

George Mason University  
Antonin Scalia Law School  
Public-Interest Litigation  
Law 217-001  
Fall Semester 2023  
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 fundamental trial-level and appellate litigation techniques. Students will then be expected to demonstrate the basic skills they have acquired, such as:

- (1) How to structure public-interest challenges, pick which claims to assert, decide remedies to seek;
- (2) how to prepare a case-evaluation memo for a cutting-edge constitutional challenge;
- (3) how to pitch a case internally to the decision makers within one's organization;
- (4) how to write a 28(j) letter alerting an appellate court to new, post-argument authority;
- (5) how to evaluate a request for amicus help sent to your organization;
- (6) 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 23.

### **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 must miss that class, you will have to make up the letter assignment before or after another class period.

As the final assignment, comprising 50% of your grade, all students will draft an amicus memo (8-10pp.) 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 public-interest clients
- Choose a suitable 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
- Help an attorney prepare for and deliver effective oral argument
- Draft 28(j) letters alerting an appellate court to newly available legal authority
- Evaluate a request for amicus help sent to your organization
- 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 in memo form and a particular organization to which to present it. (4-6 pages, double-spaced, 12-point Times New Roman, 1-inch margins). -AND-
2. 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)**

**AUG 23.** Overview of instructor's expectations, written assignments, and grading • Answer questions • 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 complaints

**AUG 30.** 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 • Fees and costs • Duties attorney owes to firm (*e.g.*, no clients on the side)

**SEPT 6.** Evaluating/designing public-interest lawsuits • General principles • Choice of venue (location, location, location) • Opportunity cost and potential impact • Evaluating judges and precedent • Always check the local rules • How many cases to bring? • Parallel proceedings? • Seeking stays • Initiate new case, intervene, or file an amicus? • How to write a case-evaluation memo for constitutional challenge

**SEPT 13.** Issue Spotting, Issue Winnowing, and Winning Issues • Constitutional versus statutory claims • Framing claims and remedies • Choosing your battles • Nationwide injunctions • Problems unique to admin. adjudication • Magic deadlines • Tolling • Seven Categories of Administrative Unlawfulness

**SEPT 20.** Virtues and Pitfalls of Preliminary Injunctions • Being right is not enough • Likelihood of success • Irreparable harm • Maintaining SQ • Balance of equities • Public interest • To appeal or not to appeal? • Real-world strategy tips around eviction moratorium/student loan debt/social media censorship cases

**SEPT 27.** Litigation Meetings • How to run an effective internal meeting • How to participate effectively in meetings • Active listening • Adding value to other people's cases • Giving/receiving constructive criticism • Handling "unconstructive" criticism • Being self-aware • Knowing your area(s) of expertise • Each person will have 4-5 mins in second half of class to orally pitch whether to take on amicus request

**OCT 4.** The Waiting Game • How to draft 28(j) letters • Deciding whether or not to send a 28(j) letter • Responding to 28(j) letters (or not) • Students will draft a 28(j) letter during class time informing a court of new precedent that emerged post-briefing relevant to a pending matter

**OCT 11.** Challenges to suing federal agencies I: Common government strategies to win 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 • Strategic dismissals

**OCT 18.** Challenges to suing federal agencies II (after defeating the Motion to Dismiss): The Dirty Dozen deference doctrines • Government litigant deference • Due process deficit • Judicial independence • The party presentation principle (Second Circuit saga) • After *Chevron* • SEC's internal controls problem

**OCT 25.\*** The "Full Court Press" • Formulating the "story" of the case • Mock press conferences 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

**NOV 1.** 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 • Ethics of mooting • Confidentiality • (NB: which class session is the moot court will vary according to when a litigator's trial date falls who is willing to come and present an argument for the class to moot)

**NOV 8.** How to Craft Effective Amicus Briefs • Best practices and common pitfalls • One point or many? • Choice of counsel • Recusing judges • Grammar/typos • Working with (scratching backs of) other public-interest orgs • Going solo or adding other amici? • Rules around amicus efforts • "Dark money"

**NOV 15.** Opportunities and career strategies in public-interest law • Discuss various paths to becoming a public-interest lawyer • How best to maximize one's chances of getting on that career track • Discuss current issues in public-interest law • Group discussion with public-interest lawyers from various orgs • Answer questions about final assignment • Leave room and leave time for class/instructor evaluations

Thank you!