

# PERSPECTIVE FROM THE BENCH ON THE VALUE OF CLINICAL APPELLATE TRAINING OF LAW STUDENTS

*Ruggero J. Aldisert\**

Because we face a serious problem of adequate representation of defendants in criminal appeals, it is welcome news that the University of Mississippi School of Law and other institutions are now sponsoring Criminal Appeals Clinics. In 1991, when I was researching for the first edition of my book, *Winning On Appeal: Better Briefs and Oral Argument*,<sup>1</sup> I received views of chief justices of over thirty states and chief judges from United States courts of appeals. Coalescing with my own experience of having been a federal appellate judge since 1968, our views on the general quality of briefs were summarized:

- Too long. Too long. Too long.
- Too many issues or points.
- Rudderless; no central theme(s).
- Failure to disclose the equitable heart of the appeal and the legal problem involved.
- Lack of focus.
- Absence of organization.

Writing a convincing brief does not get you “brownie points” or a star on the forehead. You win the case. Writing a

---

\* Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit. The author, Judge Ruggero J. Aldisert, retains the copyright to this article.

<sup>1</sup> See RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* (NITA 2d ed. 2003) (1992). Judge Aldisert has also authored several other books: *OPINION WRITING* (West Publishing) (1990); *THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES* (West Publishing 2d ed. 1996) (1976); *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (NITA 3d ed. 1997) (1988).

bad brief will not send you to sit in the corner of the school room. Instead, you lose the case. It is that simple.

Eleven years later, as I prepared the second edition of *Winning On Appeal*, I solicited comments from nineteen state chief justices, nine United States circuit chief judges and more than a score of other state and federal appellate judges. They made the same dreary complaints that their predecessors expressed more than a decade before. My experience also was unchanged, notwithstanding sitting regularly with the Fifth, Seventh, Ninth and Tenth Circuits, in addition to sitting with the Third Circuit.

I chalk this up to one phenomenon: Too many trial lawyers appear before appellate courts without recognizing that the environment on appeal is a galaxy away from that of the trial courtroom.

On the trial level, the main purpose is to persuade the fact-finder to translate a congeries of testimony and exhibits into rock-bound facts. In these surroundings, the lawyers control the time. Trials are measured in days, weeks and months.

Not so in an appeal. Your principal briefs are limited to about thirty pages or 14,000 words, and ordinarily you only get fifteen minutes to argue your case. Too many lawyers do not realize that more is *not* better on appeal.

What now follows is not a *vade mecum* on how to write a brief, but a sample of observations from one who entered law school in the fall of 1941 and, save for four years with the Marine Corps in World War II, has been involved with law ever since. Today, I am in the rare company of a handful of judges still active after serving on the federal appellate bench for almost forty years. I suggest a small handful of suggestions on how to answer the criticisms of so many appellate judges.

## I. THE ODDS OF REVERSING THE TRIAL COURT

Much is written about the burdens of proof in the trial court, while little is written about the burdens on appeal. A presumption exists on the appellate level that the trial court

committed no reversible error. We see this in those cases where, because of recusals, an appellate court is evenly divided. When this occurs, the judgment of the trial court or the lower appellate court is affirmed.

Using statistics of the United States court of appeals, that generally track any intermediate state appellate court, your chances of getting a reversal are mighty slim pickings.

*United States Courts of Appeals Per Cent Reversed in 2004*

	<i>All Appeals</i>	<i>Criminal Cases</i>
<i>All Circuits</i>	8.7	5.1
D. C. Circuit	16.5	9.2
First Circuit	12.7	12.3
Second Circuit	1.0	0.8
Third Circuit	12.0	8.5
Fourth Circuit	5.9	3.5
Fifth Circuit	6.8	3.3
Sixth Circuit	9.7	4.6
Seven Circuit	14.8	8.3
Eighth Circuit	9.7	8.6
Ninth Circuit	8.5	5.4
Tenth Circuit	9.5	6.0
Eleventh Circuit	9.4	5.7 <sup>2</sup>

The appellant today fights to succeed amid a crushing caseload where about nine out of ten cases are affirmed. In direct criminal appeals, only about one case in twenty is reversed. That is the true reality show that the lay public and trial lawyers do not see.

It all begins with what you write. The written brief has always played an important role in the American appellate

---

<sup>2</sup> Statistics on federal court filings and dispositions are published annually in Director of the Administrative Office of the United States Courts Annual Report, *2004 Annual Report of the Director*, Table B-5 (2004), available at <http://www.uscourts.gov/caseload2004/tables/B05Mar04.pdf>.

court system. By contrast, the English appellate system relies entirely on oral argument. In the American appellate court, oral argument is a fleeting moment. The written brief studied for weeks prior to oral argument is the principal instrument of persuasion.

