

Memorandum to Students

Exam Prospectus
Intellectual Property
Antitrust

Spring 2019
University of Oklahoma College of Law
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1. OVERALL POINTS

Purpose: I am writing this document to give you specific information that will help you prepare for and know what to expect on the Spring 2019 ~~Intellectual Property~~Antitrust final exam.

Fairness: My paramount value in designing and grading the exam is fairness. Over the years, I have thought long and hard about how to make exams and grading more fair, and you will see the product of that reflection in this memo. As a whole, this memo is intended to eliminate the potential for surprise on the exam by disclosing as much as I can about the exam in advance.

My goal and your goal: Your goal in taking the exam is to show your mastery of the material presented in the course and your skills in analyzing legal problems involving the course's subject matter. My goal in designing the exam is to provide you with a full and fair opportunity to do so and to avoid arbitrariness in the results.

Now for some details.

2. PARAMETERS (INCLUDING SECTION 10 OF THE SYLLABUS)

Section 10 of the syllabus describes the exam in considerable detail, including how it will be structured and administered. Section 10 does not definitively state the duration of the parts of the exam, so I provide that information now:

- Part I of the exam (worth ~~2~~1/3 of the exam grade) will be ~~two hours~~ ~~(2 hours)~~one hour in duration and will consist of approximately ~~50~~25 or so multiple choice questions.
- Part II of the exam (worth ~~1~~2/3 of the exam grade) will have a total duration of ~~one hour and 15 minutes~~ ~~(1.25~~two hours)~~);~~; divided up as follows: (1) a Reading Outlining Period ("RO Period") of 30 minutes, and (2) an Exam Writing Period ("EW Period") of ~~45~~90 minutes.

The remainder of the details about the parameters of the exam are set out in Syllabus §10, and you should review that information carefully. For your convenience, I reprint § 10 in its entirety here:

10. EXAMINATION:

10-1. General Points:

- (a) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2, *supra*.)
- (b) **Anonymity:** Each exam will be “blind graded,” so that I will not know the identity of the student as I am grading her or his exam. You may not waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials. Self-identification on the exam or otherwise compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.
- (c) **Distractions:** Do nothing that would distract your fellow students during the exam.
- (d) **Obeying Exam Requirements and Instructions:** A failure to follow exam requirements or instructions is an academic misconduct issue, and violations will be treated as such, even if inadvertent.

10-2. The examination will be administered in two parts.

(a) Part I: Multiple Choice Questions

- (1) Part I of the exam, worth ~~two-thirds~~one third of the total exam grade, will consist of multiple-choice questions. The questions will include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts. There may also be questions that test literacy of pure law (e.g., legal doctrines and statutes) and understanding of relevant concepts of legal theory and scholarship.
- (2) Part I of the exam ~~will~~may not embrace subject matter across all topics. But in combination with Part II, there will be comprehensive coverage for the entire course. I may have more to say about coverage later.
- (3) Part I will be administered on a “closed-book” basis. That is, for Part I, you may not use or reference any materials at all, other than pencils, the answer sheet, and the examination booklet.
- (4) I anticipate that Part I will be ~~two hours (2 hours)~~one hour (1 hour) in duration.
- (5) I anticipate that Part I will consist of approximately ~~50~~25 or so questions.
- (6) All multiple-choice questions are written by me.

(7) At least some of the multiple-choice questions may be questions that have been used by me in a previous semester, but which have remained unreleased.

(8) A word about the re-use of multiple-choice questions: Re-use of multiple-choice questions is standard in higher education, and the practice permits better exam quality and better calibration of the results. This is not trivial: The statistical data that results from a multiple-choice test administration is quite rich, suggesting which questions are valid and probative, and which should be revised or thrown out. Using this data and reusing questions in a careful way helps me improve multiple-choice tests from year to year. That makes exams more fair – and fairness is my ultimate aim in designing examinations. There is, of course, a downside to reusing questions, which is the possibility that some questions may be leaked to some students. I take appropriate steps to prevent the dissemination of unreleased questions. But bear in mind that the security of multiple-choice questions is not just a matter of faculty and staff responsibility; it is a matter of student responsibility as well. If you are aware that detailed information about or copies of unreleased questions are circulating, please let me know. Informing me will allow me to (1) refrain from using the compromised questions on the exam, and (2) release those questions to the public exam archive so that everyone can study from them.

(9) Be aware that the use of unreleased exam materials – whether photocopied, roughly transcribed, or otherwise – as part of your preparation for the exam constitutes academic misconduct/dishonesty. Moreover reproducing or trafficking in unreleased questions is legally actionable. If you find, receive, or are offered unreleased questions, be responsible and act promptly to ameliorate academic unfairness by letting me know; I will pursue no action against you in this regard if you make timely notice to me, which may be made anonymously, specifically identifying the materials, preferably by submission of a copy. The notice is timely if (i) it is near the beginning of the semester, (ii) it is reasonably soon after you come into possession of the materials and there is enough time to prevent such questions from being used on the exam and to release them to the class for their meaningful use in studying, or (iii) it is immediately upon coming into possession of the materials.

