

SOMETHING REINFORCED, SOMETHING NEW:  
A REVIEW OF *THE APPELLATE PROSECUTOR*

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I have been teaching appellate advocacy for over a decade. Yet, when I pick up a book or article on the topic, I often find that I still learn something new in the reading. And, even if I learn nothing new, per se, in the reading, I find important concepts re-solidified, new ways to approach important topics, things I disagree with, and a reminder that practices and customs do vary by jurisdiction. *The Appellate Prosecutor* both taught me something new and reinforced familiar, but important, concepts. It is a book I recommend to any appellate attorney but especially one that represents the government in criminal appellate matters.

*The Appellate Prosecutor* is an anthology of essays on appellate practice, with a special emphasis on attorneys who represent the state on appeal in criminal law matters. Although this emphasis is pronounced in certain chapters,<sup>1</sup> I think that most appellate attorneys, even defense-oriented appellate attorneys, will find something of value in the book. The chapters run the gamut of appellate practice, from protecting the record

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1. Hilary L. Brunell, *How Appealing Is Your Case? Eight Considerations that May Influence a Decision to Appeal*, in *THE APPELLATE PROSECUTOR* 148, 148–56 (Ronald H. Clark ed., 2005).

at trial<sup>2</sup> to brief writing<sup>3</sup> to oral advocacy<sup>4</sup> to even how judges conference cases.<sup>5</sup> The individual chapters were written by state appellate judges and state appellate prosecutors, and the volume was edited by Ronald H. Clark, a longtime state court prosecutor and Distinguished Practitioner in Residence at Seattle University School of Law. Although the book was published in 2005, I found very few things that were truly outdated. In addition to a memory-evoking reference to PalmPilot apps in chapter 7,<sup>6</sup> that chapter also contained a list of resources, some of which were a bit dated. But, these outdated references did not overly distract from the main purpose of the book, a boots-on-the-ground look at appellate work. And it is this perspective that makes this book special—it appears to be one of the only (if not the only) appellate advocacy book to focus on the role of the appellate prosecutor.

The three chapters that I learned the most from were the chapter on persuasion<sup>7</sup> and the chapters on

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2. J. Kirk Brown, *Protecting the Record for Appeal: Advice for the Trial Prosecutor*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 131–36.

3. Robert J. Humphreys, *Persuasion, Planning, and Analysis for Appellate Advocacy*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 18–21; J. Frederic Voros, Jr., *Writing the Brief*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 25–50; J. Frederic Voros, Jr., *Sample Appellate Brief Template*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 51–58; Paul Turner, *Short Declarative Sentences: The Key to Good Legal Writing*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 59–64; Timothy A. Baughman, *Writing the Persuasive Brief: (And Some Matters of Style)*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 65–79; James F. Flanagan, *Standards of Review: The First Line of Defense*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 115–30.

4. Baughman, *supra* note 3, at 157–67; Kaye G. Hearn, *Taking Advantage of Oral Argument*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 168–73; Paul H. Anderson, *Fielding Difficult Questions from the Bench*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 183–96.

5. Jerry G. Elliott, *Decision Making: Conferencing of Cases*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 174–76; Nathan D. Mihara, *Judicial Conferencing in Appellate Courts*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 177–82.

6. Donald J. Zelenka, *Research Resources: An Appellate Lawyer's Tools of the Trade*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 95, 106. Yes, I had a PalmPilot in college. I was that cool.

7. Humphreys, *supra* note 3, at 9–24.

conferencing cases.<sup>8</sup> The persuasion chapter, written by Judge Robert J. Humphreys of the Virginia Court of Appeals, started with a look at Aristotle's methods of persuasion—*ethos*, *logos*, and *pathos*—and how those methods can be used to persuade in appellate advocacy.<sup>9</sup> And while this is something I discuss in my classes, Judge Humphreys then pivoted into a topic that I had not considered before, at least when it comes to judges—the “thinking process.” As he explained it, there are generally two modes of thinking—the systematic mode and the heuristic mode.<sup>10</sup> While the systematic mode is “careful, deliberate and analytical,” the heuristic mode is a “stream-of-consciousness” approach that skims information rather than carefully analyzing it.<sup>11</sup> I suspect that most attorneys believe that judges only ever use the systematic mode. But, as Judge Humphreys noted, sometimes judges read briefs at the end of a long day when they might not be able to focus as much.<sup>12</sup> He then offered tips for brief writing that can catch the attention of the heuristically thinking judge.<sup>13</sup>

