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The Bar Exam (July 2005)

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Last fall's bar exam question in Property involved a covenant running with the land, with many of the attendant complexities (*e.g.*, touch and concern, privity of estate, implied reciprocal servitudes) that deter most law students from ever wanting to be real estate lawyers.

Both legal newspaper model answers—by Writing Edge in the Daily Journal and by Emerson's Tutorial in the Recorder—were fine. (I might quibble with Writing Edge's assertion that privity of estate still requires parties to a covenant to share a common interest in the property and with Emerson's assertion that the lack of a grantee's signature on a deed gives grantee a statute of frauds defense against the covenants in it, but both answers would certainly have gotten high scores on that exam.)

Running covenants (now more frequently referred to as a component of servitudes rather than as separated easements and covenants) is a topic that is probably covered in all Property courses, and so is fair game for a bar exam. However, I think that its extensive inclusion in our courses is more the result of the bar exam than a cause for the bar examining on it. A very similar question was asked in 2001 and, with this repeat four years later, it promises to continue as a staple in the course, even though many law schools are shrinking Property down from six to four units. If bar coverage were based on reported current decisions or on what real estate practice actually entails, covenants running with the land would be a very rare subject indeed. (The ABA's Section on Real Property Probate and Trust Law has a task force looking at the real property law curriculum, and there is hope they can do something to bring both the course and the bar exam into the 21st century.)

On another front, a different question—labeled “Remedies”—dealt with breach of contract to sell a piece of real estate and its water rights, together with acreage issues and false promises regarding development. One of the performance questions asked about age restrictions in a residential community. If bar exam scores were ever released, law firms probably would be better off using the results on this type of question as a more reliable guide to job candidates' potential for doing useful work.