

Getting to Maybe

How to Excel on Law School Exams



Richard Michael Fischl
Jeremy Paul

"Knowledge is free for those who seek..." This book is made available by Tashfin.

23

Getting to Maybe

Getting to Maybe

How to Excel on Law School Exams

Richard Michael Fischl

and

Jeremy Paul

Carolina Academic Press
Durham, North Carolina

Copyright © 1999
Richard Michael Fischl and Jeremy Paul
All Rights Reserved

ISBN 0-89089-760-3
LCCN 99-60901

CAROLINA ACADEMIC PRESS
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Printed in the United States of America.

For Pam and Laurie

"Knowledge is free for those who seek it..."

Digitized by the Internet Archive in 2011. Cracked and Scrubbed by
Tashfin in 2013. Happy Reading!

<http://www.archive.org/details/gettingtomaybehoOOfisc>

Contents

Preface	xiii
Acknowledgments	xix
Chapter 1 You're Not in Kansas Anymore	3
A Place Where "Knowing the Material" Is Not Enough	3
Some Lessons You May Need To Unlearn	6
Lesson #1 — Undergraduate Exams and the "Information Dump"	6
Lesson #2 — Sorting Through the Law School Rumor Mill	8
Lesson #3 — The Dark Side of the Socratic Method: The Rulebook vs. The Loose Cannon	11
Part I Issues in Living Color	
Chapter 2 Issues as "Forks in the Road"	21
Chapter 3 Forks in the Law: Rule vs. Counter-Rule Issues	27
A. Patterns to Watch For	28
1. Traditional Rule vs. Modern Rule	28
2. Different Strokes for Different Folks	30
3. Common Law vs. Statute	31
B. How Professors Test Rule vs. Counter-Rule Issues (and Why Students Frequently Miss Them)	32
Chapter 4 Forks in the Law: Competing Interpretations of Statutes	37
A. Patterns of Ambiguity	39
1. Plain Meaning vs. Purposes Issues	39

viii Contents

2. Where Do Purposes Come From? 40

a. Legislative intent 40

b. Policy analysis 42

3. Purposes as a Source of Statutory Ambiguity 43

a. Competing purposes 43

b. The pattern of conflict: Broad vs. narrow purposes 46

4. Language as a Source of Statutory Ambiguity: Competing Meanings
48

B. Fact Situations To Watch For 52

Chapter 5 Forks in the Law: Competing

Interpretations of Caselaw 55

A. Desperately Seeking Similarity: When To
Follow Precedent 56

B. Searching for Distinctions that Make a Difference 57

C. Patterns of Ambiguity To Watch For 59

D. Dealing with Multiple Cases 64

Chapter 6 Forks in the Facts 67

A. How Law Creates Forks in the Facts:

Why Categories Matter 68

1. Rule vs. Exception 70
 2. Statutory Boundaries 71
 3. Sequential Categories 71
 4. Crossing the Line 72
 5. Categories as Elements of Legal Rules:
Running the Gantlet 73
 6. Open-Ended or "Evaluative" Categories 74
- B. Why Categories Don't Settle Things: Sources
of Factual Conflict and Ambiguity 75
1. Facts on Both Sides of the Category 75
 2. Differing Standpoints 76
 3. Differing Time-Frames 77
 4. Differing Ways To Make Sense of the Facts 79
- a. Take things one at
a time or view them

Contents ix

b. Lenses of generality 80

c. Linguistic ambiguity 82

Chapter 7 Taking It to the Next Level: "Twin Forks" 87

A. Linked Forks: One Good Fork Deserves Another 90

B. Reciprocal Forks: Back-and-Forth between Law/
and Facts 92

C. Concurrent Forks: Straddling a Statutory Boundary 94

D. Proliferating Forks: Competing Domains 96

E. Hidden Forks: Dodging the Statute 100

F. Background vs. Foreground: Variations on the
Twin Forks Theme 102

Part n Strategies for Issue-Spotting, Analysis, and Argument: Heart,
Brains, and Courage

