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# TYPES OF ESSAY LAW EXAMINATION ANSWERS—GOOD AND BAD

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## 1. *A Brief Description of Five Basic Types of Essay Law Examination Answers*

According to my observation, based on long experience in reading answers to law examination questions of the essay type, such answers may often be broadly classified into five basic types. These may be enumerated as follows: (1) the "key sentence" type; (2) the fact omission type; (3) the law omission type; (4) the mere conclusion type, and (5) the irrelevant collateral theme type.

The first of these basic types, the "key sentence" type of answer, has been sufficiently described in the 1950 edition of my pamphlet entitled, "Suggestions on Studying Law and Writing Law Examinations," which is distributed gratis by the West Publishing Company. It is illustrated there by an example set out at pages 27-29. As I view this matter, good law examination answers tend largely to follow the key sentence type. Where answers of this type show both accuracy and completeness both as to the given facts and as to the applicable law such answers are likely to be rated as excellent.

The second of these basic types, the fact omission type of answer, in effect sets forth the writer's discourse on what he regards as the available law, and asserts that therefore the defendant is liable, or that he is not liable. The law being asserted as being thus and so, the defendant's liability, or his non-liability, is asserted to follow. In the answer itself, however, little or no indication is given of how or why the given facts fulfill, or fail to fulfill, the requisites for liability under the rules of law set forth. The conclusion thus asserted may or may not in the instance be correct. The basic flaw in such an answer is that the conclusion announced is a mere *non sequitur*. It does not follow from what is shown in the answer given. Such an answer to a law examination question obviously is not a good answer. The writer of such an answer may be serious in his efforts but he is misguided in his choice of examination technique.

The third of these basic types, the law omission type of answer, in effect sets forth the writer's view of the facts given and asserts that therefore the defendant is liable, or that he is not liable. The facts being regarded as amounting to this or that, the defendant's liability, or nonliability, is said to follow. In the answer itself, however, no indication is shown of just what the rules of law are under which liability is claimed, or how or why the facts in question fulfill, or fail to fulfill, the legal requisites for liability under those rules of law. The conclusion thus asserted may or may not in the instance be correct. The basic flaw in such an answer, as in answers of type (2) mentioned above, is that the conclusion announced is a mere *non sequitur*. It does not follow from what is shown in the answer given. Such an answer to a law examination question obviously is not a good answer. The writer of such an answer, too, may be serious in his efforts but he is misguided in his choice of examination technique.

The fourth of these basic types, the mere conclusion type of answer, in effect combines in one answer the basic flaws of both type (2) and type (3). In effect, this mere conclusion type of answer asserts that since the facts given fulfill, or fail to fulfill, the requisites for liability, the defendant is liable, or is not liable. The answer itself, however, does not set forth either what are the requisites for liability or what

details of the facts are relied upon as fulfilling, or as failing to fulfill, those requisites. Such an answer, since it is a mere assertion of the writer's conclusion without indication of how it is to be supported either on the facts or on the law, obviously is entitled to little or no credit. For all that such an answer actually reveals, it may be mere guessing both as to the facts and as to the law.

Occasionally a fifth type of answer may be noticed, the answer of the irrelevant collateral theme type. Now and then some law student in setting forth his answer to the problem given gives little or no attention to the matters involved in the actual problem given. Instead he sets forth his views, correct or incorrect as the case may be, on some unrelated outside matter having little or no appreciable bearing upon the actual problem given. For the occasion, obviously, such answers, like answers of the mere conclusion type, are entitled to little or no credit.

## **2. The "Key Sentence" Type, Illustrated**

According to my judgment in such matters, the first of these types, the "key sentence" type of answer, is usually likely to be the most effective. This I believe to be true not only in ordinary law school examinations but also in ordinary bar examinations. I believe this is equally true of the "key sentence" type of presentation before juries, courts, and other tribunals.

A question and answer worked out in detail on the "key sentence" pattern is submitted by way of illustration at pages 27-29 of the 1950 edition of my pamphlet entitled "Suggestions on Studying Law and Writing Law Examinations." As indicated there, at page 27, this form of answer is deliberately framed to give the reasons whereby to inform the court on all three phases of the "Key Sentence Job," namely: (1) why the facts given fulfill, or fail to fulfill, the requisites for liability under the rule of law regarded as applicable; (2) why the writer's view of the facts is correct rather than the view taken by his adversary; and (3) why it is correct to select the rule of law invoked by the writer rather than the rule of law invoked by his adversary as controlling in application to the given combination of facts.

