

KEEPING IT REAL: USING CONTEMPORARY EVENTS TO ENGAGE STUDENTS IN WRITTEN AND ORAL ADVOCACY¹

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Introduction

Writing and oral argument are not passive pursuits, and learning to write and argue orally cannot be either. While it is clear that we must engage our students in the process of learning written and oral advocacy, the question remains how to do so. Some students enter law school with a passion for the law or, at least, some aspect of it. This passion can focus a student's attention and invest a student in his or her legal education. Many students, however, do not feel a connection to the law or its study. For these students to invest themselves in learning written and oral advocacy, we must bridge the gap between their preparation to be advocates and their role as advocates once they become practicing attorneys. In other words, we must make clear that advocacy is not an abstract pursuit but an activity that involves real issues that are of pressing concern to real people.

This article discusses two methods that I have used to bring reality into the classroom to facilitate my students' engagement in legal advocacy: (1) using a factual scenario from a local newspaper for a series of exercises to introduce my students to advocacy and brief writing, and (2) assigning my students to observe and critique an actual oral argument to learn about not only the mechanics of appellate advocacy but also the very real-world context in which it occurs. Both of these exercises enabled students to take an active role in learning

advocacy skills by engaging in real-world legal scenarios.

Using a Real Scenario Reported in a Local Newspaper

In the first semester of their legal writing course, my students learned how to write a legal memorandum: an objective, nonargumentative legal document. In their second semester, my students would learn how to write an appellate brief and would present an oral argument on that brief. So that my students would understand the advocacy role, I assigned them to that role. While I could have assigned my students to play advocates in the context of a hypothetical scenario, I thought that this might impede their assumption of their roles. In my experience, some individuals can have a hard time wholeheartedly adopting assigned roles in the context of fabricated scenarios. To avoid any such resistance and facilitate my students' engagement with their roles, I had them become advocates in the context of an actual criminal case. I hoped that using this case would impart a sense of reality and immediacy to the role-play that a fictitious scenario would not.

Therefore, after laying the groundwork with an introduction to the role of a legal advocate and the appellate brief, I assigned a series of exercises arising out of a homicide case described in a recent edition of a Philadelphia daily newspaper. This short article contained a description of a homicide-by-vehicle case in which the defendant had run into and killed a woman with his motorcycle, fled the city for five years, and then returned and pleaded guilty to his crimes.²

I selected this article as the basis for the exercises for three reasons. First, the article contained facts that could be used to support arguments on behalf of both the prosecution and the defense. Second, the article straightforwardly described a compelling human drama, which would keep my students' attention and leave them free to focus their energies on their advocacy projects. Third, the article was short enough that the students could work with it in class without

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¹ The author is grateful to Professor Louis Sirico for his valuable feedback in the preparation of this article.

² Dave Racher, *Conscience Drives Him to Admit to Fatal Hit-Run*, Phila. Daily News 24 (January 10, 2001). I would be happy to provide the full text of the article to anyone who is interested.

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exhausting the whole class period just reading and digesting the article.

I had the article copied onto two different colors of paper: blue and yellow. During the second class of the semester, I distributed the article to the class, giving half of the students the article on blue paper and half of the students the article on yellow paper. The students who received the blue copies of the article were assigned to be prosecutors; the students who received the yellow copies of the article were assigned to be defense attorneys. I then divided the class into groups of three students, with each group composed exclusively of either prosecutors or defense attorneys.

I instructed each group to draft a statement of facts that reflected its particular perspective, using only those details provided in the article. The students readily undertook this assignment, carefully examining the article to determine how to present the facts in a manner that was consistent with their positions as either prosecutors or defense attorneys.

After the students had time to draft their factual statements, we reconvened as a class. The students then shared some of their drafts with the class, and we discussed how the statements of fact varied depending upon the positions of the drafters. The students' factual statements provided a basis to discuss how the same fact could be used differently depending on one's perspective. For example, the article's opening statement that the defendant's "conscience bothered him," could be used by the defense to show the defendant's remorse or by the prosecution to show the defendant's consciousness of guilt. The students' factual statements also illustrated how different facts might be emphasized by the prosecution or defense. For example, the prosecution might focus on the running down and killing of the victim, and the defendant's flight and ensuing five-year absence, while the defense might focus on the defendant's turning himself in and his psychological and physical condition following the incident.

I had two goals for this exercise. Primarily, I wanted my students to actively participate in the process of constructing a statement of facts as advocates, taking the assignment seriously and becoming absorbed in the process. Second,

I wanted the assignment to be manageable, nonintimidating, and—dare I say it?—fun.

Choosing a scenario based on a current criminal case reported in the paper enabled me to accomplish these goals. Because the students were presented with a real, active criminal case, they had no apparent difficulty immersing themselves in their assigned roles. The students knew that the case was an actual scenario faced by a prosecutor and defense attorney. The exercise was, thus, explicitly connected to the work of real attorneys, motivating students to participate.

