

BRIEF WRITING
and
ORAL ARGUMENT

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BRIEF WRITING
and
ORAL ARGUMENT

FOREWORD

by

The Hon. J. CLIFFORD WALLACE

*Judge, United States Court of Appeals
for the Ninth Circuit*

With the publication of its fifth edition, this landmark work by Chief Judge Re will be even more effective in satisfying an urgent need in both the initial and continuing stages of legal education. The lack of adequate written and oral advocacy in the appellate courts of our nation remains a pressing concern in the 1980's. A renewed focus on the importance of effective advocacy in our legal system gives a glimmer of hope; many, including this writer, have spoken out on the need to improve. The spotlight, however, is ordinarily upon the trial court. Certainly improvement in advocacy at that level must never be minimized. Nonetheless, it should not be forgotten that it is at the appellate level where a litigant has the last opportunity for vindication of his or her rights, and it is there where, through the doctrine of *stare decisis*, law is established for generations in the future. Litigation in an appellate court is of transcendent importance because the precedent that evolves governs all the citizens in the court's jurisdiction, not merely the litigants. The skill, foresight and industry of effective advocates provide the appellate court with the precedent and perception it needs to arrive at wise and judicious decisions. Thus, advocacy of the highest quality is also needed at the appellate level.

Appellate courts must be able to rely on the adversary system—on the arguments of opposing counsel within the bounds of ethical considerations—for the bulk of the education necessary to decide an appeal. The traditional role of the advocate has been to provide valuable assistance to the court by properly framing and analyzing the issues that must be decided, and providing the appropriate precedents. This help is vitally needed if appellate courts are to maintain their proper function and effectively carry out their role in the administration of justice. This is especially true now when appellate courts are required to decide a vastly increased number of appeals due to the litigation explosion. To the extent that success is achieved in preparing and motivating attorneys to carry out that important task, the decisionmaking process is more effective, and litigants, in particular, and citizens, in general, are benefited.

The law school of course should play an important role in providing the necessary attention to advocacy. However, it has often been observed that precious little time is given to appellate advocacy in the law school curriculum. Thus, with little formal training, the practitioner is left on his or her own to carry out this important function in the administration of justice.

The fault for this lack of formal training cannot fairly be placed entirely on the law schools and their administrators. Only from a wide breadth of practical experience can teachers gain the necessary skills to pass on to law students. While law school faculties are eminently qualified to do many things, it is often difficult to bring appellate advocacy experience into the law school setting. Here Edward Re's book is of great value. As a distinguished professor of law for over a quarter century, Professor Re understands the nature of the challenging task of teaching this subject. As a consequence, his book is bottomed on sound pedagogical and legal foundations. As a judge for more than a decade and as Chief Judge of the United States Court of International Trade, Judge Re understands the practical role of advocacy and is keenly aware of the communicative and analytical skills which are essential to the proper functioning of the adversary system. His courtroom experience has confirmed his conviction of the need to emphasize those aspects of written and oral advocacy which judges often find lacking.

Not only can this text be used in law schools, but practitioners will find it of great assistance in exploring and understanding the appellate process. The less experienced advocate will quickly find help in the areas of brief writing, oral argument, and appellate review. The experienced practitioner will have easy access to both theoretical strategy and time-tested techniques for strengthening his or her skills.

Each edition of this book represents an improvement over the last. The improvements in this edition come largely from the special background of its author. By actively combining academic and judicial experience, Judge Re provides a truly unique work to assist in this worthwhile area of education. Judge Re's recent contribution has brought *Brief Writing and Oral Argument* to a new plateau. One can only hope that he will continue to assist the law schools, the bench, and the bar with his valuable insights.

FOREWORD*

by

WHITNEY NORTH SEYMOUR

*Former President
American Bar Association*

The development of this excellent book has now proceeded for more than 21 years and it can properly be viewed as having reached full maturity. Each edition has added valuable new qualities and the present edition also contains new contributions. Among others, it makes readily available the portions of the Code of Professional Responsibility which particularly affect the advocate. Starting as a book primarily intended to help law students in their moot court work, where there were few practical guides, it has become as well a valuable guide to the practitioner who acts as advocate in a trial or appellate court.

