

MASTERING  
APPELLATE ADVOCACY  
AND PROCESS

CAROLINA ACADEMIC PRESS MASTERING SERIES

---

RUSSELL WEAVER, SERIES EDITOR

*For other titles, please go to [caplaw.com](http://caplaw.com).*

**Mastering Administrative Law, Second Edition**

Linda D. Jellum

**Mastering Adoption Law and Policy**

Cynthia Hawkins DeBose

**Mastering Alternative Dispute Resolution**

Kelly M. Feeley, James A. Sheehan

**Mastering American Indian Law, Second Edition**

Angelique Wambdi EagleWoman, Stacy L. Leeds

**Mastering Appellate Advocacy and Process, Second Edition**

Donna C. Looper, George W. Kuney

**Mastering Art Law, Second Edition**

Herbert Lazerow

**Mastering Bankruptcy**

George W. Kuney

**Mastering Civil Procedure, Third Edition**

David Charles Hricik

**Mastering Constitutional Law, Second Edition**

John C. Knechtle, Christopher J. Roederer

**Mastering Contract Law**

Irma S. Russell, Barbara K. Bucholtz

**Mastering Corporate Tax, Second Edition**

Gail Levin Richmond, Reginald Mombrun, Felicia Branch

**Mastering Corporations and Other Business Entities, Second Edition**

Lee Harris

**Mastering Criminal Law, Second Edition**

Ellen S. Podgor, Peter J. Henning, Neil P. Cohen

**Mastering Criminal Procedure, Volume 1: The Investigative Stage, Third Edition**

Peter J. Henning, Cynthia E. Jones, Ellen S. Podgor,

Karen McDonald Henning, Sanjay K. Chhablani

**Mastering Criminal Procedure, Volume 2: The Adjudicatory Stage, Third Edition**

Peter J. Henning, Cynthia E. Jones, Ellen S. Podgor,

Karen McDonald Henning, Sanjay K. Chhablani

**Mastering Elder Law, Second Edition**

Ralph C. Brashier

**Mastering Employment Discrimination Law, Second Edition**

Paul M. Secunda, Jeffrey M. Hirsch, Joseph A. Seiner

**Mastering Environmental Law**

Joel A. Mintz, Tracy D. Hester

**Mastering Evidence**

Ronald W. Eades

**Mastering Family Law**

Janet Leach Richards

**Mastering First Amendment Law**

John C. Knechtle

**Mastering Income Tax, Second Edition**

Gail Levin Richmond, Christopher M. Pietruszkiewicz

**Mastering Intellectual Property**

George W. Kuney, Donna C. Looper

**Mastering International Sales Law**

Herbert Lazerow

**Mastering Interviewing and Counseling**

Kelly M. Feeley, Rebecca C. Morgan

**Mastering Labor Law**

Paul M. Secunda, Anne Marie Lofaso, Joseph E. Slater, Jeffrey M. Hirsch

**Mastering Legal Analysis and Drafting, Second Edition**

George W. Kuney, Donna C. Looper

**Mastering Legislation, Regulation, and Statutory Interpretation, Third Edition**

Linda D. Jellum

**Mastering Negotiable Instruments (UCC Articles 3 and 4)  
and Other Payment Systems, Second Edition**

Michael D. Floyd

**Mastering Negotiation**

Michael R. Fowler

**Mastering Partnership Taxation**

Stuart Lazar

**Mastering Products Liability**

Ronald W. Eades

**Mastering Professional Responsibility, Second Edition**

Grace M. Giesel

**Mastering Property Law, Revised Printing**

Darryl C. Wilson, Cynthia Hawkins DeBose

**Mastering Sales**

Colin P. Marks, Jeremy Kidd

**Mastering Secured Transactions: UCC Article 9, Third Edition**

Grace M. Giesel

**Mastering Tort Law, Third Edition**

Russell L. Weaver, Edward C. Martin, Andrew R. Klein, Paul J. Zwier, II, John H. Bauman

**Mastering Trademark and Unfair Competition Law, Second Edition**

Lars S. Smith, Llewellyn Joseph Gibbons

**Mastering Trusts and Estates**

Gail Levin Richmond, Don Castleman



# MASTERING APPELLATE ADVOCACY AND PROCESS

SECOND EDITION

**Donna C. Looper, Esq.**

FORMER ADJUNCT PROFESSOR OF LAW  
UNIVERSITY OF TENNESSEE COLLEGE OF LAW

**George W. Kuney**

LINDSAY YOUNG PROFESSOR OF LAW AND DIRECTOR OF THE  
JAMES L. CLAYTON CENTER FOR ENTREPRENEURIAL LAW  
UNIVERSITY OF TENNESSEE COLLEGE OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2024  
Carolina Academic Press, LLC  
All Rights Reserved

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Names: Looper, Donna C., author. | Kuney, George W., author.  
Title: Mastering appellate advocacy and process / Donna C. Looper and  
George W. Kuney.  
Description: Second edition. | Durham, North Carolina : Carolina Academic  
Press, 2024. | Includes bibliographical references and index.  
Identifiers: LCCN 2024006539 | ISBN 9781531029173 (paperback) | ISBN  
9781531029180 (ebook)  
Subjects: LCSH: Appellate procedure—United States. | Trial  
practice—United States. | Moot courts—United States.  
Classification: LCC KF9050 .L66 2024 | DDC 347.73/8\_dc22  
LC record available at <https://lcn.loc.gov/2024006539>

Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
(919) 489-7486  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*To J.D., 1997–2010, who watched while we wrote.*





# CONTENTS

Table of Cases	xxi
Table of Statutes	xxix
Series Editor's Foreword	xxxiii
About the Authors	xxxv
Acknowledgments	xxxvii
Introduction	xxxix
Chapter 1 · Appellate Court Systems	3
Roadmap	3
I. Federal Courts	4
a. Overview	4
b. Federal District Courts	5
c. United States Courts of Appeal—Circuit Courts	5
United States Court of Appeals for the First Circuit	8
United States Court of Appeals for the Second Circuit	8
United States Court of Appeals for the Third Circuit	8
United States Court of Appeals for the Fourth Circuit	8
United States Court of Appeals for the Fifth Circuit	9
United States Court of Appeals for the Sixth Circuit	9
United States Court of Appeals for the Seventh Circuit	10
United States Court of Appeals for the Eighth Circuit	10
United States Court of Appeals for the Ninth Circuit	10
United States Court of Appeals for the Tenth Circuit	11
United States Court of Appeals for the Eleventh Circuit	11
United States Court of Appeals for the District of Columbia Circuit	12
United States Court of Appeals for the Federal Circuit	12
d. The United States Supreme Court	12

