

Public Interest Litigation

Fall Semester 2021
Course 217
Tuesdays 8:10pm – 10:10pm

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SYLLABUS

Course Description

One of the cornerstones of ASL's Public Interest and Advocacy Concentration, this two-credit course will teach students the theory and practice of strategic public interest litigation. Students will learn how to design and execute a public interest lawsuit, from framing legal claims to recruiting clients, drafting the complaint, and choosing the best venue. The course will cover the special procedural challenges and ethical issues that arise in public interest litigation, as well as the nuts and bolts of conducting discovery, effective motion practice, and appellate advocacy. We will also consider the government's perspective, both in defending its policies in court and in finding the appropriate balance between transparency and protecting agency equities.

Course Materials

Readings will be assigned for some but not all classes during the semester and will be posted on TWEN at least six days in advance of class. There are no assigned readings for the first day of class.

Grading

Your grade will be based on your written responses to a series of four public-interest "problems." Three of those problems will be assigned during the course of the semester, and the last will be due at the end of the final exam period. 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. Students will be invited to provide brief oral summaries of interesting public interest cases or opportunities that they become aware of during the semester.

Learning Outcomes

By the end of the course students should have acquired:

- An understanding of the history and theory of public interest litigation and what makes public interest challenges different from ordinary civil litigation
- An understanding of how to assess a potential public interest lawsuit, recruit and vet clients, select a jurisdiction, and determine what claims to assert and remedies to seek
- Knowledge of special procedures and ethical issues with particular relevance to public interest litigation, as well as an overview of what defenses the government typically deploys against public interest lawsuits in particular
- An understanding of the different constitutional standards typically applied to public interest lawsuits
- Insight into the mechanics of becoming eligible for and obtaining fee awards as a prevailing party
- Familiarity with effective written and oral advocacy

Written Assignments

The instructors will provide you with four public-interest “problems” throughout the semester, along with a set of written instructions explaining how you are to respond to each those problems and how your responses will be evaluated. The three assignments will each count for 20% of your grade and the final assignment will count for 40% of your grade. Class participation may influence your grade as described above.

**CLASS OUTLINE
(revised 8/18/21)**

* = uploaded to TWEN

= Week 1 (Aug. 24) =

= Strategic public interest litigation: Fighting injustice in the courts =

Readings:

James Otis's argument to the court on the Writs of Assistance*

Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers fought for the Civil Rights Revolution* (New York: Basic Books, 1994), pp. 256-264.*

Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education (Chapel Hill: University of North Carolina Press, 1987), pp. 138-166.*

Schmidt, *Freedom Comes Only from the Law* 2008 Utah L. Rev. 1493-1559*

Winberger v. Wisenfeld, 420 U.S. 636 (1975)

Recommended watch: *On the Basis of Sex* (2018)

- History and overview: Historical examples of effective public interest advocacy
- Goals of public interest litigation: Identifying injustices and defining success
- Varying approaches: impact litigation, client-centered lawyering, movement lawyers, and others
- The role of judges in public interest litigation: Judicial activism versus judicial engagement
- Designing a public-interest lawsuit: Claims, clients, and remedies
- Changing hearts and minds: parallel advocacy, policy, and communications efforts

= Week 2 (Aug. 31) =

= Putting together a civil-rights lawsuit =

Readings:

How to write a memo handout

Complaint, *Inst. for Creation Research v. Tex. Higher Ed. Coordinating Board**

Complaint, *Pomeroy v. Utah State Bar**

- Identifying and assessing injustices
- Preparing a case-evaluation memo
- Investigating the facts and recruiting—and truly representing and understanding—clients (individual and organizational)
- Choosing court/venue (both federal and state)
- Drafting the complaint
- Framing claims and remedies

= Week 3 (Sept. 7) =
= Special procedures and ethical issues in public-interest litigation =

Note: I will be in Washington, D.C. on this day and available for in-person meetings if you like. Please contact me at tmsandefur@gmail.com to arrange.

