

FOR 1-HOUR ESSAYS ON THE  
CALIFORNIA BAR EXAMINATION

**1440:  
ADVANCED  
COUNTER-  
ARGUMENT  
TECHNIQUES**

Edward P. Reyes, Esq.  
Jurax Bar Prep

**2024 Edition.**

# **1440: Advanced Counter-Argument Techniques**

**Score Consistent 70s On Essays**

**For 1-Hour Essays on the  
California Bar Examination**

**Edward P. Reyes, Esq.**

**2024 Edition.**

Jurax Bar Preparation, Inc.

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## INTRODUCTION: HOW TO USE THIS BOOK

This book was written so that you can consistently score at least a 70 on a 1-hour essay. Writing in a “lawyer-like manner” as the bar exam requires is a skill. Your present level of intelligence and enthusiasm is important. However, you must also be able to apply the proper skills. With proper practice, you will develop the proper skills to pass the bar exam. This is your goal and this book will help you achieve this task.

Below is an over-simplified model of what you have to achieve to excel on the written portion of the exam. This is just the gist of the required tasks. Notice that the IRAC structure is clearly present (it is in **bold** for emphasis along with the other IRAC components).

**Write the Issue.** This is usually one issue.

**Write the Rule.** This may have 3 elements.

### **Analysis.**

- i. Present your **argument**.
- ii. Present a **counter-argument**.
- iii. Present a **rebuttal** to the counterargument. A mastery of the rebuttal can land you a 70 consistently!

Don’t think that just knowing the structure of the Analysis is sufficient to get a passing score. You still have to use key facts that are given to you (the exam instructions state that you should discuss the facts). Learning to identify these key facts is also a large component of the exam.

This book is also meant to be used as a reference once you have completed reading the entire text. In other words, once you start applying the information by writing practice essays, return to this book and revisit the content as may be necessary. All the best to you on this challenging yet wonderful journey.

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## CHAPTER 1

### NON-MAJOR ISSUE FORMULA

#### **Introduction.**

This book focuses on the analysis part of IRAC. It is broken down in two sections. The first part of this section covers the non-major issue analysis. The second part of this section covers the major issue analysis segment. The counter-argument is found in the major issue analysis.

#### **Signal Word Stage.**

We'll use quasi transitional words that help structure your essay. We'll call these words and phrases *signal words*. Below is a directory to help with comprehension of the material. In a later chapter, there will be a list of other signal words you can use. For now, we are in the opening stage of the analysis where you use the word *Here*.

**Initial Argument to the Premise:** *Here* ← We are in this stage.

**Counter-argument.** *However ....*

**Rebuttal to Counter-argument.** *Ultimately, a court will likely find that ....*

#### **Introduction to Non-Major Issue Analysis Formula.**

We are going to start with the formula for a non-major issue analysis. Notice that we have not even defined a non-major issue analysis yet. But here is the formula. This is one formula that you will have to know using muscle-memory. Muscle-memory is developed through repetition.

#### **Formula:**

**Element of the Rule” [is/is] not present “because” of this “fact” (or reasoning).**

Here is another version that is distilled:

**Element + because + fact.** Also, here is another version: **E+B+F**

We'll start with explaining what a non-major issue is. But keep this formula in mind for now.

### **Non-Major Issue Defined.**

Let's give this type of discussion a name. We'll call it a Non-Major Issue Analysis Formula. There is usually no factual dispute when discussing this type of issue. For example, note the following formula we discussed earlier:

*Element is present because of fact.*

As stated above, in this type of analysis, there is no point of contention. As such, you should be brief in your discussion of them.

### **The Non-Major Issue Analysis Formula In Action.**

Let's review the formula again before we apply it. It goes like this:

*Element is present because of fact.*

Note that the *Element* as it is used here is part of a rule. Let's do an example together. We'll do *Standing* in Constitutional Law.

*Standing* will be the rule. We'll further state that *standing* has three elements. An element there is *Injury In Fact*. If we apply the Non-Major Issue Analysis Formula, injury in fact would look something like this when the formula is applied:

*Injury In Fact is present because the facts state that Plaintiff was harmed by Defendant when his application for a driver license was denied.*

Notice where the element injury in fact is located: at the beginning of the phrase. The word is underlined below. Then the word *because* is used. After *because*, then at least one fact is used.

