

George Mason University
Antonin Scalia Law School
Public-Interest Litigation
Law 217-001
Fall Semester 2022
Wednesdays 6:05-8:00pm
Faculty: Mark Chenoweth
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Office hours by appointment

SYLLABUS

Course Description

This nuts-and-bolts, introductory course will cover the theory and basic practice of strategic public-interest litigation, providing an opportunity to learn trial-level and appellate litigation techniques. Students will then be expected to demonstrate the skills they have acquired, such as:

- (1) how to prepare a case-evaluation memo for a cutting-edge constitutional challenge;
- (2) how to prepare a Freedom of Information Act request;
- (3) how to write a 28(j) letter;
- (4) how to undertake effective advocacy in the court of public opinion; and
- (5) how to solicit amicus briefs and request support from (other) public-interest organizations.

Course Materials

Readings will be assigned for most but not all classes during the semester and will be posted on TWEN at least six days in advance of class (as well as during each class period for the following class). Readings will comprise examples of the kind of writings the students will be expected to do, as well as briefs and court opinions. There are no assigned readings for the first day of class on Wednesday, August 24.

Grading

Your grade will be based on three written assignments, the last of which is due at the end of the exam period. First, everyone will draft a case evaluation memo (4-6pp.), explaining why you would or would not recommend a case idea to a particular public-interest organization for litigation and on what bases. That memo will comprise 30% of your grade in the course.

Second, you will be assigned a 300-word 28(j) letter to write in class on the day we discuss that process. That letter will comprise 20% of your grade. If you miss that class or for some reason prefer a longer, out-of-class assignment, you may instead draft and submit an actual FOIA request to an agency (6-8pp.).

As the final assignment comprising 50% of your grade (8-10pp.), all students will draft an amicus memo soliciting amicus briefs in support of your organization's brief requesting rehearing en banc. The memo must seek to persuade targeted recipient organizations to write briefs in your case.

Student participation and attendance may be factored into a student's grade by increasing or reducing a student's final course grade by a single-increment adjustment (e.g., from B to B+ or from A- to B+). There is no final examination for this class.

Attendance

Attendance is required and participation is expected. If you are unprepared for class, once during the semester you may come up to me before class and let me know that you are not prepared, and I will not call on you. That is your lone freebie; use it wisely. If you don't tell me in advance that you are unprepared and I call on you and only then discover that you are unprepared, you will get no credit for participation that day and you will lose any unused freebie. Students will be asked to participate actively in moot courts, press conferences, and other forms of public-interest advocacy. Given when this class meets, I will understand if you choose to bring some food to eat during class. I also understand that students may on rare occasions be unavoidably late. However, please do not show up late with food.

Learning Outcomes

By the end of the course students should have acquired an understanding of how to:

- Assess a potential public-interest lawsuit, recruit and vet clients, and choose a jurisdiction
- Draft a case evaluation memo for a public-interest lawsuit
- Structure public-interest challenges and determine what claims to assert and remedies to seek
- Address the particular challenges involved in suing federal agencies and officials
- Draft FOIA requests and 28(j) letters
- Help an attorney prepare for and deliver effective oral argument
- Draft an amicus memo targeted at persuading public-interest groups to support your case

Written Assignments

As discussed above, your grade will be determined based on the following THREE written assignments:

1. Case Evaluation Memo. Students will be assigned a specific case idea to present and a particular organization to which to present it. (Length: 4-6 pages, double-spaced, 12-point Times New Roman, 1-inch margins). -AND-
- 2a. FOIA Request. Students will draft and actually submit a Freedom of Information Act request aimed at gleaning information in connection with an ongoing piece of litigation. (Length: 6-8 pages) -OR-
- 2b. 28(j) Letter. Students will be given a brief to read ahead of class. In class, they will be given a post-briefing opinion that comprises relevant precedent to that pending case. Students will draft a 300-word 28(j) letter addressed to the court where the case is pending, telling it about the new precedent. -AND-
3. Amicus Memo. Students will be assigned a specific case and given a brief seeking rehearing en banc in that case. Students will then have to write a memo seeking amicus support from several other public-interest organizations chosen from a list of candidate organizations. The memo should be persuasive and suggest reasons (including at least one different reason for each organization) and arguments (suggesting at least one specific argument to each organization). One additional page may be devoted to explaining any strategic decisions behind the choices you made in the amicus memo. (Due: Last day of exam period; Length: 8-10 pages.)

