

Trademark & Unfair Competition

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1. GOALS AND GENERAL REMARKS

I intend for this class to provide meaningful training for the practice of law relating to trademark law and various neighboring fields, including in the context of legal disputes, litigation, transactional practice, and advising and counseling clients. By the end of the course, you should have a broad grasp of the principal doctrines, be keenly alert to the law’s particular pitfalls for the unwary, be conversant in the theoretical underpinnings and policy aims of the law, and have a real-world understanding of the law’s effects on people and industries.

2. LEARNING OUTCOMES

The following is a non-exclusive list of specific learning outcomes for this course:

1. Broadly know and be able to apply the principal doctrines of U.S. trademark law and the right of publicity; and have a framework of knowledge about neighboring doctrines covered in the course.

2. Be able to avoid pitfalls—especially where entitlements can be unwittingly surrendered or foregone.

3. Know and be able to apply law such that you can counsel a client confidently as to the legal consequences of doing things that could be argued to be

within someone else's exclusive rights—such as concluding that the use is generally safe, somewhat risky, very risky, or highly likely to incur liability.

4. Know and be able to apply the law such that you can advise a client on how to use trademark law and the right of publicity in the context of an incipient business strategy.

5. Be able to fashion persuasive appellate-level or scholarly arguments, grounded in case law and theoretical and policy perspectives, both for and against propositions involving trademark doctrine and the right of publicity.

6. Recognize how the real-world effect of trademark law and the right of publicity can fail to correspond with blackletter doctrine because of strategic behavior, tactical maneuvering, ignorance of the law, and unpredictable outcomes in court.

3. CLASS WEBSITE

The central repository for class materials and information is the class website. It is not password protected. You can go to ericejohnson.com and find the link on the upper left. The direct URL is:

http://www.ericejohnson.com/courses/trademark_24/.

On the class website there is a link to the Chart of Assignments. This is the direct link:

http://ericejohnson.com/courses/trademark_24/Trademark_Chart_of_Assignments.html

I may use Canvas if I need to post things that implicate student privacy—such as posting a video of class. If I do that, I'll let you know. And to the extent I use Canvas for anything that is required reading, I'll let you know by instruction on the Chart of Assignments.

4. MATERIALS

4-1. The Book

The books for the class are all open-source/open-access/OER, all available for free downloading. Here are the required books:

- Eric E. Johnson, *Intellectual Property Surveyor, Volume: Trademark* (Museum Edition, Version 1.0, 2022). It is available here: <http://ericejohnson.com/ipsurveyor/>. Please note the following: You only need the "Trademark" volume, not the others. The volume is available for free download in PDF and DOCX formats. You can print it out yourself, or you can purchase a soft-bound paperback on a print-on-demand basis from Amazon or Lulu. My practice has been to price these books at zero markup so that the price is just what Lulu or Amazon charges, with no royalties flowing to me. You might also be able to get a copy of this book from a student who took IP Survey previously. Be aware that from time to time I may update the posted and/or print-on-demand versions of the 1.0 manuscripts of my books in order to fix minor typos. Such updates are reflected in the hundredths place of the version number (e.g., 1.01). These fixes won't affect substance, pagination, or usability.

- Michael Grynberg, *Trademark Law* (v3.0, 2023). It is available here: . This is available for free download as a PDF. You can print it out yourself. There's no way I know of to buy a printed copy online. But if you want your copy (that you printed out yourself) bound, I can work on trying to figure out if I can get that done for you.

Keep this in mind: Assuming we have a normal sort of exam like I've had in the past, then I anticipate having a closed-book multiple-choice portion and an open-book/open-notes essay portion. And if that's the kind of exam we have, then you will probably want to have a printed copy of your books by the end of the semester to use on the exam. I personally would want to start the semester with a printed copy that I could markup and highlight as I went along. But you might prefer to read books on your computer or tablet and then print things out at the end of the semester (at which point perhaps you will have marked up the book electronically over the semester). It's up to you.

4-2. Other Materials: In addition, students will be required to access certain other online open-access materials, which they may choose to download and print.

4-3. Technology Expectation: Please bring an internet-connected/web-browsing-capable laptop, tablet, phone, or other portable general computing device to class for use in interactive polling. It is my hope that all students will be able to do so without incurring any additional expense or buying anything new; if you don't already have such a device you can bring to class, please let me know and we can discuss it.

4-4. Study Aids and Unassigned, Additional Reading:

Beyond the required materials, you are encouraged to use any other materials you find helpful or interesting. There are lots for sale. And the OU Law Library may be able to point you to many resources in the library's collection, or for which the library has subscription access for students. One book I'm familiar with and think well of is *Examples & Explanations for Intellectual Property* by Stephen M. McJohn, published by Wolters Kluwer. In past years, I actually used that book as the main textbook for my Intellectual Property Survey courses.

I am aware that some professors discourage the use of commercial outlines or various study aids. I don't. The more you learn about the law, I figure, the better. But a word of caution is in order.

In my experience, I have found that commercial outlines and other study aids are a great way of gaining a basic understanding of the blackletter law in a subject. But I think the best time to read such an unassigned secondary source is right at the beginning of the semester. That way, you may give yourself a better foundation of knowledge for learning the material presented in the cases and in class. Reading such a book along the way might be helpful as well, as it may explain the material in a different voice.

On the other hand, I recommend extreme caution in reading an unassigned treatise or commercial outline as exam preparation for this class. I suspect it may be a waste of your time and mental energy, because all such study aids will go into

much more detail than we will about some things and will gloss over other things we will dig into deeply. But it's up to you, of course, to judge for yourself.

If you do use outside study aids or other resources, I would be interested in hearing about your experience with them—whether good or bad. I'm always keen to know what is contributing to people's learning.

5. ASSIGNMENTS

5-1. Posting: Readings will be posted to the Chart of Assignments, online. You'll find a link to the Chart of Assignments on the class webpage. Keep in mind that you may need to hit refresh or reload the page to see the most recent updates. **Ordinarily, readings for any given week will be posted by the day after the last class of the preceding week.** Thus, readings for Thursday will generally be posted by the preceding Saturday.

5-2. Minimum Out-of-Class Workload Expectation: The vast majority of your law-school education is meant to take place outside of class. For this course, you should at least be doing out-of-class work that averages six hours per week—roughly twice the amount of time you spend in class. This is in line with ABA standards. (The American Bar Association (ABA) is the accrediting body for American law schools. Regarding the out-of-class workload expectation, see Standard 310 at https://www.americanbar.org/groups/legal_education/resources/standards/.) I have put together the assignments with this minimum expectation in mind. Note that this out-of-class workload expectation is an average across the semester. Some weeks might require less time than the average, others more.

5-3. How You Should Approach the Reading:

(a) *Where I'm coming from, what I hope for:* My aim is to avoid making the raw amount of reading unduly burdensome. Given this, I ask that you do the reading conscientiously. What does that mean? You could, of course, brief the cases, use a highlighter, make margin notes, or do any of a number of other things. And, of course, you should do what works for you. But the most important thing is to read the material with interest. "With interest" means you should be having thoughts going through your head such as, "Mmmm, interesting!" "Ah ha! That makes sense!" or "What is wrong with this judge!?"

More to the point, don't waste the case merely looking for a rule to put in your outline or to commit to memory. If a rule were the only thing to get out of a case, I would just assign the rule. The point of reading cases and other assigned materials is to help you develop a lawyerly intuition about the law. The ideal is to be able to speak in sentences like, "I'm not aware of a case exactly on point, but my sense is that in a situation like this, a court would ..." or "A case that tackled this sort of issue is _____, and it decided _____, which suggests that in this situation ..."

(b) *How cases fit in to this course:* If you had me for Torts, you should know that the cases tend to play a different role in this class than in Torts. In Torts, because there are more than 50 different bodies of tort law in the United States, the cases were mere examples of how a court might resolve an issue.

In this course, because we are mostly studying a single, unified body of federal law, the cases are much more important. Cases from the U.S. Supreme Court that we read *actually are* the law, not mere examples. And lower-court opinions we read are also the law—although, of course, subject to disagreement by other lower courts. What this means is that, in general, this class is less like Torts and more like courses such as Constitutional Law, Administrative Law, Antitrust, or Copyright. That is, **you should be thinking of how you can apply the cases you've read to novel facts, reasoning analogically.**

(c) ***Some other ways of thinking about the reading:*** One way to approach the reading, suggested by Professor Scott Brewer, is to be aware of “the literary drama of the law,” that is, to “be alert to the narratives of the hopes, aims, fears, aspirations and frustrations of the litigants ... ” Behind every case there is a real story. The more you allow yourself to be absorbed into that story, the more you will get out of the case and the more you’ll remember it.

