetent

### 4. Amount in controversy

- a. **Good faith allegation** that the claim in the complaint exceeds 75K (e.g. 75,000.00 is NOT OK but 75,000.01 is OK) –

This outline is 285 pages long and it is broken down into 175 MBE categories (keyed to the 2019 NCBE subject matter outlines). For all 175 MBE categories in the NCBE Subject Matter outlines, I report how many graded MBE questions you can expect to see on the upcoming MBE exam. This is helpful when determining how to allocate your early study time and whether a particular category deserves more attention

This is the outline black letter law section for each category. My subject matter outlines are up to date, on-point, well organized and detailed. For example, a subscriber who scored a 174 on the MBE in NY and then a 177 on the MBE in NJ told me: "... as far as the MBE is concerned, your outlines have been most useful since you emphasize the fine distinctions."

- (iii) Court must remand *anytime it finds there is no fed jurisdiction*
- f. *Waiving the right to remove:*
  - (i) D who files a *permissive counterclaim* in state court probably *waives the right to remove*
  - (ii) D who files a *compulsory counterclaim* in state court probably does NOT waive the right to remove

**Seperac Rules for NCBE MBE Issues Tested on Jurisdiction – Federal SMJ**

- Rule 1: A *defendant* may **remove a case to federal court** if: (1) the federal court would have *subject matter jurisdiction* over it; (2) *all defendants join in the petition* for removal; (3) *no defendant is a resident of the forum state*; and (4) removal is sought within **30 days** after the defendant originally received service. Only Defendants can exercise the right of removal – a plaintiff CANNOT remove a case to federal court ((e.g. if a state case is removed to federal court by the plaintiff, it can be remanded back down to state court by the defendant)). [2017]
- Rule 2: For *diversity jurisdiction*, each party must be a citizen of a state or foreign country, BUT *at least one party must be a US citizen* ((e.g. two foreign aliens may not sue in federal court under alienage/diversity, but a person domiciled in a state may sue a citizen of a foreign country in fed district court)). [2017]
- Rule 3: The U.S. Supreme Court can **review a state court judgment** only if it rested on federal grounds – there is no Supreme Court review if the federal issue doesn't affect the outcome ((e.g. if the highest state court rules under both state and federal law, the Supreme Court can't review the federal claim because the issue has been decided on *adequate and independent state grounds*)). [2017]
- Rule 4: Under the FRCP, a party must state as a counterclaim any claim that the party has against an opposing party if the claim arises out of the *same transaction or occurrence* as the opposing party's claim. If the counterclaim is compulsory, it is within the supplemental jurisdiction of the court to entertain and no independent basis of federal jurisdiction is required. Thus, as between a third party plaintiff (i.e. the original defendant) and a third party defendant (i.e. a defendant sued by the original defendant), if the third party defendant counterclaims back against the third party plaintiff and the counterclaim is compulsory, there is supplemental jurisdiction even if the counterclaim does not independently meet the requirement for diversity suits. [2017]
- Rule 5: If a claim asserts *federal trademark infringement*, it arises under federal law and subject-matter jurisdiction is proper as a general federal-question action. [2015]

**CivPro: Cat I: Jurisdiction (B. Personal jurisdiction) – MBE: 1-2 Os**

1. **In-state PJ** – courts have jurisdiction over anything within their borders. For example, PJ exists:
  - a. If D is an individual who resides or works in the state;
  - b. If D is a business incorporated in the state or has its principal place of business in the state
2. **Out-of-state PJ** – questions on PJ mainly arise with regard to a court's power to bind a D who is not physically present in the forum state. To establish out-of-state PJ, two analyses required:
  - a. Statute Analysis – there must be a statute/rule that gives the court jurisdiction over the parties (e.g. long-arm statute)
    - (i) E.g., PJ may exist if D is served in the state; OR is domiciled in the state; OR does certain things in the state (e.g. tort or business contacts).
  - b. Constitutional Due Process Analysis – if exercise of PJ pursuant to the statute/rule is constitutional

For the entire universe of released NCBE questions (about 1,830 questions), there is an MBE rule I wrote that synthesizes the legal issue being tested in that question. If you are limited in MBE practice time, studying these rules is a great way to pick up the legal knowledge without having to go through the trouble of answering these questions. Furthermore, since the older MBE questions are more straight-forward than the current MBE questions, you really don't need to answer the older questions from a practice point of view, but you still want to know the legal principles tested because this is what NCBE regards as important. Many of these concepts are re-tested over and over so you are making a mistake not to know them.

"contacts" within the state so that requiring D to defend the of law (5th and/or 14th Amendments) by offending e"  
 consent, or being present in the state when process is served; relatedness, and fairness:  
 asserted against D if: (1) D has *minimum contacts* with the s *related to* these contacts; AND (3) maintenance of the suit *justice*.  
 to make the exercise of jux over D *fair and reasonable* (must PJ over D). To determine *minimum contacts*, court will  
 activities at a state, and injures someone there through that e  
 purposeful availment with that forum (e.g. selling goods in the  
 asks whether D intended to cause an effect in the state and/or

- purposefully directed his actions at the state  
 (1) E.g. D tried to make money in the forum, or used the roads there, or marketed a product there, or sent a defamatory letter to P in the forum state.

