Tip Sheet on How to Write a Law School Essay Exam

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Law School Exams are Completely Different

Law school exams are completely different from what you've encountered before. Successful students coming from undergrad generally will have learned that success on an essay exam means regurgitating information, doing an "information dump," as I heard one person describe it.

It is crucial that you understand that this is not how law school exams work. Feeding back into a law-school exam answer all the information you've learned by repeating that information is completely ineffective.

This is especially important for first-semester 1Ls to learn. If you try to answer a law school exam in a way that worked for a subject like history, philosophy, or political science, the result will be likely be disastrous. I don't mean to scare anyone. I just want to make sure to eliminate misconceptions that could come between you and the success you deserve to achieve after a semester of hard work.

So, what is it you must do instead of repeating back information about the law? You must use your knowledge from the course to generate legal analysis. More specifically, you must *take the law you've learned in the course and apply it to the facts provided in the exam*. Doing this demonstrates that you have mastered the material and gained corresponding analytical skills.

The Golden Purple Key: Applying Law to Facts

The golden key to law-school exam writing is applying law to facts. (Or facts to law. Whichever way you want to think about it.) This is so because applying law to facts *is* legal analysis. And legal analysis is what you must do on the exam.

To create legal analysis, you necessarily must mix the law and the facts together in a way that produces some result. If law is blue and facts are red, then you want to make purple. In other words, remember that making purple is golden. So just remember to use the Golden Purple Key:

red + blue = golden purple

(Yes, I'm completely aware of what a mess I'm making with mixed color metaphors, but I'm hopeful it will help you remember the essence of good exam writing!)

Why is applying law to facts so crucial? A little reflection will show you why this must be the case.

Providing the facts alone cannot indicate your mastery of the material. With an issue-spotter exam, you have the facts in front of you. Thus, I can't give you any points for repeating them back to me. Most students understand this, but I've found that, in the pressure of the exam, some students will spend time and words just reiterating the facts.

Providing the law alone does not indicate your mastery of the material either. Thus, I can't give you any points for repeating back to me the law. (Note, however, that some professors do want you to repeat the law as an initial step before doing analysis.¹ So I recommend that for classes other than mine, you inquire, in a nice way, about the professor's views on this point.) I could see some sense in awarding a point for correctly stating the rule of law if the exam were completely closed-book. But if you are taking an open-book exam, including one that is partially open-book,² then you have the law in front of you. In such a case, correctly copying statements of legal rules, even relevant ones, into your exam response does not, as I see it, demonstrate your mastery of the material.

You've got to apply the law to the facts. That is how you show that you actually understand the law.

Now, the application of law to facts is more complicated than merely mixing the two. (Although mixing is a good start!) What you must do is put the relevant fact with the relevant legal doctrine and explain what comes of the combination.

To accomplish this, as a mechanical matter, it is helpful to talk about the facts and the law <u>in the same sentence</u> and to use words such as "<u>because</u>" and "<u>therefore</u>." These are what you might call analytical-transmission words. Using these words helps you force yourself to show the legal analysis. Sometimes "since" works in place of "because." And sometimes "so" works in place of "therefore." You can use your ear. But I strongly suggest that "because" and "therefore" be your go-to words, and I would recommend steering clear of fancy expressions like "on account of" or "inasmuch as."³

I've asked around, and there's clearly a split among law professors in this regard. Some professors award points for correctly stating a rule of law in an answer, and some don't. I don't know which view predominates, but both views are common. At any rate, even among law professors who give points for stating the rule, what those law professors prize above all is the analysis. On that, everyone I've ever talked to is in agreement.

By a partial open-book basis, I mean that outside references are allowed, but with limitations. My essay exams have generally been given on a full or partial open-book basis. Check your syllabus to find the rules for your particular course.

There's no point in trying to use alternative, fancy expressions for "because" and "therefore." Good lawyers value simple, straightforward language. I just opened up copies of a number of amicus briefs written by other law professors and did a word search. They are brimming with instances of "because." There are also many instances of "therefore," but "because" outnumbers "therefore" about 4-to-1. Occurrences of "since" were more rare. I found zero instances of "on account of" or "inasmuch as." As pop singer P!nk put it, Don't get fancy, just get dancy.

