Appellate Advocacy
Sandra Day O'Connor College of Law
Law 691 Course Number 26468, Spring 2011

Syllabus

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This is an eight-class skills course. It is not a course on appellate law or procedure, and will not include writing or researching appellate briefs. We will focus on the techniques and dynamics of appellate advocacy, with special emphasis on oral argument. Oral argument gives judges a convenient and efficient way to increase their understanding—and eliminate misunderstanding—of facts, procedural history, issues and law. But for appellate lawyers, the core function of oral argument is to make the court want to decide in your favor. We hope to help you sum up the issues by making your best points as forcefully as possible and dealing with your weakest point by reducing it to non-dispositive status. And we will do our best to convince you that the term "oral argument" is inapt. It is usually not an argument, but rather a vigorous conversation with the judges in your case. Much has been said and written about "arguing" at the appellate level. Our combined experience at the trial and appellate levels suggests something not often emphasized in textbooks or "how to" manuals. Oral argument is best thought of as the time when the judges are in effect opening their post-argument conference. It is also the time when the lawyers get a rare opportunity to participate in that conference by guiding and advancing the discussion.

We will examine what goes on during the arguing and deciding of appeals, as seen through the lens of appellate advocates and judges. The more lawyers understand about how judges think and react, the better advocates they will become. The opportunity to argue an appeal is a rare treat in the life of most lawyers. It offers the chance to practice one's craft at the summit. Little else compares with the challenge of intellect, testing preparation, insight, and performance before an audience of informed and attentive judges—whose favorable evaluation is a pearl of great value.

Appellate advocacy is an acquired talent. It takes several years to become really good at it. But we will do the best we can in eight two-hour sessions. We will study and deliver moot oral arguments in a case now pending before the United States Court of Appeals for the Ninth Circuit (on remand from the US Supreme Court). Doody v. Schiro, 596 F. 3d 620 (9th Cir. Feb. 2010), *habeas corpus* proceeding, *certiorari* granted, Oct. 12, 2010, US Supreme Court, Case No. 09-1443; judgment vacated, and remanded to the Ninth Circuit for further consideration in light of Florida v Powell, 130 S.Ct. 1195 (2010). The underlying Arizona case is Doody v. Arizona, 187 Ariz. 363, 930 P.2d 440 (1996).

The first two classes will include brief lectures (the essence of mooting oral arguments and the terror of giving them). The third class will be a PowerPoint presentation of the facts, legal history, and appellate issues currently pending in the case. Then, we will divide the students into two firms (oral argument teams—six students per team—appellant and appellee). The next

two classes will be used to help students prepare and deliver oral arguments for their "side." Then, two classes will be used for delivery of mock oral arguments in the Great Hall before sitting appellate judges and some of the state's best appellate lawyers. All mock arguments will be videotaped and CD's will be made available. The final class will be an informal rendering of what we learned in mooting the case. Every class will be an interactive discussion about the "conversation" that goes on in at the appellate level before, during, and after the oral arguments.

There is no prescribed text. We will post articles and other materials on the Class Blackboard site. We will also use that website to post documents and writings about the Doody case. And while it not necessary to purchase the book, we highly recommend, *"Making Your Case—The Art of Persuading Judges,"* by Antonin Scalia and Bryan A. Garner (Thompson/West, St. Paul, MN, 2008). The bookstore will have copies available for purchase in December 2010. The Foreword to that small, but important book says,

> "To lighten the journey, we have adopted a conversational style that includes occasional contractions and remarks more flippant or colloquial than one would normally encounter in legal commentary. The reader who feels that some of these indulgences fall short of the formality and sobriety expected of a jurist should attribute all of them to the other author and assume that they have been included under protest."

Since this class is offered by a jurist and a working lawyer, we suggest our students adopt the same protocol.

Gary L. Stuart and *Andrew D. Hurwitz*.