Putting aside our tradition, the recent astronomical increase in appellate court caseloads emphasizes the importance of briefs and diminishes the grandness of oral arguments. Crushing caseloads have imposed severe restrictions on the time available for oral argument. Notwithstanding many exhortations about the importance of oral argument, in today's appellate environment, you must write to win. Do not depend solely 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. I constantly emphasize that cases are not won at oral argument; they are only lost there. Accordingly, I will concentrate on brief writing in this Foreword.

My experience in riding the circuits has taught me that if an appeal presents an issue of institutional or precedential significance, oral argument will be granted by the court. Various courts have different procedures through which this decision is reached, but judges seem to err on the side of granting oral argument in unworthy cases, rather than denying the opportunity in deserving cases.

What then are the odds that the judges will grant oral argument in your case? The following records of the United States courts of appeals provide some indication:<sup>3</sup>

---

<sup>3</sup> U.S. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS 106-08, Table B-1 (1990); Dir. of the Admin. Office of the U.S. Courts, *2004 Annual Report of the Dir.*, Table B-1 (2004), available at <http://www.uscourts.gov/judiciary2004/dectables/B01dec04.pdf>. Most courts of appeals have screening panels. The percentage argued may differ between those that have screening panels and those that do not. In the Third Circuit, for example, because there is no screening of counseled cases prior to placing cases on the calendar, there will be no oral argument unless a member of the panel requests it.

Circuit	Percentage Argued in 1990	Percentage Argued in 2004
All Circuits	44.97%	30.93%
D. C.	57.40%	48.90%
First	67.58%	49.61%
Second	75.84%	59.52%
Third	27.27%	24.14%
Fourth	37.28%	17.28%
Fifth	30.09%	19.78%
Sixth	49.73%	42.10%
Seventh	56.77%	52.44%
Eighth	42.37%	34.31%
Ninth	49.47%	28.89%
Tenth	36.90%	31.31%
Eleventh	45.03%	19.31%

The comparison of these years illustrates that in the United States courts of appeals a significant development in the judicial process has taken place during the span of a decade and a half. It is a nationwide decline of almost fourteen per cent of cases being argued. There has been a decline in oral argument in every Circuit. On average less than one case in three are now calendared for oral argument. I am informed also by my own experience: judges will no longer vote for oral argument where the law is clear and the application of facts to the law equally plain.

This should be a signal to lawyers that today, more than ever, the appellant's brief takes on a vital and decisive role. You must not only write to persuade the court to reverse the judgment of the district court, but you must meet a threshold burden of demonstrating in your brief that, on the basis of the

proper standard of review, a serious reversible error was committed in the trial court to deserve oral argument. An arguable question of law must be presented.

### Crushing Caseloads Per Appellate Judge

#### 2004 Terminations on the Merits

Because these pages represent a “Perspective from the Bench,” I pause to reflect on the caseload for each active judge on the United States courts of appeals. I will speak of “then” and “now.” In 1969, my first full year as a United States circuit judge, each active judge on my court was responsible for deciding ninety appeals a year. I went to Philadelphia six times a year to hear oral arguments and in each sitting we had to decide fifteen appeals during argument week. The national average was ninety-three appeals per judge per year. That is the “then” part. I turn to the present “now” situation: How many cases must each active United States circuit judge decide each year?

<i>Courts</i>	<i>Cases per Active Judge in 2004</i>
All Circuits	432
D. C. Circuit	156
First Circuit	262
Second Circuit	260
Third Circuit	379
Fourth Circuit	522
Fifth Circuit	727
Sixth Circuit	348
Seventh Circuit	349
Eighth Circuit	399
Ninth Circuit	490
Tenth Circuit	254
Eleventh Circuit	711 <sup>4</sup>

---

<sup>4</sup> Dir. of the Admin. Office of the U.S. Courts, *2004 Annual Report of the*

The national average means that each United States circuit judge must decide 432 appeals each year. After deducting Saturdays and Sundays, each judge must decide more than one case each day. The One-a-Day brand was a great name for vitamins, but I doubt that it is equally great in describing the caseload for United States circuit judges. Whether presenting or defending an appeal, your case moves along an assembly line. Think about it. Statistically speaking, judges have less than one day to give the case full treatment: studying briefs; researching the law; perhaps hearing argument; conferencing with colleagues; making the decision; writing a precedential or not-precedential opinion; studying other writers' opinions; and deciding motions and petitions for rehearing. This does not include attending to correspondence and the telephone. That is over one case a day in the highest federal court to which a litigant has a right to take an appeal.

Thus, your appeal faces extreme competition with other appeals in the assembly line. That is "now," the modern day appellate court and I offer suggestions on how to cope with this.

## II. CRITICISMS OF BRIEFS

In presenting a brief summary of criticisms of the briefs in a view from the bench, I chant the mantra of the appellate judiciary: *Briefs are too long, too long, too long*. The litany of criticisms continues: lack of organization; failure to set forth logical progression; excessive citation; verbiage; and rambling statements of fact. Let me now offer some suggestions on how to avoid some of these criticisms.

