

APPELLATE COURTS

**STRUCTURES,
FUNCTIONS, PROCESSES,
AND PERSONNEL**

Second Edition

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DEDICATIONS

To the memory of Maurice Rosenberg
Great wit, boon companion, proceduralist par excellence

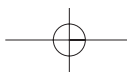
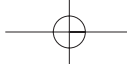
- D.J.M.

To Jane Marie, with love and appreciation

- T.E.B.

To My late father Jack, My mother Ruth, Jenny & Amanda, and
Adrien

- J.E.S.



PREFACE

This is the second edition of this casebook first published in 1994, co-authored by Professors Daniel J. Meador, Maurice Rosenberg, and Paul D. Carrington, some of the few academicians who had long devoted scholarly attention to the appellate courts. In the preparation of this new edition, Professor Meador has been joined by Professor Thomas E. Baker of the Florida International University College of Law and Professor Joan E. Steinman of the Chicago-Kent College of Law, scholars who likewise have long labored in the appellate vineyard. They have carried forward the basic themes and organization of the first edition, with some modifications and with substantial updating to include new material. Reasons for producing the first edition for use in American law schools still obtain and justify this new edition.

Although appeals constitute a relatively small portion of American judicial business, appellate courts are profoundly significant institutions whose role in law and government is far greater than such statistics might suggest. The opinions of appellate courts — the written explanations of the reasons for appellate decisions — collectively form the body of the common law. Despite the growth in statutory law and the advent of the administrative state over the last century, case law still looms large in American jurisprudence. Indeed, many important fields — not the least of them constitutional law — continue to be dominated by decisional law. Even in those areas blanketed by legislative and administrative enactments, case law plays a significant role. All of this law, in state and federal spheres, is generated by appellate courts in the course of deciding appeals. In other words, appellate courts are major sources of law in the United States.

To understand this body of law it is helpful, even essential, to understand how these tribunals function and the nature and limits of their authority. Thus, the material in this course should be part of the learning of all well-educated lawyers, whatever professional paths they may take. Case law must be dealt with in every line of legal work. Moreover, if lawyers are to be faithful to their ethical and professional obligations to improve the administration of justice, they need to be aware of the problems facing appellate courts and judges today so that they can contribute to solutions that will preserve appellate forums as the authoritative adjudicators of cases and controversies and as prominent enunciators of legal doctrine.

More immediately, law students must read and analyze appellate opinions in most of their courses; these writings pervade the study of law. Student comprehension of the opinions they read will be facilitated by a grasp of the structure, jurisdiction, procedure, internal processes, and personnel of the tribunals from which these opinions emanate. Judge Jerome Frank said that studying law only by reading appellate opinions is like studying horticulture by examining cut flowers.* This course examines the plants that produce those flowers.

With the exception of the Supreme Court of the United States, appellate courts are relatively low visibility institutions. They operate without flesh-and-blood witnesses, without the drama of the trial, and usually without the glare of publicity. Their judges appear on the bench infrequently and are therefore little known to the public. Apart from a few celebrated cases, appellate proceedings receive little attention from the press. Movies, television programs, and novels typically feature the more familiar drama of the trial. Even many lawyers are largely uninformed about the workings of appellate courts and about much that appears in this book. Unless the law school curriculum incorporates a study of these topics, graduates — except for the few who serve as law clerks to appellate judges — will continue to join the ranks of the poorly informed, and the profession will be the poorer for it.

Trial courts, in a sense, function in the shadow of appellate courts. Appellate opinions govern what a trial judge does, even if no appeal is taken in a particular case. If a trial judge departs from the appellate court's precedential enunciations of the law, the losing litigant may take the case up to the appellate court where the judgment may be reversed, a fate no trial judge relishes. Trial lawyers, too, must be ever mindful of appellate functions. They must be attentive to building a record through the presentation of evidence and the obtaining of rulings from the trial judge, always with an eye toward a possible appeal, either by themselves or by their opponents. At every step of trial court proceedings the advocates' conduct is heavily influenced by an awareness of what the appellate court can and may do. Thus, the appellate courts' authority and influence are felt by both judges and lawyers throughout the trial process at the base of the system.

Appellate courts have been affected to a much greater extent than trial courts by the litigation explosion that began in the late twentieth century. Nationwide, appellate dockets have grown several times more than trial dockets over the last four decades. In the federal system the impact has been far larger; appellate caseloads there have increased ten-fold since 1960, while trial court caseloads have increased only three-fold. In short, in both absolute numbers and percentages, appeals are being taken in many more cases now than formerly. Appellate courts thus loom larger on the American judicial scene than ever before, and lawyers involved in litigation are much more likely to become involved in appellate work than they would have been a few decades ago. It is therefore especially important for lawyers to understand the dramatic changes in the workings of those courts that have resulted from the pressures of docket growth — the so-called "crisis of volume."

