eBook - HOW TO WRITE ESSAYS FOR

Contracts, UCC, Torts, and Crimes

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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eBook - CANNOT BE PRINTED
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Chapter 5: Non-Issues, Red Herrings and Splits

It is almost as disastrous to waste time discussing a non-issue as it is to fail to discuss an intended issue. It wastes time and irritates the grader.

Remember, you usually get ZERO POINTS for discussing any issue that is not on the Grading Key. The Bar examiner has little authority to give you points for imagination and inventiveness.

Also remember that while you discuss the non-issue, everyone around you is discussing the intended issues. They are making points and you are being stupid.

How to Recognize Non-Issues.

A non-issue is an issue that is not on the Grading Key. For every issue the grader wants you to discuss there will be one or more specific facts as "signs", "hints" or indicators. The grader does not want to be accused of "hiding the ball", so If you see a "really subtle" issue or an issue that you think "most people" will not recognize, that it is probably because it is an UNINTENDED ISSUE.

Hints. If the grader does not want you to discuss an issue, they may add HINTING WORDS to show that issue is irrelevant.

Example: If the question says there was a "written contract" DO NOT waste time discussing whether the Statute of Frauds is satisfied.

Example: If the question says some one was injured by "accident" then DO NOT waste time analyzing intentional torts. If it was an accident there is no basis for discussing an intentional tort.

Example: If the question says some one took "reasonable steps" then DO NOT waste time analyzing whether or not they were negligent, because the question tells you they acted reasonably. If they acted reasonably, they could not have been negligent.

Example: If a crime is committed by two people but no facts show which one of them first came up with the idea, DO NOT waste time discussing solicitation.

Follow The Call.

Another way the examiner will direct you is by the CALL OF THE QUESTION. If the CALL is "structured" with a list of questions, the examiner is telling you the specific questions you are to address. If the call says discuss Joe's liability in an action by Bob, do NOT discuss criminal law because only the state, and not Bob, could bring a criminal action. Further, do not discuss Bob's liability in an action by Joe, because the call of the question is about Joe's liability.
Chapter 7: Essay Time Budgeting Mechanics

Doing a proper essay is like doing comedy. Timing is as important as the material.

**IT IS ABSOLUTELY ESSENTIAL** to keep on schedule while writing essays. You must establish and stick to a time budget. Do not go overtime on one essay thinking you will catch up later on another -- you won't.

**YOU MUST HAVE A WATCH OR CLOCK** with you. Do not depend on the clock on the wall when taking an exam because it will not be set to the hour at the beginning of the test, it may not be easily visible, and it might stop working. One time I was taking an exam and the clock fell off the wall and smashed on the floor!

Set your watch or clock exactly to the hour (e.g. 9:00 a.m.) When the proctor says, "You may begin," start the clock!

The key to keeping your essay on schedule is to **NUMBER THE ISSUES** on your outline, **COUNT THE ISSUES** and **MARK YOUR OUTLINE** with the time each issue should be finished.

**RESERVE 5 MINUTES** at the end of each essay to underline issue statements and key words and to check for omissions. Therefore, if you spend 15 minutes outlining, and save 5 minutes at the end, you really have only 40 minutes to write.

**Example.** Suppose it takes 15 minutes to read the question and create the Question Outline that was created above in Chapter 3. There are 45 minutes left and 7 issues to write about (the beginning "contract statement" is like an issue). If you reserve 5 minutes at the end to underline and check your work, you have to write the 7 issues in 40 minutes. This gives you between 5 and 6 minutes to write about each issue.

