HOW TO WRITE ESSAYS FOR

CONSTITUTIONAL LAW
CRIMINAL PROCEDURE &
CIVIL PROCEDURE

(Federal and State Civil Procedure Rules Compared)

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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Chapter 2: Spot and OUTLINE the ISSUES!

The first critical step in answering any essay question is to read the question, note and COUNT THE ISSUES to be discussed.

Constitutional law and Criminal Procedure are based entirely on the U.S. Constitution as interpreted historically by the federal courts. Civil Procedure is based on the Federal Rules of Civil Procedure (FRCP), Title 28 of the U.S. Code with an explanation of common differences from State rules of civil procedure. The explanations here are consistent with California procedural rules and appropriate for answering questions on the California General Bar Exam.

Limited number of issues. Although there is an extensive amount of case law concerning these subject areas, there are actually very, very few issues that can be raised on an examination. In fact, there are fewer than a dozen basic issues in each of these subject areas, and you will usually have only about five issues to discuss on any one examination question.

Since there are few issues that can be raised in these subject areas, the issues are easier to spot. Further, you can be sure that some issues will almost always appear on every exam. The following are mandatory issues that will almost always be on every examination:

**Constitutional Law --**
- Enumerated Powers of Congress
- Commerce Clause
- Equal Protection
- Due Process
- First Amendment Rights (Expression/Religion)

**Criminal Procedure --**
- Unreasonable Search and Seizure
- Violation of Right against Self-incrimination (Miranda)
- Violation of Right to Counsel (Miranda/Massiah)
- Application of Exclusionary Rule

**Civil Procedure --**
- Subject Matter Jurisdiction
- Personal Jurisdiction
- Choice of Law (Eire Doctrine)

The issue outline is simply a list of the issues you must discuss in the order you will discuss them. Make it "skeletal" in your own "shorthand," and don't waste time writing out the issue statements in full. Jot down case names and special rules like "Erie Doctrine" and "Miranda." Jot down a few facts you don't want to forget, but don't write out every fact because that WASTES TIME.

CONSIDER which issues the Reader (your professor or a Bar reader) absolutely wants you to discuss and don't chase after "unintended issues" that the Reader does not want to hear about. Consider whether some issues are so minor, marginal, lacking in facts or attenuated that you should not discuss them at all or perhaps just address them in passing. Look for specific wording in the question that indicates which issues are "required issues."
Chapter 3: Issue Spotting

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The grader/question writer always wants you to discuss certain required issues. But the graders fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

**Issue Spotting Hints**

**CRIMINAL PROCEDURE:**

<table>
<thead>
<tr>
<th>Issue Area and Coded Hint</th>
<th>Intended Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>SEARCH WITHOUT WARRANT:</td>
<td></td>
</tr>
<tr>
<td>1. Pat down:</td>
<td>Terry stop w/o warrant?</td>
</tr>
<tr>
<td>2. Drugs in cigarette pack/envelope:</td>
<td>Not justified for officer protection?</td>
</tr>
<tr>
<td>3. Consent to search:</td>
<td>Did consenting party have authority?</td>
</tr>
<tr>
<td>4. Roommate:</td>
<td>No authority to consent?</td>
</tr>
<tr>
<td>5. Opening of door, box, chest, room:</td>
<td>Improper search w/o warrant?</td>
</tr>
<tr>
<td>7. Search after pleasant visit:</td>
<td>Not for protection? Sweep? Terry stop?</td>
</tr>
<tr>
<td>8. Search of house during arrest:</td>
<td>Protective sweep?</td>
</tr>
<tr>
<td>9. Stop of car:</td>
<td>Probable cause for stop?</td>
</tr>
<tr>
<td>10. Border/airport/port:</td>
<td>Border exception?</td>
</tr>
<tr>
<td>11. Suspicious appearance:</td>
<td>Probable cause?</td>
</tr>
<tr>
<td>12. Plain view:</td>
<td>Officers have right to be at location?</td>
</tr>
<tr>
<td>13. Turning item to see serial numbers:</td>
<td>Not in plain view?</td>
</tr>
<tr>
<td>14. Entry of dwelling:</td>
<td>Exigency? Hot pursuit?</td>
</tr>
<tr>
<td>15. Victim kidnapped or in distress:</td>
<td>Exigency?</td>
</tr>
<tr>
<td>16. Alcohol/drugs:</td>
<td>Evanescent evidence?</td>
</tr>
<tr>
<td>18. Handwriting sample:</td>
<td>Unreasonable?</td>
</tr>
<tr>
<td>19. Fingerprints taken:</td>
<td>Unreasonable?</td>
</tr>
<tr>
<td>20. Highway checkpoint:</td>
<td>Checkpoint exception?</td>
</tr>
<tr>
<td>21. Body search w/o warrant:</td>
<td>Justified by evanescent evidence?</td>
</tr>
<tr>
<td>22. &quot;Next day&quot;, &quot;later&quot;, &quot;hours&quot;:</td>
<td>Time sufficient to obtain warrant?</td>
</tr>
</tbody>
</table>