Apart from their case-deciding functions (involving both error-correcting and lawmaking), appellate courts perform important roles in the governance and operations of the judiciary through their supervisory and rule making powers. This is especially true of the court of last resort, the court at the apex of a judicial system. Such courts are considered to have a measure of inherent authority to supervise courts below them in the judicial hierarchy. Typically, they also have authority to make rules for the conduct of proceedings in the lower courts, thus governing the in-court actions of lawyers, parties, and judges. In other words, in addition to its purely judicial role, a court of last resort exercises important legislative and administrative powers in our governmental scheme.

For all of the foregoing reasons a study of these legal institutions should be an integral part of every law student's professional education. Yet, paradoxically, at the very time that the subject has grown in importance, its place in the law school curriculum has shrunk. Indeed, the subject has disappeared from many schools. For a time, required first-year courses in civil procedure included a segment on appellate jurisdiction and perhaps some snippets about appellate procedure. Some civil procedure casebooks still have chapters dealing with those matters. Because of coverage pressure from other aspects of that subject and the reduction in the number of hours allotted to the course in some schools, however, the appellate material is rarely taught. Likewise, courses on federal courts long included material on appellate jurisdiction, but the press of new developments regarding other facets of the course has led many instructors to omit it entirely. The upshot of these curricular developments is that law students graduate with knowledge of trial court jurisdiction and procedure from their first-year courses (and perhaps additional exposure in upper-class electives) and in trial advocacy courses, but with an almost total lack of education concerning the appellate courts. The typical moot court competition does involve brief writing and oral argument set in a hypothetical appellate court, but most such programs do not involve serious instruction about the functioning of appellate courts.

The course for which this book is designed is intended to fill that void and place appellate courts in their rightful place in the law school curriculum. This book is unique in that it involves a study of appellate courts and the appellate process in all of their varied aspects. It deals with far more than the jurisdiction and procedure of appellate courts, although those important subjects are treated extensively. A substantial part of the book is concerned with the structure, organization, internal processes, and personnel throughout the American appellate realm. No other casebook promises this much depth and breadth of coverage of appellate courts. A student should emerge from this course with a thorough understanding of the appellate world and thus with a much better understanding of the contemporary American legal order.

Chapter 1 presents an overview of appellate courts and their work. It sketches the basic roles of these courts, the nature and volume of their business, and some assumptions and concepts underlying their work.

Chapters 2, 3, and 4 present traditional material on appellate jurisdiction and procedure, although in a fresh way. Important questions explored here concern access to an appellate forum — when and how a case can be brought to such a forum — and the scope of the court's authority when a case is properly before it. The dual roles of American appellate courts are examined: the role of correcting trial court errors and the role of generating law.

The book then shifts in Chapter 5 to a major theme of this course: the impact on appellate courts of the dramatic rise in the volume of appeals over the last third of the twentieth century. High volume has become the dominant reality of American appellate life, and this book examines at length the responses of legislators and judges to that challenge. Chapter 6 deals with structural responses, alterations in the architecture of judicial systems at the appellate level to enable appellate courts to absorb the increased caseloads. Chapter 7 then addresses the next line of response to volume: enlarging the number and

types of judicial personnel involved in the decisional process. Chapter 8 focuses on the most recent response to the perceived crisis of volume: basic modifications in the traditional ways in which appellate courts consider and decide appeals. The collective impact of all these responses on collegiality among judges and how judges have had to come to rely on staff are examined in Chapter 9, and their impact on the work of appellate advocates is addressed in Chapter 10. Chapter 11 presents information and concerns about the appellate judges themselves, the key actors in the system — including who they are and how they come to the bench.

Chapter 12 focuses on the Supreme Court of the United States and the exercise of its distinctive discretionary jurisdiction through the writ of certiorari. Chapter 13 examines the appellate courts in England and Germany, providing comparative insights from our parent legal system in the Anglo-American legal world and from a representative civil law system. In studying those appellate arrangements and the judges who function in them, students are invited to think more critically about familiar features of American appellate courts and their procedures.

The book concludes in Chapter 14 by imagining the alternative futures of the appellate courts, the various ideas still “on the drawing board” for redesigning appellate structures so as to provide solutions to current and impending problems. Students are encouraged to think creatively about the future of the appellate judiciary and about means for maintaining an effective legal order amidst the ever-changing circumstances of our time.

Editorial Note

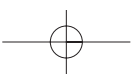
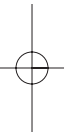
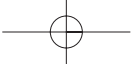
This casebook is primarily a teaching book, not a research book. For the sake of readability, in the extracts from the law review articles and judicial opinions, footnotes and citations of authorities are omitted without ellipses, but ellipses are inserted when text is omitted. Footnotes have been numbered consecutively throughout each chapter. Footnotes in excerpts from articles, books, and judicial opinions have been renumbered accordingly, but the original footnote number is shown in brackets at the beginning of each note. An attempt have been made to harmonize the original headings, styles, and fonts of the excerpts to fit into the format of the casebook.

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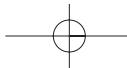
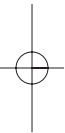
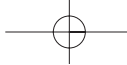


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