❖ Introduction

Judge Ruggero J. Aldisert[1]

This manual is destined to become the *vade mecum* for all lawyers writing briefs and devising oral arguments in the U.S. Court of Appeals for the Third Circuit. I am confident that my colleagues on the court will appreciate and welcome the efforts of the many lawyers who have authored these splendid chapters.

Although the instruction these pages provide will be particularly valuable to the neophyte at the bar, even the most experienced veteran will find something here worth pondering.[2] From the perspective of those on the bench, we are grateful for this effort to improve appellate advocacy. It cannot be gainsaid that when lawyers produce higher caliber implements of decision, judges will better achieve the optimum quality of justice in the twin aspects of adjudication: making the decision and publicly justifying it.

To start, I note that the odds are stacked squarely against any lawyer bringing an appeal in federal court. An appellant today fights to succeed amid a crushing caseload where fewer than 1 in 10 cases is reversed. And in direct criminal appeals, the chance of success is only about 1 in 20. That's the true reality show that many trial lawyers fail to appreciate.

The lay public, raised on a healthy dose of *Law & Order*, too often believe that a dazzling oral argument can overcome the sobering fact that few district court opinions are overturned. But not so. In contrast to the English system, which relies entirely on oral argument, American courts consider oral argument little more than a fleeting moment. Our appellate judges view the brief as the pivotal decision-making tool; it is studied for weeks prior to oral argument and the decision-making conference, and remains the principal instrument of persuasion.

Putting aside our tradition, the recent astronomical increase in appellate court caseloads has accentuated the importance of briefs and diminished the grandness of oral arguments. In 1969, my first full year as a United States circuit judge, each active judge on our court was responsible for deciding 90 appeals a year; the average of all courts of appeals was 93 cases per active judge. By 2005, each active judge decided 402 appeals, and the national average had risen to 457.[3] This means that your appeal competes with many, many others for sympathetic attention. As emphasized in chapter 14 by Nancy Winkelman, crushing caseloads have imposed severe restrictions on the time available for oral argument.

---

1. Senior Circuit Judge, Chief Judge Emeritus, U.S. Court of Appeals for the Third Circuit. Author, *Opinion Writing* (West Group 1990); *The Judicial Process: Text, Materials and Cases* (West Group 2d ed. 1996); *Logic for Lawyers: A Guide to Clear Legal Thinking* (NITA 3d ed. 1997); *Winning on Appeal: Better Briefs and Oral Argument* (NITA 2d ed. 2003); *Road to the Robes: A Federal Judge Recollects Young Years & Early Times* (AuthorHouse 2005).
2. The language here is borrowed from the late Professor Charles Alan Wright.
3. 2005 Federal Courts Statistics, Administrative Office of U.S. Courts, http://www.uscourts.gov/cgi-bin/cmsa2005.pl.

My point is this: winning on appeal begins, and often ends, with what you write. You must *write* to win. Don't depend too heavily on your powers of speech, regardless of how great they may be. Your hopes hang on the written argument; the oral argument is only a safety net. Cases are not won at oral argument; they are only *lost* there.

In writing a brief, you don't get a *second* chance to make a good *first* impression. Always keep in mind the monstrous load of cases facing the judge. Your brief is capable of generating different first impressions. The judge may look at it and say, hey, this lawyer really knows the score. She probably has something here. That's the effect you want to have. At the other end of the scale, the impression of the judge may be: This is what Ernest Hemingway had in mind when he said, what this country needs is a good [junk][4] detector. In your next brief, the choice will be yours.

A brief is a formal argument containing a group of propositions, one following from the others. An argument is not merely a collection of propositions, but an annunciation containing a formal logical structure.

The purpose of a brief is to persuade the court to accept the conclusion you present on a particular issue. You must not do this in the nude. Don't tell us merely the conclusion you want us to accept. You must also give us the reasons that justify the proffered conclusion. We need this because in accepting your conclusion we also promulgate a rule of law. Roscoe Pound taught that rules of law are precepts attaching a definite detailed legal consequence to a definite, detailed state of facts.[5] And a rule of law promulgated by a court is valid only to the extent that sound reasoning supports it.

Think of yourself as a general mustering troops for battle: always start from a position of maximum strength. Lead with your strongest and most important point. This strategy requires you to produce an intelligent answer to the following question: What argument, objectively considered, based on precedent and the court's previously stated policy concerns, is most likely to persuade the court?

Many of the authors in this manual have emphasized the necessity of brevity in the briefs, none more so than the authors of chapter 26, three former colleagues of mine on the court: Judges Arlin M. Adams, John J. Gibbons, and Timothy K. Lewis. I offer the following suggestions to help you achieve that goal.

- **Writing the Facts**

  Do not begin writing the facts until you have decided what issues you will raise. Never write the facts first. Tailor the statement of facts to fit the issues raised. Write as tersely as you can. Include only what is necessary, not what is merely interesting. The keystone is to limit your narrative to material facts. Remember the common-law tradition: the rule to be announced in the ultimate opinion will be a detailed legal consequence attached to a detailed set of facts. Give the judges who will be reading your brief a break. Let them know the adjudicative facts that are really important to the decision.

- **Shortening Your Brief, but Preserving the Contents**

  Cite cases only when they are useful. Before you cite any case in your brief, ask yourself: Why am I citing it? Think about this question every time you are inclined to use a citation. There are three separate reasons why you might insert a citation. First, you might cite a case for its facts. You do this to compare the material facts in your brief with those of the compared case. Here, you will employ precepts of induc-

4. Hemingway used a different word.

5. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law,* 7 Tul. L. Rev. 475, 482–87 (1933).

tive analogy to support your argument or to refute your opponent's. To show similarity, you will demonstrate that the resemblances in the material facts outweigh the differences. Or vice versa.[6] Second, you may cite a case for its reasoning. You include the citation because the reasons proffered by the judge support your theory. Usually this will be a categorical deductive syllogism, for example, the familiar "All men are mortal."[7] Third, you may be interested only in the conclusion of a case and cite it only to support the rule of law set forth therein. Of course, you may cite a case for a combination of these purposes. Stop and think before you cite. Don't clutter your persuasive writing with unnecessary citations.