*Injury In Fact is present because the facts state that Plaintiff was harmed by Defendant when his application for a driver license was denied.*

That is the essence of  $E+B+F$ .

## CHAPTER 2

### THE MAJOR ISSUE ANALYSIS AND THE COUNTER-ARGUMENT

#### **Signal Word Stage.**

Below is the directory again. As of now, we are in the *counter-argument* phase of the analysis where you use the word *However*.

**Initial Argument to the Premise:** *Here ....*

**Counter-argument.** *However ....* ← We are in this stage.

**Rebuttal to Counter-argument.** *Ultimately, a court will likely find that ....*

#### **Platonic Dialogue and the Appearance of Hunter the Hater.**

In this section, we'll give a quick overview concerning the makeup of the counter-argument. We will discuss formulas that you can use to achieve this. But before we do, we'll get into the essence of a major issue analysis.

Here is an essential item needed to perform a major issue analysis: You will need to invite two people to the discussion.

At this point, you may say, "Wait! What?! For the counter-argument?!" You may further ask, "Who are these two people?" The first one is Plato. The second one is Hunter the Hater. Let's start with Plato.

#### **Say Hello To Plato And Introduction To Dialogues.**

Who is Plato and why him? As you know, Plato was a Greek philosopher. As a means of exploring a question, Plato applied the use of a dialogue. This being the case, we'll identify this type of analysis as a *Platonic Dialogue*. For instructional purposes, we'll just use two people with opposing perspectives.

In playing the role of Plato, you must be honest with yourself. By being honest I mean that you will have to confront an opposing position so you will have to believe in one position. You will also have to oppose a position even if you don't necessarily agree with the outcome. You must bring up the facts and confront them. If you can't find a counter-argument, make one up or else you are *not* getting a passing score.

#### **Hunter's Statement.**

How much writing is required for the use of Hunter's counter-argument? *Answer:* At least one line. The more you become proficient at this, the more you'll write. For now, at least one line is fine.

## Summary.

In summary, the major issue analysis is approached using the Platonic Dialogue as described above. In essence, for major issues, you need to discuss a counter-argument. On to the next lecture to see how this actually works.

## WRITING YOUR COUNTER-ARGUMENT

### Commentary on the Counter-argument.

Now, let's talk about this counter-argument business. Do you remember Hunter the Hater? This is where he comes into the picture. Are you arguing against yourself? That is what it sounds like. You can think of it this way if you'd like. In the end, however, you have to contemplate a counter-argument.

Here is the formula:

*However, Element X is not present because of Fact A.*

Note that the formula E+B+F is present. It is just superseded by the word "however." Here is the updated formula.

However + E + B + F

### Example of the Counter-argument.

Notice how Hunter will use at least two sentences for his counter-argument. The element that crime was afoot will also be underlined for emphasis:

Again, this is the structure of counter-argument:

*However, Element X is not present because Fact 1 took place.*

Here is how it would look if you were writing the counter-argument.

### Your Presumptive Writing.

*However, Dan will say that crime was not afoot because he was wearing the coat as part of his exercise routine. He wanted to sweat more.*

Notice that the words "crime was afoot" or something along those lines is present in the counter-argument. It will also be present in the rebuttal to the counterargument and in the conclusion for the element.

This concludes the lecture on the counterargument. A proper counter-argument can get you a score of 65. The next step will be to rebut the counter-argument 1. I know you are itching to do the rebuttal because it seems natural that you immediately respond to a counter-argument aimed at you. Let's go there now.

## CHAPTER 3

### THE REBUTTAL TO THE COUNTER-ARGUMENT

#### Signal Word Stage.

Below is the directory again. As of now, we are in the *rebuttal to the counter-argument* phase of the analysis where you use the word *However*.