(10) Also be aware that a crucial part of exam security is the numbering of exam booklets and the marking of booklets with students' exam identification numbers. I anticipate that booklets will be clearly marked with a space for you to write your exam identification number. Do not omit to do what you are asked in this regard, and do not omit to turn the exam booklet back in. An omission in this regard, even an innocent one, will be catastrophic for your grade, likely resulting in a failing grade.

(b) **Part II: Essay Response**

(1) Part II of the exam, worth ~~one-third~~ two thirds of the total exam grade, will require a written response. This part of the exam will consist of one or

more open-ended questions calling for a written essay response to a hypothetical fact pattern.

(2) Part II of the exam ~~will be limited in subject-matter scope. That is, Part II will~~ may not be comprehensive in embrace subject matter across all topics. But in combination with Part I, there will be comprehensive coverage for the entire course. I may have more to say about coverage later.

(3) Part II will be administered on an open-book basis.

You may bring with you any paper-based notes and books you like.

But no electronic, digital, or interactive resources may be used or referenced, with ~~the exception of~~ a few exceptions:

These are devices you may have and use:

(A) a ~~the~~ device you are using to type your response (e.g., a laptop running appropriate exam software in accordance with applicable policies), ~~and (B) a watch with no other functions than timekeeping. The following are some specifics in answer to questions I've gotten in the past:~~

(B) a watch with no other functions than timekeeping, and

(C) a regular calculator that can add, subtract, multiply, divide, square, and calculate a square root; with no more memory capacity than holding a single number in memory; and with the ability to display results in no other format other than a single line of digits with commas and a decimal point. (I may have more to say about allowed calculators later on.)

The following are some specifics in answer to questions I've gotten in the past about the open-book nature of the essay portion of exams:

(i) Binders holding paper sheets and tabs in paper sheets are fine. For instance, if your ~~casebook~~ outline is in a binder, that's fine.

(ii) No phones. ~~No calculators.~~

(iii) No smart watches or other watches with functions other than timekeeping. Nothing that looks like a smart watch.

(iiiiv) A digital watch that has an alarm function and a stop watch in addition to providing the time of day is permitted. But under no circumstances may your watch beep or emit noise.

(ivv) No accessing the internet, e-mail, text messaging, the world wide web, etc.

(vvi) If you want to access a textbook or dictionary, you'll need to have it on paper. You cannot, for instance, access an e-book using an iPad or other tablet.

(vii) With regard to a computing device you use to type your exam, you may not venture outside the confines of the exam software to access files, etc.

(4) I anticipate that the total duration of Part II will be ~~one hour and 15 minutes (1.25 hours)~~ two hours (2 hours), divided up as follows: (1) a Reading-Outlining Period ("RO Period") of 30 minutes, and (2) an Exam-Writing Period ("EW Period") of ~~45~~ 90 minutes.

(5) You may use the RO Period to read the exam booklet (that is, the facts and the question or questions), to take notes, to reference your outlines or books, and to outline your response on scratch paper. During the RO Period you may not begin recording the response upon which you will be graded. That is, if you are taking the exam on computer, you may not type any characters at all into the exam response file on your computer during the RO Period; and if you are taking the exam by handwriting, you may not make any mark in a blue book (that is, an exam-response booklet, which in some places is sometimes labeled a "green book") during the RO Period.

(6) During the EW Period you are permitted to write your response. For the avoidance of doubt, it is acknowledged that during the EW Period you may also continue to do what is allowed during the RO Period (e.g., to refer back to the exam booklet, reference your notes and books, etc.), including notes you created during the RO Period.

(7) Being able to write in a concise, focused, and organized manner is extremely important for the practice of lawyering, and it is important for the bar exam as well. Thus, I encourage concision, focus, and organization in your written response, and I will look upon it favorably when grading.

(8) I anticipate that you will have the choice of typing or handwriting your response to Part II. The typing of exams will be in accordance with any applicable policy for the use of computers to write exams.

(9) I do not re-use essay questions.

10-3. Toward the end of the semester, I may release an exam prospectus that provides additional information about the exam and how I recommend preparing.

10-4. I have an Exam Archive with my exams from past courses. It is publicly accessible online. There is a link on ericejohnson.com, or you can use the direct URL: http://ericejohnson.com/exam_archive/.

3. MAKE SURE YOU PUT YOUR EXAM ID NUMBER ON THE EXAM QUESTION BOOKLETS

It is crucial that you write your exam identification number in the space provided on cover page of the question booklet and that you turn the booklet

back in at the end of the exam period. This goes for the multiple-choice-question booklet for Part I and the issue-spotter/essay-question booklet for Part II. And it is particularly crucial for Part I. See Syllabus § 10-2(a)(10). As I provided in the syllabus, “An omission in this regard, even an innocent one, will be catastrophic for your grade, likely resulting in a failing grade.” Please don’t forget.

4. TOPICS ON THE EXAM/HOW I WILL DESIGN THE EXAM

The best way for me to tell you what to expect is for me to tell you what I will draw from and what will constrain me when I write the exam.