II. State Courts	14
a. State Intermediate Appellate Courts	14
b. State Courts of Last Resort	15
Checkpoints	16
<b>Chapter 2 · Preserving Error for Appeal</b>	<b>19</b>
Roadmap	19
I. The General Rule Regarding Preservation of Error	20
II. Preservation of Error in the Trial Court	20
a. Evidentiary Errors	21
b. Arguments and Conduct of Counsel at Trial	22
c. Jury Instructions	23
d. Preserving Issues in Responsive Pleadings and Pre-Trial Motions	23
e. Post-Trial Motions	25
III. Preservation of Error during the Appeal	26
a. Record or Appendix on Appeal	26
b. Briefing the Appeal	26
c. Oral Argument	27
IV. Exceptions Regarding Preservation of Error	28
a. Plain or Fundamental Error	28
b. Subject Matter Jurisdiction	29
c. Standing	30
A Final Note Regarding Mootness	31
Checkpoints	31
<b>Chapter 3 · Appealability: The Final Judgment Rule and Exceptions</b>	<b>33</b>
Roadmap	33
I. The Final Judgment Rule	33
II. Exceptions to the Final Judgment Rule	35
a. The Collateral Order Doctrine	35
b. Partial Final Judgments under Federal Rule of Civil Procedure 54(b)	37
c. Appeals of Interlocutory Orders under 28 U.S.C. § 1292	38
1. Orders Regarding Injunctions—28 U.S.C. § 1292(a)(1)	38
2. Receivership Orders—28 U.S.C. § 1292(a)(2)	39
3. Orders Involving Controlling Questions of Law—28 U.S.C. § 1292(b)	39

d. Class Certification Decisions under Federal Rule of Civil Procedure 23(f)	40
e. Review by Extraordinary Writ (Writ of Mandamus)— 28 U.S.C. § 1651(a)	42
f. Pendent Appellate Jurisdiction	43
III. State Systems	44
Checkpoints	50
<b>Chapter 4 · Initiating an Appeal</b>	<b>53</b>
Roadmap	53
I. Notice of Appeal: Contents and Requirements	54
a. Basic Requirements—Federal and Many State Court Systems	54
b. Additional Requirements—Certain State Court Systems	55
II. Filing the Notice of Appeal	58
a. Location	58
b. Time Limits	59
1. Generally	59
2. The Federal System	59
3. Other Jurisdictions—Some Examples	61
4. Premature Notices of Appeal	62
5. Relief from the Consequences of Failing to Timely File the Notice of Appeal	63
III. Effect of Filing the Notice of Appeal	66
a. The Judgment Below—Stays Pending Appeal	66
1. Money Judgments—Bonding the Appeal— Supersedeas Bonds	66
2. Injunctions	67
b. Jurisdiction of the Trial Court while the Appeal Is Pending	68
Checkpoints	69
<b>Chapter 5 · Parties and Non-Parties on Appeal</b>	<b>71</b>
Roadmap	71
I. General Rule: Parties that Are Aggrieved	71
a. Parties	72
b. Appeals by Non-Parties	72
c. Intervention	74
d. Substitution of Parties on Appeal	75
e. Persons Aggrieved	76

II. Constitutional Standing and Mootness	79
a. Standing	79
b. Mootness—The Mootness Doctrine	80
c. Exceptions to the Mootness Doctrine	80
d. Mootness by Reason of Settlement	81
III. Amicus Curiae	82
Checkpoints	85
<b>Chapter 6 · The Record on Appeal</b>	<b>87</b>
Roadmap	87
I. Purpose	87
II. Contents	88
a. Generally	88
b. Documents Filed in the Trial Court: The Clerk’s File	88
c. Record of Oral Proceedings	91
1. The Transcript	91
2. When a Transcript Is Unavailable	93
d. Agreed Statements	93
III. Correcting and Expanding the Record on Appeal	94
a. General Rule	94
b. Correcting Errors or Omissions in the Record	94
c. Judicial Notice	95
d. Inherent Authority of Appellate Courts to Supplement the Record	99
IV. The Appendix	100
a. Content of the Appendix	102
b. Form of the Appendix	103
Checkpoints	104
<b>Chapter 7 · Appellate Legal Analysis</b>	<b>105</b>
Roadmap	105
I. Using Fresh Eyes and Focusing on Error	106
II. Tools for Analyzing and Interpreting Statutes	106
a. Using Tabulation to Explode a Statute	107
b. Using the Structure and Other Sections of the Same Statute or Statutory Scheme	108
c. Using Case Law Interpreting a Statute	109
d. Plain Meaning—The Wording of the Statutory Section at Issue	110

---

e. Legislative History	111
f. Similar Statutes in the Same Jurisdiction	112
g. Similar Statutes in Other States or Jurisdictions	112
h. Canons of Construction	112
i. Law Review Articles and Scholarly Commentary	114
III. Reviewing, Using, and Synthesizing Cases	114
a. Reviewing and Revisiting Cases	114
1. Caption	114
2. Summaries and Headnotes	115
3. Disposition	115
4. Procedural Facts	115
5. Underlying Facts	115
6. Issues	116
7. Statements of Law and Their Explanation	116
8. Application of Law	116
9. Policy	117
10. Holding	117
11. Dicta	117
b. Using Cases: A Checklist	118
1. Where Does the Case Come From?	118
2. Does the Case Deal with the Same Issue as Your Problem or Matter?	118
3. What Laws Does the Court Apply or Articulate?	118
4. What Does the Court Say about Those Laws?	118
5. What Are the Facts of the Case?	118
6. How Does the Court Apply the Laws to the Facts?	118
7. What Is the Court's Holding—The Court's Decision and the Basis for It?	119
8. Does the Opinion Contain Any Useful Dicta?	119
c. Synthesizing Multiple Cases—Putting It All Together to Advocate a Position	119
1. Getting Started—Review the Cases Starting with the Most Recent	120
2. After Reading the Cases, Write a Holding and a Brief Label or Description for Each	120
3. Sorting and Grouping	120
4. Distilling and Synthesizing the Law	121
IV. Final Steps in the Analysis	123

V. Organizing a Persuasive Legal Analysis—IRAC and CRAC Formats	124
Checkpoints	128
<b>Chapter 8 · Appellate Legal Drafting: Techniques and Strategies</b>	<b>131</b>
Roadmap	131
I. Three Strategies for Organizing Appellate Legal Drafting	132
a. Make the Structure Explicit	132
b. Establish the Context before Adding the Details	133
c. Place Familiar Information before New Information	135
II. Paragraphs	137
III. Sentences and Word Choice	138
a. Use Fewer Words	138
b. Make the Subject Concrete and Put the Action in the Predicate	139
c. Use Plain Language	139
d. Stamp Out Narration	140
e. Avoid Nominalizations	140
f. Avoid Intrusive Phrases or Clauses	140
g. Choose the Right Word	140
h. Use the Past Tense When Describing Events that Have Already Occurred	141
i. Put Yourself in the Position of the Distracted, Unfamiliar Reader	141
j. Remember to Keep It Simple	141
IV. Making Rules Persuasive: Drafting Rules and Standards in the Light Most Favorable to Your Client	142
V. The Drafting Process	144
a. Organizing Preliminary Materials into an Outline— Creating an Explicit Structure	145
b. The First Draft	145
c. Revising and Rewriting	146
d. Editing	146
e. Proofreading	147
Checkpoints	147
<b>Chapter 9 · Citation and Quotation on Appeal: Why, When,         and How?</b>	<b>151</b>
Roadmap	151

