

Memorandum to Students

# Exam Prospectus

## Torts II

Spring 2016

University of North Dakota School 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 2016 Torts II 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 writing your exam response 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.

Now for some details.

### 2. PARAMETERS (SECTION 10-2 OF THE SYLLABUS)

*Section 10 of the syllabus describes the exam in considerable detail, including how it will be structured and administered. You should review it carefully. For your convenience, I reprint § 10 in its entirety here:*

#### 10. EXAMINATION:

##### 10-1. Communications and Anonymity:

(a) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2.)

(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. Self-identification on the exam or otherwise culpably compromising anonymity will presumptively result in a deduction from your exam grade and a referral for disciplinary action.

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

(a) **Part I: Multiple Choice Questions**

(1) Part I of the exam, worth approximately one-third of the total exam grade, will consist of multiple-choice questions administered on a closed-book basis. The questions will include, but may not be limited to, bar-exam-style hypotheticals testing the application of law to facts, as well as 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 will be one hour in duration.

(3) All multiple-choice questions are written by me. None of the questions used on the exam will be questions that have been previously released.

(4) 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.

(6) 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. There is a downside, of course, which is the possibility that questions will 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.

(7) 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 dishonesty. Moreover (not to put too fine a point on it) reproducing or trafficking in unreleased questions is civilly 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.

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

(1) Part II of the exam, worth approximately two-thirds of the total exam grade, will require written answers. This part of the exam will consist of one or more open-ended questions calling for written essay responses to one or more hypothetical fact patterns. In addition, the exam may include directed response or “short answer” questions.

(2) I will write Part II such that it should be answerable in less than two hours. Nonetheless, you will have three hours in which to answer Part II.

(3) You will have the choice of typing or handwriting your response to Part II. The typing of exams will be in accordance with the School's policy for the use of computers to write exams.

(4) Part II will be administered on an open-book basis. You may bring with you any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session.

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

**10-3.** My old exams in Torts should be quite useful to you in studying for and thinking about this semester's exam. You will find them in my Exam Archive, which is publicly accessible online. You will find a link on ericejohnson.com (or use the direct URL: [http://ericejohnson.com/exam\\_archive/](http://ericejohnson.com/exam_archive/)). Later in the semester I will have more to say about the exam and how I recommend preparing.

### 3. SOME QUESTIONS ABOUT THE EXAM PARAMETERS ANSWERED

**Word limit:** There is no word limit.

**Open-book nature of essay portion:** I understand some instructors allow students only to bring assigned readings or materials that the students, themselves, have authored. There is no such requirement in this class. You can bring in any material on paper that you wish.

**Electronic materials:** Non-paper materials are not permitted. That means no electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop running exam software to write your exam (and I recommend this), but you may not reference files stored thereon during the examination session.

**Negligence, intentional torts, and topics from Torts I:** I will not be testing topics from Torts I. Knowing what you know from Torts I is hopefully making it easier for you to learn Torts II material, but I will not be testing Torts I subjects. So don't bother studying them or preparing materials on them to bring with you to the exam.

### 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.<sup>1</sup>

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<sup>1</sup> Keep the Correspondence Principle in mind when using old exams to study: Old exams correspond to old semesters. So if you see an old exam and think, gee, this old exam seems to be heavy on OSHA regulation, and that seems out of whack with this semester, since it was barely mentioned in passing, you would be right. Old exams are to varying degrees out of whack with the current semester. But your exam will correspond to this semester.

**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.<sup>2</sup> I expect to include, in some way, every topic that was substantially explored in class.

**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, if some doctrinal point came up only in one smallish note appended to a case, 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.

Now, full disclosure, I cannot guarantee that no obscure point will find its way onto the essay exam. Why not? Well, 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 hypothetical fact pattern calling for 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.

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

**The focus list – what I will draw from in writing the exam problem:** 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 emphasized in the casebook's explanatory text<sup>3</sup>
- doctrine that was the subject of extended discussion in a case we read
- problems from the casebook that we went over in class
- material and hypotheticals from slideshows posted to the class website
- the mindmap, particularly where it overlaps with the casebook and DLB<sup>4</sup>

The main message is to not worry about small details. Instead, work on having a thorough understanding of the major concepts.

