

LAW 706 – Appellate Litigation Practicum Fall, 2021

Instructor Information

Instructor: Jamesa J. Drake
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Office Hours: After class or by appointment

Course Information

Meetings: Friday, 9-noon
Location: 429
Credit Hours: 3.0

Textbook/Course Materials

See below for weekly reading assignments and Brightspace for any supplemental materials. I will publish on Brightspace a packet of information for you to review before each class.

Course Management System

I will use Brightspace as our case management system.

Course Description

A growing number of lawyers market themselves as appellate specialists. These lawyers devote most, if not all, of their practice to work before state and federal courts on behalf of clients who wish to pursue one or more of the many available avenues of appellate relief. This course aims to interest you in the appellate specialty; provide an overview of the different types of appeals and appellate rules of procedure; and provide a forum to practice written and oral appellate advocacy.

We will work on two direct appeals, one civil and one criminal. We will also simulate client management skills and you will have the opportunity to practice oral arguments. In the process, you will learn a variety of fungible skills, *e.g.* how to evaluate strategic litigation choices and how best to communicate those choices to the client; how to work with “good” and “bad” facts; how to best frame the legal questions presented by the case; and how to appropriately respond to the ethical issues that routinely confront courtroom lawyers.

Course Goals & Learning Objectives

At the conclusion of this course, you should feel comfortable independently prosecuting a direct appeal in state or federal court.

GOALS	OBJECTIVES	ASSESSMENTS
Upon successful completion of this course, students will know/understand:	Upon successful completion of this course, students will be able to:	How the student will be assessed on these learning objectives:
Understand the relationship between a direct criminal appeal and collateral appellate review.	Advise clients whether to forego an appeal and pursue collateral relief.	Prepare sample client correspondence.
Understand the principals of preservation and plain error.	Successfully litigate unpreserved appellate issues.	Draft an Appellant's Brief in a civil and criminal case.
Understand the harmless error doctrine and structural error.	Identify prejudicial error, harmless errors, and structural error.	Draft an Appellant's Brief in a civil and criminal case.
Become familiar with state and federal rules of appellate procedure, generally.	Navigate the rules of appellate procedure, and successfully initiate and file briefs, addendum and appendices.	Examine case opening documents and sample pleadings that comply (and sometimes do not comply) with the Rules.
Practice persuasive writing, and learn how to edit effectively.	Edit a colleague's work and successfully integrate caselaw into written prose.	Editing work submitted by classmates.
Observe seasoned appellate litigators, and practice oral advocacy.	Present an effective oral argument.	In-class speaking assignments and moot court.

Assignments/Exams/Papers/Projects

Students will be evaluated in the following areas:

- 10% Class participation and homework (deadlines noted herein)
- 30% Appellant's Brief, Case # 1
- 20% Reply Brief, Case # 1
- 30% Appellant's Brief, Case # 2
- 10% Editing

Grading/Evaluation

Written assignments are graded as follows:

- 10% compliance with the Appellate Rules (or the assignment)
- 20% technical writing (e.g. every writing assignment must be grammatically correct)
- 70% persuasive writing (does the pleading identify, and persuasively contend with, procedural and substantive arguments, in a way that persuades the reader)

Oral advocacy-related assignments are graded exclusively on the students' ability to persuade.

The overall course grade will be calculated as follows:

- 10% class participation
- 30% Lanahan Appellant's Brief
- 20% Lanahan Reply Brief
- 30% McKenney Appellant's Brief
- 10% editing

Course Expectations & Requirements

Class preparation is extremely important. The American Bar Association standards require that students spend a very significant amount of time in out-of-class academic activities, per credit that is awarded. Maine Law has adopted a policy, consistent with the ABA's policy, that students are required to complete approximately 30 hours 20 minutes of out-of-class work per credit per semester.

COURSE POLICIES

Academic Integrity Policy

Each student should know the standards of conduct and expectations of academic integrity. Violations of academic integrity include any actions that attempt to promote or enhance the academic standing of any student by dishonest means. Cheating on an examination, plagiarism, making statements known to be false or misleading, falsifying the results of one's research, improperly using library materials or computer files, or altering or forging academic records are examples of violations of this policy. Acts that violate academic integrity disrupt the educational process and are not acceptable.

Evidence of a violation of the academic integrity policy will normally result in disciplinary action, including referral to the UMS Student Conduct Code process. A copy of the complete Academic Integrity Policy is available on the University of Maine System website or the MyLaw Portal.