SEARCH WITH WARRANT:
Chapter 5: Organizing the Answer

ORGANIZE the essay answer based on the CALL of the question and the AREA of law.

Organized by CALL. If the CALL of the question indicates the organization of the answer, you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

"Discuss:
   a. What evidence objections might W raise?
   b. What exceptions might the prosecution raise?
   c. What would the Court consider in applying the exclusionary rule?"

Then, this is the STRUCTURE for your answer, and this structure circumscribes the issues for you to discuss. DO NOT ALTER THE DISCUSSION ORDER OR DISCUSS ANYTHING ELSE, but within each of these subject areas you can present the issues suggested.

Organization by Area of Law. If the call of the question is general, such as "Discuss the issues raised," then the organization of your answer depends on the AREA OF LAW. The issue structures shown below do NOT mean that you should discuss all of these issues every time. Rather, these are the issues you should CONSIDER DISCUSSING, and if these issues are relevant to the given facts, these are the LOGICAL ORDER OF PRESENTATION that generally works out well.

Organization of a CONSTITUTIONAL LAW Answer. If the question involves constitutional law, and the call just says "discuss", your logical issue structure should generally be as follows unless otherwise indicated by the given facts:

1) Is the case JUSTICIABLE? This should be the first consideration. Mnemonic = Standing on an Absolutely Ripe Smooth Polpaya. ONLY an issue if the case is in a federal court. It is NOT an issue in a State court.
2) Does 11th Amendment BAR the plaintiff? (Is an individual suing a State in federal court? Seeking damages?)
3) Does Congress have ENUMERATED POWERS to enact the law? Is it a federal law or act? Is a State law infringing on federal authority?
   Separation of Powers Doctrine
   Article I: Commerce Clause, etc.
   Supremacy Clause
   10th Amendment
4) Violation of FIRST AMENDMENT?
   Assembly/Association
   Religion -- freedom/separation
   Speech/Expression -- exceptions are defamation, obscenity, fighting words, incitement of violence and crimes, and false advertising. (Mnemonic = DO FICA)
5) Violation of EQUAL PROTECTION?
   Suspect class or quasi-suspect class?
   If not a suspect or quasi-suspect class it is often better to skip equal protection discussion in favor of a DUE PROCESS discussion.
Chapter 6: Issue Statement Structure

Issues Structured by Call. If the call of the question indicates the structure of the issue statements, follow that structure EXACTLY because the Grading Key will be in that precise form.

For example:

"Discuss:
   a. What evidence objections might W raise?
   b. What exceptions might the prosecution raise?
   c. What would the Court consider in applying the exclusionary rule?"

This gives you the STRUCTURE for your issue discussion, but you are free to select the ISSUES that should be discussed within this basic structure. Your answer should reflect this structure!

Numbering issues. You should always number your issues on your outline, and match those numbers to numbered issues on your answer so you do not accidentally skip an issue and fail to address it on your answer after listing it on your outline. Use ARABIC numbers. Do not use Roman numerals or letters because they are confusing.

Very few students number issues on their answers, even when told to. Some are afraid because they think, “If I am supposed to find 8 issues and my answer only numbers 7 issues I will lose points!” This is NOT the way things work. The grader has a GRADING KEY that lists MAJOR ISSUES that students MUST address along with more MINOR issues that can either be discussed separately or in combination with other discussion. So there is no “absolute number” of issues that must be discussed separately.

