

WRITING LAW EXAMINATIONS

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Author's Note: Some years ago I prepared this little essay for the guidance of my students. When the essay began to circulate elsewhere, West Publishing volunteered to publish it in these pages with the thought that it might be of help to a wider audience. I hope it is.

Law examinations share a good deal in common with other stock forms of legal writing, such as the brief, the law office memorandum, and the judicial opinion. Developing proper skills of exam writing will have, therefore, permanent returns.

Ideally, a good law examination tests how well a student has mastered the course material, and the ability to apply this knowledge to new situations. There are, however, some recurrent mistakes, oversights and unwise practices that prevent students from doing as well as they might. If you are alert to avoiding these pitfalls, you will improve your examination results.

Lack of Organization. The most costly mistake an examinee can make is to fail to organize an answer well. An answer which flails at the examination question without a plan will overlook issues and connections between issues. There is no universal scheme of organization. Depending upon the layout of the question, it may be convenient to organize by parties or by legal issues. When the facts set out a substantial number of transactions or events extending over time, it may be best to organize by dates, beginning with the earliest facts and working forward, explaining what issues and arguments change as the plot thickens. Especially in property and tax courses, it is sometimes quite sensible to key your answer to the treatment of particular assets or groups of assets. Regardless of the mode of organization, organize. You are not wasting time when you sit in an examination room thinking about how best to approach and argue the issues. Careful organization can also spare you the serious error of inconsistency in your treatment issues. I doubt that a mental checklist is enough - I think you need to jot down a little outline to which to refer as you write your answer.

Of course, virtue can be carried to excess: it is possible to overorganize, to splinter your essay into useless subheadings that lose continuity and conceal interrelations. One mode of organization that is usually unwise is to segregate the pros and cons of a great number of issues ("Plaintiff makes the following eight arguments....Defendant offers the following nine responses..."). Usually, the time to say what's wrong with an argument, or what difficulties may ensue if a certain rule is applied, is right after you state the case for the argument or rule. I recommend that you try to address liability-creating factors before you discuss defensive ones. Defensive considerations are difficult to evaluate in the abstracts.

You get the cart before the horse when you raise the defensive position in advance of the notional theory of liability that would bring it into play.

Reading the facts. Before you can organize, you must know what you are organizing. It is the worst sort of false economy to hurry through the facts in order to start writing bilge.

Examination questions are dense: every sentence, every word may have significance. You should read a question through to get its general drift, then reread it with care. You must question the question. "Why is this fact being told me, why this date, why these parties?" Above all, get the facts right. It is easy to confuse parties and places on an examination because you have not had long familiarity with the facts. Only your own commitment to avoid carelessness can save you from doing it.

Here too excess is possible. Some answers display a preposterous suspicion of the facts, e.g., the examinee who has been told that Mr. Corpse is dead, but insists on reciting that "Mr. Corpse appears to be dead," or "If Mr. Corpse is in truth dead...."

The importance of role. Pay attention to the role the examiner has assigned you. If you are told to be an advocate, you will necessarily approach a question differently than if you are put in the shoes of an impartial judge or legislative draftsman. Be alert to the common tendency of examiners to change role assignments when they change questions. Be sensitive to the significance of your role when looking at the state of the facts in the examination question: have the facts been found below in the lower court or are you being asked to shape them for argument to a trier, and if so to whom, a professional or a jury of laypersons?

Read the instructions. I have been staggered by the amount of abject carelessness that is exhibited by examinees. Some students disregard plain instructions to begin a new question in a new bluebook. Some omit their examination numbers. Others misallocate their time although told in advance and again on the examination itself what the relative weight of the questions will be. You should go into an examination with a schedule. When you have been told in advance that there are three questions of equal weight and that you will have two and one half hours to write the examination, you should work out beforehand that at 9:45 you will move on to Question Two, and at 10:30 to Question Three. The student who writes a total of four sentences on the last question, concluding with the breathless report, "Time!," is displaying a self-

inflicted wound whose consequence is deserved.

Padding. No examiner gives credit for quantity of words written. Nonetheless, a huge proportion of examination papers contain many paragraphs that should not have been written and for which no credit can be given. The two most common varieties of padding are regurgitating the facts, and what I call wind-ups (lengthy preliminary discussions of issues which might be involved, or of general policies or values like enforcing intention, or of the scheme of organization the essay is going to utilize). The examiner has written the question and knows what the facts are. You will never get credit for summarizing them all over again, even if your "role" in answering the question is that of the judge.