Attendance & Participation Policy

Attendance is mandatory. Student participation is strongly encouraged. In the event that the University cancels classes, such as for severe weather, students are expected to continue with readings as originally scheduled. Any assignments scheduled during those missed classes, such as an exam or paper, are due at the next class meeting unless other instructions are posted at the course website or communicated via email.

Attendance: Inclement Weather Policy

For information on campus closings, please call the storm line at 207-780-4800 or sign up for USM text alerts. If the University of Southern Maine closes the campus or cancels classes, this

always applies to the Law School. In rare circumstances, the Law School closes before USM. In this situation, an email about closings will be sent to students through the email listserv.

If the Law Building is (1) closed for the day, (2) open late and our class is scheduled to start before the law school opening, or (3) closed early and our class is scheduled to end after the building closes, then classes may be held remotely. If this is the case, students will be notified and sent a ZOOM link. If you are unable to attend class due to the inclement weather, you should notify me.

If class is canceled, I will let you know about scheduling a make-up.

Class Recording Policy

As a general rule, the recording of all classes is prohibited without permission. If you will be absent from class and wish to record a missed class session, you must first contact me for permission. If permission is granted, you must arrange for a classmate to facilitate the recording. (Suggested mobile apps for self-directed audio recording can be found in the MyLaw Portal.) All class recordings are for personal use only and may not be uploaded to the internet or otherwise shared, transmitted, or published without the prior consent of the professor. If permission is denied, then you must find an alternative method for making up the missed material.

If you are requesting the recording of classes pursuant to the Americans with Disabilities Act or in the case of exceptional circumstances, such as severe illness or hospitalization, you should contact the Associate Dean for Student Affairs.

MAINE LAW POLICIES AND RESOURCES

Disability Accommodations

The Law School is committed to providing students with disabilities equal access to all programs and services. If you think you have a disability and would like to request accommodations, please contact the Disability Services Center (DSC). Timely notification is essential. The Disability Services Center can be reached by calling 207-780-4706 or by email dsc-usm@maine.edu. If you have already received an accommodation letter from the Disability Services Center and would like to discuss your accommodations for this course, please contact Associate Dean Sherry Abbott Niang who serves as the liaison to the DSC. If you would like to discuss your accommodations with me, you can email me directly.

Wellness Resources for Maine Law Students

Maintaining your physical and mental health is essential to learning the law and succeeding in law school. Law school is a setting where mental health or substance use struggles can be exacerbated. If you ever find yourself struggling, do not hesitate to ask for help. Maine Law is committed to promoting wellness for all students. I encourage all of you to review the [Health & Wellness Resources](#) listed on the MyLaw Portal. The resources include confidential counseling through USM Counseling Services (207-780-4050) and the Maine Assistance Program for Lawyers

and Law Students (207-266-5951). You can also contact the Maine Law Office of Student Affairs. Please let me know if you have any questions.

If you are facing illness, injury, the birth of a child, death in the family, or other extraordinary circumstances that may impact your participation in this course, you should contact me in advance of missing classes or any assignment deadlines. Stressful situations like these may lead to diminished academic performance or may reduce your ability to participate in daily classroom activities. Law School services are available to assist students with handling these stressful events. In an emergency situation and in cases of unforeseen circumstances, you should contact the Associate Dean Sherry Abbott Niang as soon as possible. *For examination conflicts or emergency situations during the examination period, please see the Registrar.*

Statement on Religious Observance for Maine Law Students

Maine Law respects the religious beliefs of all members of the community, affirms their rights to observe significant religious holy days, and will make reasonable accommodations, upon request, for such observances. If your religious observance is in conflict with the academic experience, you should inform me of the class or other functions that will be affected. It is your responsibility to make the necessary arrangements and follow our agreed upon accommodation.

Title IX Statement

The University of Maine School of Law is committed to making our campuses safer places for students. Because of this commitment, and our federal obligations, faculty and other employees are considered mandated reporters when it comes to experiences of interpersonal violence (sexual assault, sexual harassment, dating or domestic violence, and stalking). Disclosures of interpersonal violence must be passed along to members of the University of Maine System's Title IX team who can help provide support and academic remedies for students who have been impacted. More information can be found online at <https://mainelaw.maine.edu/student-life/title-ix/>. You may contact USM's Deputy Title IX Coordinator, Sarah E. Holmes at usm.TitleIX@maine.edu or 207-780-5767 or the UMS Title IX Coordinator, Liz Lavoie at titleix@maine.edu or 207-581-5866. You can also reach out to Maine Law's Office of Student Affairs for support and referrals.

