

## Book Review

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# Book Review

**MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS** By Robert J. Martineau. Lawyers Co-Operative Publishing Co.—Bancroft-Whitney Co. (1983)

REVIEWED BY WILLIAM H. ADKINS, II\*

Willingly or reluctantly, institutions respond to changing circumstances. This rule applies to appellate courts as well as to other organizations. The development that in recent years has resulted in sometimes dramatic modifications in appellate practice and procedure—indeed in the creation of new structures—is increased workload.<sup>1</sup>

Heavy workload in appellate courts has not always been the case. As recently as 1951, Chief Judge Desmond of New York could ask “Where Have All the Litigants Gone?”<sup>2</sup> Not long thereafter, however, the Maryland State Bar Association Committee to Study the Case Load of the Court of Appeals concluded “that it is urgent that a solution of the [workload] problem confronting the Court of Appeals be worked out.”<sup>3</sup> Its proposed solution was the creation of an intermediate appellate court,<sup>4</sup> a remedy that was implemented almost a decade after the committee’s recommendations.<sup>5</sup>

“In the past ten years both civil and criminal appeal rates have doubled, growing much faster than the population, the number of trial court filings, and the number of trial or appellate judgeships.”<sup>6</sup> The creation of an intermediate appellate court in Maryland had the

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1. See generally S. WASBY, T. MARVELL & A. AIKMAN, *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* (1979) (analyzing appellate workloads).

2. Desmond, *Where Have All The Litigants Gone?*, 20 *FORDHAM L. REV.* 229 (1951). See also Rossman, *Quo Vadis?*, 32 *OR. L. REV.* 1 (1952) (asking essentially the same question).

3. Final Report of the Committee to Study the Caseload of the Court of Appeals, reprinted in 64 *REPORT OF THE MARYLAND STATE BAR ASSOCIATION* 395 (1959).

4. Fourth Report of the Committee to Study the Caseload of the Court of Appeals of Maryland, reprinted in 64 *REPORT OF THE MARYLAND STATE BAR ASSOCIATION* 193 (1959).

5. MD. CONST. art. IV, § 14A. The constitutional amendment that empowered the legislature to create the Court of Special Appeals of Maryland was proposed by Act of Mar. 23, 1966, ch. 10, 1966 Md. Laws 16, and ratified on November 8, 1966. The court began operations in 1967.

6. *Projects in Brief*, 8 *State Ct. J.* 35 (1984). See also Marvell, *Appellate Court Caseloads:*

effect of transferring much of the increased load from the Court of Appeals to the Court of Special Appeals. The latter court acquired essentially its present extensive jurisdiction in January, 1975.<sup>7</sup> At its September 1974 term, 1154 appeals were docketed.<sup>8</sup> By fiscal year 1983 this number had risen to 1921.<sup>9</sup> Indeed, in 1982, the Commission to Study the Judicial Branch of Government identified "the major problem at the [Maryland] appellate level" as "the workload of the Court of Special Appeals."<sup>10</sup>

Scholars have observed that this "torrent of appellate business" jeopardizes the performance of appellate functions and "threatens to engulf existing procedures and institutions."<sup>11</sup> It is from this perspective that Robert J. Martineau views *Modern Appellate Practice*<sup>12</sup>. His thesis is that "the sheer volume of appeals" has produced an evolution in the appellate process that requires approaches far different from those of earlier times.<sup>13</sup>

Professor Martineau is well qualified to discuss this subject. A former law clerk for the late Chief Judge Frederick W. Brune of the Court of Appeals of Maryland, he later practiced in Maryland both privately and as an assistant attorney general. He has also served as circuit executive of the federal Eighth Circuit and as executive officer of the Supreme Court of Wisconsin. His present teaching duties at the University of Cincinnati College of Law were preceded by a professorship at the University of Iowa College of Law. Thus he brings to his topic a rich and unusual combination of experience as appellate law clerk, appellate advocate, court administrator, and academic.

As his book's title suggests, Martineau deals with a broad topic—modern appellate practice. Although the book stresses federal appellate practice, it is valuable to the state practitioner, both because of the similarity between federal procedures and those of many states, and because the author discusses the specific practices

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*Historical Trends*, 1982-83 APPELLATE CT. AD. REV. 3 (analyzing developments in appellate caseloads).