Also, you should attempt to put yourself in the position of the judge. Force yourself to confront the challenge of trying to interpret the law in a way that is fair, reasonable, unbiased, in accord with accepted policy aims, and true to precedent and statute. Using this kind of viewpoint, you are bound to get something extra out of every case you read.

(d) ***Questions to be prepared to answer:*** I recommend that in the aims of getting the most out of the reading, you prepare an answer to these questions. And to the extent you opt in to cold calling, expect to be asked these:

- What is something interesting/compelling/instructive about this case?
 - Put differently, what is one thing you would point to as to why the case was worth reading, was worth assigning, or is worth remembering?
- What is your best argument against or critique of the court’s opinion?
 - (. . . or, if not a judicial opinion, then of the author’s writing, argument, or presentation)
- When you picture yourself as a litigator arguing the law to a court, or as an attorney writing a demand letter or responding to one, how could this case be useful to the future you?

And here are some additional questions I think it is profitable to consider:

- What is a strength in the analysis or presentation?
- What is a potential weak point in the analysis or presentation?
- What is a question you are left with from the reading?
 - (You might, for instance, decide you are left with a question you want to ask me in class!)
- Did you perceive that the court (or author) glossed over any difficult or complex issues? (Put differently, did the court avoid troubling itself with something it should have engaged with head on?)

Consider using these questions as a checklist to make sure you are reading deeply. For what it’s worth, I think these sorts of questions are potentially much

more useful to you than the sorts of things traditionally picked out for a case brief.

6. GRADING

6-1. Overview: I care a great deal about fairness in grading, and I believe you will see the product of that thinking throughout the course. Here are the basics: Your grade for the course will be based on your exam performance. From that, a few things could work to lower your grade, including class conduct, attendance, and academic misconduct/dishonesty.

6-2. Assigning of Exam Grades: There is no pre-determined grade-point average or grade distribution for this class. So you are not in competition with your fellow students for a limited pool of grades. Favor cooperation!

I will assign grades as follows: When I have the raw point totals from the exam, I will use my discretion to draw grade cut-offs based on natural breaks and clumps that occur in the point totals, a developed sense of how a given letter grade corresponds to levels of performance and achievement, and precedent set by grade distributions and grade-point averages in prior semesters in this and other courses. That includes looking at the grades given out in other courses at OU Law—something that helps me avoid being inadvertently out of step with other professors and classes. Bottom line, I aim for grading that is fair, so the class should neither be harsh nor an “easy A,” and so that everyone is incentivized to work cooperatively.

6-3. Alternative Minimum Grading

At some point, I was urged by students to adopt a floor for grades, so that as long as a student gets a certain percentage of points on the exam, they could do no worse than a certain grade. In response to their urging, I adopted this alternative minimum grading policy. The application of this policy cannot work to make grades lower—if it applies at all, it only works to raise grades.

(a) In addition to the method of the initial assignment of grades discussed in §6-2, I will also calculate an alternative minimum grade in terms of a percentage of possible points for the exam, according to this schedule:

A+	97% to 100%
A	93% to 96.99%
A–	90% to 92.99%
B+	87% to 89.99%
B	83% to 86.99%
B–	80% to 82.99%
C+	77% to 79.99%
C	73% to 76.99%
C–	70% to 72.99%
D+	67% to 69.99%
D	63% to 66.99%

D– 60% to 62.99%

If the alternative minimum grade according to this schedule is higher for any student than the assignment of grade under the method disclosed in §6-2, that student's initial assignment of grade will be the alternative minimum grade.

(b) This alternative minimum grade applies prior to any adjustments made, including for attendance and misconduct.

(c) For clarity and the avoidance of doubt, note that through the alternative minimum grading approach described here, it is possible that one or more students' grades might end up higher than they would have been otherwise. But nothing in this §6-3 can work to make a student's grade lower than it would be otherwise.

6-4. Class Participation, Calling on Students, Student Conduct in the Classroom, and the Relation of these to Grading

Class participation will not count for grading:

Class participation, as such, will not count in grading. That is, things said aloud by students in class (whether volunteering or responding to being called on) will not be evaluated with that evaluation affecting the final course grade. But class conduct (which could include using one's voice in a disruptive way, for example) may have a negative effect on the course grade. Read on.

Here's my explanation for why class participation won't count for grading purposes:

For years, I have kept notes on class participation and used that as the basis for potentially stepping up the final grade (which I did often), or potentially lowering the class grade (which I did infrequently). But this year I am not doing that.

The reason for changing my practice is the policy or practice regarding the issuance of audio recording accommodations to students by the main campus Accessibility and Disability Resource Center (ADRC). ADRC sometimes provides students with an accommodation to make an audio recording of class. These accommodations are made without advance consultation with me and may be made without advance notice to me. This means that in any given class, it is possible that another student is recording your voice. This raises concerns about student privacy and the provision of an environment that is reasonably comfortable for and conducive to students being called on and asked to provide analysis, opinion, or other thought.

Given these circumstances, I am not comfortable with compelling a student to speak in class, including through dint of grading. Thus, I have decided to leave class participation entirely ungraded.

To be clear, I strongly believe that students with disabilities should avail themselves of approved accommodations. Of course they should. Reasonable accommodations for students with disabilities is not only the right thing for an educational institution to do, it is the law. And I am certain that audio recording accommodations can be reasonable and appropriate in various circumstances. By explaining the changes in my approach to teaching and grading that are in

reaction to ADRC-ordered accommodations, I do not intend to communicate any opposition to the issuing of accommodations. For me, it is merely a question of how to take account of things like student privacy and various pedagogical aims under the circumstances.

Cold calling and use of student names:

For the same reasons, discussed above, that I will not grade class participation, I also plan to not cold call on students—unless the particular student opts in to being cold-called. And, again for the same reasons, I plan to not use student names in class unless the student opts in to their name being used.

I have in mind a system for students to opt in to their name being used and to opt in to being cold-called. I will discuss this in class.

Class conduct (as opposed to class participation) may negatively affect grading:

While class participation won't be graded, I may lower the class grade of a student for class conduct, including a pattern of repeated and substantial visible disengagement while in class (including being noticeably distracted by a phone or device), conduct contrary to the In-Class Conduct Rules (listed below, see §8-1, *infra*), conduct contrary to other admonitions communicated in this syllabus or otherwise, conduct that I regard as potentially dangerous (see §8-1B, *infra*; this includes, for example, driving during class if class were to be conducted on Zoom—and yes, students actually did that, back when class participation was graded and I did cold calling), or any conduct that detracts from the educational process.

6-5. Attendance and Grading: Attendance issues—including tardiness and absences—if substantial, can affect your grade. If attendance issues are severe enough, they can even result in a failing grade or involuntary withdrawal. See §9 on attendance, *infra*.

6-6. Academic Misconduct/Dishonesty and Grading: Cheating, dishonesty, and serious academic misconduct of any kind in this class will presumptively result in a failing grade (e.g., a letter grade of F) for the semester. To be clear, failing to follow final exam instructions in a way that compromises exam security or might give a student an advantage—even if done without intent to gain such an advantage and even if inadvertent—constitutes, in my judgment, serious academic misconduct, and it will presumptively result in a failing grade and a referral for discipline. It is your responsibility to treat exam instructions with diligence and care.

In any instance of misconduct, I reserve the right in my discretion to request involuntary withdrawal or award a lower grade other than a failing grade if I find there to be extraordinary mitigating circumstances. Despite my reservation of rights in this regard, however, do not expect leniency.

Please note that the awarding of a lower grade or a failing grade for misconduct is not to the exclusion of other sanctions, and I intend, in virtually all instances, to refer cheating and other serious academic misconduct to the College of Law and/or the administration of the University of Oklahoma for being dealt with under applicable policies, including the Code of Academic Responsibility.

7. COMMUNICATIONS AND OFFICE HOURS

7-1. Invitation to Chat: At least once during the semester, I hope you will take advantage of office hours, an appointment, or some other opportunity to chat—even if you have no questions or nothing specific to discuss. That’s not a requirement, just a request. Ideally, I would like to spend some informal time with everyone.

7-2. Questions About the Exam: If you have any questions about the exam, please ask them in open class. In the aims of fairness, I do not discuss the exam on an *ex parte* basis.

7-3. Office and Office Hours: My office is on the third floor, room number 3034. My phone is 405-325-2273. I post open office hours on my website, direct URL: http://ericejohnson.com/office_hours.html. If office hours are not convenient, please do not hesitate to e-mail me to make an appointment to talk, and when you do, it helps if you include some suggested times that work for you. Also, I am happy to meet with students after the completion of the course, either by appointment or during open office hours, including for reviewing exam results.

