Suzanna Moran
Professor of the Practice of Law

Lawyering Process
Lab Teacher’s Manual
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FALL SEMESTER
Lab Exercise #1: Outlining Rules of Law

The following exercises include various rule structures. Carefully review each rule below, identify the type of rule structure the rule of law illustrates, and then outline each rule.

When outlining a rule structure with a set of elements, remember that it is important to identify each separate element of the rule, even when the statute itself does not clearly reflect the separate elements.

When outlining discretionary rules, there are often a number of ways in which they can be outlined.

You may or may not decide to change the order in which factors are enumerated. You may or may not decide to add subsections that conceptualize different criteria for you, or to reorganize any subsections that already appear in the rule of law.¹

Exercise (1)

Or. Rev. Stat. § 163.212(1)—Unlawful use of an electrical stun gun, tear gas, or mace in the second degree.

A person commits the crime of unlawful use of an electrical stun gun, tear gas, or mace in the second degree if the person recklessly discharges an electrical stun gun, tear gas weapon, mace, tear gas, pepper mace, or any similar deleterious agent against another person.

¹ This material is taken in part from ROBIN WELLFORD SLOCUM, LEGAL WRITING, REASONING, AND PERSUASIVE ARGUMENT 59-60 (2d Ed. 2006).
Exercise (2)

720 Ill. Comp. Stat. 5/7-1—Use of force in defense of person.

A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony.

Exercise (3)


It shall be unlawful employment practice for an employer to –

(1) Fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
Exercise (4)

N.Y. Mental Hyg. § 9.6(e)(2)—Criteria for involuntary outpatient treatment

A court may order the involuntary administration of psychotropic drugs as part of an involuntary outpatient treatment program if the court finds the hospital has shown by clear and convincing evidence that the patient lacks the capacity to make a treatment decision as a result of mental illness and the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest in refusing medication, taking into consideration all relevant circumstances, including the patient's best interest, the benefits to be gained from the treatment, and any benefits to be gained from the treatment, the adverse side effects associated with the treatment, and any less intrusive alternative treatments. Such order shall specify the type and amount of such psychotropic drugs and the duration of such involuntary administration.

Exercise (5)

Please write a clear rule governing the type of restaurant your group would hypothetically like to go to tonight.

Lab 1: Rule Statements

TA Instructions:

(1) Prepare the Rule Statements on Lab Google Docs in advance
(2) All students should have access to the Google Doc
   (a) Make sure the students names show up in the document (to do so, go to the “Chat” box in the upper right of the document and get each student to activate Chat which will then reveal their names)
(3) The TA transcribes and outlines the rule breakdown as the students create it with Professor Moran
(4) Include these parts in the template outline below each statute:
(a) What’s the causal term and the result?
(b) Causal term:
(c) Result:
(d) Outline:

**Review:**

**Rules: formula for making a decision (element or factor)**

1. Factor - not deal breaker
2. Elements - mandatory
3. Casual term - must, shall, may not
4. Result
5. Exceptions

**TA’s Role:**

This is fairly passive role for the TA in the lab. The professor takes a leading role. Mainly the TA needs to convey to the students that they’re doing well and to cheer them on. The TA should be, as always, paying attention and determining the level of each student’s PPP: participation, preparedness, and professionalism. Freely address and ask a student speak up or repeat themselves if the Professor doesn’t see or hear them.

Note: It is very helpful if the TA arrives 15 minutes early to chat with students and introduce him- or herself. Talking before class starts opens students up more and they are more likely to participate and contribute in the actual lab if the TA gets them talking beforehand.
LAB EXERCISE #2: State v. Lochs

As an introduction to legal analysis and to reinforce our discussions of sources of law, the common law, binding and persuasive authority, and reasoning by analogy, you will be working on the criminal trespass case of the State of Enchanted Forest v. Gilda Lochs.²

For this exercise, assume that Ms. Lochs’ trial is scheduled in a couple of weeks. The court has heard no evidence about the case yet. The defense would like to present evidence relating two defenses: necessity and lack of capacity.

Evidence is only admissible if it is relevant. The evidence that the defense would like to admit would not be relevant to anything other than these two defenses. If these two defenses are not legally valid, then the evidence is not relevant and may not be admitted, regardless of the facts of the case.

The prosecution has moved to suppress that evidence on the ground that those defenses are not legally valid defenses in the State of Enchanted Forest. The court has scheduled a pre-trial hearing so the attorneys may present oral argument regarding whether the defenses are legitimate, such that the court should admit evidence regarding these defenses.

Read the facts, the statute, and the case briefs. As you are reading the case briefs, think about which cases are helpful to your side and which work against you. Focus on the facts and results in each case in determining whether the case is helpful.

Your task is to develop a rule regarding whether these two defenses are legally valid in this jurisdiction, and if they are, to flesh out what the rule requires.

First, work in your groups to develop arguments for your side. The court will hear oral argument (from volunteers) regarding each issue at the conclusion of the exercise.

² This exercise has been adapted from “Three Baers Redux,” a first-year appellate advocacy exercise developed by Lisa T. McElroy, a professor at Drexel University School of Law.
STATE OF ENCHANTED FOREST v. GILDA LOCHS
Cause No. E.F. Dist. Ct. 2014-0817

Facts

The Baer family (Mrs. M. Baer, Mr. P. Baer, and their young son, B. Baer) and Gilda Lochs are residents of the village of Wherever, in the state of Enchanted Forest. On 1 June 2014, Gilda Lochs, who was five years old at the time, entered the Baers' house without their permission. She had been walking in the forest when the day turned bitterly cold and rainy. Ms. Lochs was afraid she’d get hurt or sick because she was dressed in shorts, a t-shirt, and sandals. The Baers returned home from to find Gilda Lochs sleeping in B. Baer’s bed. The Bears called the Wherever police, and Gilda Lochs was arrested and charged with criminal trespass.

At trial, Ms. Lochs admitted that she had entered the Baers' house without the Baers’ permission. She wanted to present evidence of the following two affirmative defenses:

(1) Necessity (that it was necessary for her to enter the property because of the weather); and

(2) Lack of capacity (that due to her age should could not form the intent to knowingly enter the property of another).

Law

Criminal trespass statute

E.F. Penal Code § 30.05
(a) A person commits an offense if he enters or remains on or in property of another without effective consent.
(b) It is a defense to prosecution under this section that the actor at the time of the offense was a fire fighter, emergency medical services personnel, or peace officer acting in the lawful discharge of an official duty under exigent circumstances.
(c) An offense under subsection (a) a Class C misdemeanor unless it is committed in a habitation, in which event it is a Class A misdemeanor.
Cases

State v. Wolf, 23 E.F. 403 (1972). The Wolf court held that, even though E.F. Penal Code § 30.05 (criminal trespass) does not prescribe a culpable mental state, a culpable mental state of intentionally acting is required. The court then upheld trespassing conviction of the 59-year-old B.B. Wolf, who entered onto the property of another for the purpose of huffing and puffing and blowing a house down. The court found clear intent on the part of Mr. Wolf both to enter the property and to cause damage to the property.

State v. H. & G., 200 E.F. 85 (2001). The H. & G. court overturned the trespassing conviction of two three-year-old children who, while wandering happily through the woods, entered onto neighbor’s property without permission. The court noted that the property line was not obviously marked and that, given the young age of the children, they may not have known that they had entered private property. The fact that the children left a trail of breadcrumbs on the property was irrelevant in the court’s analysis.

State v. Pinocchio, 112 E.F. 8 (1996). The Pinocchio court upheld trespassing conviction of the defendant, a seven-year-old boy, who entered onto neighbor’s property without permission as he fled donkeys chasing him. The court reasoned that boy had several other options, including yelling for help and running toward his own property.

State v. Prince Charming, 8 E.F. Ct. App. 12 (1941). The Prince Charming court overturned the trespassing conviction of 21-year-old who climbed a tower to rescue a frightened, imprisoned princess. The court reasoned that princess could consent to Prince Charming’s entry although the princess was not was the record title owner of the property. The court also noted in dicta that, even absent consent, entry would most likely have been justified by necessity if the princess’s life had been in danger.

State v. R.R. Hood, No. 89-45567, 1989 WL198914, at *3 (E.F. Ct. App, Apr. 18, 2002). The court affirmed the trial court’s denial of defendant’s motion to dismiss, holding that a six-year-old's capacity to form the intent to trespass was a question for the jury.

State v. Jack, 112 Sky 14 (1992). State of Sky Supreme Court upheld trespassing conviction of 10-year-old boy who climbed beanstalk growing in his own yard and ended up on giant’s property. Court reasoned that the boy’s motive for climbing the beanstalk – to escape his mother, who was threatening to spank him for trading the family’s cow for magic beans – did not constitute necessity and was not a defense for trespassing.

State v. Dorothy, 8 Oz 1110 (1952). State of Oz Supreme Court overturned conviction of 12-year-old girl whose house was lifted by a tornado and taken from her Kansas home to property belonging to a commune of little people in Oz. The court reasoned that (1) child did not have intent to trespass and (2) tornado was an act of God beyond her
control. The court did note that child often dreamed of going over the rainbow but explicitly stated that mere dreams do not translate into intent to trespass on a specific occasion.

### Lab 2: State v. Lochs

**Subject:** Criminal trespass case of the State of Enchanted Forest v. Gilda Lochs  
**Summary:** Synthesize what the rule is; if the students cannot do that, they should synthesize what the rule ought to be.  
**Logistics:** Students will divide into groups of two or three

**Student Objectives:**

1. Legal Analysis: Students can identify hierarchy of legal authority  
   a. First step, creating the rule  
   b. Second step, applying it to the facts--comes later  
   c. Third step/consideration, advocacy comes into play by choice to create broad v. narrow rule--comes later  
   i. Example:
      1. Representing the State - one version  
      2. Representing Gilda Lochs - different version

2. Legal Analysis: Students can synthesize multiple legal authorities into a coherent rule
3. Identify relevant facts for rule formation from case opinions

**TA Responsibilities:**

- Make 2 documents: one prosecution, one defense  
- Start off with background - what are the facts?  
- Procedurally, where are we?  
- Only relevant evidence is admissible  
  - Statute does not summarize defenses
Where are the defenses? Case law - common law defenses

- Refer them to the statute as a starting point when they are drafting the rule.
- All the students need to do is determine what law in the state of the Enchanted Forest requires and whether that evidence is admissible
  - State v. Wolf: intentionally with regard to capacity

**Sample Rule 1** (from 2014 lab group):

A person commits criminal trespass, only if:

1. The person enters the property ([State v. Wolf](#), 23 E.F. 403 (1972)) and
   a. Without permission, and
   b. Knowingly, and
   c. Intentionally

2. Causes damage to the property ([State v. Wolf](#), 23 E.F. 403 (1972)),
   a. Without permission, and
   c. Intentionally, and

3. Unless a condition of necessity is created by a ([State v. Dorothy](#), 8 Oz 1110 (1952)):
   a. Life threatening, unforeseeable circumstances to, ([State v. Dorothy](#), 8 Oz 1110 (1952))
      i. Oneself, or ([State v. Pinocchio](#), 112 E.F. 8 (1996))
      ii. Another ([State v. Prince Charming](#), 8 E.F. Ct. App. 12 (1941))
   b. Lack of capacity ([State v. R.R. Hood](#), (E.F. Ct. App, Apr. 18, 2002))
      i. Age ([State v. H. & G.](#), 200 E.F. 85 (2001))
      c. No other choice ([State v. Pinocchio](#), 112 E.F. 8 (1996))

**Sample Rule 2** (from 2014 lab group):
A person commits the crime of criminal trespass if he enters or remains on or in property of another without effective consent if:

1. Other options to escape harm were available OR
2. Had intent to enter or remain on or in property of another without effective consent

Unless one has lack of capacity due to:

1. Does not recognize property line
2. Because of age should not have known that have entered private property
LAB EXERCISE #3: Rule, Case Illustration, and Application

Using the Illinois self-defense statute, People v. S.M., and the facts of the Bing case, draft the following:

- A rule that sets forth the standard a court will use when interpreting the requirement that a defendant have a reasonable belief that deadly force was necessary to avoid death or great bodily harm to oneself or another; and

- A case illustration that clarifies and explains how the court determined that S.M. reasonably believed that deadly force was necessary in the case of People v. S.M.

