

“The Real World”: Creating a Compelling Appellate Brief Assignment Based on a Real-World Case

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Brutal Choices in Curricular Design ... is a regular feature of Perspectives, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, e-mail: h-shapo@law.northwestern.edu, or Kathryn Mercer, Case Western Reserve University School of Law, e-mail: klm7@case.edu.

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Why Base an Appellate Brief Assignment on a Real-World Case?

Creating an appellate brief problem that is realistic, balanced, and interesting for students to work on is one of the most challenging opportunities facing a legal analysis and writing professor. Developing such a problem is particularly important because many legal writing courses use an appellate brief problem throughout an entire law school semester, usually requiring students to write at least one, and often two, appellate briefs based on the problem, and to argue that case in a moot court.¹

¹ At Northwestern Law, the second semester of our year-long required legal writing course (Communication and Legal Reasoning or CLR) for first-year law students focuses on written and oral advocacy, primarily on appellate advocacy. Most CLR professors at Northwestern use one appellate advocacy problem for the entire spring semester, and many of us require students to write two briefs in the same case—first writing a brief representing the appellant/petitioner, and then writing a brief in the same appeal representing the appellee/respondent. Each CLR professor’s section finishes the semester by holding a moot court on the same problem, with an equal number of students in the section arguing each side of the appeal to a panel of judges.

Ideas for appellate brief problems can come from many sources, including moot court case books, case materials developed by the National Institute for Trial Advocacy (NITA) or similar organizations, research sources that compile information about current federal circuit or other jurisdictional splits on various legal issues, and ideas from practicing attorneys about unresolved areas of law.² Over the years that we have taught at Northwestern School of Law, we have used a number of these methods to find or develop appellate brief assignments and have found them to be productive sources. However, one disadvantage with using some of these sources was that the problems might not involve areas of law that we were interested in exploring.

This past academic year, we decided to find a moot court problem on a topic that we found intellectually engaging and personally interesting, and which we hoped would appeal to our students as well. We also thought that it would be exciting to write briefs for a case that was in litigation. Our hope was that our students would become so engaged with the issue because of its societal relevance that they would (perhaps unwittingly) make a greater effort in the research, analysis, and writing required to produce a brief. By using a real-world problem, our students could step into the shoes of practicing attorneys and gain an appreciation for how social issues are addressed through the law.

This article will provide advice, drawn from our experience, as to how to develop a compelling and effective appellate brief problem based on a real-world case. In Part IA. of the article we discuss useful

² For more information on these and other potential sources of ideas for moot court problems, see, e.g., Kathleen A. Portuan Miller, *Creating an Appellate Brief Assignment: A Recipe for Success*, 16 *Perspectives: Teaching Legal Res. & Writing* 165 (2008).

sources for finding a real-world problem. In Part IB, we provide advice on how to assess whether the problem will satisfy your pedagogical goals. In Part IC, we discuss how to ensure that the problem is balanced so that your students can profitably argue either side of the case. In Part ID, we discuss resources that you can use to obtain or help develop documents for the problem, including accessing actual court documents from the case, and communicating with attorneys in the case to obtain additional documents that may not be publicly available. In Part IE, we discuss how to modify the “real” case to make it work as an appellate advocacy problem for a legal writing class, including when and how to create additional documents to fill in any gaps. Part II discusses benefits and challenges that we found in basing an appellate brief problem on a real-world case.

I. Identifying an Appropriate Real-World Case

A. Useful Sources for Identifying an Appropriate Case

The proliferation of Web sites and blogs related to interesting legal topics offers numerous places to begin a search for an interesting legal issue wending its way through the courts. For professors with an interest in civil rights litigation, the Web sites of organizations such as legal defense funds are fruitful resources. Many organizations such as the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, and the Mexican American Legal Defense and Educational Fund have Web sites that describe cases in litigation. Because of our strong interest in civil rights law, we searched for ideas for an appellate brief problem on the Web sites of civil rights organizations that promote gay and lesbian rights, women’s rights, and racial equality.

We located an interesting case on the Web site of Lambda Legal, “a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation,

education and public policy work.”³ Lambda Legal’s Web site summarized open cases in which Lambda was representing a party.⁴ We reviewed each of the summaries and made an initial assessment of whether each might make a good brief problem.