The Correspondence Principle: The most important thing to me when I write an exam is what I call the Correspondence Principle. It is this: The emphasis on the exam will track the emphasis in class and in the readings. For example, if we spent little time on something in class and there was little or no reading on it, it would not be more than a trifling part of the exam, if even that.⁺

Comprehensiveness: In keeping with the Correspondence Principle, I will strive to be very comprehensive in terms of the coverage of topics on the exam. I will use the syllabus and chart of assignments as a checklist. I expect to include, in some way, every topic that was substantially explored in class. Note, however, that I will not be trying to put every topic into Part II, both parts of the exam (the multiple-choice questions and the essay). Thus, neither portion .The essay portion of the exam will most definitely not be comprehensive in itself. See Syllabus § 10-2(b)(2). When the multiple-choice portion and the essay portion are put together, however, they will provide a comprehensive exam on the material of the course.

Breadth and depth of coverage: Any material presented in class or in the readings is potentially fair game for the exam. But, in keeping with the Correspondence Principle, the emphasis given to topics will correspond to how much attention they received in class and in the readings. So, as an example, if some doctrinal point came up only in passing in the reading and wasn’t discussed in class, then you can be sure that such a doctrinal point will not loom large on the exam. In fact, it won’t even loom medium.

The multiple-choice portion will be purposefully designed to avoid testing you on obscure points. I design multiple-choice questions to be answerable through application of key concepts and major points of doctrine.

The essay exam, as well, will be purposefully designed to avoid testing you on obscure points. That being said, I cannot guarantee that no obscure point will

⁺ Keep the Correspondence Principle in mind when using old exams to study: Old exams correspond to old semesters. So you might see an old exam and think, gee, this old exam seems to be heavy on topic X, and that seems out of whack with this semester, since we barely spent any time on topic X. That is a consequence of my adjusting the course from semester to semester: Old exams will be, to varying degrees, out of whack with the current semester. Rest assured, however, that your exam will correspond to this semester.

find its way onto the essay exam. Why not? There is always the possibility that some clever student will make a brilliant point regarding some tiny point of law, even if I never intentionally meant to include it. Such a possibility is a natural consequence of having an open-ended essay response. Obviously, I can't hold it against the clever student who sees something I didn't, and in such a situation I will happily award an extra point or two, although not a windfall.

That brings up a related point: As a matter of strategy on the essay exam, I strongly counsel you to stick to the straightforward aspects and do a good job on those rather than looking for obscure opportunities to make quirky, eccentric points. There should be more than enough straightforward material to engage you. Put differently, when approaching the essay booklet's hypothetical facts, I would advise you to read carefully but not suspiciously. My experience in reading exams is that when students try to look for hidden opportunities for points they usually end up going off in unproductive directions.

So, the bottom line is, the more you know, the better, but do not obsess about trying to commit to memory all the fine details. Prioritize your studying based on what I explain next.

The Focus List – what I will draw from in writing the exam: When I sit down to write the exam, in order to obey the Correspondence Principle, I will look for areas that were emphasized during our semester. To accomplish that, I will make particular reference to the following, which we can call the "Focus List." This is where you should concentrate your studies:

- ~~doctrine~~ that ~~was~~ material that is necessary to carry out analysis as set forth in the subject Antitrust Analysis Synthesis document distributed to the class
- the teachings of ~~a case~~ the cases we read
- ~~doctrine~~ material that was the subject of sustained attention in class
- slideshows posted to the class website
 - problems and hypotheticals in those slideshows
- ~~doctrine~~ with specific regard to pure economics concepts:
 - material needed to answer the POE questions that ~~is the subject of extensive coverage~~ were assigned
 - material covered in the ~~MeJohn book~~ slideshows
- ~~doctrine needed to avoid pitfalls (listed in the appendix to this document)~~
- ~~the mindmap~~

The main message is to not worry about small details. Instead, work on having a thorough understanding of the major concepts and the ones highlighted as having particular importance.

Topics that might appear/coverage on the multiple-choice portion: The scope of the multiple-choice portion ~~will comprise~~potentially embraces the full subject matter of the course. But keep in mind that multiple-choice questions will be deliberately designed to avoid testing obscure points.

Topics that might appear on the essay exam: The essay exam will focus on at least two broad topics/areas on which we spent considerable time in class. One topic will be selected from among these three: **copyrights, utility patents, trademarks**. The other topic will be selected from among these four: **copyrights, utility patents, trademarks, and trade secrets**. In addition, there might be a third aspect to the exam — quite minor — that concerns some other topic. Within those parameters, I will use a random process to select which topics to test. So the essay exam might, for example test combinations such as the following.

Examples:

- copyright and trade secret
- utility patent and copyright, plus a minor question on trademark
- copyright and trademark
- trademark and utility patent, plus a minor question on design patent
- utility patent and copyright, plus a minor question on the right of publicity

The first two examples correspond to the practice exams I previously released to my Exam Archive.² (Those practice exams are titled *Sentiments and Serendipity* and *Pulling Polymers*). The third example corresponds to the Spring 2017 exam (called *Weather Wars*), which also has been released to the Exam Archive.

Kinds of questions (legal analysis, theory/policy, etc.): The exam is mostly about applying law to facts.

The Many multiple-choice questions will be of the standard type requiring you to apply facts to law.

