Prof. Chris Newman  
Civil Procedure 112  
Spring Term 2015  
Syllabus and Class Policies

**Goals:**

My goals for this course are to help you cultivate:

1) A sophisticated understanding of the core concepts underlying the law of civil procedure.

2) The ability to recognize and analyze the key procedural issues presented by a given set of facts.

3) Familiarity with the key sources of legal authority governing civil procedure in the federal courts, and the most salient areas of dispute with regard to their interpretation and application.

4) An increased ability to understand and efficiently extract relevant information from primary legal sources (i.e., statutes and judicial opinions).

5) An increased appreciation of the culture, norms, and forms of legal reasoning and argumentation.

**Materials:**

I have asked you to purchase *A STUDENT’S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE* (2014 Edition) by Baicker-McKee et. al. (West Pub.). This book will provide you with the text of the rules and other statutory provisions we will be studying, as well as plenty of useful explanatory commentary and applications. It also contains an introductory section called “General Concepts in Federal Practice” that you may find helpful in getting your bearing with regard to many of the topics we will cover. I will not assign you to read most of that section (and reading it will NOT substitute for the things I do assign), because I want you to mainly grapple with primary sources and to extract your understanding from them. But to the extent that you find it necessary or helpful to have a secondary source giving a straightforward overview of the “black letter law,” this book should meet your needs, and serve as a useful procedural reference through law school (provided you are careful not to rely on it without checking whether the law has changed).

Most of your class prep time will be spent reading rules, statutes, and judicial opinions. I have not, however, asked you to purchase a casebook. You’re students, you have free Westlaw and Lexis. Why pay for what you can (legally) obtain copies of for free? Occasionally I may post in Course Materials a copy of an opinion that I have edited, but usually you will just look up and read full cases on your own (perhaps with instructions to skim or skip certain sections). Why read edited cases when that’s not how you will encounter them in the wild? I don’t care which source you get cases from, but for purposes of referring to page numbers in assignments and
class discussion, I will use the West Reporter pagination (or, for recent Supreme Court cases, S.Ct.). I may also occasionally post other supplementary materials (or tell you to go look them up yourselves).

You may find it useful to obtain a three ring binder in which to keep this document, the cases and other documents you will print out over the course of the term, and your outline. Or you may wish to save trees and simply keep and annotate electronic versions of those documents.

**Assignments**

I provide below a list of expected readings for the term. Law is a moving target however, and so I may vary the materials we use during the course of the term to take account (or advantage) of new developments. I will post specific assignment sheets in Course Materials a week in advance of each class. These sheets may vary or supplement the readings given here, and will usually provide questions I want you to think about when doing the reading, as well as specific issues you should prepare for class participation. **So make sure you check the posted assignment sheet for a given class before doing the reading!**

When I assign a Rule from the FRCP, the default assumption should be that you:

1) Read the text of the Rule in full.
2) Read the “Purpose and Scope” section of the following commentary in the Student’s Guide, as well as the “Core Concept” sections for each subsection of the Rule.
3) Skim through the Applications. (In other words, I don’t expect you to come to class with any sort of mastery of the details in the Applications—I just want you look through them to get a concrete idea of what the Rule looks like in practice.)

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<td><em>Dioguardi v. Durning</em>, 139 F.2d 774 (2d Cir. 1944).</td>
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### Topic III. Federal Joinder

5. FRCP Rule 12.  
*PAE Government Services, Inc. v. MPRA, Inc.*, 514 F.3d 856 (9th Cir. 2007).  
*Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000).  
*Ingraham v. U.S.*, 808 F.2d 1075 (5th Cir. 1987).  
*Taylor v. U.S.*, 821 F.2d 1428 (9th Cir. 1987).

6. FCRP Rules 11, 15.  
*Roth v. Green*, 466 F.3d 1179 (10th Cir. 2006).  
*Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186 (3d Cir. 2001).  