Lambda Legal was currently litigating a case in California state court, *Ellis v. Arriaga*, which involved the scope of gay rights under California state law. Lambda Legal represented the plaintiff, Darrin Ellis. Mr. Ellis had been in a committed relationship with the respondent, David Arriaga. During their relationship, the couple met with an attorney to execute a Declaration of Domestic Partnership under California’s Domestic Partner Rights and Responsibilities Act of 2003, Cal. Fam. Code §§ 297 *et seq.* (“DPA”), which purported to give same-sex couples registered as domestic partners under the DPA the same rights as those provided to married couples. The Declaration of Domestic Partnership allows the couple to register their domestic partnership under the DPA.

Although the couple completed the registration document, unbeknownst to Mr. Ellis his partner never sent the registration to the secretary of state. When the couple terminated their relationship, Mr. Ellis brought a petition for the Dissolution of Domestic Partnership in a California trial court. The respondent moved to dismiss the petition on the grounds that a partnership never existed because the couple had never registered the partnership with the state of California. In response, Mr. Ellis argued that he should be treated as a “putative” domestic partner under Cal. Fam. Code § 2251. The trial court granted the motion to dismiss, holding that Mr. Ellis could not be treated as a putative domestic partner because he and his partner had not registered under the DPA. Lambda

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³ See the “About Us” section of Lambda Legal’s Web site at <www.lambdalegal.org/about-us>.

⁴ Lambda Legal’s Web site, found at <lambdalegal.org>, is well organized. Click **Our Work** on the home page, then click **In Court and Docket (open cases)** to display a short description of each case it is currently litigating.

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Legal appealed that decision on behalf of Mr. Ellis. The issue on appeal was whether the DPA permits same-sex couples who mistakenly believed that they had registered as domestic partners under the DPA to be treated as putative domestic partners under § 2251 of the Family Code, for the purpose of distributing the couple’s community property. Thus, the precise legal issue was one of statutory interpretation: whether domestic partners who had not registered as partners under the DPA could be treated as putative spouses are treated under California law when the relationship terminates.

Given the status of the pleadings, it did not appear that the case would be resolved for several months, which would give our students time to complete their briefs prior to any decision by the appellate court. The case interested us because it involved a controversial civil rights issue but in the context of a legal issue over statutory interpretation. Thus, we had found the best of both worlds.

B. Assessing the Problem in Terms of Teaching Goals

Despite our interest in the problem, we also needed to determine whether the case could be fashioned into an appellate advocacy problem that would serve our pedagogical goals. Like most legal writing professors, we have a number of pedagogical goals in developing an appellate advocacy problem. We want to structure a problem that gives students practice in arguing both a pure legal issue (that is, an issue requiring students to argue which of opposing or alternative legal rules the appellate court should adopt) and a mixed issue of law and fact. Other important pedagogical goals include giving our students opportunities to develop skills such as: 1) identifying and making types of legal arguments different from the rule- and analogy-based arguments they made first semester, for example arguments based on interpretation of statutory language, and arguments based on other sources of legislative intent such as legislative history or the policy behind a piece of legislation; 2) making arguments as an advocate, which is different from the objective analysis they wrote first semester; and 3) obtaining further practice in legal

research, including new types of legal research such as legislative history research. The *Ellis* problem seemed to satisfy a number of these goals. The problem presented a discrete legal issue which would require the students to use the rules of statutory construction in their analysis. In addition, because the legal issue was a novel one with only one relevant California case on the issue, the students would also have to research the legislative history of the DPA to discern the drafter’s intent.

C. Assessing Whether the Issues Are Balanced So That There Are Good Arguments on Both Sides

Another important goal in developing our appellate advocacy problem was for the issues presented in the problem to be susceptible of reasonably strong arguments on both sides. In developing our domestic partnership problem, we felt that it was crucial for us to identify and articulate strong arguments for both sides before giving the problem to the students, in order to be sure that the problem was balanced, and so that we could revise the facts if necessary to create a more balanced problem. Therefore, before making a final decision to use the domestic partnership problem with our students, we first made a detailed written outline for ourselves of the arguments that students could make for either party.