Expect that at least some of the multiple-choice questions will be pure economics questions — disconnected from legal doctrine — that correspond to our coverage of economics concepts from the early part of the semester. In particular, expect to see pure economics questions along the lines of the released sample questions we went over in class and along the lines of assigned questions out of the POE book.

You should also expect to see some questions that are simply about recall. As an example, sometimes on prior law-school exams I have included a question where I had a quote from a reading and students were asked to recall something about it, such as where the reading came from. In particular, for Antitrust, I might include questions about cases we read, where the correct answer requires knowing something about the case's facts, holding, and/or name. That's constructive testing for Antitrust, in my view, because analogizing to the cases is

²http://ericejohnson.com/exam_archive/

a key part of mastering this body of law. So being literate in the cases is part of mastering antitrust as a subject. What is more, spending study time getting to know the cases will help you prepare for the essay exam in addition to helping you tackle any case-recall questions that come up on the multiple-choice portion. But please don't study the cases by trying to memorize useless trivia about them. Instead, work on getting to know the cases in a meaningful way.

Note that in the past, when I've included questions that look like pure-recall questions, I have often designed them in such a way that a conceptual understanding—one that goes beyond pure recall—will aid the student in finding the right answer. I may do the same here.

Also be aware that I might include questions that ask for pure characterizations of doctrine, unconnected with any hypothetical facts. But again, the emphasis in my design of such questions is to test for conceptual understanding. So don't study by memorizing particular wordings of blackletter law. Instead, aim for knowing the doctrine in a meaningful way.

Topics/coverage on the essay portion:

The essay portion of the exam will give you a novel set of facts and require you to provide analysis along the lines of what is contemplated by the Antitrust Analysis Synthesis document.

Note that the essay portion of the exam will call only for you to provide legal analysis (e.g., to analyze the parties' legal positions, including possibly explaining how you would advise a client). There will not be a "theory" or "policy" type question that, ~~for example, nakedly~~ calls for you to provide arguments for a change in the law or to analyze the law's desirability. Rather, you will be asked to evaluate how the extant law applies to the essay exam's hypothetical facts. But even though the essay portion will have no theory/policy question as such, it is nonetheless true that antitrust analysis is heavily reliant on theory- and policy-type arguments. So providing solid legal analysis, in the antitrust context, may involve grappling with theory and policy.

~~On the multiple-choice portion, the vast majority of questions will be of the standard type requiring you to apply facts to law. Beyond that, there might be a few questions of different types. You might see a question or so on theory in proportion to the time we spent on theory in the course. And you might see a question or so that is simply about recall—for instance, about legal doctrine or a reading. As an example, sometimes in the past I have included a question where I had a quote from a reading and students were asked to recall something about it, such as where the reading came from. It's possible I might do that again. But such recall questions, if they are included at all, will be infrequent. And often when I have included such questions, I have designed them so that a conceptual understanding—one that goes beyond pure recall—will aid in guiding a student to the right answer. So, bottom line, you should concentrate your preparations on cementing your conceptual understanding that will allow you to apply law to provided facts.~~

Also, the essay exam will not directly test pure economic conceptual knowledge disconnected from the law. This is in contrast to the multiple-choice portion. That being said though, you can expect that your understanding of the economics will be brought to bear in important albeit indirect ways. So, for instance, you will not be asked to draw supply and demand curves as part of your essay response. But it is fair for the hypothetical facts to assume your knowledge of the economic concepts we covered, and within the context of the hypothetical facts there may be various statements about or representations of economic analysis that you'll need to evaluate critically. Moreover, your ability to think economically will contribute to your ability to put together a compelling analytical response.

Jurisdictional coverage: You will be tested on the U.S. law we studied. You will not be tested on the law of any particular ~~state, municipality, or~~ circuit. Thus, you will not need jurisdiction-specific answers.

5. MULTIPLE-CHOICE: ABOUT THE NUMBER OF QUESTIONS

I am designing the multiple-choice portion of the exam with the intent of giving you adequate time to read and analyze each question. I do not want time pressure to be a dominant factor. In this regard, I am informed by feedback I have gotten on past multiple-choice exams, and I endeavor to have things calibrated so that students will have the time they need to get through everything in a careful, thoughtful way. My aim for the multiple-choice portion of the exam is that you will be busy and need to move diligently, but that there will be no need for you to be hasty.

I hope you will take advantage of the time you are given to carefully read the questions and double-check your answers. When doing multiple-choice questions in class, I have often noticed that encouraging people to go back and think about something again often gets additional people to move to the right answer. I am sure the same will be true of answering questions on the final exam.

As disclosed above, there will be approximately ~~50~~²⁵ questions to answer over the course of ~~120~~⁶⁰ minutes. That corresponds to 2.4 minutes per question. (The multistate bar exam, by comparison, has 1.8 minutes per question.)

In further pursuit of keeping time pressure from figuring too greatly, I intend to keep the total word volume in check. Some questions may be long, taking up a full page for instance, but I will work to balance such questions with shorter ones.

All that being said, the time you will have to answer multiple-choice questions is not unlimited. You should pace yourself.