I. Why	152
a. Overview	152
b. Citations to Legal Authority	152
c. Citations to the Record—The Appendix	155
d. Quotations	155
II. When to Cite or Quote	156
a. Legal Authority	156
b. Factual Authority—Citations to the Appendix or Appellate Record	157
c. Quotations	158
III. How to Cite	160
a. Legal Authority	160
1. Information contained in a case citation	160
2. Citation to unreported or unpublished cases	161
3. Citation sentences and clauses	162
4. Multiple cases in one citation sentence	163
5. Short citation forms	163
6. Citations to other sources	164
b. Citations to the Appendix or Appellate Record	165
c. How to Quote	166
1. Using Quotation Marks	166
2. Indicating Omissions or Alterations in a Quote: Ellipses and Brackets	167
3. Citing Original Sources and Indicating Emphasis	168
IV. Conclusion	169
Checkpoints	169
<b>Chapter 10 · Standards of Review and Reversible versus Harmless Error</b>	<b>173</b>
Roadmap	173
I. Introduction	174
II. Standards of Review	174
a. In General	174
b. Specific Standards of Review	175
1. De Novo: Wrong	175
2. Clearly Erroneous: Very Wrong	176
3. Substantial Evidence: Very Wrong	176
4. Abuse of Discretion: Very, Very Wrong	177
5. Other Standards of Review	177

III. Reversible or Prejudicial Error versus Harmless Error	178
a. In General	178
b. Errors Requiring Automatic Reversal—Structural Errors and Errors Based on Lack of Substantial Evidence	179
c. Harmless Error Analysis	180
IV. Conclusion	181
Checkpoints	181
<b>Chapter 11 · Drafting Appellate Briefs</b>	<b>183</b>
Roadmap	183
I. The Audience—Intermediate Appellate Courts and Courts of Last Resort, Judges, Law Clerks, and Court Attorneys	184
a. Basics	184
b. Intermediate Appellate Courts	185
c. Courts of Last Resort	186
II. Purpose and Goals of an Appellate Brief	188
a. Basics	188
b. Accomplishing These Goals: Developing and Delivering a Message	189
1. Developing a Message	189
2. Delivering Your Message	190
III. Appellate Brief Formats and Components	191
IV. Statement of Issues on Appeal	192
V. The Statement of the Case	194
VI. The Statement of Facts	199
a. Goals	199
b. Material Facts in the Record	200
c. Organizing the Statement of Facts	200
1. Overall Organization	201
2. Placement of Individual Facts	202
3. Tone and Treatment	202
4. Final Words	203
d. Appellate Brief Statement of Facts Drafting and Editing Guidelines	204
1. Substance/Analysis	204
2. Organization	204
3. Paragraph Structure	205
4. Sentence Structure, Word Choice, Tone	205
5. Technical Aspects: Proofing, Grammar, Etc.	206



---

VII. Summary of the Argument	206
VIII. Discussion or Argument: Purpose and Goals	207
IX. Organizing the Discussion Section	208
a. Basics	208
b. Main Sections	209
Ordering Main Sections	209
c. Subsections	210
X. Statements of the Standard of Review	211
XI. Persuading the Appellate Court	211
a. Basics	211
b. Using the CRAC Structure to Persuade	212
1. C: Conclusion—The Heading	212
2. R: Rule/Law—Identifying, Explaining, and Illustrating the Law	213
3. A: Application/Analysis	214
4. C: Conclusion	215
c. Dealing with Adverse Authority	216
d. Using Policy to Persuade	216
XII. Drafting the Components of the Appellate Brief: Order and Timing	218
XIII. Appellate Brief Discussion/Argument Drafting and Reviewing Guidelines	219
a. Substance/Analysis	219
b. Organization	220
c. Paragraph Structure	220
d. Sentence, Word Choice, and Tone	221
e. Technical: Proofing, Grammar, BLUEBOOK, Etc.	221
XIV. Heading and Topic Sentence Outline	222
XV. Appellate Brief Final Editing Checklist	223
Checkpoints	224
<b>Chapter 12 · Oral Argument</b>	<b>227</b>
Roadmap	227
I. Purpose, Audience, and Goals of Oral Argument	228
a. Purpose of Oral Argument	228
b. Audience	229
1. Generally	229
2. The Bench—Intermediate Appellate Courts	229
3. The Bench—Courts of Last Resort	230

4. Goals of Oral Argument	231
II. Preparing for Oral Argument	232
a. Goals	232
b. Knowing the Case	232
1. Knowing the Law	232
2. Knowing the Facts	233
3. Knowing the Context	234
4. Knowing What You Are Asking the Court to Do and the Possible Effects	235
c. Developing Talking Points	235
1. What Talking Points Are and How to Use Them in Oral Argument	235
2. Deciding on Your Talking Points	237
A. Generally	237
B. Arguments in Your Favor	237
C. Areas of Concern	238
D. Effects of the Court's Ruling	239
d. The Introduction and Conclusion	239
1. The Introduction	239
2. The Conclusion	241
e. Preparing Your Materials for the Courtroom— The Manila File Folder	241
f. Becoming Conversant—Practice	243
g. Knowing the Rules, Procedures, and Format for Oral Argument	244
III. In the Courtroom	245
a. Remain Flexible and Remember Your Goals	245
b. Presenting Your Argument	245
1. The Opening	246
2. Your Main Argument—The Favorable Talking Points	247
3. Concluding	248
4. Rebuttal	249
c. Answering Questions from the Bench	249
1. Welcome Questions and Answer Them Immediately and Directly	249
2. Handling Questions: A Multistep Process	251
3. Answering Particular Questions	253
A. Simple Questions	253

