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## ▶ Essay and Multiple-Choice Questions and Answers

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# CRIMINAL PROCEDURE

## *Essay and Multiple-Choice Questions and Answers*

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# Introduction

Although your grades are a significant factor in obtaining a summer internship or permanent position at a law firm, no formalized preparation for finals is offered at most law schools. Students, for the most part, are expected to fend for themselves in learning the exam-taking process. Ironically, law school exams ordinarily bear little correspondence to the teaching methods used by professors during the school year. They require you to spend most of your time briefing cases. Although many claim this is "great preparation" for issue-spotting on exams, it really isn't. Because you focus on one principle of law at a time, you don't get practice in relating one issue to another or in developing a picture of the entire course. When exams finally come, you're forced to make an abrupt 180-degree turn. Suddenly, you are asked to recognize, define and discuss a variety of issues buried within a single multi-issue fact pattern. In most schools, you are then asked to select among a number of possible answers, all of which look inviting but only one of which is right.

The comprehensive course outline you've created so diligently and with such pain means little if you're unable to apply its contents on your final exams. There is a vast difference between reading opinions in which the legal principles are clearly stated and applying those same principles to hypothetical exams and multiple-choice questions.

The purpose of this book is to help you bridge the gap between memorizing a rule of law and ***understanding how to use it*** in the context of an exam. After an initial overview describing the exam-writing process, you will be presented with a large number of hypotheticals that test your ability to write analytical essays and to pick the right answers to multiple-choice questions. ***Do them — all of them!*** Then review the suggested answers that follow. You'll find that the key to superior grades lies in applying your knowledge through questions and answers, not rote memory.

GOOD LUCK !

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# Preparing Effectively for Essay Examinations[1]

To achieve superior scores on essay exams, a law student must (1) learn and understand "blackletter" principles and rules of law for each subject; (2) analyze how those principles of law arise within a test fact pattern; and (3) write clearly and succinctly a short discussion of each principle and how it relates to the facts. One of the most common misconceptions about law school is that you must memorize each word on every page of your casebooks or outlines to do well on exams. The reality is that you can commit an entire casebook to memory and still do poorly on an exam. Our review of hundreds of student answers has shown us that most students can recite the rules. The students who do ***best*** on exams are able to analyze how the rules they have memorized relate to the facts in the questions, and how to communicate their analysis to the grader. The following pages cover what you need to know to achieve superior scores on your law school essay exams.

## The "ERC" Process

To study effectively for law school exams you must be able to "*ERC*" (***E***lementize, ***R***ecognize, and ***C***onceptualize) each legal principle covered in your casebooks and course outlines. ***Elementizing*** means reducing each legal theory and rule you learn to a concise, straightforward statement of its essential elements. Without knowledge of these elements, it's difficult to see all the issues as they arise.

For example, if you are asked, "What is self-defense?", it is ***not*** enough to say, "self-defense is permitted when, if someone is about to hit you, you can prevent him from doing it." This layperson description would leave a grader wondering if you had actually attended law school. An accurate statement of the self-defense principle would go something like this: "When one reasonably believes she is in imminent danger of an offensive touching, she may assert whatever force she reasonably believes necessary under the circumstances to prevent the offensive touching from occurring." This formulation correctly shows that there are four separate, distinct elements which must be satisfied before the defense of self-defense can be successfully asserted: (1) the actor must have a ***reasonable belief*** that (2) the touching which she seeks to prevent is ***offensive***, and that (3) the offensive touching is ***imminent***, and

1 To illustrate the principles of effective exam preparation, we have used examples from Torts and Constitutional Law. However, these principles apply to all subjects. One of the most difficult tasks faced by law students is learning how to apply principles from one area of the law to another. We leave it to you, the reader, to think of comparable examples for the subject-matter of this book.

(4) she must use no greater force than she ***reasonably believes necessary under the circumstances*** to prevent the offensive touching from occurring.

***Recognizing*** means perceiving or anticipating which words or ideas within a legal principle are likely to be the source of issues, and how those issues are likely to arise within a given hypothetical fact pattern. With respect to the self-defense concept, there are four ***potential*** issues. Did the actor reasonably believe the other person was about to make an offensive contact with her? Was the contact imminent? Would the contact have been offensive? Did she use only such force as she reasonably believed necessary to prevent the imminent, offensive touching?