I may include a chart to help you with pacing, such as this:

Pacing chart: To finish all questions and have 10 ^{five} minutes left over, then:					
At this time since starting:	15 min	30 min	1 hour	1 hr 30 ⁴⁵ min	1 hr 50 ⁵⁵ min

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It is my strong wish that no one does poorly on the exam because of time-management problems. So please stay aware of the time, and keep yourself on track.

6. MULTIPLE-CHOICE: SCORING, FORMAT, AND STUDY MATERIALS

Each multiple-choice question will be worth one point. The exception would be if I throw out a question because of error or irregularity. In such a case, the affected question would be worth no points.

There will be no penalty for incorrect answers. So if you don't know the answer to a question or run out of time, you should guess.

The questions on the multiple-choice portion of the exam will be similar in format to past multiple-choice exam questions that I have publicly released to my Exam Archive, which has all my publicly released multiple-choice questions.³

~~(Look for In particular, look at the "AMALGAMATED INTELLECTUAL PROPERTY ANTITRUST QUESTIONS." ⁴) Many of these we went over in class.~~

Note that [the sample questions in](#) the amalgamated released multiple-choice questions are not balanced in terms of subject matter so as to match the balance of subjects for ~~any particular semester, much less this current semester.~~ ~~In other words, you should not~~ [the exam. So don't](#) take the frequency of questions on particular subjects ~~in the amalgamated multiple-choice questions~~ [there](#) to be a clue as to the frequency with which subjects will come up on the multiple-choice portion of your exam. Again, your exam will obey the Correspondence Principle.

7. MULTIPLE-CHOICE: HOW TO TACKLE MULTIPLE-CHOICE QUESTIONS

I have written a memo on how to tackle multiple-choice questions. It's called *How to Take a Multiple-Choice Exam in Law School*.⁵ I strongly recommend that you read it as part of your studying. As I emphasize in that memo, I write multiple-choice questions with fairness as my chief goal. Thus, I seek to avoid tricky questions. Instead, I try to draft questions so that if you know the material I'm testing, finding the right answer should be straightforward.

³ http://ericejohnson.com/exam_archive/

⁴ ~~There are some additional multiple-choice questions concerning patent law in a 2006 Patent Law practice exam, which can be found in the Exam Archive. But I don't recommend using that document in studying. I have taken what would be useful from that document and folded that into the amalgamated questions.~~

⁵ You can find a link in the Exam Archive. Here's the direct URL: http://www.ericejohnson.com/docs/Tip_Sheet_on_Multiple-Choice_Questions.pdf

8. ESSAY: HOW THE ESSAY WILL BE GRADED; WHAT GETS POINTS

You must do legal analysis to get points for the essay. As mentioned above, your goal in taking the exam is to show your mastery of the material presented in the course and your skills in analyzing legal problems involving the course's subject matter. The way you do this on the essay is by providing legal analysis. Legal analysis is the application of the law you've learned to the hypothetical facts provided in the exam. Legal analysis is thus the necessary and the exclusive requirement for success.

Said more concisely: Legal analysis is what gets you points—period. And legal analysis necessarily involves a productive mixing of law and facts to create conclusions.

Be aware that I cannot give you credit merely for reciting relevant hypothetical facts from the exam. The recitation of facts from the exam is not legal analysis, and it's not probative of your mastery of the material. Consider that the facts of the exam can be copied out of your essay booklet—thus providing them to me in your essay response does not help me know how well you have mastered the material.

Similarly, be aware that I cannot give you credit for making correct statements of relevant legal doctrine. The recitation of legal doctrine is not legal analysis, and it's not probative of your understanding. Consider that this is an open-book/open-note exam, and thus rules of law can simply be copied out of your outline or book. This necessarily means that the occurrence of correct statements of legal doctrine in your essay response is not probative of your understanding.⁶

I have written an entire memo on what makes for a good essay response. It's called *Tip Sheet on How to Write a Law School Essay Exam*.⁷ You should scrutinize it: It tells you exactly how to maximize your grade by providing solid legal analysis. Another document I've written to help you understand what makes for a good essay response is *Three Examples of Exam Writing*.⁸ I strongly recommend reading both *Tip Sheet on How to Write a Law School Essay Exam* and *Three Examples of Exam Writing* as part of your preparations for the exam.

9. ESSAY: FORMAT; WHAT TO EXPECT

Format basics: The essay portion of the exam will be administered in [what can be called](#) a “30/4590” format, with a 30 minute period for reading and

⁶ I can concede that on a closed-book/closed-note exam, regurgitating correct statements of legal doctrine could at least be probative of your successful memorization of various material. But this is an open-book/open-note exam.

⁷ You can find a link in the Exam Archive. Here's the direct URL:

http://www.ericejohnson.com/docs/Tip_Sheet_on_Exam_Writing.pdf

⁸ You can find a link in the Exam Archive. Here's the direct URL:

http://www.ericejohnson.com/docs/Three_Examples_of_Exam_Writing.pdf

outlining and a 45⁹⁰ minute period for writing the exam. This is discussed in more detail above, in §2 of this Exam Prospectus and in §10 of the Syllabus.

