BOOK REVIEWS

PRINCIPLES OF APPELLATE LITIGATION: A GUIDE TO MODERN PRACTICE

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In Mark D. Harris's new appellate practice treatise, *Principles of Appellate Litigation: A Guide to Modern Practice*, we are told that "superior" appellate advocacy requires the practitioner to blend the "subtle interweavings of scholarship, technique, and common sense."[1] So too the superior appellate practice hornbook. Too much theory, and the book is useless for the lawyer seeking a practical guide that can be used day-to-day. Too much technique, and the treatise becomes fact-bound, limited to a single jurisdiction or to a single kind of court. *Principles*, which is intended to be the successor to Herbert Monte Levy's 1968 volume *How to Handle an Appeal*,[2] blends those approaches. The result is a satisfying and useful single-volume treatise that provides a broad overview of appellate practice, but one which does not (and is not intended to) be the last word for any particular appellate court.[3] This is a book that an experienced appellate lawyer can turn to for ideas on difficult mat-

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1. MARK D. HARRIS, PRINCIPLES OF APPELLATE LITIGATION: A GUIDE TO MODERN PRACTICE, at xxv (2021) (quoting Judge George Pratt of the Second Circuit in George C. Pratt, *Foreword* to HERBERT MONTE LEVY, HOW TO HANDLE AN APPEAL, at xxix (4th ed. 1999 & 2016 supp.)).

2. *Id.* (citing HERBERT MONTE LEVY, HOW TO HANDLE AN APPEAL (1968)).

3. Harris recognizes that this is not intended to be a comprehensive work. As he explains, "this treatise does not aim to be encyclopedic" because, after all, "[t]here are fifty separate state jurisdictions . . . plus the federal system, all with their own rules and procedures." *Id.*

ters of judgment, and that an appellate tyro can consult as a guide when handling their first appeal. It is to be commended and deserves a place on the law practice bookshelf.

Principles proceeds in turn through all the major aspects of appellate practice: perfecting the record on appeal, error preservation, writing the brief, oral argument, amicus practice, appellate motion practice, and Supreme Court review, among others. But unlike other treatises, Harris's style is readable. This is a blunt and practical manual written by a practicing lawyer. Thus, for example, we hear about Harris's writing "pet peeves"—he disdains "compound legalistic words," like "aforementioned"[4]—and his warnings that "humor" is "rarely effective.[5] And consistent with that conversational and practical tone, there is advice that goes beyond simply the technical. In the brief writing chapter, for example, Harris advises lawyers to leave ample time to "sleep on" their arguments, to give the lawyer time to revise and sharpen their arguments.[6] This advice is priceless. Giving a brief time to percolate almost always improves it. Similarly, Harris stresses the importance of adding "atmospheric" arguments to a brief that "will not win but may color the court's perception" of the case.[7] This is exactly the kind of advice that this book excels in. Atmospheric arguments are key to proper brief writing, and yet because they do not necessarily *win*, lawyers are loath to include them. An important and underappreciated aspect of appellate writing is knowing *which* atmospheric facts to include, and which to leave out. It's very good that *Principles* covers in-the-weeds details like these so that reasoned decisions can be made.

The treatise also provides some serious coverage of less common aspects of appellate work. For example, I was pleased to see an entire chapter on appellate mo-

4. *Id.* § 4:7.10.
5. *Id.* § 4:7.5.
6. *Id.* § 4:2.6.
7. *Id.* § 4:3.10(G).

tion practice.[8] While even more could have been written about it, the chapter covers the most important motions, including potentially dispositive filings like the motion to dismiss.[9] Similarly, *Principles'* coverage of the appellate decision and its aftermath is important and well done.[10] Many lawyers unfamiliar with the details of appellate practice stop when the appellate decision is released, assuming their work is complete. But there is still much to do, including potential petitions for rehearing, motions to hold the mandate, and litigation over appellate costs (which in federal court can include appellate bond premiums).[11] By the same token, the treatise does not overburden the reader with details, instead opting to provide enough issue-spotting content to allow the practitioner to consult the relevant local rules.

I also commend coverage of amicus brief practice.[12] Given the dramatic increase in the number and scope of amicus briefs,[13] it is crucial that any appellate practice manual contains a significant discussion of that practice area. Mr. Harris's discussion guides the inexperienced lawyer through *why* an amicus brief can be helpful, *how* to draft one, and the *mechanics* of filing such a brief in many courts. Again, *Principles* is the work of an experienced lawyer, and that perspective shines through. Take Harris's warning to "hesitate" before opposing the filing of an amicus brief in one of your cases.[14] It is a rare case in which opposing the filing of an amicus will do anything but harm, and yet I see lawyers oppose such briefs and damage themselves and their clients.

There is no question that Harris takes a strong view on aspects of appellate practice. Indeed, he warns the reader that he will be doing so. "[I]t goes without

8. *See id.* § 8.
9. *Id.* § 8:4.1.
10. *See id.* § 9.
11. *Id.* §§ 9:1–4.
12. *See id.* § 7.
13. *Id.* § 7:1
14. *Id.* § 7:5.3.

saying that the advice contained in this treatise is highly subjective. . . . You may not agree with all of it, but hopefully you will learn something from it."[15] Sometimes, this practical bent leads to advice with which I disagree. For example, Harris recommends that an appellate lawyer should hire a professional printer to ensure compliance with the appellate court's rules.[16] While such an expenditure might be justified, in my view a printer is an unnecessary extravagance in most appeals. Candidly, the United States Supreme Court's insistence on elaborately printed booklets is a holdover of a mostly forgotten time. Or to take another example, Mr. Harris recommends that counsel "learn and memorize the names of the judges" forming the panel at oral argument.[17] This, he explains, is so that counsel can "address each of them individually during the argument . . . ."[18] Again, I disagree. In my view, lawyers should not address judges or justices individually unless they have a high degree of personal familiarity with the judges on the court. The potential for disaster is too high. But whether Harris or I am right is not the point—the book offers well-reasoned advice that is unlikely to steer the beginner too far wrong (hiring a printer makes filing easier) while allowing the more experienced lawyer to reject the advice but learn something all the while. There is nothing wrong with that. Appellate lawyers rarely agree anyway, and the point is for each decision be made intentionally, not haphazardly.

Principles of Appellate Litigation is an important addition to the growing stable of appellate practice manuals. It deserves a spot in the appellate lawyer's rotation of valued treatises.

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15. *Id.* at xxvi.
16. *Id.* § 1:7.
17. *Id.* § 6:4.6.
18. *Id.*