Moreover, writing a statement of facts using a real case validated the legitimacy of what the students were reading in their textbooks and hearing from me. Both the textbook and I explained that an advocate's position influences the presentation of the facts of a case and provided examples of this lesson. By writing their own statement of facts, using the actual facts of a real case, the students experienced the process of presenting facts as advocates and thereby demonstrated for themselves the connection between their class lessons, their class exercises, and the practice of law. Knowing the practical significance of this particular lesson would, hopefully, facilitate the students' receptiveness to future lessons as well.

My use of the article did not stop with the statement of facts exercise. Rather, I built upon my students' familiarity with the factual scenario presented in the article and identification with their assigned roles to introduce them to argument itself. Specifically, I assigned each student to write a sentencing argument for the court for the case described in the article.³

To maintain continuity between the assignments, the students retained their roles as prosecutor or defense attorney: those students who wrote statements of facts as prosecutors made sentencing arguments as prosecutors; those students who wrote statements of facts as defense attorneys made sentencing arguments as defense attorneys. By retaining roles, the students could focus on their arguments and not have to worry about switching from one side to the other. I also

³ I gave the students this assignment at the end of the class period during which they had written their statements of fact. The students were to complete the assignment for our next class meeting.

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hoped that this continuity would enable the students to feel more invested in their arguments and, thus, approach the assignment more enthusiastically.

Although the students' ultimate goal for the semester was to write and argue an appellate brief, I thought that writing a sentencing argument would be a more approachable introduction to advocacy. Most students have no familiarity with appellate brief writing when they enter law school; however, many students have been exposed to some semblance of trial arguments through fictional television programs and broadcasts of actual courtroom proceedings. Through the sentencing argument assignment, I hoped to introduce my students to legal advocacy in a marginally familiar and less intimidating context. In this way, my students could focus on making substantive arguments without worrying about their unfamiliarity with appellate brief writing.

In fact, the sentencing argument was an effective introduction to advocacy, helping the students become accustomed to taking a position and expressing their arguments in writing. Moreover, the students' sentencing arguments possessed traits of successful appellate arguments: the arguments were sincere, were supported by references to the underlying facts, and incorporated equity and policy arguments.

With a factual statement and sentencing argument under their belts, I assigned my students one final project using the article. Specifically, as my students began working on their graded appellate briefs, I instructed them to draft a Question Presented for a hypothetical appeal of the defendant's sentence. By using the article for this assignment, my students could undertake a foreign task—drafting a Question Presented—in a familiar context. In this way, the students could focus on the task at hand, continuing their representation of a real client in a real case, while practicing a new skill.

In order to learn to be effective brief writers, students must be engaged in the written advocacy process. As legal writing professors, we must facilitate our students' absorption in this process. One way to do this is to enable our students to assume an advocacy role that is realistic and compelling. By assigning students to assume an

advocacy role in a case that they know to be real and current, we can promote our students' identification with this role and enthusiasm for their assignments. Students know that they are being asked to assume roles in scenarios faced by real attorneys and immediately see the applicability of the lessons they learn in the classroom to their future lives as lawyers. Students are, therefore, even more motivated to learn in the classroom and participate meaningfully in their assignments.

Could I have constructed a realistic hypothetical to use for the progression of exercises I assigned to my students? Of course. Would this hypothetical have caught my students' attention and enabled my students to identify with their roles as easily? I don't think so. Rather, I believe that knowing that they were being asked to assume roles in connection with a real case facilitated my students' identification with these roles and serious attention to the assignments. My students knew from the start that they were dealing with a scenario that actual attorneys had faced, not a contrived factual scenario. I, therefore, did not have to overcome any resistance to the validity of the scenario, and my students could devote their full attention to the assignments.⁴

Observing and Critiquing Actual Appellate Arguments

In addition to importing actual events into the classroom as the basis for assignments, we can send our students into the world beyond the academy to experience real legal advocacy. By seeing attorneys engaging in the skills that we are teaching, our students can better understand the significance of our classroom instruction. Students will, presumably, be more focused and engaged in their studies if they appreciate how meaningful their studies are to their future careers. To introduce my students to appellate advocacy and provide a context for their classroom learning, I instructed them to observe and critique an actual appellate argument.

⁴ Obviously, there are times when we must create hypothetical scenarios to advance our students' education. However, even when we cannot use actual cases for our exercises, we can construct scenarios that are as realistic and engaging as possible.

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During the third week of the semester, they were to observe and critique an appellate argument of their choosing. Because of my law school's proximity to Philadelphia, my students could choose to watch an argument in either state or federal court.⁵ My students also had the option of watching an appellate argument elsewhere in the country. One of my students, in fact, observed an argument in the United States Supreme Court.