7-4. E-mail: My e-mail address is eric.e.johnson@ou.edu. Please note that I do not answer or discuss substantive questions through e-mail. Why not? The answer to a substantive question is almost always, “It depends ...”, and thus it becomes very difficult to draft satisfying written responses to substantive questions. Answering those questions live and in-person is much easier, because I can ask clarifying questions and we can go back and forth until there’s an answer you find satisfactory. So please bring substantive questions to class or to office hours.

Please do not ask questions for which the answers are clearly found in this syllabus. And if you miss class, please ask other students what you may have missed.

Any e-mail communications you do have with me should be prepared in a professional manner, including the use of a meaningful subject line. Also please note that, perhaps unlike many students, I do not read e-mail on a constant basis. So please be patient for a reply.

7-5. Lack of Confidentiality; Faculty Reporting Obligations; No Legal Advice

(a) Tell me nothing that is confidential. It is important for students to understand that faculty are subject to various mandatory reporting obligations stemming from federal law, state law, and university policies. Information a student shares with me that I may be obligated to report may include, but is not necessarily limited to, that which relates to sexual harassment; gender-based discrimination; sexual-orientation discrimination; other forms of discrimination; sexual assault; stalking, dating or domestic violence; child abuse or neglect; and various crimes. This might include third-hand accounts of claims or allegations of these things. Mandatory reporting obligations can cover things that happened in the past, on or off campus, involving university-affiliated persons or not. The requirements can be complex. More information can be found here: <http://www.ou.edu/eoo/reporting-responsibilities>. Moreover, I do not wish to take

on any confidences from students, even to the extent I might be able to do so.
Bottom line: **Assume that nothing you tell me will be kept in confidence.**

(b) Please do not ask me for legal advice. I am not licensed to practice law in Oklahoma, and I cannot be your attorney. It is my job to prepare you eventually to give legal advice to others, and I am obviously happy to talk through hypotheticals with you, as that is a key way of exploring and learning the law. But giving legal advice upon which someone should be able to rely generally takes working up an in-depth understanding of the facts and taking a careful appraisal of the client's interests—all of which calls for working in the context of a confidential relationship. It also often requires doing legal research. I'm not in a position to do any of that for you.

7-6. Letters of Recommendation, Serving as a Reference

It's important to me to do a good job as a reference for my students. If you might wish for me to serve as a reference for you or write a letter of recommendation for you in the future, it would be helpful if you let me know that on the last day of class with an e-mail that attaches your résumé. You might take a moment to put this on your calendar now. Such an e-mail will allow me to file away some notes about my recollections of you, and then I can use those notes in the future as a basis for writing a letter for you or taking a telephone call on your behalf. I also refer you to a memo I've written about references and recommendations: <http://ericejohnson.com/docs/Memo to Students re References.pdf>. If you review that memo, you can help me to do the best possible job in helping you.

8. IN CLASS

8-1. In-Class Conduct Rules

In general:

(a) Avoid behavior that might disrupt class or distract your fellow students.

Some specifics:

(b) Do not eat in class. Do not chew gum audibly or with your mouth open.

(c) Refrain from any use of a digital device where such use could reasonably disrupt class or distract fellow students. All digital devices must be operated without audio volume. Screens must not display any distracting content, including, but not limited to, moving images (video, TikTok), animation, flashing graphics (including GIFs and display ads with movement that are common on sites like Facebook, the New York Times, etc.), distracting images, or indecent content. If you are being distracted by a classmate's digital device usage, please let me know! If you are being distracted, it is almost certain that multiple people are being distracted at the same time. Once I know about this, I can then communicate with that student about issue—which I will seek to do tactfully, without causing anyone any embarrassment.

(d) You may use digital devices (including, without limitation, computers, phones, and tablets) in class; however, from the time of class's scheduled beginning until class ends, **you may not communicate with others in class using your device. So you can text someone outside of class, but do not communicate**

electronically with anyone in our class. Specifically: (1) You may not engage in any digitally enabled network communications with anyone else in class, including, but not limited to, e-mail, text messaging, IM'ing, etc. (2) No posting to social media. You may not engage in any digitally enabled network communications that effect a publication, uploading to, or updating of any public or group-delimited platforms or channels, including, but not limited to, Instagram, Discord (private or public channels), Facebook (including, but not limited to, Facebook groups), Reddit, the web, and so forth. The prohibitions of this subparagraph (d) are not limited by context and apply without regard to whether the activity in question can be characterized as disruptive or distracting. Any violation of the policy in this subparagraph (d) will presumptively result in a grading penalty and may also be referred for disciplinary action. The prohibitions of this subparagraph (d) do not apply if and when you are absent from class and not on campus, nor do they apply to communications with OU information-technology staff for technical-support purposes. Bottom line: Keep the discussion in class, where it is productive and beneficial for all.

8-1A. Zoom/Remote Contingency Rules: General

If we end up conducting part of class via Zoom or a similar online arrangement—which I hope we won't—then please mind the following:

Keep your video on.

Avoid distractions on video. If you eat, eat discretely. Dress appropriately.

Remember to stay muted when you're not talking.

You can use artificial backgrounds, but avoid distracting content.

More guidance and rules may be forthcoming if it comes to that.

8-1B. Hazardous Attention-Critical Activity During Class Time

During the pandemic, when class was being done remotely through Zoom, I found out that some students attempted to drive a car and attend a class on Zoom at the same time. (Can you imagine if I cold called on a student and that caused the student to lose their focus on the road, in turn causing a collision?) Thus, whenever attending, observing, watching, or listening to class—including, for the avoidance of doubt, whether or not you are counted as absent—**you may not drive a motor vehicle, operate a bicycle or scooter, operate heavy machinery, or undertake any other task where distractions could lead to personal injury, loss of life, damage to property, or other loss. This includes harms to the student and to third persons. Sitting in the driver's seat of a vehicle will be construed as driving.** Such conduct and activity is herein referred to as “Hazardous Attention-Critical Activity.” Engaging in Hazardous Attention-Critical Activity during class is prohibited.

It is also true that while physically present in class you may not undertake any Hazardous Attention-Critical Activity. I'm not sure what that would be (remotely operating a drone?), but you can't do it.

Engaging in any Hazardous Attention-Critical Activity during class will be construed as serious academic misconduct. Consequences may and presumably will include a failing grade and/or involuntary withdrawal, and a disciplinary

referral to the administration. (See Syllabus §§ 6-1, 6-6 in this regard.) In addition, expect that I will report known hazardous behavior to law enforcement.

8-2. In-Class Participation

(a) ***Appropriate levels of voluntary participation:*** Your participation in in-class discussion should be meaningful and appropriate. Please feel free to raise your hand to have a say in discussion when you have a comment that will contribute to the experience of the class as a whole, or when you have a question, the clarification of which will benefit the entire class. On occasion there are students who raise their hand too often and take up too much of the class's time. Please aim to avoid that.

(b) ***Getting called on:*** I plan to not cold call on students except to the extent a student opts in. But to the extent you opt in, please see §5-3(d) and §6-4, *supra*.

8-3. How to Think About Class Time

Class time should be about deepening understanding, not trying to create a verbatim transcript of what is said to then memorize and regurgitate.

I intentionally structure the course so that there are written materials to serve as the fount of the “information” or “content” of the course. I’m a strong believer in need-to-know information being made available to students in writing. To begin with, there’s the assigned reading. And there will sometimes be slides—and I will post the slides after class (although I may omit pictures/graphics content from posted versions of slides). Thus, you’ll never need to transcribe words off of the screen. I also may provide content in other written forms that I post online.

So if need-to-know material is already written down for you, what is the use of class? Class is about making the content/information come alive, exploring it, providing context, answering questions, checking your understanding, making connections, etc. That can even involve going down some dead-end paths.

What this all means is that I urge you to avoid transcribing what is said. Instead, relax your mind and try to engage intellectually.

8-4. Audio Recordings and Video: No one (other than me) is permitted to make an audio or video recording of class, nor make any transmission (e.g., livestream) of class, or any reproduction of any class recordings. Any exception—which I do not anticipate making—would require my express, written permission.

I generally do record all class sessions myself. Understand that these recordings are solely for my own use. I have often found them helpful in improving my teaching. (For example, if I feel I’ve done something particularly well, I can go back and listen to it the following year to try to replicate it. Indeed, I’ve done this many times.) Also, recording class serves the purpose of perfecting copyright in the expressive content of the lecture.

But please don’t ask me for a copy of a recording. I don’t give them to students. My distribution of recordings that contain students voices would, I believe, significantly hamper students’ sense of classroom discussion as being a safe space; plus, there are legal issues with distributing such recordings. And, at any rate—and this is the most salient point—focusing on the verbatim of what was

said in class is the wrong study strategy. See §8-3, *supra*. So providing a way for students to watch or listen to class after it happens isn't part of what I do. (I guess it is possible that something really bad could happen—natural disaster, new pandemic, really bad turn of old pandemic, etc.—that would be cause for me to change the way I do things and start putting audio/video recordings on Canvas or something like that. But it's unlikely.)