Class Outline (dates with * may need to be rescheduled)

(Overview of instructor's expectations, written assignments, and grading)

AUG 24. Which Comes First: the Plaintiff or the Case? • How to find and recruit plaintiffs • Real-world dilemmas • Investigating the facts and the client(s) • Problematic plaintiffs • Bad facts • No-nos • Keeping clients aboard • How many clients per complaint? • Adding clients to amended complaint

AUG 31. Ethical issues when representing a client and cause • Engagement letters • Who to represent? • Limiting scope of representation through informed client consent and agreement • Truly representing and understanding clients • Seeking Fees • Duties attorney owes to firm (e.g., no clients on the side)

SEPT 7. Evaluating and designing a public-interest lawsuit • General principles of designing a public-interest lawsuit • Choice of venue (location, location, location) • Opportunity cost and potential impact • Evaluating judges and precedent • How to write a case-evaluation memo for a constitutional challenge • Always check the local rules • How many cases to bring? • Parallel proceedings? • Seeking stays • Considerations on whether to initiate new case, intervene in an existing case, or file an amicus brief

SEPT 14. Issue Spotting, Issue Winnowing, and Winning Issues • Constitutional versus statutory claims • Framing claims and remedies • Choosing your battles • Seven Categories of Administrative Unlawfulness • Nationwide injunctions • Problems unique to administrative adjudication • Magic deadlines • Tolling

SEPT 21.* Virtues, Seductions, and Pitfalls of Preliminary Injunctions • Being right is not enough • Likelihood of success • Irreparable harm • Maintaining status quo • Balance of equities • Public interest • To appeal or not to appeal? • Real-world strategic considerations around eviction moratorium cases

SEPT 28. The Full Court Press • Formulating the “story” of the case • Mock press conference and effective use of Talking Points • Social media promises and perils • Changing hearts and minds: parallel advocacy in the court of public opinion • Case videos • Managing client communications and deciding when to use the client in the communications plan • writing op-eds • radio/TV/podcast appearances

OCT 5. Freedom of Information Act (FOIA) as supplemental discovery strategy and alternative to suing • Cross-checking discovery • Filing Comments in response to agency rulemaking as a prelude to litigation

OCT 12. The Waiting Game • Drafting 28(j) letters • Deciding whether or not to send a 28(j) letter • Responding to 28(j) letters (or not) • Students will work in class with help from the instructor to draft a 28(j) letter informing a court of new precedent that emerged post-briefing relevant to a pending matter

OCT 19. Challenges to suing federal agencies I • Common government strategies to win in motion practice with avoidance doctrines • Standing/ripeness • Immunity (sovereign, qualified, absolute) • Mootness • Abstention and preclusion doctrines • Facial vs. as-applied challenges • State/federal court • Service of Process challenges • What to expect from the defendant(s) and how to respond to dispositive motions • APA traps for the unwary (e.g., deadlines/SOLs) • Transfer • Muddying the waters

OCT 26.* Challenges to suing federal agencies II: The Dirty Dozen deference doctrines • Government litigant deference • Chevron, Kisor, etc. • The Due Process Deficit • Judicial independence problem • The party presentation principle • Saga of Second Circuit case • SEC’s internal controls problem

NOV 2. Best practices and winning strategies for mustering support/ soliciting amici • How to write an amicus memo seeking amicus support • Moot court where students have opportunity to prep litigator

NOV 9. How to Craft Effective Amicus Briefs • Best practices and common pitfalls • Choice of counsel • Recusing judges • How to improve chances of Supreme Court review • timing briefs • enlisting the Solicitor General’s support • Whether or not to seek en banc first • best practices for cert petitions • circuit splits • working with (scratching backs of) other public-interest organizations • Dark money

NOV 16. Opportunities and career strategies in public-interest law • Discussion of various paths to becoming a public-interest lawyer and how best to maximize one's chances of getting on that career track • Discussion of current issues in public-interest law • Group discussion with public-interest lawyers

- Answer questions about final assignment
- Leave room and leave time for class/instructor evaluations
- Thank you!