

FEDERAL COURTS LAW REVIEW
BOOK REVIEW
APPELLATE COURTS

A review of Appellate Courts: Structures, Functions, Processes, and Personnel
(2d ed. LexisNexis 2006) (1994)

by Daniel J. Meador, Thomas E. Baker, and Joan E. Steinman

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Allow me to introduce myself, and then to introduce you to a book that most readers of this publication will enjoy reading. I am a law teacher, lawyer and legal writer. I have argued appeals in the Supreme Court, most United States courts of appeal and a few state appellate courts. I have written about appellate law and practice. I was also honored to work with Paul Carrington in the Spring of 2006 at Duke Law School, as he taught an appellate law seminar based on early drafts of this book.

Now, about this book. In 1994, Maurice Rosenberg, Paul Carrington and Daniel Meador published the first edition of this casebook. Maurice Rosenberg passed away in 1995. Paul Carrington decided not to participate in a second edition. Daniel Meador joined up with Joan Steinman and Thomas Baker to produce this new work. The book still carries many of the insights that Maurice Rosenberg and Paul Carrington imparted to the first edition, but this is a brand new book and those who read the first edition should not assume they “know” what is in it.

Daniel Meador has for decades been among the most astute students of the judicial process. Thomas Baker taught for many years at Texas Tech University School of Law and is now at Florida International University College of Law. Joan Steinman teaches at Chicago-Kent College of Law. Among them, they share more than 100 years of teaching, writing and practicing in the areas of trial and appellate courts.

Why do I say that you will enjoy “reading” this book? Surely, some of you may say to yourselves that I mean you should “adopt” the book for a course or “consult” the book for ideas. However, I mean what I say. One of the inherent vices of computer legal research, key numbers, and all similar ways of getting access to information is that we tend to lose broader perspectives about the history, shape, and direction of legal doctrine. And yet, outcomes are often determined more by those larger concepts than by particular citations of particular authorities. Several years ago, the Tarleton Law Library at the University of Texas School of Law divided some first year students into two groups. One group was to find relevant material using only books and other paper resources. One group was to use only Westlaw and LEXIS. The book group found more relevant material. After all, in order to do computer searches, the researcher must first develop questions to ask. One can formulate more focused questions based on an appreciation of those larger concepts previously just mentioned.

Beyond legal research for a client’s sake, lawyers must confront problems of appellate court structure and staffing. The federal courts of appeal are struggling with ever-larger caseloads, and some critics have said that, on the whole, they are not doing a

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good job with the situation. Judge Richard Posner, in his 2004 *Harvard Law Review* Foreword, lamented some of the work habits of federal appellate judges.¹ Judge Patrick Higginbotham has been heard to say that judges should not delegate to law clerks—or worse yet to staff attorneys—the bulk of opinion-writing chores. Despite these criticisms, one can see indisputable evidence that appellate decision-making is becoming more routine. Courts hear oral argument in a smaller percentage of cases and set short time limits. Clerks and staff attorneys write opinion drafts. In non-argued cases, the deciding panel of judges may not even confer in person about a case, but simply review a draft opinion passed from hand to hand. The appellate workload evokes Chesterton’s statement about the English judges: “They are not cruel, they just get used to things.”²

All of these developments undermine a central premise of the appellate adversary system. The system works best when advocates contend against each other in front of judges who are prepared to ask hard questions. For lawyers who represent clients on appeal, their first task is to have their case noticed as worthy of serious judicial attention. This initial task arises at the threshold of litigation, as the lawyer confronts many rules about finality, timing, preservation of issues, and standard of review, any of which may be invoked to end the case without ever getting to the merits. The work intensifies as the lawyer addresses the scope of appellate judicial power and the likely ways in which that power will be exercised.

In short, the best appellate lawyers will be those who have a broad view of where appellate courts fit in the overall system that calls itself justice. They will appreciate the way in which good appellate judges work with case records and legal principles. Armed with this basic understanding, lawyers can sometimes persuade even tired judges to engage in the process.

This book merits our attention because the authors have given us a picture of appellate decision-making that illuminates the process while guiding us on how to make it work. The first chapter is an overview of appellate judging. The second chapter gives us the most important cases on almost every aspect of appellate justiciability, from proper parties, to finality, to timing. The case selection is admirable: These are what one of my professors called “lighthouse cases.” That is, if you study these cases, you can enter the case names into a computerized search engine and find how the caselaw has developed in that doctrinal area, because no court can decide an issue in such an area without citing these foundational cases.