~~The 30/45 format is something I moved to in 2017. Exams you find in the Exam Archive from before 2017 are longer and more wide ranging—less focused in terms of subject matter and the calls of the questions. But barring those differences, exams Part II will otherwise have considerable similarity to essay exams from years 2016 and before.~~

The kind of fact patterns I tend to write: I try to make my exams interesting and engaging. They often have pictures, images, sidebars, and the like. In comparison to other exams, you may find that my exams have more narrative, plot, character, and backstory. As a practicing lawyer, I found that real-life cases are heavy on drama and narrative detail. So I have strived to include the same in my exams. In my view, this gets the exam closer to the real-life practice of law than the kind of stripped-down one-paragraph hypotheticals you tend to find on the bar exam.

A consequence of my writing exams as I do is that the exam ends up containing factual details that, while useful for holding the story together, are not fulcrums for the legal analysis. So, for instance, sometimes photos or graphics offer something useful to the legal analysis, but sometimes they are just decoration. A student once asked me, pointing to a sentence in one of my old exams, “I know that every single sentence in a law school exam is put in there for some reason, so why did you put this sentence in the exam? How does it change the analysis?” Well, my exams aren’t like that. There will be various details that don’t matter to the analysis. This is the way facts come to your desk in real life: Some are very significant, some are merely useful, others are irrelevant. I aim for my exams to be similar to real case-files in this sense.

Be aware of the call of the question: ~~In keeping with the shorter 30/45 format essay exam, I will be narrowing~~ I will likely narrow the ground for your answer and channeling your analysis to answer particular questions. So make sure to read the calls of the questions carefully. For instance, I might instruct you to omit discussion of something (such as remedies, ~~alternative~~ certain conduct, certain parties, liability under certain theories ~~of protection under a different form of IP~~, etc.) Similarly, I might instruct you to assume something to be true (such as the ~~patentability~~ strength of ~~an invention~~ a patent). If I provide such an instruction in the call of the question, be sure to heed it. I will not be providing credit for analysis I ask you to exclude or that isn’t embraced by the question asked.

Organization, separated questions, etc.: Organization is important. To help on that front, my habit is to instruct exam takers to organize their responses in a certain way, broken up into distinct questions and/or distinct subparts. See the ~~Sentiments and Serendipity and Pulling Polymers~~ Last Mile in the Plum Isles practice ~~exams~~ exam for ~~examples~~ an example. By requiring all exam responses to

adhere to the same format, I can grade all the exams in the same way, which helps me to be as fair as possible.

The different questions and/or subparts will not be separately weighted. The entire essay response will be graded as one. So answer all portions completely, spending relative amounts of time on them as appropriate. ~~If~~ And if I tell you that something can be answered with great brevity, then heed that instruction and keep that part of your answer brief. ~~(See *Pulling Polymers* for an example.)~~

10. ESSAY: THE 30-MINUTE READING/OUTLINING PERIOD

As already mentioned, the administration of the Part II essay portion will start with a 30 minute period for reading and outlining (the RO Period). During this period you will not be able to start typing on your computer or writing in your bluebook.

I encourage you at this point to go back up and re-read the portion of the syllabus concerning the RO and EW periods (§ 10-2(b)(4), et seq, reprinted above).

It is my hope that the RO Period will push you read the facts and think through the analysis carefully and deeply, and that it will encourage you to not race ahead to put down in your response everything you can think of as fast as you can think of it. So, during the RO Period, you should read the facts carefully, scratch out an outline, and be alert for difficult bits that will require deft handling in the analysis.

Note that you would be within the rules to start writing your response on scratch paper during the RO period and then spend part of the EW period copying what you've written on scratch paper into the computer response file or your bluebook – but this would be a terrible idea! Please take advantage of the RO Period to do careful and deep issue-spotting and analytical thinking. I am confident doing so will get you a much better result.

11. ESSAY: ABOUT THE LENGTH OF YOUR ESSAY RESPONSE

There will be no word limit, but concision is admired and valued. Be plain and direct. Of course, you should aim for being complete in your analysis. But steer away from writing that is periphrastic or verbose. Put differently, value substance over word count. My observation is that the number of words in an essay does not correspond well to the grade it earns. I've never analyzed that numerically with a spreadsheet, but it's my sense based on years of experience as a grader. To be sure, people can have analysis that is too truncated in terms of substance and lose points that way. But I commonly see people being needlessly wordy in their responses, and that seems sometimes to correspond with people not getting through the whole essay or not thinking as carefully as they should about the substance. Thus, I urge you to use your time to work carefully and thoroughly rather than trying to throw as many words onto paper as possible.

Notice that the model responses to the mock exams *Sentiments and Serendipity* and *Pulling Polymers* are both quite concise. The model answer for *Sentiments and Serendipity* is 831 words, and it is a top-flight response. The model answer for *Pulling Polymers*, also a top-flight response, is even shorter at 747 words—despite the fact that it covers more ground. And note that these are idealized answers with exhaustive analysis. In fact, I think tend to think these responses are a bit on the long side. Shorter answers could earn an A+.

Bottom line, I strongly believe you'll do better if you concentrate on quality rather than quantity.

12. ESSAY: ABOUT THE OPEN-BOOK NATURE OF THE ESSAY PORTION

I've heard of instructors allowing students to bring to the exam only the assigned textbook or only materials that the students, themselves, have authored. Let me be clear: There is no such requirement in this class. For Part II, you can bring in any material on paper that you wish.

