

APPELLATE ADVOCACY:  
PRINCIPLES AND PRACTICE

Fifth Edition

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# APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE

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Fifth Edition

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MATTHEW  BENDER

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## EDITORIAL NOTE

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Omissions from cases and other materials are indicated either by ellipses (. . .) or by substitution of new text in brackets, subject to the following exceptions. First, generally textual citations, particularly intra-sentence and intra-paragraph citations, have been deleted without notation. Additionally, most footnotes in cases are deleted without ellipses. Where footnotes from cases have been included, we have retained the original numbering and placed that number in brackets.





# DEDICATION

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In memory of our beloved friend and colleague, Eve Cary.



# PREFACE

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We had several goals in writing this book. First, by helping law students to understand the basic principles behind appellate litigation, the book should enhance their study of law in general. Since law school texts in the United States consist primarily of appellate opinions, it is not surprising that law study will be more comprehensible if the student has some understanding of how appellate courts work, and what appellate attorneys must do to have those courts consider the issues that may benefit their clients.

Second, the book focuses on the principles critical to appellate practice, principles that are not covered in any other law school courses. While extensive programs have been developed to teach trial practice, it is somehow assumed that through the study of appellate opinions students will, by osmosis perhaps, gain the necessary knowledge about handling an appeal. While students are exposed to appellate practice through appellate moot court programs, most competitions revolve around the substance of the issues identified by the simulated record, without particular regard to the kinds of questions that intrude regularly in the actual world of appeals, such as whether an issue was adequately preserved, the appropriate standard of review, or the question of harmless error. Similarly, most books addressing the subject of Appellate Advocacy are largely devoted to materials on brief writing and oral argument.

In this fifth edition, in addition to updating the material, we have included several new topics. In Chapter 2, we address briefly the important matter of seeking stays pending appeal, the possibility of en banc review, and alternative dispute resolution in the appellate context. We have expanded the discussion of the preservation doctrine in Chapter 3, including more materials on civil litigation, and augmented our discussion of scope of review to include judicial notice. In Chapter 4, more treatment is provided of review of administrative agency decisions. Chapter 5 provides more detailed discussion of the evolving constitutional harmless error doctrine. We have added some exercises to Chapter 6 to emphasize some of the ethical issues that arise in appellate practice. Chapter 7, on brief-writing, includes new sections on amicus briefs and on persuasive citations. Hearing from teachers using the text that most appellate practice courses cannot cover the material on federal habeas corpus and other avenues of collateral attack on judgments, we have omitted that chapter from this edition. (We are working on a separate text addressing those topics that we hope to have published soon.)

While this book can be helpful in a variety of contexts, it is designed primarily for use in a comprehensive appellate practice course. It includes exercises revolving around the most important principles of appellate practice that can be used as assignments. Ideally, it would be supplemented by a full, actual trial transcript which would constitute the record on appeal for which the students would prepare an appellate brief and, if time permits, conduct an oral argument.

Most appellate practitioners have access to trial transcripts suitable for that purpose; in addition, the American Bar Association's Committee on Appellate Practice of the Appellate Judges Conference in 1988 established an appellate record library for use in law schools.

The book does not cover in detail the rules of appellate practice in any particular jurisdiction; the practitioner must study those rules carefully before embarking on an appeal.

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*PREFACE*

The concept of the book is, rather, to provide a basic understanding of the most fundamental principles of appellate litigation, using examples from the federal system as well as several illustrative states. For convenience, the parties on appeal are referred to as appellant and respondent, regardless of the terms that might be used in any particular court for a specific kind of an appeal.

April, 2012  
Ursula Bentele  
Mary R. Falk

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