Readings:

Steven Teles, *The Rise of the Conservative Public Interest Legal Movement* (Princeton: Princeton University Press, 2008), pp 64-85.*
ABA Model Rules of Professional Responsibility 1.8, 3.6, 7.3, 5.4, 5.5

- Overview: Declaratory Judgment, Administrative Procedures Act, FOIA, etc.
- TROs/Preliminary Injunctions
- Asserting the Fifth Amendment right against self-incrimination in civil proceedings
- Ethical issues when simultaneously representing a client and a cause
- Limiting scope of representation through informed client consent and agreement

= Week 4 (Sept. 14) =
= Avoiding avoidance doctrines Part 1 =

Readings:

Ex Parte Young, 209 U.S. 123 (1908)
Sprint Communications v. Jacobs, 134 S. Ct. 584 (2013)
Wooley v. Maynard, 430 U.S. 705 (1977)
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)
Owen v. City of Independence, 4456 U.S. 622 (1980)
Edelman v. Jordan, 415 US. 651 (1974)
United States v. Supreme Court of New Mexico, 839 F.3d 888, 907-20 (10th Cir. 2016)
Complaint in *Randle, et al. v. Tulsa, et al.* (Tulsa reparations case)*

- Standing/ripeness
- Mootness
- Immunity (sovereign, qualified, absolute)

= Week 5 (Sept. 14) =
= Avoiding avoidance doctrines Part 2 =

- Abstention and preclusion doctrines
- Facial vs. as-applied challenges
- Administrative exhaustion

= Week 6 (Sept. 24) =

=Constitutional standards of review and how they affect strategy and execution=

Readings:

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–20 (1993), and 320–23 (Stevens, J., dissenting)

Romer v. Evans, 517 U.S. 620, 632–34 (1996)

Borden's Farm Prod. Co. v. Baldwin, 293 U.S. 194, 209–10 (1934)

Hettinga v. United States, 677 F.3d 471 (2012) (all opinions)

Cornwell v. Hamilton, 80 F.Supp.2d 1101 (S.D. Ca. 1999)

- Heightened scrutiny vs. rational basis review
- Evidence vs. speculation and conjecture
- Burden of proof: Supporting or negating asserted justifications
- Reminder: not all public interest litigation is federal constitutional!

= Week 7 =

= Trial court motion practice: Briefing to win =

Readings:

Opposition to motion to dismiss, *Boice v. Aune**

Motion for TRO in *Maxwell v. Volusia County Schools**

Motion for Summary Judgment, Texas T-shirt case*

Motion for Summary Judgment, *Bruner v. Zawacki**

- Common motions in public interest litigation: Motion to dismiss, discovery disputes, summary judgement
- Effective legal writing I: Clarity, conciseness, and engagement
- Effective legal writing II: Show, don't tell
- Effective legal writing III: Always take the high road
- Effective legal writing IV: Know your audience/court

= Week 8 =

= Discovery =

Readings:

Discovery documents from *Bruner v. Zawacki**

Response to Motion for Protective Order, *Modi v. Kan. Bd. Of Cosmetology**

- Getting the facts you know into admissible form and uncovering facts you didn't know
- Nuts and bolts: Depositions, Interrogatories, Requests for Production, and Requests for Admission

- Asserting and overcoming discovery objections

= Week 9 =
= Appellate advocacy =

Readings:

Listen to oral arguments in

Doyle v. Palmer <https://www.courtlistener.com/audio/67471/doyle-v-palmer/>

Martinez v. Ryan <https://www.ovez.org/cases/2011/10-1001>

Sorrell v. IMS Health <https://www.ovez.org/cases/2010/10-779>

- Identifying and limiting the issues on appeal, drafting questions presented, and understanding your circuit/panel
- Appellate briefing and argument
- Petitions for rehearing/rehearing en banc
- Cert petitions: Common pitfalls and best practices
- Supreme Court litigation
- Amicus briefs

= Week 10 =
= Fee awards =

Readings:

Ind. Fed. Of Flight Attendants v. Zipes, 491 U.S. 754 (1989)

Newman v. Piggie Park, 390 U.S. 400 (1968)

- When are you entitled to a fee award?
- Seeking and securing fees and costs
- Proving up the fee petition: Documenting number of hours worked and establishing hourly rates
- Potential client conflicts: Whose money is it?

= Week 11 =
= Effective advocacy outside the courtroom =

Readings:

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

Maldonado v. Ford Motor Co., 476 Mich. 372 (2006)

- Litigating in the court of public opinion: Public relations and social media
- Activism and outreach: Enlisting organizational support
- Working with government to fix the problem
- Legislative change

= Week 12 =

= Putting it all together: Case studies in effective public interest litigation =

- Presentation and discussion of successful public interest litigation efforts from the recent past

= Week 13 =

= Opening the door(s) to a career in public interest law and discussion of current issues in public interest law =

- The unique stresses, rewards and issues in public interest law