The development of the book parallels the unfolding of the author's interesting career. Originally written when he was devoting much of his time to teaching at St. John's University Law School, where he observed the need for such a guide for law students, later editions have increasingly served the needs of the practicing bar as his own observations of those needs have developed. The Third Edition was brought out when he was the distinguished Chairman of the Foreign Claims Settlement Commission of the United States and responded to the practitioner's needs as they could be seen from high posts in government. Now he has been drafted for the bench and as the Chief Judge of the United States Court of International Trade, designated from time to time to sit in United States District Courts and the Courts of Appeals, he has observed from a new angle the need for a comprehensive guide to written and oral advocacy in important trial and appellate courts. Even if fate beckons him to other tasks, already this varied background has taught him what needs of the advocate must be met and he has met them very well.

This new edition comes when advocacy is buffeted in many ways, from many directions. The need for good advocacy is clear and the shortage of good advocates is the subject of frequent comment. The adversary system is obviously the genius which makes the judicial system work and, indeed, the entire governmental system works best when all points of view are fairly and properly presented. Experienced judges know and, indeed, many proclaim that the quality of their performance depends heavily on the skill and breadth of the advocacy which they can consider in reaching their judgments. And the need for skilled advocates is not just static.

*This foreword updates the foreword written by Mr. Seymour for the Fourth Edition of this manual.

With the increased emphasis on criminal law and the right to counsel there, great new fields for advocacy have developed and everyone recognizes that there is a tragic shortage of trained advocates to take up the slack. Where formerly law schools rather assumed that advocacy was an easily acquired skill, many now recognize the need for teaching it and for exposing students to clinical materials and experiences where advocacy plays an important role. Paradoxically, the need for better advocacy and for more advocates is paralleled by what sometimes seems to amount almost to an allergy to oral argument in some appellate courts. This takes the form of vigorous encouragement of submissions in some courts, along with sharp reduction in the time allowed for oral argument except by special leave, which is grudgingly granted. Of course, some of this attitude is attributable to the crushing burdens of increased business on some courts, but I fear that more is due to the decline in the character of advocacy and increase in the illusion that judges can do as well or better without what they regard as wasting time on oral argument. In my view, this is a deplorable result; it sacrifices some of the values of the adversary system, and the bar should do all it can to reverse the tide. Those who use this book and profit by its use can help—for only better advocacy will convert some judges to its importance.

Business in the English courts is increasing too, though not nearly so fast. Largely because the quality of advocacy by the English barrister remains of a high order and the judges' experience of good advocacy enables them to take full advantage of it, the English show no signs of giving up the benefits of oral argument or turning to briefs alone for counsel's views. We should benefit by this experience. We should, of course, help to encourage well-written briefs, for they supplement and support good oral argument, and this book contains much excellent advice on that subject. We should also actively recruit talented young lawyers to specialize in advocacy (or at least do it well when they must act as advocates) and this book will be extremely valuable to them. And we should help keep the experienced, older advocates in the courtroom to remind the young lawyers what good advocacy is, for observation and experience, as the writer recognizes, must go hand in hand with the guidance which this manual provides.

Perhaps one who has spent almost fifty years of his professional life as an advocate may be forgiven a few parting words. There is no thrill like that which comes from the sense of a case well tried or an appeal well argued. There is hardly any congenial atmosphere to equal the feeling in a courtroom when the judge knows and shows that he knows that the lawyers are doing their best and that he can trust absolutely what they say. One of the great virtues of this book

is to emphasize the standards which insure that such trust can be justified. The spirit of brotherhood between such lawyers and with judges who appreciate the traditions of the Bar is one of the great joys and rewards of the profession. Finally, in these days when retirement systems often drain off talents in education, industry and the judiciary much too early, it is pleasant to recall the story about John W. Davis, surely the greatest advocate and one of the most delightful companions of my time. Judge Re obviously shares the same high opinion of him for he frequently cites his fine lecture, "The Argument of an Appeal." When, at 83, Mr. Davis had just argued a case in the Supreme Court, a reporter asked him how it felt to argue a case at his age, and he replied: "I was glad to find that there's still a tune in the old violin."

This book will help to provide the right pitch for the tune, whatever the age of the instrument.

PREFACE TO FIFTH EDITION

In the Preface to the First Edition of this manual, published more than thirty years ago, it was the author's stated purpose to provide a simple text, a "standing introduction" to brief writing and oral argument. It was written because of the author's firm belief that the principles of legal writing in general, and effective brief writing and oral argument in particular, can be taught and can be learned.

Since the book was intended as an introduction to advocacy, it set forth the basic principles which underlie an effective brief and a convincing oral argument. For the benefit of the reader who wished a deeper understanding, it contained generous references to the available literature on the subjects covered. To enhance the usefulness of the manual it also included a quantity of examples and forms.

