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Fundamentals of Modern Appellate Advocacy, 19 J. Marshall L. Rev. 541 (1986)

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BOOK REVIEW

FUNDAMENTALS OF MODERN APPELLATE ADVOCACY BY ROBERT J. MARTINEAU THE LAWYER'S CO-OPERATIVE PUBLISHING COMPANY, 1985, 189 PP., $21.50.

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Fundamentals of Modern Appellate Advocacy presents Robert J. Martineau's prescription for his diagnosis that appellate advocacy courses in American Law Schools include "too much moot and not enough court."[1] Professor Martineau's premise is that appellate advocacy skills can be taught effectively only after detailed instruction on appellate procedure. Traditional appellate advocacy curricula do not address matters of appellate procedure and typically exclude topics such as preservation of issues for appeal, finality and appealability, parties, and the record on appeal. *Fundamentals* focuses primarily on these matters and suggests that their inclusion in appellate advocacy courses is a necessary prerequisite to teaching the skills of brief writing and oral argument. In contrast to other books on appellate advocacy, substantial detail about appellate procedure is presented, while significantly less detail is presented about brief writing and oral argument.

It is true that far too little background on appellate procedure is included in most appellate advocacy courses. For this reason, Professor Martineau's presentation of rules of appellate procedure is a long overdue contribution to this field. If this contribution is incorporated into current appellate training approaches, future lawyers will be far better prepared to face the intricacies of appellate practice. The book's greatest strength is providing materials about procedure that the appellate advocacy instructor can incorporate into a

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1. Martineau, *"Moot Court: Too Much Moot and Not Enough Court,"* 67 A.B.A. J. 1294 (1981).

more comprehensive appellate skills course.

The book's greatest strength, however, is also its only weakness. By presenting intricate details on procedure, the book overcompensates in trying to fill the void. Presentation of general procedural rules regarding preservation of issues, final and appealable orders, and the parts and function of the record is certainly necessary in achieving the goal of teaching students effective appellate advocacy. However, Professor Martineau presents more detail than is necessary to accomplish that goal. For example, intricate details about the appealability of interlocutory orders[2] may be confusing and are unnecessary if the purpose of explaining finality and appealability is to provide background for teaching brief writing and oral argument. It would be sufficient to explain only the general rules of finality and appealability and then to identify the common exceptions.

As a result of the over-emphasis on appellate procedure, the book places too little emphasis on persuasive writing and oral advocacy, skills crucial for the effective appellate lawyer and successful appellate advocacy student. For example, the chapter "Briefs and Appendix" includes few detailed examples of persuasive style, simplicity, conciseness, precision, and organization. Such examples are extremely important if students are to understand thoroughly the skills of persuasive writing. Notably absent from the chapter "Oral Argument" is a discussion of rebuttal, an integral part of oral argument. Rebuttal is a skill that is the most misunderstood and difficult part of oral advocacy for students to grasp.

For these reasons, an instructor using this book to teach a course in appellate advocacy should supplement it with more detailed materials on the art of persuasion, techniques of brief writing, and skills for oral argument. On the other hand, the book could be used without supplementation to teach a course in appellate procedure and would indeed be outstanding for such a use.

Despite omissions from the book, Professor Martineau's presentation of the general principles of appealability and preserving issues for appeal, and his explanation of developing and working with the record are welcome additions to traditional appellate advocacy curricula. In addition, there are several other features of the book that would be of great use in such curricula.

The book's first chapter, on the history of appellate courts, provides background that will enable students and lawyers alike to place modern appeals in perspective. Professor Martineau traces the origin of appellate review to civilizations of the ancient Near East, then develops its history in European countries, notably Italy and

2. R. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 56-67 (1985).

England. In particular, he explains the two forms of English appellate review in the eighteenth century: writ of error and appeal.[3] He then describes how the American colonies adopted appellate review at that time. After presenting the historical perspective, the chapter includes materials on the structure, organization and function of modern American appellate courts, both federal and state.[4] In this section, Professor Martineau compares and contrasts the modern day functions and roles of appellate courts to the historical ones. In so doing, he provides a solid framework for the appellate advocacy student to begin his/her studies in appellate advocacy.

The chapter on history of moot courts in legal education is another noteworthy dimension of the book. Professor Martineau's purpose in presenting the topic is to help correct an anomaly that he perceives with moot court programs. In his view, law students who have engaged in moot court competitions are not prepared to become effective appellate advocates, and their moot court experience is unrelated to their skills as an advocate.[5] Although moot court does not always accurately reflect the "real world" of appellate advocacy, Professor Martineau's suggestion that there is little skill, if any, gained from the moot court experience is overbroad. Nevertheless, the history of moot courts in legal education provides a very useful perspective. The historical concept and purpose of "moot court" is rarely, if ever, explained to law students prior to their participation in it.