Ensuring that an appellate brief problem is balanced is especially important if the professor plans to have each student write a brief for both sides in the same case, as we did. We want our students to have an experience where they feel that they can make strong arguments in both briefs, for both sides, rather than feeling that writing the brief for one side was a lost cause. Balance is also particularly important if your students will argue the problem in moot court. As professors, we would not want to put our students—who, after all, are novice oral advocates—in a situation where the two sides must present oral argument before judges, and one side has much stronger arguments available to them than the other side. Balance in your problem is also important to create fair treatment of all students if, as in some of our colleagues’ CLR sections, students are assigned to represent one side for the entire semester, and each student writes (and rewrites) the brief for only one

side. Ensuring that the problem is balanced thus helps to achieve the pedagogical goal of assigning students to write both sides in the first place—which is to help students to learn, very concretely, that a skilled advocate’s job is to be able to represent either side of a given issue.

D. Using Documents from the Case and Contacting the Attorneys for Additional Documents

Among the important benefits of using a currently litigated case is access to the underlying documents as well as access to the lawyers who represent the parties. The Lambda Legal Web site included the brief that Lambda Legal filed in the appellate court and provided us with the heart of petitioner Ellis’ arguments. This made our job easier in terms of formulating the petitioner’s arguments.

In addition, we contacted the attorney for Lambda Legal representing the petitioner. The purpose was twofold: to see if she had any objection to our use of the case as part of our class and to see if we could obtain any other documents related to the case that we could not otherwise access. The attorney sent us the transcript of the trial court’s decision, which was not publicly available, and which we used extensively when we created a trial court opinion to give to the students.⁵

E. Professors May Need to Modify the Real-World Case to Create a Workable Problem

If you use an appellate brief problem from a real-world case you will need to be flexible and creative. Although the *Ellis* case presented an interesting and balanced legal issue, it did have one shortcoming: the case in its real-world form did not contain a fact issue. Because our students work in pairs and act as co-counsel during moot court, it is important to

find a problem with two discrete issues. Moreover, by creating a problem that contains a legal issue and a fact issue, students are asked to draw on different analytical skills to address each. In assessing *Ellis* we quickly concluded that we could create a fact issue: that is, assuming that the appellate court found that the DPA gave same-sex couples the right to be treated as putative domestic partners, did Mr. Ellis satisfy the requirements of California’s putative spouse statute? Under California law, whether a person is a putative spouse depends on a number of factors.

Another potential challenge in developing an appellate brief problem from a real-world case is that the record in the real-world case may not contain all the information about the case or all the types of documents that you want the appellate brief problem to include. In such a situation, you may need to create some of the “missing” documents. This was our situation in dealing with the *Ellis* case. Some of the documents from the proceedings in the California trial court, such as the parties’ affidavits, did not contain the level of factual detail that we wanted our appellate brief problem to include. Moreover, in granting a motion to dismiss the petitioner’s case, the *Ellis* trial court did not issue a written opinion but delivered an oral bench decision, of which we were able to obtain a copy from attorneys at Lambda Legal.

As a consequence, we used the somewhat sketchy available record materials as a starting point from which we wrote a fully developed trial court opinion (from which the appeal in our appellate brief problem was taken). We also created a record for the fact issue by creating affidavits signed by the parties that contained facts relative to the issue of whether Mr. Ellis satisfied the putative spouse statute. We tried to balance the facts so that students could make arguments regardless of which side they were representing. In creating the documents for our problem, we changed all the identifying details (names, etc.) to make it less likely the students could find information about the real case.

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⁵ We also looked up the case’s docket and monitored it throughout the semester. We found the trial docket (Superior Court of California, Orange County) for our case online by entering the appellate case docket number at <appellatecases.courtinfo.ca.gov>. From the appeals court Web site, we were able to sign up for an e-mail notification of new developments in the *Ellis* case and were able to order some of the relevant documents directly from the court.

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Once we had added the fact issue and created documents to complete the record on appeal, we researched all of the available law as well as the legislative history materials and, as noted above, outlined the arguments that students could make for either party. The problem would not work if the legislative history was inaccessible to our students or if the available case law did not provide meaningful arguments for both petitioner and respondent. By outlining the arguments available to both sides we were able to ensure that the problem was fairly balanced. In addition, this process also helped us to determine whether the problem would be too complex, which would frustrate students.