---

*Dir.*, Table B-1 (2004), available at <http://www.uscourts.gov/judiciary2004/dectables/B01dec04.pdf>; Federal Court Management Statistics, *U.S. Court of Appeals Judicial Caseload Profile Report* (2004), available at <http://www.uscourts.gov/cgi-bin/cmsa2004.pl> (using the drop-down arrow, click on the corresponding court and follow the link).

A. *The First Steps in Writing a Brief*

Above all, make certain you have allocated sufficient time to prepare the brief. Do not let it play second fiddle to a series of depositions or other works which may be irrelevant in summary judgment or at trial. Writing a good brief takes time—both in planning what to say as well as expressing your argument effectively.

*The first step in the writing process is to make an informal list of the issues that may be included.* This is just an inventory. Here, you simply want to brainstorm the issues. The first step is not to use editorial or jurisprudential judgment. You simply make a list of all possible issues about which you might write. Put down every conceivable argument. This is only the beginning. Unfortunately, too many lawyers consider it the end as well. They make that list and then indiscriminately write a brief based on it. *The second step is weeding out issues that do not have a reasonable probability of prevailing in the appellate court.* This may be the most difficult decision you make in writing the brief. It is certainly the most important one. What to exclude is as important as what to include. Here is the test you will use for inclusion: LIMIT THE SELECTION OF ISSUES TO THOSE THAT MORE PROBABLY THAN NOT WILL ATTRACT THE INTEREST OF THE APPELLATE JUDGES AND GENERATE THEIR SERIOUS CONSIDERATION. Note: I did not say issues that *possibly* will stimulate their interest. I said *probably*, which means more likely than not.

Here, you must trade places with the brief reader in black robes. You must be dispassionate, detached and imperturbable. You must also be intellectually disinterested. Put aside emotions and passions, especially when you are representing the appellant. Carefully analyze the issues to ascertain where there is an *arguable* question of law, not simply an *imaginable* one. Do not expect to win by rolling the dice or throwing a handful of issues at the wall and hoping that some will stick.

A successful trial lawyer may mix the good with the bad and still succeed. In your closing speech to a jury, you can toss in a few arguments designed for emotional or populist purpos-



es, or even one or two that smack of prejudice and superstition. You can avoid logic and get away with it. You can use fallacies of emotion and distraction. In examining and cross-examining a witness, you can permit extraneous matters to seep in and you still might get away with it.

*The game changes when you walk up the appellate ladder.* You cannot afford to *dilute*, or shall I say *pollute*, the good with the bad. One or two perfectly good arguments should not be polluted with superfluous contentions that not only will never get anywhere, but, by their mere presence, will also weaken your good points. This is forensic infection. Bad arguments infect the good.

### B. How Many Issues?

Now I come to my personal litmus test, the number of issues in a brief in *all* civil cases and a goodly number of criminal cases.

THREE:	Presumably arguable.	The lawyer is primo.
FOUR:	Probably arguable points.	The lawyer is primo minus.
FIVE:	Perhaps arguable points.	The lawyer is no longer primo.
SIX:	Probably no arguable points.	The lawyer has not made a favorable initial impression. It's all uphill now.
SEVEN:	Presumptively no arguable points	The lawyer is at an extreme disadvantage.
EIGHT OR MORE:	Strong presumption that no point is worthwhile.	

To be sure, this litmus test is arbitrary, yet veteran appellate judges are virtually unanimous in complaining about the unnecessary prolixity of issues raised in most state and federal appeals. Former Chief Justice Malcolm Lucas of California, for example, advised: “[S]pend time on issues with potential merit. Shotgun approaches that do not distinguish between important and insignificant claims weaken your

presentation.”<sup>5</sup>

### C. *A Caveat in State Criminal Appeals*

But I rush to a big caveat. In taking state direct criminal appeals, you must consider not only your efforts before the present court. You must keep in mind other possible proceedings—state post conviction remedies and federal habeas under 28 U.S.C. § 2254.<sup>6</sup> Two important considerations hang heavy in state criminal appeals not present in other appeals. First, you must avoid being procedurally defaulted for failing to raise an issue, especially a federal constitutional issue. Second, you must be totally conversant with state law setting forth what is necessary to properly raise an issue, specifically the quantum of discussion required on each point.

Because of the necessity of protecting the record for future proceedings, some of the issues you must perforce present may not comport with the advice regarding the limited number of issues and the extent and quality of the discussion in the make-or-break issues in the present appeal. With an eye to the possibility of raising federal constitutional issues in a later Section 2254 proceeding in a United States district court, you have a twofold responsibility: to insure that (1) you have exhausted all federal constitutional issues in the state court system, the Open Sesame to the federal courthouse door; and (2) you were not procedurally defaulted in the state judicial system from raising them there. Every lawyer practicing in a state or federal criminal court must be well-versed in that branch of federal constitutional law governing criminal law proceedings—from the start of a police investigation to filing a brief in the appellate courts.