**FOLLOW THE PLAN -- MARK THE START/FINISH TIMES** for each issue on the outline by adding 5 and 6 minutes (alternating) to the outline. Suppose the question in Chapter 3 above was the first essay of the morning, at 9:00 a.m. marking the times for each issue on the outline, alternating 5 and 6 minute schedules, produces the following schedule:

**QUESTION OUTLINE WITH TIME BUDGET**

<table>
<thead>
<tr>
<th>Start</th>
</tr>
</thead>
<tbody>
<tr>
<td>[:20] 1. Choice of law -- UCC (GOODS?) or common law? &quot;house&quot;</td>
</tr>
<tr>
<td>[:26] 2. Does STATUTE OF FRAUDS apply, and is it satisfied? &quot;house&quot; = &quot;land&quot;</td>
</tr>
<tr>
<td>[:31] 3. Was the ADVERTISEMENT an OFFER -- define OFFER.</td>
</tr>
<tr>
<td>[:37] 4. Did H make OFFER at 9:00? &quot;had to see it first&quot;.</td>
</tr>
<tr>
<td>[:42] 5. Did L give H a VALID OPTION at 9:00? -- define OPTION, CONSIDERATION. &quot;firm offer&quot;?</td>
</tr>
</tbody>
</table>
Chapter 8: Organizing the Answer

STATE THE PARTIES!

NEVER try analyzing two defendants at the same time like this: “Paul v. Tom and Dick”

For contract and tort essays start with a heading that states the parties to the dispute, plaintiff first and defendant second as follows:

Paul v. David

For crime essays say “State v. _____” as follows:

State v. Don

If there are two or more plaintiffs, or two or more defendants, analyze the rights, liabilities and defenses of each pair separately. After you have concluded the issues for the first pair present a new caption for the second plaintiff-defendant pair and discuss the issues that pertain to them:

Peter v. Debbie

Once you state the parties (e.g. Paul v. David) discuss all issues and defenses between those two parties and don’t restate these same parties switching their names around backwards.

Usually it is best to discuss the various parties in the order in which they appear in the fact-pattern, but if they have alphabetical names (e.g. Adam, Bob and Charley) you might consider discussing them in that order.

ORGANIZATION BY STRUCTURE OF CALL.

If the call of the question is STRUCTURED, it indicates the organization of the answer, and you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

"Discuss the following issues:
   a. What remedies does W have against Y?
   b. Can W bring an action against X?
   c. What defenses can X raise?"

Then, discuss your issues within the order of this framework. For example, the structured call above may result in the following answer structure:

"a. What remedies does W have against Y?
  1. Consequential damages?
  2. Restitution?
  3. Specific Performance?"
Chapter 10: Nailing the Elements –
The HEART of the Essay

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

1) State an ISSUE raised,
2) Cite LEGAL AUTHORITY for a rule,
3) State the LEGAL RULE with clear ELEMENTS to be proven, and then
4) PROVE that HERE EACH and EVERY ELEMENT of the rule can be proven BECAUSE a relevant SUPPORTING FACT exists in the fact pattern.

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State the ELEMENTS of the RULE, and
2) NAIL (prove) each 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.

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 grader that you know the area of law that applies. This is a good approach to citing a CASE (Palsgraf, Peerless, etc.), a STATUTORY SCHEME (the UCC, etc.), or a LEGAL CONCEPT (Statute of Frauds, 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.

Examples:

1) Under common law ...
2) Under the Statute of Frauds ...
3) Under the UCC ...
4) Under tort law ...
5) Under Palsgraf ...
6) Under New York Times v. Sullivan...

2) State the LEGAL RULE.

Generally you should state together all rules of law that apply to the issue FIRST in ONE SPOT. Do not “dribble” the rule out in bits and pieces here and there in the analysis.
Chapter 11: Don't Give "Conclusionary" Analysis

The "BAD ANSWER" in the previous chapter is conclusionary. Law students are often told their answer is "conclusionary" but that term is seldom explained. Sometimes the student is told to "use the facts." That also is seldom explained.

A "conclusionary" analysis is one that jumps to a conclusion regarding an issue without any analysis of the facts needed to prove the elements of the legal rule. The conclusion is unsupported by evidence.

The identifying characteristic of a conclusionary analysis is that the word "because" never appears because no facts are referred to.

Example: Suppose the question says,

"Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."

A CONCLUSIONARY answer is --

"1. BURGLARY?
Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with an intent to commit a felony.