***Conceptualizing*** means imagining situations in which each of the elements of a rule of law can give rise to factual issues. ***Unless you can imagine or construct an application of each element of a rule, you don't truly understand the legal principles behind the rule!*** In our opinion, the inability to conjure up hypothetical fact patterns or stories involving particular rules of law foretells a likelihood that you will miss issues involving those rules on an exam. It's ***crucial*** (1) to ***recognize*** that issues result from the interaction of facts with the words defining a rule of law; and (2) to develop the ability to ***conceptualize*** or ***imagine*** fact patterns using the words or concepts within the rule.

For example, a set of facts illustrating the "reasonable belief" element of the self-defense rule might be the following:

> One evening, A and B had an argument at a bar. A screamed at B, "I'm going to get a knife and stab you!" A then ran out of the bar. B, who was armed with a concealed pistol, left the bar about 15 minutes later. As B was walking home, he heard someone running toward him from behind. B drew his pistol, turned, and shot the person advancing toward him (who was only about ten feet away when the shooting occurred). When B walked over to his victim, he realized that the person he had shot was dead and was not A, but another individual who had simply decided to take an evening jog. There would certainly be an issue whether B had a reasonable belief that the person who was running behind him was A. In the subsequent wrongful-death action, the victim's estate would contend that the earlier threat by A was not enough to give B a reasonable belief that the person running behind him was A. B could contend in rebuttal that given the prior altercation at the bar, A's threat, the darkness, and the fact that the incident occurred soon after A's threat, his belief that A was about to attack him was "reasonable."

An illustration of how the word "imminent" might generate an issue is the following:

> X and Y had been feuding for some time. One afternoon, X suddenly attacked Y with a hunting knife. However, Y was able to wrest the knife

> away from X. At that point, X retreated about four feet away from Y and screamed: "You were lucky this time, but next time I'll have a gun and you'll be finished." Y, having good reason to believe that X would subsequently carry out his threats (after all, X had just attempted to kill Y), immediately thrust the knife into X's chest, killing him. While Y certainly had a reasonable belief that X would attempt to kill him the ***next time*** the two met, Y would probably ***not*** be able to assert the self-defense privilege because the element of "imminency" was absent.

A fact pattern illustrating the actor's right to use only that force which is reasonably necessary under the circumstances might be the following:

> D rolled up a newspaper and was about to strike E on the shoulder with it. As D pulled back his arm for the purpose of delivering the blow, E drew a knife and plunged it into D's chest. While E had every reason to believe that D was about to deliver an offensive impact on him, E probably could not successfully assert the self-defense privilege because the force he utilized in response was greater than reasonably necessary under the circumstances to prevent the impact. E could simply have deflected D's blow or punched D away. The use of a knife constituted a degree of force by E which was ***not*** reasonable, given the minor injury which he would have suffered from the newspaper's impact.

"Mental games" such as these must be played with every element of every rule you learn.

## Issue-Spotting

One of the keys to doing well on an essay examination is issue-spotting. In fact, issue-spotting is ***the*** most important skill you will learn in law school. If you recognize a legal issue, you can always find the applicable rule of law (if there is any) by researching the issue. But if you fail to see the issues, you won't learn the steps that lead to success or failure on exams or, for that matter, in the practice of law. It is important to remember that (1) an issue is a question to be decided by the judge or jury; and (2) a question is "in issue" when it can be disputed or argued about at trial. The bottom line is that ***if you don't spot an issue, you can't raise it or discuss it.***

The key to issue-spotting is to learn to approach a problem in the same way as an attorney does. Let's assume you've been admitted to practice and a client enters your office with a legal problem. He will recite his facts to you and give you any documents that may be pertinent. He will then want to know if he can sue (or be sued, if your client seeks to avoid liability). To answer your client's questions intelligently, you will have to decide the following: (1) what principles or rules can possibly be asserted by your

client; (2) what defense or defenses can possibly be raised to these principles; (3) what issues may arise if these defenses are asserted; (4) what arguments can each side make to persuade the fact-finder to resolve the issue in his favor; and (5) finally, what will the ***likely*** outcome of each issue be. ***All the issues which can possibly arise at trial will be relevant to your answers.***

## How to Discuss an Issue

Keep in mind that ***rules of law are the guides to issues*** (i.e., an issue arises where there is a question whether the facts do, or do not, satisfy an element of a rule); a rule of law ***cannot dispose of an issue*** unless the rule can reasonably be ***applied to the facts.***

A good way to learn how to discuss an issue is to study the following mini-hypothetical and the two student responses which follow it.