Scrutiny of the answer which is set out at pages 28-29 of the beforementioned pamphlet readily discloses that this form of answer involves specific statements in the answer itself not only as to what are the applicable rules of law but also as to why the facts given fulfill, or fail to fulfill, the requisites for liability involved in that applicable law. As already mentioned, where both accuracy and completeness are shown, as to both these basic aspects, the given facts and the applicable law, such answers of the "key sentence" type are likely to be rated as excellent.

## **3. The Fact Omission Type, Illustrated**

How much less effective the law examination answer becomes when the fact omission type of answer is substituted for the key sentence type can be readily illustrated by taking this same answer, at pages 28-29 in the beforementioned pamphlet and setting forth therefrom only the law statements therein. That answer, according to the fact omission type, then would read about as follows:

"Answer.

"A is not liable for slander, but can be held liable for libel.

"Four narrow types of slander, spoken defamation, are actionable without special damage. One type imputes crimes which involve a high degree of moral turpitude or subject the offender to infamous punishment, crimes which the present moral sense of the community strongly condemns. Another type covers imputations of certain loathsome diseases, such as leprosy, the plague and venereal disease. A third type imputes

unchastity to a woman. A fourth type impeaches the person's fitness for carrying on his trade, business, profession or office.

"Written or printed defamation, actionable as libel without special damage, covers not only what would be slander if spoken but also a wide range of imputations exposing the sufferer to ridicule or contempt on the part of a considerable and respectable portion of the community.

"Libel was originally distinguished from slander, and its wider liability imposed because of the greater damage supposed to be involved in the wider circulation and the greater permanence of the written word.

"Conduct which conveys defamatory impressions is at common law treated as libel, not as slander.

"The radio station's transmission of the defamatory utterances is libel, not slander.

"Where each contributes to a tort both are liable."

Even if it be granted that the foregoing statements of law are correctly set forth, such abstract statements alone do not in themselves constitute a satisfactory answer to a legal problem. Such a mere recital of the available rules of law leaves unsolved how and why the facts given in the instance fulfill, or fail to fulfill, the applicable requisites for liability. Even though the writer of such an answer may have thought about that aspect of the problem, such an answer neither sets out the steps of the actual solution nor indicates by what reasons that solution is to be justified. Such an answer leaves some of the most vital matters to mere implication, or even to mere guessing. By itself such an answer, though seriously set forth and even though substantially correct as far as it goes, cannot be rated as a good answer to the actual problem given.

Surprising as it may seem, though examination directions call for the key sentence type of answer, a very substantial number of the answers actually set forth in many examination books turn out on analysis to be answers of the fact omission type. The writers of such answers apparently have been concerned principally with revealing their familiarity with the various rules of law. They apparently have overlooked the job of setting forth the steps in the process of working out the solution to the problem given by showing how and why the facts given fulfill, or fail to fulfill, the requisites for liability.

#### *4. The Law Omission Type, Illustrated*

Equally defective, but in the reverse direction, is the law omission type of answer. The writers of such answers proceed to discussion of the facts given, but with little or no direct statement of what rules of law are applicable thereto and why.

Taking, as before, the same answer at pages 28-29 of the beforementioned pamphlet, and presenting merely the portions discussing the given facts, that answer would then read about as follows:

"Answer.

"A is not liable for slander, but can be held liable for libel."

"The facts do not come within the rules for slander. A statement of former drunkenness, uttered in the broadcast, which the person does not continue to practice, does not come within the rules for slander.

"The imputation of being a former drunkard tends to expose the party to contempt. Since it was heard by members of the Reverend Jones' own church it was reasonably understood as applying to him. If published in a newspaper such an imputation could be actionable as libel.

"Defamatory broadcasts reach many more people and can do much greater harm than any earlier known form of defamation. Moreover, the physical process of broadcasting by the radio station operator is a form of conduct rather than words. By the

operations of broadcasting the radio station operator shapes for the purpose and transmits appropriate electrical impulses, not the speaker's voice, for reception at receiving sets.

