

Creating an Appellate Brief Assignment: A Recipe for Success

By Kathleen A. Portuan Miller¹

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Creating an appellate brief problem and preparing for a dinner party share some commonalities. Both tasks can be overwhelming—in terms of time and details. But, I found out, after years of cooking and teaching—that organization is the key to a successful dinner and a compelling appellate assignment. When I am planning my dinner party, I think about where to get interesting ideas for the dinner, what foods are seasonally appropriate, what recipes to use for each dish, how to set the table, and how to serve the meal. Putting together an appellate brief problem also requires detailed planning.² Like the dinner party, a key element to a successful assignment will be using the right materials (the freshest ingredients). Through trial and error, I've found this recipe for success in creating an appellate brief assignment.

I. Looking for Sources—Here's How to Begin

1. Moot Court Case Book

New York University publishes the *New York Moot Court Casebook*, which is chock-full of ideas for federal appellate briefs. Each entry contains a complete record, including the complaint and answer, motions, affidavits, and the opinion of the lower court. There is also a memorandum of law, loaded with cases and analysis. All of the assignments are federal problems and cover many

different topics. There are about 15 assignments in one casebook.

In addition to using these ideas for appellate briefs, you can tailor the problems to create an interoffice memorandum. You can purchase a copy of the 2007 *Moot Court Casebook* and a CD-ROM for \$90. Older editions with a CD-ROM cost \$85. Checks, with a letter on official school letterhead, can be sent to: Moot Court Board, Attention: Casebook Editor, New York University School of Law, 110 West 3rd Street, New York, New York 10012.

2. NITA Materials

The National Institute for Trial Advocacy (NITA) has trial advocacy books with great appellate brief assignments, including the record, and loads of support materials. *Advocacy Before Appellate Courts—Book I: Record of Proceedings* is available for \$35, and *Advocacy Before Appellate Courts—Book II: Legal Support Materials* is available for \$30. You can contact Customer Support in Colorado at 1-800-225-6482 or NITA at 1-877-648-2632.

A typical problem, called “Discrimination Cases,” includes a summary of the pleadings, along with testimony, exhibits, appraisals, correspondence, an applicable statute, and a memorandum of law that analyzes the cases. In addition, the actual opinion from the *Federal Reporter*[®] is included.

3. Bar Association Meetings

A good way to kill two birds with one stone is to attend a local bar meeting or lunch. In addition to meeting many members of the local bar, you can find out what issues attorneys are litigating. Many times, the attorneys are litigating new topics that have not been resolved or are working on topics where there is a split in the law. At one Baton Rouge Bar Association lunch, I found out that case law is split regarding whether a matter is medical

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¹ Thanks to Michael deBarros, a second-year LSU law student, who helped research this paper.

² Editor's note: See also James D. Dimitri, *Writing Engaging, Realistic, and Balanced Appellate Advocacy Problems*, 16 *Perspectives: Teaching Legal Res. & Writing* 93 (2008).

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malpractice or health care under the Louisiana medical malpractice statute.

4. Westlaw®

Westlaw provides a great way to find a split in the case law on a given topic. If you go to the Louisiana Cases database (LA-CS) for example, and run the search *circuit /5 split*, you can find out where the circuits are split on an issue.³ On Westlaw, search terms in the cases are highlighted for easy review.

For example, in Louisiana, there was a split in the circuits concerning the enforceability of arbitration clauses in consumer standard form contracts. Two circuits read these clauses liberally while two circuits interpreted these clauses narrowly. The Supreme Court of Louisiana resolved this split in *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005). In another case, *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So. 2d 294 (La. 2001), the Supreme Court examined the interpretation and application of Louisiana law relating to noncompetition agreements. The Supreme Court noted that the courts of appeal within Louisiana have reached different conclusions as to the scope of competitive activity that may be curtailed by such agreements. Although the court ultimately remanded the matter to the trial court, the text of the decision is useful for developing an appellate problem since it cites relevant cases and lays out the arguments on both sides.

5. Using KeyCite®

After perusing cases dealing with circuit splits and selecting a topic, you should look for the older, underlying cases that are on point that have not yet been overruled. Once you identify these leading cases, you can use KeyCite on Westlaw to find cases that have cited either positively or negatively to the leading cases. The ideal topic

will have leading, or seminal, cases with equal numbers of positive and negative citing references.

6. LexisNexis®

LexisNexis, like Westlaw, can help you to find a split in the case law. In Louisiana Cases Combined, you can run the search *circuit w/s split! or divid! and date aft 2000*. The results point the way to the splits in the circuits. In the *SWAT* case, LexisNexis provides convenient categories such as Overview and Core Terms. Under Core Terms, the words “to resolve a split among the circuit courts of appeals” are highlighted to make perusal easy. Lexis conveniently highlights key terms so you can quickly find the splits.

7. Looseleaf Services

Looseleaf services, because they are so current, have the latest law on the subject, plus commentary. A few noteworthy looseleaf services are BNA's *Daily Tax Report*, which has the latest law in the tax area, the CCH *Blue Sky Law Reporter*, which has the latest in corporate and securities law, and BNA's *United States Law Week*, which provides very current analysis of significant federal and state cases in all practice areas, as well as important legislative and regulatory developments.