---

B. Hostile Questions	253
C. Questions that Ask for a Concession	254
D. Questions Posing Hypotheticals	254
E. Questions that Contain Inaccurate Information or Require a Correction	255
F. Recognizing Friendly or Favorable Questions	256
G. Questions You Are Not Sure You Understand	256
H. Questions You Believe Are Irrelevant	257
I. Questions You Do Not Know the Answer To	257
J. Multipart Questions	257
K. Multiple Questions at Once or in Succession	258
d. Presentation	258
1. Creating a Good Impression	258
2. Physical Appearance	259
3. Delivery	260
A. Nonverbal Communication	260
B. Speaking	261
Checkpoints	262
<b>Chapter 13 · Moot Court</b>	<b>267</b>
Roadmap	267
I. Purpose, Audience, and Goals of Moot Court Competitions	268
a. Purpose	268
b. Audience	268
c. Goals	270
II. Getting Started	271
a. Deciding which Competition to Enter	271
b. Understanding the Rules and Devising a Timeline	272
c. Reviewing and Understanding the Problem	273
d. Learning and Understanding the Context	275
e. Research	275
III. Brief Writing	276
a. Goals	276
1. Generally	276
2. Accomplishing Your Goals	276
A. Overall Focus of the Readers	276
B. Addressing the Three Main Problems of Lower-Scoring Briefs	277
b. Working Collaboratively	279

IV. Oral Argument	281
a. Goals	281
b. Preparation	282
c. Practice Rounds	284
d. Handling Questions	284
1. Hostile Questioning	284
2. Friendly Questions	285
3. The Dead Bench	285
e. Courtroom and Competition Demeanor	286
Checkpoints	287
Mastering Appellate Advocacy and Process Checklist	289
Sample Appellate Brief and Resulting Order	311
Index	337

## TABLE OF CASES

- Access Now v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004), 26
- Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000), 39, 40
- Alabama Power Co. v. I.C.C.*, 852 F.2d 1361 (D.C. Cir. 1988), 76
- Albrecht v. Stranczek*, 1991 U.S. Dist. LEXIS 5088 (N.D. Ill. April 15, 1991), 162
- American Games, Inc. v. Trade Prods. Inc.*, 142 F.3d 1164 (9th Cir. 1998), 82
- American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981), 176
- Andersen v. U.S.*, 298 F.3d 804 (9th Cir. 2002), 34
- Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989), 73
- Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), 24, 29, 30, 79
- Arneson v. Jezwinski*, 556 N.W.2d 721 (Wis. 1996), 48
- ASARCO, Inc. v. Secretary of Labor*, 206 F.3d 720 (6th Cir. 2000), 77
- Bank of Herrin v. Peoples Bank of Marion*, 473 N.E.2d 1298 (Ill. 1985), 65
- BankAmerica Corp. Sec. Litig.*, 270 F.3d 639 (8th Cir. 2001), 43
- Barnes v. Dale*, 530 So.2d 770 (Ala. 1988), 29
- Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), 43
- BioPort Corp., United States v.*, 270 F. Supp. 2d 968 (W.D. Mich. 2003), 98
- Bitler v. A.O. Smith Corp.*, 252 F. Supp. 2d 1123 (D. Colo. 2003), 95
- Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), 41
- Bolarinwa v. Williams*, 593 F.3d 226 (2d Cir. 2010), 63, 64
- Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003), 134, 165
- Brecht v. Abrahamson*, 507 U.S. 619 (1993), 180
- Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469 (2d Cir. 2010), 74
- Bryant v. Yellen*, 447 U.S. 352 (1980), 74

- Byrd v. Reno*, 180 F.3d 298 (D.C. Cir. 1999), 74
- C.J., In re*, 758 N.E.2d 335 (Ill. App. Ct. 2001), 65
- Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir. 1989), 99
- California v. Rooney*, 483 U.S. 307 (1987), 76
- Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993), 98
- Carp, In re*, 340 F.3d 15 (1st Cir. 2003), 163
- Catlin v. United States*, 324 U.S. 229 (1945), 33
- Cendant Corp. Sec. Litig., In re*, 343 F.3d 658 (3d Cir. 2005), 36
- Chance Industries, Inc., In re*, 367 B.R. 689 (Bankr. D. Kan. 2006), 166, 167, 168
- Chapman v. California*, 386 U.S. 18 (1967), 180, 197, 198
- Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004), 42, 43
- Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2002), 39
- Church of Scientology Intern. v. Eli Lilly & Co.*, 778 F. Supp. 661 (S.D.N.Y. 1991), 97
- Cobbledick v. U.S.*, 309 U.S. 323 (1940), 34
- Cohen v. Bd. of Trustees*, 867 F.2d 1455 (3d Cir. 1989), 38
- Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), 36
- Colbert v. Potter*, 471 F.3d 158 (D.C. Cir. 2006), 99
- Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), 176
- Corbin v. Cannon*, 838 F. Supp. 561 (M.D. Fla. 1993), 98
- Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1 (1980), 37, 38
- Dairy Queen, Inc. v. Wood*, 369 U.S. 472 (1962), 43
- Davis v. United States*, 512 U.S. 452 (1994), 84
- Delta Family-Care Disability and Survivorship Plan v. Regula*, 539 U.S. 901 (2003), 34
- Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980), 72, 76, 77, 78
- Detroit Edison Co. v. Nat'l Labor Relations Bd.*, 440 U.S. 301 (1979), 97
- Devlin v. Scardelletti*, 536 U.S. 1 (2002), 72, 73
- Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994), 35, 36
- Dilliplaine v. Lehigh Valley Trust Co.*, 322 A.2d 114 (Pa. 1974), 29
- Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965), 39
- Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197 (11th Cir. 2004), 97
- Drewett v. Aetna Cas. Sur. Co.*, 539 F.2d 496 (5th Cir. 1976), 102
- Eagle-Pitcher Industries, Inc., In re*, 255 B.R. 700 (Bankr. S.D. Ohio 2000), 162, 163
- Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), 98

- Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162 (11th Cir. 1997), 38
- Eisenstein, United States ex rel., v. City of New York*, 556 U.S. 928 (2009), 72
- Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), 77
- Elliott Indus. Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091 (10th Cir. 2005), 74
- Environmental Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001), 77, 78
- Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), 80, 81
- Federal Prescription Service, Inc. v. American Pharmaceutical Assoc.*, 636 F.2d 755 (D.C. Cir. 1980), 67
- Federated Mut. Ins. Co. v. McNeal*, 943 So.2d 658 (Miss. 2006), 73
- First Nat'l Bank of South Carolina v. United States*, 413 F. Supp. 1107 (D.S.C. 1976), 97
- First Nat'l Bank of South Carolina v. United States*, 558 F.2d 721 (4th Cir. 1977), 97
- Forney v. Apfel*, 524 U.S. 266 (1998), 76
- Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), 81
- Fry v. Plier*, 551 U.S. 112 (2007), 180
- Garriga v. Sanitation Dist. No. 1*, 2003 Ky. App. LEXIS 305 (Ky. Ct. App. 2003), 30, 31, 79
- General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), 177
- Gleason, State v.*, 851 P.2d 731 (Wash. App. 1993), 144
- Glover, State v.*, 806 P.2d 760 (Wash. 1991), 143, 144
- Gonzalez-Lopez, United States v.*, 548 U.S. 140 (2006), 179
- Gowen, Inc. v. F/V Quality One*, 244 F.3d 64 (1st Cir. 2001), 127, 128
- Grant v. Superior Court*, 275 Cal. Rptr. 564 (Cal. App. 1990), 66
- Graphic Commc'n Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001), 64
- Gumbs, United States v.*, 283 F.3d 128 (3d Cir. 2002), 97
- Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982), 96
- Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107 (C.D. Cal. 2005), 98
- Hauser, Inc. v. Hawk Measurement Systems Pty. Ltd.*, 932 F. Supp. 1147 (S.D. Ind. 1996), 67
- Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272 (3d Cir.1991), 39
- Hexcel Corporation v. Stepman Co.*, 239 B.R. 564 (N.D. Cal. 1999), 162, 163
- Hilton v. Braunskill*, 481 U.S. 770 (1987), 67, 68

