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The appellate lawyer's bookshelf

Sure, a lot can be done with online services and the Internet, but aren't certain books simply essential to have and to hold?



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On April 23, 1995, UNESCO decreed April 23 to be World Book and Copyright Day. That date was chosen because it is the anniversary of the deaths of William Shakespeare, Miguel de Cervantes, and Inca Garcilaso de la Vega. Since we are now in the month of World Book day, and since Exceptionally Appealing has frequently mentioned how lawyers – especially appellate lawyers – are “people of the book,” this month’s column will focus on appellate books. Just as one credit card company asks “What’s in your wallet?” we ask, “What’s on your bookshelf?” and provide some suggestions.

Lawyers and books used to always go together. For litigators, books in the form of case reporters were an essential tool of the trade. These days, books are gone or rapidly disappearing, as are the libraries that housed them. Physical books are becoming novelty items – law books are more likely to be found as props on furniture store shelving than in law offices. But many appellate lawyers probably still feel the need to have some actual paper tomes lying around. Sure, a lot can be done with online services and the Internet, but aren’t certain books simply essential to have and to hold?

The Law. Where does the law exist? In the minds of the people, sort of, but definitely in the written word. That written word, however, is more likely to be online than on a bookshelf. Some lawyers probably still like to have a “5-in-1” on their desk (officially titled California Civil Practice Statutes and Rules Annotated), containing the Rules of Court and excerpts of key California Codes (Civil Code, Code of Civil Procedure, Government Code) and the entire Evidence Code. But the rules and codes are readily available for free online (see <https://www.courts.ca.gov/rules.htm> and <https://leginfo.legislature.ca.gov/faces/codes.xhtml>), so that book no longer seems essential. Given how the rules and the law change on a regular basis, it’s probably no great loss not to bother with 5-in-1s anymore. So that bookshelf space can be used for other things – tchotchkes and other books.

Practice Tools. Even if it’s not necessary to have the law and the rules in paper form anymore, some books still seem crucial to the practice. Citation guides are an example. Although The Blue Book (formally titled A Uniform System of Citation, 21st edition, 2021) and The Yellow Book (formally titled the California Style Manual, 4th ed. 2000) are online, they are often easier to use in paper. And, they don’t get updated so often as to make them disposable. (Ahem, after over two decades, it might be nice for the Yellow Book to get updated....)

Practice Guides. Next, practice guides are must-haves. California appellate practitioners are blessed with many treatises: The Rutter Guide’s “Blue Bible” (formally titled Civil Appeals and Writs, in a baby-blue binder) is fundamental, as are the red-covered CEB guides, California Civil Appellate Practice and California Civil Writ Practice; also in red binders is the Matthew Bender-published California Civil Appeals and Writs. All four of these are two-volume sets. So these alone fill a bookshelf. Other good appellate resources are Witkin’s California Procedure volume 9 and the Cal.Jur.3d volumes 4 and 5. These are online, of course, but it can be nice to have them handy in print.

Another useful two-volume set is the Appellate Practice Compendium, by the ABA Council of Appellate Lawyers, which provides “insider guide” chapters on appellate practice in all 50 states, D.C., and all federal appellate courts.

On the federal side, there is Rutter’s two-volume “Green Book” (formally titled Ninth Circuit Civil Appellate Practice) as well as the Thomson Reuters single-volume Federal Appellate Practice: Ninth Circuit by Ben Cooper. Also essential is “Stern & Gressman,” officially titled Supreme Court Practice. Originally published in 1950, this roughly 1,500-page tome is now in its 11th edition (2020). High Court practitioners still call it “Stern & Gressman,” even though those authors are long gone. Appellate practitioners lament that they are not called on to use this work more often. But at the very least, its guidance on the cert process is fundamental so it has to be on the shelf.

Plummeting back down to earth (or at least to courts where regular appellate practice is attainable), another nifty practice guide is what’s informally known as the Research Attorneys’ manual, published about a decade ago by the Judicial Council’s Administrative Office of the Courts, and formally titled the California Court of Appeal Judicial Attorney Manual (3d ed. rev. 2013). Government Code section 68552 empowers the Judicial Council “to publish and distribute manuals, guides, checklists and other materials designed to assist the judiciary.” But what “assist[s] the judiciary” is useful to practitioners too. There are a variety of such publications covering all sorts of areas of the law. But appellate lawyers should check out the Research Attorney’s manual to better understand their audience. The 2013 revised edition was at least the sixth iteration of this manual, starting with the 1986 edition, and is only 174 pages long. Although written for research attorneys, it provides an insider’s guide to many issues confronting appellate lawyers as well. Just as trial lawyers like to use the California Judges Benchbooks, appellate lawyers should be familiar with this publication.