As is made clear in the Syllabus, whatever you bring in must be on paper. You cannot reference electronic/digital/interactive files or information. So, no ebooks, for example. Whatever you want to be able to reference during the exam will need to be printed out on paper. You may of course use a computer running exam software to write your exam (and I recommend this), but you may not reference files stored thereon during the examination session. For the avoidance of doubt: You may use a tablet computer (e.g., iPad) to type your exam if it is running exam software and is being used in accordance with applicable policies.

Although there is no limit on the what paper materials you can bring with you, there is a possible danger in having too much paper. You don't want to be bogged down by looking stuff up and re-reading your notes instead of doing analysis. I personally think the most important thing you can have in terms of paper is a single sheet of paper to use as a "menu outline." (See what I say about this in the "OVERALL THOUGHTS ..." section, below.)

13. ISSUES WITH TEXT: REPEATING, WRITING, TYPING, ETC.

Here are some specific pieces of advice for your writing.

Repetition: Be complete, but avoid redundancy. Specifically, do not repeat the exact same analysis with substituted parties. I will not give additional points for the same content that is repeated. Consider that repeated content is not probative of your mastery of the material. And because of this, I strongly recommend that computer users avoid the copy-and-paste function! Instead of repeating yourself, you should, to the extent appropriate, incorporate analysis by reference to another portion of your answer. For example, it would be appropriate to say something like, "The analysis with regard to Party B is the same as that for Party A, except that _____."

Spelling, grammar, etc: There are no points to be won or lost for spelling, grammar, or stylistic aspects of writing, so long as I can understand what you are saying. If grammar or spelling issues render text ambiguous, then it's a problem. But not otherwise. Substantive content is what matters.

Abbreviations: I likely will include in the exam a table of pre-defined abbreviations for you to use in your response, if you like. Examples can be found among the exams in my Exam Archive. Feel free to use other reasonable abbreviations as well; although if they are not completely obvious, you should define them the first time you use them.

Computer-typed exams: Don't worry unduly about typos. As long as I can understand what you are saying, you're fine. There's no premium on prettiness.

Handwritten exams: If you are handwriting, please write only on one side of the page in your bluebooks and use a blue or black pen. Skip lines. Finally, I cannot grade what I cannot read, so be sure that your handwriting is readily legible. (If you're on the fence about whether to type or handwrite, go with typing – it ensures that legibility won't be an issue.)

14. OVERALL THOUGHTS ON STUDYING; YOUR STUDY PLAN

The most important thing in studying is to prepare for what you need to do on exam day. That means first of all to know what you are doing in terms of exam-taking technique. For that, use the documents I've provided: *Tip Sheet on Exam Writing*, *Three Examples of Exam Writing*, and *How to Take a Multiple-Choice Exam in Law School* (links on the class webpage). Then, when studying the content, concentrate on the Focus List (in §4, above). ~~And throughout your preparations, you should bring exam-writing technique and substantive knowledge together by working through old exams from the Exam Archive.⁹ Trading your responses with classmates is an extremely effective way to find your weaknesses and strengths.~~

The benefits of a mini-outline or "menu outline": I strongly recommend that you prepare a mini-outline or "menu outline" for the course. This document should be a very simplified list of what we learned during the semester. It's your quick-reference sheet for issue spotting on the essay portion. I keenly encourage you to use one page only for this. I emphasize this because, for an open-book exam, many students work to accumulate a huge volume of materials they can reference during the exam. You need to decide what's right for you, of course, but I tend to think this kind of accumulation provides a false sense of security. At any rate, the larger the volume of materials you have, the more important it will be to have an ultra-concise one-page outline to use as a ready reference.

~~**Wypadkis:** In some prior semesters when I taught Intellectual Property, I administered the exam on a limited open-book basis where students were given to use during the exam a copy of a class-wide group outline that students~~

⁹ Again, that's http://www.ericjohnson.com/exam_archive.html.

constructed cooperatively using wiki software. This group outline was called the “wypadki.” For various reasons, I have stopped doing this, and I have moved to a no-limits open-book exam format. The legacy of the wypadkis, however, is that the old ones are available to you, if you find them useful. You can use them as is, use them as the basis for your own outline, use them to fill in holes in your outline, or, of course, you can just ignore them. There are links to the prior-semester wypadkis on the class webpage, and you can download them in PDF format or editable DOCX format.

Don’t wait to do old exams: As I have said a number of times, I believe the best use of study time is doing old exams. If you don’t yet have a completed outline and you haven’t yet reviewed all the course material, consider letting those wait just a bit and getting your feet wet with an old exam as an active learning exercise. You might spend just an hour or less looking over the topics from the semester and then dive into an old exam. You can time yourself and try to make it a realistic simulation of the final. Or you might try doing an old exam without timing yourself, just using it as a way to get your mind engaged in the task of analyzing facts using the law you’ve soaked up over the semester. Or try doing all of these things using different old exams available in the Exam Archive. I think doing an old exam early on in your studying will help you stay focused on what matters once you turn to other modes of studying (reviewing, outlining, etc.). Then, as you move forward, keep taking breaks to do more old exams. Using exams as practice: A great means of active studying is to do old exams. If you haven’t yet done the *Last Mile in the Plum Isles* practice exam, you should definitely do that. There is also an old exam of mine called *Hexed by Hexetron* from a survey course I taught in 2010 called Antitrust, Bankruptcy & Consumer Law. I recommend doing that exam as well, as it has plenty of antitrust law material in it. You can just ignore the bankruptcy and consumer law portion.