"The speaker at the microphone who participates in bringing about a defamatory broadcast is as responsible for it as is the radio station."

Surprising as it may seem, though examination directions call for the key sentence type of answer, a very substantial number of the answers that are actually set forth in many examination books turn out on analysis to be answers of the law omission type. The writers of such answers apparently have been concerned principally to express their views and feelings about the facts given and to assert their conclusions based thereon. The authors of such answers have failed to indicate just what are the requisites for liability which the given facts are regarded as fulfilling, or failing to fulfill, and why. It may chance, perhaps, in such answers, that the writers had the legal rules directly in mind and set forth their views and feelings about the facts with reference to how those facts fulfilled, or failed to fulfill, the requisites for liability. It may chance, too, that such writers yielded to instinctive urges or bents in the matter in question without being able to identify specifically just what rules of law were applicable to the facts in question, or why. So far as such answers actually reveal ideas about the law that is applicable they can be very vague indeed. Such answers do not reveal why or how the facts given fulfill, or fail to fulfill, the requisites for liability under any rule of law. They afford no demonstration at all of what rule of law is applicable, and why. Like the fact omission type of answer discussed above, such answers leave some of the most important matters to mere implication, or even to mere guessing. By themselves, such answers, even though set forth with great earnestness, cannot be rated as good answers.

### ***5. The Mere Conclusion Type, Illustrated***

Doubly defective, in that it combines in one answer the major flaws of each of these last mentioned two types, is the mere conclusion type of answer. That is the type of answer which, in the words of the California Committee of Bar Examiners, deserves "little or no credit." This type of answer in some manner sets forth the writer's conclusion on the problem given but fails to indicate either what rules of law are applicable to the facts given or what facts are regarded as fulfilling, or failing to fulfill, the legal requisites for liability, or why.

Taking, as before, the same answer at pages 28-29 of the beforementioned pamphlet, and presenting merely the portions directly expressing such conclusions, that answer would then read about as follows:

"Answer.

"A is not liable for slander but can be held liable for libel.

"The facts given do not come within the rules for slander.

"Such a publication in a newspaper could be libel.

"In the absence of change by statute the broadcasting of defamatory utterances is to be treated as libel.

"The speaker at the microphone as well as the radio broadcasting operator is liable on the basis of libel where the broadcast is defamatory."

Answers substantially in this form often appear among the relatively worthless answers in law examination books.

Supplementing the foregoing observations on the mere conclusion type of law examination answer, it seems appropriate to submit some vivid illustrations of such

answers taken directly from recent examination books. The illustrations that follow are copied as they were submitted, there being in each case nothing further in the answer on the point touched upon. These illustrations may serve as additional warnings to serious law students, and to others, on what to avoid. I submit them, seriatim, without further comment on each:

1. "B was assaulted by A's horse. Therefore A would be liable to B for the assault."
2. "A will have no action against the police department."
3. "Tom has a cause of action against the newspaper and photographer who printed his picture without his consent, and mislabeled the picture highly defaming Tom. The requisites for liability for defamation (libel in this instance) are fulfilled."
4. "Smith's letter fulfilled the requisites for libel against Jones."
5. "The prima facie requisites for liability for misrepresentation are in some respects fulfilled and in other respects not. B is engaged in half-truths in some points and is silent and allows implications to arise in the mind of the purchaser."
6. "Y is not liable as he has complied with the requirements."
7. "Apparently there has been full compliance with the statute here by all the parties."
8. "From the facts here it appears that the title has passed."
9. "From the facts here it appears that there was a breach of warranty."
10. "From the facts here it appears that the defendant is liable."

Such answers as the foregoing illustrations, when unaccompanied by explanation either on the facts or on the law, are of course utterly worthless. Perhaps the writers in these cases have assumed that they need not say anything about the facts, since the examiner can see the facts recited in the examination question. Perhaps the writers of these answers have assumed, also, that they need not say anything directly about the applicable rules of law since the examiner can be assumed to be familiar with the rules of law. Perhaps, too, the writers in these cases understood little or nothing about the whole matter, not having done their work of preparation throughout the year sufficiently consistently and seriously. At any rate, answers of the foregoing type, the mere conclusion type, are very effective in withholding from the examiner any demonstration or even indication in the answers that the writers of those answers are able to solve any legal problems. Such an answer affords no indication at all that the writer of it is able to do an effective key sentence job. Such an answer, as stated by the California Committee of Bar Examiners, is worthy of little or no credit.