For this exercise, do not use any other case or address any other issue raised by the case or the statute.

Lab 3: Drafting a Rule and Case Illustration

**Subject:** People v. S.M.

**Summary:** Students will construct their rule from People v. S.M. in separate documents. Use IRAC.

(1) Thesis sentence - that should be our answer

(2) Causal term and result - what happens if those things are satisfied? This should be the answer to the question. Narrow question: reasonable belief. Then we will deem his belief to be reasonable, and if reasonable, then he will be entitled to use deadly force.
   a. Casual term here: **has** a reasonable belief
   b. “It is reasonable only if … ” Reasonably believed; reasonably believe - not a term of art.
(3) Rule - factors or elements? Try to construct a rule based on the case People v. S.M. about our issue:

   a. Elements test (all must be present -- when, only if, a court must find)? All elements met: “Therefore the court held that each element was met.”

   b. Or is it a factors test? Which are the most important to the court? Balancing test.

      i. For example:

         Issue (call of the question): Did Mr. Bing *reasonably believe* that deadly force was *necessary* to *prevent* his death or great bodily harm? (When is a person’s belief reasonable?)

         “Reasonable for the defendant to *believe* that deadly force was necessary,”

         or

         “A person is justified in using deadly force when he reasonably believes deadly force is necessary when:

            (1) there is avoidance of confrontation by defendant (warnings, fleeing, apologizing);

            (2) victim has the *ability* (physical characteristics; weapons) to harm; or

            (3) there is clear *intent* to harm by the victim”

         What would a court say if only two are present?

(4) Rule Proof (Explanation) - case illustration; “for example” what are the key facts of the case, and what led the court in that case to its holding.

   a. “For example, in the case of S.M. …” then “Further,” or “Additionally” for example; how did the ability to harm play out?; want to be detailed and fact specific.

   b. For example, in the case of S.M., the ability of the aggressor to cause harm was present when the boys threw things, pursued the defendant across the parking lot,
cornered the defendant, and continued to advance even after a warning shot. The
court thus held that this ability to harm made the defendant’s belief more
reasonable.

(5) Case illustrations with “intent” factor all go together
   a. All three cases applied to the single factor or element (v. analyzing each case by
      factor separately)

Student Objectives:
   1. Get something on paper - and quickly
   2. See how IRAC plays out

LP Program Student Learning Outcomes:
   ● Students can identify the essential components of a case
   ● Students can outline a rule
   ● Students can write a document that provides an objective legal analysis

TA Responsibilities:
   ● Have each student’s document open and switch between them
   ● Open IM chat with Professor Moran in Outlook
   ● Be supportive and look for struggling students
   ● Comment on student’s documents as they write; take Professor’s cues on who to help
   ● Professor note: provide Issue Statement to students so time can be spent on rule drafting

People v. S.M. 2015: Discussion Notes

Tried to avoid:
   - apologized
   - tried to retreat
   - wrestler
- V kept coming
- warning shot
- asked for help
- drinking
- older
- didn’t stand his ground
- short interval between shots
- appearance and conduct of victims
- boys threw stuff
- V’s not discouraged by gun
- no time to assess

Victim’s behavior (Intent to harm):
- advance
- wrestler (aggressive) (apt at fighting)
- drinking
- threw stuff
- kept coming after shot

De-escalation by D (attempt to avoid the confrontation):
- apology
- retreat
- ran away
- help call
- warning shot
- tried to avoid

Physical characteristics (ability to harm):
- wrestler
- drunk
Past Student Examples (2014):

Karen:

Issue
The issue is whether or not our client was reasonable in believing that deadly force was necessary, thus justifying his action when he killed Mr. Geller, under IL Self Defense Statute

Brief Answer
Yes, Mr. Bing was reasonable to believe that deadly force was necessary because he could not avoid the violent advancements of Mr. Geller, and because Mr. Geller was both capable of and intending to kill him.

Discussion
A person is justified in using deadly force when he reasonably believes deadly force is necessary. In determining whether a person’s belief is reasonable, the court must find that:

1. Defendant could not avoid the situation;
2. Victim was capable of causing great bodily harm; and
3. Victim intended to cause great bodily harm.

In the case of S.M., the defendant proved avoidance by yelling to the victims to stay away, yelling for help, apologizing, and attempting to flee the situation. The defendant showed that the victim was capable of causing great bodily harm because of victim’s relative size and stature and his use of objects as weapons. Defendant reasonably believed that the victim intended to cause great bodily harm because of victim’s pursuit of Defendant by chase and victim’s verbal threats.

As with the case of S.M., our client tried to avoid the situation when he apologized, yelled for help, and attempted to flee the situation. In both the S.M. case and ours, the Defendant was in a
prolonged “circular” confrontation with the victim in which verbal threats were made. Both cases showed an attempt to flee the confrontation, although escape was not successful in either situation. S.M. showed a relative size/stature difference between the victim and Defendant (victim was larger in stature and had an athletic build) and we see the same between Mr. Bing and Mr. Geller (Geller was 15 pounds heavier and a former cross-country athlete; our client does not proclaim to be athletic). Similarly, S.M.’s victim was in possession of objects which were used as weapons, and in our case, Mr. Geller was in possession of a knife, which he did use against Mr. Newton. Mr. Geller’s possession and use of the knife showed his intention and capability for great bodily harm or death.

***********************

Josh:

Issue

Was Mr. Bing reasonable in believing that the situation required deadly force?

Brief Answer

Yes Mr. Bing was reasonable in believing that the situation required deadly force.

Discussion

A person is justified in believing that the use of deadly force is necessary when:

(1) there is avoidance of confrontation by defendant (warnings, fleeing, apologizing);
(2) victim has the ability to harm; or
(3) there is clear intent to harm by the victim

In people vs. SM, the defendant attempted to avoid the confrontation by repeatedly warning the victims that he had the right to defend himself by showing his weapon, attempting to flee the scene, apologizing and asking for help. He did everything in his power to avoid the four victims and was justified in believing that his safety was at stake.
Mr. Bing did everything in his power to avoid the confrontation with Mr. Geller. Mr Bing apologized repeatedly and made it clear that he was not interested in a physical altercation. He was winded and at a physical disadvantage to Geller, and together with Mr. Newton, attempted to resolve the conflict but were unable to dissolve the situation. This is analogous to the attempts of SM in avoiding the four defendants.

The victims clearly had the ability to harm SM as they had him outnumbered, continued to advance upon him after he attempted to resolve the situation, were actively yelling and throwing things at him and appeared to be intoxicated beyond the point of reason.

Mr. Geller was physically a larger man than Mr. Bing. He was also a more athletic person when compared to the defendant. His physical stature in concert with his unwillingness to be reasoned with and his brandishing of a deadly weapon satisfies the element of the ability to harm. In SM, the fact that the defendant was outnumbered by the four advancing victims in a violent and unrelenting manner satisfies this same element.

The victims showed clear intent to harm the defendant by blatantly disregarding his pleadings and impeding his ability to put himself in a position of safety. They were not deterred by the defendant’s weapon, and continued to back him into a compromising situation.

Mr. Geller blatantly disregarded Mr. Bing’s pleadings, would not listen to Mr. Newton, and continued to advance upon Mr. Bing for an extended period of time. The five minutes of circling and the fact that Mr. Geller’s state of mind did not change impeded Mr. Bing’s right to bring himself to safety.

Mr Bing repeatedly attempted to resolve the situation. He attempted to avoid the conflict by warning the victims, attempting to flee, apologizing and asking for help. It was also made clear
to Mr. Bing that his attempts to dissolve the situation were futile. When he brandished the gun, the victims were not deterred in any way and continued to advance upon him in numbers.

Carter:
Issue
Under the Illinois’ self-defense statute concerning the use of force in defense of person (720 Ill. Comp. Stat. 5/7-1), did our client Jeffrey Bing possess a reasonable belief that use of deadly force was necessary in committing the act against John Geller?

Discussion
A person has a reasonable belief that use of deadly force is necessary when the person attempts to avoid the confrontation, the victim demonstrates an intent to harm, and the victim demonstrates an ability to harm.

Rule Proof
In the S.M. case, the court held the defendant demonstrated a reasonable belief the use of deadly force was necessary.

In order for a court to find the obligation to avoid the use of deadly force is met, the person must make every attempt to remove himself or herself from the situation, and refrain up to the very moment he or she reasonably believes because the threat is imminent, the use of deadly force is necessary. In the S.M. case, the defendant (S.M.) avoided confrontation by moving out of the way as the victim’s vehicle approached. Once the vehicle stopped, S.M. apologized to the victims for reacting in a startled manner. As the victims exited the vehicle, S.M. retreated. When the victims did not halt their advance, S.M. produced a gun which he waved into the air to warn the victims to back away. All four victims followed S.M. into a corner against a fence to which he responded by fleeing. Similarly in our case, Bing avoided confrontation by apologizing profusely to Mr. Geller, and moving away from him by circling as he advanced. When faced
with a knife from Geller, Bing removed a gun from his knapsack and waved it to deter Geller’s advance.

A court is more likely to find a person possessed the intent to harm if he or she has but does not exercise the opportunity to remove himself or herself from the situation, and if avoided or warned to stop by the victim continues to advance anyway. In the S.M. case, the victims’ intent to harm manifested as they were confronted with a gun, but advanced anyway. After the defendant fired a warning shot, the victims were not deterred and moved to surround and corner S.M. In our case, Geller revealed his intent to harm Bing immediately by physically beating Bing’s face until forcefully being removed by Newton. Geller responded by producing a knife and slashing Newton’s arm. He continued his assault by charging and attempting to tackle Bing.

In order for a court to find a person possessed the ability to harm, the person must have a significant physical or athletic advantage, or a weapon. In S.M., all four of the victims were physically bigger and more athletic than S.M.
LAB EXERCISE # 4: Organizing Your Legal Authority Case Chart Based on ALW Ex. 5B

After you have made a master case chart that allowed you to identify all the relevant factors and synthesize a rule based on those, you will need to move toward analyzing each factor separately. Many people find it helpful to create a chart for each factor individually at this stage because it ensures that the analysis has no gaps. Others prefer moving directly to an outline from the master case chart.

We will use this chart to analyze what types of facts satisfy each factor individually and to compare the relevant facts to Mr. Bing’s case to predict which factors might help him and which might hurt him. Copy this chart for each of the factors that you have identified.

Factor ONE – (name it)

<table>
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<th>FACTS about the factor</th>
<th>HOLDING about this factor</th>
<th>Additional REASONING about the factor</th>
<th>Analogies to or Distinctions from Bing</th>
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SYNTHESIZED RULE FOR FACTOR ONE:
Lab 4: Organizing Your Legal Authority

Summary:
Download the chart (based on ALW Ex. 5B) from TWEN. We will use it in both Lecture #4 and Lab #4.

Using the electronic copy, fill out the factors columns with the factors you identified in the S.M. case for when a court is likely to find a defendant’s belief that deadly force was necessary to be a reasonable one. Then fill out each box with the appropriate information regarding how that factor played out in each of the three cases below. Add additional columns if you think you have identified additional factors.

We will use these factors to create a synthesized rule for reasonable belief. Write your rule at the bottom of the chart.

Logistics:

- Students need to have their charts built and accessible on their laptops.
- They should already have the facts sections completed, but if not, they can continue to work on them during this lab.
- Reference ALW for a chart sample.

Lab Procedures:

- Students will work individually on their charts but may talk amongst themselves to discuss their rules.
- Professor and TA will make several rounds during the lab to check on their progress and assist in their work.