PROCEDURAL MATTERS	SUBSTANTIVE MATTERS
<ul style="list-style-type: none"> <li>• Jurisdiction</li> <li>• Form of action</li> <li>• Service</li> <li>• Proper and necessary parties</li> <li>• Pleadings (e.g. detail required by pleadings)</li> <li>• Joinder of claims and parties, and splitting claims</li> <li>• Order of trial</li> <li>• Venue and forum selection (e.g. enforcement of forum selection clause in K)</li> <li>• Sanctions for frivolous litigation</li> <li>• Judge-jury relations</li> <li>• Trial by judge or jury</li> <li>• Evidentiary rules and privileges – FRE applies to all cases, including diversity cases; includes: (i) Privilege rules; (ii) Competence and credibility of witnesses; (iii) Admissibility of evidence; and (iv) Proof, presumptions, and inferences (BUT state law evidentiary rules and privileges apply in claims and defenses governed by state law)</li> <li>• Execution of judgments</li> <li>• Grounds for new trials (e.g. for excessive damages)</li> <li>• Appellate process.</li> </ul>	<ul style="list-style-type: none"> <li>• Elements of a claim or defense</li> <li>• Standards of care</li> <li>• Statutes of Limitation</li> <li>• Rules for tolling of Statutes of Limitations</li> <li>• Choice of law rules/Conflict of Law rules (i.e. choice of which state's law to apply)</li> <li>• Privileges &amp; Presumptions, Competency &amp; Burdens of proof on matters governed by <i>state law</i> under Erie</li> </ul>
	PROBLEM AREAS
	<p>Courts are split whether pocket is substantive or procedural:</p> <ul style="list-style-type: none"> <li>• <i>Immunity</i> – possibly both; defense of immunity may be available either under the law of the place of the wrong or under forum law.</li> <li>• <i>Limits on Damages</i> – probably procedural</li> <li>• <i>Statutes of Frauds &amp; Parol Evidence Rule</i> – could be either</li> <li>• <i>Testimonial Privilege</i> – probably substantive</li> <li>• <i>Survival and Revival</i> – whether tort claim survive the death of the parties is probably substantive.</li> <li>• <i>Direct Actions</i> – some cts hold that victim's right to sue tortfeasor's insurance company is substantive (governed by the law of the place of the wrong) while other cts say the issue is procedural and governed by forum law.</li> </ul>

#### Seperac Rules for NCBE MBE Issues Tested on Laws Fed Cts – State law in federal court

- Rule 31: A claim can be *precluded* if: (1) there was a *valid, final judgment on the merits* in the first action, (2) the second action is between the *same parties* or their privies, and (3) the second action involves the *same claim or cause of action*. Generally, the court in the second action applies the preclusion law of the jurisdiction that decided the first action. For example, if the first action is in federal court and the second action is in state court, the state court in the second action should apply federal preclusion law. However, if the first action was in federal court under diversity jurisdiction and the second action is in state court, the state court in the second action should adopt the state law of the state where the federal court sat. [2017]
- Rule 32: In a *federal diversity action*, a court must look to the choice-of-law rules of the state in which it sits to determine which of the two competing states' laws should be applied to the action before it. [2015]
- Rule 33: Under the *Erie Doctrine*, in diversity cases, the court *applies the substantive law* of the state where the court sits and federal procedural law, unless the state procedural law would result in important differences whereby the court uses state procedural law. [1991]

#### CivPro: Cat II: Laws Fed Cts (B. Federal common law) – MBE: 0-10s

1. **Overview** – development of legally binding fed law by the fed cts in the absence of directly controlling constitutional or statutory provisions (i.e. any rule of fed law created by fed ct where Congress has power to act but has not done so). Three main areas in which fed common law has been created:
  - a. Where the SC has decided that federal rules are necessary to protect “*unique federal interests*” such as:
    - (i) Interest in resolving disputes between states (e.g. interstate water disputes);

The rules are sorted based on the importance of the question source. For example, the 2017 MBE Study Aid rules are listed first while the MBE 1991 exam rules are listed last (at the end of each rule is a parenthetical suffix to tell you from which exam the rule is based on). If you are very short on time, this is an excellent way to pick up the most important law in the least amount of time.

exception to Federal Torts Claims Act whereby armed (to military service);  
 v will be created in suits between private parties *only if*  
 t be used to determine liability of a contractor  
 cation of state tort law would impair the federal

ded to protect the interests of the US gov't. The ct  
 ed interests against disruption caused by creating new

- c. Intentional interference by D that induces a breach or termination of the relationship or expectancy (negligent interference not enough); AND
  - d. Damage to P – must prove **actual damage** from the interference (may recover for mental distress or punitive damages)
2. Defenses
- a. *Tortfeasor's conduct may be privileged if it is a proper attempt to obtain business (e.g. competitor) or protect its interests (must have justifiable purpose and use warranted means to accomplish the purpose).*
  - b. D's is also privileged to interfere when:
    - (i) giving truthful information within the scope of a request;
    - (ii) the K violates public policy;
    - (iii) D is disinterested and only seeks to protect an obligor; OR
    - (iv) if a fiduciary encourages D to breach (b/c fiduciary is not acting for personal economic advantage).

**Seperac Rules for NCBE MBE Issues Tested on Other Torts – Interference w/ business relations**

- Rule 1810: A tort COA based on **interference with K** cannot be between the parties to a K – it must be between a party to the K and a 3rd person b/c claims of breach between parties to a K are governed by K law, not tort law. [2008]

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