- Hohn v. United States*, 524 U.S. 236 (1998), 84
- Holmes Group, Inc. v. Vornado Air Circulation Sys. Inc.*, 535 U.S. 826 (2002), 12
- Hone v. Hanafin*, 104 S.W.3d 884 (Tex. 2003), 65
- In re* (See Name of Party or Matter)
- In re City of* (See Name of City)
- In re Marriage of* (See Name of Spouse)
- Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007 (6th Cir. 2003), 99
- Integra Realty Resources, Inc., In re*, 262 F.3d 1089 (10th Cir. 2001), 38
- Intercounty Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 310 F.3d 537 (7th Cir. 2002), 36
- International Broth. of Elec. Workers v. I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988), 77
- Irons v. Federal Bureau of Investigation*, 811 F.2d 681 (1st Cir. 1987), 36
- Johnson v. U.S.*, 520 U.S. 461 (1997), 28, 179
- Jones v. White*, 992 F.2d 1548 (11th Cir. 1993), 99
- Kazales v. Minto Leasing, Inc.*, 61 A.D.2d 1039 (N.Y.A.D. 1978), 28
- Keith v. Volpe*, 118 F.3d 1386 (9th Cir. 1997), 73
- Kennedy, State v.*, 726 P.2d 445 (Wash. 1986), 144
- Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394 (1976), 42
- Kvass Contr. Co. v. United States*, 1991 WL 47632 (Cl. Ct. Apr. 8, 1991), 162
- Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001), 41
- Link, In re Marriage of*, 839 N.E.2d 678 (Ill. App. Ct. 2005), 47
- Lowry v. Barnhart*, 329 F.3d 1019 (9th Cir. 2003), 88, 94, 102
- Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), 79
- Luxton v. North River Bridge Co.*, 147 U.S. 337 (1893), 34
- Maine School Admin. Dist. 35 v. Mr. and Mrs. R.*, 321 F.3d 9 (1st Cir. 2003), 127
- Marino v. Ortiz*, 484 U.S. 301 (1988), 72, 73, 74
- Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), 68
- Marsh v. Mountain Zephyr, Inc.*, 50 Cal. Rptr. 2d 493 (Cal. App. 1996), 46
- Mason v. Mathiasen Tanker Industries, Inc.*, 298 F.2d 28 (4th Cir. 1962), 97
- McAdams, State v.*, 594 A.2d 1273 (N.H. 1991), 29
- McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099 (10th Cir. 2002), 55
- McDermott v. Cronin*, 31 S.W. 2d 617 (Tx. Ct. App. 2000), 216
- McFarlin v. Conseco Services, LLC*, 381 F.3d 1251 (11th Cir. 2004), 40



- McKaskle v. Wiggins*, 465 U.S. 168 (1984), 179
- Memphis, In re City of*, 293 F.3d 345 (6th Cir. 2002), 40
- Meredith v. Oregon*, 321 F.3d 807 (9th Cir. 2003), 43, 44
- Merrill Lynch Mortg. Investors, Inc. Mortg. Pass-Through Certificates, Series 1999-c1 v. Love Funding Corp.*, 496 F.3d 171 (2d Cir. 2007), 79
- Michigan v. Mosley*, 423 U.S. 96 (1975), 197, 198, 237
- Miranda v. Arizona*, 384 U.S. 436 (1966), 197, 198, 237
- Mitchell v. Forsyth*, 472 U.S. 511 (1985), 36
- Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), 36
- Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), 178
- Moye, People v.*, 213 P.3d 652 (Cal. 2009), 23
- Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), 162, 166, 167, 168
- Mundy, United States v.*, 806 F. Supp. 373 (E.D.N.Y. 1992), 97
- Murphy v. Hunt*, 455 U.S. 478 (1982), 80, 94
- Nash, State v.*, 951 N.W.2d 404 (Wis. 2020), 48
- National R.R. Passenger Corp. v. ExpressTrak, L.L.C.*, 330 F.3d 523 (D.C. Cir. 2003), 43
- Neeld v. Nat'l Hockey League*, 594 F.2d 1297 (9th Cir. 1979), 97
- Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128 (3d Cir. 2002), 84
- Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001), 41
- Oakville Dev. Corp., v. FDIC*, 986 F.2d 611 (1st Cir. 1993), 127
- Oliver v. Hallett Const. Co.*, 421 F.2d 365 (8th Cir. 1970), 98
- Olivia C., In re*, 868 N.E.2d 307 (Ill. App. Ct. 2007), 47
- Ornelas v. United States*, 517 U.S. 690 (1996), 175
- Orshansky, In re*, 804 A.2d 1077 (D.C. 2002), 73
- Partida, People v.*, 122 P.3d 765 (Cal. 2005), 180
- Parullo, In re*, 13 B.R. 953 (Bankr. N.D. Ill. 1981), 98
- Paul, In re*, 513 S.E.2d 219 (Ga. 1999), 46
- People v.* (See Name of Defendant)
- Perdon Coal Co./United Coal Co. v. Stiltner*, 323 S.E.2d 110 (Va. 1984), 27
- Perry, United States v.*, 360 F.3d 519 (2004), 74
- Pressley, State v.*, 825 P.2d 749 (Wash. App. 1992), 144
- Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005), 35
- Raines v. Byrd*, 521 U.S. 811 (1997), 30, 79, 85, 295