The chapters on conferencing cases were also particularly interesting. The first, written by the late Judge Jerry G. Elliott of the Kansas Court of Appeals, discussed the type of case conferencing that I am accustomed to—an immediate conference after oral argument.<sup>14</sup> The second chapter, written by former Judge Nathan D. Mihara of the California Sixth District Court of Appeal, discussed other approaches courts take to conferencing cases—including pre-argument conferencing<sup>15</sup> and draft opinions.<sup>16</sup> Both judges emphasized the need to know how courts conference cases and use it to your

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8. Elliott, *supra* note 5, at 174–76; Mihara, *supra* note 5, at 177–82.

9. Humphreys, *supra* note 3, at 10–13.

10. *Id.* at 13.

11. *Id.* at 13–14.

12. *Id.* at 14.

13. *Id.* at 15–16.

14. Elliott, *supra* note 5, at 175.

15. Mihara, *supra* note 5, at 180.

16. *Id.* at 178.

advantage at oral argument.<sup>17</sup> I hear this refrain often from our local state appellate judges in Tucson. The Arizona Court of Appeals, Division Two, is one of the few courts that issues a draft opinion prior to oral argument. The draft opinion is the work of one judge, but all three judges use it to organize oral argument. The judges conference the case immediately after argument. A savvy appellate attorney practicing in this court would know this practice, request argument to get a draft opinion, and structure oral argument to address that opinion.

In addition to these chapters, the authors reinforced several important concepts in other chapters. Chapter 2 reminded attorneys to follow “the ABCs of briefing: be accurate, be brief, and be clear.”<sup>18</sup> Chapter 4 underscored the importance of short declarative sentences, with examples from song lyrics and the Bible.<sup>19</sup> Chapters 6 and 10 underscored the importance of maintaining your credibility with the court.<sup>20</sup> Chapter 8 reminded brief writers to use the standard of review.<sup>21</sup> Chapter 9 discussed the importance of protecting the record on appeal, for all of the appellate prosecutors who also do trial work.<sup>22</sup> And, a bit surprising for a book that is over fifteen years old, the final chapter contained an important reminder to engage in self-care.<sup>23</sup>

A few chapters did give advice that contradicted advice given in other chapters. The most notable example of this was whether to ever adopt the opposing side’s statement of facts.<sup>24</sup> Likewise, I found the advice in

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17. Elliott, *supra* note 5, at 174; Mihara, *supra* note 5, at 178.

18. Voros, *Writing the Brief*, *supra* note 3, at 25.

19. Turner, *supra* note 3, at 59, 62–63.

20. Robert M. Foster, *Appellate Strategies*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 80, 81; Barbara P. Hervey, *Professional Responsibility on Appeal*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 137, 137–38.

21. Flanagan, *supra* note 3, at 125.

22. Brown, *supra* note 2, at 132.

23. Donald J. Zelenka, *Inspirational Words for the Appellate Prosecutor*, in THE APPELLATE PROSECUTOR, *supra* note 1, at 197, 201.

24. Compare Voros, *Writing the Brief*, *supra* note 3, at 35 (advising not to accept defendant’s statement of facts), with Baughman, *supra* note 3, at 68–69 (suggesting that accepting defendant’s statement of facts is advisable with few

chapter 13 to not say your name at the start of oral argument to be wrong in many jurisdictions. But most of the authors cabined their advice with a reminder to follow the conventions in your particular jurisdiction—wise advice for any appellate advocate.

*The Appellate Prosecutor* is a great resource for any appellate attorney but especially those starting a career representing the state on criminal appellate matters. It will give them not just a great foundation in appellate practice but also walk them through special considerations related to their specific client and work. I plan on directing my students interested in criminal appellate work to this book as a resource. And I hope Professor Clark considers an update of the book!

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additions and corrections provided “the defendant’s statement of facts is straightforward and reasonably inclusive”).