Notes:

- Refer students to ALW for what should go in each column (pp. 70-71, Second Edition)
- Select cases on the chart (not 10 if only 3 are useful)
- Try to construct some sort of description → general rule

- **Rules:** Avoidance of confrontation, e.g., wide range of how that might affect the case - what is the factor? How important is the factor? Take out the specifics of that case - create a rule about the factor.
  - Why pulled out separately? In the event of disagreement in the circuit

- **Facts:** Relevant facts

- **Holding:** What was the influence about the factor? E.g. This factor helped the court determine …

- **Reasoning:** If the court ‘waxes poetic’ about the factor

**Sample:**

We will use these factors to create a synthesized rule for reasonable belief. Write your rule at the bottom of this chart. (*This is the full case chart, ALW Ex. 5A, not the individual factor chart this lab uses, Ex. 5B.*)

<table>
<thead>
<tr>
<th></th>
<th>Facts</th>
<th>Avoidance</th>
<th>Warning</th>
<th>Victim’s ability/intent to harm</th>
<th>Intoxication</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>SM</td>
<td>SM shot 4 boys (killing 2) when they backed him into a fence in a unpopulated area.</td>
<td>SM repeatedly attempted to avoid the confrontation. He first apologized to the 4 boys and asked to be left alone. The boys continued to advance on him and began to back him into a fence in an isolated area behind the</td>
<td>SM warned the boys by brandishing a firearm and verbally telling them that he would use it if the situation required. This action did not deter the victims in any way as they</td>
<td>The victims in this case clearly had the ability to harm SM. They outnumbered him 4 to 1 and at least one of the victims was physically superior to SM. Boys were athletic, members of the football team and SM knew that at</td>
<td>The victims had been drinking and refused to take caution when the gun was produced or when they were verbally warned. They continued to advance on SM, throwing obscure objects and verbally instigating him.</td>
<td>trial court found him responsible for two counts of voluntary manslaughter and two counts of aggravated battery. Appellate court reversed stating that under these circumstances, SM held a reasonable belief that deadly force was necessary to prevent great bodily harm.</td>
</tr>
</tbody>
</table>
school. SM was eventually cornered by the boys who had formed a semicircle around him. He broke through the circle and began to flee the scene. He was chased by the four boys and eventually turned and shot.

least one of the boys was an experienced wrestler. The victims clearly had the ability to harm him without the use of a weapon. The intent of the victims is shown by their unwillingness to accept the defendants apologies or warnings that he had the right to protect himself. The fact that they continued to advance and cornered him should satisfy this aspect.

Moore

Defendant shot decedent after a series of arguments. Defendant returned to the scene and eventually shot after decedent refused to diffuse the situation.

Mr. Moore did not actively attempt to avoid the decedent. He returned to the scene on 2 occasions when he could have simply left the confrontation. He brought a

Mr. Moore first verbally warned the victim that he had a gun. The victim stated that he didn’t believe Mr. Moore who later returned

The victim in this case was physically a much larger man. There is no question that in a fair fight, Mr. Moore would be in trouble. However, Mr. Moore was carrying a deadly

All the men had been drinking and the defendant had shared several past experiences with the victim. Current arguments eventually turned into a confrontation about an

A jury in the circuit court found Mr. Moore guilty of voluntary manslaughter and the appellate court affirmed this finding. Mr. Moore’s belief that he needed to display deadly force
| Shipp | Defendant (Ms Shipp) shot and killed the unarmed decedent while he was advancing on her in a closed bedroom. | In this case, Ms. Shipp was confined in a bedroom when victim broke through the door and began to advance upon her. Defendant essentially was backed in to a confined space and was not able to flee the scene. | Ms. Shipp verbally warned the victim that he was not authorized to be that close to her and began to recite the terms of the restraining order she had filed against him. Ms. Shipp picked up the gun, cocked it and told the victim several years earlier in which the victim claims he was assaulted by Mr. Moore. The intoxication could have played a part in both the escalation of the confrontation and Mr. Moore’s decision to remain at the scene with the firearm. | was not warranted under these circumstances. |
decedent to, “Please don’t come any closer” but the victim continued to advance upon her with his hand in his pocket. Victim responded to this warning by stating, “If you want to shoot me, go ahead and shoot.”
did not know what, if anything was contained in the victim’s pocket and had every reason to believe that it was a weapon based on past experiences with the decedent.

SYNTHESIZED RULE:

In lab, we will turn the chart into an outline of the rule proof section of your memo so you may begin drafting. Refer to the template in your materials and to ALW Ch. 5, Part II for additional information about the outline.

Thesis statements

A person has a reasonable belief that deadly force is necessary when:
(1) victim is not deterred by warning
(2) victim physically superior
(3) has caused harm in the past
(4) person is outnumbered
(5) they are verbally threatened or assaulted
A person has a reasonable belief that deadly force is necessary if the victim is physically superior, has caused harm in the past, and continues to advance despite sufficient warning.

A person has the ability to harm when he is physically superior; has caused harm in the past; possesses a weapon; and continues to pursue despite a serious warning.

A person has the intent to harm when:

A person attempts to avoid confrontation when:
Now that your case charts are complete, you are ready to refine your analogies, outline your memo, and firm up your conclusions regarding each of the factors. A good outline can take many forms, but the most typical is the Roman Numeral style shown in ALW Example 5C. This form is the most typical because most courts expect to see briefs organized in this form. You, however, may use any form that works for you.

In this lab, we will turn the information in your charts into a thorough outline of your memo that will essentially operate as your first draft. Look at ALW Example 5D as a starting point for content, organization, and depth.

Please create an individual outline of your memo in your lab’s shared drive.

Each section of the outline will deal with an individual factor. The first part of each section will deal with the law. The second part of each section will use reasoning by analogy to predict an outcome for each factor.

After you have outlined and predicted an outcome for each factor, you should outline a brief introductory section and ultimate conclusion.

Lab 5: Organizing to Outlining to Concluding

(1) Application (IRAC)

(a) Rule-based reasoning

(i) Statutory language - this is what it means, and does my client fit or not fit this statute. “No motor vehicles permitted in the park.”

(1) How do we interpret? Plain meaning of the word - ‘motor vehicle’

(a) Things in a list -
(2) How do we know the reason behind the statute? Ask the legislature. City Council minutes, e.g.

(3) Canons of construction - tools we use to interpret meaning. Rule Against Surplusage.

(b) Analogical reasoning (This is Memo 1): the court has told us what it means; how you make a prediction about your client’s likely result under a particular element by drawing analogies to and distinctions from prior cases

(i) Describe the prior cases

(ii) Rule application: will show comparisons between our case and the prior cases

(2) Concluding

(a) The court will find that he reasonably believed that the use of deadly force was necessary

(i) Please not guilty. Why? We are comparing the cases … SHOW THE ANALOGIES!

(3) Outlining

Criminal litigation: options for your client

- Plea bargain - make a deal with the DA
- Plead guilty
- Plead not guilty

How do we know if the news is good or bad for Bing?

Factors or Elements?

- Feels like it should be elements
- None of the courts itemized them as elements
- Pretty likely we’re dealing with factors
Courts are just considered the various facts in the cases and they gel out as factors.
Factors are a continuum - weighs for or against a particular party either weakly or strongly.

- The ‘history’ cluster in only some of the cases - makes you think they’re factors
- 3 factors (the 4th is the history facts which fit into pretty well into the victim’s intent and ability)

Complete analysis:
- Rule proof
- Rule application for each factor

Factors: What does the continuum consist of? The writer has to tell the reader what the rule is, and how far along we are on the spectrum.

- When it comes time to apply, you have two possible approaches - rule-based or analogical reasoning
  - Analogical: how are the intent-based things similar or dissimilar
    - How things are similar in a legally significant way - how are they similar, what makes them analogous?

(1) Intent to Harm

People v. S.M. and our case: how are they similar?
- In People v. S.M. (the factor): demonstrations of intent - physical (in one case) and verbal (in another case)
- In our case (the factor)
  - Victims in S.M. backed defendant into a corner
  - Distinguished with Bing, who was never backed into a corner
    - In S.M., it was backing the defendant into a corner
    - In Bing, it was circling
But can this actually be analogized?
  ○ Bing couldn’t retreat any further
  ○ S.M. was backed into a corner

People v. Shipp
  ● Continued advancement even in the face of a weapon
  ● Both aggressors burst through other people trying to get to the defendant
  ● In both cases, the victims indicated one person or the other was going to die
  ● Victim undeterred by weapon

People v. Moore
  ● Presence of onlookers

3 cases; 3 situations in which the victim has demonstrated a clear intent to harm the defendant; similarities and differences. What’s our conclusion?

→ Does the factor favor or hurt Bing? Weigh how the factors are similar to Bing or dissimilar.
  ● Identical facts between Bing and Shipp and S.M., can Moore be weighed less (the victim was rushing at Moore)
    ○ Moore: the Intention factor favored the defendant even though he lost on another factor, Avoidance

→ Do we think the Intention to Harm factor favors Bing?
  ● Drawing specific comparisons between Geller and the aggressors in the other cases (we know that Geller was trying to kill Bing)
  ● Yes. We can conclude the factor favors Bing.

→ Slam dunk for Bing?
(2) Avoidance of Confrontation

- S.M. and Bing: how are these cases similar or different? Very similar:
  - S.M., he apologized; Bing also apologized
  - Brandishing of the gun
  - Verbal warnings
- Shipp: she backed up until she was trapped - analogy is “effectively trapped”
  - Bing was also effectively trapped because he was a paunchy, slow fellow
- Shipp tried to recite the terms of the restraining order
  - Similarities to Bing
- Moore: retreated but came back
  - Left, got a gun, and came back
  - Moore lost because he didn’t run; distinguished to Bing who couldn’t run
    - Effectively trapped

(3) Ability to Harm

- S.M.
  - Both cases,
  - Outnumbered vs. just one
    - Different - 4-to-1
    - Try to draw an analogy
      - 4 people or a guy with a deadly weapon
      - Presence of bystanders

- Shipp
  - Both athletes
  - Both larger
  - History - done all those things before
    - Anything like this with Geller? Yes.
- Shipp - big guy; certainly had the ability to cause harm

- Geller
  - Aggressive nature
  - Past assault on a roommate
  - Has the ability to cause serious bodily harm

- Moore
  - **Distinguishing** this case - differences are more important than the similarities
  - One guy without a weapon, and a whole bunch of people pulling him off
    … most he could have done, punch him and get pulled off again
    - In our case, nothing preventing Geller from using his gun
  - Court seemed to say the victim couldn’t really hurt the defendant
    - Victim did not have gun (but like the other cases)
    - What about crippled hand
      - Court rejects that, so not a fact - we can ignore

→ Does this factor help or hurt Bing? Just looking at Moore, a little hesitation. But no question if Geller had caught Bing, he could have killed him.

**Counter Analysis:** (not applicable in this memo)
- There could be comparisons that might actually hurt us
  - It could be argued that these factors go the other way (possible counter-comparisons the other side could draw)
  - But, … we will explain them away by … explaining why ours is better

**Once we’ve gotten this far, we are ready to outline … (get the ideas in the right order)**
- Follow the outline from ALW: p. 75
  - Take the fields that are in our chart, and plop them right in order
■ Introductory paragraph (thesis)

(1) What is our ultimate conclusion: A court will likely find … Bing reasonably believed deadly force was necessary …

(2) Statutory reason that reasonable belief came from statutory language that governs this: little snippet - in order to succeed in a claim of self-defense, he must reasonably believe

(3) Needs to contain the synthesized rule that comes from all of these cases

■ Factor 1: (choose a factor)

(1) Rule Proof:

(a) Thesis - synthesized rule for the factor: Under the law, … synthesized rule for the factor; synthesized statement of the law

(b) Case 1: Facts, holding, reasoning (the relevant information from the precedent cases (do not need to know anything about Bing))

(c) Case 2:

(d) Case 3:

(2) Rule Application:

(a) First sentence: thesis sentence - whether the factor hurts or helps Bing

(b) Case comparisons

(i) “Like this case,”

(ii) “Like this case”

(iii) “Unlike this other case”

■ Factor 2: rinse and repeat …
LAB EXERCISE #6: Drafting a Complete Legal Analysis

In this lab, you will convert your outline into a draft of Memo One.

