

## **FAQ About Preparing for the Law School Exams**

### **By Professor John Delaney**

1. What is the challenge in answering law school exam problems?
2. What are the criteria for grading these exams?
3. What distinguishes the "A" and "B" answers from the Cs and Ds?
4. Do law exams favor those students with one learning and performing style and analytical wavelength while hurting others?
5. Is there a general mental and emotional quality that distinguishes those students who do well from those who do not?
6. You apply a rule if there are facts to establish each element of the rule. Is that correct?
7. In a practice exam problem in tort, an eighteen-year-old appeared to have no money, so I didn't discuss any causes-of-action against him. Why bother if the plaintiff can't collect?
8. In an old exam problem in tort, 'Bear Hug,' a victim of a vicious battery, apparently had no witnesses. I stressed that in my argument. Is that correct?
9. Did I hear you right? Did you say that I could be graded down because I set forth legal rules accurately?
10. I find model arguments to be intimidating. I could never write such an argument. Do you have any comment?
11. Is there any single fundamental mistake that beginning law students tend to make?
12. Isn't it necessary to adjust your method of arguing on exams depending on the type of problem, the time allocated, and the professor's expectations?
13. Is it true that students who prepare carefully and do very well in class recitation sometimes do not do well on the exams? If so, what is the reason for this contradiction?
14. What is the impact of self-confidence or the lack of it?
15. Is statutory interpretation important for exams?
16. So what do I do?

#### **1. What is the challenge in answering law school exam problems?**

Prior schooling often emphasizes memorization of materials from a textbook and the teacher's lectures and requires a sophisticated regurgitation on the exam, and sometimes in weaker programs not such a sophisticated regurgitation. Clearly, this low level of teaching and learning is prevalent in many middle and high schools, and unhappily

intrudes into college and beyond. In marked contrast, a fundamental priority in law school exams is placed on the display of two core skills rather than knowledge itself or even just understanding. These two skills are issue spotting from a dense set of exam facts, and then application of relevant legal rules and principles to resolve each identified issue with a concise legal argument.

The performance of this analytical challenge is confounded since it is *not what you do in class*. There, you learn important case skills by studying, briefing, and dialectic discussion of appellate cases that are often lengthy and discursive. You decode the case facts, procedural history, issue, holding, reasoning, and judgment. Thus, you gradually acquire a valuable skill in after-the-fact dissection of mostly old appellate cases. In these "legal autopsies," you meticulously analyze how a judge has constructed the key case facts from the trial record, articulated the decisive appellate issue(s), applied a rule or principle of law to resolve the issue, and explained and justified her decision.

Based on all your schooling experience, you might expect that a law school exam would, of course, flow from what you have studied in the assigned materials and dissected in class, perhaps akin to an analysis of a chain of cases. Though logic, prior exam experience, and pedagogic principle are manifestly in your favor, this expectation is *completely contradicted* by the reality of most law school exams that require issue spotting and concise advocacy arguments to resolve the issues. There is only *modest direct connection* between your dissection of appellate cases in class and what you must do on the exams. Even worse, the elaborated, discursive reasoning typical of many appellate cases is *exactly contrary* to the concise required arguments on time-pressured exams with many issues. Generations of first-year law students have been confounded, dismayed and disappointed by the realization, after their initial first-year exams, of this contradiction. Please take this warning to heart; it could save you much suffering.

## **2. What are the criteria for grading these exams?**

You will be graded by how well you perform the two core skills: issue spotting and resolving each issue with a lawyerly argument. These two skills, however, can be unpacked and detailed in six grading criteria.

### **SIX GRADING CRITERIA**

1. Your lawyerly skill in extricating the key facts from the non-key facts detailed in the essay exam problems.
2. Your lawyerly skill in spotting and specifying the issues raised by the key facts.
3. Your lawyerly skill in learning, recalling, and applying the applicable legal rules (or principles) to resolve the specified issues.
4. Your lawyerly skill in interweaving (meshing together) the key facts with the elements of the applicable rules (or principles).

5. Your lawyerly skill in sometimes applying the appropriate policy purpose(s) to support your rule application, and sometimes arguing two (or even three) ways to resolve an issue.
6. Your skill in demonstrating all of the above skills with succinct legal argument within the allocated time.

Notice that the six criteria are formulated as skills, i.e., capacities for performance. This skill-focused formulation is, of course, intentional. It captures the holistic, skills-centered approach that is central to dialing into the legal wavelength.