Use a question mark (?) to mark your issues. The issue statement should present a SHORT question ending with a question mark (?). The main legal word in the question should be in UPPER CASE.

Make the “issue” clear. You must make the issue clear to the Reader. You can do that by posing the “issue” as a short question as shown below. If you do not do this, you MUST make the issue clear after that anyway, so why not do it at the beginning. If the Reader cannot figure out what your “issue” you are in serious trouble.

Examples:

1) Was there insufficient PROBABLE CAUSE for the warrant?
2) Does the PLAIN VIEW exception apply?
3) Did the Court have SUBJECT MATTER JURISDICTION?
4) Does the Court have PERSONAL JURISDICTION?
5) What SUBSTANTIVE LAW will determine the case?
6) Is there a violation of EQUAL PROTECTION?

Phrase the Issue for an EASY ANSWER. The best phrasing for the issue statement depends on the area of law: Set up your issue as a "straw man" so that you can easily "knock it down" by identifying the elements, showing the facts support the elements, and thereby go on to consider
Chapter 9: Nailing the Elements - The HEART of the Essay

The heart of every law school or Bar essay is the ANALYSIS, and the key to analysis is NAILING THE ELEMENTS. This means to

1) State a disputed legal ISSUE. This should be an issue that is determined by a rule of law;
2) Cite the LEGAL AUTHORITY for the RULE of law that will determine that issue;
3) State the LEGAL RULE that will determine that disputed legal issue, and clearly state the LEGAL ELEMENTS that must be proven to resolve the disputed legal issue;
4) PROVE that EACH and EVERY LEGAL ELEMENT of the rule can be proven BECAUSE a relevant SUPPORTING FACT exists in the fact pattern, OR on the contrary prove that some single element CANNOT be proven.

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State and underline the LEGAL ELEMENTS of the RULE, and
2) NAIL (prove) each LEGAL ELEMENT of the rule with a QUOTED FACT.

NAILING THE ELEMENTS is the easiest thing to do, and it produces the greatest benefit. Yet some students simply refuse to do it. Those students are usually referred to by other students in the past tense.

If you are discussing an issue in EQUITY instead of in LAW, you still cite a rule, but it is a rule of equity rather than law. The moving party must still prove ELEMENTS of the rule, but they are “equitable” elements rather than legal elements (e.g. “reasonable reliance”).

Follow this order:

1) Cite the AUTHORITY. This is mandatory on a Bar Exam and it is a good habit to start in law school. Show the Reader that you know the area of law that applies. This is a good approach to citing a CASE (Mathews v. Eldridge, etc.), a STATUTORY SCHEME (the FRCP, etc.), a Constitutional provision (The 14th Amendment, etc.) or a LEGAL CONCEPT (The MILLER test, MIRANDA, etc.). TELL THE GRADER THE LEGAL AUTHORITY your answer is based upon.

To do this, start your answer with the word "Under …" and cite the authority for your rule of law as discussed in the prior chapter.

2) State the LEGAL RULE. Pose “legal issues” that can be determined by a single “rule of law”, and present a legal rule that clearly states the LEGAL ELEMENTS that the moving party must prove. Generally you should state together all rules of law that are necessary to determine the issue.

The grader is looking for the RULE to follow the ISSUE. You must put the rule where the grader expects to find it. Follow the IRAC approach -- put the RULE right after the ISSUE.

In writing practice essays underline the ELEMENTS of the rule so that your analysis and application of the facts to the rule makes it clear you are proving the elements exist. Excessive
Chapter 15: Answering Constitutional Law Questions

Use Professor's Rule Statement. More than any other subject in law school, Constitutional Law essays demand that you memorize a prepared statement of the law. If your professor provides you with such a prepared statement, such as a statement to explain Equal Protection, use the professor’s statement and do not use the statement presented here.

Logical order for exams. Constitutional Law exam questions always concern some governmental action such as a new law, statute, act, or government action based on existing law. The question will always present a dispute between 1) federal government and private parties, 2) between State governments and private parties, or 3) between States and the federal government. Often the facts will say that one of the parties has filed an action in federal court.