### Topic IV. Scope and Burden of Federal Discovery

7. FRCP Rules 13, 14, 18, 20, 42.  
*Jones v. Ford Motor Credit Co.*, 358 F.3d 205 (2d Cir. 2004).  

*Planned Parenthood of Minn. v. Citizens for Cmnty Action*, 558 F.2d 861 (8th Cir. 1977).  
*Keith v. Daley*, 764 F.2d 1265 (7th Cir. 1985).  
*Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

### Topic V. Allocation of Power Between Judges and Juries


11. U.S. Constitution, Amend. VII.  
FRCP 38, 39, 56.  
*Lundeen v. Cordner*, 354 F.2d 401 (8th Cir. 1966).  

12. FRCP Rule 50.
**Topic VI. Personal Jurisdiction and its Constitutional Limits**

   U.S. Constitution: Art. III §§ 1-2; Art. IV. §1; Art VI. ¶2.


   Illinois Long Arm Statute, 735 Ill. Comp. Statutes 5/2-209.


17. FRCP Rule 12(b)(2).
   *Walden v. Fiore* (U.S. 2014)

   *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011).

**Topic VII. Original Subject Matter Jurisdiction of the Federal Courts**

   FRCP Rules, 12(b)(1), 17.
   *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974).

    *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (edited version posted).


**Topic VIII. Federal Venue**

Topic IX. Supplemental Jurisdiction and Removal

23. FRCP Rules 14, 42.


Topic X. Vertical Choice of Law

    *Swift v. Tyson*, 41 U.S. 1 (1842).
    *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

    FRCP Rule 83.

Topic XI. Preclusion

    *Cromwell v. County of Sac*, 94 U.S. 351 (1876).
    *Russell v. Place*, 94 U.S. 606 (1876).

28. FRCP 41.

Why am I making you read so many unedited cases instead of “teaching you to apply black letter law”?

Amazingly (to me), I still get law students who are perplexed about this. Here are a few different versions of the same answer. Choose whichever works best for you.

Answer #1:

As a lawyer, you will need to take a universe of often confusing, ambiguous, and perhaps even contradictory authorities, and exercise judgment to distill them into the principles most likely to provide your client with useful and reliable guides to action under particular circumstances. Or else you will need to persuade a judge why, among the various potentially plausible ways of applying the relevant authorities to your client’s situation, the one that serves your client’s interests is actually the one that makes most sense. Your goal as a law student should be to begin
cultivating the conceptual tools and habits of mind that will enable you to excel at these tasks, and my goal is to try to help you do so. A crucial part of this is becoming versed in what is often called “black letter law,” but your job is not primarily to memorize things that can be stated in a bullet point, and my job is not primarily to “explain” the material in such a way as to make it “clear.” To understand an area of law is to understand where, how and why it is unclear, and if you do not feel any uncertainty about this material at the end of the course I will have failed you. (For a good discussion of this point, take a look at this post.) That’s not to say that everything is unclear, nor is it to say that I’m not going to try to help clarify many important things—I will also have failed if the quality and objects of your uncertainty at the end of the course are not very different from what they are now. Just don’t make the mistake of thinking that I can give you the skills you need. All I can do is midwife; you have to push. You will be useful as a lawyer to the extent that you figure out how to figure things out. To the extent that your legal studies consist of relying on secondary sources to break down and explain things to you, your future clients would do nearly as well to consult those sources themselves. And increasingly, they will be able to.

**Answer #2**

Statements of black letter law are bricks. Solutions to complex legal problems are buildings. Your job as an advocate is to provide a court with a blueprint showing it how to use the available bricks to build the most sturdy, habitable and elegant building on the given factual terrain (and that just happens to be the one your client wants to live in). That’s what “applying” the black letter law means. To do this, you need to know certain things about bricks and their properties, but knowing those things is rarely sufficient to win; there are lots of bricklayers out there. To win, you need to understand architecture. You don’t learn architecture by just studying bricks. The only way to learn architecture is through studying buildings and trying to assess what makes them sturdy, habitable, and elegant—and what doesn’t.

**Answer #3**

Here is an excerpt from the seminal article of the modern jurisprudential canon, Oliver Wendell Holmes, Jr.,*The Path of the Law*, 10 Harvard Law Review 457 (1897):

> When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.
The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies.

. . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

Whether or not we wish to swallow unreservedly Holmes's view that law is “nothing more” than prophecies of what courts will do in fact, your job as a lawyer consists in great part of becoming the best prophet you can. The primary means through which judges both act and justify their actions is the written opinion. What we call “black letter law” is just somebody's attempt after the fact to distill the reasoning of prior opinions into manageable bits of information. This is useful, but it is also misleading, because in law context is everything. Mediocre lawyers fill briefs with disconnected statements of black letter law that seem to point to the result they want. Good lawyers persuade judges that, properly understood in context, those statements of black letter law do not mean what the other side claims they mean. To be sure, there are doubtless many things affecting judges’ actions that are not expressed on the face of an opinion. Mastery of legal reasoning is not sufficient to be a reliable prophet. But it is necessary. Regardless of a judge’s true motivations, to persuade a judge to act in the way you want her to, you have to offer her arguments that she will be willing to put into an opinion and sign her name to.

Answer #4:

Because I said so.

Class Preparation:

I suggest that you expect to allot about four hours (YMMV) to work your way through the readings before each class session. These are difficult materials; to understand them will require work, and it is work that no one else can do for you. Class time will generally not be used to
rehearse basic information that can readily be obtained from the reading; instead you will be assumed to have that information and class will be used to try to help you correct, confirm and deepen your understanding of the materials, to integrate them conceptually, and to think about them critically and strategically (i.e., like a lawyer). I also strongly suggest that you do your outlining throughout the course of the term as part of your weekly class preparation, rather than leaving it to the end. The best way to master any area of the law is to take the primary source materials (statutes and opinions), tear them apart intellectually, digest them, and convert them into your own analytical outline. Simply writing out answers to the Basic Questions listed below for each case you read will give you a good start on this process, and then after each class you can go back and refine your outline based on our discussion. Ultimately you will want your outline to be organized not primarily by cases but by doctrinal areas and issues, so that it provides you with a ready checklist of issues to think about when analyzing a fact pattern, and pulls together and organizes all the examples and judicial statements from various opinions that bear on each issue. This outline—and the mental organization you acquire by creating it—will be your best friend during the exam.

Each time you read a case for class, keep in mind the following Basic Questions:

a. Who brought this lawsuit and against whom, what precisely was the plaintiff asking the court to do, and what in concrete terms (i.e., real world consequences) was at stake for the parties?

b. What court was this lawsuit filed in, and what relation does that court have to the parties or events involved in the lawsuit?

c. What court issued the opinion we are reading?

d. If the answers to b. and c. are different, how exactly did the case get from one court to the other?

e. What exactly was the court whose opinion we are reading asked to do by the party responsible for bringing the case before it?

f. What precise question or series of questions does the court regard it as necessary to answer in order to determine whether it should do what it has been asked to do? Make sure that your formulation of these questions is attentive to the standard of decision the court regards itself as applying. For example, there is a big difference between the questions “Is X correct?” and “was it arbitrary or capricious for someone to decide X?”

g. What sources of legal authority does the court regard as providing the rules, standards, or principles governing these questions? Are they rules, standards, or principles? For a useful discussion of the distinction, see this post. Taken together, the answers to f. and g. describe what I will refer to as the “framework” the court is using (or at least purporting to use) to decide a given case.

h. What premises underlying the relevant questions do all the parties and judges seem to agree on, and where exactly is the dispute? Another way to put this is: What is the most specific
statement of the governing law that everyone would agree on? Keep in mind that statements of governing law can range in specificity from “Defendant is entitled to due process under the U.S. Constitution” to “It is a denial of due process to proceed to in personam judgment against a defendant when the only service of process was by publication in a newspaper, and no affidavit was submitted to the court showing that diligent efforts were made to effect personal service.” The propositions of law that everyone agrees on are what I will sometimes call the “bedrock” of the case.

i. What chain of reasoning does the court use to get from the bedrock to the decision it reaches? Map it out as concisely as possible, and distinguish between things the court says that seem logically necessary to support the result reached and things (if any) that seem extraneous. If there are any of the latter, why do you think they were included?

j. If there are concurrences or dissents, where and why exactly do those judges differ from the majority’s approach? Which judge’s opinion do you find more persuasive and why?