Chapter 8 Taking Exams Seriously: A World Full
of Wicked "Whiches" 109

Chapter 9 How To Spot Issues, and What To Do
Once You Spot Them 117

A. Issue-Spotting 119

1. What the Course Will Tell You If You Listen 119

a. Classnotes and outlines 119

b. Themes and "issues" 122

c. Old exams and study groups 124

2. What the Exam Will Tell You If You Let It 125

a. Map the parties' claims and conflicts 125

b. Don't stop with the first issue you see 127

c. If the answer seems too easy, it probably is 128

d. If you finish early, "check your work" 130

B. What To Do with Issues Once You Spot Them 131

1. You Already Know More than You Think

You Do 131

2. From Issue-Spotting to Issue Analysis 133

3. The Recipe for Argument Construction:

Just Add Reasons 135

X Contents

b. Once again, you already know more

than you think you do 137

(i) Patterns of argument for forks in

the facts 137 (ii) Patterns of argument for competing

interpretations of statutes and cases 141

c. The crucial role of policy arguments 142 4. Where To Focus Your Fire 143

a. Focus your fire on points in conflict 143

b. Focus your fire on points that make a

difference 144

c. Focus your fire on issues emphasized by

the professor 145

d. Write till the facts run out 146 C. What Not To Do With Issues: Herein of "IRAC" 147

Chapter 10 Czars of the Universe (Otherwise known as "Policy Wizards")	151
A. To Know and Not To Know—That Is the Answer	153
B. Touching All Parts of the Policy Kingdom	156
1. "Shaping" Society	156
2. Administering Policy	157
3. Doing the Right Thing	159
a. The unfairness of change (consistency over time)	160
b. Treat like cases alike	161
(i) Consistency over space	161
(ii) Consistency across social categories	162
(iii) The distribution of wealth (consistency across economic class)	163
4. What Kind of Czar Are You?	165
5. Government Non-interference and the Prime Directive: Even Czars Have Limits	166
C. Heads and Tails You Win	168
1. Getting Past the Obvious	169
2. One Good Argument Deserves Another	171

4. Learning To Mix and Match 174
 5. Accentuate the Multiple 177 D.Find the Fun and Snap the Test's a Game 180
 1. Trade-Off vs. Paradox 181
 2. The Pattern of Paradox 184
 - a. The short run and the long run 185
 - b. Intent vs. effects 186
 - c. Lav[^] on the books vs. Islw in action 188
 - d. Categories are many-splendored things 188
 3. Paradox Is an Attitude 190
 4. When in Doubt, Write It Down 192
- Part in Test-Taking Tips — Your Very Own Ruby Slippers
- Introduction 197
- Chapter 11 Preparing for the Exam 199
- Tip #1. Exam Preparation Takes All Semester 199
- Tip #2. Focus Your Exam Study on Your Classnotes 202
- Tip #3. Prepare Your Own Outline of the Course 203
- Tip #4. Review the Professor's Old Exams 207
- Tip #5. Consider What Questions You Would Ask 210
- Chapter 12 Writing Exam Answers 215
- Tip #6. Carefully Read the Exam Instructions and

Follow Them to the Letter 215

Tip #7. Read Each Question Carefully, and Answer
the Question Asked 219

Tip #8. Organize and Outline Before Writing
Your Answer 223

Tip #9. Provide the Reader with a Brief Roadmap 226

Tip #10. Explain Your Reasoning 228

Tip #11. Draw Conclusions When They Are
Called For 232

Tip #12. Argue Both Sides 234

Tip #13. Stick to the Facts and Circumstances
xii Contents

Tip #14. Remember Who Your "Judge" Is 242

Tip #15. Watch Time/Credit Allocations 244

Chapter 13 Mistakes to Avoid 249

Tip #16. Don't Regurgitate Legal Rules and
Principles 249

Tip #17. Don't Repeat the Facts 252

Tip #18. Avoid Conclusory Answers 255

Tip #19. Avoid Disquisitions on Topics Outside

the Course 257

Tip #20. Don't Leave Your Common Sense at

Preface

This book is aimed at every law student who has ever wondered how to progress beyond her teachers' repeated warnings that "learning the rules is not enough" to a sound idea of exactly what it takes to perform well on law school exams. This is no small question. Law students are expected to demonstrate top performance in a setting where everyone agrees that "knowing the answer" is the wrong way to think about excellence. For most entering law students, however, the obvious alternative to "knowing the answer" is "not knowing the answer." And clearly "I don't know" isn't what your professors are looking for either. So what lies between getting it right and not getting it at all? What kind of intellectual work is required to cope with exams on which some questions yield yes-or-no answers, but where the real trick is Getting to Maybe}

