INPUT FOR STUDENTS WRITING ANSWERS TO

MY EXAMINATION QUESTIONS

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IMPORTANT NOTES:

(i) Revisions to this document may be published during the "exam season" for Fall 2005 classes. This current version is ver. 7.8.2005.

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I.   INTRODUCTION

A.   *Purpose of this Document*

This document provides information to help students better understand my examinations. In particular, I am interested in supplying what I view as helpful hints and methodologies about writing an exam answer. Also, I think it better if students understand how an answer earns points in my examinations so that students can focus their learning energy both in preparing for an examination, and in writing the answer.

B.   *What this Document Does Not Address*

There are important issues concerning law school exams, legal pedagogy, and how legal education shapes lives. While I am interested in these subjects, I do not address them here.[1] Rather, I take on its own terms the fact that my exam methodology is generally in the norm for legal education, with all that this may imply. Given this, from a sense of fairness and wanting to allow students to prepare well, I feel it important to be as descriptive as possible about the processes I employ to generate and evaluate examinations.

I also do not address modes of study and preparation during the course of the semester. While I have suggestions in this area, I think this area is very individualized. Moreover, in no way do I believe that any one method is better for my classes and examinations.

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[1]   Often law school students receive grades that do not reflect their knowledge of the subject matter. Failure to obtain a good grade sometimes has little to do with a student's intellectual ability or mastery of the course. A host of other factors can intervene, including issues of preparation, exam taking skills, and various stresses.   In broader view, from a professional development perspective, many factors make one successful in a career after law school and exam-taking skills are not necessarily a dominant predictor of those later-deployed success factors.

II.   POLICY-ORIENTED AND BROADLY-PHRASED EXAMINATION QUESTIONS

In doctrine-oriented classes, I am unlikely to use open-ended/policy-oriented examination questions.   Of the classes I currently regularly teach, Patent Law and IP Survey are highly doctrine-oriented.   The focus of the class is primarily learning the doctrine.   Thus, the examination focuses on application of the hopefully-learned doctrine.

However, my other two classes, International IP and Property, provide more room for policy discussion and a greater likelihood of policy-oriented or broadly-phrased, open-ended questions.

A.   The Arguments Make the Difference

Open-ended/policy questions are about demonstrating that one is familiar with, indeed, understands, the arguments surrounding an issue.   The best way to demonstrate this understanding is by applying the relevant arguments to the question or problem posed.

It is also useful to develop a sense of classification of the arguments.   This could be along the traditional lines one might study in jurisprudence, or along other lines.   The important thing is to note the "depth" at which an argument operates.   Does the argument spring from the nature of something or some situation?   From a body of theory?   From a functional analysis of the likely effects, causes and counter-causes embedded in an issue?   Does the argument have implicit empirical assumption(s), which if not true, the argument loses its force?

Generally, and in my case, open-ended/policy questions are not written to see if a student "agrees" with the instructor's view on the issue.   The question, hopefully, provides an opportunity to allow an answer to argue both sides of the issue.   In my view, bringing all the relevant arguments and manipulating them well is much more important than an answer's ultimate "stance" on an issue or problem.

B.   Relevancy of Arguments is Critical

Not all arguments are relevant in all situations.   Thus, part of the "art" of writing an answer that earns a high number of points is choosing the most relevant arguments.

I view relevancy choices as a function of learning.   In other words, an answer that selects and applies the most relevant arguments implicitly reflects a deeper understanding of the subject matter of the course.   This means of course, that there is an opportunity cost during a time pressured exam if one selects and applies less relevant arguments.

The importance and relevancy of arguments is determined by the body of law studied in the class.   Most of the arguments one will select and apply in writing an answer are arguments in the class materials.   Thus, a "flash of brilliance" does not determine a good answer, rather, the preparation beforehand in learning the material does.   In particular, learning the material with a view to applying arguments during a time pressured exam provides one the best chance to write answers that earn high point totals.

On the other hand, creativity is more useful in an open-ended/policy question than in a pure issue-spotting, apply-the-doctrine question.   This is because the law operates via human thought and in the context of our greater human experience.   Open-ended/policy questions are closer to this reality.

C.   *General Exam-Taking Principles Still Apply in Their Own Way*

Some of the points in the section below for issue-spotting, fact-pattern examination questions apply to open-ended/policy questions to some extent, in particular the suggestions going to organization, completeness and clarity. As you read them, think about them in light of both types of possible examination questions.