The OU College of Law has provided the following language for inclusion in syllabi, all of which is applicable to this course:

“Sessions of this course may be recorded or live streamed by the professor. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.”

The OU Center for Faculty Excellence has provided similar language for inclusion in syllabi (obtained August 2022 from <https://www.ou.edu/cfe/teaching/syllabus-support>), all of which is also applicable to this course, and which usefully additionally emphasizes privacy rights of students:

“Sessions of this course may be recorded or live-streamed. These recordings are the intellectual property of the individual faculty member and may not be shared or reproduced without the explicit, written consent of the faculty member. In addition, privacy rights of others such as students, guest lecturers, and providers of copyrighted material displayed in the recording may be of concern. Students may not share any course recordings with individuals not enrolled in the class or upload them to any other online environment.”

Let me provide some rationale for not distributing recordings to students: A key part of class is letting students feel free to stumble and attempt to push past their competency. Often that can be with difficult, emotional subject matter. Student recordings of class time would—I think it is reasonable to infer—impede that.

All that having been said, I cannot guarantee that class sessions won't be recorded by a student under an accommodation from ADRC. (See § 6-4, *supra*, for relevant discussion.)

If ADRC has issued an accommodation to you that conflicts with the admonitions against recording set out above: You should of course avail yourself of that accommodation. But you must abide by the above admonitions to the extent that the accommodation does not provide otherwise. Additionally and particularly, **you may not do any of the following: play a recording for others, distribute a recording or post any recorded material online, use a recording for non-class purposes, fail to delete a recording following the conclusion of the semester.** The only exception would be if—and only to the extent that—your accommodation contains specific language approving such conduct, and then only to the extent that such conduct does not violate the legal rights of others, including intellectual property rights and privacy rights.

9. ATTENDANCE

9-0 Overall

I have to require attendance. That derives ultimately from law-school accreditation standards and college policy. Also, I happen to be of the view that punctual, regular attendance in class is an essential component of the educational experience.

Given that I need to require students' attendance, I need an attendance policy. If there's going to be a policy, I believe it should be enforced. (I believe in enforcement because of the obvious sort of justice rationale: It's unjust for most people suffer a detriment because of anticipated repercussions while a few do what they want and face no consequences.) The only meaningful way to enforce it is with grading/course-withdrawal/credit-denial consequences. And if an attendance policy is going to be enforced with these things, then I believe the policy should be clear and laid out in advance—not made up on the fly.

So, here comes my attendance policy. It's long. It's detailed.

But here's the thing. My attendance policy is very generous. Grading penalties don't kick in until there are several absences. See below. Now, there are some nuances—for instance, a tardy is half an absence. But still, it's very generous.

9-1 Communications About Attendance: There is generally no need for you to e-mail me if you are or anticipate being absent. Moreover, there is generally no need for you to explain to me why you have been absent. The only reason I imagine that I would need to know why you are absent is if attendance is approaching a severely deficient level (discussed below) and it becomes necessary to discuss extenuating circumstances, or if your absence is excusable under university or college policy and you wish to have it excused (in which case see §§ 9-3(f)-(h), 9-6).

9-2. Keep Track of Your Attendance: You must keep track of your own attendance. Do not ask me how many absences/tardies you have accumulated. I do not add up attendance on a day-by-day, week-by-week, or even month-by-month basis. **I only add up attendance once: after the semester is over, right before I submit grades.** I'm only trying to enforce the outer bounds of a policy that already has generous attendance allowances baked into it. Thus: **It is your responsibility to keep track of your own absences**, including with regard to the presumptive involuntary withdrawal or failing grade. And do not expect to get independent notice that you are approaching the threshold for grade reduction, failing, or being involuntarily withdrawn. **This syllabus provision is your notice.**

A caveat: If your question is limited to asking me to what extent I've used my discretion under §9-3(b), *infra*, then I admit there's no way you could know that just on your own. If you really want to know that, come up to me after class and ask about the specific day or days about which you are concerned.

9-3. Specifics Concerning Effects of Absences and Tardiness, Including Excused Absences, Extenuating Circumstances, Grade Reductions, Other Consequences, Etc.

(a) **Late Arrivals and Early Departures:** For purposes of determining the appropriateness of penalties discussed below, a late arrival or early departure will count as half of a whole absence. (For recordation of late arrivals and early departures, see §9-4, *infra*.)

(b) **Comings and Goings; Intraclass Absences:** I understand that you may have an urgent need to leave class for a short time. But coming and going tends to be disruptive, so please leave class only when necessary. Bear in mind that leaving and re-entering if determined in my discretion to be prolonged or notably disruptive, may be counted as a half absence.

(c) [reserved]

(d) **Automatic Reduction in Grade for Severely Deficient Attendance:** Independent of and cumulative with any effects of attendance on the class-participation grading component, a student's grade will be automatically reduced as follows: **nine (9)** absences will result in the dropping of a student's final grade by one step (e.g., from a B to a B-); **ten (10)** absences will result in the dropping of a student's final grade by one additional step (e.g., from a B- at nine absences down to a C+); **eleven (11)** absences will result in the dropping of a student's final grade by yet another additional step (e.g., from a C+ at 10 absences down to a C). So for a student that started with a B but has 11 absences, the automatic grade reduction is three steps (e.g., from B, to B-, to C+, to C). Note that if a student's grade is reduced from a D-, that results in an F.

(e) **Involuntary Withdrawal or Failing Grade for Profoundly Deficient Attendance:** For a student with a profoundly deficient attendance record, I will presumptively have the student involuntarily withdrawn from the course without credit and with a grade of F, have the student involuntarily withdrawn from the course without credit and with some other grade that may be appropriate under university or college policy, or award a failing grade at the end of the semester. For these purposes, I will presumptively regard as profoundly deficient attendance twelve (12) or more absences. Recall that partial absences (i.e., late arrivals, early departures) will count as half an absence. **It is your responsibility to keep track of your own absences, including with regard to the presumptive involuntary withdrawal or failing grade.** Thus, do not ask me to calculate your attendance record so that you can weigh whether to miss an additional class. And do not expect to get independent notice that you are approaching the threshold for failing or being involuntarily withdrawn. **This syllabus provision is your notice.**

(f) **Special Extenuating Circumstances:** I may take account of special extenuating circumstances in deciding whether to drop a grade, award a failing grade, and/or request involuntary withdrawal. Special extenuating circumstances can include weather emergencies, personal illness, illness of a close family member, bereavement, etc. Extracurricular activities, job interviews, court appearances, or the like can be considered in this vein as well. (For absences

caused by religious observances, which are excusable, see §9.3(g), *infra*, and for absences caused by covid, which are excusable, see §9.3(h), *infra*.)

Notwithstanding the foregoing, it is expected that under almost all circumstances students will be able to keep absences within the numerical thresholds identified above—including absences caused by illness, storms, job interviews, etc., and even coronavirus. Giving students special dispensation on the issue of attendance will only be done if appropriate under the totality of the circumstances. As an example, suppose a student was absent from class a number of times because the student wanted to sleep in; then, at the end of the semester, the student was absent one additional time because of an out-of-town job interview. In such a case, if the job-interview absence takes the student over the threshold for an automatic reduction in grade, then the grade reduction is appropriate. If the student had been generally conscientious about attendance from the beginning, the student would not have created any issue with missing class for the job interview.

If you wish for me to consider any special extenuating circumstances with regard to your attendance, then you must file an End-of-Semester Attendance Mitigation Statement, as discussed in §9-6. (I suggest you calendar the filing of that statement now, so you’ll remember to do it if you need to. See §9-6.)

Note that you should not feel compelled to discuss with me reasons for absences or extenuating circumstances if your attendance is not approaching a severely deficient level.

(g) **Absences Resulting from Religious Observances:** In accordance with University of Oklahoma policy, I will excuse absences that result from religious observances. That the absence is excused means it doesn’t count as an absence for purposes of hitting the “severely” or “profoundly” thresholds for grade reductions, involuntary withdrawal or failing grade under Syllabus §9-3(d) and §9-3(e)). To have an absence excused on the basis of a religious observance, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6. (Calendar the filing of that statement now if you think you might have an excusable absence this semester because of a religious observance or holiday. See §9-6.) You should also separately contact me as appropriate or useful during the course of the semester in regard to such absences.

(h) **Absences Excused for Covid:** Absences that result from covid will be excused—including being sick with covid, staying away from class to avoid exposing others after you have been exposed, acting in compliance with university, state, or federal policy/guidelines/rules, or following the advice of a physician, nurse, or other health care provider. As with religious observances, that the absence is excused means it doesn’t count as an absence for purposes of hitting the “severely” or “profoundly” thresholds for grade reductions, involuntary withdrawal or failing grade under Syllabus §9-3(d) and §9-3(e)). But to have an absence excused, **you must file an End-of-Semester Attendance Mitigation Statement**, as discussed in §9-6.