Both of us wondered about such questions a great deal as we traveled through Harvard Law School many years ago, and neither of us found much guidance beyond the occasional paraphrase of Justice Stewart's famous remark about obscenity, "I know it when I see it." So when we began teaching together at the University of Miami in 1983, we decided soon thereafter that we would devote the same level of analytical rigor to the exam process that our colleagues expected us to deploy in our more traditional research. We have been working on this book, off and on and mostly clandestinely, ever since.

We have believed all along that the law school exam is a topic worthy of academic interest. Law professors give the kind of exams they do precisely because they believe that students who perform well have demonstrated the skills identified with good

XIII

xiv Preface

lawyering. So we decided that if we could succeed in providing an accurate description of those skills, we would have helped legal educators everywhere to define more precisely the content of a first-rate legal education.

But we also knew from the start that mere academic concerns would not be enough to spark interest in our work among many in our intended audience. So we have devoted particular care to sharpening observations about exams that we believe will be directly useful to student readers seeking to improve their own performance. We don't believe that any book on exams can substitute for hard work and learning the law. But we are confident that the conscientious student who works through our book will be rewarded at the end of every semester. This is, after all, a "how-to" book.

What proved most gratifying to us as we progressed with our project was that we discovered no clash between our desire to challenge teachers and students to think seriously about what goes into exams and our goal of helping students write better answers. Indeed, it's the combination of these goals that we hope will earn *Getting to Maybe* a place among the classic books aimed at beginning law students. This is not a book about legal reasoning generally, because its focus is solely on exams. But neither is it a book of simple exam-taking tips—although you'll find many within—because law school exams involve complicated legal reasoning, a fact astonishingly ignored in the many current books that purport to tell students how to write topflight answers.

What we have done instead is to tackle the exam process by breaking it down into discrete analytical components. Many people describe law school exam questions as hiding legal issues within complicated fact patterns. We compare it with Martin Handford and his wonderful drawings that hide Waldo in a maze of design and color. By watching other people, and practicing on one's own, virtually anyone can get pretty good at locating Waldo. Imagine, however, if you could sit down with Mr. Handford and have him describe for you how he hides Waldo in the first place. That's our task in Part I of the book—"Issues in

Living Color"—in which we seek to explain why "issues"

Preface xv

(rather than merely chaos and confusion) lurk within those long hypotheticals. We identify aspects of the legal system that create patterned ambiguity where newcomers arrive expecting to find a rulebook instead. Such ambiguity is at the core of law school exams, and virtually every practicing lawyer to whom we have spoken has applauded the idea of figuring out what makes something an "issue." Issue recognition, they tell us, is crucial to subsequent success at the bar.

To put Part I to work for our readers, however, we needed to go well beyond merely describing what an issue looks like. We want students to develop study habits that actually fit the skill of spotting issues expected on the typical exam. Like virtually every other guide to exam-taking, this one recommends that our readers study hard, outline their courses, practice on old exams, and discuss the material with classmates. But in Part II, we go beyond the conventional advice to explain how to connect these familiar study techniques to the kinds of performance your professors expect. We hope in the process to vindicate professorial warnings about the dangers of hornbooks and commercial outlines, warnings that too many students ignore at their peril.

Our colleagues often remind us that spotting an issue is only half the battle and that many students fall down when the task turns to analysis. We agree. We doubt, however, that analytical difficulty is a product of students' moral or intellectual failings. Rather, we attribute many perceived student inadequacies to a breakdown in communication between students who expect to be judged on whether their answers are "correct" and professors who want discussion of both sides of difficult questions. So in Parts II and III we seek to remedy the communication gap.

The long, complicated exam question throws many students for one loop and then another. First, because each question contains multiple