**Initial Argument to the Premise:** *Here ....*

**Counter-argument.** *However ....*

**Rebuttal to Counter-argument.** *Ultimately, a court will likely* ← We are in this stage.

#### Introduction to the Major Issue Analysis Formula:

Welcome to this section! It is here where you will begin to rack up the big points! Before we start, review the next two diagrams. They are model answers from the July 2018 California Bar Exam, Question 3 and Question 6. This means they probably scored 100 points, the maximum allowed on an essay.

If you perform two of these major issue analyses, you can start getting at least 70's on every essay. This is because each major issue analysis has (1) an initial argument, and (2) a counter-argument which you are familiar with. But also, they have (3) a rebuttal to the counter-argument. See for yourself.

#### From Question 3.

##### ABA MODEL RULES

**Initial Arg.** Len would argue that he reasonably believed that he could still represent ABC despite the fact that he did not personally agree with ABC's objectives, and believed that the statute was good law. He would argue that it is common for lawyers to personally disagree with their client's positions, but for them to nonetheless do the work as required and necessary to further their interests in the current matter.

**Contr-Arg.** However, it could be argued that Len's belief was not reasonable. Len's beliefs directly and completely diverged from that of his client's objectives. Such a strong, powerful belief, which even led Len to secretly hope that ABC was not successful in its lawsuit, would have inevitably affected Len's ability to represent ABC fully and to his utmost ability. Accordingly, it could be argued that due to the divergent disparity between his beliefs, and the objectives of his client, which even led him to essentially root for his client's failure, Len could not have reasonably believed he could represent ABC despite his personal beliefs.

Then comes the rebuttal to the counter-argument.

Rebutl  
to  
Contr-  
Arg.

A court would likely find that Len's belief that he could represent ABC effectively notwithstanding his personal beliefs was likely to be unreasonable. While it is common for a lawyer to disagree to an extent with the client's objectives, here Len was completely against them. The severity of his belief, and the likelihood of his personal sentiments materially impairing his ability to represent ABC is strongly evinced by the fact that he was rooting against his own client's victory.

Moreover, as discussed above, Len did not disclose such a conflict in writing to ABC, nor did Len obtain their informed consent.

The next step is to write a rebuttal to the counter-argument. There is also an alternative component. The alternative is called the *Statement in Support of the Counter-argument* and it is discussed later. Here is the formula to the rebuttal.

**Rebuttal to Counter-argument:**

*Ultimately, a court will find that Element X was present because of Fact 2.*

Notice that you still use  $E+B+F$ . It is just superseded by a phrase that sums up the argument. As such, the formula is as follows:

*Ultimately, a court will find  $E + B + F$ .*

Here is an example.

**Presumptive Writing.**

*Ultimately, a court will find that it was reasonable to believe that crime was afoot because heavy winter coats are usually not used for exercising.*

Keep the statement brief for now if you wish. Once you master the concept, you can write longer statements.

**Skeletal Outline of the 70 Essay..**

The skeletal outline of the 70 essay is described below.

**SKELETAL OUTLINE**

**(I) Issue** – Is Issue ABC present?

**(R) Rule** – Here is the Rule and its two elements: (i) Element 1; and (ii) Element 2.

**(A) Analysis**

**Non-Major Issue Analysis:** Element 1 is present because of Fact 1.

**Initial Argument:** Here, Element 2 *is* present because of Fact 2.

**Counter-Argument:** However, Element 2 *is not* present because of Fact 3.

**Rebuttal to Counter-Argument:** Ultimately, a court will decide that Element 2 *is* present because of Fact 4.

**(C) Conclusion** – Issue ABC is present.

That is it! There is no need for complicated formulas. Later we will go more into detail.

**Alternative to the Rebuttal of a Counter-argument.**

It is possible that you can disregard the *Rebuttal to the Counterargument*. Instead, you can write a sentence that supports the counter-argument. This statement is called the *Statement In Support of the Counter-argument*. Here is an example:

*This is a close call but a court will probably agree that it is reasonable to believe that crime was NOT afoot because heavy winter coats are usually used for exercising and people who exercise have an expectation to want to perspire heavily.*

**More on the Statement In Support of the Counter-argument.**

For simplicity, just think of this section as an alternative to the Rebuttal to the Counter-argument. As such, do not write *both* a Rebuttal to the Counter-argument and a Statement In Support of the Counter-argument.