- Ramirez Pomades v. Becton Dickinson & Co., S.A.*, 839 F.2d 1 (1st Cir. 1988), 163
- Regula v. Delta Family-Care Disability Survivorship Plan*, 266 F.3d 1130 (9th Cir. 2002), 34
- Reno v. Koray*, 515 U.S. 50 (1995), 84
- Riccard v. Prudential Ins. Co.*, 307 F.3d 1277 (11th Cir. 2002), 55
- Ross v. Kemp*, 785 F.2d 1467, 1474–75 (11th Cir. 1986), 99
- Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), 235
- S.E.C. v. Black*, 163 F.3d 188 (3d Cir. 1998), 39
- S.E.C. v. Forex Asset Management LLC*, 242 F.3d 325 (5th Cir. 2001), 73
- Samnorwood Indep. School Dist. v. Texas Educ. Agency*, 533 F.3d 258 (5th Cir. 2008), 73, 74
- Samuels, People v.*, 113 P.3d 1125 (Cal. 2005), 180
- Sarabia, State v.*, 875 P.2d 227 (Idaho 1994), 28
- School Asbestos Litigation, In re*, 977 F.2d 764 (3d Cir. 1992), 43
- Sears v. Hull*, 961 P.2d 1013 (Ariz. 1998), 31, 79
- Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), 37
- Seminole Tribe of Fla. v. Butterworth*, 491 F. Supp. 1015 (S.D. Fla. 1980), 97
- Shelby v. Subperformance Int'l Inc.*, 435 F.3d. 42 (1st Cir. 2006), 127
- Siedle v. Putnam Investments, Inc.*, 147 F.3d 7 (1st Cir. 1998), 160, 163, 164, 177
- Soto-Garcia, State v.*, 841 P.2d 1271 (Wash. App. 1992), 144
- Stack v. Boyle*, 342 U.S. 1 (1951), 36
- State v.* (See Name of Defendant)
- Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), 41
- Strange v. State*, 258 S.W.3d 184 (Tex. App. 2007) 65
- Sullivan v. Louisiana*, 508 U.S. 275 (1993), 179
- Sumitomo Copper Litigation, In re*, 262 F.3d 134 (2d Cir. 2001), 42
- Superior Court (Romero), People v.*, 917 P.2d 628 (Cal. 1996), 109
- Swinkle v. Illinois Civil Service Comm'n*, 903 N.E.2d 746 (Ill. App. 2009), 58
- Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), 35, 43
- Terry v. Ohio*, 392 U.S. 1 (1968), 143, 144
- Therrien v. Target Corp.*, 617 F.3d 1242 (10th Cir. 2010), 176, 179
- Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970), 67
- Tumey v. Ohio*, 273 U.S. 510 (1927), 179
- U.S. Bancorp. Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994), 81, 82
- U.S. Gypsum Co., United States v.*, 333 U.S. 364 (1948), 176

- United States ex rel.* (See Name of Relator)
- United States v.* (See Name of Defendant)
- United States v.* (See Name of Defendant)
- Valero Terrestrial Corp. v. Paige*, 211 F.3d 112 (4th Cir. 2000), 82
- Van Hazel, United States v.*, 468 F. Supp. 2d 792 (E.D.N.C. 2006), 98
- Verhoeven v. Brunswick School Comm.*, 207 F.3d 1 (1st Cir. 1999), 127
- Vitello v. J.C. Penny Co.*, 107 F.3d 869, 1997 WL 87248 (4th Cir. 1997), 103
- Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003), 83, 84
- Waller v. Georgia*, 467 U.S. 39 (1984), 179
- Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), 41
- Welker ex rel. Bradbury v. Teachers Standards and Practices Comm'n*, 27 P.3d 1038 (Or. 2001), 62
- Wilkinson v. Fabry*, 869 P.2d 182 (Ariz. App. 1992), 58
- Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560 (5th Cir. 1989), 97
- Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495 (10th Cir. 1997), 98



# TABLE OF STATUTES

## **United States Constitution**

Article 1, § 8, 4  
Article 3, 29  
Article 3, § 1, 4  
Article 3, § 2, 16, 30, 71, 79, 85,  
291, 295  
Article 3, § 2, cl. 1, 30  
Amend V, 97

## **United States Code**

11 U.S.C. § 362, 67  
18 U.S.C. § 700, 13  
28 U.S.C. § 41, 5, 16, 290  
28 U.S.C. § 46, 6  
28 U.S.C. § 158, 5, 51  
28 U.S.C. § 371, 6  
28 U.S.C. § 1292, 38, 39, 40, 51  
28 U.S.C. § 1253, 13  
28 U.S.C. § 1291, 7, 33, 34, 36,  
38, 44, 50, 292  
28 U.S.C. § 1292, 34, 38, 39, 45, 51,  
293  
28 U.S.C. § 1294, 5  
28 U.S.C. § 1295, 5, 16, 290  
28 U.S.C. § 1331, 30  
28 U.S.C. § 1332, 30  
28 U.S.C. § 1651, 42, 51, 293  
28 U.S.C. § 1961, 66

28 U.S.C. § 2342, 6, 16, 290  
28 U.S.C. § 2343, 6  
42 U.S.C. § 1983, 80  
Bankruptcy Code § 363, 162, 163

## **Federal Rules**

Fed. R. App. P. 3, 54, 55, 57, 58, 69,  
71, 293  
Fed. R. App. P. 4, 58, 59, 60, 62, 63,  
64  
Fed. R. App. P. 10, 88, 89, 90, 91,  
92, 93, 95  
Fed. R. App. P. 25, 75  
Fed. R. App. P. 28, 8  
Fed. R. App. P. 29, 83, 84, 85  
Fed. R. App. P. 30, 100, 103  
Fed. R. App. P. 35, 6  
Fed. R. App. P. 43, 75, 76  
Fed. R. App. P. 60, 54, 69, 70, 295  
Fed. R. App. P. 62, 294  
Fed. R. Civ. P. 7, 24  
Fed. R. Civ. P. 12, 23, 24, 29, 56, 57  
Fed. R. Civ. P. 14, 72  
Fed. R. Civ. P. 15, 24, 72  
Fed. R. Civ. P. 19, 23, 24  
Fed. R. Civ. P. 23, 35, 40, 41, 42,  
51, 293  
Fed. R. Civ. P. 24, 74, 89, 93

Fed. R. Civ. P. 46, 20, 21  
Fed. R. Civ. P. 50, 24, 25  
Fed. R. Civ. P. 51, 23, 28  
Fed. R. Civ. P. 52, 176, 179  
Fed. R. Civ. P. 54, 35, 37, 38,  
50, 56, 293  
Fed. R. Civ. P. 58, 60  
Fed. R. Civ. P. 59, 25  
Fed. R. Civ. P. 61, 178  
Fed. R. Civ. P. 62, 66, 67, 68, 70  
Fed. R. Civ. P. 77, 64  
Fed. R. Civ. P. 79, 60  
Fed. R. Crim. P. 52, 28  
Fed. R. Evid. 103, 21, 22  
Fed. R. Evid. 201, 95, 96, 104, 296  
Fed. R. Evid. 301, 22, 47  
Sup. Ct. R. 10, 13, 16, 92, 291  
Sup. Ct. R. 24, 13  
9th Cir. R. 35-3, 6

