Introduction

This course has three objectives, which will be given approximately equal weight.

First, we will read a modest amount of material and discuss together how the Supreme Court works and how it differs from other American courts. We will also read the briefs and discuss the issues and strategy in three or four of the cases presently pending before the Court.

Second, through two short (roughly 10 page) writing assignments and opportunities for extensive one-on-one discussion and comment, there will be a heavy emphasis on effective legal writing.

Third, we will focus on effective oral advocacy, as practiced in the U.S. Supreme Court, with multiple opportunities for each student to observe and participate as advocate and judge in short, informal moot courts in actual pending cases, and to observe actual moot courts and talk with arguing counsel following oral argument.

Course Description

In this course, we will focus on the lawyer’s role in the decision making process of the United States Supreme Court. Because that Court itself plays a unique role in our legal system—to identify and resolve important disputed and recurring issues of federal law—the role of counsel in that Court is markedly different in many respects than it is in other appellate courts.

These differences are most obvious in the certiorari process, by which the Court identifies the cases it will hear on the merits. Lawyers on both sides are charged with the task of convincing the Court that the case at hand either is or is not one which clearly presents a legal issue of sufficient moment and controversy as to presently demand the Court’s attention. We will study the certiorari process, consider at some length the features of a case that enhance or detract from its chances for certiorari, and focus specifically on the tasks of drafting certiorari petitions, oppositions to certiorari, and reply briefs.

After a case is granted and it goes forward on the merits, the selective nature of the Court’s jurisdiction, and its focus on resolving recurring legal issues rather than simply deciding cases, shapes the lawyer’s approach to the case in many important respects. These peculiar aspects of advocacy in the Supreme Court will be discussed in several class sessions dealing with the tasks of drafting merits briefs, including briefs of petitioners, respondents and reply briefs. We will also discuss the role of amicus briefs and the ways in which they can contribute to the Court’s decision.
The unique nature of the Supreme Court’s decision making role is substantially reflected in the nature of oral advocacy as it is now practiced at the Court. We will deal with the nature and challenges of oral argument in the Supreme Court beginning with the first class, and then again more intensely in a number of class sessions. In addition to reading secondary sources addressing oral argument in the Court from a variety of perspectives, we will observe and discuss two moot court arguments featuring advocates in upcoming cases in the Court.

In addition, we will have as guest lecturers some experienced Supreme Court advocates. These occasions will afford you a unique opportunity to talk first hand with Supreme Court experts about their roles and choices in handling historic and important Supreme Court cases. I hope you will make the most of these opportunities. All students will also participate in one moot court exercise involving an upcoming case.

Course Requirements

This is a two credit course, and class meets for two hours each Wednesday, between 1:30 and 3:20 pm. **Attendance at the two moot court arguments presented by the lawyers who will argue before the Court, which will be held at or close to the usual class time or during the lunch hour on another day of the week, is a course requirement.**

Class sessions will generally follow a two-part format. During the first portion of the class, for as much as half of the class period, there will be a presentation/discussion, either by me or by an outside speaker, in which class participation will often be a major part. The latter half or more of the class will be devoted to various forms of participatory exercises and class discussion in which the class members play the principal role.

You are required to attend, and to come to each meeting fully prepared to participate in the activities of the day. This preparation will include reading and reflecting upon the assigned reading material, which will include a combination of secondary materials and briefs and decisions in Supreme Court cases. (Some classes may begin with a five question pop quiz focused on the readings.) There will be a substantial amount of class discussion in every class session.

Students will also be asked on at least one occasion to make a brief oral argument in an upcoming Supreme Court case. (See description under Week Four.) All class participation activities together will provide the basis for 1/3 of your grade.

The remaining 2/3 of the grade will be determined by two writing assignments. These assignments will require each student to put him or herself in the position of a lawyer responsible for drafting, on the one hand, an opposition to certiorari (assigned August 29, 2012, due October 3, 2012), and on the other, a reply brief on the merits (assigned October 3, 2012 due November 7, 2012). The intent of these assignments is to familiarize you with the intensive iterative process by which the best written work filed in the Supreme Court is prepared, and to engage you in a substantial way in that process of conceptualizing and articulating legal positions in the U.S. Supreme Court. Only by formulating positions in writing, subjecting them to intensive critique, and reformulating them, often many times, is it possible for most people to arrive at
written formulations that embody their best effort to convince the Court of the wisdom of their position.