Here Bob broke and entered into a house, it wasn't his house and it was at night. He took a purse with intent to steal it. Therefore Bob can be charged with burglary.

The conclusionary analysis jumps to a conclusion that the issue is proven by reference to the rule without reference to supporting facts.

Here you might argue there is some reference to the facts because the student writes that "Bob broke and entered a house". But there is no reference to a fact that proves he "broke" into the house. The word "because" is missing. The explanation, that "Bob broke" because he "forced the lock" is absent from the answer. The explanation that "Bob entered" a dwelling because he "climbed into the house" is missing.

In an essay there should be one "because" and at least one reference to the facts for every element of every rule. This rule can be relaxed after you have made “nailing the elements” a firm habit, but if there are few or no "because"s at all, and few references to the facts, the essay will become conclusionary and totally unacceptable.
Chapter 16: Answering Contract and UCC Questions

There are several basic types of contract essay questions. These types are often combined, and some issues can be skipped in some questions that do not call for their discussion. Some people recognize 4 basic contract question formats, but in this book I recognize 6 basic types:

1) **FORMATION QUESTIONS** – Raise issues of whether contract ever formed at all.
   - Was there an OFFER?
   - ACCEPTANCE?
   - Manifestation of INTENT?
   - Was the contract for a LEGAL PURPOSE?
   - Supported by CONSIDERATION?
   - Between parties with LEGAL CAPACITY?

2) **TERMS DISPUTES** -- What were the terms of the contract?
   - Sufficiently CERTAIN that a court can enforce?
   - Was there a MODIFICATION supported by consideration?
   - Is a term or promised performance a MATERIAL CONDITION?
   - Is a given term or promise INCLUDED or EXCLUDED from the agreement?

3) **THIRD PARTY QUESTIONS** -- Who has the right to bring an action?
   - Were there THIRD-PARTY BENEFICIARIES?
   - Was there a VALID ASSIGNMENT?
   - Was there a VALID DELEGATION?

4) **DEFENSE QUESTIONS** – Focus on defense issues.
   - Statute of Frauds satisfied?
   - Lack of consideration?
   - Illegal purpose?
   - Rights of underage party?
   - Fraud? Duress?

5) **BREACH QUESTIONS** – Focus on the issue of who breached first?
   - Anticipatory breach?
   - Major or Minor breach?
   - Waiver?

6) **REMEDY QUESTIONS** – Raise issues of what each party can recover and how.
   - SPECIFIC PERFORMANCE?
   - RESTITUTION (quantum meruit concepts)?
   - RIGHT TO CURE?
   - COVER?
   - FAILURE TO MITIGATE?
   - ESTOPPEL?
   - SAVING DOCTRINES?
Chapter 17: Answering Tort Questions

There are 5 basic types of tort essay questions; issues can be skipped if the question does not call for their discussion.

1. **INTENTIONAL TORTS AND NEGLIGENCE** – Intentional torts are deliberate ACTS causing CONFINEMENT, FEAR, OFFENSE or other harm and negligence is a NEGLIGENT act causing harm. If both intentional torts and negligence are suggested by the facts, address the INTENTIONAL TORTS first and the possible defenses. Then address NEGLIGENCE second with the possible defenses to that cause of action.

2. **PRODUCTS LIABILITY** – Anyone who releases an UNREASONABLY DANGEROUS product into the stream of commerce may be held liable for any personal injury, property damage or other economic losses caused, but the extent of liability depends on the legal theory proven by the plaintiff.

3. **DEFAMATION AND INVASION OF PRIVACY** – Defamation is a false assertion causing damage to REPUTATION. Invasion of Privacy can be any of four theories for unreasonable acts causing EMBARRASSMENT or INCONVENIENCE.

4. **NUISANCE** – Nuisance is an unreasonable interference with the plaintiff’s ability to enjoy and use private LAND or else to enjoy the use of PUBLIC resources.