### **Alaska**

Alaska R. App. P. 204, 58  
Alaska R. App. P. 210, 88

### **California**

Cal. Code Civ. P. § 425.16, 45  
Cal. Code Civ. P. § 581d, 44  
Cal. Code Civ. P. § 904.1, 44, 45  
Cal. Code Civ. P. § 917.1, 66  
Cal. Code Civ. P. § 918, 67  
Cal. Code Civ. P. § 1222, 44  
Cal. Comm. Code § 2104, 108  
Cal. Comm. Code § 2207, 107, 108  
Cal. Penal Code § 667, 109  
Cal. Penal Code § 1259, 29  
Cal. R. Ct. 2.1055, 90  
Cal. R. Ct. 8.66, 65  
Cal. R. Ct. 8.104, 61, 62, 65

Cal. R. Ct. 8.108, 61  
Cal. R. Ct. 8.121, 92  
Cal. R. Ct. 8.122, 90  
Cal. R. Ct. 8.124, 100  
Cal. R. Ct. 8.308, 61

### **Colorado**

Colo. Rule of Civ. P. 59, 56  
Colo. App. R. 25, 57  
Colo. App. R. 32, 56

### **Florida**

Fla. R. App. P. 9.040, 58  
Fla. R. App. P. 9.200, 93

### **Georgia**

Georgia Code § 5-6-34, 45  
Georgia Code § 5-6-35, 46  
Georgia Code § 5-6-38, 61  
Georgia Code § 9-1111.1, 46  
Georgia Code § 16-11-173, 46  
Georgia Code § 17-10-6.2, 46  
Georgia Code § 353-37, 46

### **Illinois**

750 ILCS 50/05, 47  
750 ILCS 50/05, 47  
ILCS S. Ct. Rule 615, 29  
Ill. App. Ct. 2001, 65  
Ill. App. Ct. 2005, 47  
Ill. App. Ct. 2007, 47  
Ill. L.R. 62.1, 66  
Ill. Sup. Ct. R. 303, 61, 62, 65  
Ill. Sup. Ct. R. 303, 65  
Ill. Sup. Ct. R. 323, 93  
Ill. Sup. Ct. R. 307, 47  
Illinois Eminent Domain Act  
20-5-10, 47

**Indiana**

Ind. R. App. P. 9, 57, 88, 92, 93

**Kansas**

Kan. Sup. Ct. R. 3.05, 93

**Massachusetts**

Mass. R. App. P. 8, 91, 93

**Maryland**

Md. R. Evid. 2-517, 3-517,  
4-323, 21

**Michigan**

Mich. Ct. R. 7.104, 58

Minn. R. Civ. App. P. 110.03, 93

**New Hampshire**

N.H. Sup. Ct. R. 7, 58

**New York**

New York Civil Practice Law and  
Rule 2221, 49

New York Civil Practice Law and  
Rule 5701, 48

**Oregon**

Or. R.S. § 19.240, 58

Or. R. App. P. 2.05, 57

**Pennsylvania**

Pa. R. App. P. 1731, 67

Pa. R. App. P. 1924, 93

**South Dakota**

S.D. Codified Laws §  
15-26A-55, 93

**Tennessee**

Tenn. Code Ann. § 40, 93

Tenn. R. App. P. 13, 177

**Texas**

Tex. R. App. P. 26.3, 65

**Utah**

Utah R. App. P. 11, 89, 91, 93

**Virginia**

Va. Sup. Ct. R. 5A:6, 57

Va. R. App. P. 5.33, 27

**West Virginia**

W. Va. R. App. P. 6, 90

**Washington**

Wash. R. App. P. 5.2, 62

**Wisconsin**

Wis. Stat. § 808.03, 47, 48

Wis. Stat. § 808.04, 61, 62

Wis. Stat. § 809.30, 61





## SERIES EDITOR'S FOREWORD

The Carolina Academic Press Mastering Series is designed to provide you with a tool that will enable you to easily and efficiently “master” the substance and content of law school courses. Throughout the series, the focus is on quality writing that makes legal concepts understandable. As a result, the series is designed to be easy to read and is not unduly cluttered with footnotes or cites to secondary sources.

In order to facilitate student mastery of topics, the Mastering Series includes a number of pedagogical features designed to improve learning and retention. At the beginning of each chapter, you will find a “Roadmap” that tells you about the chapter and provides you with a sense of the material that you will cover. “Checkpoints” at the end of each chapter encourage you to stop and review the key concepts, reiterating what you have learned. Throughout the book, key terms are explained and emphasized. Finally, a “Master Checklist” at the end of each book reinforces what you have learned and helps you identify any areas that need review or further study.

We hope that you will enjoy studying with, and learning from, the Mastering Series.

Russell L. Weaver

PROFESSOR OF LAW &  
DISTINGUISHED UNIVERSITY SCHOLAR  
UNIVERSITY OF LOUISVILLE,  
LOUIS D. BRANDEIS SCHOOL OF LAW



## ABOUT THE AUTHORS

Donna C. Looper was an adjunct professor of law at the University of Tennessee College of Law in Knoxville, Tennessee, from 2003 to 2022, where she taught Legal Process. She received her J.D. in 1989 from the University of California, Hastings College of the Law, and her A.B. in 1984 from Barnard College, Columbia University. She clerked for the chief judge of the United States District Court for the Eastern District of Louisiana and then for the United States Court of Appeals for the Ninth Circuit. Before teaching at the University of Tennessee College of Law, Ms. Looper was a senior attorney for the California Court of Appeal, Fourth District, Division One, and prior to that, was in private practice in San Diego and San Francisco. She is an author of CALIFORNIA LAW OF CONTRACTS (CEB), MASTERING INTELLECTUAL PROPERTY (Carolina Academic Press), MASTERING LEGAL ANALYSIS AND DRAFTING (Carolina Academic Press), A CIVIL MATTER (UT BE Press Repository 2023), LEGAL DRAFTING: PROCESSES, TECHNIQUES, AND EXERCISES (4th ed., West), LEGAL DRAFTING IN A NUTSHELL (5th, ed., West) with George Kuney, and A TRANSACTIONAL MATTER (West) with Brian Krumm and George Kuney. She is admitted to practice law in California and Tennessee and consults in matters nationwide.

