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Book Review

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Briefing and Arguing Federal Appeals. By Frederick Bernays Wiener. Washington: The Bureau of National Affairs, Inc., 1961. Pp. xvi, 506. $11.75.

Here is a highly readable textbook. It is not a collection of abstract exhortations, but a systematic exposition of the psychology of persuasion, buttressed with many sage and practical hints—the product of the author's long experience in appellate courts.

The present work is a revision of Mr. Wiener's 1950 publication, *Effective Appellate Advocacy*. The new book differs from the old in that the number of topics treated has been expanded and modernized, and the revision is limited to appeals in federal courts.

The problems with which the book deals are those encountered by every practitioner. While the discussion will prove enlightening to the beginner, it will be useful also to the more experienced, for it highlights pitfalls and mistakes that are commonly committed, but which by reasonable forethought may be avoided. The volume is replete with excellent illustrations of the principles laid down, and it is no derogation to note that the author frequently draws upon examples from his own practice, both as a member of the Solicitor General's staff and in representation of private clients. In teaching the art of appellate advocacy, the book also provides an amazing wealth of substantive law, commented on interestingly and with insight, and brightened with an occasional flash of wit. And the reader will be grateful for the adequate index, both of subjects and cases.

The author, dividing his work into two parts, first tells how to write an effective brief, and second, how to make an effective oral argument.

Some of the author's instructions on brief writing and organization may strike one as statements of the obvious, but anyone who has occasion to observe the day-to-day appellate practice can testify that it is precisely the obvious which is persistently overlooked. He begins with the common-sense suggestion that the advocate should always check the rules of the court to which he is appealing in regard to permissible form and length of briefs and date of filing. The compilation of the court rules and internal practices of the several

circuits will be found helpful, but as the author himself warns, rules change and should always be carefully examined.

The sections which tell how to formulate an effective statement of the facts are preceded by a useful reminder of the varying limitations on the powers of an appellate court in reviewing findings of fact. The standards for review are different depending on whether the finding was made by a jury, or a judge sitting in an equity proceeding, or an administrative tribunal. But almost every case can be strengthened or weakened by the statement of the facts. Perfunctorily recited, the facts may lose much of their force. On the other hand, they may be so treated as to demonstrate equities that will powerfully incline the judge to decide in the advocate's favor. What a satisfaction it is to read a statement of facts that concisely but adequately tells the story, yet eschews "burdensome, irrelevant, and immaterial matter." In an instance cited by Mr. Wiener, the Supreme Court felt called upon to rebuke counsel for neglect of this caution and to demand the filing of completely new briefs.

How grateful is the judge when he finds the facts accurately and candidly set forth in logical order and suitably captioned with supporting references to the record at appropriate places. A brief ordinarily presents the judge with a sufficiently interesting intellectual challenge so that he should not be afflicted with the unnecessary ordeal of searching for a needle in a haystack. At the very least, the judge may rightfully look to the brief writer to spare him this frustration. And how often does the lawyer who is careful to provide this assistance to the judge get his reward in the confidence it engenders in the judge's mind in appraising the brief as a whole. The author stresses that the statement of facts should not editorialize and offers some horrible examples as well as approved models.

A prescription that is sound enough, but difficult to induce the eager advocate to accept, is to avoid proliferating legal points on the appeal, lumping the good with the highly dubious, so that the force of a strong argument is diluted beyond effectiveness in the indiscrimate admixture. Chief Judge Parker, speaking from the fullness of a third of a century of experience on the fourth circuit bench, used to say that no case is likely to suffer if the lawyer limits himself to three points. Of course the lawyer has the task of selecting which three to rely on, or of deciding that his is *really* a case involving more than just three points.

Equally important and too often unheeded are other directives contained in the book. Particularly instructive is Chapter V, "The Finer Points of Brief-Writing." Emphasis here is on the details of good draftsmanship. Like others before him, the author recognizes that trifles make perfect, and perfection is no trifle. How needful are the reminders not to weigh down a brief with useless citations which blunt the cases really in point; to use footnotes sparingly; and to check and recheck all citations and record references for accuracy.

The important opportunity presented by the oral argument on appeal has been described again and again by eminent Justices and judges. Justice Harlan calls it "the most effective weapon" in a lawyer's arsenal, and according to Justice Frankfurter, oral argument frequently has a force beyond that which the written word conveys. How strange it is, then, that advocates will arise to address an appellate court without giving this phase of the appeal adequate forethought. Indeed, nothing is more annoying to a court or dangerous to a client's interest than an unprepared lawyer who attempts to extemporize.

It is discouraging to a judge who has just read a brief to be exposed to a lawyer's mere rereading of it instead of availing himself of the opportunity to make a fresh approach, revivifying what has been written. Even reading any segment of the brief is to be avoided, unless absolutely necessary.

The author is tireless in the reiteration of the two most essential requirements for an effective oral argument—thorough mastery of the record and preparation for the inevitable interrogation from the bench. The old practice of appellate courts of sitting silently through the recital of set speeches by lawyers is now the exception. When judges had not seen the briefs and knew nothing of the case being argued, they asked few questions, fearing to interrupt. But with the growing practice of reading briefs in advance, judges may and do profitably direct the course of the discussion to clarify issues and dispel misconceptions. This is a service to the lawyers, as the competent ones recognize. Some may resent interrogation because it breaks up the preconceived order of presentation, but almost without exception, when the hour is over, all that the lawyer really wanted to tell the court will have been fully covered and covered in a way that enables the judges best to understand the case.

The details of oral argument, discussed in Chapter VIII, are not

less important than the minutiae of brief writing. A worthwhile caution is to avoid citing too many individual cases in open court. Attempting to evade a question from the bench is dangerous and, says Mr. Wiener, no answer is better than an evasive one. Finally, avoid sarcasm, bitterness and dramatics for, according to our author, the court is, in the jargon of Madison Avenue, a "soft-sell." An advocate has truly reached the heights when he evokes the judicial sentiment, attributed to Justice Cardozo commenting at the conclusion of one of Charles Evans Hughes' arguments at the bar of the New York Court of Appeals, "How can I possibly decide against this man?"

With paternal solicitude, the book guides the lawyer along the highways and byways of appellate advocacy. Not neglected are admonitions as to deportment and dress in the court room (for the lady advocate, the author suggests a black dress with a touch of white at the neck). The author may be overfastidious, too, in his insistence as to forms of citations. He has no patience with the young whippersnappers who cite 4 Cranch, not as 4 Cranch, but as 8 U.S. Yet if there are judges who share this distaste, it may be a service to tell the reader about it.

It is due Mr. Wiener to say that he practices what he preaches and has achieved an enviable record in appellate courts.

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BOOKS RECEIVED

Legal Problems in International Trade and Investment. Edited by Crawford Shaw. New York: Oceana Publications, Inc., 1962. Pp. xiii, 265. $12.50.