

Excerpts

Contracts

Sourcebook for the NextGen Uniform Bar Examination

July 2026–February 2027

NCBE National Conference
of Bar Examiners

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Preface

NCBE's July 2026–February 2027 Sourcebook series is intended to provide legal educators and other stakeholders with information about which legal concepts and principles are within the scope of doctrine to be assessed in the July 2026 and February 2027 administrations of the NextGen bar exam. Each sourcebook in the series relies on a small number of sources that should be readily available to educators interested in bar exam coverage.

Examinees may expect that some questions on the exam will be presented with legal resources. When legal resources are provided within the test, the examinee will be expected to demonstrate their ability to efficiently analyze and apply the legal resources to answer the question or questions.

Within each Sourcebook, there are two types of topics:

Topics with a star symbol ★

Topics followed by a star symbol ★ require an examinee to rely solely on recalled knowledge and understanding of the topic; they will be tested without provision of legal resources.

Topics without a star symbol

Topics without a star symbol may be tested with or without provision of legal resources. When these topics are tested without legal resources, the examinee is expected to rely on recalled knowledge and understanding that will enable the examinee to demonstrate recognition that the topic is at issue in the fact scenario.

For each topic, regardless of whether the topic includes a star symbol, the sourcebook identifies which concepts and principles are within the scope of doctrinal subject-matter knowledge and understanding assessed on the exam.

It is important to note that the Sourcebook series is not intended as a comprehensive study guide for examinees and has significant limitations as such. Limitations of the series include:

- The documented concepts and principles are often quoted directly from the cited sources. The extensive use of quotations is intended to help educators find references easily. The quotations do not always reflect the wording that a skilled educator would use in stating the underlying concepts and principles.
- The sourcebooks do not explain when or how to apply the documented concepts and principles. The NextGen bar exam does not assess memorized legal knowledge in a vacuum. The exam assesses an examinee's ability to perform common lawyering tasks involving the application of legal knowledge to fact patterns typical of entry-level practice.
- The documented concepts and principles are organized within the structure of the NextGen bar exam's Subject Matter Outlines. The structure of each outline is intended to group clusters of related topics together within a larger subject area or discipline, for ease of comparison to law school course outlines in the same disciplines. The structure of the sourcebooks does not convey how concepts

and principles work together or overlap with one another, either within or across disciplines.

- For the following reasons, the documented concepts and principles should not be understood as a rigid cap on the knowledge that may assist examinees in performing well on the NextGen exam:
 - While the documented concepts and principles are intended to cover the *doctrinal* knowledge that is within the scope of the NextGen bar exam, the sourcebooks are not exhaustive of all types of knowledge required to perform the lawyering tasks assessed on the exam. For example, research skills assessed on the exam require practical knowledge of the types of legal sources and documents that would advance a lawyer’s understanding of a client’s position and options. Such practical knowledge is not documented in the Sourcebook series.
 - The documented concepts and principles are intended to be *sufficient* to answer all NextGen questions as a matter of legal doctrine. However, grading teams assigned to constructed-response questions may occasionally, in their discretion, award credit to examinee responses grounded in additional, alternate approaches to doctrine that are not documented in the Sourcebook series.

The Sourcebook series also is not intended to document the entirety of the law as it currently stands, but rather to identify the doctrinal knowledge that will be tested on the exam.

- For most topics, the sourcebooks identify a single approach—typically the majority approach or the approach that experts believe reflects the clear trend among jurisdictions that have recently addressed a topic.
- For some topics, the sourcebooks identify in “Scope Notes” any aspects or applications of doctrine that will be specifically avoided on the exam.
- Finally, for some topics, the sourcebooks identify multiple approaches that examinees should understand and be prepared to apply—typically where there is more than one influential approach among jurisdictions and no clear trend. The sourcebooks flag such topics as “*Testable Jurisdictional Splits*,” identify which approaches might appear on the exam, and provide guidance to educators regarding how exam questions will alert examinees to the approach to be applied to respond to relevant questions, as follows:
 - For some *Testable Jurisdictional Splits*, all questions on the exam requiring application of the relevant doctrine will explicitly instruct examinees which approach to apply.
 - For other *Testable Jurisdictional Splits*, examinees should apply the default approach identified in the sourcebook, unless a question instructs or suggests an alternate approach. A question might “suggest” an alternate approach by providing facts that are incompatible with the default approach, such as the designation of a prevailing party in a legal action where that party could not have prevailed under the default approach.

■ General Sources (Common Law)

- Contract (Rest. 2nd § 1): A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.
- Agreement (Rest. 2nd § 3): An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.
- Promise; Promisor; Promisee; Beneficiary (Rest. 2nd § 2):
 - (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
 - (2) The person manifesting the intention is the promisor.
 - (3) The person to whom the manifestation is addressed is the promisee.
 - (4) Where performance will benefit a person other than the promisee, that person is a beneficiary.
- Manifestation of Mutual Assent (Rest. 2nd § 18): A manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.
- Intention to be Legally Bound (Rest. 2nd § 21): Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.