7. Act of Aug. 22, 1973, ch. 2, 1973 Md. Laws Spec. Sess. 4.

8. 1975-76 ADMINISTRATIVE OFFICE OF THE COURTS ANNUAL REPORT 70.

9. 1982-83 ADMINISTRATIVE OFFICE OF THE COURTS ANNUAL REPORT OF THE MARYLAND JUDICIARY 5.

10. REPORT OF THE COMMISSION TO STUDY THE JUDICIAL BRANCH OF GOVERNMENT 14 (1982).

11. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 4 (1976) [hereinafter cited as P. CARRINGTON].

12. R. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS (1983).

13. *Id.* § 1.2, at 10-11.

in a number of states, including some references to those in Maryland. In-depth consideration is given to state process in California, New York, and Wisconsin. This should not deter the Maryland lawyer, however, since Martineau deals with numerous issues and practices that are common to all appellate courts—that is those that exist in civil cases. The treatise does not deal with problems that are peculiar to criminal appeals, nor does it cover United States Supreme Court practice or appeals to the new United States Court of Appeals for the Federal Circuit.

Divided into nineteen chapters, the volume has in addition an appendix containing federal rules and a good workable index. Chapter 1 discusses the structure and function of appellate courts and is of particular interest because of its exposition of the effect of structure and function on appellate practice. Valuable to the judge and scholar, this section of the book is helpful to the thoughtful practitioner as well. In shaping appellate strategy and in presenting an appellate case, the careful lawyer should understand the nature of the institution with which he is dealing, the constraints under which it operates, and the functions it is designed to perform.

Professor Martineau identifies those functions as error correction, law development, and doing justice. While one hopes that the last function, exercised within the limits of a government of laws, pervades all the appellate process, the first two, which are emphasized at different levels of the process, require different appellate strategies. For example, in an intermediate appellate court, where error correction is a chief objective, pre-appeal and appeal approaches and considerations may vary considerably from those used when law development weighs more heavily, as in the highest court of a state.

Having laid his institutional foundation, Professor Martineau erects on it a chronologically arranged examination of the appellate process. Chapter 2 considers the basic decision to appeal in light of such factors as the object of the appeal, cost, and delay. A point made here, but perhaps not always observed by practitioners, is the desirability of “making the possibility of appeal part of the litigation strategy from the inception of the law suit.” As Martineau aptly observes: “Appeal strategy is far too important to be left until the attorney is faced with an unfavorable decision, for by that time the most effective route to appeal may be inadvertently precluded.”<sup>14</sup>

Martineau next explores the critical area of preservation of is-

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14. *Id.* § 2.1, at 25.

sues for appeal. Generally, issues not presented in the trial court are not available on appeal.<sup>15</sup> As is his custom, Martineau carefully explains the reason for this rule. While it is no doubt frustrating to counsel to be told by an appellate court that an issue has not been preserved, the appellate court, when exercising its error correction function, should not reverse the lower court on an issue which that Court never considered; "error can be committed only on an issue raised in the trial court. Further, fairness to the trial judge dictates that he should not be reversed on an issue he never considered, for if the issues had been presented, it is possible that no error would have been committed."<sup>16</sup> But Martineau is quick to point out that new legal theories may often be presented on appeal, especially in support of a judgment appealed from, since the trial judge (or the intermediate appellate judge) may have been right for the wrong reason.<sup>17</sup> Nevertheless, it is no doubt the safest procedure to raise an issue at the first opportunity and to make sure that the record clearly reflects that it has been raised.