III.   ISSUE-SPOTTING FACT-PATTERN EXAMINATION QUESTIONS

A.   *Recommendations Relating to the Mechanics of Exam Taking[2]*

1.   Read the question(s) and facts very carefully

This cannot be overemphasized. A corollary is to always read all of the facts and the question(s) before beginning. In real cases and transactions, facts change outcomes. Find a new fact, and the case is over. Discover better information in a negotiation, and turn the tide your way. It bears repeating: ***facts change outcomes***. Thus, treat the facts carefully. The first step to do this is to read them all and know what they are.

As to the question(s), double-check, perhaps even triple-check, that you truly understand what the question is asking. Keeping the parties straight is sometimes important in this endeavor. Use whatever methods help you organize and visualize the question(s) and facts.

2.   Read the instructions very carefully

Practically, this is as important as reading the question(s) and facts carefully. The exam is an artificial environment created by the instructor. To earn more rather than less points, your energy must be focused on writing an answer that satisfies the stated objectives within the requested structure. These objectives and structure are in the instructions.

3.   Plan and write a clear answer

Plan out your answers, at least briefly, before you start to write, so that they are clear, organized, and succinct. A clearly written answer increases the likelihood the instructor will find, and be able to give you credit for, the arguments you made.

Perhaps the most common problem with answers to issue-spotting fact-pattern questions is the answer's lack of organization. Outlining the answer to a final exam question may help organize your arguments.

Use headings and lists. Look at this document and other documents I have supplied. They make liberal use of headings. They use numbered lists to enumerate items. These simple devices can contribute substantially to the overall communicative effect of one's answer. The more clear the answer, the more analysis it can communicate to the professor, and the greater chance of earning points. It is possible to overuse this technique, however, and lists or headings can be distracting if they are not organized according to a familiar pattern, such as the elements of a legal test.

4.   Relevance is critical

Relevancy of discussion is more important than length of discussion. Even if the examination is time-pressured and factually dense, the best answers are not necessarily those that contain the longest discussion. On the other hand, it is to your benefit to demonstrate your reasoning, especially in order to

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[2]   Some of the items in this subsection are adopted from Rogelio A. Lasso, How to Write a Good Law School Exam (2002) (online article available at Prof. Lasso's website).

allow me to account for partial credit when only part of the analysis of an issue, test or rule is correct. Stick to the problem's facts and be judicious and even-handed in the factual inferences you draw. Write your answer based on the problem's facts, not based on an alternative hypothetical set of facts of your own creation.

Like most professors, I do not "grade by the pound." It is more important to write less information which is readable than to fill many blue books with hieroglyphics that I cannot decipher. Although I work very hard to take all the meaning from what is written, when the information is indecipherable it is impossible for it to earn points. This problem is not limited to blue books. Computer-typed exam answers with tremendously high typo rates can be nearly as unintelligible as indecipherable handwriting. In either case, please take care to ensure that you analysis can be read.

5. *Abbreviations*

Abbreviations can be useful when writing an exam answer because they save time and allow one's thoughts to not be interrupted writing a long phrase such as "person of ordinary skill in the art." Writing POSITA is much more efficient. However, students should be careful in use of abbreviations. They should not be overused. The best choice for any abbreviation is one that you know the professor is familiar with, say, for example, because the professor used the abbreviation in overheads, in the examination, in a model answer, or in some other writing. For any abbreviation you use where you are not completely confident that the professor is familiar with the abbreviation, be safe and define it in your answer.

6. *Time management*

Budget your time to discuss and resolve the most prominent issues arising under the facts. It is better to ensure that you cover all the major issues before spending time on minor issues or minority rules. The discussion of issues raised by my examinations should roughly approximate the percentage of time spent covering each area in class. Budget your time accordingly.

B. *The Nature of My Issue-Spotting Fact-Pattern Examination Questions*

1. *Are my issue-spotting questions "essay" questions?*

Because my issue-spotting fact-pattern examination questions tend to be issue-dense and factually dense, they might be better characterized as a collection of short-answer questions embedded in a fact-pattern. Thus, spotting the issue and resolving it should be done with an economy of words and a recitation of the most relevant law raised by the facts you find.

Another way to say this is that dumping one's previously prepared outline into an answer is unlikely to produce success.

An example of this would be the following. Assume that the facts in an examination raise only one patent validity issue: novelty/anticipation. It would be a poor strategy for an answer to discuss the law for each of the five elements of patentability (patentable subject matter, usefulness, novelty/anticipation, obviousness, and specification support), and then only apply the anticipation standard because that is the only issue you have facts for.

