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Herbert Monte Levy, How to Handle an Appeal

Marshall J. Jox

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BOOK REVIEWS

HOW TO HANDLE AN APPEAL. By Herbert Monte Levy, New York: Practising Law Institute. 1968. Pp. —.

Anyone familiar with the materials published by the Practising Law Institute (beginning with the pamphlets which appeared shortly after World War II) will probably attest to the general high quality of the publications. *How to Handle an Appeal* is no exception.

While the subject of appeals, other than works concerning themselves exclusively with the practice in particular states or in the federal courts, has recently been treated by a small number of other authors, Levy's approach is quite unique.

Roscoe Pound in 1941 published a monumental volume¹ in which he traced the development of appellate review in England and the United States from earliest times to the date of publication. In addition, he chronicled the most important improvements made in the present century. The book exhibits Pound's characteristic meticulousness to detail and is amply documented. Nevertheless, it is of scant assistance to an attorney faced with the tactical problems involved in an appeal today.

In 1950, Frederick B. Wiener produced a valuable addition to the attorney's collection,² but of the nearly 600 pages of text, only 45 are devoted to a general discussion of appellate practice; about 200 pages relate to suggestions concerning brief writing and oral argument, and the balance of the book consists of sample briefs. The latter are presented in various categories, according to the chief questions involved, viz.: law and fact.

The same general approach was taken by J. A. Appleman, whose text appeared in 1958.³ About one-seventh of the book contains a discussion of brief-writing—the only subject considered—and the remainder of the volume consists of sample briefs employed in successful appeals in the courts of last resort of every state, as well as in the court of appeals and the United States Supreme Court.

Levy, on the other hand, provides numerous suggestions concerning the entire process of litigation from the trial itself to post-appeal devices. For example, the point is made that a trial may be conducted differently if an appeal is anticipated than if the case is expected to remain in the trial

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1. R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941).
 2. F. WIENER, *EFFECTIVE APPELLATE ADVOCACY* (1950).
 3. J. APPLEMAN, *APPROVED APPELLATE BRIEFS* (1958).

court. At the other extreme, the advisability of requesting a rehearing of the court *en banc* is another device referred to. A checklist at the conclusion contains a virtual summary of the entire text and is extremely valuable in and of itself.

Any book whose scope is wide, and yet which includes such a myriad of specific comments, could only be written by one with very considerable trial and appellate experience. Herbert Levy has participated in many trials and, as staff counsel for the American Civil Liberties Union for seven years, has supervised hundreds of appeals. A member of the New York bar, he is also a lecturer for the Practising Law Institute, and is a member of several bar association committees at the national and local levels. The author's experience is also evident in the nature of many of the suggestions, which, if noted, will tend to avoid the necessity of learning through the trial-and-error method. Thus, the point is made that if a knowledgeable printer is available, it is preferable to use printing to reproduce the record, and that this method, although *apparently* more expensive than other duplicating techniques, usually proves to be otherwise.

The author acknowledges the influence which the late Karl Llewellyn, that eminent theoretical realist, had had upon him. This influence is demonstrated in many passages, as, for example, in Levy's statement that "half the battle may be won by your phrasing of the issues."⁴ The point is well made that an appellee does not need to accept the phrasing employed by the appellant, but may state the issues in a manner more likely to elicit a favorable response by the appellate court.

While some of the suggestions would seem to be self-evident (importance of making a record, or the advisability of reserving time for reply in oral argument), others are not necessarily in this category (that a fixed retainer fee is preferable to a contingency fee arrangement, or charging on an hourly basis).

Considerable space is devoted, as it should be, to the preparation of appellate briefs and oral argument. The comments with reference to the briefs must be read in conjunction with local statutes and rules. The portion concerning oral argument is not quite so limited, for statutes and rules rarely go beyond matters of sequence and time. Hence there is much more latitude given counsel and no single approach is always to be preferred. Parenthetically, it should be noted that the chapters pertaining to briefs and oral arguments can be helpful in a law school moot court program.

4. H. LEVY, HOW TO HANDLE AN APPEAL 918 (1968).

One of the major problems confronting an attorney who wishes to write a book on practice for nationwide use is that of coping with the many variations in statutes and rules in the different jurisdictions. *How to Handle an Appeal* may not be the solution. One chapter contains suggestions for conducting an appeal to the United States Supreme Court, and another chapter relates to the United States Courts of Appeal. All citations, and they are relatively few, are to cases decided either by federal or New York state courts. The forms in two of the appendices are those to be used in these same courts. In the other two appendices the appellate rules for the United States Supreme Court and the court of appeals, effective respectively in 1967 and 1968, are reproduced. In fairness, it must be stated that the author does, at intervals, advise the reader to consult local statutes and rules. In addition, three chapters (III, IV and V) involve what the author calls "technical problems." In these chapters there are reminders as to what to watch, and these reminders are pertinent, no matter what the local rules are. These three chapters alone are worth the price of the book.

In the Foreword it is stated that the book will enable an attorney with limited appellate experience to conduct an appeal without assistance from counsel with greater experience. The author himself seems to make no such claim, for in several places he himself advises consultation. This attitude is commendable, for in the last analysis no "aids" or "guides" can replace the necessity of exercising sound judgment. The same may be said with reference to using printed forms in practice books without the necessary consideration of their applicability.

Even a casual reading of the book may fortify one's conviction that, although many steps have been taken in recent years to reform appellate procedure to make it less complex, much still remains to be done. Some rules quite obviously must be imposed—it must be made clear to the appellate court what professedly went wrong in the trial court—but one cannot help but harbor the suspicion that some of the rules are designed to reduce the number of appeals without regard to the merits of the case. Perhaps Levy had no such objective in mind. But if this conviction is shared by enough of his readers who can translate their thoughts into action, the writing of the book could be doubly worthwhile.

MARSHALL J. JOX*

*Professor of Law, Valparaiso University School of Law.