### **3. What distinguishes the 'A' and 'B+' answers from the Cs and Ds.**

Many students are unaware of what professors know: The decisive difference between a mediocre, good and excellent exam paper, between a "C-" and a "B+" or "A", is typically in the quality of the skills displayed. The reason for this fact is that *knowledge and to a lesser extent even understanding tends to be broadly shared among many first-year students since most are able and study intensely. In contrast, however, the core exam skills specified above are distributed widely across the spectrum from poor to outstanding.* To be sure, arguments may also reveal differences in knowledge and understanding and, of course, these differences can be important too, especially at the extremes.

Nevertheless, after grading thousands of exam papers over three decades, *what leaps out at you as a grader are the radical differences displayed in legal skills.* Briefly, some answers are lawyerly. They are directly responsive to the interrogatory at the end of the essay. They are lucid, logical, well organized and fact- and issue-centered, and they display cogent legal reasoning. In addition, issue spotting of all major issues is followed by apt rule application and interweaving of key facts with the relevant rules. Policy is briefly but appropriately applied when it adds analytical or persuasive value. The writing is concise without meandering or regurgitating irrelevant knowledge in service of the annoying vice of "legal lecturing."

In essence, these arguments embody or approach the writing formats detailed in Chapter Five of the *How To Do Your Best On Law School Exams* and approximate the model and excellent student responses detailed in Chapter Seven. These exam papers make professors smile. In contrast, many other exam responses, in varying degrees of weakness, display unlawyerly qualities. They are often not directly responsive to the interrogatory. They are confused, not well organized, not systematically presented, and not sufficiently fact- and issue-centered. Major issues are missed altogether, rule application is often faulty, and interweaving with key facts is weak or even missing. At worst, the paper is an unappetizing stew of relevant and irrelevant rules and principles, a weak use of facts, mixed well with confusion, rambling, and often ending abruptly, sometimes with the words: "no more time." Illustrations of poor responses are also set

forth in Chapters Five, Seven and throughout the Exam book.

**4. Is there a general mental and emotional quality that distinguishes those students who do well from those who do not?**

Yes. First, those students who do well have cultivated more mental and emotional flexibility than those who do not do well. Their learning is more adaptable. They see law as an analytical and advocacy process, not as a static bunch of things to be memorized. They see hypotheticals and rules as part of this process, *not* as items to be learned atomistically. They develop skill in tracking the difficult fact patterns in the exam problems. They are not surprised that discretion is central in the human judgments inherent in legal fact-finding, formulation of issues, selection and interpretation of rules, and determination of rights and liabilities. Most of all, they see memorization and all techniques of learning of rules not as ends in themselves, but as *means for performing your understanding* with the two core skills as the *raison d'etre*.

They also understand well that the learning methods that enabled them to succeed with college and LSAT exams and got them into law school are **not** the skills that will enable them to do well in law school. Instead of adding issue-spotting skills and skills in writing concise advocacy arguments to resolve each such issue, students who do not do well *relentlessly* apply the skills that enabled them to do well in college. Often, this means regurgitating the assigned materials, the class discussion, and especially mini-sections of their outlines, on exams in mini-lecture form. If you do so, you are likely to acquire Cs on your exam; if instead you substitute the issue-spotting and advocacy skills mentioned above, you are on the path to As or B pluses.

**5. You apply a rule on an exam to resolve an issue if there are facts to establish each element of the rule. Is this correct?**

Basically, yes. If you believe a rule applies, you match the facts to each element of the rule. If you have facts satisfying each element, the rule applies; the facts are *sufficient*. If you do not have facts on any one element of the rule, then the rule does not apply. The facts are *not sufficient*. Unless instructed to the contrary by your professor, you do not have to go any further: if one element is not factually spelled out, the rule is inapplicable.

Why then did I hedge at the beginning of this answer with the words, "Basically, yes"? One reason is that, if a defense (crime or contracts) or a privilege (torts) applies, then the initial rule is *inapplicable* even if there are facts that seem *sufficient* on their face for all elements. This possibility does not negate the validity or importance of the prior discussion. It only qualifies it. Your argument instead must then focus on the applicable defense, which becomes the rule to be applied. A second reason for the hedging is that infrequently a rule is invalidated as unconstitutional or otherwise repudiated, even though there are facts spelling out all elements (see *Exam*, pp. 102-

104).