Please note: I strongly wish to encourage students to err on the side of caution and stay away from class whenever they perceive a potential risk to members of the law school community by coming to class.

9-4. Attendance Record: To avoid being distracted in class by constantly noting things like late arrivals and early departures, I generally require students to log their own attendance, including filling out late slips. Thus, it is of paramount importance that you deal with all attendance issues with utmost honesty, integrity, and care. Inaccuracies in marking an attendance log or late slip will presumptively be treated as academic misconduct and will presumptively result in a lowered grade or a failing grade. If an inaccuracy is inadvertent, prompt self-disclosure is encouraged and will be considered ameliorative.

(a) **Means of Taking Attendance:** Attendance may be taken by means of a paper log (paper sheet or card) for students to fill out during class, by roll call, by reference to the seating chart, or by some other method.

(b) **Indicating Attendance:** If attendance is taken by means of a paper log, then when the attendance log comes around to you, fill it out as instructed, indicating your attendance for the instant date. (“Instant date” means the current date as you are looking at the log.) Indicating your attendance this way is your responsibility: If the attendance log does not come around to you, please come up to me immediately after class and ask to fill it in. If you omit to fill in the log during class or immediately afterward and before I leave the room, you will be counted as absent.

This is very important: You may only fill out the attendance log on behalf of yourself and for the instant date. You may not mark the log on behalf of another person, even if that person is in attendance, and you may not permit another person to mark the log on your behalf. You may not make any mark indicating your attendance for any other date other than the instant date, even if you were or will be in attendance on that other date.

(c) **Self-Reporting Partial Attendance:** If an attendance log is used, and if you will need to depart class early and not return, then you must make an appropriate notation of that on the attendance log. Alternatively, if you have a change of plans requiring you to leave early despite not having indicated that in advance on the attendance log, then you must inform me by e-mail as soon as reasonably possible afterward to correct the record.

(d) **Filling Out of Late Arrival Slips:** If you arrive late to class, you must legibly and completely fill out a late arrival slip before you sit down. Assuming a clipboard is provided with late slips, you can just fill it out and leave it on the clipboard. If you know ahead of time you will be late, you can fill out a late slip in advance and bring it with you to leave with the clipboard as you enter.

(e) **Unrecorded Absences:** At my discretion, I may announce that for a particular class meeting I will not record attendance and that absences from such a class meeting will not count for purposes of the attendance policy. It is also possible that I may omit to record attendance for a class. That being said, recordation of an absence is a distinct issue from the existence of an absence. And for the purposes of self-disclosures of profoundly deficient attendance under §9-5, *infra*, a student’s self-disclosure obligation is not relieved by the fact that one or more absences (including partial absences) may be unrecorded. Toward the end of encouraging candor, I will exercise discretion with unrecorded-but-disclosed

absences and, as of justice require, I will choose not to count them for purposes of grade penalties and administrative withdrawal. So err on the side of disclosure.

9-5. Mandatory Immediate Self-Disclosure Statement of Accumulated Absences in Cases of Profoundly Deficient Attendance: I do not add up and calculate accumulated absences on an ongoing basis during the semester. As mentioned previously, it is each student's responsibility to keep track of her or his own absences. In keeping with that: Upon a student's accumulation of a record of profoundly deficient attendance (see §9-3(e), supra), that student is required to disclose such accumulation immediately in writing to me. The disclosure must be made to me by e-mail (eric.e.johnson@ou.edu) with a paper copy handed to me in person, or, if in-person delivery is not practicable, to a faculty administrative assistant with an explicit explanation of the nature and urgency of the communication. The subject line of the disclosure e-mail must be "Self-Disclosure Statement of Accumulated Absences."

If the student hopes to avoid involuntary withdrawal or the awarding of a failing grade for the course, then the statement must explain the reasons for the student's absences, or at least a portion of the absences sufficient to avoid the profoundly deficient attendance, and must provide a rationale for why the student should be allowed to continue in the course notwithstanding the accumulated absences. Any supporting backup documentation that is to be considered must be provided with the statement, or, if this is not immediately possible, then the student must provide what she or he can with the statement and explain in the statement the nature of the delay and when the remaining documentation will be forthcoming. To this end, the student is referred to §9-3(f), *supra*, regarding special extenuating circumstances.

My rationale for requiring this self-disclosure is that if I find out about the attendance problem during the semester, then I have more options available other than just the grading penalty of giving an F. For instance, if there is the possibility to have the student withdrawn instead of given an F, that's usually the better outcome. So, again, please err on the side of disclosure.

If a student has already submitted a disclosure under this section and then subsequently accumulates another absence (including a partial absence in the form of a late arrival or early departure), the student must submit a supplemental disclosure, like the original disclosure in form and substance.

For counting absences to determine the necessity of submitting a disclosure under this section, where there are any interpretive questions, a student is instructed to err on the side of inclusiveness. That is, a student who is unsure of whether a given instance will count as an absence or partial absence should err on the side inclusion of that absence or partial absence in the quantification of deficient attendance. A student is advised to note such interpretive questions and the fact of the student's erring on the side of inclusiveness in the statement. Further to this regard, refer to §9-4(e), *supra*. I don't want to penalize someone for being diligent in reporting a possible problem, so I will take that into account.

9-6. End-of-Semester Attendance Mitigation Statement: In order for me to consider absence excuses and extenuating circumstances, I must be

aware of them. It is crucial that this information is readily accessible to me at the moment I am putting together grades at the end of the semester! To make sure that I don't miss anything, I require that students provide this information to me in a particular way: **To the extent a student wishes to make a claim of extenuating circumstances for any reason or claim any excuse (e.g., based on religious observance), then the student must file an End-of-Semester Attendance Mitigation Statement not earlier than the last day of class, nor later than the day after the last scheduled day of final exams** for the College of Law for the semester. **Take a moment now to calendar this**—so you will remember when the time comes at the end of the semester.

The statement must be sent to me by e-mail (eric.e.johnson@ou.edu) with the subject line, “End-of-Semester Attendance Mitigation Statement.” I also suggest providing a paper copy to a faculty administrative assistant with the request that it be given to me. File just one statement—that is, just one e-mail with attachments, and if you are handing in a physical copy, just one stapled packet of papers. By your putting everything together, we can avoid any possibility of my overlooking anything relevant. If you want me to consider any previously sent e-mails in a claim for special extenuating circumstances, then please include copies of those e-mails within the one communication.

There is no prescribed format for the statement; substance is what matters. Regarding what might qualify as extenuating circumstances or excuse, see §9-3(f) & (g), *supra*.

If you have already filed a mandatory disclosure for profoundly deficient attendance under §9-5, *supra*, then you should additionally file an End-of-Semester Attendance Mitigation statement, which can include copies of any previously filed disclosures made pursuant to §9-5.

Please note! The End-of-Semester Attendance Mitigation Statement and the requirements above are not intended to be retributive or to deter students from making use of valid excuses or calling my attention to extenuating circumstances. Rather, **the point is to make sure I have the relevant information at the time I count up attendance for grading purposes and so no one is needlessly given a reduced grade!** 😊

9-7. No Waiver: No provision of this attendance policy can be waived by me orally. (See §12, *infra*). If you think I said something that relieved you of an obligation under this attendance policy, then you misunderstood me. Also, I can't imagine a circumstance under which I would grant a written waiver: The policy is already built to be fair and generous and to take into account varied circumstances. It must apply to everyone equally.

10. EXAMINATION

10-0. Transparency and Fairness

(a) **Overall aims:** The most important thing to me in creating exams and grading them is fairness. I think you will see throughout my description of the exam that I have made design choices and adopted practices with fairness utmost in my mind.

(b) **Ex Parte Communications:** I will not discuss the exam on an *ex parte* basis. (See §7-2, *supra*.) Giving some information to some students that I don't give to all students would undermine fairness.

(c) **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. This, too, is a key part of fairness. This is not just a matter of protecting students that, theoretically, might have impressed me unfavorably in class. It is really mostly a matter of avoiding giving any advantage to students who have impressed me *favorably* in class. Thus: 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.

10-1. Commitments in How I Will Design the Exam and Key Advice to You in Studying

(a) A “Normal Exam”

Things have been so unpredictable and non-normal over the past few years that I feel I have to start by addressing that.

The normal sort of exam I use is one that has a Part 1 portion, which comprises multiple-choice questions and is administered on a closed-book basis, and a separate Part 2 portion, which comprises essay questions requiring legal analysis of a fact pattern and is administered on an open-book/open-note basis wherein any printed materials are allowed but referencing electronically stored files or information is not allowed. Yet it seems like these days we can't take normal for granted. So pandemic contingencies, a natural disaster, or something else out of left field may require something other than a normal exam. Thus, in this syllabus, I'm mostly going to discuss and make various commitments to what I'll do for a normal exam. But I have to reserve the right to make adjustments if circumstances require it.