Go immediately to the issues, then mention those facts that are relevant when they are relevant. A particular variety of padding is to write out quotations from casebook materials or statutes in an open book exam. Cite it, don't copy it.

Inventing facts. An especially maddening trait of some examinees is the manufacture of facts. Usually these are very convenient facts that let issues be avoided. Typical: "The law in this jurisdiction is..." Or "It was argued in this matter..." Never add to what the examiner has told you about the facts. If you don't know what positions were taken into court, deal with them as possibilities rather than attributing them to particular parties. If the examiner hasn't told you what jurisdiction you are in, and you know that there is a conflict of authority on the issue, talk about the conflict, don't try to weasel out by assigning the governing rule. It may sometimes be in order to tell the examiner that particular additional facts, if present, would affect your analysis in some particular aspect, but do not dwell on such matters.

Authority. There are two opposite extremes to be avoided in citing statutes and cases. If you are taking an open book examination, especially in a statutory course, don't neglect to mention the statute section numbers you are referring to. That is to say, when relevant authority is close to hand, take advantage of the opportunity to make your answer more precise and lawyerly by citing the statutes or cases you are discussing. The greater failing, however, is senseless reference to authority. It weakens rather than strengthens your argument when you cite case names whose relevance you do not and cannot explain.

Negative issue spotting. It is usually quite appropriate to say that on these facts, a particular issue that might have arisen does not arise, having been foreclosed by such-and-such fact or factor. But this shades into a flagrant error that will cost

you points. If you have come prepared to talk about the ABC issue, and are disappointed to find no ABC issue on the examination, it is not a solution to write an essay about the subject of your disappointment. ("Since I don't find an ABC issue on these facts, I'll tell you that there is no ABC issue here, and then I'll spend a page telling you about ABC.") The examiner knows what's on the exam.

Knowledge. A common failing in a needlessly weak examination essay is the tendency to try to barf back the contents of classnotes or course materials. What the examiner looks for is not memorized knowledge, but ability to use the knowledge of the course. To be sure, you have to have the knowledge. That's the essential precondition. But what distinguishes strong work is that the student brings that knowledge to bear on a new problem, or that (in response to a question) the student uses that knowledge as a basis for thinking about new facts or new issues.

Another way to make this point is to say that you must not expect to employ everything you know about a course on the examination. Often a course starts with the basic concepts, then adds more advanced knowledge, and in these circumstances the examiner is likely to probe for the advanced knowledge. You have not wasted your efforts learning the basics that are not called for on the examination. Without the basics, you couldn't deal with the frontier. It is a major blunder in such circumstances to insist on emphasizing the rudiments when the question invites you to higher ground.

Procedure and remedy. Common procedural issues cut across most substantive issues: does a particular party have sufficient interest to have standing; what are the remedy implications of the substantive legal rights you think pertinent; has there been delay such as to raise laches or statute of limitation problems? Remedy is especially important. It will be a rare examination that does not pose problems of remedy. Consequently, to speak in tort terms, get in the habit of asking yourself: "Now that I see there has been a wrong, which of the many conceivable things a court can do about the wrong seem appropriate here and why?"

Question-begging. The most recurrent error that we all make in legal analysis is failing to justify our conclusions. The art has many forms. Beware the adverb "clearly" or the phrase, "It is clear that...." Examiners tend not to set questions that can be resolved by sentences that properly begin with the word "clearly." I do not mean to suggest that there are no easy issues on law exams. There are. One thing your examiner is testing for is your ability to distinguish straightforward

problems from complicated ones: a hallmark of a weak answer is that the student spends time thrashing an easy point to death rather than facing up to the hard problems. Because legal issues do not involve the same degrees of doubt, you should signal your awareness of how open a particular issue is.

Under the heading of question begging, the basic failing I am talking about is the practice of stating legal conclusions without giving the reasoning. You will get little credit for saying "Bloggs committed fraud and so his legacy fails." You have to show why the issues inheres in the facts (what conduct amounted to fraud and why), why your result follows from the facts and the law. The right answer isn't right unless you show why.

Issue spotting is not enough. We emphasize issue spotting on law examinations because it is so central to the lawyer's job. Your client is not going to come in and say "I have a Section 1983 action I'd like you to bring." Instead you will hear something of what happened, or what the client wants to achieve, and it is your job (after getting at the facts) to see what legal issues may arise on those facts.

But however important issue spotting is, you need to do more. It is not enough to hit the side of the barn. Once you see that an issue is in question, that a doctrine or a statutory section applies, continue to ask yourself: what are its implications, its ramifications for the various parties, the difficulties it raises? Have you indeed spotted the applicable rule, or can the rule be distinguished? The examiner will commonly set a question whose facts suggest, but do not quite fit, some conventional rule of law. The student who displays sensitivity to distinguishing the particular case according to the purposes of the seemingly applicable rule is on the way to an A.

If you are going to get beyond issue spotting, you must refrain from dealing with issues in generalized terms that prevent you from developing your analysis. Abstract discussions of legal doctrine are seldom justified. The examiner wants to know which facts raise the issue and how the issue affects the rights of parties.

The other side. The hardest part of legal analysis, I think, is to keep one's mind open to all sides of an issue. We tend especially in the adversary process to blot out opposing positions. We take a stand and justify it. But there is almost always another side, or several. And you can't be sure that your view is (a) correct or (b) properly articulated and defended, unless you have asked yourself: "What can be said against my interpretation of the facts and the law, what would the other side argue?" A really good examination answer not only suggests the preferred

solution, but it develops both sides of the problem.

You should master the technique of arguing in the alternative. If you deal with an issue and resolve it, and you are aware that had you resolved it the other way you would have had to deal with other issues consequent to the other solution, argue the point in the alternative. Don't duck issues that the facts do invite you to discuss.

Irresolution. It is usually best to reach results. Lawyers are paid to advise and judges to decide. Hence you are not doing your job on the typical examination questions if you say only that such-and-such doctrines may apply. Do they? Why and how? A strong essay constantly signals the weight being attached to various issues, rules and arguments, and it suggests in a reasoned fashion the probable outcome(s).

Inspiration. It sometimes happens that the examiner puts an issue on the exam about which you have thought long and hard, or indeed, about which you find yourself with something daring to say even though you have not thought long and hard. You have an analysis that no prior legal thinker has ever suggested, or you think the relevant doctrines to be quite wrong for such-and-such reason. It is quite proper for you to put such observations on your examination answer, they are the stuff from which A-plus grades can be made. But before you reach the unconventional, be prudent. Set out the ordinary analysis that would govern the problem in case the court or the examiner were to think less of your inspiration than you do.

The seamless web. In statutory courses students have a tendency to overlook considerations not directly tied to code numbers. Statutes do not work in isolation in our legal system. The code may not reach all aspects of the problem. Furthermore, don't let course titles become blinders. Don't be afraid to use your knowledge from one course in another. It may be quite appropriate to point out on a torts exam that a problem would also be susceptible to contract analysis. On the other hand, don't get carried away with such efforts. If it's a torts exam, the bet is good that the examiner has supplied you with lots of torts issues to write about.

Writing. No matter what the level of your writing skills, there are some mechanical things you can do to present your work at its best. Break up the main scheme of your answer into paragraphs. Use complete sentences and avoid abbreviating ordinary words. Avoid slang; expressions like "to throw out of

court" can conceal distinctions that your examiner regards as important. Write legibly; if you have a difficult handwriting, skip a line between each written line. Leave a conventional left-hand margin for your examiner's notations. Remember that if your examiner is spared having to decipher your script, more time will be available to concentrate on the nuances of your meaning.

Format. I recommend to students that they consider word-processing examination answers whenever it is allowed. Even a hunt-and-peck typist is not at a particular disadvantage, because it will not be necessary to do copy-typing on an exam. My hunch is that for most students word processing facilitates clarity.

Avoid jocularly. Your examiner takes seriously the questions propounded on the examination. I don't suppose that I mean to recommend against all levity, but rather to say that in my experience most attempts seemed strained and cloying, and most seem needlessly to have preoccupied the examinee. As an empirical matter humor is associated with error and bad-exam-writing in a surprisingly high correlation. (Some students think that jocularly is invited because the examiner uses bizarre names for the parties and places in setting a question. This is done in order to help students avoid confusing the parties. Even when the examiner uses very awkward names, a goodly minority of examinees still confuses them. You have no reason to imitate the examiner's art in this manner).

Panic. Somehow it happens that a few students get all the way to law school without learning to steel themselves against panic psychology in exam taking. The thought process must be something like this: "Because this exam is important to me, I have to abandon my analytical good sense in a race to slop something on paper. I also have to jettison my usual attention to grammar, spelling, and punctuation, and I shall adopt stream-of-consciousness prose style in order to show the examiner how desperately urgent I thought it all was." No matter how important the exam, panic will not help. It only renders you less capable and less persuasive than you otherwise would be.