Even when particular issues have been properly preserved, the case itself may not be appealable. Lack of a final judgment or an appealable interlocutory order is generally fatal to an appeal in some jurisdictions, including Maryland.<sup>18</sup>

In his general discussion of appealability, Professor Martineau recognizes that the final judgment rule produces problems because of "tension between the twin [appellate] goals of judicial efficiency and fairness."<sup>19</sup> His solution is to limit appeals as of right to final judgments, but to permit discretionary appeals from interlocutory orders. This approach has theoretical attractions, but one wonders about its desirability in Maryland, where the legislature has carefully enumerated appealable interlocutory orders in section 12-303 of the Courts and Judicial Proceedings Article, which has been extensively construed by case law. One question, too, whether the discretionary approach might swell appellate workload still further by produc-

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15. Maryland courts generally will not consider issues that do not plainly appear on the record to have been decided by the trial court. MD. R.P. 885, 1085. A common example of non-preservation is the failure to except to jury instructions. *See, e.g., Calhoun v. State*, 297 Md. 563, 593-94, 468 A.2d 45, 59 (1983). *But see State v. Hutchinson*, 287 Md. 198, 411 A.2d 1035 (1980) (jury verdict reversed on appeal despite defendant's failure to object to jury instructions).

16. R. MARTINEAU, *supra* note 12, § 3.2, at 35.

17. *See, e.g., Tadjer v. Montgomery County*, 300 Md. 539, 479 A.2d 1321 (1984).

18. *E.g., Eastgate Assoc. v. Apper*, 276 Md. 698, 350 A.2d 661 (1976); *Felger v. Nichols*, 30 Md. App. 278, 352 A.2d 330 (1976).

19. R. MARTINEAU, *supra* note 12, § 4.14, at 67.

ing a flood of appeals from previously unappealable interlocutory orders.

Martineau goes on to consider the special problems with appeals involving multiple claims or multiple parties.<sup>20</sup> Chapter 4 discusses these problems in the context of Federal Rule of Civil Procedure 54(b), a discussion which is useful to the Maryland lawyer in light of Maryland case law that refers to the federal rule in considering the application of former Maryland Rule 605(a) and current Maryland Rule 2-602.<sup>21</sup> Additionally, this chapter has an excellent analysis of the collateral order doctrine—a doctrine that has appeared on the Maryland appellate scene only recently, but which is gaining increasing attention.<sup>22</sup>

From the topic of appealability the text moves on to a discussion of parties on appeal (Chapter 5) and consideration of how to initiate and perfect an appeal (Chapter 6). Timeliness is the theme of the latter, and there is a useful warning about the dangers of relying on filing by mail.<sup>23</sup> Chapter 7 covers relief pending appeal, including the sometimes vexing problems of supersedeas or stay.<sup>24</sup>

Chapter 8 returns to the direct appellate process by explaining the procedures involving the record on appeal and its preparation. Reverting in part to the teaching of Chapter 3, Professor Martineau reemphasizes the importance of issue-raising, this time in the context that a showing of reversible error must be included in the record on appeal. What is not in the record (however pertinent rules may define that term) is not before the appellate court, and thus cannot be a basis for reversal.<sup>25</sup>

After his discussion of the record in the appellate court, Martineau moves to appellate motion practice. He includes a good discussion of motion strategy, stressing the value of keeping motions to a minimum.<sup>26</sup> He also briefly treats voluntary dismissal, and then

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20. See, e.g., *Happy 40, Inc. v. Miller*, 57 Md. App. 589, 471 A.2d 333 (1984).

21. See, e.g., *Snowden v. Baltimore Gas & Elec. Co.*, 300 Md. 555, 479 A.2d 1329 (1984).

22. See, e.g., *Parrot v. State*, 301 Md. 411, 483 A.2d 68 (1984); *Public Serv. Comm'n v. Patuxent Valley*, 300 Md. 200, 206-10, 477 A.2d 759, 762-64 (1984); *Peat & Co. v. Los Angeles Rams*, 284 Md. 86, 91-95, 394 A.2d 801, 804-06 (1978).

23. R. MARTINEAU, *supra* note 12, § 6.3, at 84-85.

24. Maryland's rules regarding these issues are found in Md. R.P. 1017-1021. Note that new Md. R.P. 2-632 modifies in some respects prior provisions, and in subsection (f) it seems to recognize an inherent power in an appellate court to grant a stay or take certain other actions pending appeal.

25. See, e.g., *Barone v. Winebrenner*, 189 Md. 142, 55 A.2d 505 (1947).

26. R. MARTINEAU, *supra* note 12, at 136-38.

moves to two of the most useful chapters in the book, dealing with briefs and appendices (Chapter 11) and oral argument (Chapter 12).