Please create your draft in your lab’s shared drive so that your Professor and TA can access it. We will work with you to ensure that your memo follows the required structure and contains all the necessary components.

After this lab you should understand exactly what the memo should look like, so you can spend your remaining time editing and polishing it.
LAB EXERCISE #7: Guided Research

During this lab, Westminster Law Library research librarians will work with student research groups and guide you through some preliminary research on Westlaw and Lexis.

They will focus on:

- generating search terms,
- choosing databases,
- narrowing results,
- using search results find both later and earlier cases, and
- updating your research.

They will also teach you how to use the research tracking and filing tools available under each of the two systems to keep your research organized and easily accessible.

You are free to begin researching your case using these platforms before the lab, but you are also free to wait until after the lab session.

Please bring your laptop and problem materials to the lab, and make sure that you are able to access both Westlaw and Lexis before the lab. If you are having difficulties accessing either platform, please contact the student representatives.
LAB EXERCISE #8: Client Interview

This exercise will be performed in pairs. One student will act as an attorney and one student will act as the client. The facts and separate instructions for the attorneys and clients will be distributed at the lab session.
LAB EXERCISE #9: Research Status Conference

In many law offices, a junior attorney will have a number of status conferences with senior attorneys while researching a client matter. This exercise will simulate one such meeting that frequently occurs relatively early in the research process: a team meeting in which the junior associates tell the partners what they have found before they commit to a position and draft a memo.

In this lab, you and your assigned research partners will have 30 minutes to present your research results and a preliminary analysis of your case, based on your Module Three Assignment. Bring enough hard copies of your work for everyone.

Your partners are relying on your research and analysis to decide how to advise the client. They will question you as attorneys in a law office would. Expect to have your knowledge of the key cases thoroughly examined. You must know relevant dates, jurisdictions, and subsequent histories. You will have to defend why you chose to rely on certain cases and not others.

When you present your rule, be prepared to discuss whether there are potentially opposing versions of the rule.

Then be prepared to discuss whether the client meets every factor or element that you have identified. You may be asked about possible opposing arguments.

Your performance in Lab 9 will contribute to the 10% of your grade in the course for research and preliminary analysis.
LAB EXERCISE #10: Memo Two Writing Workshop

This lab is working time for you to revise, edit, and polish your draft memo and to ask questions of your Professor and TA. Before this lab you should have at least a rough draft of every section of your memo. If you have one section more completely drafted, you will be able to ask more specific and useful questions.
LAB EXERCISE #11: Live Grading Conference

Live grading benefits both the student and the professor by clarifying problems in the writing project, providing instant feedback, and allowing the student to participate in the work's evaluation. Although it can be intimidating initially, most students ultimately find that the benefits of live grading far exceed those of receiving detailed written comments and having to get clarification later.

For live grading to be most effective, some structure is required. Following are instructions on how to prepare for our conference and some additional information on what will happen during the conference.

Logistics

Each conference will be scheduled for 30 minutes. Please help me stay on schedule by letting me know when you arrive for your conference even if another student is still in my office. A preliminary schedule will be posted on TWEN. If you cannot make the time that you are scheduled, you will need to trade times with someone in your lab group.

How to Prepare

In preparation for your conference, reread your memo as if you were a stranger seeing it for the first time. Try to respond to it as if it were not your memo. The objective is to see what the memo actually says, as opposed to what you thought it said or what you meant it to say as you were writing.

While you are rereading the memo, make some notes in the margins to record your observations. Bring this copy of the memo with you to the conference. Also bring something to write with.

When you have finished reviewing your memo from this reader perspective, score your memo on the grading rubric sheet in your course pack.
During the Conference

When you arrive I will not yet have read your memo. (Bonus question: what tense is the preceding sentence in?) For the first few minutes I will skim your memo.

After that, we'll start at the beginning of the memo and discuss the major issues in the paper. This is your opportunity to explain your thinking and to ask me questions. We will discuss what is and is not working effectively. We will explore why you handled particular substantive or stylistic issues the way you did, and we will talk about ways to handle those things in future memos. You should take detailed notes during this part of the conference, using the attached form or something similar.

**My comments will be illustrative, but by no means exhaustive.** In other words, I will focus on concepts and point out some specific examples to help illustrate those concepts, but I will not point out every flaw in your memo. It will be your job to learn from these illustrations and incorporate the feedback into your next assignment.

Next we’ll go over the grading rubric together, and I will score you in each of the categories. I probably won’t have your citation score yet, and won’t be able to give you a final score. At the end of the conference I will give you my marked up copy of the memo. I will keep the rubric sheet for the time being.

After the Conference

After I get your citation score from the TAs, I’ll calculate your final score and return the grading rubric to you.
During this conference, you will need to take extensive notes (both below and on your Memo). While the “template” provided below is designed to help you take notes, you may of course use any format you choose.

Overarching / Initial Comments:

Stylistic / Writing Comments:

Substantive Comments (Content / Organization / Analysis):

The Most Important **Substantive Concepts** We Discussed During this Conference

(before leaving this conference, you will tell me what you think – and we will then discuss your thoughts):

1) 

2) 

3)
LAB EXERCISE #12: Oral Report to Mentor

**Background:**

Although it is fundamental for attorneys to develop their ability to communicate an argument or legal analysis in writing, it also is vital in many circumstances to be able to articulate that legal analysis orally. This assignment is designed to prepare you for a frequent occurrence in a law firm: a face-to-face meeting with a partner to give an oral summary of your final analysis.

**Scheduling:**

The oral reports will ideally take place during the weeks of November 2 and November 9, during the same time frame as Lab 11, but may take place at another time if your Mentor’s schedule requires it. Please contact your Mentor ASAP to set up a time to go to the Mentor’s office to make this report.

As soon as you have made this appointment, please e-mail your Senior Associate with its time and date and your Mentor’s e-mail address. We will send your Mentor some separate information.

**Feedback:**

Attached is the critique sheet the Mentor will use as a guide to give you oral feedback. Your Mentor will not be grading your performance; you will receive credit on a pass/fail basis for completing the assignment.

Please have your mentor email the attached feedback sheet to your Senior Associate with any additional comments upon completion of the report so that we can record your completion of the assignment.
Instructions:

1. You will have a total of 15 minutes with your Mentor (or another attorney) for this exercise. Be prepared to talk for approximately ten minutes of that time, allowing for interruptions from the Mentor to ask questions. The Mentor will use the remaining time to give you feedback on your report.

2. Your oral report should focus on whether your client would satisfy the Executive and Management Personnel exception to the Colorado statute voiding covenants not to compete. Presume that your Mentor has not yet read your memo, but instead has asked you to summarize the analysis briefly so that the partner may report back to the client during an imminent client meeting.

3. You need not make copies of the cases to give to the Mentor, however it is advisable to bring copies of the cases with your notes to the session so that you can refer to them as necessary to answer in-depth questions from the Mentor about specifics.

4. Prepare for anything and dress for success. Some Mentors may grill you on the details of the cases and challenge your analysis strongly, treating you like a real associate. You should be prepared to present yourself as such.

5. You may not sit in on any of your classmates’ oral reports. However, you are allowed and encouraged to collaborate in preparing for your own oral report. In fact, doing a “dry run” with a fellow student is recommended.
Critique of Oral Report

I. Structure of Presentation
   A. Clarity of Presentation.
      Organization in logical manner.
   B. Scope of Presentation.
      Discussion of major issues.
   C. Allocation of Time.
      Effective use of time.

II. Delivery and Style
   A. Speaking Style.
      Speed of delivery.
      Volume and inflection.
   B. Body Language.
      Eye contact.
      Posture and gestures.
   C. Use of Notes.
      No excess reliance on notes.

III. Presentation
   A. Support of Argument.
      Use of legal authority.
   B. Application of Law to Specific Fact.
      Discussion of specific facts.
   C. Responses to Questions.
      Responsive answers.
      Support for answers.
      Return to presentation.
LAB EXERCISE #13: Client Counseling

For this simulation, you and your research partners will play the role of co-counsel for the client, played by your TA. Your job is to interview and counsel the client about the research and analysis you completed on the issue of the noncompetition agreement with his employer. You and your co-counsel will counsel and interview him during a 30 minutes simulation.

Your goals are to:

- Inform the client regarding Colo. Rev. Stat. § 8-2-113 and the executive/management personnel exception and how a court will likely analyze these authorities, as well as how they apply to his situation.

- Counsel him about the likelihood of success if his employer sues him to enforce non-competition agreement. In doing so, counsel him about his options going forward.

- Receive and record any additional information that the client might have regarding the reasonableness of the noncompetition agreement he signed.

- Establish and cultivate a professional relationship with the client such that the client feels comfortable to provide further information and confident of your ability to represent his interests effectively.

To prepare, review your research memorandum, as well as the reading regarding client counseling skills.

You should discuss and prepare with your partner a short agenda to follow in the interview that highlights each of the points you want to make during the conference. One way to organize the agenda is to follow an outline that sets forth “Beginning,” “Middle,” and “End” points. For example, you should think about: (1) the beginning as introducing yourself and setting the stage; (2) the middle as providing the legal research cogently and asking relevant questions to help you go forward with your next assignment; and (3) the end as wrapping up, seeing if she has any questions, and working collaboratively with him in discussing next steps.

After the conference, please complete the attached post-simulation self-assessment sheet and submit it to TWEN by noon on the day after your lab. The client and I will complete the evaluation form attached at the end of this document.
POST-SIMULATION ASSESSMENT FOR ATTORNEY:

Student: _________________________

Please answer the following questions and provide additional information on additional sheets if necessary.

1. Do you believe you accomplished all of the objectives set forth in the assignment sheet? Explain, including details of any particular success or obstacle that you encountered.

2. Did you introduce yourself and establish a rapport with the client? What strategies did you implement to establish a professional relationship and encourage trust?

3. Did you provide all of the necessary information you set out to inform him regarding the noncompetition agreement issue? Were there any reasons or problems that prevented you from doing so? What were particularly effective strategies that you employed or particular obstacles that you faced in implementing those strategies?

4. Were you able to elicit relevant information from the client regarding the potential reasonableness of the noncompetition agreement? What were effective questions that you asked that garnered particularly helpful information?

5. Did you collaborate with the client about next steps and counsel him about the potential risk or likelihood of success of certain outcomes?

6. What was the most effective part of the counseling session? What was the least effective and how would you change it for the next time you counsel a client?
# EVALUATION SHEET OF THE ATTORNEY

Student: ___________________

1) **Counseling Preparation:** Judging from the performance and the apparent strategy, how well-prepared did this attorney appear to be?

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<td>(Good)</td>
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2) **Case Analysis:** How well had the attorney analyzed the case, from both the legal and non-legal perspectives? Did the attorney recognize and appreciate the strengths and weaknesses of the opposition and convey this analysis appropriately to the client?

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3) **Demeanor and Professionalism:** Did the attorney establish the foundation of an effective professional working relationship with the client?

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<td>(Good)</td>
<td>(Very Good)</td>
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4) **Performance in Asking and Answering Questions:** Was the attorney able to provide information to the client effectively? Did the attorney ask questions seeking relevant information?

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5) **Summarizing and Next Steps:** Was the attorney able to conclude by summarizing the necessary points? Did the attorney work collaboratively with the client to discuss options and potential next steps for the client?

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LAB EXERCISE #14: Cover Letters

As we transition to spring semester, it is time to starting thinking about persuasion, and not just description.