1. If an action has been filed in federal court:
   a. Consider whether it is justiciable under Article III.
   b. And if the action is filed by private parties against States, is it barred by the 11th Amendment?
2. If the dispute concerns a federal law or action,
   a. Is the federal action within the enumerated powers of Congress?
      i. No laws “for the general welfare”.
   b. Is the federal action justified by the Commerce Clause?
      i. Is there a clear nexus between interstate commerce and the law?
      ii. No laws “for general welfare” masquerading as trade restrictions.
   c. If a State is impacted by a federal law, does it violate state sovereignty?
3. If the dispute concerns a State law or action,
   a. Is it barred by the enumerated prohibitions of the Constitution?
   b. Does it violate the Commerce Clause? Unreasonably burdensome?
4. If a government act infringes on 1st Amendment rights (expression, religion, association, petition government) turn to discussion of 1st Amendment and forego discussion of equal protection and/or due process.
   a. Freedom of expression:
      i. Is the government action over-broad, underinclusive or a prior restraint?
      ii. Is protected speech being infringed? Obscenity, etc.?
      iii. Speech in a public forum or on private property?
      iv. Is the restriction a valid, content-neutral time-place-manner restraint?
   b. Freedom of religion:
      i. For the establishment clause cite the Lemon test (or similar law)
      ii. For the establishment clause cite Smith and Yoder (or similar law)
   c. Freedom of association and right to petition government are seldom tested
5. If not a 1st Amendment issue, does a government action discriminate against a suspect or quasi-suspect class? If so, focus on Equal Protection first and either forgo discussion of due process completely or give it second consideration.
6. If not a suspect or quasi-suspect class, is it a fundamental right being infringed? If so, focus on Substantive Due Process first and either forgo discussion of equal protection completely or give it second consideration.
   a. The fundamental rights of interest here are due process, equal protection and those rights within the “penumbra” of the Constitution as referred to in the 9th Amendment: voting, traveling, privacy (to be left alone by government), personal
Chapter 16: Answering Criminal Procedure Questions

**Preliminary Considerations.** There are about 6 basic types of criminal procedure issues:

1. Unreasonable SEARCH AND SEIZURE of evidence – 4th Amendment
2. Evidence from forced SELF-INCRIMINATION / MIRANDA – 5th Amendment
3. Evidence without RIGHT TO COUNSEL / MIRANDA-MASSIAH – 6th Amendment
4. Right to not testify at own trial (5th Amendment) versus RIGHT TO CONFRONT adverse witnesses (6th Amendment)
5. Prosecution in DOUBLE JEOPARDY – 5th Amendment
6. Right to CONFRONT ADVERSE WITNESSES – 6th Amendment

**The Exclusionary Rule.** Criminal Procedure questions almost always involve the application of the EXCLUSIONARY RULE.

The EXCLUSIONARY RULE is the LAST ISSUE to discuss because you first must decide the legality of the evidence. The second consideration is how the court will respond to the police misconduct. The Court may allow the evidence to be admitted even if it was improperly obtained by police.

**The Proper Focus for Criminal Procedure.** Your Criminal Procedure answer should usually focus on the arguments that may be raised by the defense concerning the legality of evidence offered by the prosecution on Constitutional grounds, NOT on “evidence rule” grounds.

If the police used a warrant, consider that it might not have been based on probable cause or issued by a neutral magistrate. If the warrant was valid, consider that it might have been improperly executed. If there was no warrant, consider that the cops should have gotten a warrant.

**Do not let the word “admissible” mislead you.** Evidence rules and Criminal Procedure rules BOTH determine whether evidence is “admissible”. So if an exam question asks, “Is the evidence admissible”, determine if it is an evidence question or a criminal procedure question and don’t leap to apply the wrong law.

**Analyze the Propriety of All Evidence.** Analyze the propriety (legality, reasonableness) of the police method used to collect each item of evidence mentioned in the essay question.

**Body Searches without Warrants.** If the question describes evidence taken from the body of the defendant after arrest, analyze the legality of each police act considering the amount of bodily intrusion and whether a warrant could be obtained.

For example, the question might state the police 1) took fingerprints, 2) took fingernail scrapings, 3) took a handwriting sample, 4) took a picture, 5) took a voice sample, 6) took a blood sample, 7) did a body cavity search and 8) removed a bullet from the defendant.

