# May It Please the Classroom: Using Pending United States Supreme Court Cases to Teach Appellate Advocacy and Persuasive Writing

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Over the years, the legal-writing academy has developed a rich array of ways to teach persuasive writing. The "Idea Bank" on the Legal Writing Institute's listserv contains dozens of creative approaches using compelling fact patterns developed by experienced professors across the country.[1] While these problems have served many legal-writing professors well, I will offer an alternative to the "canned" problem — that is, one based on a fictitious case and designed for repeated use.

For more than two decades, professors in the legal-writing department at Vermont Law School have used pending United States Supreme Court cases to teach a three-credit course called Appellate Advocacy. Appellate Advocacy is taught by five professors in the fall semester of the second year, after students have had two semesters and five credits of legal writing in their first year. Each professor has about 40 students, divided into two sections. Each professor picks a different Supreme Court case. The students write a brief based on the actual case. Students then argue the case

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[1] The Idea Bank is password-protected and available to legal-writing professors at www.lwionline.org.

in a moot-court setting before volunteer lawyers and judges from across Vermont and New Hampshire.

This program has been in place at Vermont for over 20 years. We are convinced that it's one of the best ways to teach persuasive writing and appellate advocacy. In this article, I'll describe how our Appellate Advocacy program works, highlighting what I see as the major advantages and disadvantages of using live United States Supreme Court cases in the legal-writing curriculum.

## Selecting a Case

Work on the course begins each year in early March, when the Court starts granting certiorari in cases to be heard in the fall. The Court recesses for the summer on July 1, after which it stops granting certiorari (except in the most exceptional cases) until it reconvenes in October. By the time the Court recesses, it generally will have granted certiorari in about 30 cases.

Selecting a case from this small pool can be challenging. Since each professor works with just one case for the entire semester, it must meet some exacting criteria for it to be successful.

To begin with, although it's not absolutely necessary, I favor cases with a dissent in the lower court. This gives students representing the petitioner some arguments to work with and can make them feel they have a chance of winning, since at least one judge below agreed with their side.

While we prefer high-profile cases to create interest, the case does not necessarily have to be a newsmaker. Once I used a relatively obscure labor-law case, *Marquez v. Screen Actors Guild, Inc.*[2] *Marquez* worked because it carved off a discrete and manageable

[2] 525 U.S. 33 (1998).

section of the National Labor Relations Act and posed a classic statutory-interpretation question about the wording. The case also worked because it involved an actor's dispute with the Screen Actors Guild, so the facts had a dash of Hollywood interest.

For a case to work the entire semester, it must have meaningful policy implications, legal issues that law students can grasp, and enough legal and political heft to motivate students to write a high-quality 25-page brief. Only a handful of cases from any given docket fit this bill. And in the last few years, the number of cases docketed for the October Term, before the Court's summer recess, has fallen to as low as 26 in 2007 (although it rose back up to 43 in 2009).[3]

So far, our program has managed to fill our own docket each fall with five interesting cases. Still, anyone considering our model should recognize the new reality of having to select good cases from a depleted certiorari pool.

## Developing the Case

By early July, everyone in the department has selected a case. Then the professors must become familiar with the issues. We spend July and August reading all the briefs, consulting secondary sources, chatting with other professors at Vermont who have an interest in the case, and eventually calling the attorneys involved. This last resource becomes one of the many enjoyable aspects of using pending Supreme Court cases. It's fun talking with the attorneys — and at times even strategizing with them about the best approach to oral argument. You might think the attorneys

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[3] *See* Jason Harrow, *SCOTUSblog End of Term "Super Stat Pack,"* Grant Rates by Conference, http://www.scotusblog.com/wp/wp-content/uploads/2009/06/grants2.pdf (accessed Sept. 22, 2009).

would be too busy to find time to chat, but that has not been my experience. After I describe the program, they are often flattered that their case will be studied so closely by my students, and they are always willing to help.

Summer work includes creating the course packet. Since all the professors in our program are seasoned academics, we do not feel the need to prescribe any department-wide requirements for the packet. Some favor a more theoretical approach to appellate advocacy, while I'm more comfortable with a practical approach to the subject and the case. My course packet is heavy on the precedent needed to resolve the appeal. I stress with students that they all still need to do research beyond these key cases, and that I expect discussion of their independent research in their briefs. But there will always be certain cases that everyone needs to discuss, and I prefer to include them in the course packet so that we have a common reader. It can be 300 pages and sometimes even longer.