Here are some examples of mixing law and facts together, providing a conclusion, and using "because" or "therefore" as a connector – all in the same sentence:⁴

- (Ex. 1) Abby has a good claim for assault against Danny because, by shouting "That saw blade is going to hit you!" while triggering the loud saw noise, Danny created an immediate apprehension of a harmful touching.
- (Ex. 2) The plaintiff in this case cannot prove actual causation under the but-for test because the damage to the gymnasium would have happened anyway, even if the defendant had not been intoxicated.
- (Ex. 3) The UCC's statute of frauds requires a writing evidencing a sale-of-goods contract for \$500 or more; therefore, the oral contract to sell the painting for \$11,000 is not enforceable.

Don't those passages sound good? Doesn't that sound like a lawyer or a judge talking? That's what professors want you to sound like, too.

To help you see how to discuss both the law and facts together in order to create legal analysis, I have diagrammed the above sample sentences in color. Facts are red. Law is blue. Legal conclusions are purple. An underlined analytical-transmission word ("because" or "therefore") connects it all together.

Example 1 follows this pattern:

legal conclusion \rightarrow <u>because</u> \rightarrow facts + law

Ex. 1^(color) Abby has a good claim for assault against Danny <u>because</u>, by shouting "That saw blade is going to hit you!" while triggering the loud saw noise, Danny created an immediate apprehension of a harmful touching.

Example 2 follows this pattern:

legal conclusion \rightarrow law \rightarrow because \rightarrow facts

Ex. 2^(color) The plaintiff in this case cannot prove actual causation under the but-for test because the damage to the gymnasium would have happened anyway, even if the defendant had not been intoxicated.

Example 3 follows this pattern:

 $law \rightarrow \underline{therefore} \rightarrow facts \rightarrow legal conclusion$

Ex. 3^(color) The UCC's statute of frauds requires a writing evidencing a sale-of-goods contract for \$500 or more; therefore, the oral contract to sell the painting for \$11,000 is not enforceable.

You can see that these examples present different ways of mixing facts and law together to create analysis. Don't make too much of these particular patterns. There's no magic in any particular way of doing it. Many, many other patterns are possible. The indispensible point is to remember the Golden Purple Key: Force the law and facts

⁴ Example 1 is from a practice exam called "Ye Olde Sawmill," which can be found in my exam archive at http://ericejohnson.com/exam_archive. Examples 2 and 3 are completely made up.

together and produce a conclusion from them. When you do that, you've got legal analysis.

And in pushing the law and facts together, I cannot emphasize enough how important it is to use "because" and "therefore," or some equivalent. Use them over and over. In fact, it's long been my strong hunch that as a quantitative matter, the number of instances of "because" and "therefore" strongly correlates with the exam grade. I've never tried to validate that empirically, but I'd definitely put a wager on it.

Your Goal in Writing an Exam and Pitfalls to Avoid

So now that you understand the means for forming an essay response – applying the law you've learned to facts given to you in the exam – let's step back and look at this a broader context.

Here is your overall goal in writing an exam: To show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter. I've put that in bold and italics to encourage you to dwell on it for a moment. So go ahead and dwell on it for a moment.

An exam might ask you to "advise a client," or "write a brief," but those are just pretenses to help you frame your answer. Your real goal on an exam is always to show your analytical ability and your mastery of the material from the course at hand.

As I've said, this means that what you should do is take the law you've learned in the course and apply it to the facts provided in the exam. But it's helpful to think about your overall goal not only in terms of what you should do, but also in terms of what you should avoid.

First off, **do not make moral arguments**. Do not argue what is fair. This seems to be a special hazard for first-semester 1Ls. But I've also seen it in upper-level courses. The problem with moral arguments is that they do not show mastery of the law.

Next, **do not bring in material from another course**. It's a waste of limited time, limited words, or both. So, for instance, if you are taking an exam in intellectual property, do not include analysis based on what you have learned in secured transactions, even if doing so would provide a more complete analysis of the factual scenario.⁵ (This seems to be a special hazard for people who are taking more than one exam on the same day – a tough circumstance, no doubt.)

