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Review of “Successful Appellate Techniques,” By John Alan Appleman

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BOOK REVIEWS

SUCCESSFUL APPELLATE TECHNIQUES. By John Alan Appleman. Indianapolis: The Bobbs-Merrill Co., Inc., 1953. Pp. vii, 1081. \$15.75.

In a recent address to the New Jersey Judicial Conference, Chief Justice Vanderbilt of the New Jersey Supreme Court said:

The Supreme Court and the Appellate Division are still harassed by many inadequate briefs and a considerable number of poor arguments. Where we have to do the work that counsel should have done on his brief and in his argument in order to do justice in a particular case and to make good by our individual research his shortcomings, we are not only called upon to do work that is not properly ours but we are deprived of the benefit of the argument of opposing counsel as to such new matter.¹

This situation is not confined to New Jersey and, therefore, this book serves a definite need.

This book contains helpful suggestions about briefs and oral arguments. It properly emphasizes the importance of adequate legal research by the lawyer so that he becomes familiar with the development of the principles involved in any case which he is presenting. It suggests reading law review articles and textbooks to get a general view of the field. (This is also a good idea for judges while writing opinions in less familiar fields.) The shotgun approach of briefing many minor errors is condemned and the good advice given that this "takes the sharp focus of attention away from a matter of major concern."² Certainly all judges will agree. On this subject, Mr. Justice Rutledge once said:

When a judge finds a brief which sets up from twelve to twenty or thirty issues or "points" or "assignments of error," he begins to look for the two or three, perhaps the one, of controlling force. Somebody has got lost in the underbrush and the judge has to get him—or the other fellow—out. . . . Though this fault has been called overanalysis, it is really a type of underanalysis.³

The book also points out the necessity for frankness and for recognition of the strong points of the opponent's side of the case. The author, believing that "actual examples may prove more fruitful than mere lectures,"⁴ has included briefs and abstracts used by him in actual cases.

This book is based mainly upon Illinois practice in the preparation of the record on appeal, although it also shows what is required in the United States Court of Appeals and the United States Supreme Court. The samples of abstracts of the record set out (with narrative statements of the testimony) emphasize to this reviewer the improvement in Missouri appellate practice made by our new code in requiring a complete transcript of the evidence in the lower court to be sent to the appellate court (unless

1. Vanderbilt, *The Record of the New Jersey Courts in the Fourth Year Under the New Constitution*, 7 RUTGERS L. REV. 317, 318 (1953).

2. p. 559.

3. Rutledge, *The Appellate Brief*, 28 A.B.A.J. 251, 253 (1942).

4. p. iii.

the parties agree otherwise), rather than a narrative statement of the testimony,⁵ which usually gives the appellate court a distorted view in place of the actual picture of what occurred at the trial. Is there any more useless work to require of a lawyer than to change questions and answers to a narrative? Having worked under both systems, this reviewer is convinced that the appellate court should have the testimony in question and answer form to see just how it was received in the trial court. Narrative statements were necessary in times before we had court reporters, when the record of the evidence had to be prepared from the lawyers' notes. Modern reporting methods have given us the opportunity to have the exact record and that is what the appellate courts should have.

The author, in his discussion of brief writing, stresses "sincerity" and well states that, "[n]o contention will bear the close scrutiny of intelligent men which is not advanced with complete honesty."⁶ He warns against inaccuracy, exaggeration and loss of personal or professional dignity. There is a good discussion of how to create an interesting brief, including the use of short clear sentences, short paragraphs and use of explanatory headings for subdivisions of the brief. The importance of charts, diagrams and photographs is noted. There is also a warning against use of such terms as *supra*, *infra* and *ibid.*, without repeating citations, as they cause waste of time and extra work for judges to find citations. The samples of briefs set out in the book are those used in the Illinois courts, the United States Court of Appeals and the United States Supreme Court. Of course, it is essential for lawyers to read and follow the rules of the court in which the case is to be heard before preparing briefs.