Class Participation:

I assume you are here because you are intellectually engaged in the enterprise of understanding the law and are therefore already motivated to get as much as you can out of this course. I assume this means that you are eager to take advantage of any opportunity to hone your ability to communicate about difficult legal issues, to challenge and be challenged in an arena where your performance is blissfully irrelevant to the disposition of anyone’s life, liberty, or property. (If your actual feelings diverge radically from this description, I suggest you think seriously about why you are in law school now before you’ve invested too much money in it. The world doesn’t need any more miserable lawyers.)

Nevertheless, we all know (we are, after all, at George Mason!) that external incentives matter and that people function better and more consistently when doing so has readily discernible consequences. It is in your interest that you do your best to prepare for each class, and it is part of my job to help you feel motivated to do so. Tradition holds that I should achieve this by cold-calling on you, and perhaps distributing small change. But here’s the thing: I’m really not into playing gotcha. I hate calling on people who are unprepared, and having students write or approach me to say why they are unprepared. You hate listening to people who are unprepared waste your class time by trying to BS their way through questioning. And we all know that it is nigh impossible to be fully prepared every single day. Life happens. So here’s what we’re going to do:

Each assignment sheet will identify one or more Class Participation Tasks (CPT). Prior to each class session, you will have the option to sign up on TWEN to participate in as many of the tasks listed for that class as you wish. The sign-up window closes one half-hour before the start time of the class in question. The method to be used for signing up (generally a TWEN Sign-up Sheet) will be designated for each task.

By signing up for a given task, you represent that you have studied and thought about the relevant materials and are prepared to provide thoughtful answers to the questions posed.
This doesn’t mean that you think your answers are perfect or that you have mastered the materials; it just means that you have made a conscientious effort to do the groundwork so as to enable you to help advance the ball constructively in class. **Do NOT sign up unless this is true.** Not aspirationally or intentionally true, but actually true at the moment you sign up. Once you sign up, you cannot take it back. If part of the task involves responding to a Class Poll, make sure you answer the poll before signing up for participation.

Each task will have a number of participation points allotted to it equal to the number of students enrolled in the course. Those points will be distributed equally among all the people who sign up for that task, regardless of whether or not they are actually called on. If you don’t sign up, you will not be cold-called, and there is no penalty for not signing up on any given day. **No explanation for not signing up on a given day is necessary (or welcome).** This is not an invitation for you to simply check out—it is meant to provide you with assurance that you won’t get called on the one time when for some reason you couldn’t bring your A-game. You really ought to be signing up most of the time for most of the tasks.

If you sign up, you are fair game to be called on that day for any of the matters contained within the task you signed up for. So long as you appear prepared, you will get to keep your share of the participation points for that task. **By “prepared,” I don’t mean that you necessarily have the “right” answer (assuming there even is one)—I mean that you give the clear impression of having diligently prepared for the task you signed up for, which means that you show familiarity with all the relevant materials and signs of having made some effort to make sense of them.**

There may well (probably will) be things that you still don’t feel you understand fully, but you ought to be able to articulate clearly what you find confusing about them. **If you sign up but then don’t attend class, or appear when called on to be inadequately prepared for the task you signed up for, you will be penalized a number of points commensurate with the gravity of the lapse.**

Don’t assume that because you’ve been called on once, you can now sign up with impunity. Each day I will select at least some participants purely randomly; if you put your name in the hat two days in a row, it might come out two days in a row. **If you sign up for more than one task on a given day, you might be called on for more than one.**