The first of these written exercises will be a rough draft (approximately 8-10 pages double spaced) of an opposition to a petition for certiorari in a case that was actually filed in the Court a few years ago. Prior to the preparation of the draft opposition, you will prepare an outline which will be reviewed and commented upon by the professor. In this assignment, the ground rules allow review only of the petition for certiorari filed in the case, and preclude the review of any other briefing filed in this case in the U.S. Supreme Court, including the opposition to certiorari that was actually filed. This project is to be completed between August 29, 2012 and October 3, 2012, with an outline of the brief to be submitted on September 12. During the week of September 19, the professor will meet individually with each student to discuss the outline.

The second written assignment will be to draft a reply brief on the merits in the first case in which we will conduct in-class moot courts. By the time you commence this assignment on October 3, 2012, you will have read the merits briefs in the case (other than the reply brief, which you are directed not to consult), watched the case being mooted and engaged in substantial discussion of it. This reply brief should be in the range of 10-12 double-spaced pages. This assignment must be submitted by email no later than 5:00 pm on November 7, 2012. Each student also has the option to submit an outline of the reply brief by noon on Friday, October 12, 2012, and meet individually with the professor during the next week to discuss the outline.
The present plan is to cover the course subject matter, and engage in the following activities, on the schedule set forth below. In general, class will meet on Wednesdays 1:00 – 2:50 pm. We may also hold class at certain other times, to accommodate the moot court schedule. There will almost certainly be some adjustments to the course plan below, based on issues of speaker availability or other considerations.

**Week One (August 22, 2012): Introduction to Class and Role of Oral Argument in the Supreme Court Today**

Reading Assignment (Oral Argument):

1. David C. Frederick, Chapter Two of “Supreme Court and Appellate Advocacy — Mastering Oral Argument” (Pgs. 14-49) (Heavily Edited)
3. Supreme Court of the United States — Guide for Counsel (October Term 2008)

Class Exercise: Listen to sample oral arguments, recent and 40 years ago, and discuss.

**Week Two (August 29, 2012): What is a Certworthy Case?**

Reading Assignment (What Is A Certworthy Case):

1. Part III and IV, Rules of the Supreme Court of the United States (Adopted July 17, 2007 — Effective October 1, 2007)
2. Gressman, Geller, Shapiro, Bishop, Harnett, Supreme Court Practice, 233-310 (9th Ed. 2008) (Chap. 4: “Factors Motivating the Exercise of the Court’s Certiorari Jurisdiction”)
3. Four Sample Cert Candidates for Discussion

Class Exercise: Discussion of certworthiness of four sample cases.

Assign paper—Opposition Brief in *Smith v. U.S.* Outline due September 12, 2012 at 5:00 pm.
Week Three (September 5, 2012): Drafting Cert Petitions and Oppositions

Reading Assignment (Drafting Petitions and Oppositions):

3. Cert Petition and Opposition – Renzi v. Connelly School

Class Exercise: Discuss petition and opposition in Renzi v. Connelly, focusing on whether the case was certworthy and why or why not.

Week Four (September 12, 2012): Discussion of Cert Petition in [FIRST CASE]; Mini-moot courts in [FIRST CASE]

Reading Assignment:

1. Petition for Certiorari, Opposition and Reply in [FIRST CASE]
2. Petitioner and Respondent Merits Briefs in [FIRST CASE] (you are instructed not to read petitioner’s reply brief)

First Hour: Discuss certiorari process in [FIRST CASE].

Schedule times to meet with professor to discuss cert opposition outlines.

Second Hour: Class Exercise: Working in pairs, a total of four students will be responsible for thinking deeply and critically about the positions being advocated by one side or the other in [FIRST CASE]. Thus dealing first with petitioner’s position, one pair of students will first identify two issues/arguments standing in the way of petitioner prevailing that the students believe present the most substantial challenge for petitioner to overcome. The same pair of students will then offer their best effort to articulate a response by petitioner to these two problems that they have identified. A second pair of students will repeat the same exercise as it bears on respondent’s position. Then one more pair of students will repeat the same exercise again, focusing on the position of petitioner. (Each pair of students is required to work together. One important point of the exercise is to experience the benefits of a collective thought process in testing theories and formulating arguments.)

Outlines of Smith cert opp. due at 5 pm.