Any serious law student who cares to make the effort can compare this form of answer with the key sentence type of answer as illustrated in the beforementioned pamphlet at pages 28-29. Such a student ordinarily can readily see for himself that as compared with the answer there set forth this mere conclusion type of answer for the identical problem is on the merits worthy of little or no credit.

Inability on a law student's part to grasp such pertinent differences in the quality of the answers as is illustrated in these different types, where such inability occurs, is probably in most cases due not to lack of legal aptitude but to lack of sufficiently serious and consistent preparation. Legal achievement requires not only legal aptitude but also interest, initiative, and industry. If a law student actually cannot grasp such differences in the quality of examination answers even though he has seriously and consistently done his utmost in the work of preparation, I believe that such a student should earnestly consider whether or not he is seriously lacking in legal aptitude. Both his interest and his abilities, indeed, may be much greater in other directions. If that is actually so, as sometimes is the case, it may for him be a relatively wasteful use of time to keep on trying to become a lawyer. It is my belief, however, that most failures by law students are due to lack of interest, lack of initiative, or lack of industry, rather than to lack of legal aptitude. Of these, it is my impression that lack of interest and lack of industry probably are the most usual immediate causes of failure.

## 6. *The Irrelevant Collateral Theme Type, Illustrated*

Answers of the irrelevant collateral theme type seem to be less common than the other beforementioned defective types of answers. This type of answer seems to involve an utter failure to grasp the substance of what is involved in the problem given, this failure being coupled with an association of ideas that suggests to the writer's mind the discussion of some other matter having little or no relation to the problem given.

Taking, as before, the same answer at pages 28-29 of the beforementioned pamphlet on "Suggestions on Studying Law and Writing Law Examinations," and presenting it as an answer of the irrelevant collateral theme type, that answer could then read about as follows:

"Answer.

"A should not be liable for slander or libel. Such an action would here amount to malicious prosecution, and such actions cannot be maintained without probable cause and without proof of malice. Probable cause must depend on what facts were known or available to the accuser at the time he made his accusation. Personal hostility or bad faith or other improper motive may show express malice. There is nothing in the facts given, however, to make A liable for malicious prosecution."

The terms of this supposed answer obviously have nothing to do with the application of the law of defamation to the facts given in the problem given, which had to do with the question of liability for a defamatory broadcast. Instead, this answer, as it is here supposed for purposes of illustration, gets into some irrelevant discussion, which is far outside of the question given, and is also itself far from accurate, on the requisites of lack of probable cause and of malice in malicious prosecution cases. Obviously, whether or not a prospective defendant is liable to a plaintiff under the law of defamation is a very different question from whether or not the proceedings in the action for defamation, if unsuccessful, would give rise, in turn, to an action for malicious prosecution.

An answer that so completely fails to grasp the substance of the problem given, and instead concerns itself with such utterly unrelated or at best but remotely related collateral matters, is for the occasion worthy of little or no credit. In the large majority of cases it seems probable that failure to do the work of preparation sufficiently seriously and consistently during the law school year is the principal reason for the examinee's inability at examination time to grasp the pertinent differences in the issues involved. As stated more at length in an earlier paragraph, in connection with discussion of the mere conclusion type of answer, if it actually be that a law student has not the ability to grasp such differences in issues even though he has seriously and consistently done his utmost in the work of preparation. I believe that he should earnestly consider whether or not he is seriously lacking in legal aptitude. For one whose interest and abilities are greater in other directions, as often is the case, it may be a relatively wasteful use of time to keep on trying to become a lawyer.

## 7. *As Seen From the Judicial Bench*

### a. Excerpts from an address by Judge Peters

The Hon. Raymond E. Peters, Presiding Justice of the California District Court of Appeal, First Appellate District, Division One, in 1947 delivered an address on the preparation and writing of briefs on appeal. This address appears in the *Journal of the State Bar of California*, volume 22, at pages 175-185 (May-June, 1947). This entire address is worth very careful attention from law students.