Note that I plan to use the problems from the book that we went over in class and the examples and problems from posted slides as inspiration in designing the hypothetical facts for the exam, but I will not re-use them. This means that some fictional events in the exam hypothetical may be loosely similar to, but not the same as, the facts

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<sup>2</sup> As a consequence, I recommend that you use the syllabus and chart of assignments to build a “menu outline” to use when spotting issues on the exam. I discuss this at the end of §6, below.

<sup>3</sup> By “explanatory text,” I mean the part of the casebook that explains the law, the part I wrote myself. That is as opposed to the “readings” – e.g., the cases.

<sup>4</sup> That is, the Diamond, Levine & Bernstein book, *Understanding Torts*.

from problems and examples. To put it another way, the problems and examples will give you a very good idea of things to expect on the exam, but they will not represent an opportunity to draft portions of your exam answer ahead of time.

**Jurisdictional coverage:** All the hypothetical facts on the exam will take place in one or more hypothetical or unspecified states within the United States, with no circuit court of appeals specified. You will not be tested on the law of any particular state, municipality, or circuit.

**Kinds of questions (legal analysis, theory/policy, etc.):** 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, calls for you to provide arguments for a change in the law. Theory would only come up on the multiple-choice portion to the very limited extent we covered any theory concepts. (Note that we will not make it to the Part V policy and theory topics at the end of the syllabus.) It is a good idea, however, for you to keep in mind, at the most general level, the intended function and broad policy aims of doctrines we studied. This is mostly because knowing those will help cement your understanding of the doctrines themselves. For instance, we talked about the functions of punitive damages, and understanding those aims helps you understand punitive damages generally.

## 5. FORMAT OF PART I

The multiple-choice portion of the exam will be similar in format to my past multiple-choice exams<sup>3</sup> and to the midterm quiz you took. It will look very familiar.

## 6. FORMAT OF PART II

The essay portion of the exam will be similar in form to essay exams I have given in the recent past. Get a feel for them from my exam archive.<sup>5</sup>

**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 are heavy on 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 multistate bar exam.

A consequence of my writing exams this way 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

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<sup>5</sup> To get to my exam archive, there is a link from my home page. Or you can go directly to [http://www.ericejohnson.com/exam\\_archive.html](http://www.ericejohnson.com/exam_archive.html).

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.

**Don't get unduly anxious about dropped issues:** Making things interesting and more realistic is not the only reason I write exams the way I do. I also do it to reduce arbitrariness. In my view, with a reservoir of facts that is both wide and deep, there is less at stake with any given issue. To be more specific, the fact-filled, broadly comprehensive, and relatively long nature of my exam hypotheticals reduces arbitrariness by adding opportunities for students to show off their knowledge. Anyone can, in the pressure of an exam session, blow by something important. On my exams, that won't destroy your grade. Dropping an important issue here or there will not be disastrous if you do well with the rest of the material. In fact, I have found that the top-grade recipients in my classes have never exhausted all the possibilities for legal analysis. Not only that, I can confidently say that the top grades usually miss at least one significant issue that can be found among the B exams. I am convinced that this method of exam design helps me, when grading, to develop a good overall picture of students' mastery of the course, as opposed to seeing who can walk a tightrope without slipping.

**Don't provide analysis of Torts I topics:** With a big, open-ended fact pattern, there will almost certainly be an opportunity, if you seek it, to discuss negligence or intentional torts issues – but don't do it! I am not testing on Torts I topics, and I won't award points for discussion of Torts I topics, so please remember to stick to the Torts II topics in your analysis.

To the end of staying on topic and making the most of the opportunity to earn points on Part II, I strongly suggest that you make what might be called a menu outline – a very short outline, preferably one-page, that does nothing more than list out the topics and doctrines we covered this semester. Then use this menu outline to help you prompt yourself to spot relevant issues as you work your way through the Part II hypothetical facts.

## 7. ORGANIZATION

Organization is very important in an exam response. In fact, I've found it to be so important, it is now my practice to take it largely out of the exam taker's hands.

For your exam I will provide you with a pre-determined organizational structure, broken up into various subparts. You will find examples of this in the more recent exams in my online exam archive. 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.