**6. In a practice exam problem in tort, an eighteen-year-old appeared to have no money, so I didn't discuss any causes-of-action against him. Why bother if the plaintiff can't collect?**

On many exams, you are often asked at the end of the fact pattern, "What causes of action would you initiate as a plaintiff's or defense lawyer?" You can legally initiate and sustain a cause-of-action, and obtain a judgment, against an impecunious defendant. The fact that you are presently unable to satisfy (collect) the judgment does not invalidate the judgment or detract one bit from the determination of key facts, issue articulation, rule application, and reasoning that is the substance of law-school exams. What underlies your question is a practitioner's perspective, a practical judgment in practice but *not* on law school exams.

**7. In an old exam problem in tort, 'Bear Hug,' a victim of a vicious battery, apparently had no witnesses. I stressed that in my argument. Is that correct? .**

No. In law-school exams, the challenge is to uncover the legal significance of the fact patterns as detailed in the problems. Which issues are raised by the key facts? Which rules apply? What reasoning supports this rule application? *The facts in the exams are all givens: they are assumed to be true.* Ordinarily, your professor intends no question as to the truth of the exam facts. Questions about proving the facts with witnesses and other forms of evidence can be important issues in evidence, definitely in clinical courses and certainly in practice, but not in typical law-school exams.

**8. Did I hear you right? Did you say that I could be graded down because I set forth legal rules accurately?**

Yes. At the extreme, you will receive a failing grade for a perfect argument to a question that was *not* asked. If your accurate statement of legal rules is unresponsive to your professor's question and problem, that statement is unlawyerly, an exam blunder. It's the vice of "*legal lecturing.*" It is as unlawyerly as correctly explaining legal rules that are unresponsive to a judge's question in court. A judge will not respond well to such "legal lecturing," nor will your professors who rightly complain that too many students largely *ignore* their explicit exam questions.

**9. I find model arguments to be intimidating. I could never write such an argument. Do you have any comment?**

Model arguments can be intimidating, especially to beginning students. Consider for a moment who prepares them: professors who usually have devoted many thousands of hours to the subject. Often, they have taught the course numerous times. In addition, many have written articles and some even books about the subject. Finally, while you are

usually given fifty minutes or an hour or so to spot the issues and prepare the exam argument, model arguments typically require many hours of careful preparation by your professor. Take heart, your fellow students are also intimidated by the model arguments. You can do very well on an exam *without* writing a model argument.

**10. Is there any single fundamental mistake that beginning law students tend to make?**

Yes, there is an underlying misleading societal view of the nature of law, and hence of the study of law, that manifests itself in a series of blunders in learning, outlining of courses, and writing exam arguments. That misleading view, as noted previously, is that law is essentially a series of clear, black letter rules to be memorized and applied on cue, more or less automatically, once facts are ascertained. This view of law leads to memorizing legal rules apart from their policy purposes and to slighting the critical, *fact-specific, fact-limited character* of legal rules. This view often leads to unfocused frenetic studying that detracts from your professor's typical emphasis on thinking, talking, and writing in a lawyerly manner.

It also leads to confusion in studying cases: an excessive preoccupation with the holdings of cases; a tendency to see cases as *the law* in a monumentalized sense rather than as an advocacy determined procedure; and to an inability to see beyond the cases to the pattern of principles illustrated by the cases.

With this erroneous view of law and cases, the existence of inconsistent, contradictory, confusing, and aberrational cases is confounding. With the view of law as a concrete, advocacy-determined procedure, such cases are to be expected. Of course, the rules are not always clear or certain; and the judges who resolve the relevant issues in their judgments and opinions personify varying legal perspectives and different degrees of competence, and exercise a substantial measure of discretion in finding facts and in determining which rule should apply. Inescapably, this advocacy determined "truth" will include a segment of inconsistent, contradictory, and even aberrational, cases. This result is to be expected, taken in stride, and accommodated. There are other examples of difficulties attributable to this erroneous view, but these are illustrative.