This is a poor strategy due to the opportunity cost. While you are spending time writing down the four-step test for obviousness, you could be applying the law to issues for which the examination supplies facts. In this example, ***at most*** one should acknowledge the other four elements of patentability:

> *The prior art reference to Smith raises a novelty/anticipation issue for claim 1 and perhaps for claim 4. Novelty/anticipation, is one of the five elements of patentability, the other four being: (i) patentable subject matter,(ii) usefulness, (iii) obviousness, and (iv) specification support. The other four are not raised by these facts. The test for novelty is . . . The Smith reference has these elements . . . In comparing Smith's elements to claim 1, the question is whether element A in Smith is the same as claim 1's element A . . .*

Note that this example simply communicates that the writer is aware of the other four elements of patentability. This is useful as long as the answer goes no further when there are no facts raising any validity issues for the other four elements of patentability. Also notice that the actual issue to be resolved is very narrow: whether "*element A in Smith is the same as claim 1's element A.*"

2.   What are the relevant facts?

There are at least two ways to describe or identify which facts are relevant. The first is that the facts are similar to, or a hypothetical of, facts in a case we studied. The second is that the facts fit within the meaning of the words defining some of the doctrine studied in class.

By doctrine, I primarily mean "black" letter rules. However, often the rules are "gray" and have fuzzy edges. This is inherent in the nature of law. Nonetheless, this second guide is the source of many relevant facts because not all of the examination questions will be case hypotheticals.

3.   Issue spotting advice

You may spot more issues within a set of facts than the question is looking for. Some of the issues will be clearly important, some will be less important, some will be so peripheral to the main question that they won't be important at all. Although you want to make sure you spot all the important issues, you do not want to spend much time resolving irrelevant, trivial, or peripheral issues. Outlining your answer may help prioritize the issues by their importance.

Most of the facts will be relevant to an issue, but my issue-spotting questions sometimes include a few "red herring" facts. These are facts that do not raise any particular legal issue under the law that we studied. The presence of these facts make the examination question more challenging. They require an analysis with a greater understanding of how the facts raise legal issues, and which law applies.

4.   Advice for stating legal rules, cases, and examination question facts

References to relevant primary statutory provisions and cases will be marginally beneficial, but only if the reference is correct. ***Even more important than citing a source for a rule, is to correctly state the rule that you apply to an issue***. The advantage of citing the statute section or case name is that sometimes it allows you to economize your words in stating the law. For example, if

there is a factor test with eight factors and we consistently used a case name to identify this factor test in class, you could do the following:

> *Jone's situation raises the issue of _____, which is controlled by the eight factors of the XXXXX case. Of these eight factors, we only have relevant facts for the following three factors: (i) . . . . Applying the first of these three, . . .*

As opposed to listing all eight factors, this saves time in writing your answer.

Similarly, take care to correctly recite the problem's facts that you use in your answer. Misstating the given facts increases the difficulty of awarding partial credit and can undermine the professor's confidence in your analysis.

5.   *Using the examination question facts and application of those facts to the law*

Apply the facts from the examination question. Don't spend time merely telling the story back to the professor. This has an opportunity cost and is unnecessary. In essence, one can "merge" one's communication of the proper law and the relevant facts into an integrated sequence that demonstrates mastery over both. For example:

> *The prior art reference to Smith raises a novelty/anticipation issue for claim 1 because Smith probably has all the elements of claim 1, depending on whether the elongated member in Smith meets the "axially supporting" element in claim 1. The other elements of claim 1 clearly all read on Smith, the only close question being the means for rotating. As to the "axially supporting" element, . . . As to the means for rotating element . . .*

This formulation communicates the key facts on which the issue turns, and also communicates the essence of the novelty/anticipation test. Another sentence or two may be necessary to round out the law and/or facts, but a surprising number of points can be earned with a small number of words using the approach in this example.

Although you may make some reasonable factual inferences from the examination question, be careful not to go overboard. Even if such inferences make your answer more credible, facts that are not in the examination question should be mentioned only when there is ambiguity in the examination that requires alternative analysis depending on different facts.

C.   How I Evaluate Issue-Spotting Answers

1.   *In general*

Grades for my examinations are based upon both the correctness of answers and the quality of discussion, including articulating arguments on both sides of an issue. ***Issue spotting is important to your performance***.

Remember, many, but not necessarily all, of the facts in the examination problem(s) are relevant to an issue arising under the examination's fact pattern.

2.   The point system I apply to issues

I have a checklist of issues for an examination question. Issues come in small, medium and large sizes. Whether an issue is small, medium or large is a function of the number of facts on the exam going to that issue, the breadth of the issue, and its overall importance in the area of law we studied. For example, in patent law, obviousness is a more broad issue than whether a certificate of correction for a patent is properly granted.

Regardless of the size of an issue, it breaks down into quartiles for earning points. This is demonstrated and further explained in the table below.