Cut down the length of your brief by using the parenthetical. Many briefs bulge at the seams because lawyers insist on reciting the entire histories of cases they rely on. In recent years, the parenthetical has become an increasingly popular tool, and I strongly recommend that lawyers master its use if they wish to write effective briefs that persuade.

If a case is cited to show resemblances or differences in the facts, a parenthetical disclosing the material facts of the cited case will be very effective. The parenthetical also can be used to emphasize the reasons that support the conclusion of the cited case. Or again, to state the legal rule that constitutes the holding.

Accompanying a citation with a parenthetical serves three important purposes: (1) it tells the reader why you are citing the case, (2) it shows where the case fits into the theme or focus of your brief, and (3) it furthers the objective of concise brief writing.

Brief writing certainly remains the meat and potatoes of appellate advocacy. That said, I hope to augment the excellent chapter on oral argument written by Charles W. Craven by offering three suggestions from this side of the bench: first, because in the 15 minutes allocated time you will be bombarded by questions, be prepared to slip in at least 5 minutes of the argument that you want to make. Develop a five-minute presentation and squeeze it in whenever you can among the barrage of questions.

Second, when you have completed the argument and are satisfied that you have answered all the questions and that the court understands your position, thank the court and sit down. Even though the green light is still on. Don't believe that you have to use all 15 minutes. Quit while you're ahead.

Third, the most delicate situation in any oral argument is the forensic dilemma of how to face a continuous blitz of questions from a single judge who is off on an intellectual frolic of his or her own. How can you please the court by answering its questions and yet diplomatically return to the argument you want to make? This calls for the highest advocacy and impromptu speaking skills.

One method is to announce that you have multiple responses to a certain question, the second of which returns you to your planned format: "If the court please, I have two responses to that question." Make a direct response to the question and then immediately state, "For my second response to the court's question, I would add . . . ." From there, give an indirect response by way of analogy that tracks your planned presentation. This sometimes staves off interruption. At worst, it gives you a transition back to your planned presentation.

6. See *Logic for Lawyers: A Guide to Clear Legal Thinking* 93–102 (NITA 3d ed. 1997).

7. Id. at 53–93.

In preparing the latest edition of my book, *Winning on Appeal: Better Briefs and Oral Argument*, I asked for suggestions from many chief judges of the courts of appeals on how to handle this. Our Chief Judge Anthony J. Scirica advised:

> Be patient. In most cases, there will be a break that will enable you to return to your argument. If time has run, ask the court for a few minutes to present your most compelling argument. Usually one judge on the panel will respond favorably.

His predecessor, the late Judge Edward R. Becker, commented:

> Express appreciation for the questions of the wayward judge, but then pointedly ask the presider if he or she may have a few minutes to develop what he or she believes to be the critical issues.[8]

The successful trial lawyer is at heart a successful salesperson, successful in the sense of persuading the fact finder to select from the mass of testimony and evidence those adjudicative facts that favor the lawyer's client. To persuade is to sell effectively. I think of good trial lawyers as able salespersons, a function they do not always recognize and one that many of them probably would deny. There comes to mind the rebuke flung in the face of Willy Loman in the play *Death of a Salesman*: "The only thing you got in this world is what you can sell. And the funny thing is that you're a salesman, and you don't know that."[9]

The trial advocate is not limited to reasoned argument and may speak of many things, including irrelevant, somewhat irrational, or shamelessly emotional matters. These are ploys, but ploys that are used every day, everywhere. They are used in advertising and political campaigns, and by essay writers, columnists, editorial writers, and television commentators. They are of such ancient lineage that many bear Latin names: *argumentum ad misericordiam* (appeal to pity), *ad verecundiam* (appeal to prestige), *ad superbium* (appeal to snobbery or pride), *ad hominem* (appeal to ridicule), *ad populum* (appeal to popular opinion), *ad antiquitam* (appeal to tradition), *ad terrorem* (appeal to fear), *ad superstitionem* (appeal to credulity). And if the wind is right and the sail is full, the trial advocate can hoist a little *dicto simpliciter* (applying the general rule to exceptional circumstances) or some hasty generalization, or tie on a *non sequitur* or *post hoc ergo propter hoc* (fallacy of false cause) or *ignoratio elenchi* (fallacy of irrelevance, an argument that has nothing to do with the point at issue).

But check this baggage after you finish your closing summation to the jury. Don't carry it upstairs to the appellate court. You are still a salesperson when you appear before the multi-judge court, but it's a different audience, requiring different rhetorical skills.

The appellate salesman carries a different sample case. The law is argued principally, and the tools of argument—the rhetoric, if you please—must be adjusted accordingly. Too many lawyers fail to make this adjustment. Indeed, too many lawyers do not even realize that an adjustment has to be made.

I am confident that the use of this comprehensive *Third Circuit Appellate Practice Manual* will go a long way to help make this adjustment. It is written by an extraordinary group of distinguished appellate lawyers who have put together a truly magnificent source book. I would call it a performative utterance because if the lawyers who appear in our court follow the advice contained in these pages, their clients should feel confident that their causes will receive the maximum degree of understanding by those who will ultimately adjudicate the issues before them.

8. Advice offered by chief judges of other circuits may be found in 24.6.3.1, *Winning on Appeal.*

9. Arthur Miller, *Death of a Salesman* 97 (1949).