**11. Isn't it necessary to adjust your method of arguing on exams depending on the type of problem, the time allocated, and the professor's expectations?**

Absolutely! As stressed in *How To Do Your Best on Law School Exams* it is vital for you to *dial into your professor's exam frequency*. What does she expect? Do her exam problems contain a plethora of issues (seven or eight or even more) with quite limited time allocated so that the especially concise multiple-issue argument is what you must do (see the *Mary Lee* problem and argument in Chapters VI and VII)? Or do her problems have far fewer issues and an expectation that these fewer issues will be more fully explored (see the *Policy, Prince Iple, Blowing In The Wind, and Let Them Eat*

*Cake* problems and arguments also in Chapters VI and VII). The arguing style for the issue-packed problems will result in a poor grade for arguing in response to the latter set of problems. The more elaborately developed argument style for the latter set of problems, if applied to the *Mary Lee* type of problem, will result in a poor grade because you will miss too many issues and run out of time. The *Speluncean Explorers* problem is in between: there are many issues, but an hour and fifteen minutes is allocated, enough time for fairly elaborate arguments. The *Olivia Warbucks* problem and response raises so many issues it may resemble somewhat a *Mary Lee* type of issue-packed problem and arguments, but substantial time is allocated. In addition, as you know, some instructors structure problems that require substantial back-and-forth discussion (e.g., *Olivia Warbucks* and *Blowing In The Wind*), and some do not (e.g., *Mary Lee*). The lesson is clear: You must be able to adjust your arguing style to the problem presented and to your professor's expectations. The best source of your professor's expectations is her old model argument or outline of a response. The next best source is her old exams on file. If these are unavailable, ask her for a sample essay exam, and check with former students who have done well on her exams.

**12. Is it true that students who prepare carefully and do very well in class recitation sometimes do not do well on the exams? If so, what is the reason for this contradiction?**

Yes and it happens more than occasionally. The chief reason, I believe, is that such students do not understand the *differences* between the case skills that you need to excel in class and the mostly different skills you need to excel on law school exams (see Exam, pp. 2, 4). To illustrate and as noted, the elaborated, even discursive, writing that is typical of many appellate opinions sharply contrasts with the direct and concise writing that you need for many or even most exam arguments. A second reason in my experience is the varying skill levels among students in tracking the dense fact pattern. Some students easily track the dense facts and identify and decode the various legal conflicts and resulting issues. *Other students find it difficult to do so, often, I believe, because of failure to practice during the semester.* But what is clear is that this tracking skill is hardly genetic. It can be learned, practiced and mastered by relentless practice during the semester.

**13. Do law exams favor those students with a particular learning and performing temperament and analytical wavelength while disadvantaging others?**

Yes. The inherent bias of law exams strongly favors those students who are quick and nimble, whose skills include *rapid first-draft organizing and writing under time pressure*. The more reflective student who in college and elsewhere has honed deep critical skills in pondering a problem, deconstructing its multi-layered dimensions and viewing it from a variety of relevant perspectives, may be at an initial disadvantage. The

exams do not allow enough time for this clearly more profound approach and ordinarily do not even ask for it. It's the *wrong wavelength*. Unlike preparation for class where usually you have enough time to read, analyze, brief and ponder cases before the day of the class, on exams you know now that you are typically given a dense fact pattern and expected to decode it in fifty or so minutes, including identifying a bunch of issues and writing out concise first-draft arguments to resolve the issues. Thus, the relatively ample preparatory time for class contrasts with the extremely hurried nature of exam analysis and writing. The remedy for the more reflective student is first to understand exactly this hurried nature of first-draft, law-exam writing, and secondly, to practice it at least weekly during the semester with your professors' old exams so that you become both skilled in such writing and confident in applying these skills. Some more reflective students easily adjust to such first-draft writing. They also have this skill in their repertory, or quickly add it. But others must practice much and struggle to add this skill. Without such practice, even brilliance in multi-layered college-type analyses will not produce As. Incidentally, I believe this inherent bias of law-school exams is a searing weakness of such exams. To risk penalizing the reflective student is unjustified; to discourage more profound, multi-layered analysis is a stark contradiction in a graduate school.

In the words of an acquaintance who has long taught at the New York University Law School, "I was never asked in practice to resolve three problems in less than three hours, and without use of the law library." But to be forewarned is to be forearmed.

#### **14. What is the impact of self-confidence or the lack of it?**

Those students who do well usually believe they will do well, and such belief tends to be a fact-factory for actually doing well. Put differently, such belief tends to be a self-fulfilling prophecy. Believing you can do it well spurs the systematic preparation that leads to doing well. It's not Pollyanna or simply "the power of positive thinking." Rather, the belief and associated habits of mind and behavior lead to intense and focused preparation that is rewarding in an initial external sense, and this success reinforces in a circular process the beliefs, attitudes, and related behaviors. Conversely, lack of self-confidence is often correlated with students-and sometimes groups of students-who do poorly, and it's clear that such negative thinking is a fact-factory too, a negative self-fulfilling prophecy associated with habits of mind and behavior that produce poor performance. Don't sabotage and rob yourself of your potential to do well by such negative thinking. My experience is that negative attitudes limit the realization of the potential of many students. At an extreme, such attitudes can hurt badly and require therapeutic intervention. But most of us can struggle with these internal demons. Old and new friends can help, including empathetic study group members. In law school, as in life, you need friends.