Scalia and Garner books. A category unto themselves are the books by Justice Antonin Scalia and Bryan Garner. First came Scalia and Garner’s Making Your Case: The Art of Persuading Judges (2008). This short book compiles a ton of advocacy wisdom into delightfully digestible chunks. Next came Scalia and Garner’s Reading Law: The Interpretation of Legal Texts (2012). This book is a lot thicker because it provides chapters on all the various canons of statutory construction. Although this book is not focused on California law, its principles are universal and appellate lawyers will find it useful. The California Supreme Court has cited it numerous times (e.g., *People v. Hubbard*, 63 Cal.4th 378 (2016); *People v. Gutierrez*, 58 Cal.4th 1354 (2014); *Apple, Inc. v. Superior Court*, 56 Cal.4th 128 (2013)) and so have many court of appeal opinions. Also of use to appellate lawyers is *The Law of Judicial Precedent* (2016), authored by Garner and a number of appellate judges.

Language books. Having mentioned Bryan Garner, we turn next to reference and teaching books, of which he is a prolific author. A copy of the venerable Black’s Law Dictionary (now up to the 11th edition (2019), which Garner edits) can be useful. But

given the prevalence of online dictionaries (and because Black's is online), having a print copy is probably not essential. But familiarity with Garner's books is very useful, whether it be Garner's *Modern American Usage*, *Dictionary of Legal Usage*, *Legal Writing in Plain English*, or *The Redbook: A Manual on Legal Style*. Also edifying are works such as Ross Guberman's *Point Made: How to Write Like the Nation's Top Advocates* (2d ed.) and *Point Taken: How to Write Like the World's Best Judges*.

Appellate practice books. This brings us to the many books available on appellate practice generally. One that is nice to have simply because it's the classic and original guide – and still holds up – is Frederick B. Weiner's *Effective Appellate Advocacy* (1950) (a revised 2004 edition also exists). An early review noted "This book is equally good reading for the seasoned practitioner and the youngster preparing to argue his first case on appeal." (C. Brewster Rhoads, 99 U. Penn. L. Rev. (1950); see also Book Notes, 11 La. L. Rev. 278 (1951) ["This is easily one of the very best volumes to appear on the art of advocacy in appellate courts."].)

Next in the canon of classic appellate guides is *Winning on Appeal*, originally authored by Judge Ruggero Aldisert in 1996 and published by NITA (the National Institute for Trial Advocacy). Judge Aldisert wrote a second edition in 2003. The latest edition is titled *Better Briefs and Oral Argument: Third Edition Winning on Appeal* and lists as authors the late Judge Aldisert as well as Fifth Circuit Judge Leslie Southwick and law professor Tessa Dysart. This 2017 update preserves the wisdom of the original editions with necessary modernization.

Also on the list of must-have appellate guides is David Frederick's *Supreme Court and Appellate Advocacy*, now in its third edition (2019). This relatively short book is chock full of practical advice applicable to practice in any appellate court.

And, returning again to Bryan Garner, it would be odd not to have *The Winning Brief* and *The Winning Oral Argument*. These works collect timeless wisdom and practical advice laying a solid foundation for any appellate practice in any court.

The most recent addition to the pantheon of classics is the late Charlie Bird's *Advanced Topics in Appellate Practice: The Path of Mastery*, published in 2021 by Full Court Press (which wins the best-name-for-a-legal-publisher award).

In addition to books on citation, writing, language, and appellate practice, sometimes you find yourself looking for an apt quote or anecdote to help bring an argument to life. Enter New Jersey trial lawyer Tom Vesper who, for over four decades, has collected over 30,000 useful quips and tidbits in *Uncle Anthony's Unabridged Analogies: Quotes, Proverbs, Blessings & Toasts for Lawyers, Lecturers & Laypeople* (4th ed. 2014).

And many more. The listing above is meant to hit the highlights of the classic and arguably essential books, but is certainly far from exhaustive. Many dozens of other appellate books have been published over the decades, all worthwhile, e.g., Berry,

Effective Appellate Advocacy (West 1998); Fine, The “How-To-Win” Appeal Manual (Juris 2000); Lofaso (editor), A Practitioner’s Guide to Appellate Advocacy (ABA 2010); Axelrad, Appellate Practice in Federal and State Courts (ALM 2011); and Mayer Brown LLP, Federal Appellate Practice (3d ed. 2018). And new books are coming out all the time, such as the hot-off-the-presses Federal Appeals: Jurisdiction & Practice (Thomson Reuters 2023). Please share your thoughts about what books you find essential.

And speaking of feedback, in response to last month’s article on appellate judicial recusals, Judge Curtis Karnow wrote in to point out that superior court judges also need to know which entities are owned by companies in which they hold stock, based on a recent opinion holding that “a judge’s ownership of stock in a parent corporation with a value in excess of \$1,500 is a financial interest within the meaning of [Code of Civil Procedure] section 170.1 in the parent’s wholly owned subsidiary and requires disqualification of the judge where the wholly owned subsidiary is a party to an action.” *Chaganti v. Superior Court*, 73 Cal.App.5th 237, 247 (2021).