

Federal Appellate Practice and Procedure



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FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL

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To Jane and Alexandra.

— G.A.C.

To my Family.

— R.H.K.

*To lawyers and law students throughout the
country who are attempting to master the
art of appellate advocacy.*

— G.A.C. and R.H.K.

*

PREFACE

This text is for students taking courses on appellate procedure or appellate advocacy. It is also designed as a concise reference book for attorneys handling cases in the federal appellate system. Its focus is on the federal courts of appeals and the U.S. Supreme Court. It addresses all of the major issues facing an advocate in the federal appellate court system, including the final-judgment rule and its exceptions, preservation of error, standard of review, filing an appeal, briefs, appendices, oral argument, rehearing and rehearing *en banc*, opinions, Supreme Court jurisdiction, writs of certiorari, and Supreme Court briefing and oral argument. In addition to providing information on core principles and cases, as well as “nuts and bolts” information (such as word and page limits on briefs), the text also provides strategic advice, such as how to prepare a persuasive brief or to deliver an effective oral argument.

Professor Castanias is a Partner in the Washington, D.C. office of the Jones Day law firm, and an Adjunct Professor of Law at the Indiana University—Bloomington School of Law (his alma mater), where he teaches appellate practice and procedure. He has been a practicing appellate lawyer for all of his 17-plus years in practice. He has briefed and argued numerous cases in the U.S. Supreme Court,

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before most of the federal courts of appeals, and in several state appellate courts as well.

In addition to teaching appellate procedure for a number of years, Dean Klonoff has been a practicing appellate lawyer for about 25 years. As an Assistant to the Solicitor General of the United States (and later in private practice at Jones Day), he has briefed and argued numerous cases before the U.S. Supreme Court. He has also briefed and argued appeals before many other federal and state appellate courts throughout the United States.

Professor Castanias counts Dean Klonoff as one of his early mentors in the practice of law, and as one of his great friends.

Throughout the text, we cite and discuss the Federal Rules of Appellate Procedure (FRAP), specifically the version of those rules that became effective on December 1, 2007. Those rules govern procedure in the United States courts of appeals. The text also frequently references the Rules of the Supreme Court of the United States, specifically the version of those rules that became effective on October 1, 2007. Various rules contained in the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (the versions that became effective on December 1, 2007), as well as statutory provisions of the Judicial Code (Title 28, United States Code) also bear directly on important issues that arise on appeal. The use of the terms “he” and “him” in the text are for simplicity, and are not (un-

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less the context plainly indicates otherwise) gender-specific references.

The reader should also be aware that the individual federal circuits have their own local rules, internal operating procedures, and handbooks that govern or inform appellate practice within each particular circuit. Although a discussion of the specifics of these numerous local rules is largely beyond the scope of this book, anyone practicing before a particular federal circuit must become thoroughly familiar with that court's local rules.

We wish to express our appreciation to our research assistants, who helped with researching various topics in the text. These include Ashely Atwell, Miriam Bailey, Gabrielle Beam, Zhijun Gong, Heather Hermosillo, Rory Kane, Andrew Lonard, Jennifer McGrew, Uzo Nwonwu, Erica Perkin, Michael Raine, Valley Renshaw, Jeremy Wikler, and John Witten.

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Finally, Jackie Ford, who has worked with Professor Castanias for almost 13 years now, deserves special recognition for her efforts in the preparation of this text, which included everything from manag-

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ing the boxes of research files to formatting the earlier drafts.

The statements and conclusions in this text are ours alone, however, and do not necessarily represent the views of Jones Day, its clients past, present, or future, any other attorney affiliated with that law firm, or anyone who had input into this text.

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February 2008

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