---

<sup>5</sup> ALDISERT, WINNING ON APPEAL, *supra* note 1, at 123 (quoting former Chief Justice Malcolm Lucas).

<sup>6</sup> 28 U.S.C. § 2254 (2000).

#### D. *The First Impression*

You have limited the arguments to the points that are generally arguable issues. Your task now is to make a good first impression. In writing a brief, you do not 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. This lawyer has something here." That is the effect you want to make. 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]<sup>7</sup> detector.'" In your next brief, the choice is yours.

#### E. *Arrangement of Issues*

Lead with your strongest and most important points. Always lead from a position of maximum strength. 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 calculated to persuade the court to your benefit? You want the point to be objectively considered by the court. It is your baby, but do not look at the baby through rose colored glasses. Look at your baby with all its warts and blemishes.

The law does change, but it changes in increments. You are not going to get an intermediate court of appeals to overrule precedent set by the highest court in the judicial hierarchy. Listen to Myron Bright of the United States Court of Appeals for the Eighth Circuit: "If an appellant can't win on the strength of the strongest claim or claims, he stands little chance of winning a reversal on the basis of weaker claims."<sup>8</sup> The court needs to know just where the heart of the appeal

---

<sup>7</sup> See ALDISERT, WINNING ON APPEAL, *supra* note 1, at 121. Hemingway used another four-letter word. *See id.*

<sup>8</sup> Myron H. Bright, *Appellate Briefwriting: Some "Golden" Rules*, 17 CREIGHTON L. REV. 1069, 1071 (1983).

lies. Distracting attention from arguable issues never helps an appellant's cause.

*F. State the Issue Narrowly*

State the issue as narrowly as possible. The objective of appellate advocacy is to win the particular appeal before the court. Do not ask the court to make a decision with molar consequences when all you need is a molecular effect. There is a difference between succeeding as an advocate in a particular case and mounting a white charger to expound a greater cause in which you passionately believe. The law develops incrementally. There are few sea changes. Do not expect the court to change the law drastically in a single case. Write as narrowly as possible in order to win this appeal only.

*G. The Statement of Facts*

In selecting the facts, the brief writer walks a very tight rope. This job requires consummate skill because you must constantly maintain a balance between being scrupulously accurate and putting the most favorable spin on your version of what happened. Do not steal the facts. Your opponent's brief (or the judge) will expose you. The exceptional advocate weighs these conflicting duties and conveys the impression that his or her client deserves to win.

It is essential that the statement of facts demand and retain the reader's attention. Do not bore the judge. Do not make the narrative difficult to follow. Do not mimic the style of an IRS regulation. Come closer to John Grisham than Beltway bureaucrats. Catherine Drinker Bowen kept a sign posted above her desk to discipline herself as she wrote her Books: "Will the Reader Turn the Page?"

Consider how judges study briefs. Very seldom does the judge read one brief all the way through and then read the other brief completely. What I usually do is first read the appellant's statement of issues to learn what the case is all about and get the flavor of the case. I want to know the per-

imeters of the judicial inquiry. Then I read that portion of the trial court's opinion dealing with those issues. I do not read the whole opinion, merely the facts and that portion of the opinion discussing the issues presented on appeal.

Next, I read the appellant's summary of the argument, and then that of the appellee. And I do all of that before I read the statement of facts in the appellant's brief. I have already looked at the fact finder's rendition of the facts. I know the summary of both arguments. That forms the background before I start reading the facts.

From all this comes one direction to brief writing that absolutely must be followed: *Never write your statement of facts until you have written the statement of issues.* This is an absolute imperative. It is your protection against writing a long-winded, rambling account of facts that will immediately turn off the judge. Keep in mind two concepts that many law clerks call "Aldisertisms:"

*Learn the difference between that which is important and that which is merely interesting.*

*It isn't unconstitutional to be interesting.*

#### *H. Summary of the Argument*

The summary is critical because it gives the reader a concise preview of the argument and, therefore, should be crafted to allow the judge to form a mental outline of his or her pre-argument memorandum. Preparing an effective summary may be the brief writer's most challenging and important task. Former Mississippi Supreme Court Justice James L. Robertson once commented:

I think the most important part of the brief is the Summary of the Argument. I invariably read it first. It is almost like the opening statement in a trial. From clear and plausible argument summary, I often get an inclination to affirm or reverse that rises almost to the dignity of a (psychologically) rebuttable presumption.

...

I do not mean to denigrate the importance of a fully developed and technically sound argument. But I read the subsequent argument in a "show me" frame of mind, testing whether it confirms my impression from the summary of the argument.<sup>9</sup>

Professor David W. Burcham, dean of Loyola Law School in Los Angeles, was one of my former clerks who went on to clerk for Justice Byron White and to practice law with a large Los Angeles firm before donning academic robes. He offers these observations: A brief writer should understand that the summary of argument will likely create the first, and perhaps last, impression of the Court toward the legal merits of the client's case. It should be the structural centerpiece of the entire brief.<sup>10</sup>

Finally, I turn to the heart of your brief: the discussion of the issues or points you raise under the rubric of "Statement of Issues."