(b) **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.

(c) The Correspondence Principle

When I write an exam, I work hard to ensure that the emphasis on the exam will track the emphasis in class and in the materials, and the topics covered on the exam will be at least roughly proportional to the time spent on those topics in the course. I call this the Correspondence Principle, and I will do my best to obey this when putting the exam together. (And to be clear, this applies whether it's a “normal exam” or not.)

So, for example, if something received very little attention in the course, you can expect that it will receive very little attention on the exam—if any. Thus, when studying, I advise you to be balanced in your topic approach and to concentrate on understanding the bigger issues rather than memorizing minutiae.

(d) 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 Chart of Assignments and the topic list at the end of this syllabus as a checklist. I expect to include, in some way, every topic that was substantially explored in class.

(e) 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.

(f) Multiple-choice questions:

For multiple-choice questions, a general design principle I follow is to try to make all of them straightforwardly answerable through application of key concepts and major points of doctrine—not memorization of obscure points. (Often I try to provide multiple ways for a student to get to the right answer on the basis of what we studied.)

Now, that being said, note that **“straightforward” does not mean “easy.”** The regular type of multiple-choice question I use, where you are expected to apply law to facts, is a kind of puzzle. You solve the puzzle by applying the law you've learned. You have to work through the question to eliminate wrong answers and figure out the right one based on the doctrine taught in the course. I wouldn't represent that task as being easy. And, indeed, if you could tell the answer right away just by glancing over the question, it wouldn't be accurate to describe it as a kind of puzzle.

Here's another way to think about it: I've got a lot I keep in mind when I design multiple-choice questions: fairness, accuracy, straightforwardness, correspondence to coverage in the course. Easiness is just not something I worry about. Statistically speaking, what I care about with an individual question is getting a high point biserial (which can be thought of as an indicator of fairness). I do not concern myself with whether a question garners a high percentage of correct responses (which would be a measure of easiness).

Looking over past statistical results, it is clear that some of my questions end up being easy, and some end up being hard. Frankly, before running the test, I can't tell what will be easy and what will be difficult. Many questions that I thought before would be easy end up being answered correctly by only a small percentage of test takers. And I've had questions I thought would be decently difficult be answered correctly by 100% of the class.

All in all, what I find in looking over past statistical results is that **my multiple-choice exams often skew toward being fairly hard.** In one recent class for which I looked up statistical information, a student with a median score on the multiple-choice section answered fewer than two-thirds of the multiple choice questions correctly. So that was a hard test. And if I used a grading system, as in high school, where a student had to get 83% correct to get a B, then that would be pretty frightening. But my grading system is much, much more forgiving.

To the extent that a test is hard, that can be a very good thing for grading fairness. In truth, **you don't want a test that's super easy**. Instead, **you want a test where what you score is correlated to how much you know**—in other words, a fair test. And if you think about it, an exam that is super easy becomes dangerous: Happen to miss a question or two—perhaps because your mind is randomly drawing a blank on something—and then all of a sudden you are at the bottom of the class. **A test that is decently difficult ends up being forgiving of random little mental blocks and minor slip-ups.**

So when you are taking the exam, if you feel like you are missing lots of questions, don't freak out. It doesn't necessarily mean you're doing poorly. You might be doing very well. Just keep moving forward, staying on pace, working through the questions to straightforwardly apply what you have learned in the course.

(g) Essay questions:

The essay exam will be built to avoid testing you on obscure points. Now, that being said, I cannot guarantee that no obscure point will 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 finer points. Instead, I suggest you prioritize your studying based on what I explain next.

(h) How I design my exams and how you should approach them:

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: (1) doctrine that was important to the resolution of a case we read or otherwise loomed large in a reading; (2) doctrine emphasized in the casebook's explanatory text (i.e, the part of the casebook that explains the law, as opposed to the cases and other "readings" within the casebook); (3) problems, hypotheticals, examples, etc. that we went over in class, including ones from slideshows posted to the class website; (4) material—including doctrine—covered in slideshows posted to the class website." In other words: The slides are important as a signal of emphasis even beyond their being carriers of problems, hypos, and examples.

Indeed, when I draft exam hypos and questions, I frequently look back at the above sources to convince myself that what I'm testing is something that's fair to expect a good student to have learned. In fact, you can expect that I will likely look for inspiration for an exam's hypothetical facts by looking at cases we read and problems, hypotheticals, and examples we worked through.

But note that I don't re-use those problems or facts. This means that some fictional events appearing in the exam may be loosely similar to, but not the same as, the facts from cases, examples, and problems. To put it another way, cases, problems and examples could give you a good idea of kinds of things you might find on the exam, but they would not represent an opportunity to draft portions of your essay exam answer ahead of time.

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

I try to make my exams interesting and engaging – particularly the essay portion. In comparison to other law-school exams, you may find that my essay exams have more narrative, plot, character, and backstory—things that aren't necessarily relevant to the legal analysis.

On the other hand, my essay exams also tend to have a lot of facts that are, indeed, footholds for productive legal analysis. And at first glance—as in real life—these may appear innocuous. Law school essay exams are often called “issue spotters,” and let's just say that mine tend to have lots and lots and lots of issues to spot. Indeed, even the top-performing student in any given class misses at least one or two issues that were successfully picked up and dealt with by many other students. So I guess you can fairly describe my essay exams as being “difficult.” But again, as with multiple-choice questions, that's a good thing! It makes for an exam that tends to be forgiving of little slip-ups. I mean, if the top student in a class is routinely missing one or two issues, then everyone can do that and more and still walk away happy.

(i) Jurisdictional coverage: Unless I make an exception in writing in the “exam prospectus” that I issue toward the end of the semester, you will not be tested on the law of any particular circuit or court. It's all just general United States law. Thus, you will not need jurisdiction-specific answers. Sometimes, to emphasize this, I place exam facts in a fictional state. In the past, I've used Arkassippi, Floribama, Nevizona, and Minnesconsin, to name a few.

10-2. Obeying Exam Requirements and Instructions

(a) Be wary: As you read above, it is happily the case that my multiple-choice questions and essay questions, while difficult, end up being forgiving of minor mistakes (see §10-1(f)-(g), *supra*). But be aware the reverse is true when it comes to things like complying with exam instructions, correctly using your exam ID number, and turning back in all exam materials. These things are easy to do. But making a mistake with these things can have severe negative consequences.

(b) Failure to follow exam requirements and instructions: A huge part of fairness is that students receive like treatment. The foundation of that is the exam requirements and instructions, which are meant to ensure that everyone labors under the same parameters. Thus: Failure to follow exam requirements or

instructions is an academic misconduct issue, and violations will be treated as such, even if inadvertent and/or without intent to gain advantage. Make sure you treat exam instructions with diligence and care. (Syllabus §6-6, *supra*, says a bit more about this.)

(c) Your responsibility with regard to handling and returning exam materials and using your exam identification number: You bear the burden of properly, legibly, and correctly marking exam materials with your exam identification number. (Your examination identification number, of course, means your examination number for this semester—not one from a prior semester.) You must also obey instructions on the handling and non-mutilation of examination materials. Given the system we have, these things are crucial to exam security and to the accurate assigning of grades, which means they are crucial for basic fairness in grading. If some exam item (question booklet, scantron answer sheet, etc.) is not turned in with your number on it, that, unfortunately, creates a serious problem that may be impossible to fix. So please do not omit to do what you are asked with regard to exam materials. And expect that any omissions, even if inadvertent, will be treated harshly, including resulting in a failing grade and a referral for discipline.

10-3. Decorum: *Assuming we have a live, in-person exam administration*, then during the administration of the exam you must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells. (Yes, there have been problems in the past.) Here's the thing: Exams are stressful. Yet some of the things some students hope will be useful in lowering their stress can actually intensify the stress of others. One recurrent problem in this regard has been food and beverage use during exams. Thus, you will be allowed to have food and drink with you during the exam only under the following conditions:

- Drinks must be open and drinkable before the exam starts. No popping cans or opening soda bottles during the examination period.
- Food and beverages cannot smell. Nothing creating an odor stronger than a cup of unflavored coffee is permitted. So, to be crystal clear, no sandwiches, condiments, salads, etc.
- Food cannot be noisy. No chips, carrots, or granola. In addition, food in wrappers must be unwrapped before the exam begins. For example, if you bring a package of M&Ms into the examination, the candy should be removed from the wrapper and poured onto a paper towel before the exam starts.
- Chew with your mouth closed.
- Do not allow examination materials to be contaminated with food. (Yes—this has happened. ☹)

In addition:

- Don't wear perfume or cologne.
- No essential oils. No candles, potpourri sachets, or anything that is infused with scents.

