

SYLLABUS AND RULES FOR APPELLATE ADVOCACY

Sections 3&4

Fall Semester 2021

Professor Brian Porto

Home Phone: (802) 674-9505

E-mail: bporto@vermontlaw.edu

Office: Old Schoolhouse Room 204

Office Hours (in-person or by phone): MW11 a.m. - noon; TTH 12-1 p.m., and by appointment

INTRODUCTION

Persuasive speaking and writing are the essence of effective appellate advocacy. This course aims to hone your analytical, research, writing, and oral advocacy skills by requiring you to write a brief in a case pending before the United States Supreme Court and to present an oral argument in that case. Classes are intended to help you think critically about the issues in your case and articulate them effectively.

During the first third of the semester, you will draft individual sections of an appellate brief, one at a time. Later you will write a first draft of a complete brief. I will critique your first draft in writing and will confer with you about your work. Conferences will occur between October 25 and November 4. Come to our conference prepared to ask questions and to discuss revisions for the final draft. You will then rewrite your brief and submit the final draft for grading; the final draft will be **due two weeks after our conference**. You will receive a grade for your final brief that will reflect the quality of both your first draft and your final draft. The goal of this process is to get you to develop the habit of continually improving your writing.

In November you will formally argue the case before a panel of Vermont and New Hampshire attorneys and judges. To prepare, you will practice your oral argument with me acting as the court. I will critique your argument. You may also have an opportunity to practice your argument before members of the Moot Court Advisory Board (MCAB).

LEARNING OUTCOMES

By the end of this course, you will be able to:

1. Evaluate a trial court's decision to judge whether the circumstances of the case warrant an appeal;
2. Organize the record on appeal to tell a compelling story about your client's case to an appellate court;
3. Create an argument that includes legal sources and policy-based evidence to give an appellate court a sound rationale for deciding in your client's favor;

4. Construct a brief whose Table of Contents and point headings, by themselves, present a persuasive narrative for your client's case; and
5. Deliver an oral argument that conveys to the Court your client's view of the case, while also responding to the judges' concerns about the implications of your client's position.

Please Note: If you have any condition that might require special arrangements for Appellate Advocacy, including Oral Argument, it is your responsibility to inform your professor and/or formally request an accommodation through the proper channels within the first two weeks of class or within a week of learning of the need for accommodation. This is critical because each student's individual needs affect the overall scheduling and pedagogical requirements of the course.

MATERIALS

The following materials are required for this course:

1. **The Course Packet**, which includes the record for the case of *City of Austin, Texas v. Reagan National Advertising*, No. 20-1029, 972 F.3d 696 (5th Cir. 2020) (cert. granted June 28, 2021), pertinent precedents, and background readings on appellate advocacy and appellate procedure, respectively.
2. The Harvard Law Review Association, **The Bluebook: A Uniform System of Citation** (21st ed.). Supplemental materials may be distributed electronically during the semester via the course TWEN site.

You will have assigned readings for each class. They are designed to facilitate class discussions, give general information about appellate advocacy and the appellate process, and assist you in writing your brief and preparing for oral argument. The library has legal writing texts and law review articles on brief writing and oral argument that you should feel free to consult. An excellent brief written for this course several years ago is included at the course TWEN site for your convenience.

APPELLATE ADVOCACY RULES OF PROCEDURE

PART I: GENERAL RULES

RULE 1: SCOPE OF RULES

These rules govern form and procedure for the writing assignments and oral arguments in Appellate Advocacy. When these rules are silent, you should follow the rules of the Supreme Court of the United States, which are available at the Supreme Court's Web site. See: <http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf>.

RULE 2: ASSIGNMENTS

You must write (1) a Preliminary Outline of your brief (including the Question(s) Presented); (2) a draft Statement of the Case; (3) a draft of your point headings; (4) a draft Summary of the Argument and Argument; and (5) a final brief. You must also participate in practice and final oral arguments and attend the final class on December 7.

RULE 3: FORM OF WRITTEN ASSIGNMENTS

Written assignments must be typed and double-spaced. The typeface should be Times New Roman, 12 point. Margins must be one inch on all sides. Page numbers should appear at the bottom center of each page. Written assignments not conforming to these rules may be rejected and returned to the student or may result in a lower grade.

RULE 4: GRADING

Grades will be computed as follows:

Brief (first and final drafts combined):	60% of final grade
Oral Argument:	25% of final grade
Class Participation:	15% of final grade

Class participation includes class attendance and preparation; the quality of your drafts; participation in class discussions; preparation for and participation in conferences; and preparation for and participation in practice oral arguments. You cannot participate in class if you do not attend regularly, so **class attendance is mandatory**. Points will be deducted from the final grade of any student who has two unexcused absences. **A student who has three or more unexcused absences will receive a failing grade of “F” for the course.** Points may also be deducted from a student’s final grade for repeated failures to arrive for class on time or for leaving class early.

