

Writing Exam Answers

Exam Answers Differ from Other Forms of Legal Writing

A supervising lawyer or a judge reads your work for the purpose of deciding what to do in the client's case. A teacher reads your exam answers to decide something else: how much you've learned in the course. Many students assume that teachers want to know how well students have memorized rules of law. But that's only part of it. A teacher is also interested — and often *much more* interested — in your understanding of how to *use* the rules and what the law is trying to accomplish with them.

Compare a law school examination to a computerized cash register in a store. The cashier places each item next to an electronic “eye” that “sees” the item's universal product code and records the price. If the cashier doesn't hold an item at exactly the proper angle, the eye sees nothing and registers nothing. Like the electronic eye, the teacher will give you points for what you show in the proper form. A teacher grades by looking for things you say that are point-worthy.

Essay Questions

An essay question contains a story, which you are asked to analyze according to the law covered by the course. You're graded on how well you do **all** the following:

- recognize the legal issues in the story
- identify the applicable rules of law

- state those rules accurately
- apply the rules to the facts and
- explain your reasoning thoroughly.

The teacher is less interested in your conclusions than in the analytical skills you display in arriving at and explaining those conclusions.

Analyzing the facts: Put each fact based in a category based on its role in the story:

- Category 1 —** The fact is legally significant because helps to create an issue, resolve an issue, or both.
- Creates an issue —** The fact is inconsistent with the law. Or it's inconsistent with another fact in a way that matters to the law.
- Resolves an issue —** The fact helps to show whether a rule's elements or factors have been satisfied.
- Both —** You'll use the fact twice because it both raises and helps to resolve an issue.
- Category 2 —** The fact's role is to tempt you into making a mistake. It looks like a Category 1 fact. But it isn't. It's there to fool you. (Some teachers call this kind of fact a red herring.)
- Category 3 —** The fact helps to tell the story. It has no legal significance. It's *background noise*.

Suppose you see the following facts in a Civ Pro exam. Smith is trying to sue Jones.

- Category 1 facts —** Smith wants to sue Jones. Smith's process server tosses the summons and complaint into a crowd, hoping they will fall in front of Jones and that she will pick them up and read them. Jones is 10 feet from where they land. She notices nothing.
- Category 2 facts —** Kilroy picks up the summons and complaint, reads them, and later describes them to Dawes. Dawes recounts that conversation to Chen. Chen tells Jones.
- Category 3 facts —** The crowd is in Times Square on New Year's Eve. Smith's process server leans out a third-floor window when he tosses the summons and complaint. Kilroy takes them home, falls asleep from all the partying, reads them the next day while drinking coffee, and describes them to Dawes over the phone. Dawes tells Chen because Chen is

Dawes' roommate. Chen tells Jones because Chen knows her from work.

The Category 3 facts add details so the story works as a story.

The Category 1 facts do not satisfy any of the formulas in Rule 4 of the Federal Rules of Civil Procedure. They are therefore inconsistent with the law (and thus create an issue). Unless Jones was served legally in some other way, these Category 1 facts show that Smith has not succeeding in suing Jones (and thus the Category 1 facts not only raise an issue but also help resolve it).

The Category 2 facts show that Jones knew about the lawsuit. They seem to say that she was *on notice*. And isn't *notice* what the whole process is all about? This seems so tempting. But it's wrong. If the plaintiff doesn't follow one of the Rule 4 formulas, there's no lawsuit. Period. Knowing the law is the only way you can avoid this temptation. The teacher put the Category 2 facts into the story to find out whether you can tell the difference between facts that satisfy Rule 4 and facts that don't.

This isn't a testing gimmick. It replicates life. Throughout your career, you'll see and hear facts that look legally significant but aren't. You'll be tempted by them daily. When a client sits in your office telling you the story, the important facts and the red herrings are all mixed together. The client can't tell the difference. That's your job.

If you recognize that the Category 2 facts aren't relevant, *say that in your answer and explain why*. Say that the failure to follow Rule 4 is fatal *even though the defendant learned about the summons and complaint through other means*. When you write your answer, use "even though" or similar language to show the teacher that you spotted the red herring and didn't fall for it. Explain how the Category 2 facts do not affect what the law will do.

Also explain in your answer why the law insists that a plaintiff follow a Rule 4 formula — even when someone like Jones learns about the lawsuit through other channels. This is a *policy* explanation. What problems is the law trying to solve or prevent?

Planning and organizing your answer: There are many effective methods of planning your answer to an essay question. Here's one:

Start by reading the question once from beginning to end without taking notes. Just read, so that you see the big picture.

Then read the question again, underlining important things or making notes in the margin.

