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Book Review

Richard B. Collins

University of Colorado Law School

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Robert J. Martineau, *Fundamentals of Modern Appellate Advocacy: Law School and Moot Court Edition*. Rochester: Lawyers Cooperative Publishing Co., 1985. Pp. xvii + 219. \$21.50.

Reviewed by Richard B. Collins

In 1983, Lawyers Co-op published Professor Martineau's book *Modern Appellate Practice*. Last year a revised and shorter version of the 1983 work was published; this version is the subject of my review. In the new book's introduction and in his other writings, Martineau states that his purpose is to produce a book for law school courses teaching appellate advocacy skills, for moot courts, and for law school appeals clinics. He decries the lack of appellate advocacy skills courses beyond the traditional moot court requirement of most first year curricula and the moot court competitions that follow.

The book focuses on civil appeals and does not address the peculiar problems of criminal or *habeas corpus* cases. It opens with two interesting chapters on the history of appeals and of moot courts. Next are four technical chapters on preserving issues for appeal, appealability, parties, and the record. These are competently done; Martineau has been a federal and state court administrator as well as a practitioner and teacher, so he has an unusually varied background for his subject. But one may question the value of these technical topics for law school courses. A law school skills course ought to teach skills that require repeated experience to perfect. Witness examination, negotiation, and trial objections are common examples. Appellate brief writing and oral argument qualify, but I am dubious about subjects such as appealability, a technical doctrine that is not conceptually difficult. When the occasion arises, lawyers can learn what they need to know about it in the law library.

The book's last two chapters, covering nearly half its text, address the lawyering skills of brief writing and oral argument. Professor Martineau nicely puts modern appeals into the context of the way courts actually work in the 1980s. He gives a good account of the relation of briefs to oral argument, dispelling the lingering romance of Daniel Webster. He schools the reader on the effects of heavy caseloads on appellate courts and how these affect a lawyer's route to winning an appeal.

Realism about courts is not always matched by realism about lawyers. In the customary way, Martineau presents an idealized appellate lawyer who "never" does certain things—never tries to supplement a brief with authorities that are not new since the brief was filed, never files a brief with a serious typographical error, never writes a partisan statement of the case or a partisan question presented in an appellate brief. The mortals who actually practice law could use more information about which points are debatable, the practical consequences of not measuring up, and the practical means of recovery from error. The urge to prescribe ideals must be strong, however, since the same criticism can be made of most other practice books.

Richard B. Collins is Associate Professor of Law, University of Colorado.

This book will not compete in the large market serving compulsory moot court courses. It costs more than twice as much as the books most widely used, such as the Harvard and UCLA student publications; its text is longer; and it includes no sample brief.¹ If the extra money and pages returned proportionately better material, it might compete. But as noted above, the additions are in technical areas that will not be assigned in these courses. Martineau's chapters on brief writing and oral argument offer some useful insights lacking in the other books, but these are not significant enough to justify the added expense. Moreover, the chapter on brief writing has too much detail on particular court rules.

Martineau's book will be a useful addition to the reference library of law offices and law school appellate clinics that do actual appellate practice. It offers a more accessible and readable source on technical subjects than traditional multivolume practice works such as Moore's and Wright and Miller.²

Professor Martineau's principal goal is increasing the number of appellate advocacy skills courses. I question his assumption that these are rare. A number of schools offer elective appellate advocacy courses beyond student-administered moot courts. However, many of these are designed for the state jurisdiction in which the school is located, and their teachers probably use materials based on local practice.

Nor can I foresee a significant increase in appellate skills courses. The most important skill needed for many appeals, particularly in civil cases, is the ability to devise the winning theory of a case and of each issue in it. In other words, the crucial skill is the same facility in conceptual analysis that traditional law school academic courses strive to impart. (Readers will recall too many instances when appellate lawyers simply did not think of the best theory for their case or for a troublesome issue in it.) Some students fail to appreciate this connection while they are in law school and believe that skills courses provide a more "relevant" education. For faculty to address this misperception, an appellate advocacy course ought to challenge students to solve these conceptual problems. To do so, a regular supply of appellate records is required. The most practical way to obtain records is from actual cases, so that an appeals clinic is more likely to meet this need than is an appellate skills course.

The other skill most essential to modern appellate practice is brief writing. To give students rigorous training in good legal writing is helpful but expensive, as are legal clinics. A dilemma faced by every law school is that what appears to be a debate about traditional classroom courses versus practical education turns out to be very much a question of money. If all law school courses had a faculty to student ratio of 1 to 12, instruction would improve no matter what the mix of methods of instruction. Since we cannot

1. Harvard Board of Student Advisers, *Introduction to Advocacy*, 4th ed. (Mineola, N.Y., 1985); UCLA Moot Court Honors Program, *Handbook of Appellate Advocacy*, 2d ed. (St. Paul, Minn., 1986).
2. See James William Moore, Bernard J. Ward & Jo Desha Lucas, *Moore's Federal Practice* 9, 2d ed. (New York, 1985); Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, *Federal Practice & Procedure* 16 (St. Paul, Minn., 1977).

afford this, we must decide in which limited areas we can afford to have clinical or skills courses. New appellate advocacy skills courses are unlikely to get far in this race.