RULE 5: TIMELY SUBMISSION OF ASSIGNMENTS

You are responsible for submitting assignments at the proper time and place. Any student who fails to submit an assignment by the deadline is subject to a late penalty of one-half a letter grade per day late. For example, an assignment that would otherwise have received a “B+” will receive a “B” instead if submitted after, but within 24 hours of, the deadline. A student who submits any assignment more than one week (7 days) late will receive a failing grade in the course. Exceptions to this policy will be made only in the event of an emergency.

RULE 6: THE HONOR CODE

The Vermont Law School Honor Code governs your work and conduct in Appellate Advocacy. Whenever you use the words or ideas of another writer, you should acknowledge their source. Cite the source if you express another person’s ideas in your own words. The assignment you submit must be your own work product. You may not give an outline, a list of cases, or a completed assignment to another student. The student who loans the information and the student who uses it are equally at fault. Do not consult any attorney, judge, or faculty member other than me on any question dealing with the substance of your brief or oral argument. **Do not obtain or review the cert petitions or the briefs (including amicus briefs) filed in the Supreme Court or the briefs filed in any lower court in *City of Austin, Texas v. Reagan National Advertising*.** Before submitting your first written assignment, read *A Primer on*

Plagiarism, which is attached as an appendix to this syllabus. A violation of this rule will be considered a violation of the honor code and will result in a grade of “F” for the course.

RULE 7: THE RECORD

Pertinent parts of the record of *City of Austin, Texas v. Reagan National Advertising* are included in the Course Packet. You may rely on all items that are in the record. You may not assume any pre-litigation fact not in the record. When referring to an item from the record in your brief, you must cite the relevant page of the record, e.g. (R.12).

PART II: WRITTEN ASSIGNMENTS

RULE 8: PRELIMINARY OUTLINE

Your first assignment will be an outline summarizing the major issues in the case. It should note your theory of the case, the research materials already consulted, and the research still to be done. Included in the outline should be the Question(s) Presented by the appeal, stated in a persuasive manner. The Preliminary Outline [including the Question(s) Presented] is due **Thursday, September 16, by noon.**

RULE 9: STATEMENT OF THE CASE

The Statement of the Case (SOC) must succinctly state the relevant facts and the procedural history of the case. It should tell a coherent and compelling story that persuades the Court of the justice of your client’s cause. Any fact used in the argument section must be included in the SOC. The page limit for this assignment is 5-7 pages, but your SOC might be shorter, depending on the nature of the case. A draft of the SOC is due **Tuesday, September 28, by noon.**

RULE 10: POINT HEADINGS

The point headings are an outline of your argument. They should be arranged in such a way that the reader can discern the crux of your argument just by reading the point headings. Each heading must be a complete sentence. Point headings must conform to the following conventions, plus **they should be in bold print.**

I. MAJOR POINT HEADINGS, IDENTIFIED WITH A ROMAN NUMERAL, MUST CAPITALIZE EVERY LETTER OF EVERY WORD.

A. Minor point headings begin with a capital letter in the first word of the sentence and must be underlined.

1. Minor subheadings should not be capitalized or underlined.

A draft of point headings is due on **Thursday, October 7, by noon.**

RULE 11: SUMMARY OF ARGUMENT, ARGUMENT, AND CONCLUSION

1. Summary of Argument (SOA): The SOA is a summary of all arguments made in the body of the brief. It should communicate your theory of the case clearly. It should be no longer than two pages. It should conclude with a request for relief. The SOA should not include citations to the record or to legal authorities.

2. Argument: The argument is the heart of the brief. It must include your contentions and the reasons for them. It should be organized by point headings that divide it into clearly presented issues and sub-issues. It must be persuasive and must include citations to pertinent authorities. Citations must conform to the Bluebook. The argument should be between 13 and 16 pages long, maximum, but it will likely be shorter if the featured case presents only one discrete issue.

3. Conclusion: The conclusion must specify the precise relief requested. It must be short (i.e. no more than three or four sentences). It may include a one or two sentence summary of the argument, but it must identify the precise relief requested. It should not include facts, arguments, or citations to authority not discussed earlier in the brief.

One copy of the first draft of your brief, including the Question(s) Presented, SOC, SOA, Argument, and Conclusion, is due **Thursday, October 21, by noon**. I will critique it and will return the critiqued draft to you before our conference.