Then read it a third time. While doing so, make a list on scratch paper of all the issues

you see in the question. Leave plenty of blank space between issues. Whenever you see a fact relevant to a particular issue, make a note of that fact under the issue in your list of issues.

Now go back to the list of issues you're making on scratch paper. Look at each issue individually. What rules are necessary to resolve it? Make a note of each rule in the blank space under the issue. What policy considerations would help resolve the issue? Make a note of them as well. If you think of anything else relevant to the issue, make a note of that as well. Don't write complete sentences. You're only making a list of things to address when you write your answer.

Now look at all the issues as a group. In what sequence should you discuss them in your answer? Write "1" next to the issue that should be discussed first, "2" next to the one that should come second, and so on.

You have just made an outline of your answer. Under exam conditions, you won't have time to make an extensive formal outline. The one that grew out of your list of issues will be good enough.

Many teachers will tell you (or at least imply) how much time you should budget for each question. Don't be afraid to spend a third to half that time reading the question and making an outline. If you do that well, you'll have everything you need to write a good answer.

For each issue, use the following mutation of the paradigm formula described in Chapters 11 through 14. Students have traditionally tried to remember the exam version of this formula by calling it "IRAC" — *Issue, Rule, Application, Conclusion*. Many people consider the A to stand for Analysis, but IRAC works the same way whatever you call the A.

Since the teacher is interested in your issue-spotting ability, start by stating the *issue*. You can express the issue as a question (in a Contracts exam: "Does the buyer's email satisfy the statute of frauds?"). Or you can express the issue by stating how you resolve it ("The buyer's email satisfies the statute of frauds"). Either method does the job.

The governing *rule* or *rules* should normally follow.

Be sure you know what the issues really are and what rules resolve them. Suppose that in a Civil Procedure exam you decide that a court lacks subject matter jurisdiction. You've done a wonderful job analyzing that issue. The exam facts are that the defendant hasn't moved to dismiss for lack of subject matter jurisdiction, but that seems like Category 3 background noise. It isn't. It creates a second issue. The teacher is trying to find out whether you know that defects in subject matter jurisdiction can never be waived. The first issue is more complicated than the second one. But you'll get no credit for the second issue unless you realize it's there.

In some situations, you might have studied competing rules. One rule might be followed in a majority of states and another rule in a minority. Or one rule might be traditional and another newer. If you've studied two competing rules, resolve the issue twice — once according to one rule and again according to the other rule. (But if the exam says that the story is in a state that follows one of the competing rules, use that rule.)

Proof of a rule is usually not necessary. The teacher is in part testing your ability to remember rules that have been more or less proven in class. But in some subjects dominated by uniform or federal statutes, the teacher may be willing to give you a little credit if you refer to specific sections of a code (although the teacher won't give you credit for good citation form).

Apply the rule to the facts. Use additional rules as you need them. Show intellectual depth by explaining how your analysis is consistent with the policy behind these rules. You can also show intellectual depth by including a counter-analysis. With big issues, you often can't get full credit without policy discussions and counter-analyses.

If you haven't already done so, state your *conclusion* before moving on to the next issue.

Your answer to each essay question will include several IRAC-structured discussions — one for each issue you identify. But limit the IRAC formula to exam-taking: it does not work well in office memoranda, motion memoranda, or appellate briefs.

As you use each fact, rule, or policy consideration, cross it off the checklist on your scratch paper. Do the same for each issue as you finish it. When you've finished the last issue, go on to the next exam question. (If you have time after answering all the questions, go back and proofread what you wrote.)

Answering effectively: Your goal is to accumulate the largest number of points when the teacher grades your answer. (Remember the cash register.) Teachers give points for spotting issues and resolving them carefully in a professional way. If you understand that, you will also understand the two biggest mistakes that cause students to lose points.

One is failing to spot issues. If you miss an issue entirely, the teacher cannot give you any points at all.

The other mistake is failing to explain your reasoning fully. If you identify the issue, state your conclusion, and then move on to something else, many teachers will give you only a fraction of the points available for that issue, even if your conclusion is absolutely correct. That fraction can be very small. If an issue is worth 15 points, a teacher might give you only three to five points for stating a correct answer and doing nothing more. The proportion of points allocated to your reasoning tends to grow if the issue is a big one and tends to shrink if it is a small one. If the issue is worth only three points, you might get one point for spotting it,

one point for resolving it, and one point (only a third of the total) for giving a reason. Teachers' practices on things like this differ widely, and many teachers do not assign a specific number of points to each issue. But if you assume that all teachers grade this way, you are less likely to miss points for not giving reasons.