One important consideration when compiling the course packet is what to do with the joint appendix. The joint appendix contains the greatest hits, as it were, from the record. The Court orders the parties to collect the most relevant documents from the record, compile them in the joint appendix, and file it with the petitioner's brief. If the joint appendix is short enough, I put it in the course packet. If it's long, it can be put on the course's TWEN site (West's electronic class-support service) or in hard copy on reserve in the library. Occasionally, I need a document not found in the joint appendix. That's where early contact with the attorneys involved pays off. They send me PDF versions of the necessary documents, and I distribute them to the students.

After creating the course packet, which is due by August 1, each professor drafts a one-page summary we call the case synopsis. Professors take a journalist's approach to the synopsis, avoiding case

citations and heavy legal analysis. The goal is to get students interested in the case by dramatizing its importance to jurisprudence and public policy.

In our program, students are allowed to pick the case and professor they want. One week before the semester starts, we e-mail the five case synopses to the students, along with a preference sheet listing the times of each professor's sections. Students have until 4 p.m. on the first day of class to submit their preference sheets. We then have a rather frantic two-hour paper shuffle in the department with 170 preference sheets. Not surprisingly, there is almost always an imbalance in the preferences. Although the students sometimes get their second or third choice, about 75% get their first choice.

## Arguing the Case

The rest of the semester proceeds much like any other appellate-advocacy class. We break the brief down into its component parts and critique drafts of discrete sections before the final draft is due. After that, we have practice arguments before the big show — ten nights of oral arguments before a panel of lawyers and judges from Vermont and New Hampshire. In the middle of all this, each professor is required to draft a bench memo, typically 10–15 pages, for the volunteer judges. These are due in mid-October.

One popular feature of our program is a trip to D.C. to hear the actual oral argument in the case. We work with the Court to try to arrange reserved seats; sometimes we succeed and sometimes we don't, mostly depending on how closely watched and notable a case is. (Perhaps this is one reason to pick a less well-known case, all things considered, since you're more likely to score reserved seats.) Not having reserved seats simply means that students will

need to stand in line. We tell students to arrive no later than 5 a.m. Many will camp overnight on the courthouse steps. All who have taken these measures have made it in, even for the most popular cases.

In any event, we stress that attending oral argument is strictly extracurricular and certainly not required or even expected. Still, every year probably two-thirds of the students manage to find the time and the money to see the argument. All who go are thrilled by it, as you can imagine. When students discover that their answers to questions at their own oral arguments were as good as or better than the answers the real lawyers give to the same or similar questions, the experience can be empowering.

Problems arise, though, when the argument occurs at a point in the semester before students have had their oral arguments. The chance to hear the Supreme Court argument could give an advantage to those students with the means to get to D.C. But the department has concluded that the benefit is too great to pass up and that any disparity between those who go and those who do not can be tempered with thoughtful classroom strategies. The transcript of every oral argument is usually available online within a day or two after the argument. Allowing students to read the transcript helps neutralize the possible advantage of attending the argument in person. And when students who heard the argument return from D.C., they are required to debrief the class.

The semester culminates with a big appellate-advocacy panel. We invite one attorney from each case to come to campus and speak. The goal is to get one of the attorneys who argued the case, but sometimes the argument occurs too close in time to the panel. In that event, we choose some notable attorney who has written an amicus brief. Over the years, we have brought dozens of attorneys to the school, all with interesting stories to tell. They have ranged

from seasoned government attorneys who have argued as many as 50 cases before the Court, to solo practitioners who through cosmic luck got their one chance.

The panel lasts about two and a half hours. The first hour and a half is a plenary session at which each attorney speaks for 10–15 minutes to the entire second-year class. At this session, the attorneys speak generally about appellate advocacy and tell tales of their time before the Court. We encourage them to make it a nice mix of humor, cautionary tales, and life lessons. For the second part of the panel, we break up into small groups, and each attorney speaks with students who have worked on his or her case. By this time, with the semester over, students are all highly conversant with the details of the case and regularly impress the attorneys with the level of their understanding and the quality of their questions. The panel makes for a satisfying end to a busy semester.

## Advantages of the Program

One advantage of using pending Supreme Court cases is that there are no bad facts. With canned problems, even the most carefully prepared ones, it's not uncommon for there to be holes in the record, especially when the problem is first used. With pending Supreme Court cases, the case is what it is. If the Court grants certiorari on an interlocutory appeal, leaving parts of the factual record incomplete, that becomes a teaching moment about the merits of the finality rule, rather than a source of embarrassment for the professor who did not think through a fact pattern completely.