Correspondingly, **stick to the material from your lectures and assigned reading**. That is, you should not waste time or words on material that, even if relevant to the topic of the course, was not presented in the course itself. There are many reasons you might have knowledge that goes beyond the course. Perhaps you learned this area of law as a paralegal before you came to law school. Maybe you read a commercial outline

You might be surprised at how often I get material from some other course included in exam responses. I used the particular example I did because one year there was a rash of commercial law material on an upper-level intellectual-property exam of mine. I determined later that the exams were on the same day. I must have had many overlapping students. (Taking two exams in one day is unfortunate, and I feel for you if you are in that situation.) In my 1L torts course, I have often gotten a fair amount of contracts and criminal law on exam answers. This sometimes happens despite the fact that these 1L exams were administered with at least one free day in between. Bottom line: Get some sleep and remember which exam you are taking!

(which is perfectly fine, as far as I am concerned). Perhaps you are working on a law-review project that has caused you to learn a great deal about some particular aspect of law. The problem is that showing off knowledge from outside the course doesn't correspond with the goal ("To show your mastery of the material presented in the course ..."), and, thus, it won't help you get a better grade.

Also, keep in mind that your goal is to show "mastery" of the subject matter. Inherent in that charge is the need to **exercise judgment** in what you choose to discuss and how much analysis you bring to bear on any particular part of the problem.

Conclusions, Confidence, and Seeing All Sides

Don't make up a conclusion if it is not warranted.

In each of the examples above (nos. 1, 2, and 3), there is a forceful conclusion, stating with certainty what comes of given facts. That is appropriate in many circumstances. But such sureness is not called for all the time. Good lawyers know that honest assessments of legal rights and liabilities are often phrased as a matter of how likely something is. And that, in turn, requires seeing both sides of an issue, articulating those sides, and providing a candid assessment of the range and likelihood of possible outcomes.

Consider the following, taken from a model response about trade secret misappropriation, which does a great job of considering both sides and providing a lawyerly and insightful – yet indeterminate – conclusion:

Ex. 4 A trade-secret misappropriation claim here requires that the acquisition of the trade secret was somehow improper, in violation of law or ethics. Did that happen here? Vasarelski wasn't even trespassing; all he was doing was reading a disc that he picked up innocently. On the other hand, after he perceived the nature of it, his continued exploration of it and his copying of it was not inadvertent. Also, he seemed to think he was doing something shady, because he wiped it down for fingerprints. This could indicate a transgression of accepted norms of business ethics. Arguably this is more wrongful and culpable than the conduct in the DuPont-flyover case, so in my view there is a strong likelihood that this could be considered misappropriation.

The law is largely shades of gray, and a great attorney or law student understands and recognizes that. On the other hand, sometimes the law is black-and-white, and when that's the case, the great attorney or law student says so.

So, often the smartest thing you can say on an exam is, "This is a close issue, and thus the court could come down either way." On the other hand, sometimes the most intelligent thing you can say is "This is a slam dunk for the plaintiff." The best exam answers deftly make use of a range of levels of confidence in stating conclusions.

This is adapted from the model response at: http://ericejohnson.com/exam_archive/Intellectual_Property_Final_Exam_Spring_2012-Good_Cheer_model_answer.pdf.

Issues and Organization

Organization is important. With jumbled-up organization, you cannot communicate your thoughts effectively. Do not write stream-of-consciousness style. Have a logical plan for tackling the issues in a sensible order, and follow it.⁷

In particular, I recommend you sketch out a very abbreviated outline of your response on a piece of scratch paper. At this stage, don't write out complete sentences, just scratch out a list of what you are going to talk about and in what order. Then stick to that outline and use it to pace yourself as you write your answer.⁸

If you find that you forgot to cover a particular point that belonged with a section of your answer that you already drafted, then, assuming you are using a computer, scroll back up to that point and insert it where it belongs. If you are handwriting, and if there is no room for an insertion where the point would logically go, then use a large asterisk, an arrow, or something else to make a notation explaining where the remainder of your analysis can be found.

It is possible to worry too much about organization. As long as the reader sees where you are going and understands what you are talking about from one place to the next, there is no need to make your exam answer pretty. I would avoid wasting time on elaborate headings. If you feel that you need to show that you are transitioning from one major area of analysis to another, a single-word heading is often adequate. And you might even skip that in favor of an underlined or bolded word. Often, simply going to a new paragraph is a good way of helping the reader see that you are on to a new set of points. Nor is there any need for a "roadmap" section in which you preview what will be discussed and in what order. It is possible some professors would disagree with me here, but it seems to me to be a waste of time and/or words to do this. Besides, I can't give points for a roadmapping section if the same material is going to be covered below; to do so would be double-counting.