Explain why you are right. A good explanation lays out the steps in your logic in a lawyerly manner, using the rules and policies covered during the course. *That is not the same as writing down every thought you have on the subject.* Why are you right? How do the law and facts support that conclusion? What other conclusions did you reject? Why are they inferior? Use facts that support your arguments. If facts could be used to challenge your arguments, show why those challenges should not succeed. Support your reasoning with policy.

And *decide*. Don't just state the arguments for each side and then waffle or avoid stating a conclusion ("the plaintiff could argue this, and the defendant could argue that"). Some teachers call that ping-ponging. Which arguments are better? Why? Take a position and support it with analysis. That's what lawyers are paid to do.

Don't waste time writing about background matters unless they truly help you resolve the issues in the exam. Most teachers will give you credit only for finding issues and analyzing them. Don't start your answer by reciting the facts. Instead, *use* the facts later in your answer by applying the rules to them. And don't give the historical evolution of the rules you're using unless the evolution is needed to substantiate the position you're taking. If you're given the wording of a statute or are taking an open-book exam, don't waste time by copying the statute word for word into your answer. Instead, refer to the statute and explain how it supports your conclusion. Quote only the few words that settle an issue. That might be as few as three or four words, sometimes more.

Your goal isn't to find the largest number of issues in each question. It's to identify the issues that are actually in the question — no more and no less. You'll lose credit for missing issues. But many teachers will also reduce your grade if you "find" issues that aren't reasonably suggested by the facts. Even if your teacher doesn't do that, you won't get credit for analyzing nonexistent issues. Don't waste time or space.

Analyze every genuine issue, even if you believe that your analysis of one issue would make all the others moot. Not only must you do that in law practice anyway, but you can't get full credit on examinations without doing it.

Some issues are worth more — often *much* more — than other issues. In a one-hour, 33-point essay question, one issue might be worth half the points. Some students will spend the same amount of time or space on that big issue as on each of the smaller ones. That can be a disastrous mistake. The big issue is worth half the points because it's hard. It takes more thought and writing to resolve a big and difficult issue than to resolve a small and easier issue. If you treat all these issues as worth the same amount of effort, you'll probably lose most of the

points available for the big issue. (Some teachers don't assign specific point values to issues, but they'll still penalize a student who gives no more effort to a tough issue than to an easy one.)

How can you tell which issues are the big ones? Smaller issues are more easily resolved. Big issues are tougher puzzles and often require several steps of logic.

Many — perhaps most — big issues can reasonably be resolved in more than one way. Remember that the teacher is most interested in the quality of your reasoning (and often is less interested in the result of that reasoning). It is not unusual for two students to get full credit for a given issue while coming to opposite conclusions about it. They deserve full credit because both conclusions are reasonable and arguable, and because both students supply knowledgeable and perceptive supporting analyses.

But that does not mean that you can adopt any conclusion you please. Some conclusions are more reasonable and easier to prove than others. And some issues have only one correct answer (usually when the teacher wants to know whether you have understood some very basic concept in the course).

If you make an assumption in answering a question, say so. Don't mush over a gap in the facts without realizing that the gap is there. A precise mind recognizes the gap, defines it exactly, and offers a resolution of the issue while taking the gap into account. Make an assumption only where there truly is a relevant gap in the facts, which doesn't happen very often in exams. Don't invent far-fetched facts of your own that distort the question the teacher wants you to answer. The teacher will see that as an attempt to avoid facing the hard aspects of the exam.

Other Types of Questions

Non-story essay questions: The teacher might describe a proposed statute and ask you to comment on it. There's no story. Figure out how the proposal would alter the way the law functions. And decide whether that would be a good idea or a bad one, remembering the policy considerations stressed in class and in the casebook. Then write an answer in which you state your conclusion and substantiate it by analyzing the proposal in policy terms.

Short-answer questions: Several short-answer questions might be based on a single set of facts. Each question poses a specific and narrowly framed inquiry, such as "Did the defendant waive defects in personal jurisdiction?" You are given a small space — perhaps enough for a few sentences — in which to give your answer and the reasons for it.

Multiple-choice questions: You can answer multiple-choice questions more effectively if you understand how they're created. A teacher thinks up a fact pattern, adds a question ("Did

the manufacturer breach the contract's anti-delegation clause?"), supplies the correct answer, and then adds three or four wrong answers to produce a list of answers from which you choose.