Be aware that I may issue further specific instructions in this regard at some point later on.

10-4. Format

The format of the exam is in part dependent on how it is administered. At the time of writing this syllabus, I can't know for sure how the exam will be administered. Exam administration has been in flux over the past couple of years because of the ongoing coronavirus pandemic and changing policies of the decanal administration.

Here's what I can say about the exam for now:

Assuming we can have a normal exam, then I anticipate that there will be a closed-book multiple-choice portion. That means you can access no materials at all. And so long as we have any kind of exam at all (and I know that sounds wild, but in Spring 2020 we didn't!), then it will certainly include an essay-based portion, which will consist of one or more open-ended questions calling for a written essay response delivering legal analysis concerning a hypothetical fact pattern that is provided as part of the exam. The essay portion will be administered on an open-book basis. **Allowed reference materials for the open-book portion will be limited to paper-based notes and books.** Expect that the device you use to type your response will be required to be locked down with software that prevents access to the internet and to locally stored electronic files. You might consider how this factors into your choices over the semester about how you read, how you outline, etc.

It is likely that I will divide up the time during the essay portion so that the first 30 minutes is a Reading-Outlining Period ("RO Period") during which you can read the exam booklet (that is, the facts and the question or questions), take notes, reference your printed materials (outlines, books, etc.), and outline your response on scratch paper. But during this time you cannot begin typing or handwriting the actual response upon which you will be graded. I've found that imposing this constraint on students has led to better exams—more organized, more balanced in coverage, more focused on the more important issues, and overall less scattered and stream-of-consciousness-like.

I may provide more detail about the exam at a later time, perhaps in the form of a document called an "Exam Prospectus," mentioned below.

10-5. Things You Can Have With You During the Exam

I've gotten lots of questions over the years about what students are allowed to have with them during the exam. Thus, I've created pretty specific instructions on that. So, assuming we have a normal in-person exam, be aware of the following.

Applicable to multiple-choice and essay:

- You must refrain from conduct which could reasonably be distracting to the students sharing the room with you, including by generating noise and smells. See the requirements under §10-3, *supra*, regarding food, drink, and odors.

- No devices (other than your laptop or tablet for typing the essay), no music, nothing with Bluetooth. All items and materials are subject to inspection.
- For the avoidance of doubt: No ebooks, no accessing web, internet, etc. It makes no difference what you are reading or accessing or whether it has anything to do with the exam.
- Do not have a phone on your person—even if you aren’t interacting with it.
- Do not wear a smart watch or anything that looks like a smart watch—even if you aren’t interacting with it.
- Also, you cannot use a calculator (you wouldn’t need one anyway).
- You may use earplugs. You may use noise-cancelling or white-noise-producing headphones (the word “headphones” includes earbuds) provided that they have no other electronic capabilities, functions, or features (including but not limited to Bluetooth, signal transmission, signal reception, playing music, etc.). What matters is the item’s capacity to do other things—not whether that capacity is being used. Expect inspection.
- You may wear a regular watch with no functions other than timekeeping. A digital watch that has an alarm and stop watch function in addition to providing the time of day and date is permitted—but it may not beep or emit noise.
- You cannot share items with other students.
- You may not communicate with anyone—necessary communications with administrators/proctors being the exception. You may not view or attempt to view materials other than your own. If necessary, a brief bathroom break is allowable under applicable policies; otherwise, you cannot leave the exam room.
- For the avoidance of doubt: Absolutely no talking or communicating with any other student is permitted before time is called—even if, for instance, you are finished working on the exam and you are out of the exam room visiting the restroom. It makes no difference what you are talking about or whether it has anything to do with the exam—the communication is not permitted.

Applicable to a normal “closed book” multiple-choice portion:

- You can have no materials to reference.
- Bring no. 2 pencils. You can bring an eraser. No highlighters, pens, or other writing instruments.

Applicable to a normal “open book” essay portion:

- Any touching, using, accessing, viewing, or listening to electronic devices or other materials, except as provided, is prohibited.

- You can have your computing device (including a laptop or keyboard-equipped tablet) to write your exam, provided it is running the required exam-taking software and is used pursuant to applicable policies. But you may not reference files stored thereon during the examination session.
- You may use any paper-based notes and books you like, including inert binders and tabs. You can bring, for instance: your casebook volumes (good idea), your notes (also a good idea), a simple abbreviated one-page-or-so outline (sometimes called an “attack” outline) (excellent idea), a detailed outline you’ve done (sounds sensible), an outline prepared by someone else (could be helpful), a paperback dictionary (not sure you’d need that), a printed commercial outline (likely to be more troublesome than helpful, I would think, but it’s up to you), printouts from the website, or what have you.
- You can also use pens, pencils, and highlighters.

10-6. Some studying advice:

The possibility of getting bogged down with paper: As far as the open-book essay portion allowances go, while there is no limit on what paper materials you can bring with you to the exam, 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.

The benefits of a one-sheet menu outline (which some people might call an “attack outline”): For an open-book essay exam, I personally think the most important thing you can have in terms of paper is a single sheet that lists the things you’ve learned during the semester that you can bring to bear in analyzing the hypothetical facts. One sheet, printed on just one side, I would suggest, is ideal. I tend to call this a “menu outline” because it is a list of things you can choose from. If you are fond of video games, you might think of it as a “weapons inventory.” I’ve seen some people use the term “attack outline” in a way that gets at this idea (although I’ve seen “attack outlines” that are more involved and complex than what I have in mind.) The point is, I suggest you have a ready list of the doctrines, tests, and so forth you can apply to the hypothetical facts of the essay booklet for the purpose of producing a thorough analysis. In other words, it’s a quick-reference document that simply reminds you of what you already know.

Exam technique and active studying: The most important thing in studying is to prepare for what you need to do on exam day. That means first of all you should know what you are doing in terms of exam-taking technique. I’ve made available some resources that you can find in my Exam Archive, particularly: *Tip Sheet on How to Write a Law School Essay Exam* and *How to Take a Multiple-Choice Exam in Law School*. And I strongly recommend that you bring exam-writing technique and substantive knowledge together by working through old exams from the Exam Archive. I particularly recommend trading your responses with classmates: That is an extremely effective way to find your weaknesses and strengths, and reading various student responses can allow you to start to develop something of a graders’ perspective.

Doing old exams is also a great way to study because it is *active*. Any form of active studying—where you must use your brain to actively figure something out or produce some kind of answer—is likely to be much more beneficial to you than passive studying—for example reading and re-reading your outline.

10-7. Exam Prospectus: Toward the end of the semester, I might release a document called the “Exam Prospectus,” posted to the class website, providing more detailed information about the exam.

10-8. Exam Archive: You should note that I have a very large archive of old exam questions. It is publicly accessible online. Go to http://ericejohnson.com/exam_archive/. The point of the archive is to provide lots of practice opportunity, and to provide it to everyone on the same footing. The prior exams for Intellectual Property generally contain a lot of trademark and right of publicity material. I suggest practicing with those.

11A. ACCOMMODATIONS

Disability Accommodation: At the OU College of Law, disability accommodations are handled through the main campus Accessibility and Disability Resource Center. Address: 730 College Avenue. Phone: 405-325-3852. TDD (Telecommunications Device for the Deaf): 405-325-4173. E-mail address is adrc@ou.edu. Website <https://www.ou.edu/adrc>.

The OU Faculty Handbook §5.4 states that the Disability Resource Center “is the central point of contact to receive all requests for reasonable accommodation and all documentation required to determine disability status under law. This center will then make a recommendation concerning accommodation to the appropriate administrative unit.”

The following text, which is useful in explain the scope of disability issues, accommodations, and arena for university support, has been provided by OU for inclusion in syllabi:

“The Accessibility and Disability Resource Center is committed to supporting students with disabilities to ensure that they are able to enjoy equal access to all components of their education. This includes your academics, housing, and community events. If you are experiencing a disability, a mental/medical health condition that has a significant impact on one or more life functions, you can receive accommodations to provide equal access. Possible disabilities include, but are not limited to, learning disabilities, AD(H)D, mental health, and chronic health. Additionally, we support students with temporary medical conditions (broken wrist, shoulder surgery, etc.) and pregnancy. To discuss potential accommodations, please contact the ADRC at 730 College Avenue, (ph.) 405.325.3852, or adrc@ou.edu.”

In general, students are not required or encouraged to disclose disabilities to instructors—which is as it should be. But if you are not getting the help you feel you need from the Accessibility and Disability Resource Center, and if you would like to talk to me about it, then I invite you to do so. As part of my pursuit of effective teaching and the best educational outcomes for my students, I consider it to be in my interest to advocate for students with disabilities to get the

accommodations they need to succeed. I also am interested in making changes—whether required or not—to make my materials and my classroom more accessible for people with a variety of impairments. And I am grateful to students with disabilities in the past who have helped me make improvements in that regard.

