A New "Bible" for Appellate Practice

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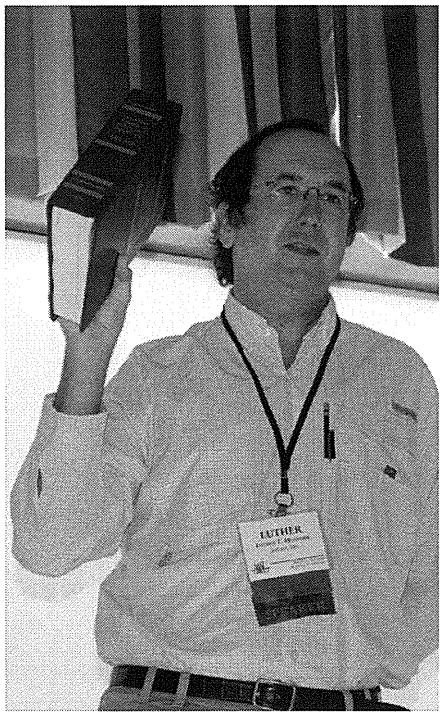
David Axelrad has hitched a team of first-class appellate lawyers to a book-writing wagon and produced a treatise that Fellows of the Academy will want to study from cover to cover, APPELLATE PRACTICE IN FEDERAL AND STATE COURTS. Rules are explained, practice tricks are revealed, and judicial preferences are examined, all at a level of detail that is low enough to make easy reading but also high enough to bring new insight to the most skilled appellate lawyer.

The description "Bible" may be too strong. It is not likely to be memorized or even cited as a primary source. But its 15 chapters written by an array of authors speak with authority and can be looked to for sound instruction.

The chapters go from the beginning, i.e., whether to appeal, to the end, i.e., U.S. Supreme Court review, and beyond, i.e., building an appellate practice. Taken together, there is nothing quite like them. They are part treatise, part do-it-yourself manual, and part map of the road through an appeal.

For a flavor, a brief description of our Fellows' contributions will have to suffice:

Sidney Powell leads off by teaching how to evaluate an appeal and begin the process of appellate representation. She provides an example of an engagement letter. The subliminal



Editor Luther Munford endorses David Axelrad's book at San Francisco meeting

message is "this lady knows her stuff and is serious about it." When she puts the duty to pay bills within 30 days in boldface, the reader knows she means business.

Dan Polsenberg follows with a perceptive chapter on issue preservation. It includes precise legal points—inconsistency in the verdict has to be raised before the jury is discharged—as well as practice pointers. Beware the trial judge who denies a motion "without prejudice" to later renewal, or who says that counsel can make an offer of proof later in the trial. Preservation in these situations requires diligent follow-up.

Then we get **Walter Sargent** and a discussion of standards of review from a modestly philosophical view point. What, after all, is the test for deciding whether an issue is one of fact or of law? He suggests asking whether it is something a jury is competent to decide. If it is, then the issue is a fact issue. And when it comes to deference to administrative agency discretion, he provides a helpful list of exceptions to that principle.

Next comes **Roger Townsend's** discussion of stays and supersedes. He outlines alternatives to the traditional bond, and addresses the effect of an opposing party's appeal on the need to post a bond. That effect depends on whether the opposing party challenges the judgment itself, or is happy with the judgment and just wants more.

Rick Derevan addresses notices of appeal, standing and appealability. He charts the twists and turns wrought by the *Torres v Oakland Scavenger*, 487 U.S. 312 (1988) decision. That decision was embarrassingly wrong. The court overlooked Fed. R. Civ. P. 10(a) which authorizes the use of "et al" in post-complaint pleadings—but it is an error with which we now must deal in light of the corrective amendment to Fed R. App. P. 3(c).

Mary Massaron Ross takes on the opportunities for interlocutory appeal such as they are. She boldly wades into the civil versus criminal contempt morass and attempts to parse the nice distinction between orders that "modify" an injunction and so are appealable and those that merely "clarify" it and so are not appealable. On the way she describes the circuit split over the factors to be considered in appeals of class action certification decisions.

After chapters on the appellate record and motions written by others, **Charlie Carpenter** stands and delivers his wisdom on amicus briefs. While doing so, he provides the book's best two-liner: "Traditionally, writers have described an amicus as a disinterested outsider, who does not advocate, and who only provides unbiased help to the court. If such a creature ever did exist, it has long been extinct." He also provides a list of typical types of amici suitable for citation when one of those types seeks amicus status. And those who know Charlie will not be surprised to know that he delves into the history, amicus and otherwise, of the 1950s school desegregation cases.

Alan Morrison, whose oral arguments have prevailed in the U.S. Supreme Court in some of the most important cases of the past few decades, shares his view of the oral argument process. The key to preparation, he says, is to determine the one sentence that you want a judge to write down at the conclusion of the argument. He gives examples of his own attempts to craft "magical sentences," and modestly includes two that got written down by the majority and one that did not. He also cautions that the sentence, which is to begin the argument, should usually not be so controversial as to provoke immediate questions that go in an undesirable direction.

Jim Westwood then tackles the unenviable task of describing how various courts arrive at their decisions and then deny rehearing, issue the mandate, and refuse to grant a stay pending filing of a petition for writ of certiorari. His description, of course, wears a more positive face than the previous sentence would indicate. But that makes his task even more difficult. Fortunately he shoulders it well.

Next comes **Paul Clement** with a discussion of review by courts of last resort, i.e., the U.S. Supreme Court. His 34-page primer on certiorari review concisely states everything basic to that process. He even lists characteristics that make a case, in Supreme Court argot, a poor "vehicle" for review: failure to preserve an issue, the presence of an antecedent question, the lack of a final judgment, and the existence of state issues so intertwined with the federal issue as to make decision of the federal issue alone difficult.

In this book, however, the Supreme Court is not the last word. After the certiorari primer come two bonus chapters and an appendix. The first bonus chapter, by **Robin Meadow**, discusses the use of technology in an appellate practice. He offers the somewhat frightening prediction that we will one day stand at the podium with iPads that can call up the briefs, record, and authorities. If so, technology may take away the well-worn crutch of the unprepared—"I'd like to submit a post-argument letter with that citation, your honor." In the last chapter **Paul Ulrich** shares his views on how to develop an appellate practice. The appendix lists web sites useful to practice in federal, state, and tribal appellate courts.

A book this ambitious necessarily falls short of perfection. Some chapters would be more helpful if they cited to more authority. There are not enough cross-references to other treatises on similar subjects. The chapter on the record reflects an imperfect understanding of the "record excerpt" practice in some circuits. While the title of the book refers to both federal and state courts, the text treats state courts as an after-thought.

But if a reader wants the "big picture" of modern appellate practice, and would like to know how the real pros do it, I can't think of a better way to start than by reading this book. ❖