II. Benefits and Challenges of Basing a Problem on a Real-World Case

A. Challenges

1. Teaching Challenges

Because we were dealing with a real-world case that was fairly challenging to 1Ls we had to provide the students with sufficient guidance. We recognized that in order to help our students learn about the legal issues in the case, we would have to understand the California legislative enactment process, become familiar with the types of documents generated in that process, and be able to find the particular documents generated in the enactment of the DPA. Thus, in preparing our appellate problem, we also created some documents that summarized for the students some aspects of the California legislative process, and that gave the students advice about researching California legislative history (and in particular, the history of the DPA, to find relevant legislative statements of intent).⁶

Another challenging aspect of the problem was helping students feel comfortable making arguments based almost solely on statutory interpretation as opposed to relying on analogous cases to make an argument. Most of the students' prior written work in our classes had been structured around analogical reasoning in which they compared and contrasted facts of precedent cases to their issue. Given the scarcity of case law on the *Ellis* legal issue, the students had to order their arguments around the rules of statutory construction applicable to statutory interpretation. Freed from analogical reasoning, some students felt that they were “just making up arguments.” We alleviated this problem by showing our students samples of memoranda and briefs that used the rules of statutory construction in ordering an argument.

The structure of our appellate advocacy class required each student to write one brief on behalf of the petitioner and then switch sides and write a brief for the respondent. Many students, having so fully invested themselves in the petitioner's arguments, voiced concern that they could not possibly come up with convincing arguments on behalf of the respondent. Thus, we had to provide them with guidance in generating arguments once they switched sides. Lambda Legal's brief was available online, but the respondent did not oppose petitioner's appeal and did not submit a brief to the appellate court. Therefore, for purposes of our appellate brief problem, we started from scratch in developing the respondent's best arguments on appeal. Once we generated those arguments we created a document titled “Questions to Consider in Formulating Arguments on Behalf of Respondent,” designed to help the students transition from writing from the petitioner's perspective to writing from the respondent's perspective.

⁶ For example, two of the summary documents that we wrote were “Basic Chronology of the Legislative History of the DPA” (listing steps in the chronology and locations where students could find particular relevant legislative history documents) and “The California Legislative Process and the Documents It Generates” (compiling and explaining information that we found in various documents on the free Internet regarding this topic).

These summary documents also pointed the students to some useful online guides that our own research uncovered about researching California legislative history. For example, we pointed the students to: 1) Finding California Legislative History, found at <www.law.berkeley.edu/library/dynamic/guide.php?guide=general/calLegis>, 2) Finding California Legislative History, found at <www.usfca.edu/law_library/calleg.html>, and 3) Overview of Legislative Process, found at <leginfo.ca.gov/bil2lawx.html>.

2. Handling Controversial Subject Matter

Many interesting current legal issues involve controversial social and political issues. We knew that selecting a topic involving gay rights might make some students uncomfortable. In the past, we had both steered clear of creating appellate brief problems that might remind a student of a painful experience in his or her past. The *Ellis* case, however, raised a unique legal issue on a more general rather than personal level. Nevertheless, in anticipation that some of our students might be uncomfortable with the subject matter, we strategized ways to address these concerns should they arise. However, no student ever voiced objection to the problem. Part of this may be due to the fact that all of our class discussions primarily focused on support for the various legal arguments of the parties. Our experience was that students applied their analytical skills irrespective of their personal feelings on gay rights.

3. Preventing Students from Accessing the Real Briefs of the Real-World Case

Some people hesitate to use real cases as the basis for an appellate brief problem because they are concerned that the students will be able to access the briefs written by the parties in the case. Although we appreciated these concerns, they did not outweigh the many teaching benefits of the *Ellis* problem. Thus, as a safety measure, we instructed students that they could not read or rely on briefs from the underlying case, or the briefs from the relevant cases they were using in their analysis, and that doing so would be an honor code violation. We also familiarized ourselves with those briefs in order to recognize them should they surface in our students' work. Fortunately, our students appeared to follow our rules.

4. Risk That the Real Case Will Be Decided While Students Are Writing the Briefs

When we selected the *Ellis* case for our appellate problem we made a calculated guess that the California appellate court would not issue a decision prior to the conclusion of our semester. This prediction was based on our review of the docket for the case. The docket reflected the briefing schedule for the appeal and indicated that we had a few months before the appellate court would decide the case.

The real appeal was decided a few weeks after the term ended. We forwarded the decision to our students.⁷ The students found it rewarding to evaluate the appellate court's opinion in light of the careful analysis they had given the issues all semester. And, in fact, the appellate court's opinion did not have nearly the same thorough level of analysis that we saw in our students' work. We were lucky that the *Ellis* case was not decided until after we had completed our work for the semester, but if it had been decided earlier we would simply have "protected" the class from being influenced by the decision by extending our prohibition against reading briefs in this or similar cases to a prohibition against reading the appellate court's opinion.