It is on these two areas of appellate process that high caseloads have had a major impact. That impact has been in the direction of increased emphasis on the brief, as the time for oral argument has been reduced. Counsel must now structure oral argument with the utmost care, since only the most critical issues in a case can be addressed during the relatively short time allowed for oral argument in most courts. Fuller development must be left to the brief.<sup>27</sup>

Professor Martineau's advice on brief-writing is excellent, both for the experienced appellate advocate and for the novice. Stressing the role of appellate judge and appellate counsel, he notes the critical part the brief plays in decision making. He contends that a brief is most effective when it avoids being "the ultimate partisan, claiming everything and conceding nothing." Rather, it should make sure "that the judge understands the issues and what are the *significant* facts and legal authorities."<sup>28</sup>

In *Kirgan v. Parks*<sup>29</sup> Judge Bloom directed appropriately critical remarks at the "kitchen sink" style of pleading. "Such pleadings," he wrote, "inspire no confidence; they suggest that the pleader is not sure what his cause of action is but hopes that if he includes enough allegations the finished product will probably contain at least one cause of action somewhere within it."<sup>30</sup> A "kitchen sink" appellate brief is equally if not more ineffective. As Chief Justice Burger has noted:

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues . . . . This has assumed a greater importance in an era when oral argument is strictly limited in most courts . . . and when page limits on briefs are widely imposed . . . . A brief that raises every colorable issue runs the risk of burying good arguments . . . .<sup>31</sup>

Martineau summarizes these teachings in what he terms "the overriding principle of simplicity":

Simplicity in substance means that the number and kind of

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27. *Id.* § 11.2, at 154, § 12.1, at 209.

28. *Id.* § 11.17, at 177 (emphasis added).

29. 60 Md. App. 1, 478 A.2d 713 (1984).

30. *Id.* at 15, 478 A.2d at 720.

31. *Jones v. Barnes*, 103 S. Ct. 3308, 3312-13 (1983).

issues presented to the court should be as few and as uncomplicated as the attorney can make them. Simplicity in style means that the principles of good writing style demanding brevity and short, simple declarative sentences should be closely followed.<sup>32</sup>

These are words of wisdom too often disregarded by brief writers.

Martineau's discussion of oral argument is also excellent. The principle of simplicity remains important, as does the concept of persuasion. But, as he observes, persuasion in the appellate argument context is

not the kind of persuasion in which an appellate attorney by the force of his personality and the eloquence of his argument convinces a court with little or no prior knowledge about a case to decide it in his client's favor. The modern appellate attorney should view the oral argument as an opportunity to sit in on a conference of the judges to discuss the case with them, to point out the essential elements of each side of the case, and most importantly to answer any questions the judges may have.<sup>33</sup>

Among the many other useful admonitions about appellate argument are a warning against reading the brief<sup>34</sup> and emphasis on the importance of anticipating and answering questions from the court when the questions are asked.<sup>35</sup>

Chapter 13 covers case management and internal procedures of appellate courts. Appellate counsel should well understand the inner workings of the institution to which he is appealing and the policies that will be applied as the appeal is processed. The text includes discussion of the decision-making process, and the entire chapter is good reading for judges and court administrators as well as advocates, for many of the concepts are relatively new.<sup>36</sup>

One matter noted by Martineau, the importance of publication of a court's internal case management and decision-making proce-

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32. R. MARTINEAU, *supra* note 12, § 11.14, at 172-73.

33. *Id.* at 211-12. For another excellent discussion of appellate advocacy, see Scanlan, *Effective Appellate Advocacy in the Court of Appeals of Maryland*, 29 Md. L. Rev. 126 (1969).

34. R. MARTINEAU, *supra* note 12, § 12.5, at 218.

35. *Id.* § 12.7, at 220.

36. For a good discussion of some recent developments in this field, see Lateef, *Keeping up with justice: automation and the new activism*, 67 JUDICATURE 213 (1983); see also Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 UCLA L. REV. 465 (1976); Chapper & Hanson, *Expedited Procedures for Appellate Courts: Evidence from California's Third District Court of Appeal*, 42 MD. L. REV. 696 (1983).

dures, points to a deficiency on the part of Maryland appellate courts. Except to the extent the Maryland Rules explain them, these policies and procedures are not generally known. This seems unfortunate; it is an area our courts might wish to explore.