Candidates for [FIRST CASE]:

Arkansas Gaming Comm’n v. U.S., No. 11-597 (Granted: 4/2/12)
Fisher v. Univ. of Texas, No. 11-345 (Granted: 2/21/12; Petr. Br. filed 5/21/12)
Lozman v. City of Rivera Beach, No. 11-626 (Granted: 2/21/12; Petr. Br. filed 5/8/12)
Week Five (September 19, 2012):

Reading Assignment: Read merits briefs in [SECOND CASE], and selected Supreme Court decisions.

**First Hour:** Discuss outlines with individual students.
**Second Hour:** Discuss background issues re [SECOND CASE].

Week Six (September 26, 2012): **Discuss Merits Briefs**

Reading Assignment (Merits Briefs):

2. Supreme Court Rules 24-26

**First Hour:** Discussion of Drafting Merits Briefs: Petitioner, Respondent and Reply Briefs.
**Second Hour:** Discuss drafting *Smith v. U.S.* reply brief.

Week Seven (October 3, 2012): **Discuss Merits Briefs; Mini-moot courts in [SECOND CASE].**

**First Hour:** Class Exercise: During the second hour, we will repeat, with regard to the second moot court we will attend, the exercise in which we engaged in Week Four. Two more pairs of students (i.e., 4 students) will engage in the exercise described under Week Three, with the same limitations and format as we have employed previously, using the briefs in [SECOND CASE].

**Second Hour:** Discuss the special challenges and approaches to drafting reply briefs on the merits, in connection with the next writing assignment—preparation of a merits reply brief in [FIRST CASE] which will be due November 14, 2012.

**Final Draft of Smith v. United States Opposition is Due at 7:00 pm.**
Week Eight (October 10, 2012):  The Role of the Solicitor General

Reading Assignment (The Role of the SG):


Optional Submission: Outline of reply brief in __________ v. ______________.
For students who submit an outline of their reply brief by noon on Friday, October 12, 2012, individual meetings will be scheduled during the week of October 15-19.

Class Exercise: Following the appearance by a representative of the Solicitor General’s office, we will discuss and perhaps debate the proper role of the SG. Should the SG be more of a servant of the Court—a counselor and advisor to the justices—or an advocate for a client? If the latter, who is his client? The President? The United States? The Executive Branch? What about Congress? Are these advocacy roles inconsistent? If so, how are conflicts to be reconciled? If the SG is essentially an advocate for one or all of the above, how if at all is his position different from any other lawyer hired by a client to advance his interest in litigation?

Week Nine (October 24, 2012):  Big Moral Questions in the Supreme Court

Reading Assignment: Merits Briefs in __________ v. ______________ for next moot court.
Other readings to be announced.

First Hour: The class today will focus on the big, recurring-issue type of cases that are perceived by the general public as most of what the Court is concerned with. In recent decades, affirmative action and abortion have commanded a great deal of public attention. More recently, cases involving detainee rights, the war-on-terror, and suspension of habeas corpus have become another important category of such cases. Specifically, we will focus on one or several cases to be determined in advance of class.

Second Hour: Class Exercise: During the second hour, we will repeat the exercise in which we engaged in Weeks Four and Seven. Two more pairs of students (i.e., 4 students) will engage in the exercise described under Week Four, with the same limitations and format as we have employed previously, using the briefs in __________ v. ______________.
Week Ten (October 31, 2012): Lecture on Amicus Briefs

Reading Assignment (Amicus Briefs):

3. Amicus briefs in ____________ v. ________________.

First Hour: Discuss general role of amicus briefs in Supreme Court cases.
Second Hour: Discuss use of amicus briefs filed in ____________ v. ________________.

Week Eleven (November 7, 2012):

Reading Assignment: Briefs in ____________ v. ________________ for next moot court.

First Hour: Class Exercise: During the first hour, we will repeat the exercise in which we engaged in Weeks Four, Seven and Nine. Two more pairs of students (i.e., 4 students) will engage in the exercise described under Week Four, with the same limitations and format as we have employed previously, using the briefs in ____________ v. ________________.
Second Hour: TBA

Reply Briefs in [FIRST CLASS] are due at 7:00 pm on November 7, 2012.

Week Twelve (November 14, 2012): Moot Court in ____________ v. ________________

First Hour: Discuss moot court argument in ____________ v. ________________.
Second Hour: TBA

Week Thirteen (November 30, 2012):

TBA