Language Accommodation: An example of a language accommodation would be if you are not a native English speaker and you feel you might need an English-to-foreign-language dictionary on a closed-book portion of the exam.

What I've been told is that if students desire language accommodations for the exam or otherwise and there is not a disability issue involved, then the accommodation request goes directly to me, not through ADRC. But I can't find anything definitive about that in writing. So you could ask ADRC first. At any rate, insofar as it falls to me to authorize a language accommodation, the following is my policy: **Any language accommodation must be authorized by me in writing. Please get this taken care of as soon as possible—at least by the seventh week of classes.** I may decline requests that are otherwise reasonable on the basis of being dilatory.

11B. VARIOUS INFORMATION CONCERNING UNIVERSITY POLICIES

Religious Holidays/Observances: The OU Faculty Handbook §3.15.2 states: "It is the policy of the University to excuse the absences of students that result from religious observances and to provide without penalty for the rescheduling of examinations and additional required class work that may fall on religious holidays."

Note that religion-based absence excuses, like other excuses, need to get in front of me for me to treat them appropriately. So note the relevant portions of the attendance policy above, including §9-3 through §9-7. In particular, see §9-3(g).

Title IX Resources and Reporting Requirement: For any concerns regarding gender-based discrimination, sexual harassment, sexual assault, dating/domestic violence, or stalking, the University offers a variety of resources. To learn more, including how to report an incident, please visit <http://www.ou.edu/eoo.html>.

Also, please be advised that professors are mandatorily required to report, among other things, instances of sexual harassment, sexual assault, and discrimination to appropriate campus authorities. (See §7-5, *supra*, in this regard.)

The following is language provided by OU for inclusion in syllabi:

"Anyone who has been impacted by gender-based violence, including dating violence, domestic violence, stalking, harassment, and sexual assault, deserves access to resources so that they are supported personally and academically. The University of Oklahoma is committed to offering resources to those impacted, including: speaking with someone confidentially about your options, medical attention, counseling, reporting, academic support, and safety plans. If you would

like to speak with someone confidentially, please contact OU Advocates (available 24/7 at 405-615-0013) or another confidential resource (see “Can I make an anonymous report?”). You may also choose to report gender-based violence and discrimination through other means, including by contacting the Institutional Equity Office (ieo@ou.edu, 405-325-3546) or police (911). Because the University of Oklahoma is committed to the safety of you and other students, I, as well as other faculty, Graduate Assistants, and Teaching Assistants, are mandatory reporters. This means that we are obligated to report gender-based violence that has been disclosed to us to the Institutional Equity Office. This includes disclosures that occur in: class discussion, writing assignments, discussion boards, emails and during Student/Office Hours. For more information, please visit the Institutional Equity Office.”

Adjustments for Pregnancy/Childbirth Related Issues: Should you need modifications or adjustments to your course requirements because of pregnancy-related or childbirth-related issues, you should contact the Accessibility and Disability Resource Center as soon as possible. A useful document to look at is an FAQ with answers to common questions here: <https://www.ou.edu/eoo/faqs/pregnancy-faqs>.

Mental Health Support Services: If you are experiencing any mental health issues that are impacting your academic performance, counseling is available through the University Counseling Center (UCC). You can call 405-325-2911 to make a counseling appointment. The Center is located on the second floor of the Goddard Health Center on the corner of Brooks Street and Elm Avenue, at 620 Elm Avenue, room 201, Norman, Oklahoma 73019. For more information please visit the University Counseling Center website: <http://www.ou.edu/ucc>.

Fire Alarms and General Emergencies: The following language was provided by OU under the heading “Fire Alarm/General Emergency” for inclusion in syllabi.

“If you receive an OU Alert that there is danger inside or near the building, or the fire alarm inside the building activates: 1. *LEAVE* the building. Do not use the elevators. 2. *KNOW* at least two building exits 3. *ASSIST* those that may need help 4. *PROCEED* to the emergency assembly area 5 *ONCE safely outside, NOTIFY first responders of anyone that may still be inside building due to mobility issues.* 6. *WAIT* for official notice before attempting to re-enter the building.

OU Fire Safety on Campus”

Severe Weather and University Emergency Procedures: The following language was provided by OU under the heading “Emergency Protocol” for inclusion in syllabi.

“During an emergency, there are official university procedures that will maximize your safety.

Severe Weather: If you receive an OU Alert to seek refuge or hear a tornado siren that signals severe weather.

1. Look for severe weather refuge location maps located inside most OU buildings near the entrances
2. Seek refuge inside a building. Do not leave one building to seek shelter in another building that you deem safer. If outside, get into the nearest building.
3. Go to the building's severe weather refuge location. If you do not know where that is, go to the lowest level possible and seek refuge in an innermost room. Avoid outside doors and windows.
4. Get in, Get Down, Cover Up
5. Wait for official notice to resume normal activities.

Additional [Weather Safety Information](#) is available through the Department of Campus Safety.”

Mass Shooting Situations, Etc.: The following is language provided by OU for inclusion in syllabi:

“If you receive an OU Alert to shelter-in-place due to an active shooter or armed intruder situation or you hear what you perceive to be gunshots:

1. *Avoid:* If you believe you can get out of the area WITHOUT encountering the armed individual, move quickly towards the nearest building exit, move away from the building, and call 911.
2. *Deny:* If you cannot flee, move to an area that can be locked or barricaded, turn off lights, silence devices, spread out, and formulate a plan of attack if the shooter enters the room.
3. *Defend:* As a last resort fight to defend yourself.

For more information, visit [OU's Emergency Preparedness site](#).

[Shots Fired on Campus Procedure – Video](#)”

University Polices and Recommendations Regarding Covid: Please be apprised of any university policies and recommendations regarding coronavirus. Adhere to the policies and take recommendations strongly into account. **I recommend that all of my students follow the university's and law school's recommendations to reduce the spread of covid, including wearing a mask as applicable.**

12. REVISIONS TO THIS SYLLABUS, WAIVERS OF STUDENT OBLIGATIONS, MISTAKES

This syllabus may be amended or revised, and if it is, the most recent syllabus and any amendments or addenda thereto will be posted to the class website.

No student obligation under this syllabus can be waived by me orally. If you think I said something that allows you different treatment under this syllabus, you must have misunderstood me. The syllabus needs to apply to everyone equally. (See also §9-7, *supra*, regarding attendance.)

It is possible (and probable) that this syllabus contains technical mistakes, such as typos, misnumbered cross-references, etc. In construing this syllabus, mistakes that are purely technical in nature and that do not create genuine

ambiguities or hamper substantive understanding by a reasonably diligent student are to be disregarded.

13. COURSE ORGANIZATION: The planned organization of the course is below.

Note that the list here is just the topics. The reading assignments will be on the online Chart of Assignments, which is updated on an ongoing basis with the exact assignments for the immediate future. The Chart of Assignments may also provide, subject to change, a longer-range projection of future readings.

This list is subject to some adjustment and change (which would be reflected on the Chart of Assignments). It is very possible that some of these topics may not be covered at all because of time constraints. It is also possible that some topics may be covered out of order and inserted into a class period where time permits—particularly if coverage will be brief and no reading will be assigned.

PART I: Preliminaries

1. About the Course
2. Orientation to Trademark Law and its Context
3. Policy and Theory

PART II. Trademark Basics

4. Distinctiveness
5. Generic marks
6. Non-Word Marks, Colors, and Trade Dress
7. Trade Dress and Product Design
8. Functionality
9. Aesthetic Functionality
10. Non-Traditional Marks
11. Obtaining Trademark Rights Through Use of the Mark
12. Priority Issues
13. Trademark Ownership
14. Trademarks and Geographic Protection
15. Abandonment
16. Licensing
17. Registration
18. Infringement
19. Likelihood of Confusion
20. Trademark Procedure

PART III. Origin, Identity, and Unfair Competition

21. Domain Names
22. The Right of Publicity
23. Trade Libel and Defamation

24. False Advertising
25. FTC and Unfair Competition
26. State Unfair Competition Statutes
27. Antitrust Law
28. Geographic Protection Revisited

PART IV. Trademarks Beyond the Basics

29. Trademarks and Merchandizing
30. Broadened Theories of Confusion
31. Secondary Liability in Trademark
32. Dilution
33. Fair Use Defense
34. First Sale Defense
35. Expressive Uses and the First Amendment
36. Dispute and Litigation Techniques

14. FEEDBACK: If you have feedback for me—suggestions, ideas, commendations, or criticisms—please do not hesitate to tell me in person or by e-mail. If sending something to me anonymously would make you feel more comfortable, then I invite you to do just that. I hope you enjoy the course!

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