### *I. Issue-by-Issue Discussion*

You proceed to the argument in a highly compartmentalized, issue-by-issue format. This is not the time for cross-pollination. The statement of your issue should be the argument heading. Use simple declarative sentences; state what you want the court to accept. Tell us this in a simple sentence. You do not have to use a "whether" statement or an interrogatory. If you want to move and influence the court to your way of thinking, set forth the point you want the court to accept in the statement of issues as well as the topic sentence in each one of your sections. Do not be a "whether" man or woman.

FIRST CRITERION: Do not wander, ramble, digress, or become unglued.

SECOND CRITERION: Incorporate the proper standard of review in the topic sentences introducing each point. You must

---

<sup>9</sup> James L. Robertson, *Reality on Appeal*, 17 LITIG. 3, 5 (1990).

<sup>10</sup> Series of Informal Telephone Discussions with David W. Burcham, Dean, Loyola Law School (unspecified date).

set forth and remind the reader of the standard of review for each issue presented.

THIRD CRITERION: Determine whether the issues are independent of each other. "If you find on point one, you will then reverse, and it's not necessary to decide point two." The ideal brief contains several independent issues, so that if the court does not agree with you on the first issue, it might agree with you on your second or third. The tough road to hoe is when your points are interrelated, where the conclusion of the syllogism of your first point becomes the major premise for your second point. And the conclusion of your second point becomes the major premise of the third and so on. That's the difficult brief, because if you get whacked on your first point, the court can't go to your second or third point because they are logically prohibited. For example, in a *Miranda* issue, you must prove that the defendant was in custody. Without this proof, every other argument fails. Analyze your issues. Try to avoid an interdependent format by making your issues as independent of each other as possible.

FOURTH CRITERION: Always consider the consequences of each point you make. In considering how the law will affect other cases, appellate courts are always anxious not only about in personam justice between the parties, but also in rem justice. Always contemplate what precedential and jurisprudential institutional results will be forthcoming if the court accepts the conclusion you urge in your brief.

Much advice abounds on how to craft the discussion in your issues. I will now address only one critical part of that undertaking. For a more comprehensive discussion, I refer you to my book, *Winning On Appeal: Better Briefs and Oral Argument*.<sup>11</sup>

### *J. The Required Logical Form for Each Issue*

Although it can be said that formal logic is not an end-in-view of law, it is one of the important means to those ends,

---

<sup>11</sup> ALDISERT, *supra* note 1.

perhaps the most important. Logical form and logical reasoning are critical in the judicial process. We all know the "why" of logic in the law. Justice Felix Frankfurter said it best on his retirement after twenty-three years on the Supreme Court: "[F]ragile as reason is and limited as law is as the expression of the institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."<sup>12</sup>

The common law tradition demands respect for logical form in our reasoning. Without it, we are denied justification for arguments before a court. Although logical form is only a means, it forms the most important tools of argument. Logical rules are the implements of persuasion. They form the imprimatur that imparts legitimacy and respect. They are the acids that wash away obscurity in your own argument and expose obfuscation in your opponent's argument.

Logical argument is a means to test the soundness of a purported conclusion. We do this by following well-established precepts of logical order in a deliberate and intentional fashion. Brief writers must follow a thinking process that emancipates us from impulsive conclusions or arguments solely supported by strongly felt emotions or superstitions. John Dewey's advice to teachers in generations past is still vital and important today: Reflective thought "converts action that is merely appetitive, blind, and impulsive into intelligent action."<sup>13</sup>

The purpose of an appellate brief is to persuade a group of highly trained legal professionals. When an argument is presented to judges, it must employ inductive or deductive reasoning and be free from both formal and material fallacies. I now turn to a quick summary of concepts to be employed by brief writers.<sup>14</sup>

---

<sup>12</sup> Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

<sup>13</sup> JOHN DEWEY, *HOW WE THINK* 17 (Dover Publications 2d ed. 1933) (1910).

<sup>14</sup> I set forth this thesis in detail in my book, *LOGIC FOR LAWYERS*, by analyzing logic precepts used in the law and illustrating these precepts with excerpts from cases. The reader is directed to that book for a comprehensive study of the topic discussed here. See ALDISERT, *LOGIC FOR LAWYERS*, *supra* note 1.



K. *The Required Logical Structure of Each Issue*

We now come to the make-or-break part of your brief. It is a formal argument containing a group of propositions in which one follows from the others. An argument is not merely a collection of propositions, but an annunciation with a particular, rather formal structure.

