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

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Introduction

Mastering Appellate Advocacy and Process is intended for both upper division law students and practicing attorneys. Our goal in writing this book was to produce a source that comprehensively yet concisely covers all major aspects of an appeal—from preserving error, 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 and 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 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, in turn, 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 takes 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. Drafting the appellate brief itself then 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, to 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@gmail.com; gkuney@utk.edu.

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