

APPELLATE LITIGATION CLINIC 2024-2025

The Appellate Litigation Clinic is a full-year clinic intended to give 12 third year students real practical experience litigating cases before the federal courts of appeals. Scott Ballenger and Cate Stetson lead the clinic, and this year we're going to be joined by Lori Alvino McGill. All of us come from the biglaw appellate world. Scott was an appellate partner at Latham & Watkins until recently; Cate is still the co-director of Hogan Lovells' appellate practice; and Lori has been an appellate partner at Latham, Quinn Emanuel, and Wilkinson Walsh and is currently head of appeals at Apple. We think of the clinic more as a small, excellent and highly collegial law firm than as a class. We usually work in teams of 2-4 students (plus us) to write briefs, and then divide arguments so that one student does the opening and the other the rebuttal. Litigation is unpredictable enough that it is impossible to make promises, but my hope is that we will take on enough cases over the course of the year that most if not all of you get a chance to argue at some point. We will also write some certiorari stage briefs, at least, in the Supreme Court. We will meet all together most weeks at lunchtime on Fridays, but will also have regular individual case team meetings at times that are convenient for you. We encourage you to talk to past members of the clinic, who can give you the best sense of what it is like.

We only take on appeals in the federal circuit courts, but they are all over the country. This year we already have three cases in the Ninth Circuit, and expect to supplement them with cases from the Fourth, Third, Sixth and D.C. Circuits. The three Ninth Circuit cases are, roughly:

- A Quiet Title Act dispute between our client and the Forest Service, over access to a parcel he owns entirely within the Tahoe National Forest.
- A copyright infringement case in which our client alleges (very credibly) that Blac Chyna stole the hook from one of her songs—but which will mostly be about whether the district court could dismiss her case with prejudice solely because she failed to file a response to a motion for judgment on the pleadings, at a time when the district court knew she was homeless.
- An Eighth Amendment case about whether a prisoner who was being treated for cancer was entitled to more food. His weight was sort-of stable during the period he was begging for more nutrition, but it was stable at a level far below where he had been only a few months before. And the magistrate judge appears to have improperly credited the defendant's contested testimony when granting summary judgment.

A few other illustrative recent matters from recent years:

- A Sixth Circuit case about whether there is a Seventh Amendment right to jury trial on contested facts relevant to exhaustion of administrative remedies under the Prison Litigation Reform Act, at least when those facts overlap with the merits. The Sixth Circuit agreed with us that the answer is yes, creating an acknowledged circuit split with a

Seventh Circuit opinion written by Judge Posner. *See Richards v. Perttu*, ___ F.4th ___, 2024 WL 1172634 (6th Cir. 2024). We'll be working on an opposition to certiorari this summer.

- A Third Circuit case that two students from last year are arguing on July 8, about whether the Securities and Exchange Commission could serve our client—a Swiss investor—by email in an enforcement action, or whether that service violated the Hague Service Convention, Swiss law, the Federal Rules, and Due Process.
- A federal habeas case for a prisoner who was incarcerated for ten years for stealing a six pack of beer and a sandwich from a convenience store, because his lawyer did not understand that the lesser included offense of burglary was not grand larceny (10 years) but petty larceny (6 months). The court of appeals concluded that he received ineffective assistance, and ordered a new trial. *See Wright v. Clarke*, 860 Fed. App'x 271 (4th Cir. 2021). Virginia elected not to retry him, and he was released soon after.
- An excessive force case for a North Carolina prisoner who was beaten by guards. In a first for the Fourth Circuit (at least), the case was argued by a deaf student without any translation delay, by way of two simultaneous ASL interpreters (one translating her in real-time to the Court, and one translating the Court to her). The court of appeals agreed that the evidence presented a triable case, and adopted a general rule that qualified immunity is never appropriate when the constitutional violation turns on a forbidden state of mind. *See Dean v. Jones*, 984 F.3d 295 (4th Cir. 2021).
- A Title VII case for a woman who experienced racial harassment from the six year old child of her primary supervisor. The district court granted summary judgment on the ground that the employer could not be held responsible. The court of appeals agreed with us that employer liability could be based in negligent oversight and potentially also in agency law principles, and remanded. *See Chapman v. Oakland Living Center*, 48 F.4th 222 (4th Cir. 2022). Ms. Chapman recently won a favorable jury verdict.
- A case challenging a high school student's suspension for in-class discussion of the Parkland school shooting. The court of appeals agreed that his First Amendment rights were violated. *See Starbuck v. Williamsburg James City County School Board*, 28 F.4th 529 (4th Cir. 2022).
- A case for a Muslim prisoner who was denied access to kosher meals because he was not Jewish, forcing him to choose between violating his religion or becoming a vegetarian. The district court dismissed on the ground that there is no right to eat meat, but the court of appeals concluded that he had a claim for religious discrimination and remanded for trial. *See Coleman v. Jones*, 2022 WL 2188402 (4th Cir. 2022).

- A religious liberty case for a Muslim prisoner who was forced to listen to Christian worship services broadcast by closed circuit TV to the prison day rooms. The court of appeals remanded for further consideration of the Establishment Clause claims after the Supreme Court's decision in *Kennedy v. Bremerton*. See *Firewalker-Fields v. Lee*, 58 F.4th 104 (4th Cir. 2023).

If you are interested, we want to emphasize that this is a great experience but also a serious commitment. The Clinic counts for four credits each semester. You should expect that the workload will be at least commensurate with that and for some, at times, significantly more. You'd be taking on real professional obligations to real clients, whose freedom or livelihood often hangs in the balance. You should be prepared to prioritize their needs.

Interested students must both rank the clinic in the lottery system and submit an application by July 8. Please email us (at sballenger@law.virginia.edu) a current resume and transcript, some sort of writing sample, and a brief statement about why you are interested in the clinic and any experiences you have had that you think might be pertinent (e.g., moot court, mock trial, debate, work as a paralegal or police officer, etc.). Of course we know that there is considerable overlap in interest between this clinic and the Supreme Court clinic, so feel free to send the same application to Professor Wang and me.

If you are selected, the clinic will be posted to your schedule before the regular course lottery process. We anticipate working closely with the Supreme Court clinic and will probably share some class sessions and collaborate on some cases.

You cannot enroll simultaneously in the appellate clinic and in Cate's separate advocacy course, but it's fine if you have taken it previously. There are no specific prerequisites other than being a 3L, but Professional Responsibility, Evidence, Criminal Adjudication, Civil Rights Litigation, Church and State, Civil Liberties, and any courses in advocacy and advanced legal research and writing would all be helpful. If you haven't taken PR yet and you are selected for the clinic, you should sign up for PR in the Fall—since some circuits require it before argument.

We look forward to hearing from you.