**Non-intrusive Searches.** The taking of fingerprints, fingernail scrapings, handwriting, picture and voice sample are non-intrusive. Even if there were adequate time to obtain a warrant, the police argument would be that their search was incident to a lawful arrest and not unreasonable because the search was non-intrusive. Be prepared to analyze this.
Chapter 17: Answering Civil Procedure Questions

CIVIL PROCEDURE concerns whether an action has been brought in the right court, with proper jurisdiction, with proper notice, the proper law to apply, and the preclusion of claims and issues that have already been decided.

Some State Bars only test on the FEDERAL RULES OF CIVIL PROCEDURE but others test on differences between State and federal rules. The explanations given here are consistent with California rules of civil procedure.

Tangential Issues. Civil Procedure necessarily touches on peripheral issues that are more closely regarded in classes on EVIDENCE, REMEDIES and CONSTITUTIONAL LAW. There is no bright line that entirely divides one subject area from another. For example, the 14th Amendment guarantees due process and in Mullane it was held that reasonable notice that would afford an individual an opportunity to be heard is a jurisdictional requirement. Therefore, Mullane is a case that impacts both Civil Procedure issues (jurisdiction) and Constitutional Law issues (due process).

Generally civil procedure questions raise court jurisdiction as an issue.

Be Prepared. You MUST be prepared to give a good recitation of rules for 1) the SUBJECT MATTER JURISDICTION, 2) PERSONAL JURISDICTION, 3) the ERIE DOCTRINE, 4) ISSUE PRECLUSION (collateral estoppel) and 5) CLAIM PRECLUSION (res judicata).

Mnemonics. Minimum contacts may be shown if there is a Forum Related Cause of Action [FRCA = "fur-kuh"] or Continuous And Systematic Activities [CASA = "ka-suh"].

CIVIL PROCEDURE ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. **Does the court have SUBJECT MATTER JURISDICTION?**
   Under federal rules of CIVIL PROCEDURE, federal courts have limited SUBJECT MATTER jurisdiction based on 1) DIVERSITY or 2) a FEDERAL QUESTION. And under the WELL-PLED COMPLAINT RULE complaints (or petitions) filed in federal court must expressly state why the court has jurisdiction. Important!

   [This is only an issue if an action is filed in a federal court. It is not an issue if an action is filed in a State court because they have general jurisdiction. Then add additional statements conditioned upon the factual situation as follows:]
e) DIRECTED VERDICT (Judgment as Matter of Law) –

Under the FRCP a motion for directed verdict must be made BEFORE JURY RETIRES to deliberate. The movant must argue that the respondent FAILED TO PRESENT EVIDENCE on an ESSENTIAL ELEMENT of the COMPLAINT or AFFIRMATIVE DEFENSE.

But under State procedural rules a motion for a directed verdict often can be made after the jury has retired, but before the jury has reached a verdict.

f) JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) –

Under FRCP a JNOV must be made WITHIN 10 DAYS AFTER TRIAL and only if a PRIOR MOTION for directed verdict was denied during trial and NO REASONABLE TRIER OF FACT could have found for the other party.

But under State procedural rules a motion for a judgment notwithstanding the verdict often can be made whether a directed verdict was requested or not.

g) NEW TRIAL –

Under FRCP this motion must be made WITHIN 10 DAYS AFTER TRIAL and requires that the trial verdict be AGAINST MANIFEST WEIGHT OF EVIDENCE.

But under State procedural rules parties often have more time to file a motion for a new trial.

The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a CIVIL PROCEDURE examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

The comparisons between federal and State rules given above are consistent with California procedural rules and are applicable to many other States. The more significant differences between federal and State rules are:

1. Federal rules allow less specific and more general complaints;
2. Federal rules often have shorter time limits for filing answers and motions;
3. In federal courts answers can challenge personal jurisdiction;
4. Answers in federal courts must specifically deny each allegation made in a complaint or it is deemed to be admitted;
5. Federal rules require automatic discovery; and
6. Federal Rule 11 requires attorneys to reasonably investigate the claims of clients and other factual and legal issues BEFORE filing any pleading.

There are thousands of other differences between federal and State rules but these are the important ones you should focus on.
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