People who make their living giving multiple-choice exams — like the SAT and the LSAT — call the wrong answers “distractors” because they are designed to distract and fool you. An effective distractor sounds right, often using phrases or concepts you heard and read during the course. But the distractor will contain a flaw that makes it ultimately wrong. The flaw could be that although the distractor is literally true, it doesn't really explain what the law will do; the correct answer does that. Or the distractor might be partly right and partly wrong. Or it might be incomplete — right as far as it goes, but it doesn't solve the problem. Or it might be all wrong but dressed up in lawyer-like language so that it sounds good anyway. To identify a distractor, look for the flaw. And think carefully about it. Don't make a quick, snap decision. Ask yourself, “What could be wrong here?” You have to understand the law to eliminate a distractor.

How do you identify the correct answer? You have to know the law precisely, and you have to know exactly how to apply it to facts. You really have to know the material.

You can use two methods to find the correct answer to a multiple-choice question. You can identify the correct answer because you really know it to be correct. Or you can identify all the distractors, thus finding the correct answer by process of elimination.

Use both methods. Use one to make a tentative selection of the correct answer. Use the other to check and confirm your choice.

Eliminate the distractors by finding the flaw in each one. But to be sure that the only alternative left standing really is the correct answer, examine it carefully to make sure that it really is based on an accurate understanding of the law and that the reasoning in it is also right. *You can be confident that you've answered correctly when you know both why the answer you have chosen is right and why the other alternatives really are distractors.*

In a multiple-choice question, you are being tested in part on your ability to spot what's wrong. For the rest of your career, other lawyers will be saying things to judges that will hurt your client if believed by the judge. If you can't spot the flaws in another lawyer's arguments, you'll be at that lawyer's mercy. You must be able to explain not just why you are right, but also why the other lawyer is wrong. And you must be able to spot the flaw in the other lawyer's reasoning. Eliminating distractors is similar to spotting bad reasoning in another lawyer's arguments.

Finally, check your answers before the exam ends. But don't change your mind without having a very good reason. Here's an example:

Suppose that from 10:46 to 10:50 p.m., you spend four minutes figuring out the right answer to multiple-choice question 7. You think deeply about everything and come up with good reasons for eliminating three of the answers. You find their flaws. You also know exactly why the right answer is right. You correctly answer this question when you choose A. From 10:51 to 11:26 p.m., you answer other questions. At 11:27, you start checking over your work to make sure it's right before the exam ends at 11:30. At 11:28, you look again at multiple-choice question 7, and suddenly you become alarmed. Answer *D* looks so good that you think you must have made a mistake earlier by choosing answer A. You change your answer and at 11:30 submit your exam to the proctors. When the exam is graded, your response to question 7 is scored as wrong because A is the correct answer.

Here's what really happened: When you first worked on question 7, you might have spent a minute deconstructing answer *D* and figuring out why it was wrong. You did a good job of not being fooled. Then, in the moments before the exam ended, you might have spent five seconds thinking about answer *D*. By then you had forgotten what you had figured out a half-hour earlier. You weren't fooled at 10:49 after 60 seconds of thought — but you *were* fooled at 11:28 after five seconds of thought.

Not only did you spend more time when you first worked on question 7, but each second of thought at 10:49 was more efficient than any second of thought at 11:28. That's because at 10:49 you had been thinking about *everything* in question 7 and were able to see the big picture. At 11:28, you were rushing and no longer saw the big picture. You had even forgotten why answer A was the correct one. At 11:28, you weren't even thinking about A because *D* looked so good.

Check over your work before finishing the exam. But change an answer only if you know — and can explain to yourself — *exactly* why the answer you chose earlier is really the wrong one and why the answer you like now is really the right one.

General Suggestions for Taking Exams

During the exam, budget your time carefully. One of the tragedies of the exam room is the student who spends so much time on one question that the student has no time left to handle the others adequately.

Read the instructions carefully. Before beginning to answer a question, be sure that you understand the role you have been assigned. Are you being asked to analyze objectively the rights and liabilities of various characters in a story? To state the legal advice you would give to one of the characters if that person were your client? To make arguments on behalf of one person and against others? To write a judicial opinion? *Do exactly what you're instructed to do.* Do it completely. And don't do anything else. The teacher will give you credit only for doing what you were instructed to do.

And the teacher will give you credit only for what is plainly written into your answer. You will get no credit for ideas you think but don't expressly *state*. And you'll get no credit for ideas you state in handwriting that the teacher can't read.

Finally, learn from your examinations. Most teachers will let you read your examination after grades are posted. Many are willing to talk with you individually about what you did well or badly. Some provide written post-mortems (sometimes called model answers) that explain the issues on the exam. Take advantage of all of these opportunities. Sometimes you will learn more about the subject matter of the course, which may be tested again on the bar examination and in any event will help you later as a lawyer. And sometimes you will learn how to write examination answers more effectively.