8. American Law Reports

American Law Reports, or ALR®, contains annotations written by experts in the field. These annotations show majority-minority splits among state and federal courts. ALR also gives references to other helpful sources in the Research References section. For example, in the annotation, *Wrongful or Excessive Prescription of Drugs*, 19 ALR 6th 577 (2006), by George L. Blum, the research references include West topics and key numbers that apply to the particular annotation; in addition, pertinent Westlaw databases and even sample search queries are provided. Also included are other applicable ALR annotations and citations to the legal encyclopedias *American Jurisprudence 2d* and *Corpus Juris Secundum*® and to law review articles.

³ Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 Utah L. Rev. 917.

9. Newsletters and Journals

Newsletters are great. For example, in Louisiana, there is *Marais's Civil Law and Procedure Newsletter*, which sums up recent issues and significant developments in case law in one- or two-sentence blurbs. The *ABA Journal* and the *National Law Journal* contain practitioners' columns with summaries of new litigation or developing areas of law.

10. Legal Writing Institute Idea Bank

The Legal Writing Institute provides an Idea Bank, available online at <www.lwionline.org>. If you submit an idea, you can take an idea for an appellate brief from the Idea Bank. Many of the ideas for appellate briefs or memoranda include answers and show the split of authorities. If you use these sources, you can also contact the drafter of the problem and get a sample answer and a student-written paper. The 2006 Idea Bank is available online at <www.ideabank.rutgers.edu>.

The Legal Writing Institute is located at Walter F. George School of Law, Mercer University, 1021 Georgia Avenue, Macon, Georgia 31207; 478-301-2622.

11. Additional Online Services

Blogs, or online journals, can be an excellent way to gather cutting-edge topics for appellate brief problems. Some law professors and attorneys write blogs containing their commentary about developments in different areas of the law. One particularly useful blog, Split Circuits, authored by Professor A. Benjamin Spencer of the University of Richmond School of Law, tracks developments concerning splits among the federal circuits.⁴ Another blog, Blawg Republic, provides a digest view of the latest news and commentary from the legal blogging community.⁵

In addition to blogs, Seton Hall University School of Law of New Jersey publishes the *Seton Hall Circuit Review*, which contains a Current Circuit

Splits column—a superb tool for fielding topics for appellate brief problems.⁶ The column contains brief summaries of recent circuit splits identified by a federal court of appeals opinion. It is arranged by topic under civil and criminal law categories.

II. Putting the Assignment Together

Once the preliminary search for a topic is complete, check that the topic affords both parties an equal opportunity to argue each of their respective positions. In order to facilitate this opportunity, there must be a “balance of cases” (that is, each party must have a sufficient number of cases that bolster his or her position). The problem should also be simple enough for a first-year law student to understand.

Professors Michael Millemann and Steven Schwinn discuss how balance is created through “reverse engineering.”⁷ That is, the creator of the appellate brief problem forges the analytical paths retroactively, working from the legal authorities, the analysis, and the arguments, back to the facts.⁸ This process establishes a limited number of acceptable pathways for the students to follow. As part of the reverse engineering, the question for the students is defined by the predetermined answer. When the students' authorities, analysis, and arguments comport with the teacher's expectations, then the problem has worked.⁹

When I am creating a capstone legal writing problem like an appellate brief assignment, I make sure I give students an opportunity to exercise all of the skills they have learned throughout the course—print and online research skills, writing skills, and whatever analytical approach to legal analysis we have focused on, whether IRAC, CREAC, five-step, or REAC. I support the use

⁶ *Seton Hall Circuit Review*, <law.shu.edu/journals/circuitreview/index.html>.

⁷ Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 *Clinical L. Rev.* 441, 458 (2001).

⁸ *Id.*

⁹ *Id.*

⁴ Split Circuits, <splitcircuits.blogspot.com>.

⁵ Blawg Republic, <www.blawgrepublic.com>.

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of a hypothetical fact situation rather than using a real case because the hypothetical problem can be designed to meet specific learning objectives. As I draft the problem, I make sure I have summarized the law and arguments for each side of each issue. Finally, I create the facts so that one side does not seem to be the winner. It's important to fit the facts with the law so that when the law is analyzed and applied to the facts, neither side appears to be a clear winner. I recommend choosing a substantive topic from one of the subjects taught in first-year courses.¹⁰

In addition to a balance of the cases, there should be two major issues in the same area of law. (Multiple issues tend to confuse the judges, as well as the students.) The issues should be able to be tailored so that the appellant and the appellee are able to slant them to support their arguments.

The facts of the assignment should raise these issues, and the law needs to support the arguments for the appellant and the appellee under the facts of the assignment.

Allowing the students to slant the issues to their side will serve both as a foundation that will allow them to solidify their arguments and as a means to clear up confusion as to which party is the appellant and which is the appellee.

III. Conclusion

I began by comparing creating an appellate brief problem to preparing for a dinner party. Both tasks can be overwhelming—in terms of time and details—but also extremely rewarding. The key to success for both ventures is planning and careful selection. I hope this short piece has given you some ideas on how to “cook up” an appetizing appellate assignment.

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Another Perspective

Please note that beginning with volume 1, all issues of *Perspectives* are available in the Perspectives database (PERSPEC) on Westlaw and in the LEGNEWSL, TP-ALL, and LAWPRAC databases. *Perspectives* is also available in PDF at west.thomson.com/newsletters/perspectives.

Authors are encouraged to submit brief articles on subjects relevant to the teaching of legal research and writing. The *Perspectives* Author's Guide and Style Sheet are posted at west.thomson.com/newsletters/perspectives/perstyle.aspx.

¹⁰ See, e.g., Barbara Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 *Tulsa L. Rev.* 503 (2001).