Quartile	Example – 8 point issue	Up to all of the points in this quartile may be earned for . . .
First: ¼th of the points	2	Communicating the issue, i.e., stating the issue. Partially misstating the issue, but getting some of it right would result in some of the 2 points being earned. Typically I delineate in half-point increments.
Second: ¼th of the points	2	Communicating the law that applies to this issue. Again, partial credit applies.
Third: ¼th of the points	2	Communicating the analysis of how this law applies to the facts given. Partial credit applies.
Fourth: ¼th of the points	2	Communicating the "outcome" – that is, whether Bert wins, or Ernie wins, or whether the answer is that it is too close to call on these facts. Partial credit applies, but to a lesser degree than the first three quartiles.

To some degree, as the discussion earlier in this document demonstrates, the analysis for the Second and Third quartiles can be merged and/or interplay off each other.

3.   Unanticipated issues

When an exam fact pattern consistently and rightly raises issues I did not plan to raise, I adjust my issue list accordingly. Typically, this occurs because a pattern appears in the student answers, demonstrating that there was a real issue not on my list. This unanticipated issue simply becomes another way for students to earn points. I reread previously read answers for any treatment of this issue. When this occurs it is in some ways gratifying that learning was sufficient for students to see this valid issue that the question did not plan to raise. Basic fairness requires that it be added to the point-earning issue list.

4.   General grade assignment philosophy and steps

From my small, medium, large issue methodology, each answer generates a certain number of raw points. Then I apply a relative curve, allowing the raw scores to primarily dictate the shape of the curve via a "normal" curve/distribution histogram analysis, although there is some room for judgment in this step. For the final step, I have a standing policy to move the aggregate, class-average curved scores as high up the grade scale as allowed by the law center's grading policy. Please note, however,

that this does not necessarily guarantee any particular number of grades in any particular grade "bucket." The shape of the curve (determined by the student answers), more so than its location on the grade scale, determines the number of grades in each "bucket."

5. *Handwritten versus Typed Exam Answers*

Students have posed the following questions in relation to their decision whether to hand write their exam answer in bluebooks versus type them on a computer using exam taking software: (i) do I have a preference?; and (ii) does one mode or the other tend to perform better on my exams? I address each question in turn below.

Firsts, I have no preference. I work hard to find and take all the meaning available in either a handwritten or typed exam answer. As noted in the discussion above, both types of answers have pros and cons in terms of communicating your analysis and knowledge. I encourage students to use the method that works best for their situation. For example, for myself, I don't type fast enough to feel confident typing an exam answer, if I were taking a law school exam today. In law school in the late 1990s, I hand-wrote all my answers. I felt that my thought process worked better with a pen in hand versus fingers on a keyboard. This was a challenge for me, however, because my handwriting is atrocious and I had to write slowly to ensure that it could be read.

There are two technological factors relating to typed exam answers. One is that often students don't type exam answers because they are risk adverse, fearing a computer crash. This is the down side of typed exam answers. There is an upside on the administrative side after I collect exam answers. I have my secretary print typed exam answers to .pdf files before she prints a paper copy for me to grade. This means I have an electronic backup, which isn't available for bluebook answers. I have never lost a bluebook exam answer, and most law professors can make this claim. There is always a small risk of this, however, and typed exam answers don't have this risk to the same degree.

Second, students ask whether typed or handwritten answers tend to perform better on my exams. In order to answer this, I will present two types of data.

The common assumption is that typed exam answers contain more words than handwritten exam answers. To test this assumption, I undertook a study of the number of words contained in student answers for my first class, IP Survey, from the Fall of 2002. The class had fifty-five students in the curve. The final exam was two hours. Twenty-seven students hand wrote their answer. The other twenty-eighty typed their answer. I estimated that the average number of words in a handwritten answer was about 1,500 words. In contrast, the average number in a typed answer was about 2,600, a 73% increase. My reaction to this data is that more words are not necessarily better. It all depends on how the words are used, and whether a student is spending time typing when a little more thinking about the issues would be more productive. As the discussion earlier in this document tries to demonstrate, it doesn't necessarily take a lot of words to earn all the points for an issue on my exams.

I also tabulated all the assigned grades for students in the curve from the ten courses I taught during my first three years as a law professor. The table below shows how the grades awarded breakout into handwritten and typed exam answers.

Grade	Handwritten	Typed	Total
A	10	26	36
A-	30	30	60
B+	48	51	99
B	54	48	102
B-	32	29	61
C+	24	12	36
C	7	10	17
D+	2		2
Total	207	206	413

The pattern shown in the aggregated data is reflected in the pattern for each individual course. I continue to have roughly half of the students choose each method to write exam answers. The only grades that show a tendency to favor one method over the other are the highest and lowest grades in the curve. My own interpretation of this data is ambiguous: there are too many factors that impact law school exam performance to draw conclusions from this data. Students, however, may be interested in these results in order to inform their decision about choice of method.