The author gives good advice about the preparation of the statement of facts in the brief, advising that the key issues of the case must first be analyzed and the evidence presented in a non-argumentative manner to spotlight those issues. He also includes a statement about what not to do:

The average young attorney confronted with an appeal makes a diligent effort to comply with the court rules. But, led astray by enthusiasm, he may give a highly argumentative presentation of the facts, omit essential elements of the case, or resort to bitter criticism of the lower court or of his adversary. Upon having a brief or two stricken, or losing an appeal, he learns that a proper presentation is essential. Then, in striving to present all of the facts, he laboriously details each allegation of the pleadings; then the plaintiff's evidence, witness by witness, in chronological order; then the defense evidence; finally the rulings of the court and matters leading to the appeal. As a result, the presentation is boring and leaves no impression of rightness or wrongness upon a perusal of the facts.⁷

The author also gives this important advice:

Then one comes to the disputed or unfavorable facts—and it is here that one of the most glaring types of error occurs with great frequency. Many attorneys tend to omit wholly a discussion of their adversary's case, or that evidence which is difficult to explain away.

It is twice as damaging to have one's adversary point out the unfairness of such a presentation and then to dwell in great detail upon the

5. MO. CODE CIV. P. § 135 (a); MO. REV. STAT. § 512.110 (1949).

6. p. 563.

7. p. 584.

omitted evidence. It is far better to give all of the facts adequately in the original statement. This pulls the sting. Even a rehash by opposing counsel will then be ineffective. For like reasons, exaggeration of the evidence or use of hyperbole, the resort to conclusions, argument, screaming, or hysteria help to blaze a trail to disaster.⁸

There is a good discussion on preparing assignments of error, and the propositions of law supporting them which are variously known in different jurisdictions as "Questions Presented," "Points and Authorities," "Propositions of Law," and "Points Relied On." The author notes that this part of the brief varies tremendously from one jurisdiction to another. The Missouri Supreme Court has attempted to simplify briefs by authorizing assignments of error (called allegations of error in our new code)⁹ to be combined with "the points relied on."¹⁰ When Rule 1.08 (a) (3) is properly complied with the "points" constitute a *short and concise outline* of the part of the brief called "an argument." On this subject the author gives the following good advice:

Never start off, if it can be avoided, with any abstract statement of law. In fact, always avoid, where possible, abstract statements for any heading. It is far more forceful to tie the statement down to the facts and circumstances arising in the case.¹¹

Examples are included to show how this may be done.

The author says of the *Argument* in the brief:

It is the development of the factual matters previously set forth in nonargumentative fashion; it is the development of the legal principles previously enunciated as applied to those facts; it is the development of the issues in the case brought to the highest point of persuasion which advocacy can develop.¹²

He stresses brevity, clarity, logic and calmness. Appellate judges will heartily agree with his statement as to quotations:

Since the argument is designed to produce conviction, rather than to demonstrate the exhaustiveness of counsel's research, it should be simple, logical, and persuasive. It should not be studded with frequent quotations of any type, which may be relevant but which serve to interrupt the train of thought. Quotations from decisions or from any other source should be few in number—and they should be used only when so pertinent and powerful that it would be folly to omit them.¹³

Judges prefer to read the controlling cases as a whole and not piecemeal from long quotations out of context in a brief.

Mr. Appleman prefaces his discussion of the oral argument with this criticism of the arguments of many lawyers.

Frequently, they are not wholly familiar with the record in the case. They organize their material badly; the approach is non-objective; they seem unable to select that which is material and to discard that which is trivial. They have not analyzed the law and its history, so as to understand the immediate problem in its proper perspective. . . . Frequently, arguments are started in the middle, instead of acquainting the court first with the controversy. Statements of facts are either

8. p. 587.

9. MO. REV. STAT. § 512.160 (1949).

10. MO. SUP. CT. RULE 1.08 (a).

11. p. 603.

12. p. 610.