## CHAPTER 4 OTHER TOPICS

### SECTION 1: SIGNAL WORDS.

Below is a collection of signal words and phrases. These are broken down into initial arguments, counter-arguments, rebuttals to the counter-argument, and conclusions. Signal words will guide the grader throughout your analysis.

#### **Initial Argument to the Premise:**

*Here; In this matter.*

#### **Counter-argument.**

*However; A counterargument; On the other hand; The other party will counter.*

#### **Rebuttal to Counter-argument.**

*Ultimately, a court will likely find that ...; In rebuttal; This is a close call, however, the court will agree that ...; The party will correctly argue that; Overall.*

#### **Words to Continue your discussion.**

These words can be used in all of the components above to continue the discussion.

*In addition; Moreover; Additionally; Furthermore; Similarly; The party may also argue.*

This is not an exhaustive list.

## SECTION 2: CARVING OUT THE RULE.

### **Introduction to the *Carving Out the Rule Technique*.**

Recall that the format of the counter-argument requires a discussion of the element(s). If you are having difficulty extracting an element, recall the technique known as *Carving Out the Rule*. This is where you underline the key elements in your rule statement.

### **Objective.**

1. Identify key elements in the rule.
2. Stay organized as you deal with a bombardment of elements.

### **Commentary.**

This is an advanced technique that will help you identify and deal with key elements. Remember that identifying an issue is one thing. But you also have to systematically discuss the elements. You'll now become familiar with the technique known as *Carving Out The Rule*.

### **The Strategy Behind the Technique.**

After you write your rule statement, underline the element(s) that you think are important. You can eventually phase-out this step as you develop in this area.

### **Example 1.**

Let's do an example. You will see that the key elements are already underlined.

#### **Rule Statement to Standing.**

*To establish standing, the party must show that he suffered an injury in fact; That a causal relation between the injury and the challenged conduct existed, and that the court can redress the harm.*

Simple enough right? Let's do another example.

### **Example 2.**

Here is another example. This time, read the rule. Then underline an element that you think may be relevant and that may earn you points. Let's go with the exception to the Free Exercise clause. Let's assume the exception to the rule is what is relevant and important. Here is the rule:

*Under the free exercise clause, a general statute of neutral applicability is valid even if it incidentally burdens religious practices.*

Which element did you underline? Here is a possible response.

*Under the free exercise clause, a general statute of neutral applicability is valid even if it incidentally burdens religious practices.*

By underlying a general statement of neutral applicability, you will know which content to analyze. Even if you just underlined neutral applicability, this may still be correct. This is because you will use the content in your analysis. In summary, focusing on certain elements will help you keep your writing clear, organized and will help you earn points.

### **SECTION 3: JUICY FACTS.**

We're now going to identify key language you can use in your counter-arguments. Let's call them *Juicy Facts*. These Juicy Facts may be found throughout the fact pattern. When you outline and when you write, these words will be used to enforce your analysis. At that point you will be able to put them into a specific and powerful context.

Here is what you will be looking for: In particular, you will be looking for *adjectives, verbs, or adverbs*. Also, you will be looking for words *that seem out of place*. Furthermore, be on the lookout for *phrases that are descriptive*.

You may want to use a different color highlighter in this section. Here are clues to spotting Juicy Facts: look for words that come before a noun or verb. For example: "extremely doubtful," "immediately recorded," "shortly after the incident," or "would have been useless to Mr. Plaintiff." Highlight these words because they may translate to major points.

By the time you complete the stage where you read the hypothetical, you should be extremely familiar with the fact pattern. If you feel as if you don't understand the facts, by all means, read the fact pattern again.

You will use the facts you highlighted to discuss major issues. Let me emphasize this: the Juicy Facts will *directly* go towards discussing major issues.

With these skills, you won't need luck to pass the examination. Best wishes!

**Edward P. Reyes, Esq., served in the U.S Marines. He then attended UC Berkeley where he majored in English Literature. He then earned a Masters in Education from UCLA. After teaching for the Los Angeles Unified School District, he attended Liberty University School of Law. He now practices law in California. State Bar No. 330131.**



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