5. Difficulty in Using the Appellate Brief Problem Again if the Appellate Court Decides the Issue

Now that the California court has decided the issue on appeal in *In re Domestic Partnership of Ellis*, we won't be able to use the problem again if we set it in California. The inability to reuse an appellate problem is certainly a factor to consider in deciding to develop a problem based on a real-world case, since professors put a great deal of work into developing appellate problems, and typically hope to reuse them in subsequent academic years. We recognized this risk going in, and determined that on balance, the challenge and excitement of working with this problem outweighed the risk that we would not be able to reuse the problem.

⁷ The decision in the real case, *In re Domestic Partnership of Ellis*, 162 Cal. App. 4th 1000, 76 Cal. Rptr. 3d 401 (Cal. Ct. App. 4th Dist. 2008), was released on May 6, 2008, about six weeks after our students submitted their second brief and about a month after they had their moot court oral arguments. The Court of Appeal reversed the trial court's decision and ruled for Mr. Ellis, holding that under the DPA "a person's reasonable, good faith belief that his or her domestic partnership was validly registered with the California Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner, even if the registration never took place." 162 Cal. App. 4th at 1003, 76 Cal. Rptr. 3d at 402.

Shortly thereafter, on May 15, 2008, in a separate case on a separate but related legal issue, the California Supreme Court in *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008), ruled that barring lesbian and gay couples from marriage violates the state constitution.

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Another alternative to simply “retiring” the problem would be to try to modify it and reset it in another jurisdiction that has a similar statutory scheme of domestic partnership, but has not yet determined the precise issue that was before the court in *Ellis*. In addition to California, other jurisdictions that have some type of domestic partnership or civil union statutes include Connecticut, the District of Columbia, Hawai’i, Maine, New Hampshire, New Jersey, Oregon, Vermont, and Washington.⁸

B. Benefits

1. The Problem Improved the Students’ Skills

The *Ellis* problem achieved an important pedagogical goal of teaching students how to research and write about an issue of statutory interpretation. Over the course of a semester, they became familiar with the legislative history of a statute and learned the rules of statutory construction, and they learned to use those sources to construct a legal argument. Likewise, the problem aptly illustrated for the students the debate as to whether a statute’s plain language or its underlying objectives govern a court’s interpretation of a statute.

The problem also taught the students that the standard of review can help shape arguments on appeal. In the *Ellis* case, the issues involved an appeal from the trial court’s grant of summary judgment to the respondent. One of the petitioner’s best arguments on the issue of whether he could be treated as a putative spouse (the fact issue) was that there were issues of material fact. First-year students, however, typically over-argue and attempt to prove that their client should win the case as a matter of law. The *Ellis* case taught the students that often the best argument is simply convincing the appellate court that the trial court misapplied the standard requiring reversal.

Finally, and most importantly, the students learned to analyze both sides of a legal issue. By the end of the semester, students who so firmly felt that the

petitioner should win on appeal become strong advocates for the respondent. The students expressed surprise that they were able to create convincing arguments once they switched sides. Thus, although we often teach students in appellate advocacy to anticipate the other side’s arguments and rebut them, here we took the process one step further and pushed the students to truly stand in the shoes of their opponent. As practicing attorneys in our former life, we tried to impress upon our students that forcing them to switch sides was a luxury that practice would, for ethical reasons, never afford them.

2. Students Get the Opportunity to Do Work Approximating That of Experienced Lawyers

Any of the challenges noted above were far outweighed by the benefits of using a real-world case. Most importantly, the students felt that they were engaged in the type of work practicing lawyers do rather than working on a contrived legal issue. The issues presented by *Ellis* were topical, relevant, and had no easy answers. We repeatedly reiterated to our students that issues with no readily apparent answer will arise in legal practice. By working through the *Ellis* problem in our class, our students gained some confidence in their abilities to handle a difficult and novel legal issue.

Because the issue of gay rights was topical it seemed to hold the students’ interest regardless of their personal views on the subject matter. Although appellate problems based on circuit splits, for instance, may engage students intellectually, our problem seemed to engage students not only on an intellectual level but on a personal level as well.

The students also learned to make legal arguments irrespective of their personal views on an issue. Many current issues in civil rights revolve around notions of fairness and morality. The *Ellis* case gave students the opportunity to translate these broader concepts into specific and convincing legal arguments.

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⁸ See the Lambda Legal Web site at <www.lambdalegal.org/our-work/states>.