Some of the most important persuasive writing you will ever do will be the cover letters you send to potential employers. Make no mistake, cover letters are marketing pieces meant to generate interest in you as a potential employee and persuade the employer that her organization would benefit more from hiring you than the next person.

For this lab, please bring a cover letter for yourself for a particular job or type of job that you want. Please bring several hard copies of what you consider to be a complete letter to your lab, and also post it in your lab’s shared drive. We will workshop these letters as a group during the lab so that all of you can go on the job hunt with the most persuasive materials available.
SPRING SEMESTER
LAB EXERCISE #1: Rhetorical Analysis

1. Review the passage below. With your lab partners, identify and write down how the author uses ethos, pathos, and logos to persuade his audience, and evaluate the effectiveness of his use of each technique.

Re: Letter From A Denver Classroom
Dear Professor Moran,

As the weekend draws near, I would like to make one last-ditch effort in attempting to convince you to push back the due date of assignment 3 to Tuesday in response to the Super Bowl being this Sunday. Once broken down, the decision is really a simple one.

There is no denying that if we are expected to turn the assignment in on Monday, the overall quality of our work will suffer. This is an inevitable truth. As a result of the game, the overwhelming majority of us will be too intoxicated, too full, too depressed, too elated or some unfortunate combination of the four, to produce the high level of work that, surely, we are capable of. My fear is that our papers will not only lack creativity and thought-provoking argument, but (and perhaps most importantly) it will contain an unusually large number of grammatical errors. I know that, as a professional editor in your past life, you greatly dislike grammatical errors.

Next, I would like to reply to your earlier conviction that by turning in this assignment on Tuesday, as opposed to Monday, there may be grave consequences in regards to the schedule. While I do not doubt your superior knowledge of our upcoming agenda, I believe you may have jumped to this conclusion in haste. A Tuesday due date should have little-to-no bearing on how the rest of our semester plays out, primarily because we have no class on Tuesday. In addition to that, discounting ICW exercises, we have no other assignments due for a number of weeks. I understand that pushing the due date back one day may mean waiting one extra day in which the assignment is returned to us graded, but I am confident that this is a sacrifice most of my classmates are willing to make.

At this juncture you may be thinking that I am an outlier; just a fanatical football fan who doesn’t represent the sentiments of the rest of the class. You may be thinking that not everyone truly cares about the game on Sunday, and that I’m making a big deal out of a trivial matter. You may be correct. However, Super Bowl Sunday is about much more than just a football game. Super Bowl Sunday is a holiday celebrated by all types of person. For most, Super Bowl Sunday is a time to gather with friends and family and not only celebrate the annual finale of a great sports season, but to celebrate good times. Some say Super Bowl Sunday is 50% Thanksgiving, 50% Fourth of July, and 100% fun. Is it really fair to make us write and edit a paper while we could be making lifetime memories during an occasion that comes once a year?

Lastly, let us not forget the sacred ideal that lies at the very heart of our American legal system. An ideal revered by lawyers of all ages, shapes, sizes, genders and colors: the compromise. By changing the due date for assignment 3 to Tuesday, you are engaging in the art of compromise. So, let this serve as a model compromise for future generations of LP students to gaze upon and learn from. In closing: do it for the children.

God Bless, and Go Broncos.
Sincerely,
Nathaniel J. Reed
2. Review the response below. With your lab partners, identify and write down how the author uses ethos, pathos, and logos to persuade his audience, and evaluate the effectiveness of her use of each technique.

Dear Mr. Reed and Fellow Brilliant Students:

The Superbowl. An American tradition, showcasing the very best our athletes and advertisers have to offer. The very best that we hope for in ourselves. That magical Sunday afternoon in February, honored by all: high and low; rich and poor; man, woman, and child.

Imagine it now: The hiss as you pop open that bottle of cold brew, the clink as you toast your buddy, the soft warmth of the sofa as you fall back to fully immerse yourself in the greatest show of the year. You let out a contented sigh, knowing that no cloud mars this perfect moment, no work weighs upon your shoulders, your conscience as clear as the bright blue sky over the Mercedes-Benz Superdome. All this because you finished your brief before 4:30.

It's done! The relief, the joy, the pride of accomplishment! It isn’t turned in yet; oh no, you'll leave yourself Monday morning for a final proof, having given yourself almost a full day to clear your mind so you can read it fresh – as you have so often promised yourself you’d do. Finally, you have lived up to the expectations you have set so high for yourself.

And you know you did the right thing. Nobody can do their best work bloated, hung over, and emotionally drained by the most important sports event of the year. You’ve already bought the Cheetos, wings, and pony keg. Not to mention, this is a golden hook-up opportunity. You’d have been a fool to leave yourself work to do when you know you’ll be seeing that cute neighbor. You knew the writing was on the wall. Leaving the brief for Sunday night or Monday would have resulted in a crumpled, nacho-cheese smeared, beer-soaked disaster. Thank goodness you finished early.

Over the many, many years I have shepherded new lawyers through the birth pains of becoming excellent legal analysts and writers, I have heard many pleas for extensions, all of them for excellent reasons, though none articulated with such passion and persuasion. Some I have granted, some I have denied. Never has a denial worked out badly. Never has a grant worked out well. Instead, they have resulted in essentially losing the first day of a new problem (despite all student
promises to the contrary), pinched schedules, disorganization, chaos, and the
destruction of budding legal careers.

And what of your peers, those who have already worked ahead in anticipation
of this very event? An extension to them is essentially a forced day of extra labor,
occaisioned at the request of those whose priorities they might well consider
imbalanced. Is that not punishment to those most deserving of reward? How can I, a
devoted teacher, wreak such educational injustice?

I can not.

But I sincerely applaud your effort.

Respectfully yours,

Suzanna Moran

3. With your lab partners, discuss which piece you found more persuasive, and why.
Lab 1: Rhetorical Analysis

Material:
Logos: appeal to logic or reason
Pathos: appeal to passion or emotion
Ethos: appeal based on the character of the speaker

Letters:
- What are the hidden assumptions?
- What are the rule-based arguments?
- Theory? Theme?
- Casting a wide net to arouse the reader’s sympathies - the emotional appeal bolsters his arguments.
- What was most effective?

Letter 1:
- On the whole, did you find it persuasive?
- Audience: Professor Moran … clearly, different impact on different audience
- Persuasive? What worked?

Second paragraph: states facts expressly - factual premise has to do something with the state people will be in on Super Bowl Sunday. So what is the rule he suggests?
- Major premise: You want your students to do the best work
- Minor premise (this is the one you want to state): We won’t do our best work if you don’t give us the extension
  - Can the Professor argue with his premises? Yes. She can argue with whatever she wants. Two prongs of possible attack: idea that Prof. wants quality work - hard to attack; that SB Sunday = drunken mess
    - It’s not a given that Super Bowl Sunday = drunken mess
- Conclusion: Therefore, give us the extension
Pathos and buried ethos as well (credibility in the writer researching about Professor’s past career as an editor, therefore he should be trusted (adding the pathos to Professor’s ego as a professional editor).

Underlying rule - shared assumption is extensions should be granted if it won’t have any bad effect/hurt the schedule. Can Prof. make a counter-argument to that? Yes. What might her rule be: extensions have importance that go beyond sticking to the schedules (major premise); there is an impact to the schedule that he’s not thinking about (minor premise).

Can you attack the shared assumption (that may not be stated)?

Fourth paragraph: what kinds of tools does he use to stir up that emotional response in the Professor? American holidays … trying to turn SB Sunday into an American holiday that the Prof. should revere. Lots of pathos, but is there actually a logical argument in this as well? **Why should I care?** Ask this when you’re looking for the rule piece. Can Prof. disagree with

- Major premise: Holidays should be celebrated
- Minor premise: Super Bowl Sunday is a holiday
- Conclusion: Therefore, Super Bowl Sunday should be celebrated

Last paragraph: you should model compromise for your students (logical argument)

- Compromise is an important value
- Compromise takes precedence over other values
- Therefore, you should compromise and grant an extension

Letter 2:

- Tools used by Professor Moran: imagery; character (using character as a storytelling technique to evoke pathos)
- Did the Prof. adequately address the arguments that he raised?
  - Did not address the compromise issue
• Prof. acknowledges what is important to the student - the Super Bowl
• Anything persuasive? What are the logical arguments?
  ▪ Logical syllogism? Rule or fact? Arguments:
    • Quality of his work
      o You want to do your best work
        ▪ Hard to disagree with this Major Premise
      o You can’t do your best work given the kind of shape you will be in
        ▪ Can attack this Minor Premise
        ▪ Flaw in this argument: disagree factually?
      o Therefore an extension won’t help
    • Enjoyment of the game - pleasure of an unencumbered SB
      o You want to enjoy the game in your most relaxed happy state
        ▪ He can’t argue with that
      o You can’t enjoy the game if you have work left to do
        ▪ He can argue with that but it’s tougher … it is assailable (“Can I attack your assumption?” “Can I attack your factual assertion?”)
      o Therefore, you should finish before the Super Bowl
    • You will feel good about yourself
      o Living up to your own expectations - sticking to the schedule
      o Granting an extension will not help us stick to that schedule
      o Therefore, granting an extension will not make you feel good about yourself
    • Counter-argument to the quality of the work
      o Everybody wants the best quality work
      o (He says an extra day would yield that but) Finishing early will yield the best work
Therefore, we should not grant an extension and finish a day early

**Granting an extension**

- We want things to work out well; extensions should be granted if it won’t impact the schedule
- Extensions typically work out badly and there will be an impact on the schedule (failed to state the Minor Premise in this paragraph; failed to give the facts that support this Minor Premise)
- Therefore, we shouldn’t grant extensions

**Fairness** - what kind of argument? Pathos and logos; some ethos. Why do we care? We should do what is fair to everyone.

- Logical premise is we want to be fair to everyone
  - Factual premise is extension = an extra day of labor
- Granting an extension would be unfair to others who have worked ahead
- Therefore, we should not grant an extension

**Persuasiveness of Both Letters:**

- Make the logical argument in a legal brief, state and prove your rule
  - But you can still use policy
  - Can use ethos and pathos

**Main points:**

1. Not all logical arguments are obvious. Job as lawyer to ferret them out to then attack them. Also important to know your own assumptions so you know where your weaknesses are …
2. Logical argument by itself doesn’t have much weight. A lot more effective when combined with pathos + ethos.
LAB EXERCISE #2: Guided Tour of Client Materials

This lab may take place during a makeup class for the MLK Day holiday, rather than during individual lab sessions, depending on the labs schedule this semester.

During this lab we will go through all the materials for the spring case, identifying all the parties, facts, claims, and the bases for the motion for summary judgment and opposition thereto. The lab will also act as a basic civil procedure refresher on the litigation process and summary judgment standards.
LAB EXERCISE #3: Drafting: Persuasive Rule Proof and Rule Application

Study the materials below and consider the questions posed at the end. During our next lab you and your lab partner(s) will write a short argument (rule proof and application) based on these facts and cases.

FACTS
Yvonne Hardy, an employee of Tri-State Fuel Co., was driving a fuel tanker truck loaded with an expensive and highly flammable grade of oil. She had been following a pickup truck filled with pumpkins for several miles on a two-lane highway when the latch on the back of that truck suddenly came loose, spilling pumpkins on the right side of the highway. The driver of the pickup immediately pulled over. Hardy swerved into the left lane to avoid the pumpkins, forcing a car driven by Ted Hansen off the road. Hansen, who was coming from the opposite direction in the correct lane, suffered severe injuries.

