

# The View From the Bench

A rigorous and detailed textbook on appellate advocacy

## WINNING ON APPEAL: Better Briefs & Oral Argument

By Ruggero J. Aldisert  
Clark, Boardman & Callaghan  
New York, N.Y.  
388 pages; \$45

*Reviewed by Judge Alex Kozinski*

Plato recounts the allegory of the cave, in which people are pilloried so they can see only the cavern wall in front of them. Behind them blazes a fire, and between them and the fire pass people, animals and objects, acting out scenes from everyday life. Yet the prisoners can't turn



their heads to steal even a glance at the action behind them; they are doomed to perceive reality only as the shadows cast on the wall in front of them.

It turns out Plato was really talking about appellate judges, or so it seems at times. Trying to figure out what happened at trial from a cold, often incomplete, almost al-

*Alex Kozinski, a federal judge on the U.S. Court of Appeals for the 9th Circuit, is perhaps better known for his advice on how to lose appeals. See "The Wrong Stuff," 1992 B.Y.U. L. Rev. 325. The judge wishes to thank his law clerk J. Daniel Plants for his assistance.*

ways badly organized record is the stuff of our day-to-day existence. It takes a special breed of lawyer to lend perspective to the process; an understanding of the frustrations and limitations of an appellate court's vantage point is critical.

There aren't many practitioners of this trade. Few lawyers, perhaps with the exception of prosecutors, appear in appellate courts with any frequency; most handle appeals sporadically, as a by-product of having tried the case below.

For those thrust into taking or defending an appeal, perhaps with no more training guidance than law school moot court many years before; for those who regularly appeal and want to improve their chances for success; and for those of us shackled to the cave wall, "Winning on Appeal," by Judge Ruggero J. Aldisert, is sure to become the definitive text on the subject.

To be sure, some cases can't be won or lost on appeal, no matter how hard the lawyers try. Controlling precedent, findings made by the court below, an unfavorable set of facts and (in too many cases) the panel's personal predilections, all influence the result of a case, sometimes decisively.

But, as Judge Aldisert writes, "in a certain percentage of cases—in which the

rule of law, and therefore, the decision, could go either way—how and where the axe will fall may depend upon the quality of appellate advocacy." It's for these cases, and the lawyers who handle them, that this book is written.

### A Unique Vantage Point

Like Judge Aldisert's earlier books, "Logic for Lawyers" and "Opinion Writing," his most recent work draws heavily on his three decades as a jurist: seven years as a Pennsylvania state judge, a quarter-century on the U.S. Court of Appeals for the 3rd Circuit (including service as chief judge), and regular tours of duty on the 5th, 9th, 10th and 11th Circuits.

As the judge observes with his usual candor, "I have heard the best, 'in every clime and place,' ... and I probably have heard the worst."

Therein lies the unique contribution of this book. Told from a judge's viewpoint, the book is an exposé of appellate lawyering from the other side of the bench. It fills a curious void in the existing literature on appellate advocacy, until now authored almost exclusively by non-judges. While practitioners and academics often have invaluable insights, theirs is only half the story.

Who better to speak about what judges expect from appellate briefs than one who has spent much of his life reading them? Likewise, Judge Aldisert can speak with authority about how judges see oral argument—what they expect from attorneys, what they hope to accomplish with the questions they ask, what they think most needs improvement.

The book also offers a glimpse of how judges prepare for and decide appeals. As Judge Aldisert laments, "[b]riefs are ... not very often read in a cloistered setting, a quiet, library room where the only sound is a softly ticking clock. Briefs usually must compete with a number of other demands on the judge's time and attention."

Sensitivity to these competing priorities—rising caseloads, to name only one—is at least as important to any appellate lawyer as photographic recall of the Federal Rules of Appellate Procedure. The discussion of the hectic judicial habitat also reinforces one of the book's recurrent themes: the imperative of organization and word economy in brief writing.

The book gives pointers on "psych[ing] out the court"—again from the perspective of *The Man in Black*. It discusses the differences in approach when arguing before "hot" and "cold" courts (those whose schedules do and don't typically permit reading the briefs and record prior to argument). It also discloses that questioning from the bench often is just a disguised colloquy among the judges; observes that the client's presence will generally detract from the lawyer's performance at oral argument; and explains the subtle art of disengaging from persistent and unhelpful questioning from a single judge.

Judge Aldisert supplements his

views with those of the nation's leading appellate jurists. Where else, for example, can a lawyer find out what the chief justice of each state recommends for improving appellate briefs, or the suggestions each has for preparing for oral argument? The book polls the chief judges of each federal circuit on how to effectively answer questions at oral argument, and also reports the criticisms leveled by the law clerks who pore over the briefs.

### Fundamentally Speaking

But "Winning on Appeal" is not just a collection of war stories or a listing of various judges' pet peeves; it is a rigorous and detailed textbook, focusing on every aspect of appellate advocacy. As Professor Charles Alan Wright says in his Foreword, "[t]here is a sense in which appellate advocacy cannot be taught. Ultimately it is the lawyer, all alone at the lectern, who must count on his or her instinct and sense of the situation—perhaps even genius—to carry the day. But that lawyer is far more likely to succeed if he or she is well-schooled in the fundamentals."

To that end, the book takes great pains to teach the fundamentals of effective appellate lawyering.

The book opens with general essays on the appellate process that will be of interest to practicing lawyers, professors and students alike. Part III takes an in-depth look at brief writing, with separate chapters on the use of authorities, formulation of issues, statements of the case and facts, summary of argument, shortening the argument, structuring the argument, perfecting the argument, and a capsule summary of the canons of logic. Part IV takes the same approach to sharpening oral argument skills.

The book is also an invaluable reference asset, earning it a place on any appellate lawyer's shelf right next to Strunk and White, Roget's and The Federalist. Part I houses statistics on various aspects of appellate practice: the likelihood of winning on appeal in federal court and in various state courts; the likelihood of obtaining review in the highest state courts with discretionary appellate jurisdiction; and the frequency with which each of the federal appellate courts grants oral argument. Part II provides a digested review of appellate jurisdiction, rules and scope of review. Part V contains checklists to assist in preparing both briefs and oral argument.

As usual, Aldisert doesn't pull any punches, freely offering his views on the serious challenges facing our judicial system. While recognizing that some of the increase in litigation is due to various social and economic factors, at bottom he blames the increasingly "litigious temperament" of our society. "[A] basic premise underlying the entire [book] is that altogether too many cases are sent up, or rather dragged up willy-nilly, before appellate courts." But this observation, too, merely reinforces what the judge believes to be one of the best-kept secrets to success on appeal: concise briefs, focused issues, tight arguments.

For those who have grown accustomed to Judge Aldisert's gentle humor and his penchant for colorful anecdotes, this book doesn't disappoint. Displaying the talents that have earned him a reputation as a master raconteur, he illustrates and reinforces the book's lesson with stories from his wide experience as a practitioner, professor and jurist.

Once again, Judge Aldisert has given us a book that's a fun read, in addition to being thorough and clear-headed. It behooves all who ply their trade in our appellate courts to invest in this indispensable primer. ■



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