If students want to speak with someone confidentially, the following resources are available on and off campus: University Counseling Services (207-780-4050); 24 Hour Sexual Assault Hotline (1-800-871-7741); 24 Hour Domestic Violence Hotline (1-866-834-4357).

COURSE SCHEDULE

The schedule, policies, procedures, and assignments in this course are subject to change in the event of extenuating circumstances, by mutual agreement, and/or to ensure better student learning.

Week 1: Changing the Story

September 3, 2021

Class Topics: Appellate jurisdiction, the Final Judgment Rule, exceptions to the Final Judgment Rule, the Divestiture Rule, and the different types of appeals available to aggrieved litigants.

Reading: Before each class, I will publish a packet of materials on Brightspace. We will discuss these materials in class, so you will want to be able to access them in some way (ideally, on a laptop or tablet). Please try to avoid printing the packets, because they are voluminous. Likewise, please do not feel compelled to print any of the other reading material, such as assigned cases.

*** **Skim** the following cases in this order:

Porter v. State, 564 So.2d 1060 (Fla. 1990) (direct criminal appeal)

Porter v. State, 788 So.2d 917 (Fla. 2001) (state post-conviction appeal)

Porter v. Crosby, 2007 WL 1747316 (M.D. Fla. 2007) (federal habeas petition)

Porter v. Attorney General, 552 F.3d 1260 (11th Cir. 2008) (federal habeas appeal)

Porter v. McCollum, 558 U.S. 30 (2009) (SCOTUS review of federal habeas appeal)

*** You may complete the reading assignments either before or after class, depending on whether you prefer to preview or reinforce what we discuss. There is no need to prepare case briefs. I do not expect you to be familiar with the intricacies of each reading assignment. I do not teach using the Socratic method.

These five cases illustrate the different types of appeals available to criminal defendants. Notice how Porter's case evolves. In the first case, the facts of the crime are set out at length and the focus is on what the trial court did (or did not do). The focus changes as the case progresses through successive stages of the appellate process. In the last case, the facts of the crime have receded in importance and the emphasis is on the defendant and the interplay between state and federal courts.

From a policy standpoint, is it a good thing for a case to last nearly two decades or more? If you could choose to litigate one of Porter's appeals, which one would you pick?

Week 2: Preservation

September 10, 2021

Class Topics: Who decides whether to appeal, the attorney or the client? What happens if the notice of appeal is not timely filed? Guilty pleas and appeal waivers. The contemporaneous objection rule, structural error, the harmless error doctrine.

Reading: (1) Pro se appellate litigation: *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000). **(2) Structural error:** *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018).

Homework: You have been appointed to represent Mr. Lanahan on his direct appeal to the Supreme Judicial Court of Maine. Begin reviewing the record and **write a letter to Mr. Lanahan**. What does he need to know at this point in the process?

Week 3: Plain Error and Standards of Review

September 17, 2021

Class Topics: Plain or obvious error. Standards of review.

Reading: (1) Pro se appellate litigation: *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000); **(2) Plain error:** *State v. Pabon*, 28 A.3d 1147 (Me. 2011); *United States v. Olano*, 507 U.S. 725, 736 (1993); **(3) Standards of review:** Andrew M. Mead, Abuse of Discretion: Maine's Application of a Malleable Appellate Standard, 57 Me. L. Rev. 519 (2005).

Homework: Mr. Lanahan has responded to your letter (see Brightspace). Familiarize yourself with the Maine Rules of Appellate Procedure and begin researching and drafting Mr. Lanahan's Appellant's brief.

Week 4: What Are the Facts of My Case?

September 24, 2021

Class: Drafting the statement of the case. Inference drawing.

Reading: Click on the merits cases tab on the scotusblog.com webpage. From there, download briefs that interest you which have been filed in the U.S. Supreme Court. Pay particular attention to the Statement of the Case.

Homework: Keep working on the Lanahan appeal.

About the Lanahan Brief: Send it to me via email at my @maine.edu account in MSWord form. You do not need to create a table of contents or table of authorities. You do not need to create a brief cover page. Don't forget to include a signature block.

Week 5: Problems

October 1, 2021

***** DRAFT 1 OF THE LANAHAN APPELLANT'S BRIEF DUE BY 11:59 P.M. *****

Class Topics: Law of the Case Doctrine, record problems, *Anders*, and editing.

Reading: *Anders:* *State v. Junkins*, 779 A.2d 948 (Me. 2001); *In re William P.*, 765 A.2d 76 (Me. 2001). For more information about the ABA approach, see James E. Duggan & Andrew W. Moeller, Make Way for the ABA: Smith v. Robbins Clears a Path for Anders Alternatives, 3 J. App. Prac. & Process 65 (2001).