Hansen sued Tri-State for negligence and claimed that Hardy (and thus Tri-State) was negligent per se under State Code § 98.01. Hardy testified at trial that she had driven fuel trucks for eight years. She stated that she did not think she could maintain control of the truck if she struck the pumpkins and that she did not have time to stop. She also testified that there was an extremely narrow shoulder on the right side of the highway and that it dropped off sharply into a small river valley. She said she had reason to believe the truck would explode if she went off the road or lost control, and that she did not see Hansen’s car until just before he drove off the road. The driver of the pickup truck testified that he recovered eleven pumpkins, ranging from fifteen to twenty pounds in size, from the road. Other pumpkins shattered when they struck the road, he said, and several cars ran over unbroken pumpkins after the incident. The trial court found Tri-State negligent per se and awarded Hansen $175,000 for his injuries. Tri-State has appealed.

LAW
State Code § 98.01(c) provides:
Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:
(c) When an obstruction exists making it necessary to drive on the left half of the roadway.

The highest appellate court in the state has decided the following cases:
Meekhof v. Golden (1939)
Meekhof brought an action against Golden for injuries Meekhof sustained when the automobile Golden was driving forced Meekhof off the road. Golden, who was intoxicated, was in the left lane of a two-lane highway at the time. The trial court awarded Meekhof $6,100 in damages, and we affirm. State Code § 98.01 requires all vehicles to be driven on the right side of the roadway except in specifically defined situations. The obvious purpose of this statute is to protect persons
and property on the left side of the roadway. Golden’s violation of the statute constitutes negligence *per se*, and the trial judge so instructed the jury. None of the exceptions stated in the statute is applicable here.

*Yerrick v. Boughton* (1956)
The appellee, Cecelia Boughton, was seriously injured when Bruce Yerrick's Model T automobile, which was fast approaching hers head on in the same lane, forced her off the road to avoid an accident. Boughton brought an action for negligence to recover for her injuries and argued that Yerrick's violation of State Code §98.01 constituted negligence *per se*. The trial court agreed and awarded judgment to Boughton. Although Yerrick admitted that he was driving in the left lane of the highway, he argued pursuant to subsection (c) that an obstruction made it necessary for him to drive in the left lane. The obstruction was a bumpy and somewhat uneven forty-yard stretch of the right lane, which Yerrick told the trial court "might have severely damaged my antique car." We agree with the trial court. The purpose of section 98.01, as we said in *Meekhof v. Golden* (1939), is protection of persons and property on the left side of the roadway. There is no obstruction within the meaning of section 98.01(c) unless there is an obstacle that prevents, or is likely to prevent, the driver's safe passage on the right side of the roadway. In any case, it is not intended simply for the convenience of drivers who claim for financial or other reasons that their vehicle is somehow special. A bumpy and uneven road in itself does not meet that test. Affirmed.

*James v. Strange* (1964)
Alton Strange was driving about twenty miles per hour on a two-lane street in a residential neighborhood when a child suddenly ran in front of him, chasing a ball. Knowing he did not have time to stop, Strange swerved suddenly and sharply into the left lane. In so doing, he crashed into Kristine James's vehicle, which was traveling in the opposite direction. Neither the child nor James was injured. James sued Strange for damages to her vehicle, arguing that Strange was negligent *per se* under State Code § 98.01. Strange admitted that he did not see the other car until he struck it. The trial court dismissed the suit. This court has often stated that section 98.01 is designed to protect persons and property on the left side of the roadway. *E.g., Yerrick v. Boughton* (1956). Drivers have a right to believe that the statute will be observed. At the same time, it would offend the conscience to force a driver to choose between killing a child and subjecting himself to a negligence lawsuit. Section 98.01(c), which permits travel on the left side of the road when an obstruction makes such travel necessary, encompasses small children who run into the roadway. There is no negligence *per se* here. Affirmed.

**TASK**
In preparation for lab, consider the following questions in detail. During lab you and your lab partner(s) will write a short argument (rule proof and application) based on the facts and cases above.

1. Whose argument will emphasize the general rule in the statute, and whose argument will emphasize the exception?
2. What facts will each party emphasize, and why?
3. What policies will each party emphasize, and why?
4. Affirmatively state each party’s position in one sentence.
5. What arguments support each party’s position?
6. How will you synthesize the cases supporting each argument?
Lab 3: Draft Proof and Application

Theory of the Case:
Clients Facts + Law you choose to pursue = theory of the case.

Theme of the Case:
Whole case in a nutshell.

Defendant for the case:
What’s his theory? Procedural theory: no authority.

Think of 2 things:
1. Your theme can be procedural (SJ standard, etc), substantive, or social values/public policy/fairness. Always tie back to social values.
2. Theme should not be controversial. Everyone should agree on it.

All Semester: use logos in a persuasive manner.

Rule & Application. First, figure out what the rule is based off research.
Lab 3: statute and 3 cases. Find the rule and apply to your client.

Step 1: persuasive rule (broad or narrow depending on what is best for your client). THESIS. Persuasive thesis—first sentence. ** Remember, rule has elements/factors, exceptions, and causal term/result. [person with the better rule will win].

Step 2: Law, Statutes, Facts from case law. Rationale in persuasive writing is way more important. Below is a straight up LOGOS argument.
- If we have a good case that helps our client, explain the facts so it is easily analogous to our case. Describe holding in these cases to encompasses as much as we need it to (broad holding).

- Good cases = broad holding.
- Good facts = sound similar to our case. Lavish on the facts if they help; embellish on good facts; spin the words.
- Rationale of good cases = same thing.
- Bad cases = narrow holding.
- Bad cases & their facts = emphasize distinctions; mike it dull
- Bad cases rationale = don’t even bring up. Why give court any reasoning to think that bad case should apply to yours.
  - Bad Rationale = ignore it.
  - Distinguishable Rationale = explain briefly.

- Application: this is easy for persuasive writing. We have to give answer that supports our client. Application: Answer = Conclusion = Thesis = Appealing.
  - Start with analogy to good cases. Once Reader is already in our camp, then distinguish bad cases. Use facts and rationale in both cases.

Good = Detail.
Bad = Vague.
Bad = bury it in the middle of a sentence.
Good = first position and last position.
Good = Mirror that language.
Good = staccato

** People remember what they hear first and what they hear last.
Then, incorporate ethos through clarity & style.
Sample Lab Exercise from 2015 Students – Defendants:

Tri-State
Under State Code § 98.01(c), a vehicle shall be driven on the right side of the road unless an obstruction exists preventing safe passage making it necessary to drive on the left side. In James, the driver’s way was obstructed by a child running in the road. He swerved to avoid causing harm, and, in doing so, the court found it falls under subsection “c” of the statute. Conversely, in Yerrick, the driver traveled on the left side of the road to avoid a bumpy and uneven surface. The court found the uneven surface did not constitute an obstruction under the statute because avoiding it was not necessary to assure safe passage.

Tri-State falls under the exception because our client’s lane was significantly obstructed making it necessary to use the left lane.

15-20 pound pumpkins fell rapidly without warning from the pickup truck, and produced a significant obstruction requiring immediate, necessary action. Not only did our client not have time to react, she possessed no certainty as to the substance of the obstruction. Given her eight years of experience, in avoiding the obstructions, she actively prevented a potentially large-scale catastrophe had the fuel tanker exploded because she had no other safe alternative other than using the left lane.

As with the Strange case, our client was avoiding a great harm when she crossed to the left side of the road: her tanker truck, filled with flammable fuel, could have had serious incident if the driver did not avoid the obstruction and or if she had swerved to the extremely narrow right shoulder.

Granted, there was no perilous, certain danger as with the Strange case (a child), but the the driver was carrying an highly flammable substance and it could have easily ignited if she had lost control of the tanker by hitting the pumpkins or falling off the side of the road. The choice to cause a large, toxic explosion would equally “offend the conscience”.

The court in *Yerrick* found that driving on the left side of the road was not justified if the driver’s purpose was for convenience or financial reasons. While our client was driving an expensive truck, her reason for shifting to the left side of the road was most certainly not for convenience or financial (gain); she was avoiding a potentially deadly explosion knowing she was carrying a tanker full of flammable fuel.

Just as James fell under the exception, Tri-State’s action of driving on the left side of the road was warranted given the public safety concern it raised. This is blasphemy!

**Sample Lab Exercise from 2016 Students – Plaintiffs:**

**Questions:**

1. Whose argument will emphasize the general rule in the statute, and whose argument will emphasize the exception?

2. What facts will each party emphasize, and why?
   1. Several cars ran over unbroken pumpkins after the incident.
      i. Therefore, Hardy could have driven over the pumpkins and would not have lost control of the truck since other cars seemed to be fine driving over them.

3. What policies will each party emphasize, and why?
   1. Plaintiffs: purpose of the statute is to protect persons and property on the left side of the roadway, meaning Hansen.

4. Affirmatively state each party's position in one sentence.
   1. Defendants: Hardy/Tri-state are not liable of negligence because if she hadn't, the truck would have exploded or she would have lost control of the truck; therefore, it was necessary to drive on the left half of the roadway and constitutes the exception within the statute.

5. What arguments support each party's position?
1. Πs: It was not necessary for Hardy to be in the left lane because she was not trying to avoid hitting a small child. Similar to Yerrick - court said bumpy and uneven stretch of road did not make it necessary for him to go into the left lane.

6. How will you synthesize the cases supporting each argument?

1. Meekhof v. Golden
   -Purpose of the statute is to protect persons and property on the left side of the roadway. Intoxication is not sufficient to invoke the exception within the statute.

2. Yerrick v. Boughton - affirmed judgment to Δ.
   -There is no obstruction within the meaning of § 98.01(c )
      1. UNLESS there is an obstacle that prevents, or is likely to prevent, the driver’s safe passage on the right side of the roadway.
         1. A bumpy and and uneven road in itself does not meet that test.
         2. “…it is not intended simply for the convenience of drivers who claim for financial or other reasons that their vehicle is somehow special.”

   -Exception encompasses small children who run into the roadway.

Think about …
What is an obstruction?
What is necessary?

- Think about: whether we are going to have one step - obstruction?
  o Or, two steps:
    - Plaintiff has two bites - obstruction? Yes or No.
    - And even if yes, was it necessary?

Synthesized Rule:
Under State Code § 98.01(c), all vehicles shall be driven on the right side of the roadway unless a human obstruction exists, which if struck, would cause severe bodily harm or death to said
obstruction. It is necessary to drive on the left side of the roadway only if there is an immediate and substantial risk of severe bodily harm or death caused (to the obstruction) by remaining on the right side of the roadway.

In *Meekhof*, the court held that the purpose of the statute is to protect persons and property on the left side of the roadway. Here, our client is the person on the left side of the roadway that the statute intended to protect.

In *Yerrick*, the court held that the statute is not intended for the convenience of drivers who claim for financial or other reasons that their vehicle is somehow special...prevention of property damage is not sufficient reason for driving into the left lane. The court held that a bumpy and uneven road does not constitute an obstruction which would make it necessary to drive on the left side of the roadway. Therefore, *Yerrick* is analogous to *Hansen* because pumpkins in the road are similar to bumpy and uneven terrain and should not be considered an obstruction. *Hansen* is also analogous because the prevention of property damage is not a sufficient reason to deem it necessary to drive into the left lane.

On the other hand, in *James*, the court held that a child running into the road constituted an obstruction and therefore the driver who drove on the left side of the roadway fell within the statutory exception. Because death or severe bodily harm would have been caused to the child if the driver remained on the right side of the roadway, the court dismissed the suit. The driver could not be held liable for negligence per se under the statute because avoiding the child obstruction constituted a necessity. The child in *James* is highly distinguishable from the pumpkins in *Hansen* because the act of hitting pumpkins would not cause injury or death to any individual.

Tri-State does not fall under the exception because avoiding pumpkins in the road do not constitute an obstruction making it necessary to drive on the left half of the roadway.
Lab 3 Plaintiffs

Synthesized Rule:
Under State Code §98.01(c), a vehicle shall be driven on the right half of the roadway unless an obstruction exists making it necessary to drive on the left half of the roadway. An obstruction is a physical, unexpected object which risks injury to a third party if struck. It is only necessary to swerve into the left lane to avoid an obstruction when there is a great risk of bodily harm or death to a third party.