RULE 12: FINAL DRAFT OF BRIEF

The page limit for the final draft is twenty-five pages. That is a limit, not a goal. **Do not feel pressured to write twenty-five pages.** The Table of Contents and Table of Authorities do not count toward the page limit. The final draft is **due two weeks after your individual conference**. Please submit to me **the final draft and one copy of the critiqued first draft by noon on the due date**. Exchange **a copy of the final draft** with opposing counsel as soon as both of you have submitted briefs. Also submit **one electronic copy** of the brief to the Appellate Advocacy website when you submit the hard copy to me. The final draft of the brief should include the following sections:

1. Title Page: See attached appendix.
2. Question(s) Presented: This section should state each issue clearly and succinctly without setting out a full argument. Questions Presented normally do not include names, dates, amounts, or similar items. The Question(s) Presented must appear on a separate page numbered “i” immediately following the title page. The question(s) must be single-spaced.
3. Table of Contents: This section begins a new page numbered “ii.” It must set forth each section of the brief, including all point headings, with the number of the page of the brief on which each section begins.
4. Table of Authorities: This section begins a new page with the appropriate lower case

Roman numeral. It must list each authority cited in the brief and the page(s) on which it is cited. If an authority is cited on seven pages or more of the brief, use “passim” instead of listing all pages. Divide the Table of Authorities into the following three sections:

- A. Cases: List the cases cited in the brief in alphabetical order.
- B. Statutes and Constitutional Provisions: List all constitutional provisions, statutes, code sections, and model code and act provisions cited in the brief.
- C. Other Authorities: List all other authorities cited, such as law review articles and treatises.

5. Inside Caption: This is the title page without your name and address. It begins a new page numbered “1.”

6. Opinions Below: This section should give the citation to the pertinent opinions and judgments delivered in the courts below. It must be double-spaced, and it should begin on the same page as the inside caption.

7. Jurisdiction: The jurisdictional statement must include a citation to the statutory provision, general rule, or other authority that confers jurisdiction on the Court to review the appeal. This statement must also include the dates of the opinions below and the dates that the petition for certiorari was filed and cert was granted.

8. Constitutional and Statutory Provisions Involved: This section should quote any constitutional provisions, statutes, and code sections that are at issue. Give the complete citation. If the provisions involved are lengthy, indicate that you will set them forth in an Appendix to the brief.

9. Statement of the Case: (See RULE 9, above)

10. Summary of the Argument (See RULE 11, above)

11. Argument (See RULE 11, ABOVE)

12. Conclusion (See RULE 11, above)

13. Signature Block: See attached appendix.

14. Appendices: Appendices contain the complete text of provisions referred to in the section of the brief called Constitutional and Statutory Provisions Involved. An appendix is only necessary if the pertinent provisions are lengthy. Generally, a separate appendix should be used for each major category of statute. Each appendix should be lettered, e.g., Appendix A, and should begin a new page.

PART III: ORAL ARGUMENT

RULE 13: PRACTICE ARGUMENTS

Mandatory practice arguments will occur before your final argument. Specifically, the practice arguments will occur during the **week of November 8**. You will be allotted ten minutes for your practice argument. I will ask questions during the practice argument and will critique your performance afterward.

RULE 14: FINAL ARGUMENTS

Final arguments will occur **between November 15 and December 2**. You will argue before a three-member or four-member panel comprised of lawyers and judges from Vermont and New Hampshire. You will be allotted twenty minutes to argue. Counsel for Petitioner may reserve up to three minutes for rebuttal. Petitioner will begin the argument. Respondent will argue after Petitioner. You are prohibited from arguing a legal point that neither your brief nor your opponent's brief mentioned. Petitioner may not discuss in rebuttal issues that the Respondent did not raise during the argument, even if they were raised in Respondent's brief.

APPENDIX A

The title page of your brief must appear as follows:

NO. XX-XXXX (Docket number)

In the

SUPREME COURT OF THE UNITED STATES

October Term, 20XX

(Name of Petitioner – all in capital letters),

Petitioner,

v.

(Name of Respondent – all in capital letters),

Respondent.

On Writ of Certiorari to
(Name of Lower Court)

BRIEF FOR (PARTY DESIGNATION)

Student's Name
VLS Address
VLS Phone Number

Attorney for (Party)

APPENDIX B

A PRIMER ON PLAGIARISM¹

Law school honor codes and disciplinary rules normally forbid submitting the work of another as one's own work in any academic pursuit, whether or not with the consent of the author of the work. Plagiarism violates this rule.