For example you might get a call-of-the-question and subpart structure like this:

Analyze the parties' legal positions. Organize your response as follows, clearly labeling the subparts:

*Subpart A:* Discuss any claims that may be brought by Party A.

*Subpart B:* Discuss any claims that may be brought by Party B.

*Subpart C:* Discuss any claims that may be brought by Party C.

*Subpart D:* Discuss any claims that may be brought by Party D.

*Subpart E:* If there is anything else you wish to discuss, which does not belong in any of subparts A through D, please put it under this Subpart E.

Your subpart structure will look something like this, although the way in which the subparts are divided up might well be different. Instead of being organized by parties and the claims that those parties could bring, the subparts might be organized by parties and the claims that might be brought against them. Alternatively, the subparts might track particular occurrences, places, or relationships. (Again, you can see examples from my past exams.) After I write the hypothetical, I will design the subpart structure so that it breaks down the analysis in a logical, sensible way.

No matter how I prescribe the organization of your response, you can be sure that the subparts will not all be given equal weight. Thus, it may be entirely appropriate for one subpart to have very little content, while another subpart might call for very detailed analysis. The point of the subpart structure is to organize your response, not to suggest how much emphasis anything should be given. You will have to use your judgment to determine how much analysis is needed with regard to any particular subpart.

## 8. ABBREVIATIONS

I likely will include in the exam a table of pre-defined abbreviations for you to use in your response, if you like. Again, examples can be found among my more recent exams in my online 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.

## 9. 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 double the points for the same content that appears twice. (Along these lines, computer users should probably not use the copy-and-paste function.) Instead, to the extent called for, you may 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.

**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.)

## 10. WHAT MAKES FOR A GOOD ESSAY RESPONSE

I have written an entire memo on what makes for a good essay response. It's called *Tip Sheet on Exam Writing*, and there's a link to it on the class webpage. 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*. There is a link to this one, as well, on the class webpage. I strongly recommend reading these as exam preparation.

## 11. HOW TO TACKLE MULTIPLE-CHOICE QUESTIONS

I have written an entire memo on how to tackle multiple-choice questions. It's called *How to Take a Multiple-Choice Exam in Law School*, and you can find the link on the class webpage. 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.

## 12. TIPS ON STUDYING

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 just mentioned above: *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). Finally, you should bring exam-writing technique and substantive knowledge together by working through old exams from the exam archive.<sup>6</sup> Trading your responses with classmates is an extremely effective way to find your weaknesses and strengths.

Be aware that I have made available for you all the wydadkis – class-wide group outlines – from prior semesters. There are links on the class webpage. You should feel free to use them as you see fit in preparing your own materials.

### **Some notes about coverage in prior semesters:**

- Note that the coverage in each semester tends to be a little bit different. In looking at old exam questions, do not take the relative amount of emphasis on certain subjects to indicate the coverage for the Spring 2016 exam. See footnote 1, *supra*.
- Note in particular that since I started teaching at UND in 2007 through the 2011-2012 school year, Torts I was a two-credit course that covered only negligence and health-care torts, but not intentional torts (battery, assault, false imprisonment, outrage, trespass to land, trespass to chattels, conversion). Beginning in 2014-2015, Torts I changed to three credits, and thus I added intentional torts to the Torts I subject matter and took that out of Torts II. Thus, pre-2014 Torts II exams will have intentional torts issues. That should not, of course, be taken to indicate that intentional torts will be covered on this exam!

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<sup>6</sup> Again, that's [http://www.ericjohnson.com/exam\\_archive.html](http://www.ericjohnson.com/exam_archive.html).



- Note also in particular that the Spring 2015 class spent significantly more time on the oblique torts (transactional torts, defamation, privacy torts) than we have this semester. So the Spring 2015 exam (and it's model answer), reflects that.

### **13. FEEDBACK ON YOUR TORTS I EXAM**

Please feel free to come see me if you would like to discuss your Torts I exam. I am happy to give you feedback. I will be scheduling extra office hours at the end of the semester to be sure to accommodate anyone who wants to talk. If you do come by for feedback, please bring your exam with you.

### **14. FINAL THOUGHTS**

Don't get too anxious. Study the big concepts, pay attention to the focus list (§ 4, above), remember the exam-writing tips from the *Tip Sheet*, and get a good night's rest. I wish you the best of luck!