Don't Dwell on the Obvious

Let's move on to a fine-tuning issue to make your exam response as good as it can possibly be: Avoid dwelling at length on obvious points.

You will have a limited amount of time or words for your exam. Maybe both. So don't squander your limited point-making opportunities by saying more than you need to, particularly when the issue is easy (i.e., not very interesting as an analytical matter).

For an intellectual property course, I once read an exam in which a student spent several pages explaining why a machine was patentable subject matter. If you are familiar with patent law, you might see why this is problematic: All machines are

This tends to be less of an issue for my own exams because my practice is to specify a certain organizational structure for the answer that all students are to follow. I put this organizational structure right in the question. If you look at my more recent exams from my Exam Archive, you will see what I am talking about.

In many of my classes, my recent practice has been to divide the essay exam period in two, with an initial period just for reading the exam facts and outlining a response, and then a subsequent period for actually writing the response. If you are not given separate reading/outlining time, I nonetheless recommend that you consider imposing it on yourself.

patentable subject matter. It is very rare in patent practice that subject-matter constraints are a barrier to patentability. It could be an issue, for example, with medical diagnostic techniques. But on this exam, the invention was a "machine." That meant it was patentable subject matter, and that was all that needed to be said about it. The sticky issues in that exam had to do with other points of doctrine.

Whether obvious points are worth talking about depends on the course and the exam problem. You need to exercise good judgment. For example, the elements of actual and proximate causation are required in various causes of action and various theories of damages studied in many different courses. Often these do not even rise to the level of being "an issue." So in some upper-level classes, where actual and/or proximate causation are required elements of a cause of action that was studied, but where the doctrines of actual and proximate causation were not, as such, a focus of study and where they are obvious in a given problem, then you can probably skip even mentioning them. But if you are taking a course in which actual and proximate causation themselves were subjects of study (as is the case with Torts I at my school), then I recommend you provide analysis, but if it is obvious, keep it brief. For instance, suppose in a Torts I hypothetical a driver fails to stop a red light, hitting and totaling a pick-up truck. The pick-up's owner sues for the value of the truck. In such a case, actual and proximate causation are so clear as to essentially be non-issues. But I wouldn't skip over them in Torts I. I would just dispatch them as expeditiously as possible. For actual causation, you could say: "The damage to the pick-up truck is actually caused by the red-light running because, but for the defendant's failure to stop at the red signal, the pick-up truck would not have been hit and thus would not have been damaged." About proximate causation, you could say, "The plaintiff can establish proximate causation because, it is a natural and foreseeable consequence of running a red light to collide with a vehicle in the intersection and damage it."

But Don't Pass Up Low-Hanging Fruit

Are you familiar with the expression "low-hanging fruit"? It denotes something you want that's not difficult to get. In other words, in the exam context, *easy points*. So the advice on exams is: Don't pass up the low-hanging fruit.

This is an important caveat to my advice about not dwelling on the obvious. Not dwelling on the obvious does not mean omitting to mention something just because it is straightforward. If something is a legitimate issue in the case, but it is easily analyzed, then note it, analyze it to the extent appropriate, and move on to the next issue.

At the end of the day, I can't give you a formulaic way of determining what you should skip, what you should mention in passing, and what you should spend considerable time on. You will need to exercise judgment about how to spend your limited time or allotted word count. And that is as it should be: Part of understanding the law at a high level is understanding what really matters – that is, which issues are the crucial ones. Thus, showing that you have a strong sense of judgment about where to focus your analysis is an important way of showing that you know the material well.

The Twin Dangers of "If"

Be careful if you find yourself using the word "if" on an exam. There are two things that can go wrong if you find yourself speaking in the conditional: (1) You may be

neglecting to engage with the facts, and thus not doing any legal analysis. (2) You may be going outside the scope of the exam.

Neglecting to engage with the facts: If you use "if" to dodge the facts, then you aren't engaging in legal analysis. On a property exam, suppose a student writes the following:

Ex. 5^(BAD!) If Trixie's will has created an interest that may vest later than 21 years after some life in being at the creation of the interest, then the interest will not be valid and will not be upheld in court.