With but slight adaptation of phrase, the following quotation from that address,

at page 180, becomes literally applicable to the law student's task in writing his law examination answers:

"It is a very common error of counsel to state isolated propositions of law which in the abstract are correct, without showing their application to the case at bar. It should always be remembered that in most cases the chief difficulty of the brief writer is not to prove a certain legal proposition, but to demonstrate that that proposition is applicable to the specific facts of the case in hand."

**b. Excerpts from an address by Judge Jackson**

The Hon. Robert H. Jackson, Associate Justice of the Supreme Court of the United States, in 1951 delivered an address on "Advocacy Before the United States Supreme Court." This address doubtless is getting the careful attention of most outstanding members of the bar. It is certainly also worthy of very careful attention from every law student. It may be found, in continuations, in volume 37 of the American Bar Association Journal, 801 at pages 803, 804 and 864 (Nov., 1951).

The following paragraphs from that address are also closely applicable to the law student's task in writing his law examination answers:

"The purpose of a hearing is that the Court may learn what it does not know, and it knows least about the facts. It may sound paradoxical, but most contentions of law are won or lost on the facts. The facts often incline a judge to one side or the other. A large part of the time of conference is given to discussion of facts, to determine under what rule of law they fall. Dissents are not usually rooted in disagreement as to a rule of law but as to whether the facts warrant its application. . . .

"Sometimes counsel is confronted with the dilemma of inconsistent lines of authority where the Court has recently overruled its own not-very-old decision. In such cases, the sitting Justices are apt to be sharply divided as to which rule will apply to slightly varied facts. I have no advice to offer in this situation—you will just have to get out of that dilemma by your own wit. . . .

"Adequately and helpfully to present a case—as it is about to be transformed into a precedent to guide future courts, to settle the fate of unknown litigants, perhaps to become required reading for a rising generation of lawyers—will challenge and inspire the true advocate. Decisional law is a distinctive feature of our common law system, a system which can exist only where men are free, lawyers are courageous and judges are independent. To participate as advocate in supplying the basis for decisional law-making calls for vision of a prophet, as well as a profound appreciation of the continuity between the law of today and that of the past. He will be sharing the task of reworking the decisional law by which every generation seeks to preserve its essential character and at the same time to adapt it to contemporary needs. At such a moment the lawyer's case ceases to be an episode in the affairs of a client and becomes a stone in the edifice of the law."

# SUGGESTED METHODS FOR THE EFFECTIVE RESOLUTION OF CONFLICTING INTERESTS, BY COMPROMISE AND OTHERWISE

"How are you getting along with your law studies, my boy?" asked the Judge.

"Fine," his grandson replied, "but I'm a bit puzzled about one thing. Yesterday one of my Profs recommended three different texts for supplemental reading in his course, and——"

"And you want to know which one to choose. Well, my boy, the best advice I can give you is simply to say—ask your law book dealer."

"Then you really think he knows what's best for me?"

"Absolutely, my boy," affirmed the Judge, as he launched another of his perorations. "To become a lawyer you must learn to apply the pragmatic approach. Remember, a fish peddler is apt to know more than a biologist about the taste of a shad. A lawyer must weigh conflicting authorities and judge their relative merits. He must learn never to accept without question the most eminent authority, never to overlook the fact that the basest sources sometimes must be given the most credit. A case on all fours from a foreign jurisdiction may well outweigh a plethora of local cases where the facts do not match up . . ."

"I wish I knew what you were talking about," thought his grandson fifteen minutes later. What he said was, "All I want to know is how to decide which of three books to buy for supplemental reading."

"Again I say—ask the law book dealer. He usually is aware of your Professor's recommendations and the recommendations of other Professors who teach the same subject. Besides, he knows by experience what the successful law students have used and are using . . ."

"Well, I'm glad you have so much faith in the law book dealer, because I asked him which of the three he thought would do me the most good——"

"And?" beamed the Judge.

"And he said that, as long as you had opened a charge account for me—I might as well take all three. Here's the bill."

As his grandson dashed off to class, the old Judge sat alone with his thoughts for some moments. "Yessir, that boy will make a fine lawyer," he finally concluded. He slowly opened his checkbook and executed a commonly used form of negotiable instrument to the order of:

**RALPH & STEW LEEMAN**

**DEALERS IN LAW BOOKS**