The authors then take us through standards of review, using materials that help us to see the relationship among trial judges and their appellate colleagues. This is a difficult area of procedural law. Trial judges like to think they should be affirmed, either because their direct contact with witnesses and pleadings gives them a better vantage point; because the point on which the appellate court comes to rest really doesn’t matter in the scheme of things; or for expressed or unexpressed reasons that are more personalized and subjective. Appellate judges have opinions about the abilities and temperament of trial judges and about which issues merit deference to the lower court.

¹ [Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 61 \(2005\).](#)

² I first heard this line quoted by a federal judge, in the process of granting a motion for judgment of acquittal. [See Michael E. Tigar, *Book Review*, 86 Harv. L. Rev. 785 \(1973\).](#)

Over time, these different views have crystallized into a structure of review standards. Consider, for example, the rule that admission or exclusion of evidence is reviewed for abuse of discretion. The rule makes sense because those decisions usually involve the trial judge in hitting a moving target—shaping the case as it is being tried. Any given admission/exclusion decision is not likely to be truly significant in the case as a whole, and the abuse of discretion rule ties up with the harmless error rule to insulate judgments from reversal. However, in order to benefit from the abuse of discretion standard, the trial judge must correctly apply the applicable rule. Review of rule interpretation is *de novo*, because the appellate court is as prepared as the trial judge to decide a legal question, and perhaps more so, because the appellate judges can take more time to analyze the issue.

The authors give us a great deal of practical insight about the interplay among the different standards of review. One good example is an essay by Judge Henry Friendly that also includes Chief Justice Marshall's views on the point. Inclusion of this essay illustrates a great strength of this book. Charles Alan Wright used to say that if you want to know how to catch fish, you should ask fish and not fishermen. If you want to impress judges, ask judges what they look for.

When judges decide cases, they justify a result. Case law necessarily gives limited information on how to operate within the process. Then, some judges are hardly self-reflective about what they do. But judges such as Henry Friendly were anxious to make their process of deciding transparent.

The authors are also careful to place appellate judging in its separation of powers and federalism contexts. In discussing judicial creation of causes of action, they give us an edited version of *Sosa v. Alvarez-Machain*,³ in which the Supreme Court sets out standards for recognizing actionable torts committed in violation of the law of nations. The authors note that federal judges have limited power to create causes of action, given the strictures of *Erie Railroad Co. v. Tompkins*.⁴ Under state constitutions, appellate judges may enjoy more latitude. However, in both systems the process of judicial selection—itsself regulated by separation of powers concerns—is of great impact on the course of decisional law, and the authors devote attention to it.

The authors also introduce us to the other issue on which *Erie* turns: Federalism. They devote some attention—and I wish they had given more—to relationship between state and federal courts. There are the ordinary instances of relationship, such as Supreme Court review of state judgments, state court decisions on questions certified from federal courts, and the influence of federal rules on state rulemaking. However, the ongoing battle over federal habeas corpus might have profitably engaged the authors' attention. The federal courts "review" of state court criminal judgments, and the battle over the timing, availability, and extent of review rages in legislative and judicial forums.

The book has 1057 numbered pages, plus tables and indices. This is, I think, problematic. I would be hard put to eliminate any given item, but I can see that some ruthless editing would be possible. A three-unit law school course is, at least where I teach, 42 class sessions of 50 minutes each. There is so much material in this book that I don't see that any group of teacher and students can get through it all in three units worth of class time. Yet all of the topics are important to understanding the appellate process.

³ [Sosa v. Alvarez-Machain, 542 U.S. 692 \(2004\).](#)

⁴ [Erie R.R. v. Tompkins, 304 U.S. 64 \(1938\).](#)

In addition, I suggest that in the next edition, the authors take a fresh look at their “comparative perspective.” They ably introduce us to the United Kingdom and German appellate systems and then spend only five pages with brief references to the European Court of Justice and the European Court of Human Rights. I think a thorough reworking of this material would greatly shorten the treatment of UK and German procedure and add substantially to information about ad hoc and permanent transnational courts. The European Courts are important as examples of tribunals created by and sitting over the courts of individual states. However, recent events have shown us that transnational courts can exist as alternatives to national tribunals, particularly in the enforcement of human rights. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are important institutions in the Western Hemisphere. The international criminal tribunals for Yugoslavia and Rwanda (ICTY and ICTR) were created because victim redress was difficult in the national courts of those countries, and hence are “appellate” in purpose if not strictly in function. The International Criminal Court will also have a significant effect on the hierarchy of judging. The ICTY, ICTR, and ICC have their own appellate structures, which represent an amalgam of common law and civil law procedures.

In a world where almost all of our students will be touched by transnational rules and institutions to a much greater extent than was our own generation, comparative perspectives are an essential ingredient of almost every law school subject.

To sum up, this book deserves a place on your shelf, and if you teach at a law school, a place in your curriculum.