The purpose of a brief is to persuade the court to accept the conclusion you present in the particular issue. You must not do this "in the nude," using the felicitous expression of Loyola Dean David W. Burcham.<sup>15</sup> Do not tell us merely the conclusion you want us to accept. We must also receive 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."<sup>16</sup> A rule of law promulgated by a court is valid only to the extent that sound reasoning supports it.

Because reason must always support the conclusion presented for acceptance in the brief, we turn to some basic concepts of legal reasoning that brief writers must use.

L. *Concepts of Reasonable, Reasoning, Reasons, Reason*<sup>17</sup>

It is necessary to remind ourselves of some elementary, yet indispensable, concepts of logic for lawyers. Involved in the judicial process is an interrelationship among four terms that sound alike, but whose meanings diverge in the decisional process: "reasonable," "reasoning," "reasons" and "reason."

---

<sup>15</sup> See Burcham, *supra* note 10.

<sup>16</sup> Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

<sup>17</sup> This section sets forth discussion that I first presented in *Aylett v. Secretary of Housing and Urban Dev.*, 54 F.3d 1560 (10th Cir. 1995). I have included this material without quotation marks or citations throughout, although much of the text is directly quoted from *Aylett*. See *Aylett*, 54 F.3d at 1567-68.

### 1. Reasonable

The court's acceptance, interpretation, and application of a suggested legal precept in the brief involves a value judgment that is justifiable because the court is convinced that its decision is fair, just, sound, and sensible and, therefore, "reasonable."

One judge may believe that it is "reasonable" to maintain the law in harmony with existing circumstances and precedents and accede to the magnetic appeal of consistency in the law; another may assert that the issue should be considered pragmatically and will respond only to its practical consequences. What is "reasonable" in given circumstances may permit endless differences of opinion. This is how it should be. The inevitable varying views found in multi-judge reviewing courts is one of the most vitalizing traditions animating the growth of the law.

### 2. Reasoning

Determining what is "reasonable" is closely related to the overarching process we call "reasoning," defined as a progression of thought based upon the logical relation between truths. Logical thought is reflective thinking, which may be understood as an "operation in which present facts suggest other facts (or truths) in such a way as to induce belief in what is suggested on the ground of real relation in the things themselves, a relation between what suggests and what is suggested."<sup>18</sup> Reasoning involves recognizing a "link in actual things, that makes one thing the ground, warrant, evidence, for believing in something else."<sup>19</sup> The ability to adjudicate cases depends upon the power to see logical connections between cases and to recognize similarities and dissimilarities in the compared material facts. This means solving a problem by pondering a given set of facts to perceive the relationship among those facts and those in similar cases, thus reaching a logical conclusion.

---

<sup>18</sup> Dewey, *supra* note 13, at 12 (emphasis omitted).

<sup>19</sup> *Id.*

### 3. Reasons

To do this we resort to “reasons.” These are the various propositions utilized in the reasoning process. In the judicial review process, deductive reasoning is the centerpiece, and “reasons” constitute the major and minor premises of the categorical syllogism that lead to the final proposition, the conclusion.

### 4. Reason

The item “reason” is often used as a shorthand expression to describe the validity or cogency of “reasoning” and the truth contained in factual components of “reasons.” Applying “reasonableness” to “reason” is an ever-recurring scenario.

Trial judges and reviewing judges always appraise a specific argument from two separate, but related, considerations: (1) from the sole vantage-point of examining the reasoning in the argument to determine whether, in the language of the logician, it is valid or cogent, without at the same time troubling over the truth and falsity of its premises; and (2) from the sole vantage-point of the truth and falsity of its premises, without troubling over the validity or cogency of its reasoning.

Whenever judges appraise an argument to determine whether they ought to accept its conclusion, they perform both of these functions. That is why much time is expended by judges and their law clerks in research prior to the oral argument or the decision-making conference of the judges. Arguments that have both valid or cogent reasoning and true premises are sound arguments. An argument fails to be sound if either: (a) the reasoning it employs from premises to conclusion is not acceptable; or (b) one or more of its premises is false.<sup>20</sup>

#### *M. Introduction to Deductive Reasoning*

Deductive reasoning in the law is a mental operation that a student, lawyer, or judge must employ every working day of

---

<sup>20</sup> See *Aylett*, 54 F.3d at 1567-68.

his or her life. Formal deductive logic is an act of the mind in which, from the relation of two propositions to each other, we infer, that is we understand and affirm, a third proposition. In deductive reasoning, the two propositions which imply the third proposition, the conclusion, are called premises. The broad proposition that forms the starting point of deduction is called the major premise; the second proposition is called the minor premise. They have these titles because the major premise represents the class; the minor premise represents something or someone included in the class. In appellate advocacy, the subject of the minor premise, what we call the minor term, is the facts found by the fact-finder.