### Mini-Hypothetical

A and B were involved in making a movie which was being filmed at a local bar. The script called for A to appear to throw a bottle (which was actually a rubber prop) at B. The fluorescent lighting at the bar had been altered for the movie—the usual subdued blue lights had been replaced with rather bright white lights. The cameraperson had stationed herself just to the left of the swinging doors which served as the main entrance to the bar. As the scene was unfolding, C, a regular patron of the bar, unwittingly walked into it. The guard who was usually stationed immediately outside the bar had momentarily left his post to visit the restroom. As C pushed the barroom doors inward, the left door panel knocked the camera to the ground with a resounding crash. The first (and only) thing C saw was A (about 5 feet from C), who was getting ready to throw the bottle at B, who was at the other end of the bar (about 15 feet from A). Without hesitation, C pushed A to the ground and punched him in the face. Plastic surgery was required to restore A's profile to its Hollywood-handsome pre-altercation look.

Discuss A's right against C.

### Pertinent Principles of Law:

1. Under the rule defining the prevention-of-crime privilege, if one sees that someone is about to commit what she reasonably believes to be a felony or misdemeanor involving a breach of the peace, she may exercise whatever degree of force is reasonably necessary under the circumstances to prevent that person from committing the crime.

2. Under the defense-of-others privilege, where one reasonably believes that someone is about to cause an offensive contact upon a third party, she may use whatever force is reasonably necessary under the circumstances to prevent the contact. Some jurisdictions, however, limit this privilege to situations in which the actor and the third party are related.

## First Student Answer

***Did C commit an assault and battery upon A?***

An assault occurs when the defendant intentionally causes the plaintiff to be reasonably in apprehension of an imminent, offensive touching. The facts state that C punched A to the ground. Thus, a battery would have occurred at this point. We are also told that C punched A in the face. It is reasonable to assume that A saw the punch being thrown at him, and therefore A felt in imminent danger of an offensive touching. Based upon the facts, C has committed an assault and battery upon A.

***Were C's actions justifiable under the defense-of-others privilege?***

C could successfully assert the defense-of-others and prevention-of-crime privileges. When C opened the bar doors, A appeared to be throwing the bottle at B. Although the "bottle" was actually a prop, C had no way of knowing this fact. Also, it was necessary for C to punch A in the face to assure that A could not get back up, retrieve the bottle, and again throw it at B. Although the plastic surgery required by A is unfortunate, C could not be successfully charged with assault and battery.

## Second Student Answer

***Assault and Battery:***

C committed an assault (causing A to be reasonably in apprehension of an imminent, offensive contact) when A saw that C's punch was about to hit him, and battery (causing an offensive contact upon A) when (1) C knocked A to the ground, and (2) C punched A.

***Defense-of-Others/Prevention-of-Crime Defenses:***

C would undoubtedly assert the privileges of defense-of-others (when defendant reasonably believed the plaintiff was about to make an offensive contact upon a third party, he was entitled to use whatever force was reasonably necessary to prevent the contact); and prevention-of-crime defense (when one reasonably believes another is about to commit a felony or misdemeanor

involving a breach of the peace, he may exercise whatever force is reasonably necessary to prevent that person from committing a crime).

A could contend that C was not reasonable in believing that A was about to cause harm to B because the enhanced lighting at the bar and camera crash should have indicated to C, a regular customer, that a movie was being filmed. However, C could probably successfully contend in rebuttal that his belief was reasonable in light of the facts that (1) he had not seen the camera when he attacked A, and (2) instantaneous action was required (he did not have time to notice the enhanced lighting around the bar).

A might also contend that the justification was forfeited because the degree of force used by C was not reasonable, since C did not have to punch A in the face after A had already been pushed to the ground (i.e., the danger to B was no longer present). However, C could argue in rebuttal that it was necessary to incapacitate A (an individual with apparently violent propensities) while the opportunity existed, rather than risk a drawn-out scuffle in which A might prevail. The facts do not indicate how big A and C were; but assuming C was not significantly larger than A, C's contention will probably be successful. If, however, C was significantly larger than A, the punch may have been excessive (C could presumably have simply held A down).

## Critique

Let's examine the First Student Answer first. It mistakenly treats as an "issue" the assault and battery committed by C upon A. While the actions creating these torts must be mentioned in the facts to provide a foundation for a discussion of the applicable privileges, there was no need to discuss them further because they were not the issue the examiners were testing for.

The structure of the initial paragraph of First Student Answer is also incorrect. After an assault is defined in the first sentence, the second sentence abruptly describes the facts necessary to constitute the commission of a battery. The third sentence then sets forth the elements of a battery. The fourth sentence completes the discussion of assault by describing the facts pertaining to that tort. The two-sentence break between the original mention of assault and the facts which constitute assault is confusing; the facts which call for the application of a rule should be mentioned ***immediately*** after the rule is stated.