5. **MISCELLANEOUS MALICIOUS TORTS -- MALICIOUS PROSECUTION / ABUSE OF PROCESS, INTERFERENCE WITH CONTRACT / INJURIOUS FALSEHOOD, DECEIT** – Watch out for these. They are often too simple for an entire essay answer so they may be mixed in with intentional torts, negligence or other issues.

Mnemonics for Tort Essays:
- **ABC-FITT** = The intentional torts – Assault, Battery, Conversion, False imprisonment, Intentional infliction of emotional distress, Trespass to land and Trespass to chattels.
- **DARN COPS** = The intentional tort DEFENSES. Discipline, Authority of law, Recapture, Necessity, Consent, Others (defense of), Property (defense of), Self (defense of).
- **SCRAP** = DUTY can be based on Statute, Contract, Relationship, Assumption, and Peril caused (both a TORT and a CRIMES factor).
- **CLUB** = Slander per se – Crime, Loathsome disease, Unchaste behavior, Business practices
- **LAID** = Invasion of Privacy – false Light, Appropriation of likeness, Intrusion into privacy, public Disclosure of private facts.

Recommended Tort Essay Answer Strategies:
1. Discuss INTENTIONAL TORTS first and NEGLIGENCE second.
2. Always DEFINE "INTENTIONAL" in the discussion of the first intentional tort.
3. Discuss both intentional torts and negligence UNLESS it is CLEAR there was NO INTENTIONAL ACT done to cause the tortious event that caused the injury.
4. For ASSAULT and BATTERY be clear you are talking TORT and not CRIMINAL law.
5. BATTERY suggests an issue of ASSAULT and possibly INTENTIONAL INFILCTION.
6. FALSE IMPRISONMENT suggests an issue of INTENTIONAL INFILCTION.
7. NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS is only for BYSTANDERS.
8. CONVERSION suggests TRESPASS TO CHATTELS.
9. DEFAMATION suggests NEGLIGENCE; separate analysis is often needed.
Chapter 18: Answering Criminal Law Questions

Preliminary Considerations and Specific Rules:

1. Almost all crimes require a MENS REA, evil intent, and ACTUS REUS, evil act. The exceptions are the “strict liability” crimes of statutory rape, traffic offenses, and regulatory offenses. Those only require a criminal act and criminal intent is not required.

2. There must usually be COINCIDENCE, meaning that the criminal ACT must be done at the SAME TIME there is criminal INTENT. An exception is that under the “relation back doctrine” a larceny may be found when a subsequently formed intent to steal is “related back” to a prior act of taking.

3. Criminal law essay questions are identified by the CALL which will ask about what acts the defendant may be “prosecuted” for, for which “charges” may be brought, for which he may be “guilty”, etc.

4. The most common crimes tested are SOLICITATION, CONSPIRACY, ASSAULT, BATTERY, BURGLARY, LARCENY, ROBBERY, MURDER, and MANSLAUGHTER.

5. There are some unusual crimes to remember (uttering, mayhem, compounding, etc.) but they are less likely to appear, and will be given less weight in grading.

6. If a question gives you a statute – read it very carefully because it determines the answer.

7. Your focus should usually be on WHAT CHARGES CAN BE PROSECUTED and WHAT DEFENSES CAN BE RAISED and not on whether the defendant is “guilty”.

8. Some crimes are “lesser included offenses” of other more serious crimes. Defendants can be CHARGED with both the more serious crime and the lesser included offenses. If the defendant is CONVICTED of the more serious crime, the LESSER INCLUDED OFFENSES MERGE into that crime and the defendant cannot be separately convicted of the lessor included offenses.  

9. On at least one criminal law exam there will ALWAYS BE A MURDER ISSUE.

Answer Structure: Where there two or more defendants, consider the crimes of each defendant separately as follows:

PEOPLE V. TOM
1. ISSUE –
2. ISSUE –

For example every robbery includes a larceny, an assault and often a battery. The defendant can be CHARGED with four crimes: robbery, larceny, assault, and battery. But if the defendant is convicted of the robbery the other charges “merge” into that one crime.
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