The major premise of the issue usually takes the form of a fresh statute or the rule of law of the court, enunciated in a previous case. This is the precept that should appear as the topic sentence of the discussion of each issue. Your major premise is a detailed legal consequence attached to a detailed set of facts that has previously been promulgated by the Court as ruling case law, and therefore a legitimate precedent.<sup>21</sup> This is exemplified by the traditional major premise in the categorical deductive syllogism: ALL MEN ARE MORTAL. If the major premise is not true, your entire argument fails. All is lost. All the facts you set forth and all citations that follow will not help you.

Your minor premise consists of the facts found by the fact-finder. Your purpose is to show that these previously stated facts come within the broad class of facts subsumed in the major premise. The classic example is: SOCRATES IS A MAN. Your conclusion then will logically follow—SOCRATES IS MORTAL. The bottom line: Be absolutely certain that you accurately state the rule of law which is a detailed legal consequence attached to a detailed set of facts constituting the rule of law that forms the major premise and anchors your entire deductive argument.

---

<sup>21</sup> A caveat: As discussed *infra*, sometimes the starting point is not clear, and the brief writer must "find" the law by using inductive generalization to fashion the major premise from a series of rules of law from a series of cases.

*N. Deductive Reasoning in the Discussion of Your Issue*

I now turn to the major logical framework of the issue you discuss. Although other aspects of logic may be involved in some cases, you will principally utilize what the logicians describe as the categorical deductive syllogism. By this time, you know it by its familiar form:

Major Premise: All men are mortal.

Minor Premise: Socrates is a man.

Conclusion: Socrates is a mortal.

Apply this syllogistic format to the opinion of Judge Cardozo in *MacPherson v. Buick Motor Car Co.*<sup>22</sup>

Major Premise: Any manufacturer, who negligently constructs an article that may be inherently dangerous to life and limb when so constructed, is liable in damages for the injuries resulting.

Minor Premise: A manufacturer who constructs an automobile in which the spokes on a wheel are defective is such a manufacturer.

Conclusion: Therefore, a manufacturer who constructs an automobile in which the spokes on a wheel are defective is liable in damages for the injuries resulting.

The classic means of deductive reasoning is the *sylogism*. Aristotle first formulated its theory and offered this definition: "A syllogism is discourse in which, certain things being stated, something other than what is stated follows of necessity from their being so."<sup>23</sup> He added, "I mean by the last phrase that they produce the consequence, and by this, that no further term is required from without to make the consequence neces-

---

<sup>22</sup> 111 N.E. 1050 (1960).

<sup>23</sup> L.S. STEBBING, A MODERN INTRODUCTION TO LOGIC 81 (6th Ed. 1948) (quoting Aristotle in *Anal. Priora* 24B).

sary.”<sup>24</sup>

From this concept we can say that a syllogism is a form of implication in which two propositions jointly imply a third. A syllogism must appear in one form or another in almost every issue you discuss in your brief. If you do not supply a syllogism and argue only the conclusions, be prepared to answer the question put to you in oral argument by an appellate judge: “Counsel, you are urging that we accept this proposition. Assume that I agree with you. Will you please state for me the premises in syllogism that I must use in writing the opinion in your favor.” If you are unable to do this, you are committing forensic suicide.

*An argument that is correctly reasoned may be wrong, but an argument that is incorrectly reasoned can never be right.*

#### *O. Introduction to Inductive Reasoning*

Deductive reasoning and adherence to the Socrates-is-a-man type of syllogism is only one of the major components of the common law logic tradition. Other forms of reasoning may be utilized, especially inductive reasoning. In law logic, it is often used to fashion either the major or minor premise of the deductive syllogism.

In logical analysis, statute, specific constitutional provision, or ruling case law qualifies as the controlling major premise. It is the law of the case in which the facts (appearing in the minor premise) will be compared, so as to reach a decision (the conclusion). Where no clear rule of law is apparent, however, it is necessary, using Lord Diplock’s phrase, to draw upon “the cumulative experience of the judiciary”<sup>25</sup> to fashion a proper major premise from existing rules of law found in an assortment of many cases as the specific holdings of those cases. This is done by inductive reasoning, that is, reasoning from particulars to the general.

---

<sup>24</sup> *Id.*

<sup>25</sup> See *United States v. Villegas*, 911 F.2d 623, 629 (11th Cir. 1990) (paraphrasing Lord Diplock).

Deductive reasoning moves by inference from the more general to the less general to the particular. Inductive reasoning moves in an opposite form—from particulars to the general or from the particular to the particular.

*P. Inductive Generalization*

Let us start with an example of inductive reasoning from particulars to the general. We call it inductive generalization, and use again as our example, the All-men-are-mortal major premise. In its general form, this premise has been induced from a process of counting millions of particulars to create a general statement. The world has been inhabited by millions of men. We know all these men to be mortal. Thus, in the inductive syllogism we are able to reach by inductive generalization what becomes the major premise: All men are mortal.