In his review of case management policies, Professor Martineau expresses some scepticism about the usefulness of prehearing conferences at the appellate level.<sup>37</sup> Although the author thinks "there is no conclusive evidence that this procedure results in more dispositions of more cases more quickly with less judicial effort than the traditional hands-off approach,"<sup>38</sup> the Maryland experience suggests otherwise.<sup>39</sup> Nor does Martineau's criticism of the use of active appellate judges in this process withstand scrutiny. Neither undue impositions on judicial time nor adverse perceptions of the parties seem to follow from the Maryland version of the prehearing conference. The confidentiality and recusal provisions of Maryland Rule 1024 should serve to assure parties that what is said at the conference goes no further, and that the judicial conferee plays no part in the subsequent handling of the case if it is not disposed of as a result of the conference.

Martineau's views as to prehearing conferences are subject to debate, and he omits virtually any mention of another case management policy that is gaining increasing acceptance—the expedited appeal.<sup>40</sup> Provided for in Maryland by Maryland Rule 1029, this procedure allows for rapid and less costly appeals as well as issue simplification in certain types of cases.<sup>41</sup> It can be a valuable product of the prehearing conference.<sup>42</sup> Unfortunately, the procedure has been relatively little used in the Court of Special Appeals.<sup>43</sup> The use of this tool in appropriate cases is commended to the appellate bar.

Professor Martineau follows his case management chapter with one on opinions—their functions and the need for them. The author thinks that in every case there should be a written opinion

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37. R. MARTINEAU, *supra* note 12, § 13.3, at 227.

38. *Id.* at 228.

39. See generally Couch, *The New Maryland Appellate Pre-Argument Conference*, Md. B.J., April 1981, at 7. See Md. R.P. 1022-1024.

40. See generally Chapper & Hanson, *supra* note 36 (analyzing the procedures involved).

41. See Gilbert, *Court of Special Appeals Announces Invocation of Expedited Appeal*, Md. B.J., June 1982, at 2.

42. About a third of the 1982 and 1983 Term expedited appeals were the result of prehearing conferences rather than of initial party election under Md. R.P. 1029(a).

43. Statistics collected by the writer show only 10 expedited appeals docketed to the 1982 Term, 31 to the 1983 Term, and eight to the 1984 Term (as of June 30, 1984).

stating the reasons for the decision.<sup>44</sup> Siding with the current trend, he does not believe that every opinion need be published.<sup>45</sup>

Once an opinion is filed, the thoughts of losing counsel naturally turn to reconsideration. Martineau's views on this are succinct: "Reconsideration in an intermediate appellate court . . . is at best a waste of time and expense for the parties and the court and at worst another way for an unsuccessful appellant to delay the inevitable."<sup>46</sup> Wise words!

Having effectively disposed of reconsideration, the author moves on to a discussion of higher court review. Next he looks at the judgment and mandate and after reviewing miscellaneous procedural requirements gives brief consideration to the use of extraordinary writs in appellate courts.

*Modern Appellate Practice* accomplishes what Professor Martineau sets out to do: It presents a comprehensive and thoughtful analysis of all aspects of appellate practice in the context of today's appellate courts. It does so, one might add, in large and readable type—a distinct advantage to those of us whose years affect our eyesight. Its federally oriented approach does not slight state appellate issues, and its rather infrequent references to Maryland specifics should not deter Maryland appellate lawyers from acquiring an insightful and practical guide to the appellate world.

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44. R. MARTINEAU, *supra* note 12, § 14.3, at 242. In Maryland this is required by MD. CONST. art. IV, § 15.

45. R. MARTINEAU, *supra* note 12, § 14.3, at 244. See MD. CONST. art. IV, § 15; MD. R.P. 1092(b). For a contrary view as to publication, see P. CARRINGTON, *supra* note 11, at 35-39.

46. R. MARTINEAU, *supra* note 12, § 15.1 at 248.