■ General Sources (Article 2 of the Uniform Commercial Code)

- [When used in Uniform Commercial Code (“UCC”) Article 2], “[c]ontract” and “agreement” are limited to those relating to the present or future sale of goods. (UCC § 2–106(1)).
- “Agreement”, as distinguished from “contract”, means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1–303. (UCC § 1–201(b)(3).)
- “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. (UCC § 2–106(1).)
- “A sale” consists of the passing of title from the seller to the buyer for a price. (UCC § 2–106(1).)

I. Identification of governing law ★

This topic includes understanding whether a transaction at issue in a test question raises issues governed by the common law or the Uniform Commercial Code Article 2 (UCC), or whether it is a hybrid transaction. With respect to hybrid transactions as defined by UCC § 2–102, resources may be provided.

Sources

- Goods (UCC § 2–105(1)): [A]ll things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (UCC § 2–107).
- Hybrid Transaction (UCC § 2–106(5)): [A] single transaction involving a sale of goods and:
 - (a) the provision of services;
 - (b) a lease of other goods; or
 - (c) a sale, lease, or license of property other than goods.
- Goods to be Severed from Realty (UCC § 2–107(1)–(2)):
 - (1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within [Article 2] if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.
 - (2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.
- UCC Article 2 Scope (UCC § 2–102):
 - (1) Unless [otherwise indicated], [Article 2 of the UCC] applies to transactions in goods and, in the case of a hybrid transaction, it applies to the extent provided in subsection (2).
 - (2) In a hybrid transaction:
 - (a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.
 - (b) If the sale-of-goods aspects predominate, this Article applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the transaction which do not relate to the sale of goods.
- Applicability of Supplemental Principles of Law (UCC § 1–103(b)): Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

Scope Note: Examinees may encounter fact situations involving a transaction in goods where there is no applicable rule in Article 2. In that event, consistent with UCC sec. 1–103(b), examinees will be expected to apply the common law rule to the fact situation.

II. Formation of contracts

A. Mutual assent (offer and acceptance, and unilateral, bilateral, and implied-in-fact contracts)

This topic includes what constitutes an offer and an acceptance, how an offeror can control the manner of acceptance, when the offer and acceptance establish mutual assent, and when an offer terminates (e.g., revocation, lapse, rejection, death, counteroffer). This topic also includes the mirror image rule, limitations on the offeror’s power to revoke (e.g., option contracts, reliance), and when an offer can be accepted only by a return promise, only by performance, or by either a promise or performance. This topic also includes sale advertisements and offers made to the public (e.g., offers of reward money).

Sources

- Express contract: “[A] contract made in express oral or written terms.”¹
- Implied-in-fact contract: A contract that “is not created or evidenced by explicit agreement of the parties, but is inferred . . . from the acts or conduct of the parties. . . . There is no legal difference between an express contract and a contract implied in fact. . . .”²
- Bilateral contract: A contract in which “formation occurs through the [mutual] exchange of promises.”³
- Unilateral contract: A contract in which a promise is made in exchange for a performance.⁴

1. Manifestation of assent ★

Sources

- How a Promise May Be Made (Rest 2nd § 4): A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.
- Requirement of a Bargain (Rest 2nd § 17(1)): [T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
 - Manifestation of Mutual Assent (Rest. 2nd § 18): Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

¹ Jeffrey Ferriell, UNDERSTANDING CONTRACTS (5th ed.) § 1.02 [A].

² Jeffrey Ferriell, UNDERSTANDING CONTRACTS (5th ed.) § 1.02 [A].

³ Jeffrey Ferriell, UNDERSTANDING CONTRACTS (5th ed.) § 1.02 [C].

⁴ Jeffrey Ferriell, UNDERSTANDING CONTRACTS (5th ed.) § 1.02 [C].

- Conduct as Manifestation of Assent (Rest. 2nd § 19):
 - (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
 - (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
 - (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.
- Intention to Be Legally Bound (Rest. 2nd § 21): Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.
- Mode of Assent: Offer and Acceptance (Rest 2nd § 22):
 - (1) The manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties.
 - (2) A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.
- Necessity that Manifestations Have Reference to Each Other (Rest. 2nd § 23): It is essential to a bargain that each party manifest assent with reference to the manifestation of the other.
- Existence of Contract Where Written Memorial is Contemplated (Rest. 2nd § 27): Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.
- Agreements to agree: The enforceability of an agreement to agree turns on “two issues: first, whether the parties intended to enter into a legally binding agreement; and second, whether the terms are sufficiently definite to permit the court to frame an appropriate remedy.”⁵ Both must be satisfied for the agreement to be enforceable.

2. Offers ★

Sources

- Offer Defined (Rest. 2nd § 24): An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

⁵ Jeffrey Ferriell, UNDERSTANDING CONTRACTS (5th ed.) § 4.11.