It should be emphasized that the truth of the conclusion drawn from this inductive process is not guaranteed, not even when all the premises are true and no matter how numerous they are. We always run the risk of the informal fallacy of hasty generalization. All we can say, however, is that the creation of a major premise in law by the technique of inductive enumeration, although not guaranteed to produce an absolute truth, does produce a conclusion that is more likely true than not. This process permits the induced general conclusion to be modified as new cases are decided. Formulating a generalization, that is, enumerating a series of tight holdings of cases to create a generalized legal precept, is at best a logic of probabilities. We accept the result, not because it is an absolute truth, like a proposition in mathematics, but because it gives our results a certain hue of credibility. The process is designed to yield workable and tested premises, rather than absolute truths.

*Q. Analogy*

Analogy is that part of inductive reasoning in which we move from one particular to another particular. A proper analogy should identify the number of respects in which the fact

scenarios in the compared cases resemble one another (positive analogies) and the number of respects in which they differ (negative analogies). Unlike the method of induced generalization by enumeration, numbers do not count in the method of analogy. Instead, what is important is relevancy. And by this I mean the extent to which the compared facts resemble, or differ from, one another in relevant respects.

John Stuart Mill asked the question: "Why is a single instance, in some cases, sufficient for a complete induction, while in others myriads of concurring instances, without a single exception known or presumed, go such a very little way towards establishing an universal proposition? Whoever can answer this question knows more of the philosophy of logic than the wisest of the ancients, and has solved the problem of induction."<sup>26</sup>

Judge Cardozo estimated that at least nine-tenths of appellate cases "could not, with semblance of reason, be decided in any way but one," because "the law and its application alike are plain," or "the rule of law is certain, and the application alone doubtful."<sup>27</sup> This means that applying the process of analogy, the resemblances in the facts in the compared cases are materially similar or identical. I agree that this is a conservative estimate and is not guesswork. Recall again the reversal statistics set forth heretofore.

The case most often presenting an arguable question for decision in the United States Court of Appeals comes within Cardozo's second category, where the law is certain but the application doubtful. Where there is an absolute right of appeal to an appellate court, Cardozo's first two categories form the largest number of counseled appeals. To determine whether the application of facts found by the fact-finder apply to the rule of law, we must perforce compare those facts to those contained in the governing rule of law, and in doing this, we resort to tenets of inductive analogy.

---

<sup>26</sup> JOHN STUART MILL, *A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE* 206 (8th ed. 1916).

<sup>27</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 164 (1921).



Assume this as the controlling rule of law: Where all facts A, B, and C are present, legal consequence X follows. Assume now that in the case at bar, the facts D, E, and F were found by the fact finder at trial and D, E, and F are materially similar or identical with facts A, B and C. Whether rule X should be attached to facts D, E, and F depends on whether they are materially similar or identical to facts A, B and C.

### III. CONCLUSION

I believe that the statistics I have set forth above paint a true picture of today's environment in appellate advocacy. No advocacy program will be complete without a recognition of these stark facts of life in our appellate courts. In these pages I have not attempted comprehensive suggestions for those who participate in the Clinical Appeals Clinics, as students as well as mentors, but I have presented these few suggestions as advice along the way from one who has given much thought to our problems and has had the rare opportunity to have sat regularly in so many different United States Courts of Appeals.

I congratulate Professor Phillip W. Broadhead, Clinical Professor and Director of Criminal Appeals Clinic, National Center for Justice and the Rule of Law at the University of Mississippi. I have enjoyed our telephone conversations that have extended over a year and am honored to participate in this symposium. I congratulate also the professors who are administering similar programs at their universities. You all have made meaningful contributions to the judicial process. You all strike the important chord—to extend optimal training in law school for students to participate in criminal cases. In so doing, you are making a magnificent contribution to one of the highest objectives of our profession—to give maximum protection to those whose lives and liberties are sorely threatened.

On behalf of the state and federal judiciary I thank you for your pioneering efforts.

What I have set forth in the foregoing represents advice of a contemporary. As early as 1851, however, the famed constitutional scholar and prolific writer on the law, Joseph Story, Justice of the United States Supreme Court and Dane Profes-

sor of Law at Harvard, encapsulated all of this in rhyme.

You wish the court to hear, and listen too?  
Then speak with point, be brief, be close, be true.  
Cite well your cases; let them be in point;  
Not learned rubbish, dark, and out of joint;  
And be your reasoning clear, and closely made,  
Free from false taste, and verbiage, and parade.  
Stuff not your speech with every sort of law,  
Give us the grain, and throw away the straw.  
Whoe'er in law desires to win his cause,  
Must speak with point, not measure our "wise saws,"  
Must make his learning apt, his reasoning clear,  
Pregnant in manner, but in style severe;  
But never drawl, nor spin the thread so fine,  
That all becomes an evanescent line.<sup>28</sup>

---

<sup>28</sup> JOSEPH STORY, LIFE AND LETTERS II 89-90 (William Wetmore Story, ed. 1851), reprinted in John M. Greaney, *Power of the Pen*, 38 TRIAL 48, 54 (July 2002).