Handling Factual and Legal Ambiguity

One key to writing a great essay is learning to recognize ambiguity and using this ambiguity to show off your quality legal analysis. Ambiguity comes in two forms: factual ambiguity and legal ambiguity.

What is Factual Ambiguity?

When you are reading a fact pattern and a fact makes you scratch your head because you aren’t sure what the outcome of the analysis will be because of that individual fact, this is factual ambiguity. Factual ambiguity is great because it gives you the opportunity to do quality legal analysis and show the grader you understand how to argue both sides.

In other words, when you look at each element from your legal rule and link it to the facts, if there is factual ambiguity at play, the outcome of at least one legal element will be uncertain because of the facts you’ve been given.

An Example of Factual Ambiguity – Conflicting Facts

For example, if you are analyzing burglary on a Crimes essay and you are told that “the common law applies,” you know that the rule you will use states that “Burglary is the (1) breaking, and (2) entering, of (3) the dwelling of another, (4) at night, with (5) intent to commit a felony once inside.” You will need to hunt through the fact pattern for facts that pertain to each of these elements.

If the facts state that the structure broken into was a “garage adjacent to the home,” where there was “a couch and a TV, as well as many shelves of paint and industrial cleaning supplies,” and that “P’s houseguests slept there when they visited once per year,” these facts raise factual ambiguity as to element (3). Why? Because you might reasonably argue that this space counts as “the dwelling of another,” but the opposite argument is also plausible. The facts give you ammunition for either argument! It could probably go either way.

- *Why is this “the dwelling of another”?* It might be more like a dwelling since there is a place to sit and sleep and a TV for entertainment, similar to what you would find in a living room.

- *Why is this not “the dwelling of another”?* On the other hand, the many shelves of paint and industrial cleaning supplies indicate that it might be more like a warehouse---somewhere people don’t live. I mean, who lives in a garage (except bar studiers with no money)!?

You would want to briefly analyze each possibility (using all those facts) and then conclude one way or the other for element (3).

Note here that you still need to move onto the next element, even if you conclude that the garage here would not count as a dwelling under the common law. You have to hedge your bets. For example:

- Whether this structure qualifies as “the dwelling of another” is a close question, as discussed. Assuming the court decides it is, the other elements of burglary are met/not met because [give your reasons].

Questions? Email Lee@barexamtoolbox.com
Another Example of Factual Ambiguity – Holes in the Facts
For element (4) of burglary, if the facts you are given state that “it was 8 o’clock,” when the alleged incident occurred, this raises some factual ambiguity about whether element (4) is met.

- It could be nighttime or daytime---8pm or 8am.
- We also do not know whether it was winter or summer, which could make a difference in whether it was dark, or nighttime, or not.

This is an example of holes in the facts---we don't know one way or the other about the season or darkness, and the facts don’t tell us.

Does that mean we want to spend time discussing all possible scenarios? No. Remember, if you don’t have facts to support an argument, it's not an argument at all.

If the exam writers want you to discuss something like the season here, then there will be a clue.

For example, you will have a fact about “Later that summer,” etc. If that happens, you should very, very briefly state where any holes are and what the outcomes could potentially be:

- Here, it was 8 o’clock when the incident occurred, but the facts do not state whether it was morning or night. If it was 8pm, then the “at night” element will probably be met. Since it was summer, though, even if it was 8pm, it may not have actually been dark outside yet, which could raise some question about it was actually “at night” under the common law.

You should just quickly analyze the 8am vs. 8pm ambiguity and move on!

What is Legal Ambiguity?
Legal ambiguity arises when there is a lack of clarity in the law, or more than one legal framework or approach that could apply to the same set of facts.

An Example of Legal Ambiguity – Modern and Traditional Rules
For example, on another Crimes essay involving burglary, if you are not told that only the common law applies, you would need to analyze the problem under both the common law and the modern rule. Since you know that the modern rule does not require the breaking and entering to happen at "night" and applies to any structure (not just a "dwelling") the two rules are somewhat different and create legal ambiguity since you cannot be sure which law applies and the outcome might be different depending on which test applies.

You would need to state each rule (modern and traditional) separately and then apply it to the facts (carefully considering all the facts) and conclude what the result would be under each approach.

Another Example of Legal Ambiguity – Jurisdictional Differences
Legal ambiguity can also arise when there are jurisdictional distinctions in how to attack a particular problem. Common examples include: state vs. federal rules (or California vs. the ABA), or various approaches to the same issue, e.g. analyzing whether a defendant will be acquitted by reason of insanity (Model Penal Code vs. the Durham vs. the M’Naghten vs. the Irresistible Impulse Test).
Remember:
The exam writers may include triggers for factual and legal ambiguity in a fact pattern. If they do, you should realize that this has been done on purpose! It is to test how well you know the ins and outs of the rules you’ve memorized. Ignore such hints at your peril.

- **For factual ambiguity**, the exam writers may give you tricky facts to determine how well-versed you are in the legal elements you are responsible for knowing, but also how good you are at applying the law to the facts they give you. As we have said before, every fact is important! Think carefully about what legal arguments each fact allows you to make, and be on the lookout for ambiguity.

- **For legal ambiguity**, obviously, you need to know all of the different laws that could apply if there are differences in the materials you've studied. This does not mean you need to memorize the laws for every jurisdiction in the world. What it means is that you need to know where there are different approaches that might be relevant on the bar exam. These differences should be apparent in Lean Sheets or other substantive law materials you are using. When you come across meaningful distinctions, it can be helpful to chart them for later review. If you have questions, ask!

And finally, remember that factual and legal ambiguity give you the opportunity for quality legal analysis. Typically, where there is factual or legal ambiguity, the issue is a major one instead of a minor one. To learn more about this distinction, check out our handout on Major v. Minor Issues.