13. p. 616.

too skimpy or boringly laborious. The counsel quote from cases in great detail. They speak badly; they mumble or they shout; they read the written briefs or a canned speech; they are inflexible and unadaptable. In short, neither do they shed light upon the controversy nor do they bring persuasion to the minds of the justices.¹⁴

The importance of oral argument is emphasized and it is wisely said that "oral argument is the only time one will ever receive the full attention of the entire court."¹⁵ The importance of thorough preparation of the oral argument cannot be overemphasized. The author truly states: "[O]ne must know his record almost verbatim if he hopes for success upon appeal."¹⁶ He suggests index tabs on records for quick reference, writing out the problems involved to get them in proper perspective, checking for most recent decisions, thoughtful consideration of the facts and preparation of notes on index cards. He warns against reading to the court, which is of course the surest way to lose its attention. He includes examples of index cards used in oral argument to show how an outline of the points may be concisely stated. He admonishes:

Always state the facts fairly. Do not withhold or secrete that which is unfavorable, nor distort the evidence in the record. Not only is the reaction of the court extremely bitter when the concealments or misrepresentations are pointed out by one's adversary, as is certain to be done, but the recollection of such conduct remains with the court to that lawyer's prejudice in future cases.¹⁷

He also says:

If one represents the appellant, he must be willing to face the crystal clear fact that he lost the case below. This is no secret, also, to the court of review. Therefore, one should plunge into this matter directly and tell the court why the case was lost—the reasons therefor and the answers to those questions.

If one represents the appellee, he should make clear immediately why he won the case below, if it is possible to do so—or, perhaps, the reasons why appellant was unsuccessful.¹⁸

As to questions by the judges, the author says:

. . . [A]ny advocate should welcome questions from the court. He should fear the silent court, lest silence prove to reflect disinterest. Interrogation demonstrates that the court is alert and interested in the discussion. Also, it is far better to have the court ask questions when one has an opportunity to give the exact answer than to have the justices raise such questions in the judicial conference to follow, when the advocate is not present to assist.¹⁹

This book will be most valuable to Illinois lawyers since so many of the specific examples of briefs and abstracts set out follow the requirements of the Illinois Courts. However, the general principles discussed, especially those concerning preparation of the brief and the oral argument are universally applicable. As the author truly says: "[S]ome thoughtful study of fundamental principles may help to increase his chances for a proper

14. p. 995.

15. p. 996.

16. p. 1003.

17. p. 1020.

18. p. 1022.

19. p. 1033.

presentation of his case."²⁰ Reading this book will give one a good opportunity to make this thoughtful study; the results should be beneficial both to lawyers and to appellate courts.

HON. LAURANCE M. HYDE†

MARITAL PROPERTY IN CONFLICT OF LAWS. By Harold Marsh, Jr. Seattle: University of Washington Press, 1952. Pp. xi, 263. \$4.50.

A not-inconsiderable segment of the subject matter of conflict of laws which has hitherto received scant attention from writers in the field and all too frequently has been well-nigh ignored by members of the bar in handling the preparation and trial of a variety of cases is put under the searching examination of Mr. Marsh in his new work *Marital Property in Conflict of Laws*.

Mr. Marsh has succeeded in keeping his work in a physically manageable form, holding down the size of his treatise to what for a law book is a scant 250 pages, but due to his almost epigrammatic style and very careful groundwork in spelling out the precise scope of the work, and in carefully defining the terms he uses throughout the book, he has succeeded in producing a volume which succeeds not only in reviewing the status quo of the laws bearing on marital property in both the common law and community property states, but also in delineating the choice of law rules used in fact, and available in theory, in courts of the several states. Nor has the author settled for a mere recitation of black-letter law, which parenthetically would be welcome in many a law office beset with some of the more vexatious problems in the field, but on the contrary, he has supplied his reader with a critical analysis of the three major nuances of the choice of law problem.

It is not the intent of this reviewer to agree or disagree with Mr. Marsh's conclusions on the merits of the choice of law rules that he advocates; time and the courts will pass that judgment. Rather I should like to call attention to what I consider to be an extremely valuable contribution made by the author to the literature in this field, namely his accurate definitions of the various concepts which are to be discussed throughout his treatise. The clarity of Mr. Marsh's classification of the various types of legally recognized and legally protected rights and interests is a good example of the lucidity of thought and expression which alone would make the reading of his work a rewarding experience. It is fairly safe to say that hitherto courts have lumped together such a variety of rights, interests, privileges and/or immunities which belonged or appertained to one or both spouses, that the term "marital property" has almost degenerated into an amorphous concept roughly connoting anything owned by a married person. This lack of precise definition and lack of incisive separation of the various types of marital property

20. p. iii.

† Judge, Supreme Court of Missouri.