You are always welcome to raise your hand and volunteer answers or ask questions in class; doing so has no bearing on participation points. If I do not call on you, don’t take it personally—there are many reasons why I might not do so, and you are encouraged to post any unanswered questions or comments on TWEN (see below). In particular, you are invited to post answers to questions that were posed in the assignment sheet but that we didn’t get to in class. You are also invited to post thoughtful responses to other people’s postings. **As discussed further below, learning how to discuss legal issues in writing is an important skill.** There will also be a pool of participation points (equal to ten times the number of people enrolled) that is divided at the end of the term among all the people who have at some point posted a thoughtful substantive response to a question posed either by me (whether online or in an assignment sheet) or by another student. **(No extra points for quantity, though you are welcome to participate online as much as you find useful.)**
At the end of the term, I will tally each student’s point total for class participation. **Any students whose totals exceed the class mean by more than one standard deviation will have their exam grades increased one notch (i.e. B to B+). Any students whose scores fall below the mean by more than one standard deviation will have their exam grades decreased one notch. This means that (assuming a normal distribution) fully 30% of you will have your grades adjusted one way or the other.** (If, on the other hand, you manage to overcome all collective action problems so as to eliminate any significant variance in class participation score, no-one’s grade will be adjusted, but you will all be sent to the GMU Neuroeconomics Lab to have your brains scanned.) While any sort of academic evaluation (including the final exam) is an imperfect proxy for the qualities we are trying to measure, the skills of diligent and timely preparation and of speaking clearly about complex issues are most assuredly things you will need to be a competent lawyer. By reflecting them in your grade we improve the accuracy of the sorting signals your grades send to interested third parties.

Both sections will be pooled together for purposes both of exam curving and the class participation system described above (although I will provide separate sign-up sheets so that each section can use all the time up to 30 min before class.)

**A note on notes (and slides):**

I am not paternalistic enough (yet) to actually ban the use of laptops in class. But I urge you to read and carefully consider the advice contained in this article. When you do so, remember that what you’re trying to learn (and what you’re going to be tested on) is conceptual understanding, not regurgitation of information. Your goal in class should not be to play passive stenographer; it should be to actively engage in putting together the pieces to get a big picture that makes (more) sense. Laptops are distracting, and you’re spending a lot of money to be here. Don’t shortchange yourself.

I make some use of Powerpoint slides. Occasionally I will give them to you beforehand to be used as part of class prep; usually not. If I use them in class I will post them online later, so don’t sit there and try to copy their contents down in class. My slides are not intended to be self-explanatory or comprehensive. They are merely a tool I use to structure lectures and provide exhibits of things I wish to highlight. Some of them contain information in outline form, but do not rely on them as containing everything you need to know about the topics covered in class that day. They do not. Use them as a resource, and take any useful information from them and integrate it into your own outline. On the exam, my slides do not constitute citable authority in their own right. Also, you are not authorized to make the slides available to others.

**Class TWEN page:**

I make extensive use of TWEN, and encourage you to do so as well. Ideally, our TWEN page is a second classroom where we can expand the discussion beyond what we have time to do in the first one. I am lumping both sections together into one TWEN page so that we can get the benefit of roping a larger group into that discussion.
Class Assignments and other materials will be posted in the section called “Course Materials.” Check it regularly: you will be regarded as having constructive notice of anything posted there.

Class time is a very limited resource, and in an attempt to keep it coherent and focused on the key points, I will inevitably have to cut off certain trains of thought and ignore certain raised hands. Not everything I raise in an assignment sheet will be answered in class discussion. Even the things we focus on will rarely if ever be completely resolved by what we say in class. So here’s our place to continue the conversation and engage the stray thoughts. Did you have a burning question or comment that we didn’t get to in class? An idea you’d like to get feedback on? Run across an interesting or amusing article, blog post, or video clip relevant to what we’re studying? I encourage you to post it. You all have the power to create and respond to topics in the “Civ Pro Discussion” forum. Remember, our coverage of a topic is not over just because we’ve moved beyond it in class.

