

TESTING 1 – 2 - 3:

An insider's insight on how to do well on bar exam essays*

By Mary Campbell Gallagher, J.D., Ph.D.

This summer some 40,000 bar candidates will gather in the heat, many to take the computer-scored Multistate Bar Examination, almost all to write six or more hours of essay examinations, and so themselves and the coveted title *attorney at law!* As summer turns into fall, alas, several thousand of those examinees will receive a thick envelope containing the notice "You did not pass," and application forms for the next sitting for the bar. Often burdened by debt, embarrassed in front of their family and friends, usually having to work until the last moment at a job they are afraid of losing if they fail the bar again, these repeaters, as they are known, are a brave and hard-working band. But wouldn't it be wonderful if they had received the thin envelope of congratulations, instead?

To find out how to receive that thin envelope, one question we have to ask is, How do the bar examiners view the essays? In my many years of research and teaching on essay-writing for bar examinations, I found that while there are a few states, including New York, where one may still prepare for the bar principally by clerking in a law office, bar examiners everywhere look at the bar exam as the main test of the bar candidates' capacity for the unsupervised practice of law. Behind every passing set of essays the bar examiners see not a hard-working law student whose family love him, but a man or woman who can hang out a shingle, represent the legal profession in the larger community, take on clients, and practice law entirely alone.

Second, because the bar exam can lead to the unsupervised practice of law, the bar examiners read the bar essays not only for knowledge of law, but for the kind of legal analysis and writing a lawyer must do in practice, what they call lawyer-like writing. As director of Testing for the National Conference of Bar Examiners, overseeing the development of questions for the Multistate Essay Examination, Jane P. Smith has responsibility for essay questions used and graded locally, in ten states. Ms. Smith, an attorney who was formerly Director of Testing for the California Bar Examiners, says that the difference between the essays and a computer-scored test like the Multistate Bar Examination is that the "the essays give you the opportunity to explain how you reach a conclusion, to work through your analysis." Asked whether the following, regarding battery, was an example of "analysis of issues," Ms. Smith said *Yes* emphatically: *In this case, Henry intentionally struck John with the bat. He had no privilege. He struck John on his arm, that is, on his body. There*

was a resulting harm, including fracture of John's arm. This analysis systematically applies the elements of the tort in question to the facts of the case, one-by-one.

If the bar examiners want not merely recitation of principles of law, but focused lawyer-like *analysis* in the essays, it is the bar candidate's task to provide it. As John W. Davis, Solicitor General of the United States for ten years, wrote in *The Argument of an Appeal* (a 1940 address to the Association of the Bar of the City of New York and later privately printed), "To adapt yourself to the hearer's methods of reasoning is not artful, it is simply elementary psychology."

Let us suppose that a typical bar candidate, Horace Jones, has heard everything the bar examiners have to say about the essays, and that he hopes to remember it as he writes his exam. Let us follow him as he sets down his backpack full of flash cards and yellow bar review notes and goes through the door of the bar examination room in a high school in State X.

I. READ THE FACT PATTERN WITH CARE.

Horace Jones has just sat down and glanced at the first fact pattern in the essay test booklet when he notices that the man sitting next to him has not only already opened his bluebook, but has in fact already begun to write. We know that the thought in Horace's mind is this: What is *wrong with me?* The bar examiners state that careful reading is crucial. The best advice of most bar examination tutors and bar review courses is that the candidate should plan to spend about a third of the time reading and outlining each essay question. Let's slip up invisibly behind Horace's chair and whisper a reminder in his ear: *Outline the question, Horace! Don't pay attention to anyone else!*

Anthony F. Renzo speaks from his three years' experience directing the bar exam grading process for the Bar Examiners of the State of California when he says of the bar exam essays, "It is really important to know what the *important issues* are, as opposed to those that are there but in the judgment of the profession are less important."

Reading and outlining are key. The interrogatory, or call of the question, is the examinee's best guide to the examiners' intent. *Horace! Can you hear us?* We follow Horace's gestures and see, with relief, that he is reading the interrogatory, or "call of the question," first, starting with the bottom of the question. He will not waste his time on "issue-spotting" for its own sake. He is starting by finding out what the question asks,

and he'll look for the issues that help him give the bar examiners what they want. Horace starts to write an outline. *Good work, Horace!*

II. WRITE SIMPLY.

Anthony F. Renzo offers the following advice: "Write simple sentences. Be as precise as you can be. Write with clarity." The bar candidate should say "contract" and not "contractual agreement." He should use legal terms where appropriate, but write in plain English. His sentences should be short and direct. Our friend Horace has just decided to state the mail-box rule. As we watch him, we can see him waver between saying "Acceptance is effective upon dispatch" and saying, "Whereas the party of the second part may receive an invitation by one means and wish to respond by another, he may also respond in a manner anticipated by the party of the first part, and so create a valid and effective acceptance that the law will enforce, immediately upon dispatch."

Anthony F. Renzo says that "what a lot of people tend to do is to think that the simplest way of explaining something is not adequate." Horace, meanwhile, chews his pencil shifting mentally between the simpler and more complex way of stating the rule. Finally, (Halleluia! we cry), Horace remembers that plain English is always the better choice. Mr. Renzo says, "There is a genius in simplicity, especially when you are dealing with complex concepts." *Acceptance is effective upon dispatch.*

III. STATE THE LAW. DO SO CLEARLY COMPLETELY AND SIMPLY.

The bar exam essays test knowledge of basic principles of law. "This is a profession," as Anthony Renzo says, "and we do require a modicum of knowledge." The principles tested are usually straightforward. Horace writes: *Under the common law, a contract requires offer, acceptance and consideration.* The bar examiners ask about the basic rules of law: the elements of negligence, the rules for contract formation, enforcement of divorce decrees, wills.