The book has proven useful to both law students and lawyers. It has been used by law students as a text in legal writing classes as well as in the preparation for law school moot court practice. It has also been used by lawyers who, in the practice of law, in addition to opinion letters and memoranda of law, must write many briefs, whether designed for the trial or appeal of cases.

Subsequent editions have afforded the author the opportunity to reorganize the order of presentation, as well as to add materials that have enhanced the utility of the book for both lawyers and law students. While the discussion of the essentials of legal writing, literary style, legal reasoning, legal authorities and the analysis of cases may be of primary benefit to the law student, it will also serve as a helpful reminder to the practicing attorney. At the same time, the extensive treatment of matters of procedure and practice, which has given the manual the utility of a practitioner's desk book, will afford the law student an awareness of the practical aspects of the work of the advocate.

The purpose of this edition is to improve the utility of the manual by updating all of the materials, and by incorporating, in substance or by reference, the current literature on the subject. Although the fundamental principles of advocacy remain constant, much of the text has been rewritten and new areas have been included. Some of the modifications and additions in the text were dictated by the author's personal experience as a judge; others reflect the contributions of some of the ablest lawyers and judges who are experts in the trial and appeal of cases.

Although the manual is primarily devoted to the prosecution of an appeal and appellate brief writing, materials have been included which will assist the reader in drafting all types of legal

briefs and memoranda. In addition to the principles of effective legal writing, the reader is introduced to the trial brief for counsel, the trial brief for the court, the office memorandum of law, and the memorandum of law for the court. The Appendix contains forms which are illustrative of office memoranda, trial briefs, trial memoranda and opinion letters, as well as model appellate briefs. Additionally, the Appendix sets forth the complete text of the Rules of the Supreme Court of the United States,¹ the Federal Rules of Appellate Procedure, and pertinent rules of representative state courts.

In recognition of the importance of correct, concise and complete citation in all forms of legal writing, the author has retained in this edition the chapter on "Citation of Authorities." The instructions and sample citations contained in that chapter comprise an abridged citator and cover most of the citation problems likely to be encountered when writing a brief or memorandum of law.

All of the materials included in this book are designed to teach skills that are necessary for the professional competence of the advocate. Appellate judges will readily detect inadequate research, faulty legal reasoning, bad grammar or citation form, and are particularly sensitive to violations of applicable court rules. Judges can sense, almost at once, whether counsel has prepared a brief and oral argument designed to be helpful to the court in deciding the question presented on the appeal. Indeed, a brief will only be as effective as it is helpful to the court.

As in previous editions, the Fifth Edition highlights professional responsibility and the prominent role of the lawyer in the adversary system. As stated elsewhere:

The lawyer, by applying his professional skills, will succeed in accomplishing several goals. First, he will discharge his duty to his client. Second, he will help the judge or other adjudicator make a well-reasoned and well-written decision. Third, he will contribute to the substantive aspects of that opinion or decision. Fourth, he will play a vital role in giving impetus and guidance to the law itself. Indeed, the process proves that the lawyer, by the competent practice of his profession, is also truly a lawmaker.²

It is hoped that this manual will help the reader to attain the professional expertise necessary to achieve these worthy goals.

EDWARD D. RE

New York City
December 8, 1982

¹ Effective June 30, 1980.

² Re, *The Lawyer as a Lawmaker*, 52 A.B.A.J. 159, 160 (1966).

*"In deciding whether to appeal or not, and what questions to raise, as well as in arguing his case, counsel will do well to bear in mind the words of Mr. Justice Hughes * * * 'No lawyer can render a higher service either to his client or to the Court than in the preparation of a complete, candid, intellectual, honest statement and argument of his case to the Court that he addresses. Sophistries, evasions, and the tricks of the petti-fogger are indefensible from an ethical standpoint, and are of less avail in winning a case than some imagine.'" Moorfield Storey, The Reform of Legal Procedure, Yale University Press, New Haven, Connecticut (1912).*

"The process of deciding cases on appeal involves the joint efforts of counsel and the court. It is only when each branch of the profession performs its function properly that justice can be administered to the satisfaction of both the litigants and society and a body of decisions developed that will be a credit to the bar, the courts and the state." Chief Justice Vanderbilt in *In re Greenberg*, 15 N.J. 132, 104 A. 2d 46, 49 (1954).

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