## **15. Is statutory interpretation important for exams?**

Absolutely, and it often falls through the cracks in the first year, even though *all professors agree with its central importance*. Skills in statutory interpretation aid you in issue spotting and in arguing for the application of one rule over another. I have repeatedly emphasized in all my books that rules are not all alike. For example, some are highly technical while others are open ended, and interpretation ranges from strict, stressing plain meaning, to highly flexible, stressing policy and moral ideals such as justice or utility for the majority. I have also stressed in all my books that principles are also integral to law and its learning and resonate on a different wavelength than rules. But this important insight for class, exams and practice also applies *within* many statutes and case-based rules. Indeed, the truth is that the elements within many statutes and case-based rules (and regulations too) offer sharply varying and sometimes almost endless interpretive potential. *In your classes (and in class materials), you should be listening carefully as your professor unpacks statutes, rules and regulations-and their elements-for their interpretive possibilities, both established and innovative.* Follow her guidance in this unpacking too.

One of countless examples of variation within a single statute, the interpretation of the *mens rea* of "intent to kill" (i.e. a conscious objective to kill a specific person) is fenced in both by its fairly specific and defined words, and by contrast with the other major forms of *mens rea* (evil mind). Thus, an "intent to kill" for intentional murder is contrasted with the knowledge (awareness) form of *mens rea*, and also contrasted with the reckless and criminal negligence forms of *mens rea*. But the *actus reus* (the voluntary act) element in the same statute is strikingly wide open in interpretation: virtually any behavior will be sufficient if it is actuated by the intent to kill, including shooting, stabbing, beating, poisoning, throwing off a building, .... The failure to appreciate how elements within a rule, as well as entire rules and principles themselves, offer varying and even sometimes endless interpretive possibilities is yet another source of first-year confusion.

## **16. So what do I do?**

If you are graded by your professor's six grading criteria, then the principle directing what you must do is clear. Your studying, reviewing, outlining, study group focus, and especially your practice with hypotheticals and in arguing old exam problems, must be carried out with these six criteria in mind and within the wavelength of each professor. The details for implementing this direction comprise the content of the Exam book.

To reduce your learning to an exam focus is unnecessary and foolish, but to overlook it, denigrate it, or in classic college fashion, to reserve it to the last week or two before the exam may be folly for which you could suffer. For my fellow liberal-arts

devotees, the time-pressured surface character of law-school exams is, of course, a lamentable reduction of the rich history, economics, culture, religion, and political struggle from which law has emerged over the centuries and from which arise vibrant perspectives for analysis and critical appraisal. Yes, of course, I strongly agree. But keep in mind that you need not sacrifice any of your hard earned liberal-arts perspectives and critical reading skills. You just need to add a new frequency for exam decoding, for singing this particular song, for dancing this dance. That's all.

Chapter Two in the Exam book concentrates on aiding you to get on the right frequency for learning law for exams (and practice). From my long experience in law teaching, it is abundantly clear to me that weaknesses in exams are often rooted in deficiencies in learning efficiently and effectively. Similarly, strengths in applied legal argument utilizing the specified core skills can flow from well cultivated learning and performance skills first acquired in high school and college, school skills that often translate into the required legal skills in law school. Thus, the priority in strengthening learning skills that is embodied in Chapter Two is justified by an analysis born of much experience. Chapter Three details a number of outlining methods designed to prepare you for what you must perform on the exams: issue spotting and argument making. Chapter Four also explains in detail how to spot issues and Chapter Five details the writing of lawyerly arguments to resolve such issues. Chapter Six sets forth a series of actual essay exam problems, and Chapter Seven presents responding arguments at an 'A' level of grading as well as some mediocre and poor responses. Chapter Eight explores emotional pitfalls that occur and how to respond.

Adios and always seek justice and defend the Constitution.

<p>John Delaney is the author of: Learning Legal Reasoning, Briefing, Analysis and Theory; How to Do Your Best on Law School Exams; and Learning Criminal Law as Advocacy Argument <a href="http://www.JohnDelaneyPub.com">www.JohnDelaneyPub.com</a></p>
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