Knowing the law for the bar exam essays requires mastery, not just recognition. Mastery means being able to explain the law to someone else. If you can't explain something to another person, you don't really understand it, a principle Socrates taught centuries ago. Pretend you are explaining the law to your parents, to your grocer, to a child.

We have already seen our friend Horace state simple rules of law, and do so completely and simply. So far, Horace is remembering the bar examiners' lessons very well.

II. APPLY THE LAW CAREFULLY TO THE FACTS.

Standing in the courtroom or sitting in the bar examination room, one of the most important rules for all legal argument is this: use the facts. Bar candidates often suppose that getting the law right is their only job. The bar examiners, however, regard using the facts as the key to the lawyer-like *analysis* they are looking for. Psychometric expert Stephen P. Klein, of the Rand Corporation in Santa Monica, California, has been a consultant not only to the National Conference of Bar Examiners but to the bar examiners of twenty states. He says that the bar candidate whose essay demonstrates the way the law applies to the facts of the case often gets higher marks. Aristotle said that human beings often reason: All men are mortal; *Socrates is a man*; therefore, Socrates is mortal. As John W. Davis said of arguing and appeal, when the facts are brought out properly, the legal rules often prove to be elementary.

Our friend Horace, meanwhile, has gone from the contracts question to the torts question. It is obvious that the defendant in the fact pattern was negligent. Horace is now writing very competently, however. Instead of brushing the facts off in a conclusory way by saying, "And of course defendant was negligent," he takes his rule to the facts of the case, one-by-one: "Defendant owed plaintiff the duty of care of reasonably prudent person," he begins. "Defendant arguably breached that duty by bumping against plaintiff's shoulder." He goes on, "Defendant's blow was clearly the cause of plaintiff's falling and gashing her head open. The harm, namely, her injury, is also clear." *Well done, Horace!*

III. ORGANIZE YOUR PARAGRAPHS AND YOUR ESSAY TO SHOW YOUR REASONING.

Logic is key. Both good organization and sound logic are necessary for the lawyer-like writing the bar examiners want. When ideas flow naturally, "the conclusion seems to follow inevitably from the chain of reasoning," writes James C. Freund, in *Lawyering: A Realistic Approach to Legal Practice*. (Freund is a partner in Skaden, Arps, Slate, Meacher & Flom, in New York City.) On the other hand, he adds, "the same concepts might be there in a disorganized document, but the sense of disarray causes the reader--unsure of where he's heading, and dubious of the writer's subject matter mastery--to take issue with the conclusion."

According to Standard 16 of the Code for Bar Examiners:

The Bar examination should test the ability of the applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to present a reasoned analysis of the issues *and to arrive at a logical solution* by the application of fundamental legal principles, in a manner that demonstrates a thorough understanding of these principles (*italics added*).

SCORING HIGH ON BAR EXAM ESSAYS

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Persuasiveness depends upon logic. Professor Richard K. Neumann Jr., of Hofstra Law School observes that every "educated person ought to be able to organize thoughts in such a way as to produce a proof."

Horace, meanwhile, wavers. He is about to start his paragraph with the facts. Then he remembers to put the rule of law first in his paragraph, to follow it with analysis of the facts, point-by-point, finishing with the conclusion. *Well done!*

IV. UNDERSTAND THE DIFFERENCES BETWEEN LAW SCHOOL EXAMINATIONS AND BAR EXAM ESSAYS.

Bar exam essays are different from law school exam essays. The bar examiners ask for a practitioner's analysis and logical, well-organized solution to a practical legal problem, usually one where there is a better and a worse solution. The fact pattern presents relatively few issues, possibly in several fields of law.

Law school professors, on the other hand, ask their students to spot all of the possible issues in a complex fact pattern on one field. Steven Nemerson, Associate Dean of Cardozo Law School, points out that in bar exam essay fact patterns, virtually every fact exists for a reason and raises only one issue. In a law school exam, he says, a fact may have no purpose at all, or it may raise a number of different issues.

Mr. Renzo says bar candidates can be hurt where they put "a lot of extraneous material in the essay." By contrast, Dean Nemerson says that in his torts exams he would give credit for an interesting analysis even if he did not think the fact pattern really raised the issue.

Our friend Horace starts to read a fact pattern from the top, quizzing each fact to see if it harbors new issues, just the way he did in law school. He is getting tired. We wring our hands. But no! He catches himself. He reads the interrogatory at the bottom of the fact pattern again, and finds that the main question is whether the plaintiff is entitled to summary judgment! So the issue is whether the case presents a triable issue of fact. Horace reads the fact pattern again, searching for an answer to that question. *Congratulations, Horace! Judging by the analyses you have written today, you will pass the bar!*

The moral of our story is that if you want to receive the thin envelope of congratulations on passing the bar, you must give the bar examiners the lawyer-like analyses they want. Don't make up transparent excuses for your friends and relations ("I guess I just don't test well"). Remember that while good bar exam essays require mastery of basic principles of law, they are really an exercise in

deductive reasoning. Like Horace Jones, you must apply the bar examiners' advice:

- (1) Read the fact pattern with care;
- (2) Write simply. Let *Dick and Jane* be your literary model;
- (3) State the law fully but clearly. Use legal terms, where appropriate, but pretend you are explaining the law to a child;
- (4) Take the bar examiners by the hand in your analysis, and apply the law to the facts one element at a time;
- (5) Make your logic as clear as this: All men are mortal; Socrates is a man; Therefore, Socrates is mortal.

Finally, don't try to aim for law school brilliance. Follow Henry David Thoreau's advice, "Simplify. Simplify." Remember what Horace's mother always told him: *Don't get lost in the trees, Horace. Explain the forest!* *****