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Evidence: Making the Record

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BOOK REVIEW

EVIDENCE: MAKING THE RECORD. By Jon R. Waltz and John Kaplan. Mineola, New York: The Foundation Press, Inc. 1982. Pp. vii, 83.

REVIEWED BY MARGARET G. STEWART*

At a time when the legal profession is widely perceived as devoted to obfuscation and redundancy, the publication of any book addressed to that profession which is both concise and written in comprehensible English is a delightful surprise. When the same book provides aid to novice litigators and thus addresses a current concern of the Chief Justice of the United States and a vast number of practicing lawyers—the competency of the trial bar—it is doubly welcome.

For fifteen years, the Louisell, Kaplan and Waltz casebook, *Cases and Materials on Evidence*,¹ has included a lead chapter entitled “Making the Record.” I suspect that, as a chapter in a casebook, it has been given much less attention than it deserves. To some extent, this was inevitable. If read and discussed at the beginning of the basic law school course in evidence, it might raise more questions than it answered (what *is* hearsay and why shouldn’t it ordinarily be admissible?). On the other hand, if the chapter were held to the end of the semester, it would be all too likely ignored in the rush to complete coverage of more traditional and academic issues raised by the law of evidence. Furthermore, no matter how frequently and sincerely a professor suggests that students read material “on their own,” only a fraction do so. In any event, the structure and focus of the chapter made it more appropriate for consideration in the beginning of a clinical or trial advocacy course. *Evidence: Making the Record*² expands and updates this under-utilized chapter and, as a separate and inexpensive publication, facilitates use of the material by professors, students and practitioners alike.

Clearly the perfected trial record is essential to an appeal from any decision reached in the course of the proceedings so recorded. Profes-

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1. LOUISELL, KAPLAN & WALTZ, *CASES AND MATERIALS ON EVIDENCE* (3rd Edition 1976).
2. WALTZ & KAPLAN, *EVIDENCE: MAKING THE RECORD* (1982).

sors Waltz and Kaplan³ logically focus on that portion of the record which reflects the trial itself, although some of what is explained in that context is directly applicable to similar issues in other situations, such as a pre-trial conference. For the most part, the authors assume that the reader has at least that degree of familiarity with the federal laws⁴ of evidence and civil procedure as would a law student who had taken the traditional courses in those areas. This book is not an attempt to explain the best evidence rule or the structure and limitations of a pre-trial conference. It is, rather, designed as an aid to the litigator who needs to know how to apply, in the courtroom, the rules of law so carefully learned in a classroom. It is for the nervous lawyer who, for the first or very nearly the first time, hears those ominous words from the bench, "Counsel, call your first witness." The core of the book is Chapters II and III, offering and objecting to evidence. Here, the authors, in some detail, describe how to qualify an expert, how to admit tangible evidence, what kinds of objections are frequently available and when and how they should be made. Even though each fact pattern a litigator confronts will obviously necessitate a unique set of questions and objections, the examples given are extraordinarily helpful as a meticulous construct of appropriate concerns in frequently occurring situations.

It is obvious that Professors Waltz and Kaplan bring more than an impressive intellectual understanding of rules of law to their discussion of how an appropriate record is to be created. Only those who have had substantial courtroom experience, as they both have, could produce such a succinct and well-ordered mix of the theoretical, the practical, and the tactical considerations involved in conducting a trial with one eye on what will be available to a reviewing court. Ranging from suggested one-line questions or responses to three-page series of questions and answers, the book inexorably and clearly guides the inexperienced through the maze of "making the record."

This book is an essential adjunct to evidence and trial practice courses. Furthermore, some of the Chief Justice's concerns about the proficiency of the trial bar would be eased were law firms and other

3. Jon R. Waltz is the Edna B. and Ednyfed H. Williams Professor of Law at Northwestern University; John Kaplan is the Jackson Eli Reynolds Professor of Law at Stanford University.

4. To the extent the text cites specific rules of evidence or of civil procedure to illustrate the need for a question or the basis for an objection to the introduction of evidence, only the Federal Rules of Evidence and the Federal Rules of Civil Procedure are used. Any reader, however, who knows the evidentiary and procedural law of his state could easily transform the book into "Making the Record in State X."

litigating agencies to make the Waltz and Kaplan book mandatory readings for their less experienced litigators.

