BOOK REVIEWS

BRIEF WRITING AND ORAL ARGUMENT. Third Edition. By Edward D. Re. Dobbs Ferry: Oceana Publications, Inc., 1965. Pp. xxii, 262 and index. $6.00.

For many law students moot court activity is a high point in their legal education. A special challenge is presented, and the skill of their response to that challenge sometimes surprises their professors. Recognizing that moot court participation has significantly benefited some of their students, many law schools have recently given new emphasis to such endeavors—either as part of their regular curriculum for academic credit or on an extra-curricular basis.[1]

Unfortunately, some possible benefits to the law student from his moot court activity may be dissipated because of failure to provide him at the outset with a clear, comprehensive guide to briefwriting and oral argument. He begins his research and drafting for the brief without fully understanding the purpose of his efforts. Prior to the argument of the case, the student may be reluctant to seek advice from his instructors in the fear that obtaining such advice might involve taking unfair advantage of an adversary; and instructors may hesitate to provide advice for a similar reason. Then, after the oral argument has taken place, there may be little opportunity for a detailed critique of the brief and argument.

Failure to provide the student with greater initial guidance probably does not reflect a conscious determination by his professors that he will profit from being cut adrift in an uncharted sea. Instead, it more often has other causes—such as unavailability of a useful reference book to recommend to the moot court participant, modesty on the part of the faculty members concerning their own skill and experience in legal advocacy, and lack of complete understanding of the student's need for some initial guidance in his efforts.

Dr. Re's excellent textbook will be of great value in making the moot court advocate aware of the best means to perform his task. Its value has already been demonstrated in two earlier editions—which, however, are considerably less comprehensive and useful than the current book. It draws directly on the author's own extraordinarily varied experience and vicariously on the experience of other law teachers, lawyers, and writers. And the text is written in a way that makes it understandable not only to the practitioner but also to a student who has never crossed the threshold of a court.

The text is divided into five parts. The first details some preliminary considerations for legal writing; and the virtues of accuracy, brevity, and clarity which Dr. Re preaches in this part of the book are practiced by him

[1]Here at Duke the last few years have seen a substantial expansion of moot court activities, together with a transfer of responsibilities therefor from the law faculty to the students.

throughout the entire text. Part Two deals with trial briefs and memoranda of law, both as to form and content. Counsel will be well prepared for trial if, as Dr. Re suggests, he has at his side a trial brief which contains (a) table of contents and authorities cited; (b) statement of facts; (c) digest of the pleadings; (d) grounds for challenging judge and jurors; (e) evidence required to establish the case and key questions to ask on direct examination; (f) list of witnesses and exhibits; (g) digest or statements of witnesses; (h) proof required by opposing counsel and key questions in aid of cross-examination; (i) brief on the legal questions presented; and (j) requested charges to the jury.

In Part Three, which describes appellate brief writing, the author emphasizes that, subject to minor qualifications by reason of the doctrine of judicial notice or with respect to matters of a jurisdictional nature, the record, as settled by the lower court, is controlling on the appellate tribunal. In preparation for appellate brief writing, a digest should be made of the facts and of the record. Then, in performing his legal research, the brief writer must be aware of applicable statutes and must be thoroughly aware of the limitations on the doctrine of stare decisis—which, "like almost every other legal rule, is not without its exceptions" and "does not apply to a case where it can be shown that the law has been misunderstood or misapplied or where the former determination is evidently contrary to reason." [2] Dr. Re's discussion of the appellate brief is greatly aided by his use of well-chosen examples. Thus, the reader understands far more fully the importance of phrasing properly the "Questions Presented" in the appeal after examining several alternatives for stating the same basic legal issue. The book poses such practical questions as whether the briefwriter should begin his argument with his best point, rather than a weaker point, and whether—as Dr. Re recommends—an appellant should undertake "a candid discussion of ostensibly hostile cases," rather than hope that those cases will be overlooked by opposing counsel and the court. The role of the "Brandeis brief" is treated succinctly but adequately.

Part Four concerns oral argument. The importance of such argument may depend in part on whether the court has already read the briefs [3] and on whether it is the court's custom to question counsel extensively. In any event, Dr. Re suggests that submission of the case on briefs is inadvisable. Furthermore, as he emphasizes, questions from the court should be welcomed by counsel, who thereby is assured of the court's interest and is enabled to establish a closer relationship with the court. (Unfortunately, in this respect the atmosphere of some moot court arguments becomes quite artificial since the judges may be using their questions more as a test of counsel's skill than as a means to obtain a better understanding of pertinent legal issues.)

In Part Five the text discusses the citation of authorities—even to the point of specifying how instructions should be given to the printer and set-

[2] Quoted by Dr. Re (at page 74) from Gould v. Hudson River R. R. Co., 6 N.Y. 522 (1852).

[3] Dr. Re points out that some judges maintain that it is advantageous for the court to hear about the case for the first time on the oral argument. However, it has always seemed to me that this *tabla rasa* approach is less and less desirable as the legal issues involved become more complicated.

ting forth proofreader's marks and notations to be used in correcting a typewritten manuscript or printed galley. Finally, the appendices present some of the Revised Rules of the Supreme Court of the United States and the rules of several other appellate tribunals. Also, they contain sample appellate briefs and an office memorandum of law; thus, the student is furnished with a model that he can utilize.

To some extent, Dr. Re has focussed his discussion on advocacy in the Federal and New York state courts. Even so, his suggestions and comments have general applicability and are intensely practical. This well-written, comprehensive textbook should be recommended by law teachers to any students participating in moot court activity or in a trial practice course.

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REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION, Robert B. McKay (New York: Twentieth Century Fund, 1965, 498 pp., $7)

Professor McKay, Associate Dean of the New York University School of Law, has written the most comprehensive study to date of the constitutional and judicial aspects of legislative apportionment. Despite its subtitle, the focus of this book is on the law rather than the politics of equal representation. McKay notes that most of the early state legislatures were apportioned substantially on the basis of population and that malapportionment was a result of state constitutional amendment and legislative inaction, which first became evident in the 1890's. After a brief summary of the *Colegrove* decision and other pertinent cases prior to 1962, he analyzes in considerable detail the factual background and the Supreme Court's decisions in *Baker v. Carr* and in *Reynolds v. Sims* and the related cases. He is particularly concerned with showing the relationship of these decisions to earlier decisions on the equal protection clause and on the right to vote. He gives briefer attention to judicial decisions on congressional districting.

Those who are familiar with the wide variety of studies on apportionment in the law journals and in political science publications will gain few new insights from this book. It is primarily a summary of the actions taken, and the arguments advanced, by the courts in imposing the principle of population equality on the legislatures. Nor will the reader find a critical evaluation of the Supreme Court decisions, for which McKay presents an articulate defense.

The book contains, in a 200 page appendix, a state-by-state history of the constitutional provisions and judicial decisions on legislative apportionment, dating back to the colonial and territorial period before statehood, and a much briefer description of recent actions on congressional districting. The appendix is a valuable reference source, not duplicated anywhere in the voluminous literature on apportionment.

McKay ventures briefly into the political realm in discussing some of the unsettled problems of apportionment. His most provocative suggestion is that "the county should no longer be regarded as the sole or nearly exclusive