- Other truck immediately pulled over to side of the road
- “bumpy and somewhat uneven” = pumpkins cause bumps but can be smashed can be driven over without causing harm to a person, but swerving causes harm to another

Case Illustration:
Policy: to protect persons and property on the left side of the road (Meekhof, Yerrick, James)

In Meekhof, the court held that the purpose of the statute is to protect persons and property on the left side of the roadway.

In Yerrick, the court held that it was not necessary to drive on the left side of the road for reasons of convenience or financial interest. The road was bumpy and somewhat uneven.

In James, the court held that small children who run into the road constitute an obstruction that is necessary to avoid by driving the left side of the road. The court reasoned that it was necessary to swerve to protect a third party.

Application:
Like Yerrick, the obstruction in our case was not necessary to avoid because the pumpkins could have been driven over, like other drivers did, without causing injury to a third party. Alternatively, the driver could have pulled over to the right side of the road as the pumpkin truck
driver did. Pumpkins do not constitute an obstruction that makes it necessary to swerve into the left lane.

Unlike James, in our case the loss of pumpkins is distinguishable from the loss of life of a third party which made it necessary to swerve into the left lane. Swerving in our case does not constitute protection of a third party. The driver in our case was not choosing between the life of a third party and swerving, but rather choosing between hitting pumpkins and swerving.

Tri-State’s action of driving on the left side of the road was not warranted given there was no third party’s life or body put in danger.
LAB EXERCISE #4: Rhetorical Oral Presentation Feedback

Speaker:

Position:

Logical arguments
What rules/assumptions/basic governing principles did the speaker rely on? Were these major premises embedded or explicit? Were they convincing?

Emotional appeals
What tools did the speaker use to generate sympathy for her position? How did they affect you?

Credibility appeals
Did the speaker convince you that she is trustworthy on this issue? How?
LAB EXERCISE #5: Motion in Limine

During his deposition earlier today, the defendant revealed that he is a member of an anti-government “militia” group that advocates violent governmental overthrow.

Defense counsel intends to make an oral Motion in Limine at an evidentiary hearing scheduled for today asking the court to exclude evidence regarding the militia group. Plaintiff’s counsel will oppose the Motion and argue that the evidence should be admitted.

Article IV of the Federal Rules of Evidence governs admissibility of evidence. Based on these rules, develop an argument regarding whether the court should admit or exclude the evidence in question. Be prepared to address the question whether the evidence is relevant to any issue at trial, and assuming that it is, whether it should nevertheless be excluded based on rules 403-407 of the Federal Rules of Evidence.

For this exercise, you need to do no research other read the provided rules and advisory committee notes accompanying them. For your oral argument, use the attached script to organize your presentation. You will be questioned by the judges during your argument.
Good morning/afternoon and may it please the court.

My name is ________________, and along with co-counsel ________________, I represent the plaintiff/defendant in this case, ________________.

We are here to argue for the admission/exclusion of evidence regarding ________________ for the following reasons.

1.

2.

3.

First, ...

Therefore, for the reasons just discussed, we respectfully request that this court admit/exclude the evidence in question.
Lab 5: Motion in Limine

Claims

1. Negligence
2. Gross negligence, reckless, and intentional conduct

Elements of a Tort

1. Duty
2. Breach
3. Causation
4. Damages

Federal Rules of Evidence

FRE 401 & 402: relevance + relevance to negligence claim

FRE 403: if the probative value is substantially outweighed by the danger of unfair prejudice, evidence may be excluded

FRE 404: character evidence - sometimes admissible in a criminal case; never admissible in a civil case - if it’s being used to show act propensity

FRE 405: how to get character evidence admitted

FRE 406: routine/habit

FRE 407: subsequent remedial measures, even if relevant, not admissible to prove negligence, culpable conduct, etc.

Ask the students:

- Not just what the evidence is
- What is the evidence being introduced for
- Then, have them look at this evidence in chunks
  1. He was in the militia
  2. He quit
  3. He took down the site

Maybe some of it can get in …
LAB EXERCISE #6: Research Status Conference

This lab will operate as a mini-class just on the issue and party that you represent. Labs will be reorganized this week so that all students working on that issue and party (your litigation team) will present in one lab. You and your litigation team will present your research results and a preliminary analysis of your case as if you were participating in a firm meeting with a senior partner to plan your litigation strategy.

Research Results

You should be prepared to thoroughly discuss all the relevant case law and how each case or other authority helps or hurts your client. Expect to have your knowledge of the key cases thoroughly examined. You must know relevant dates, jurisdictions, and subsequent histories. You will have to defend why you chose to rely on certain cases and not others. Make sure you bring electronic or hard copies of all the key documents and research materials with you.

Preliminary Analysis

You should also be prepared to discuss the theory, theme, and arguments that you will be making on behalf of your client. The senior partner is relying on your research and analysis to decide how to litigate this case. She will question you as an attorney in a law office would. Because we are now in litigation, we will be arguing against equal and opposite attorneys who will be presenting a very different view of this case to the court. You must anticipate their arguments and be prepared to discuss how you might rebut them.

Deliverables

Bring hard copies of the team’s research results and preliminary analysis for the senior partner to review during the conference. Although you may now choose how to organize and present your research and your analysis, the two documents must be at least as effective as the Case Chart and Outline components of the fall Module Three Assignment.

Assessment

Your performance in Lab 6 will count significantly toward the 5% of your grade in the course that consists of Modules 1 and 2 Participation, Preparedness, and Professionalism. You will be asked to specifically address both your own and your partners’ collaboration on this project in your self-evaluation.
LAB EXERCISE #7: Brief Workshop

During this week's lab you will work on your Point Headings and, if time allows, Statements of Fact, with the help of your Professor and TA. Come to lab with drafts of these portions of your brief.
Good morning/afternoon and may it please the court.

My name is ________________ , and along with co-counsel _________________, I represent the plaintiff/defendant in this case, ________________ .

We are here to argue for the admission/exclusion of evidence regarding _________________ for the following reasons.

1. 

2. 

3. 

First, ... 

Therefore, for the reasons just discussed, we respectfully request that this court admit/exclude the evidence in question.
Lab 7: Drafting Point Headings

Logistics:

- Have students walk into lab knowing that they need to have the Google Docs up and running.
- Spend 10-15 minutes developing point headings
- Have students edit their peer sitting to the left. Feed them the “things to think about” one at a time, slowly, as they’re working. This takes about 10-15 minutes.
- Have students return back to their work and incorporate their peer’s comments
  - This typically incites talking--students elaborate their comments and explain them
  - Encourage students to not directly edit their first attempt: leave it there and start from scratch so the document includes about three versions (hopefully increasing in quality)
- Have students read examples provided by Professor Moran
- Have students return to their work
- Rotating in the opposite directing, have the students peer edit once more

Student Objectives:
Work on point headings themselves and look to other examples of point headings.

Student Learning Outcomes:
Notice and feel the difference between memo point headings and court document point headings

Peer Editing Component--Specific things to look at:

1. Look first to clarity--can you understand the point sentences itself?
   a. Did you have to reread it?
   b. Were you not sure what it was conveying?
2. Look to the length?
a. no more than 3 lines (hopefully)

3. Is it complete?
   a. Does it indicate the result desired
   b. Does it say more than just the rule

4. Is it persuasive?
   a. As a judge, would you feel compelled to rule the way the party urges?

**TA Responsibilities:**
- Assertive headings (heading format; not that different from thesis sentences)
- Point Headings discussed in textbook
  - What is it we want the court to do
  - The main reason we want the court to do it
    - See textbook example page 191, example 9C

**Outline for Point Headings at SJ Stage:**

I. Jurisdiction/Free Speech Issue:
   A. Statement of the legal requirement
   B. The result the author wants
   C. The facts that support it
      1. Essentially an overall conclusion statement

   - Should be short enough to be readable; clear on one pass; nice strong persuasive impact
   - Adding a “must” or an “if” to make it more forceful
   - Examples from Professor Moran for Jurisdictional issue: going for **pushy/forceful**:
     - “Bringing Mr. White across the country based on a single internet transaction is unreasonable, and that transaction created no meaningful contact with Colorado; thus, Colorado has no jurisdiction over Mr. White and he is entitled to summary judgment.”
“Justice demands that Mr. White be held accountable for his sale of a dangerous bomb-making manual in the state where he caused the death of a child, and his commercially interactive website creates more than substantial enough contacts to warrant personal jurisdiction over him.”

- Examples from Professor Moran for Free Speech issue: going for pushy/forceful:
  - The Yellowbirds may constitutionally seek damages from Mr. White for the death of their son because Mr. White intended his website to provoke violent acts of lawlessness and the website was likely to result in the very acts that ended Bear Yellowbird’s life.
  - The First Amendment shields Mr. White from liability for expressing his political views because he merely advocated various acts but did not direct any particular person to do any particular thing at any particular time; therefore summary judgment is required.

**Helpful Comments from Moran**
- If it feels clunky, maybe don’t include the standard---we know it’s a motion for summary judgment.
- Not a discussion any more---this is the argument
LAB EXERCISE #8: Pre-Trial Settlement Negotiation

This lab will consist of a pre-trial settlement negotiation for your case. You and your co-counsel will work together and participate in a good-faith negotiation against your opponents and attempt to come to a mutually agreeable resolution of the case.

Your negotiation should be based on:

- The strength of the parties’ legal positions, as described in the summary judgment briefs filed by you and your opposing counsel.

- The monetary value of the case to the parties. Your research has revealed that compensation for wrongful death of a child ranges from $100,000 to $50,000,000 depending on the culpability of the defendant.

- The parties’ wishes and abilities to proceed with litigation, as described in the separate additional information for each party that you will receive in lab.

- Your own strengths as attorneys, as described in the separate additional information for each party that you will receive in lab.

- Any other relevant considerations addressed in the readings or class.
LAB EXERCISE #8
Pre-Trial Settlement Negotiation

Additional Information for Counsel for the Defendants

You are highly experienced and seasoned insurance defense attorneys working for a client with a very deep pocket.

Officers Channing and Bergman are both covered under the City’s comprehensive municipal general liability insurance policy. This policy provides coverage for (1) the costs of defending the excessive force claims against police officers and (2) payment of liability assessed by a court of competent jurisdiction. If Mr. Wilson wins this case, the insurance company will be liable to pay up to $25 million per incident. As is typical in such circumstances, the insurance company has provided its own counsel to defend Officers Channing and Bergman. Although you technically represent the officers, you must also consider the interests of the insurance company and the city.

You have developed your own opinion about the strength of your cases. Your clients, of course, have their opinions too. The Officers do not want to admit any wrongdoing. They both believe that the force they used did not violate any constitutional standard or standard of police conduct, and that they will win at trial. The City and Police Department are getting a lot of bad press and want this case to go away quickly, and most important, quietly. The Insurer is strongly opposed to going to trial because it fears an excessive jury verdict in the current climate of hostility toward police use of force, and it does not want any bad precedent set regarding what constitutes excessive force. However, it is also aware that settlements and jury verdicts for minor injuries such as Mr. Wilson’s tend to be rather low.

You have been authorized to settle this case for up to $1 million per claim.
LAB EXERCISE #8
Pre-Trial Settlement Negotiation

Additional Information for Counsel for the Plaintiffs

You are senior associates at a prestigious national law firm. Bringing in Mr. Wilson as a client was a coup for you, and a big win at trial or a large settlement will pretty much guarantee that you will make partner. You have taken this case on a contingent fee basis. If you win at trial, your firm will receive 40% of the verdict. If you settle before trial, your firm will receive 33% of the settlement amount. If you lose a trial, the firm loses the approximately $100,000 in costs and expenses it will have invested in the litigation.

Your client, Mr. Wilson, is a somewhat wealthy dilettante who spends his time dabbling in various social causes, particularly when those causes include public events that might get his face on the news. He has some half-hearted political aspirations that have been fueled in the wake of this incident because he has now become something of a celebrity. He has appeared on numerous local news programs and is enjoying himself. His net worth is about $12 million.