This sentence does nothing more than restate the rule against perpetuities. There is no legal analysis. It is the exam taker's job to apply the law to the facts and explain what comes of that. In this example, it is the exam taker's job to say whether the will has created an invalid interest. So, remember: Don't use "if" to avoid applying law to facts.

Going outside the scope of the exam: Often, "if" can be a path to wandering away from the stipulated hypothetical facts of the exam. Suppose a contracts exam says nothing more about the signing of a contract other than, "The dealership put the document in front of Dirk, and he signed it." Now, suppose the student writes this sentence in the essay:

Ex. 6^(BADI) Dirk could have another defense if he had been forced to sign the contract under an unlawful threat, for instance if the dealership pulled a gun on Dirk and told him to sign the document 'or else.' Such a threat would constitute duress, and would, under the affirmative defense of duress, invalidate the contract.

Here, the student is unhelpfully inventing facts. There was nothing in the facts indicating or even suggesting duress, so there is no call to discuss it. In such a case, the student may be doing real legal analysis, but it doesn't count as showing the student's mastery of the subject matter of the course, because the student is essentially writing her or his own exam question and then answering it. So: Don't use "if" to unwittingly make up facts that aren't in the exam.

When "if" is called for – deliberate ambiguity, branching contingencies: While "if" is often problematic in an exam answer, sometimes it is called for, such as where a fulcrum for the analysis has been left ambiguous, leaving branching contingencies that beg to be analyzed. Suppose a secured transactions exam states that Midland Motorcycles sold and delivered a motorcycle to Gwen "in late July"; that Gwen then sold the motorcycle to Walter, who bought it in good faith with cash "sometime in August"; and that "the next day" Midland Motorcycles perfected its purchase-money security interest on the motorcycle with a filing. With no dates specified, these facts leave open whether Midland Motorcycles' security interest was perfected within 20 days of Gwen having taken possession. That makes a difference as to whether Midland Motorcycles has priority over Walter in the case of a default. In this kind of situation, it is appropriate for a student to use "if" in order to fully analyze the given facts:

Ex. 7^(GOOD) Based on the facts given, knowing the date only to be "sometime in August," we don't know whether Midland Motorcycles filed within 20 days of Gwen taking possession. If they did, then Walter will lose to Midland Motorcycles' security interest because the perfection relates back to the date Gwen took possession, which gives Midland Motorcycles priority. On the other hand, if

Midland Motorcycles did not file within 20 days of Gwen taking possession, then Walter has clear title to the motorcycle.

As with all things, you've got to exercise good judgment in accordance with the goal of applying the law you know to the facts you've been given to show your mastery of the material presented in the course and your skills in analyzing legal problems within the scope of the course's subject matter.

If You're Doing a Good Job, It Should Be Tough Sledding

Let me offer another thought about exam writing that gets at much of what I have said above, but from a different angle: Writing the exam should be tough sledding. That is, if you are going along writing, thinking to yourself, "This is a breeze!", then chances are that you are neglecting to do legal analysis that will get you points.

Some people, as a way of coping with the stress of taking an exam, make the mental decision to just start putting something on paper, whatever it is. This might seem reasonable, and in fact, it is often offered as a solution to writer's block: "Just get started writing something, whatever it is." Well, I don't know if this is good advice for other kinds of writing, but I see this as bad advice for exam writing. The things you can write with little or no mental effort are precisely the things that will earn you few or no points (repeating facts from the exam without referencing the relevant law, providing lengthy recitations of law without reference to the facts, setting out roadmaps, dwelling on obvious points, making moral arguments, etc.9). I have even read a few exams where students set out a lengthy list of abbreviations they would be using. I'm sure it was their way of coping with stress, and I sympathize, but their time would have been better spent doing legal analysis.¹⁰

How to Study for the Exam

Now let's talk about the most effective ways to study. Here I am talking specifically about how to study for the essay exam, as opposed to how to prepare for class each day during the semester.