Since observation alone can be a passive undertaking, particularly when what is being observed is legal argument, I told my students to write a short critique of the argument that they observed. I instructed them to prepare the critique in order to focus their observations and require them to be active observers, engaged in and attentive to the arguments.⁶

Since my students were generally unfamiliar with oral argument, I prepared an assignment sheet to guide their observation and critique. The instructions told the students to focus their critique on the attorneys' presentation of their arguments and described particular aspects of the attorneys' presentation that the students should examine (for example, whether the attorneys' arguments were logical and coherent, whether the attorneys were in control of their arguments, whether the attorneys spoke clearly and audibly, and whether the attorneys were respectful of the court). I also asked the students to discuss how the arguments met their expectations and how the arguments differed from what they had expected.

I had four goals in assigning this introduction to appellate advocacy to my students. First, I

⁵ Obviously, not all law students have the luxury of such easy access to appellate courts. However, students can access videotapes of actual appellate arguments and, if nothing else, transcripts of actual arguments. In addition, moot court arguments are a valuable resource for first-year students, even if they do not replicate the experience of an actual argument. Moreover, even with relatively easy access to appellate courts, it can be very difficult for first-year law students to make the time to observe such arguments. In fact, because of the many demands on their time, I subsequently amended the assignment to allow students, if necessary, to observe and critique a moot court argument.

⁶ The students' critiques were due by the Friday of the first week that we were going to focus on oral argument in class. I set this deadline to ensure that the observation experience would provide context for our classes and the students' own arguments to follow.

wanted my students to see in practice the different aspects of oral argument that we would be talking about in class (e.g., preparation, organization, comportment) and to experience themselves the practical impact of these different aspects of attorney behavior (e.g., an attorney who speaks too softly and/or too quickly will not be understood). I hoped that my students would become more conscious of the factors that make an effective presentation and would internalize their critiques of the arguments when preparing for and presenting their own arguments.

Second, I wanted my students to observe that oral argument styles are individualistic: that there is not one right way to present an oral argument. Students who are unfamiliar with appellate advocacy and courtroom presentation in general may believe that there is a particular "courtroom persona" that they must adopt in order to be successful advocates. Seeing practicing attorneys with different personal styles can prove to students that there is not one right way to present an argument. Students can also judge for themselves what styles they find to be particularly effective or counterproductive.

Third, I hoped that the observation and critique assignment would demystify oral argument. Oral argument is foreign to most students and intimidating to many. Students may feel that successful advocates are perfect at what they do: always calm, smooth, dynamic, and articulate. Obviously, this is not the case. By watching actual oral arguments, students get a realistic and more approachable view of appellate advocacy. Students see that even the most effective advocate will fumble for words at times or misunderstand a judge's question. Especially as they prepare for their first oral argument, it can be reassuring for students to see that effective advocates do not have to be flawless advocates and that there is a range of attorney competence in the courtroom.

Fourth, I wanted my students to experience the context in which oral advocacy occurs: an experience that can only be obtained by physically sitting in an actual courtroom during argument. My students observed that oral argument does not

occur within a hermetically sealed environment. Rather, arguments occur in courtrooms where multiple arguments are scheduled on any given day, where attorneys and other observers are coming and going, and where judges may converse with each other and engage in other distracting (and distracted) behavior while an attorney is presenting argument.

In this regard, the experience of watching an oral argument in context cannot be replicated. Moot court arguments, the only other live arguments that students can observe, provide exposure to argument in a vacuum: away from the context in which argument actually occurs and in an optimal environment (attentive and prepared judges, attentive and prepared advocates, attentive audience). Moot court arguments are an invaluable resource for our students (both as observers and as participants), but they do not give our students a complete picture of legal advocacy.

Understanding the context in which argument occurs can focus students' attention on the skills that must be mastered to present an effective oral argument. For example, students who appreciate that their arguments will be among the many heard on any given day and that their arguments will take place in courtrooms where there may be many distractions will commit themselves to preparing clear, direct, and concise arguments to ensure that they communicate their main points to the court.

Observing actual oral arguments and understanding the real-world context in which arguments occur provide a foundation for students to develop their own argument abilities. Students experience for themselves the impact of skillful, and less skillful, presentations and can apply those experiences to their own arguments. Moreover, observing and critiquing actual oral arguments puts the students' classroom instruction into a real-world context, thereby validating what the students learn in class and further motivating the students to immerse themselves in their own argument preparations.

Conclusion

As law professors, we have a responsibility to prepare our students to be competent and dedicated advocates. As legal writing and advocacy professors, we require our students to be active participants in this process (e.g., by writing memoranda and briefs and presenting oral argument). The more engaged our students are in learning how to be effective written and oral advocates, the more successful they will be as both students and attorneys. We can engage our students by using contemporary events to create meaningful and absorbing assignments. Moreover, by learning legal writing and advocacy in the context of actual events, our students will better appreciate the connection between what they are learning in the classroom and their future professional lives and will, accordingly, be more motivated to learn inside the classroom. As a result, our students will be better served by us and better prepared to serve their clients.

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