George W. Kuney (<http://www.law.utk.edu/faculty/kuney/>) is a Linsay Young Distinguished Professor of Law and the Director of the Clayton Center for Entrepreneurial Law at the University of Tennessee College of Law in Knoxville, Tennessee. He holds a J.D. from the University of California, Hastings College of the Law, an M.B.A. from the University of San Diego, and a B.A. in economics from the University of California, Santa Cruz. Before joining the UT faculty in 2000, he was a partner in the Allen Matkins firm's San Diego office. Previously he practiced with the Howard, Rice and Morrison & Foerster firms in his hometown of San Francisco, doing litigation and transactional work largely in the context of business restructuring and insolvency. At the University of Tennessee, he teaches business law courses, including Contracts, Contract Drafting, Commercial Law,

Property, Debtor-Creditor, Mergers and Acquisitions, Representing Enterprises, and Workouts and Reorganizations. Kuney writes about business, contracts, and insolvency-related topics; advises clients nationwide regarding restructuring, reorganization, and related matters; and conducts training seminars for law firms regarding business law and transactional drafting. He is admitted to practice in California and Tennessee, and consults in matters nationwide. Kuney is the author of *MASTERING LEGAL ANALYSIS AND DRAFTING* (with Donna C. Looper, Carolina Academic Press); *MASTERING INTELLECTUAL PROPERTY* (with Donna C. Looper, Carolina Academic Press), *THE ELEMENTS OF CONTRACT DRAFTING* (4th ed., West), *LEGAL DRAFTING: PROCESS, TECHNIQUES, AND EXERCISES* (with Thomas Haggard, 2d ed., West), *LEGAL DRAFTING IN A NUTSHELL* (with Thomas Haggard, 2d ed., West), *CALIFORNIA CONTRACT LAW* (with Donna C. Looper, CEB), *MASTERING BANKRUPTCY* (Carolina Academic Press), *Chapter 11-101* (with coauthors, ABI), *A CIVIL MATTER: A GUIDE TO CIVIL PROCEDURE AND LITIGATION* (with Donna C. Looper, West), *BUSINESS REORGANIZATIONS* (with Michael Gerber, 3d ed., LexisNexis), *JUDGMENT COLLECTION IN TENNESSEE* (with Wendy Patrick, Amazon), *EXPERIENCING REMEDIES* (West), *BANKRUPTCY IN PRACTICE* (with Michael Bernstein, ABI), *A TRANSACTIONAL MATTER* (with Brain Krumm and Donna Looper, West), and a number of articles dealing with contracts, business acquisitions, corporate governance, and reorganization matters.

## ACKNOWLEDGMENTS

This book would not have been possible without substantial contributions of time and effort on the part of the members of the firms and courts that we have worked for across the country. Any list of those to whom we are indebted for teaching us about legal analysis and drafting is necessarily incomplete. That said, the following individuals have contributed materially to our understanding of legal writing in general and appellate advocacy and procedure in particular and our attempts to teach that skill to law students and lawyers: Barbara J. Cox, Nanna Frye, the Hon. Fredrick J. R. Heebe, the Hon. Alex C. McDonald, the Hon. James A. McIntyre, Carol McCrehan Parker, Mary Ann Darr Wegmann, and our students at Hastings College of Law, California Western School of Law, and the University of Tennessee College of Law.

The works of other authors have also influenced our views and must be acknowledged. These include:

Robert J. Martineau, Michael E. Solimine, Kent Sinclair, Randy J. Holland, *CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE*, 2d ed. (Thomson West 2005).

Robert H. Klonoff, Gregory Castanias, *FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL* (Thomson West 2008).

Bradley G. Clary, Sharon Reich Paulsen, Michael J. Vanselow, *VANSELOW'S ADVOCACY ON APPEAL*, 3d ed. (Thomson West 2008).

Mary Beth Beazley, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY*, 2d ed. (Aspen 2006).

Alan D. Hornstein, *APPELLATE ADVOCACY IN A NUTSHELL*, 2d ed. (Thomson West 1998).

Helene S. Shapo, Marilyn Walter, Elizabeth Fajans, *WRITING AND ANALYSIS IN THE LAW*, 5th ed. (Thomson West 2008).

UCLA Moot Court Honors Program, HANDBOOK OF APPELLATE ADVOCACY, 3d ed. (Thomson West 1993).

John Korzen, MAKE YOUR ARGUMENT MAKE YOUR ARGUMENT: SUCCEEDING IN MOOT COURT AND MOCK TRIAL (Kaplan 2010).

William K. Suter, Clerk of Court, Supreme Court of the United States, GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES (2010).

Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631 (2009).

# INTRODUCTION

*Mastering Appellate Advocacy and Process* is intended for both upper-division law students and practicing attorneys. Our goal in writing this book is to produce a source that comprehensively yet concisely covers all major aspects of an appeal—from preserving error and assembling an appellate record or appendix, through drafting effective appellate briefs and oral argument. We have also included a chapter on moot court, specifically on maximizing one’s chances of succeeding in law school’s longest running intercollegiate sport.

This book is unique in that it addresses both appellate *advocacy* and appellate *process*—subjects that are usually covered separately in different books, or taught in different courses in law school. We believe that advocacy and process go hand in hand, however. In real life, appellate process is of little moment in the abstract. It becomes relevant when attorneys are involved in an actual case in which they or the other side may pursue an appeal. Also, in real life, approaching appellate advocacy in isolation without knowing and appreciating the process involved is both foolish and dangerous. The best crafted appellate argument in the world will do the client little good if error was not preserved below, if a notice of appeal was not timely filed, if the record is inadequate, etc.

Appellate process begins long before the trial or other disposition in the trial court is concluded. It begins with producing and protecting the factual and legal record in the trial court and clearly communicating to all involved that a ruling on the merits or otherwise against one’s client can and will be effectively challenged and reversed on appeal should it issue. In other words, error must be preserved before it may be appealed.

After the proceedings in the trial court have concluded, the appellate process is formally initiated by filing the notice of appeal of a final order or judgment, or a petition for review of an interlocutory order. This is followed by preparation of the record on appeal, formulation of the statement of the

issues, and briefing. These steps are followed by oral argument and the appellate court's disposition of the case.

At each juncture there are numerous technical requirements and traps for the unwary. Careful preparation and foresight are critical to effective appellate practice. The aim of this book is to provide a general guide, which, when supplemented by the applicable specific rules of the jurisdiction involved, will guide the novice, whether law student or lawyer, through the process.

The book also explains techniques of advocacy, both in written submissions and in oral argument before the court. It begins with the building blocks of appellate legal analysis and research. Effective appellate advocacy requires looking at the facts and law with a fresh eye, and with a focus on error under the applicable standards of review. Techniques and strategies for compelling appellate legal drafting are reviewed, including organizational principles and using the CRAC (Conclusion, Rule/Law, Application, Conclusion) format to draft persuasively. Then drafting the appellate brief itself is covered extensively, from the various audiences and the processes by which they may review the briefs and decide the appeal, to developing a message or theme to package the arguments, to drafting individual components and using policy to persuade. In the chapter on oral argument we introduce the talking points method for both conveying your main arguments as well as answering questions from the bench. The focus of all the chapters on advocacy is on *persuading a court to rule your way* as opposed to “winning an argument” or showing up the other side.

The book concludes with a chapter on moot court—where doing well means showing the judges how much you know and how easily you can explain it all—versus actually persuading them to rule a certain way.

We welcome readers' comments, reactions, and war stories on the subjects covered in this book. [dcooper@hotmail.com](mailto:dcooper@hotmail.com); [gekuney@utk.edu](mailto:gekuney@utk.edu).

Donna C. Looper  
George W. Kuney  
KNOXVILLE, TENNESSEE  
2024