Exam technique: The most important thing to do heading into exams is to make sure you have the generic knowledge of how to write a law school exam. (Happily, you are attending to that right now by reading this memo!) But you will have to gauge for yourself whether you will need to do more. Most 2Ls and 3Ls know how to write an exam, although it never hurts to do some more thinking about it. But if you are new to law school or if, despite your experience, you are unsure of your exam-taking abilities, then you will need to spend more time developing your exam-writing technique. Read other people's advice, do exercises, etc.¹¹ Ultimately, if you can't effectively use an exam to show your mastery of the subject matter of any given course, then it doesn't matter how well you know the course's subject matter. Thus, if you perceive your exam-writing

⁹ As I discussed at length above.

At some point a few years ago I started providing with my exams a ready-made list of suggested abbreviations for persons and things that appear in the facts. Certainly, that should make an abbreviation key in an exam answer doubly unnecessary.

One very good, short piece on how to write exams is *Bad Answers, Good Answers, and Terrific Answers* by Professor Orin Kerr, at http://www.volokh.com/posts/1168382003.shtml.

technique as a weakness, then working on your exam-writing technique has to be your first priority.

The next priority should be to focus on the course at hand. But don't go crazy with your outline just yet.

Old exams: The absolutely best way to study your course's material is to actively practice spotting and analyzing issues, particularly with old exams. Old exams do not have to come from your professor. You can use an issue-spotter exam covering the same course subject matter no matter who wrote it. Look for old exams retained by your own school and those archived by other schools.¹²

Don't worry about finding old exams that are paired with model answers. The usefulness of an old exam is the opportunity it gives you for active studying. Model answers can be helpful, but they can also lead you astray. Note that if the model answer was written by a professor, then it will be far better than even the best student would be capable of drafting during an exam. So it's likely to set too high a bar. On the other hand, if the model answer was written by a student, then you can bet it is imperfect, and if you put too much stock in it, you may wind up drawing the wrong lessons from it. For example, you might mimic some aspect of its style, when perhaps the exam answer was good in spite of its style. Also, even if you can get a model answer that springs from your course and your professor, you will still be looking at something from a different semester, and every time a class is taught, it is at least slightly different – perhaps very different.

I recommend, if possible, that you use old exams in the context of a study group. Better than fussing over model answers from other times and places, you will find that a model answer that is keyed to your exact class will emerge out of your discussion of old exams with your classmates. Look at an old exam, draft or at least outline an answer, then get together with some classmates and compare your results. I believe this is the single most effective use of a study group, and it is actually pretty fun, insofar as studying goes. Doing this will allow you to see what you are missing and what you don't understand. Then you can go back to your outline, book, notes, etc., and focus your studying where it's needed the most. What's more, seeing other people's responses will allow you to develop your own ideas of what works and what doesn't. If you really want to make the most of this, I would recommend that everyone in your study group drafts a full mock exam response and gives that to every other member of the study group. Reading other people's exam responses will allow you to develop the same sort of perspective that your professor has when grading.

One last thing about studying with old exams: I remember toward the end of my first semester of law school, I asked a classmate if she had looked at any old exams. She said she had not, because doing so would only stress her out. Do not make that mistake! If you feel anxious about exams, that's all the more reason to look at some old exams sooner rather than later. Better to stress out a little now than to stress out even more during the exam.

Active studying: When you are doing a more regular sort of studying, such as

Some schools that have publicly accessible exam archives are the University of Kentucky, Golden Gate University, the University of Dayton, among others. There are several links from my exam archive page: http://ericejohnson.com/exam_archive/.

working with your notes or outline (as opposed to working through old exams), try to make your studying as active (i.e., non-passive) as possible. Don't just read and re-read. Ask yourself questions. Talk to yourself. Look for connections among disparate points of doctrine. For instance, you might search for overlapping themes, factual similarities in cases, political trends, historical patterns, etc. I know, many of you are thinking, "Hey, I'm not going to be tested on historical patterns!" It doesn't matter. The point is that it is helpful to give your brain multiple ways to embed the doctrinal knowledge.

Good luck!

Be confident that you have the raw ability to succeed. Put aside the self-doubt. and see law school as something that's challenging and difficult but eminently doable.

So, to summarize: The key is to provide legal analysis. To do this, you must actively make use of both the facts and the law together. Even if you feel anxious or pressured, do not recite law or facts at length without applying them to each other, and do not use "if" or other devices to avoid doing legal analysis.

Finally, don't worry too much. The top students almost always hand in exams that are far short of the ideal. If you work hard and if you are smart about how you approach your studying and your exam writing, you'll do just fine.

Good luck!

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