Homework: Finalize Draft 1 of Mr. Lanahan's Appellant's Brief. Edit the Appellant's Brief filed by one of your classmates (I'll redistribute the briefs electronically after class).

***** EDITS OF THE LANAHAN APPELLANT'S BRIEF DUE ON WEDNESDAY, 10/7 BY 11:59 P.M. *****

Week 6: The Red Brief

October 8, 2021

Class Topics: Right-for-the-wrong-reason doctrine, briefing from the Appellee perspective.

Homework: Finalize the Lanahan Appellant's Brief.

Week 7: Reply Brief, Discretionary Review and U.S. Supreme Court Review

October 15, 2021

**** FINAL DRAFT OF THE LANAHAH APPELLANT'S BRIEF DUE BY 11:59 P.M. ****

Class Topics: When and how to file a petition for certiorari, M. R. App. P. 19, and the Reply Brief.

Reading: (1) **SCOTUS:** Ryan C. Black and Timothy R. Johnson, *Behind the Velvet Curtain: Understanding Supreme Court Conference Discussions Through Justices' Personal Conference Notes*, 19 J. App. Prac. & Process 223 (2018). (2) **Reply Brief writing:** Peter M. Mansfield, Practice Note, *The Art of the Effective Reply*, 19 J. App. Prac. & Process 261 (2018).

Week 8: State Post Conviction

October 22, 2021

Class Topics: Post-trial investigation, ineffective assistance of counsel, post-trial motion practice, the post-conviction hearing, the post-conviction appeal.

Reading: (1) **Ineffective assistance of counsel:** *Strickland v. Washington*, 466 U.S. 668 (1984); *Theriault v. State*, 125 A.3d 1163 (Me. 2015).

Homework: Review the State's Brief in the Lanahan case (which I'll distribute after class). Begin drafting your Reply Brief.

Week 9: Federal Habeas

October 29 2021

**** DRAFT 1 OF THE LANAHAH REPLY BRIEF DUE ON WEDNESDAY, 10/29 BY 11:59 P.M. ****

Class Topics: A primer on federal habeas.

Reading: See Brightspace for a packet of material.

Homework: Edit a classmate's Lanahan Reply Brief (which I'll will distribute to you electronically after class).

**** EDITS OF THE REPLY BRIEF DUE BY TUESDAY, 11/2 AT 11:59 P.M. ****

Week 10: Appellate Practice in Maine, Part 1
November 5, 2021

Class Topics: Guest speaker. Building an appellate practice in Maine.

Homework: Finalize the Lanahan Reply Brief.

****FINAL DRAFT OF THE LANAHAN REPLY BRIEF DUE BY TUESDAY 11/9 AT 11:59 P.M. ****

Week 11: Working with Appellate Courts
November 12, 2021

Class Topics: Guest speaker. Working with the Clerk's Office.

Homework: Work on the McKenney Appellant's Brief.

Week 12: Oral Advocacy – Opening and Rebuttal
November 19, 2021

Class Topics: Introduction to oral advocacy.

Homework: Work on the McKenney Appellant's Brief.

Week 13: Oral Advocacy – Mid-Argument Pivots
December 3, 2021

**** DRAFT 1 OF THE MCKENNEY APPELLANT'S BRIEF DUE BY 11:59 P.M. ****

Class Topics: Controlling the argument.

Homework:

EDITS OF THE MCKENNEY APPELLANT'S BRIEF DUE BY 11:59 P.M. ON 12/9.

FINAL DRAFT OF THE MCKENNEY APPELLANT'S BRIEF DUE BY 11:59 P.M. ON 12/18.

Briefing Deadlines

Lanahan Appellant's Brief

Draft due 10/1

Edits to Draft due 10/7

File Brief due 10/15

Lanahan Reply Brief

Draft due 10/29

Edits to Draft due 11/2

Final Brief due 11/9

McKenney Appellant's Brief

Draft due 12/3

Edits to Draft due 12/9

Final Brief due 12/20

You must file a motion with me as Clerk of the Court to extend or enlarge the briefing schedule if you need additional time. Your motion must comply with the Maine Rules of Appellate Procedure (for the Lanahan case) or the Federal Rules of Appellate Procedure (for the McKenney case). If I deny your motion, then you will receive no credit for the assignment. I will not extend the final brief due date for the McKenney Appellant's Brief.

Electronic Filing

Email me your pleadings in MS WORD by 11:59 p.m. on the date that they are due.