In fact, if you have a question that doesn’t get answered in class I’d strongly encourage you to post it here rather than emailing or just coming to ask me during office hours. There are several advantages to this:

- The process of having to formulate your question in writing will almost certainly cause you to think about it more clearly, and the benefit from any answer you receive will be directly proportional to the amount of effort you have already put into thinking about it yourself.
- Posting it online enables other people to try their hand at responding to your question, which is a valuable exercise. I promise that you will gain a lot more from hashing out an answer for yourselves than by passively imbibing one posted by me. (Plus you never know: I might be wrong. As you ought to know by now, there are such things as authorities in the law, but they aren’t people.)
- Any answer I provide will be of much higher quality if I have the ability to think about it and respond in writing rather than giving you whatever I happen to have on the top of my head when you ask.
- It lets everyone in the class get the benefit of the exchange, so that people do not feel compelled to attend office hours for fear of missing some crucial bit of information.

Keep in mind when interacting on TWEN that tone matters. I definitely encourage you to engage critically with each other (and me), both in class and outside it. One of the skills you should be cultivating is how to engage in a critical conversation about legal issues respectfully and constructively. This is not an academic exercise but a crucial practical skill that attorneys use every day, whether in a meeting (or email exchange) with partners or clients, or in letters or emails to opposing counsel. E.g.: When a senior partner (or judge) tells you forcefully and impatiently that of course the law is X, and you think she is overlooking something important, how do you correct her without pissing her off?

I have started a page of web links to relevant materials that I think useful and/or interesting. If you run across any additional ones that you think might profitably be added, by all means let me know.
There is also a forum called Class Concerns, in which you can make any comments you wish about what is going on in class or outside of it. My goal is to try to make this course as useful as possible, and it is better to get feedback when I can still do something about it than to have flaws revealed to me only in a post hoc class evaluation. You are empowered to post anonymously in this forum. I trust you to use this power responsibly and constructively.

The TWEN page has links to CALI exercises, which are generally well-done and useful. Before shelling out for Glannon, I suggest you try making use of these when you want to run through some practice problems (as you should). I will also be posting exam questions from prior years in the section called Practice Problems, and will give you opportunities to write and get feedback on practice answers to them, or to other problems.

**Office Hours**

If you need to meet with me personally for any reason, feel free to email and we can set up a meeting. I will also schedule a regular time for walk-ins after I get a chance to canvas you to find out when most people are likely to be able to take advantage of it. For the reasons explained above, I strongly encourage you to post substantive questions about the material we’re studying in class on TWEN before just coming to ask in person.

**The Exam**

You’re already thinking about it, aren’t you? Sad, but not irrational. The exam will be in-class. Internet access will be blocked, but laptops will not be locked down so that you may access electronic copies of course materials and notes. You may bring in whatever printed materials you wish, but only authorities featured in course materials may be cited on the exam.

The exam will last at least four hours, and will be designed to let you display the following skills:

1) **Issue spotting.** This doesn't mean identifying every conceivable legal category that one could apply to a given set of facts. It means identifying, within the context of the facts and the specific question asked, which legal issues are both relevant to the answer and doubtful enough to be worth discussing. This doesn't mean that if an issue is relevant to the answer but not doubtful in outcome you should just ignore it; it means you should identify the issue and the clear answer without wasting time belaboring the point, and spend more time discussing the issues whose outcome is less clear. Part of what you're being tested on is the ability to distinguish between the two.

2) **Analysis.** By this I mean exhibiting a clear, organized way of explaining the structure of the legal problem and the logical relationship of its various subparts to each other. This is what I will sometimes refer to as the "framework" in class. It also involves identifying the relevant "bedrock" premises that will not be in dispute and the extent of the gap between those and the needed solution.
3) **Argument.** By this I mean the art of filling in the gap between the bedrock and the needed solution by making nuanced, creative, and plausible use of facts and legal authorities to create something on which a judge might hang her hat without embarrassment. This is why we read full cases and not outline summaries of holdings.

Because it is an open-book exam (albeit with limited books), you do not get points for regurgitating black letter law. You get points for intelligently applying law to the facts given. If you do the class prep, stay engaged in class and on TWEN, and actually do the intellectual work of creating your own comprehensive outline from scratch, you will be well-prepared. Note that on the exam you will be expected (like any lawyer) to identify the source of any assertion of law you make, so as you work on your outline during the term make sure it does not omit that information.