The following exercises are taken from Shapo, Walter & Fajans, Writing and Analysis in the Law, Third Edition, Foundation Press (1995).

I. Questions Presented

Ms. Bell is suing her husband for damages under a law popularly called the "Federal Wiretapping Act," or Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Alice Bell claims her husband wiretapped her business telephone. Which is the best Question and why? What is wrong with the other Questions?

A. DID THE TRIAL COURT ERR IN DISMISSING MS. BELL'S CLAIM AGAINST HER HUSBAND FOR DAMAGES FOR USING AN EXTENSION TELEPHONE TO INTERCEPT HER PRIVATE COMMUNICATIONS WITHOUT HER CONSENT?

B. DOES TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT PROHIBIT THE APPELLEE'S INTERCEPTION OF THE APPELLANT'S TELEPHONE CONVERSATIONS?

C. DID THE TRIAL COURT ERR IN DISMISSING THE APPELLANT'S CLAIM SINCE HER HUSBAND'S UNAUTHORIZED ACTIONS OF INTERCEPTING HER ORAL TELEPHONE COMMUNICATIONS ARE CLEARLY PROHIBITED BY TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT AND DO NOT COME WITHIN THE EXCEPTIONS TO THE ACT?

D. DOES TITLE III OF THE OMNIBUS CRIME CONTROL, AND SAFE STREETS ACT, WHICH PROHIBITS AN INDIVIDUAL FROM INTERCEPTING ANY WIRE OR ORAL COMMUNICATION, PROVIDE A CAUSE OF ACTION FOR A WIFE AGAINST HER HUSBAND, WHO EAVESDROPPED ON AN EXTENSION TELEPHONE AND SECRETLY RECORDED HER PRIVATE TELEPHONE CONVERSATION?

II. Persuasive Techniques in Sentence Writing

Identify the "problem" in the following sentences and rewrite to be more persuasive:

A. *Assume you are representing an employee-at-will (an employee-at-will can be fired at any time for any or no reason)*

Although the Pennsylvania Supreme Court has never held there is an exception to the employment-at-will doctrine, the lower courts have recognized a limited exception to the doctrine when an employer's discharge violates a clear mandate of public policy.

B. *Assume you represent two children in a loss of parental consortium claim (loss of intangibles like love, companionship, and solace):*

In all but thirteen jurisdictions that have recently considered the issue, children cannot sue for loss of parental consortium.

C. *Re-write with the assumption that you want to invoke an exception to government immunity from liability:*

Generally a municipality is not liable to an individual for failing to provide police protection. However, there is an exception for police who assume a "special relationship" or "special duty" towards an individual.

III. Broad v. Narrow Case Holdings

A graduating high school student, Tim Jefferson, has sued in federal district court seeking to declare unconstitutional and to permanently enjoin the inclusion of prayer at graduation. The school board of Tim's school had authorized student elections to permit students to decide whether to include a voluntary, nonsectarian, student-led prayer in their graduation ceremony. By a majority of one, the students voted to have such a prayer.

The most recent decision on this issue is Lee v. Wiesman, 112 S. Ct. 2649 (1992). In Lee, a middle school principal had invited a member of the local clergy to offer a nonsectarian and non-proselytizing prayer at his school's graduation. The Court said the principal's action represented governmental coercion to participate in religious activities, a form of establishment of religion banned by the First Amendment.

A. Assume you are representing Tim Jefferson. Write a sentence or two interpreting Lee broadly so that it is analogous to your case.

B. Assume you are representing the school board. Interpret Lee narrowly to distinguish it from your case.

IV. Rebutting Opposing Arguments and Authority

Identify the technique in the following examples for minimizing unfavorable precedents or facts (for help, consult the next page in this packet). How successful is the writer?

A. The court below relied heavily on Carroll v. Talman Savings Ass'n., 604 F.2d 1028 (7th Cir. 1979). Yet Carroll is the only decision from a Court of Appeals that has held a dress code discriminatory. Not only is the case ten years old, but it was decided only by a 2-1 vote over the vigorous dissent of the respected Judge Vest.

B. In Carroll, the court overturned an employer's sex-based dress code policies which required its female employees to wear a uniform but permitted male employees to wear a wide variety of attire, including sport coats and leisure suits. The Carroll dress code is easily distinguishable from the one required here, where both men and women must dress in conservative business suits. In fact, in Carroll, the court said that Title VII does not prohibit uniforms in the workplace but only requires that a "defendant's similarly situated employees be treated in an equal manner." Defendant accomplishes the very thing that the court suggests: it treats its employees equally.

C. Defendant has urged that the proper comparison is to cases involving personal grooming regulations in which the courts have held that grooming standards, such as hair length regulations for male employees that differ from the permitted hair length for females, did not constitute sex discrimination under Title VII. In Knott, for example, the court permitted reasonable grooming standards for its employees that included minor differences for males and females that reflected customary grooming styles.

These grooming codes are markedly different, however, from Defendant's dress codes. First, Defendant's disparity of treatment between the sexes is more severe. Fields requires female clerks to wear a clearly identified uniform in a limited style and color range while permitting male clerks their own choices. In Knott, each sex was required only to meet a customary standard of good grooming. The limitations on their grooming were minor. Second, grooming regulations merely maintain a standard of conventional grooming for employees to follows. In Knott, men with long hair were unconventional and inappropriately groomed for their employer's business. Defendant, however, fired the plaintiff for wearing her own conventional and entirely appropriate business suit because it was in a different dark color from the one issued.