Mr. Wilson’s damages consist solely of the pain and suffering he endured during the incidents at issue. Because he doesn’t work for a living, he lost no wages, and because he has excellent health insurance, he incurred no medical expenses. In fact, he is now negotiating a book deal that will be worth several hundred thousand dollars, and will be worth more if he goes to trial than if he settles.

However, Mr. Wilson understands that the monetary value of his case is probably quite low and that his only chance for a significant recovery is if the jury decides to award punitive damages. Therefore, he has authorized you to settle at a floor of $1 million. At that price, he wants a public apology, with lots of media attention and fanfare, delivered to him in person by the mayor, police chief, Officer Channing, and Ms. Molloy on behalf of Officer Bergman. He is willing to give up on that for more money.
Live grading benefits both the student and the professor by clarifying problems in the writing project, providing instant feedback, and allowing the student to participate in the work's evaluation. Although it can be intimidating initially, most students ultimately find that the benefits of live grading far exceed those of receiving detailed written comments and having to get clarification later.

For live grading to be most effective, some structure is required. Following are instructions on how to prepare for our conference and some additional information on what will happen during the conference.

Logistics

Each conference will be scheduled for 50 minutes. Please help me stay on schedule by letting me know when you arrive for your conference even if another student is still in my office. A sign-up sheet is posted on TWEN.

How to Prepare

In preparation for your conference, reread your brief as if you were a stranger seeing it for the first time. Try to respond to it as if it were not your brief. The objective is to see what the brief actually says, as opposed to what you thought it said or what you meant it to say as you were writing.

While you are rereading the brief, make some notes in the margins to record your observations. Bring this copy of the brief with you to the conference. Also bring something to write with.

When you have finished reviewing your brief from this reader perspective, score your brief on the attached grading rubric sheet.
During the Conference

When you arrive I will not yet have read your brief. (Bonus question: what tense is the preceding sentence in?) For the first few minutes I will skim your brief.

After that, we’ll start at the beginning of the brief and discuss the major issues in the paper. This is your opportunity to explain your thinking and to ask me questions. We will discuss what is and is not working effectively. We will explore why you handled particular substantive or stylistic issues the way you did, and we will talk about ways to handle those things in future briefs. You should take detailed notes during this part of the conference, using the attached form or something similar. Remember you will be revising this for your appellate brief, so be thorough.

My comments will be illustrative, but by no means exhaustive. In other words, I will focus on concepts and point out some specific examples to help illustrate those concepts, but I will not point out every flaw in your brief. It will be your job to learn from these illustrations and incorporate the feedback into your next assignment.

Next we’ll go over the grading rubric together, and I will score you in each of the categories. I won’t have your citation score yet, so won’t be able to give you a final score. At the end of the conference I will give you my marked up copy of the brief. I will keep the rubric sheet until I have calculated your final score.

After the Conference

After I get your citation score from the TAs, I’ll calculate your final score and return the grading rubric to you.
STUDENT'S LIVE GRADING CONFERENCE NOTES

During this conference, you will need to take extensive notes (both below and on your Brief). While the “template” provided below is designed to help you take notes, you may of course use any format you choose.

**Overarching / Initial Comments:**

**Stylistic / Writing Comments:**

**Substantive Comments (Content / Organization / Analysis):**

The Most Important **Substantive Concepts** We Discussed During this Conference

(before leaving this conference, you will tell me what you think – and we will then discuss your thoughts):

1) 

2) 

3)
LAB EXERCISE #10: Practice Oral Arguments

Each practice argument will be formatted in approximately the same way as the final oral arguments except that each of you will have only about 2/3 as much time as you will have in the final argument (10 minutes instead of 15). This will leave time for feedback on your substantive responses and to address presentation, particularly your introduction, responses to questions, recovery from questions, and conclusion.

Accordingly, plan to present only a portion of your argument, and include a conclusion to wrap up the argument. If you are the appellant, you should reserve 1 minute of your 10 for rebuttal.

Practice oral arguments are held publicly to give you the opportunity to see the types of questions that are asked and the types of responses that are most effective. You are required to attend one lab session this week other than your own. You may come to all of them if you wish.

Your TAs and Professor Moran will present feedback during practice arguments using the oral argument rubric posted on TWEN.

Honor Code Considerations:
You may work with anyone in preparation for your practice argument.

Assignment Evaluation:
Your preparedness and demeanor during the practice argument will count toward your PPP score for this module. Nerves and stumbling will not count against you. This is practice, after all.
LAB EXERCISE #11: Colorado Court of Appeals Arguments

The Lawyering Process Program has invited the Colorado Court of Appeals to hold court at Denver Law and hear oral arguments in two real cases that are currently pending. For this lab, your assignment is to prepare for your own oral argument by watching and listening to these real, live arguments.

The arguments will be held at 4:00 on April 6, in room 165. There will be enhanced security and you will need to show your student ID to get into the room. Line up early to get good seats.

You will receive information about the cases a week or so before the arguments are heard, including the briefs in the cases and some summaries. Please read all this material so you can evaluate the effectiveness of the arguments.

As you listen, pay attention to both the judges’ questions and the attorneys’ presentations. Consider, for example, to the following questions:

- How much of the argument was question and answer rather than prepared speech?
- How prepared did the attorneys seem with knowledge of the law and facts?
- What kinds of questions did the judges ask?
  - Hypotheticals
  - How is a particular case unlike or like yours
  - What evidence do you have that...
  - Policy – effect of your rule
  - Clarification of facts
- How responsive were the attorneys to the judges’ questions?
- How much did the argument focus on specific authorities rather than more general concepts?
- How well did the attorneys provide roadmaps and signposts for their arguments? How did that affect how easy it was to follow the arguments?
- How much did the attorneys rely on notes?
- How did the attorneys use non-verbal messaging?
  - Hand gestures
  - Eye contact (to the extent you can tell)
  - Posture
  - Demeanor and tone
LAB EXERCISE #12: Final Oral Arguments

Due Date:
Arguments will take place on April 13 and April 15 at the Tenth Circuit Court of Appeals. The schedule will be provided as soon as it is available.

Honor Code Considerations:
You may work with anyone in preparation for your practice argument.

Assignment Evaluation:
The judges for your session will provide feedback on your performance in the final argument immediately after the arguments are concluded, but they will not grade your presentation. Professor Moran will grade your individual presentation in accordance with evaluation rubric handed out with the practice oral argument assignment sheet.

This assignment will count toward the 20% of your grade that is reserved for final and practice oral arguments, and will be scored using the Final Oral Argument grading rubric.

Assignment Details:
Prepare and present an appellate oral argument on the topic of your spring brief in accordance with the readings, class instruction, and practice feedback you have received through the semester.

1. **Introductions.** Before you begin your argument, the chief judge may ask all parties to make an “entry of appearance.” If the request is made, you should stand at counsel table and tell the court, one at a time, who you are and who you represent, e.g., “I am Suzanna Moran, on behalf of the plaintiff-appellant Bill Clinton.”

   When you begin your argument, state your name (again), introduce your co-counsel (if applicable), identify your client and the issue you will be addressing, and, if you are the appealing party, indicate if you wish to reserve time for rebuttal.

2. **Order of argument.** The party who lost below and is now appealing the issue will present first, followed by the party who won below. Then the party who lost can rebut.

3. **Timing.** Each student is allotted 15 minutes for the final argument. You will be given a two-minute warning before the end of your argument, net of reserved rebuttal time. The warning gives you the opportunity to wrap up questions and to conclude. If your time runs out before you conclude, you may ask permission for additional time. Be warned, however, that in practice judges often cut off any argument beyond the allotted time.
4. **Rebuttal.** In the final oral argument, the appealing attorneys may carve out a total of no more than 5 minutes of their time for rebuttal. Rebuttal time need not be allocated equally, but consider 12.5 minutes for the opening and 2.5 minutes for rebuttal. It is permissible to waive rebuttal, but not advisable. Keep your rebuttal short and precise. Judges can use up your entire rebuttal time with questions, so don't save anything important—you may never get to it.

5. **Preparation.** Prepare two outlines: one of about 5 minutes to cover your essential points and one of 10 to 15 minutes in case you don't get many questions. You will want to memorize your introduction and conclusion to get yourself started and finished cleanly. You should be prepared to make specific points in the remainder of the argument, but you must also remain flexible so that you are responsive to the judges’ questions and so that you do not read from or recite a memorized script.

6. **Arguments.** Oral information can be very hard to follow. Give the judges frequent signposts to signal where the argument is headed: outline the main points you intend to cover (the oral equivalent of your point headings) and alert the judges you have reached the end with wording such as “in conclusion.”

   Do not attempt to argue your entire brief; focus on the best points. Don’t quote or cite—leave that to your brief.

   You are responsible for any case cited in your briefs or your opponents’ briefs. You may bring a table of authorities or a notebook of the cases to the argument for peace of mind, but you are unlikely to have the time to refer to them.

   You may only reference the cases in the briefs, except you may reference another case in the following circumstances:

   (i) The report of the case first became available two days before the briefs were due, or later than that date. Then, counsel shall give opposing counsel at least 48 hours’ notice of intent to cite the case in oral argument.

   (ii) Counsel cites in oral argument a case cited as reversing, overruling, disapproving, or distinguishing any case cited in the brief of opposing counsel. Such a case must be from the same jurisdiction as the case cited in the brief or from a court whose decision is binding upon the court that decided the case cited in the brief.

7. **Handling questions.** The judges are not your adversaries. They are asking questions because they need the information to make their decision. Do not assume all questions are unfriendly.
In responding to questions, state your answer first; then give your explanation. Think before answering, and watch out for concessions. It is O.K. to say you don’t understand the question and to ask the court to repeat or rephrase it.

Use your answers to questions as a bridge back to your essential points, but be subtle and be sure you have answered the question first. If you detect there is a follow-up question, pause.

Act as though you are glad to get the questions, but don’t be patronizing. Stop your presentation in mid-sentence when asked a question; don’t signal annoyance or irritation. If you sense a judge wants to interrupt you, give him or her an opening. If you go on too quickly, you may miss the opportunity to give input on something that is troubling the judge. Let the judges finish their questions; although they may interrupt you, you should not interrupt them.

8. **Judges.** Your judges will be law professors, practicing attorneys, and in some instances, real judges. All of these judges are donating their time, so some of them may have reviewed the briefs extensively before argument while others may only have had an opportunity to skim them quickly. Some of the argument judges will be familiar with the area of the law involved; others will not.
LAB EXERCISE #13: Persuasive Letters

Some of the most important persuasive writing you will ever do will be the cover letters you send to potential employers. Make no mistake, cover letters are marketing pieces meant to generate interest in you as a potential employee and persuade the employer that her organization would benefit more from hiring you than the next person.

Similarly, some of the most important persuasive writing I ever do is write letters of recommendation for my brilliant students to help them get that all-important first legal job. I have to highlight your strengths and minimize your weaknesses in legal analysis, research, and writing, and include something personal that makes you sound like a great person to work with.

Certainly all of you will have to write cover letters soon, and eventually someone is going to ask almost all of you to write your own letter of reference. Both of these tasks are difficult to do well, but they can be easier if you remember that all the persuasive techniques we have studied this semester apply equally to these letters as they do to legal argument.

For this lab, please draft either a cover letter for yourself or a letter of recommendation from me for a particular job or type of job that you want. Please bring several hard copies of what you consider to be a complete letter to your lab, and also post it in your lab’s google drive. We will workshop these letters as a group during the lab so that all of you can go on the job hunt with the most persuasive materials available.

Note: While the choice of which kind of letter to write is yours, you should consider doing a recommendation letter if you think that you will ever want a letter from me. It will be stronger than a letter I have to create from scratch, particularly as time goes by and my memory of exactly what made you so wonderful becomes a bit fuzzy.