Another advantage: with a real case, you get a result. It's always great fun when the Court hands down the decision. That usually happens after the semester is over, yet it rekindles all the fervor students had when they were working on the case. The class listserv

is alive with discussion, pro and con, about the result. The Court's decision provides a rewarding closure that's not possible with a canned problem.

There are benefits for the professors as well. One is an increased familiarity with the Court's docket and new insights into the Court itself. Another is that the professor becomes one of the go-to people on campus for students and other professors interested in the case. I make it a point to discuss the case with the professors on campus who specialize in the subject. Over the years, professors in our department have given popular talks on and off campus about the cases they're using. These efforts increase the presence and stature of legal-writing professors who struggle to convince the rest of the faculty that they do more than parse sentences.

Finally, using Supreme Court cases can benefit the entire school by attracting media attention. We have had local media cover our trips to the Court for the oral argument, and every year newspaper and television journalists from across Vermont cover our appellate-advocacy panel.

## Disadvantages of the Program

The most common concern expressed when I describe our program is that students might read the real briefs online. We try our best to warn students not to do that, starting as soon as we send them the synopses before the semester starts. I also tell my students that it will not do them any good to try to copy any of the briefs, since I've read them all.

Even with these precautions, I will grant that some students probably peek at the briefs. Since the briefs are now so accessible on the web, the temptation can be overwhelming. This is a problem. Yet I don't see it as any more of a problem than the risk that students might look at old briefs when a canned problem is used

more than once. If anything, the risk of plagiarism in the latter instance could be greater, since the number of old briefs that could be circulating is far greater than the number of briefs available online. This risk is compounded if canned problems are used by more than one professor. The chance of spotting the work of one of my former students is slim; the chance of spotting the work of another professor's student is essentially zero.

As with any other plagiarism issue, no amount of monitoring can completely eliminate the possibility. We must, in the end, trust that our students have enough honesty and integrity to play by the rules. In my opinion, using an exciting and important Supreme Court case increases the chance that they will do the right thing because they will care more about the case and therefore put more time and energy into their work.

Rather than worrying about the wayward misbehaving student, I tend to be more concerned with larger institutional and pedagogical concerns. A program like ours requires a staff of experienced and well-trained professors. A less experienced staff can still use pending Supreme Court cases, since even new legal-writing professors usually come to the academy with some clerking or other work experience. But new hires will probably need extensive mentoring and monitoring if you opt for this advanced method of teaching persuasive writing.

Another potential drawback is the extra work it takes professors in getting up to speed on a new issue. As I mentioned earlier, it can be a bit daunting to sound like an expert on the Clean Water Act or prior restraint on the first day of class. Precious summer days must be spent researching the subject. One way to lessen some of the time demand is to select cases similar to ones used in the past, as I have done with environmental law and First Amendment cases. Still, no two cases are alike, and preparing inevitably takes time.

An additional risk in using Supreme Court cases, especially high-profile ones, is that students (and the professor) become too interested in the subject matter and lose sight of the class's ultimate pedagogical goals. I give a standard speech every year in the very first class. I stress to students that, however exciting the case may be, this is first and foremost a legal-writing class. I tell them that in every class we will cover at least one legal-writing lesson, and I make sure to follow through on that promise. We have several in-class writing workshops, as well as individual student conferences on each student's written work. Sure, we debate the subject matter often, sometimes heatedly, but I make sure students leave the class having had ample opportunity to absorb and develop important legal-writing principles.

Finally, there is the possible conflict with professors who teach the substantive law underlying the case. All professors like to teach subjects in certain ways. If my angle is different from theirs, it could cause a problem. Communication, of course, is the solution to avoiding this problem. For example, when I first used a Clear Water Act case, I knew that some of the giants in the field were right here at Vermont. I set up meetings with them in the summer, studied hard beforehand, and then asked a lot of questions about the material when we met. They were delighted that we had selected an environmental-law case and were happy to help.

## Conclusion

Using Supreme Court cases to teach persuasive writing and appellate advocacy energizes students because they can work on important, controversial cases actually pending before this nation's highest court. Lawyers who volunteer to judge also enjoy the experience because many of them are familiar with those high-profile

cases. And students, lawyers, and professors alike benefit from increased exposure to the Court's jurisprudence. We at Vermont Law School are pleased to offer our model to other legal-writing programs and moot-court competitions.