

3-1994

## Winning on Appeal: Better Briefs and Oral Argument

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### Recommended Citation

Hirrel, Michael J. (1994) "Winning on Appeal: Better Briefs and Oral Argument," *Federal Communications Law Journal*: Vol. 46 : Iss. 2 , Article 4.

Available at: <https://www.repository.law.indiana.edu/fclj/vol46/iss2/4>

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## BOOK REVIEW

### **Winning on Appeal: Better Briefs and Oral Argument. Ruggero J. Aldisert. Clark Boardman Callaghan (1992), 361 pages.**

Reviewed by Michael J. Hirrel\*

John G. Johnson, the great appellate lawyer of the late nineteenth century, turned down President Cleveland's offer of a seat on the Supreme Court. He allegedly explained, "I would rather talk to the damned fools than listen to them."<sup>1</sup> Judging from his successful record at the Court, however, Johnson listened to the damned fools pretty well. At the end of the day, as he surely knew, it is what they think that counts.

For communications lawyers, it is what judges on the U.S. courts of appeals think that often counts. Decisions by the Federal Communications Commission (FCC) generally are driven by policy goals. The FCC's ambition to attain these goals predisposes it to overlook the merits of individual cases and sometimes to neglect fidelity to legal principles. Thus, appeal of an FCC decision often is a party's first and only chance to have a case considered on its individual merits and to have legal arguments impartially examined. The lawyer representing a party in this predicament has no choice; her client will succeed only if she seeks to understand what motivates appellate judges.

Ruggero J. Aldisert's *Winning on Appeal* provides an indispensable foundation for every such effort. Judge Aldisert, one

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1. Letter from Dean Acheson to Harry S. Truman (Oct. 8, 1957), in *AMONG FRIENDS: PERSONAL LETTERS OF DEAN ACHESON* 131 (David S. McLellan & David C. Acheson eds., 1980).

of the nation's most distinguished appellate judges, served on the U.S. Court of Appeals for the Third Circuit from 1968 to 1987. Since taking senior status, he has continued to serve on the Third, Fifth, Ninth, Tenth, and Eleventh Circuits. He has written extensively about the appellate process and the mechanics of legal decisionmaking. Judge Aldisert's insights will both enlighten and entertain appellate litigators from the most junior to the most experienced.

In Parts I and II of his book, Judge Aldisert discusses the appellate process in general, the functions served by briefs and oral argument, and the elements of appellate jurisdiction. In Part III, he examines the parts of the brief, how judges use each part, and how lawyers should approach both drafting briefs and polishing them into final products. Part IV examines the process of preparation and delivery of oral argument. Throughout the book, Judge Aldisert draws on the thoughts of other circuit court judges, state supreme court justices, and judicial law clerks, all of whom he queried in researching the book.

From Judge Aldisert and his sources, readers learn much that is useful to anyone preparing an appellate case. An often unappreciated section of the brief, for example, the summary of argument, seems only a nuisance to the litigator. It must be written out of order, after the argument is completed, making the brief's logical flow more difficult to maintain, and when time is pressing. The summary usually cannot, moreover, do justice to the argument itself. But the litigator who slights the summary does so at her peril. As Judge Aldisert's book makes clear, appellate judges rely heavily on the summaries, often forming preliminary views of their cases after reading them.

For lawyers who take appeals of agency decisions, such as those from the FCC, Judge Aldisert stresses the limited scope of review. Such appeals will not succeed, he points out, based on even the most thorough exposition of the agency's allegedly erroneous findings or its alleged legal mistakes. Rather, briefs and oral arguments must focus quickly and specifically on facts showing that the agency's findings are not supported by substantial evidence, or that its result is arbitrary or capricious.

Judge Aldisert also teaches the importance of brevity at oral argument. Too many times, he notes, lawyers squander their advantage by continuing to talk after they have tentatively persuaded the court, opening doubts in the judges' minds that were not there before. Here, Judge Aldisert teaches what John Johnson knew very well. In an era when oral arguments generally lasted longer than an hour per side, Johnson was famous for his twenty-minute presentations. It was said that "[w]hen he had concluded it was difficult for his adversary to persuade the court that there was anything else worthy to be considered."<sup>2</sup>

*Winning on Appeal* does have some limitations as a treatise on how to win on appeal. It tells the reader how judges decide cases and how lawyers can most effectively participate in this process—vital elements to success on appeal—but it is somewhat weaker in discussing the mechanics of persuasion, how a lawyer inspires the judges to adopt her view of the case. Judge Aldisert understandably tends to view the process from his own perspective. He focuses on lawyers' finished products, their briefs and oral arguments. He is less helpful on the techniques lawyers use in creating those products to make them persuasive.

On some points, in fact, Judge Aldisert's perspective leads him to conclusions that may clash with a lawyer's objective to win the appeal. This conflict is illuminated in the book's opening pages. Judge Aldisert quotes John W. Davis's famous dictum that lawyers must listen to what judges say about appeals just as attentively as an angler would listen to any fish who could tell him how to make a catch.<sup>3</sup> I have always thought, *pace* the great Davis, that an angler should be a little suspicious of any advice given by a fish. Judges are human, and like all of us they want their work to be made easier. But winning on appeal does not always involve making the judges' work easier.

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2. John W. Davis, Address before the Association of the Bar of the City of New York, *quoted in* WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 402 (1973).

3. RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 3 (1992).

Judge Aldisert recommends, for example, that briefs almost never exceed thirty-five pages, and that reply briefs be foregone altogether unless the appellee makes a new argument. In many FCC appeals, these would be questionable strategies. FCC decisions often arise from complex records that cannot adequately be summarized in a few pages. Whereas trial courts typically seek to narrow the legal issues to a single point or two, the FCC typically offers a smorgasbord of rationales, all of which require attention in the brief. Reply briefs are almost always advisable in FCC cases because the FCC's attorneys almost always try to deflect the appellant's arguments with soothing assurances about the agency's reasonableness. The appellant should, if it can, show why these assurances are not responsive to its arguments.

A discerning reader will, however, detect when Judge Aldisert's advice might be influenced by self-interest. Even then, a shrewd lawyer will do her very best to accommodate the advice. And with these small caveats in mind, she will greatly benefit from meticulous study of Judge Aldisert's book.