Note that you don’t need old exams written by me in order to get great practice—all you really need is a story with facts in it that allow you the opportunity to spot issues and bring to bear law you’ve learned during our semester. Any old antitrust exam should do. If the question prompt on someone else’s exam doesn’t correspond to what we studied or how we’ve approached the material, then just proceed as if you got a more general question prompt, like “Discuss the antitrust issues in view of what we have covered this semester.”

In terms of looking for old exam by other instructors, I found the following resources—but I haven’t delved into any of these, so I can’t make any specific representations about what you might find:

- The University of New Hampshire has an archive with a few antitrust exams in it: <http://library.law.unh.edu/Exams>
- Harvard Law School has an extensive law school exams archive. There are some old antitrust exams in there. But you have to do some digging since there’s no user-friendly search capabilities:

https://hollisarchives.lib.harvard.edu/repositories/5/resources/4539/digital_only

- [UNH and Harvard are the only law school exam archives that I know to have antitrust exams. But there might be more out there. The University of Washington Gallagher Law Library has a guide to various law schools' online archives of old exams. So you can start from there to look for more: <https://guides.lib.uw.edu/law/exams/other>](#)

[Keep in mind that it doesn't matter if an antitrust exam is very old. The law may change, but hypothetical facts stay useful.](#)

15. FEEDBACK ON PRACTICE EXAM ESSAY RESPONSES AND MULTIPLE-CHOICE QUESTIONS

I do not do essay review or multiple-choice-question review over e-mail. But I am happy to do this in the context of an office visit.

If you would like me to look over a practice exam essay response you have done, please bring a typed, printed copy of your exam response when visiting during office hours or during an appointment. I will look over it while meeting with you. I am also happy to discuss, in the context of an office visit, your answers to released multiple-choice questions, including why the correct choice is the correct choice, etc. [I plan to send out an e-mail with times for last-chance end-of-the-semester office hours.](#)

16. FINAL THOUGHTS

Don't get too anxious. You probably know far more than you think you do at this point. So try to stay relaxed. Study the big concepts, pay attention to the focus list (§ 4, above), remember the tips on exam-taking technique, and get a good night's rest. I wish you the best of luck!

APPENDIX: IP PITFALLS

~~The following are "pitfall" areas – that is, aspects of the law that, if misunderstood or neglected, can result in a surprising loss or substantial liability. Because of the potential treacherousness of these areas in practice, I am especially keen that you learn them well and know them for the exam:~~

- ~~Copyright:~~
 - ~~Understand that the author is the initial owner of a copyright – not necessarily the person who commissioned or paid for the work.~~
 - ~~Be able to determine whether a hirer will be deemed the author of a work under work-made-for-hire doctrine.~~
 - ~~Understand that co-owners of a copyright can independently grant a non-exclusive license and their default obligation to one~~

- another is only for an accounting (i.e., sharing of profits, if any).
 - Understand that transfer (assignment or exclusive license) requires a writing signed by the transferor.
 - Recognize that there are limited opportunities to terminate transfers, allowing the copyright to revert to the author or author's heirs.
 - Understand that existing derivative works can continue to be utilized after termination.
 - Be aware that many foreign works first published with authorization before 1923 had copyrights restored by Congress and that this was upheld as constitutional.
- Patent:
 - Understand that waiting too long to apply for a patent can result in the loss of prospective patent rights
 - Be sure to be able to apply 35 U.S.C. §102(a) & (b) under current law (i.e., the 2012 AIA version).
 - Recognize that enablement problems in a patent application cannot be cured without loss of the original filing date.
 - Understand that co-owners of a patent can independently grant a non-exclusive license and that patent law gives them no obligation to one another to share any profits.
- Trade secret:
 - Understand that trade secret protection is fundamentally incompatible with patent protection, since trade secrets must remain secret, and patents must be published.
 - Understand that trade secret protection is lost when the trade secret stops being secret—whether or not as a result of the fault of the trade secret's owner.
 - Understand that trade secret protection is lost when the owner does not take sufficient measures to maintain secrecy.
- Trademark:
 - Understand that a trademark's ownership is established by use in commerce, not by being the "author" of the mark.
 - Understand that two persons cannot be independent co-owners of a trademark (same mark in the same market), as that would mean the mark is not associated with a single commercial source.
 - Understand that a trademark need not be registered to be the basis of liability.
 - Understand the advantages of federal registration of a mark, including preventing future junior users from establishing rights.
 - Corollarily, understand the disadvantages of foregoing federal registration, including the possible loss of rights to a more junior user who registers.

○—Understand that trademark protection is destroyed by naked licensing, assignment-in-gross, and abandonment.
Understand that a mark can become generic, and if it does, this destroys trademark protection.