D. Although several courts have recognized an exception to Title III for interspousal wire tapping, some federal courts have held that a cause of action exists between spouses for violation of the Act. In Jones v. Jones, the court applied Title II to a husband who had tapped a telephone at his estranged wife's residence, and in White v. White, the court held that there is a cause of action for a wife whose husband had hired an investigator to tap her telephone. In these cases, however, the parties had gone beyond a domestic dispute. In Jones, the parties were already estranged. The telephone was located outside of the marital home. In White, a third party to the relationship was the agent of the intrusion. Neither of these cases involved the special nature of an ongoing domestic relationship within a marital home.

E. Those courts that have decided that Title III does not apply to interspousal wiretapping have misinterpreted the policy behind the statute. As the legislative history shows, Congress repeatedly heard testimony about the frequent use of electronic surveillance between spouses in divorce cases. In fact, one committee witness, echoing the testimony of others, said that "private bugging can be divided into two categories: commercial espionage and marital litigation." Several Senators stated in the Congressional Record

their understanding that the bill prohibited private surveillance.

Possible Responses to Opposing Arguments/Authority

A. Your opponent has misstated the holding of a case.

B. The proposition cited by your opponent is dictum rather than the holding of the case.

C. Your opponent's case involves a significantly different procedural posture.

D. The material facts in your opponent's case are distinguishable.

E. Your opponent's case is from another jurisdiction and is not controlling.

F. Your opponent's case is against the weight of authority and/or the modern trend in authority.

G. Your opponent's case is old and outdated.

H. Your opponent's case has been reversed, overruled or modified.

I. Your opponent's case is a split decision and the dissent is more persuasive.

J. Your opponent's case was wrongly decided and created bad law.

Point Headings

1. These point headings were written for an appellant's brief arguing that a person who serves alcoholic beverages in his home (a social host) can be liable for serving a guest who the host knew was intoxicated when the guest later was injured. Which point heading is best for the plaintiff-appellant Joseph Nunn? What is wrong with the other headings?

A. JOSEPH NUNN STATES A CLAIM AGAINST SAMUEL TANN FOR SERVING HIM ALCOHOLIC BEVERAGES UNDER STATE V. SMALL.

B. DISMISSING JOSEPH NUNN'S CLAIM AGAINST THE DEFENDANT FOR SERVING HIM ALCOHOLIC BEVERAGES WHEN HE WAS ALREADY INTOXICATED WAS ERROR AND FAILED TO UPHOLD WELL-ESTABLISHED NEW HAMPSHIRE LAW PROVIDING PLAINTIFF WITH A CLAIM AGAINST THE DEFENDANT.

C. THE COURT BELOW COMMITTED ERROR IN DISMISSING THIS SUIT BECAUSE UNDER NEW HAMPSHIRE LAW THE DEFENDANT VIOLATED HIS DUTY TO HIS GUEST NOT TO SERVE HIM ALCOHOLIC BEVERAGES WHEN THE GUEST WAS INTOXICATED, KNOWING THE GUEST WOULD SOON BE DRIVING HIS AUTOMOBILE.

2. Another issue in the social host problem is whether, if the social host is under a duty not to serve the intoxicated guest, the host may be liable to the guest for the guest's injuries as well as to a person whom the guest injured (the more typical claim). Which is the best heading for the defendant-appellee (the social host)? What is wrong with the others?

A. EVEN IF THE DEFENDANT HAD A DUTY NOT TO SERVE THE INTOXICATED PLAINTIFF, THAT DUTY EXTENDS ONLY TO INNOCENT PARTIES WHOM THE PLAINTIFF FORESEEABLY INJURES, NOT TO THE PLAINTIFF FOR THE PLAINTIFF'S OWN INJURIES BECAUSE THE PLAINTIFF MUST BEAR RESPONSIBILITY FOR DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL.

B. THE DEFENDANT'S DUTY, IF ANY, ARISING FROM RSA 175.6 EXTENDS ONLY TO INNOCENT THIRD PARTIES.

C. LEGISLATIVE POLICY AND SOCIAL WELFARE DICTATE THAT THE INTOXICANT HIMSELF CANNOT RECOVER FOR HIS INJURIES.

D. THE FACT THAT THE APPELLANT WAS HIMSELF THE INTOXICATED GUEST AT THE PARTY AND NOT A THIRD PERSON SHOULD BAR HIS RECOVERY FOR INJURIES RESULTING FROM BEING SERVED DRINKS, WHILE OBVIOUSLY INTOXICATED, BY HIS SOCIAL HOST.

3. The following headings were written by a criminal defendant-appellant whose request for an instruction to the jury on entrapment was denied. Which is best? Why?

A. THIS COURT SHOULD REVERSE THE DECISION OF THE COURT BELOW ITS REFUSAL TO GRANT APPELLANT'S REQUEST FOR AN ENTRAPMENT INSTRUCTION TO THE JURY BECAUSE OF INCONSISTENT PLEADINGS CONSTITUTED REVERSIBLE ERROR.

B. THE LOWER COURT ERRED IN NOT INSTRUCTING THE JURY ON ENTRAPMENT BECAUSE, ALTHOUGH THE DEFENDANT PLEADED NOT GUILTY AND DENIED THE INTENT ELEMENT OF THE CRIME WITH WHICH HE CHARGED, HIS PLEA IS NOT INCONSISTENT WITH A REQUEST FOR AN ENTRAPMENT INSTRUCTION.

C. THE DEFENDANT WAS ENTITLED TO AN ENTRAPMENT INSTRUCTION.