A more serious error, however, occurs in the second paragraph of the First Student Answer. While there is an allusion to the correct principle of law

(prevention of crime), the ***rule is not stated.*** As a consequence, the grader can only guess why the student thinks the facts set forth in the subsequent sentences are significant. A grader reading this answer could not be certain whether the student recognized that the issues revolved around the ***reasonable belief*** and ***necessary force*** elements of the prevention-of-crime privilege. Superior exam-writing requires that the pertinent facts be ***tied*** directly and clearly to the operative rule.

The Second Student Answer is very much better than the First Answer. It disposes of C's assault and battery upon A in a few words (yet tells the grader that the writer knows these torts are present). More importantly, the grader can easily see the issues which would arise if the prevention-of crime privilege were asserted (i.e., "whether C's belief that A was about to commit a crime against B was reasonable" and "whether C used unnecessary force in punching A after A had been knocked to the ground"). Finally, it also utilizes all the facts by indicating how an attorney would assert those facts which are most advantageous to her client.

## Structuring Your Answer

Graders will give high marks to a clearly written, well-structured answer. Each issue you discuss should follow a specific and consistent structure which a grader can easily follow.

The Second Student Answer basically utilizes the ***I-R-A-A-O format*** with respect to each issue. In this format, the ***I*** stands for the word ***Issue***; the ***R*** for ***Rule of law***; the initial ***A*** for the words ***one side's Argument***; the second ***A*** for ***the other party's rebuttal Argument***; and the ***O*** for your ***Opinion as to how the issue would be resolved.*** The ***I-R-A-A-O*** format emphasizes the importance of (1) discussing ***both*** sides of an issue, and (2) communicating to the grader that where an issue arises, an attorney can only advise her client as to the ***probable*** decision on that issue.

A somewhat different format for analyzing each issue is the ***I-R-A-C format.*** Here, the ***I*** stands for ***Issue;*** the ***R*** for ***Rule of law;*** the ***A*** for ***Application of the facts to the rule of law;*** and the ***C*** for ***Conclusion. I-R-A-C*** is a legitimate approach to the discussion of a particular issue, within the time constraints imposed by the question. The ***I-R-A-C format*** must be applied to each issue in the question; it is not the solution to the entire answer. If there are six issues in a question, for example, you should offer six separate, independent ***I-R-A-C*** analyses.

We believe that the ***I-R-A-C*** approach is preferable to the ***I-R-A-A-O*** formula. However, either can be used to analyze and organize essay exam

answers. Whatever format you choose, however, you should be consistent throughout the exam and remember the following rules:

First, ***analyze all of the relevant facts.*** Facts have significance in a particular case ***only as they come under the applicable rules of law.*** The facts presented must be analyzed and examined to see if they do or do not satisfy one element or another of the applicable rules, and the essential facts and rules must be stated and argued in your analysis.

Second, you must communicate to the grader the ***precise rule of law*** controlling the facts. In their eagerness to commence their arguments, students sometimes fail to state the applicable rule of law first. Remember, the ***R*** in either format stands for ***Rule of Law.*** Defining the rule of law ***before*** an analysis of the facts is essential in order to allow the grader to follow your reasoning.

Third, it is important to treat ***each side of an issue with equal detail.*** If a hypothetical describes how an elderly man was killed when he ventured upon the land of a huge power company to obtain a better view of a nuclear reactor, your sympathies might understandably fall on the side of the old man. The grader will nevertheless expect you to see and make every possible argument for the other side. Don't permit your personal viewpoint to affect your answer! A good lawyer never does! When discussing an issue, always state the arguments for each side.

Finally, don't forget to ***state your opinion or conclusion*** on each issue. Keep in mind, however, that your opinion or conclusion is probably the ***least*** important part of an exam answer. Why? Because your professor knows that no attorney can tell her client exactly how a judge or jury will decide a particular issue. By definition, an issue is a legal dispute which can go either way. An attorney, therefore, can offer her client only her best opinion about the likelihood of victory or defeat on an issue. Since the decision on any issue lies with the judge or jury, no attorney can ever be absolutely certain of the resolution.

## Discuss All Possible Issues

As we've noted, a student should draw ***some*** type of conclusion or opinion for each issue raised. Whatever your conclusion on a particular issue, it is essential to anticipate and discuss ***all of the issues*** which would arise if the question were actually tried in court.

Let's assume that a negligence hypothetical involves issues pertaining to duty, breach of duty, proximate causation, and contributory negligence. If the defendant prevails on any one of these issues, he will avoid liability. Nevertheless, even if you feel strongly that the defendant owed no duty to