Types of plagiarism are:

1. quoting the words of another without attribution.
2. paraphrasing the words of another without attribution.
3. using the ideas of another without attribution.

The underlying rule is simple: do not use the words or ideas of another and represent them as your own. Give credit where credit is due. Avoid plagiarism by including a citation to the source.

Plagiarism applies to memos, briefs, and other Law School projects in the following ways:

1. Quotations. When you quote, give a citation to the source.
2. Paraphrasing. If you take another's sentence and change a few words, you still must give a citation. If you paraphrase, do not use quotations, but use a signal (often see). There is a grey area between paraphrasing and putting something in your own words. You must decide whether or not a citation is necessary. Err on the side of caution. Usually you will want to include a citation because a citation to authority increases the persuasiveness of what you are saying.
3. Original Ideas. Closely following the structure of another person's written work falls into this category of plagiarism. For example, taking a few pages from a law review article or treatise and rewriting them in your own words constitutes plagiarism. Debatable cases

¹ By Louis J. Sirico, Jr., professor at Villanova Law School and co-author of *Legal Writing and Oral Advocacy* (Matthew Bender), *Persuasive Writing for Lawyers and the Legal Profession* (Matthew Bender), and *Legal Research* (Casenotes). Copyright 1988 by Louis J. Sirico, Jr. The author wishes to acknowledge the assistance he gained from reading Ralph D. Mawdsley, *Legal Aspects of Plagiarism* (National Organization on Legal Problems of Education 1985).

arise when the structure of another's argument is not particularly original. Again, err on the side of giving credit. A citation increases persuasiveness.

4. A Sense of Proportion. You need not place a citation after every sentence you write. Excessive cites are unattractive and break the flow of the sentences and your argument. They also suggest that you have avoided thinking and instead have pasted together the words of others. This sort of cut-and-paste product is rarely effective. In deciding when to cite, use your common sense. If you have questions, ask them before your deadline for submission. Avoid putting yourself and others in an embarrassing position.

ILLUSTRATION

The left-hand column is an excerpt from a fictitious law review article. The right-hand column is a plagiarized version.

The classic cases on the law of lost and found property are worthless guides for a principled court. Authorities frequently cite Armorie v. Delamirie as the major finder's case. The case, however, is about the rights of a finder against those of a subsequent possessor who wrongfully converted the property. The court's brief discussion of the comparative rights of the finder and true owner is dictum. In South Staffordshire Water Company v. Sharman, workers found gold rings on their employer's property. The court announced a rule accurate as a generality—the owner of a locus in quo presumptively possesses items on the land—when it could have relied on an uncontroversial rule—employees who find things in the course of their employment act as agents of their employers. In reaching its holding, the court entirely misread Bridges v. Hawkesworth, another traditional case. In Hannah v. Peel, the court offered a thorough discussion of the law and then ignored it to reach a curious result.

The classic cases on the law of lost and found property are worthless guides for a principled court. Authorities frequently cite Armorie v. Delamirie as the major finder's case. The court's brief discussion of the comparative rights of the finder and true owner is dictum. The case really is about the rights of a finder against those of a subsequent possessor who wrongfully converted the property. South Staffordshire Water Company v. Sharman concerns workers who found gold rings on their employer's property. Though the court could have rested its opinion on an uncontroversial rule—employees who, in the course of their employment, find personal property act on behalf of their employers—it chose to rely on a rule that is accurate only as a generality—the owner of a locus in quo presumptively possesses items on the land in question. The court betrayed its lack of understanding by misreading Bridges v. Hawkesworth, another standard case. The court in Hannah v. Peel reached a curious conclusion after offering a thorough discussion of the law and then ignoring it.

COMMENT ON THE ILLUSTRATION

The first two sentences in the right-hand column are the clearest examples of plagiarism. The writer copied them verbatim without quotation marks and without citation. The next two sentences are virtually verbatim, but in reverse order, perhaps to mislead the reader who is

familiar with the original article. In the remaining sentences, the writer has rearranged parts of sentences and changed a few words here and there. Throughout, the writer has employed the organizational structure and substantive ideas of another without giving credit.

By failing to give proper attribution, the writer has reduced the persuasiveness of the argument. Citations to the article would have demonstrated that a published authority shared the writer's view and thus made the argument stronger. Equally important, this writer would have violated the law school honor code.

APPENDIX C: SIGNATURE BLOCK

The signature block should follow the last line of your conclusion. It should read as follows:

Respectfully submitted,

Name of Petitioner or Respondent

By: _____

Your Name

Address

Phone number

Attorney for Petitioner (Respondent)

Date: