

Handout material produced in November 2009 by:

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*Examination tips: I have based the following exam “tips” on the most common mistakes made by first-year students. The tips range from the obvious (**Read the Instructions**) to the not so obvious (**Objectivity and Indecisiveness are Not the Same Thing**). As you review these tips, keep a few things in mind. First, follow your professor’s instructions if you perceive there to be a difference between these tips and your teacher’s views. Second, when I use legal principles in some of these tips, the law is being used for illustrative purposes only. Again, follow your professor’s views on the current state of the law. Finally, these tips are valuable, but are not magic and cannot take the place of your own hard work. Good luck!*

You will be nervous when the examination proctor says “Begin,” so the worst thing you can do is to start writing out your answer immediately. Instead, consider writing out your skeletal outline as soon as the exam begins. A skeletal outline is merely an organized list of principles and issues, created by you, which relates to a given area of the law. Think about the outline you have been creating all semester, but now reduce it down to a page or two – this is your skeletal outline. Writing out this list will give a few moments to compose your thoughts before digging into the exam.

Read the instructions! This is the most obvious advice imaginable, but every exam period several students will, for example, answer 3 short exam questions, only to discover that the instructions said “provide an answer to 1 of the following 3 hypotheticals.” Most students get flustered at the start of an exam, so this type of mistake is more common than you might imagine. When the exam starts, take a deep breath, slow yourself down, and read the instructions.

Before answering an essay question, you must outline and organize your response. When the proctor says “Begin,” too many students read the first sentence in an essay exam question, recognize an issue, and are so overjoyed at finding an issue that they spend the next 20 minutes responding to it. The problem with this approach is that the fact pattern was probably over a page long, and the writer just spent more time than was necessary in responding to a relatively straightforward issue. While different students outline differently, students who perform well on law school exams take the time to read through the entire essay question, create a list of the various issues contained therein, and then take a few more minutes to separate out the major issues from the minor ones. This approach will give you a better sense of how much time you have to complete your entire answer.

The first part of any law school exam is a math test. You must look at the amount of time allotted for the question, then consider the number of problems you must resolve in that time, and finally do the math to determine how much time you have per issue.

[...]

In terms of an essay question, determining the number of issues that require resolution is a little more complicated. This is where outlining your response, a recently discussed exam tip, comes in. Once you have read an entire essay question, and then listed all the issues, you will have a much better sense of how much time you can allot to each problem

You cannot perform legal analysis without discussing the facts. There are few absolutes in law school, but including the facts in your answer to essay questions is one of them. Remember, most law school essay questions are written in the form of a lengthy fact pattern or story. The facts within these stories create the issues that you must discuss. Almost every fact in these stories must be reproduced and discussed in your examination answer. While it is true that your professors will know the facts in the problem, we do not know whether you understand which facts are relevant to resolving each issue. Including the facts in your answer does not guarantee success on your law school exams, but excluding the facts guarantees that you will perform below your capabilities.

To ensure that the facts are making their way into your essay answers, place a line through each fact as you use it. Do not cross the fact out so that it becomes illegible, however, because a single fact may be relevant to more than one issue. After you finish your essay answer, look back at the fact pattern. If there are facts left over, one of three things has occurred: (1) the facts are truly irrelevant and do not need to be discussed (unlikely!); (2) the facts are relevant to an issue or issues that you have already discussed; or (3) the facts are relevant to an issue that you have not addressed at all.

As for supposedly irrelevant facts, professors rarely place information into their fact patterns that does not need to be discussed. Most “irrelevant” facts are there so that you can explain why they are irrelevant.

Listing facts is not the same thing as discussing them. True legal analysis occurs when you explain to a reader why a fact (or facts) leads to a legal conclusion. Consider the following examples.

Example 1 - John told the plaintiff “I will hit you if you come around here again.” Therefore, the battery was not imminent.

Example 2 – John told the plaintiff “I will hit you if you come around here again.” Generally, words alone cannot satisfy the imminence element of an assault. More specifically, these words merely inform the listener that he might be “hit” at some point in the future. The words “at some point in the future” placed a condition on the plaintiff being struck, which means that the plaintiff might never be struck by John. The fact that John might never strike the plaintiff means that the battery cannot be imminent.

If you were not sure, example 2 is the better answer! I have created a somewhat obvious example to illustrate my point. The pattern in the second example – note a fact (or facts) and then explain why you have brought it to the reader’s attention – consistently appears in well done legal analysis.

Your analysis is the most important thing that goes into a law school exam, so make sure it is in there! Much of what students write when answering a law school exam is not legal analysis, and has originated in places other than the student's mind. The issues you will be dissecting were created by your professors and are contained within the examination fact patterns. The same is true of the facts you will be discussing in your answer; they were created by your professor. The law you will be relying on to resolve these issues originated in the cases and statutes you read during the course of the semester. The only part of an essay answer unique to you is your commentary on WHY certain facts lead you to believe that a legal issue should be resolved in a particular way. This commentary is legal analysis, and is the difference between the grades of "C" and "A" on a law school exam.

Analyze each element of the relevant causes of action in your examination answer. For example, an Assault is often defined as the intentional placement of another in apprehension of an imminent battery. If the fact pattern on your torts exam raises the possibility of "A" assaulting "B", then you MUST address all the elements of an assault. Was the defendant's conduct **intentional**, was the plaintiff placed in **apprehension**, and was that apprehension of an **imminent** battery? While you must address all of these elements, the depth of your analysis regarding each element will depend on the complexity of the problem. For example, it might be quite obvious that the defendant was acting intentionally, but the real question is whether the plaintiff's apprehension was of an imminent battery. In this instance, your analysis of imminence will likely be longer than your analysis of intent. Forcing yourself to analyze every element will accomplish two things: (1) it will let the professor know that you understand that every element of a cause of action must be proven; and (2) it will force you to consider whether each element has been satisfied, thus avoiding the mistake of failing to discuss a complex problem that, at least on the surface, seemed quite obvious. [...]

Avoid starting your analysis with a conclusion. Instead, the first sentence of your discussion of each issue should identify the problem in need of resolution. For example, you might begin your analysis of a torts problem by noting that "John may have battered Fred when he threw a stick over the fence that struck the plaintiff." In contrast, avoid writing "John battered Fred when he threw the stick over the fence." While beginning with a conclusion may be acceptable when writing a memorandum, keep in mind that these conclusions are usually based on a great deal of thoughtful reflection. When writing an examination answer, time is of the essence and you may be incorrect regarding your initial belief as to how the problem will come out. Beginning each problem with an issue statement, as opposed to a conclusion, addresses two related problems. First, it provides you with the flexibility to look at all sides of a problem before coming up with an answer. Second, it helps you to remain objective. When you start with a conclusion, the tendency is to support that conclusion even in the face of strong opposing arguments.

Objectivity and indecisiveness are not the same thing. When students attempt to perform objective legal analysis, they often fall into the trap of being indecisive as opposed to objective. When performing objective legal analysis, you must still come to a conclusion. It's just that your conclusion is the product of carefully considering all reasonable alternatives. Telling the reader that a problem could be resolved in two ways, but that the final answer will "depend on what the court thinks" is tantamount to telling the reader "this is hard, so you figure it out!"

Be sure to address all reasonable alternative points of view. [...] So what is a reasonable a counterargument? A counterargument is reasonable if it is based on the facts in the problem or reasonable inferences from those facts. If you find yourself creating facts, then the counterargument you are creating is unlikely to be a reasonable one.