Martineau describes the evolution of moot court, beginning with its earliest days in fifteenth century England. At that time, "moots" were hypothetical questions raised by "readers" during their lectures to students.[6] The students would argue based upon the moots, to give them practice in oral pleading.[7] Moots were the forerunners of the socratic-method classroom discussion.[8] The role of moots declined in England in the sixteenth and seventeenth century.

Moot courts first appeared in American legal education in the late 1700's.[9] They consisted of students arguing hypothetical cases before student judges, the decisions being reviewed by faculty. Their purpose was primarily to teach the substantive law.

In 1820, Harvard Law School's program included moot court as a means of generating student interest and a vehicle to teach substantive law as well. With the growth of student law clubs, the use of

3. *Id.* at 4-5.
4. *Id.* at 12-24.
5. *Id.* at 25.
6. *Id.* at 27.
7. *Id.* at 28.
8. *Id.*
9. *Id.*

moot courts at Harvard continued to flourish but the students themselves conducted the moot courts. The system was formalized in 1910 when the faculty voted to establish a board of third year students to serve as advisors to first year students. Later, a moot court competition between law clubs developed. It was the forerunner of the modern moot court competition.[10]

Professor Martineau describes the history of moot court in several other nationally recognized law schools as well.[11] He concludes that moot courts were useful because they strengthened student interest; provided experience in brief writing and oral argument; and developed legal reasoning skills. Martineau maintains, however, that the exclusion from moot court of the procedural and practical aspects of an appeal is fatal to effective skills training in advocacy.[12]

Three other features of the book are worth noting. First, in chapter seven, there is an excellent discussion of standard of review. The subject is often confusing to students and one which the courts fail to define clearly. Professor Martineau explains logically both the importance of the standard of review and the various degrees of deference that reviewing courts give to different types of questions on appeal.[13] Standards of review are rarely, if ever, thoroughly addressed in other appellate advocacy texts. For these reasons, the topic is an important portion of the book and would be an outstanding contribution to course materials.

Martineau's opposition to monolithic approaches to appellate advocacy is also an exceptional feature of the book. For example, in Chapter Seven, he suggests that there is more than one approach to brief writing.[14] This suggestion is often ignored entirely in appellate advocacy classes, giving students the false impression that brief writing is an exact science and that there is only one correct way to write a persuasive brief. Unfortunately, that false impression provides no educational benefit but instead generates frustration. By exposing students to multiple approaches, the book will help prevent the false impression and resulting frustration.

Finally, throughout the book, Professor Martineau continually distinguishes "real appeals" from "moot courts." For example, he distinguishes the "law development" issues typically addressed in moot court competitions from the "error correction" issues that are usually addressed in the majority of appeals heard by intermediate reviewing courts.[15] Another example is his explanation of the differ-

10. *Id.* at 30.
11. *Id.* at 31-34.
12. *Id.* at 35.
13. *Id.* at 131-139.
14. *Id.* at 141-42.
15. *Id.* at 24.

ences between records typically used in appellate advocacy classes and actual appellate records. He characterizes the absence of realistic records as the single greatest defect in moot court competitions, creating little more than exercises in solving abstract legal issues.[16] Professor Martineau notes than in contrast to the "real world," moot court misplaces emphasis on certain aspects of oral argument, including personality, technique, and persuasion, at the expense of emphasis on the brief.[17] He notes that student preparation for moot court, making one practice argument after another, is entirely dissimilar from preparation for a real appeal.[18] He also suggests that the moot court custom of having two persons argue is unrealistic and undesirable in practice.[19]

The foregoing examples and many more appear throughout the text and are comparisons that should be presented in every appellate advocacy, or moot court, class. Awareness of the differences between "moot court" and a "real" appeal will help prepare students for practice, whether their careers focus primarily on appellate practice or include only a small number of appeals.

Professor Martineau's approach to appellate advocacy is unique. He has brought to the forefront aspects of appellate practice that have customarily been ignored in appellate advocacy classes. Although the book's emphasis on procedure makes it best suited for a course focused primarily on appellate procedure, *Fundamentals of Modern Appellate Advocacy* presents an enlightening and informative perspective for the appellate advocacy student to consider.

16. *Id.* at 89.
17. *Id.* at 172-173.
18. *Id.* at 180.
19. *Id.* at 188.