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# Book Reviews: Briefing and Arguing Federal Appeals

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BRIEFING AND ARGUING FEDERAL APPEALS. By Frederick Bernays Wiener, † Washington, D.C.: The Bureau of National Affairs, Inc. 1967. Pp. xvi, 527. \$13.25. Reviewed by Paul Mark Sandler. ††

At the pinnacle of the adversary system sits the appellate tribunal. It is there that the ruling of the *nisi prius* court becomes illuminated to serve as a beacon of precedent for the emergence of a legal precept, which is praised or scorned by lawyers and the inhabitants of the commonwealth. The origin of the appellate court is ancient. The *Institutes of Gaius* reports that even prior to the rise of the Roman Empire during the era of the Roman Republic a system existed whereby one could challenge a judgment for invalidity, and *Justinian's Digest* reflects that appeals were necessary during the era of the Roman Empire to correct unfairness of court judges.

As development occurred within Roman Canon-Law, the precursor of the Germanic-Law, which sired our common law appellate procedure, the idea became embedded upon the mind of legal justice that there should be a method for the review of a judgment, which was independent from the initial proceeding. The evolution of that concept did not occur overnight. There were certain old ideas which had to be put to rest, such as, the procedure wherein review consisted of an attack against the judge or court involved as opposed to a challenge to the decision of that court. However, with the passage of time and the creativity of man, there developed a system of review in England during the 12th through 17th centuries which served as a guide for appellate procedure in colonial America.

During the formative years of American law the writ of error, adopted from England, was the primary vehicle of appeal. Eventually, writs became an integral part of the English law, each one designated for a specific purpose. A private individual petitioned the King for the use of his judicial machinery to invoke legal action. The writ of error was the method by which review was procured for Parliament, in the Exchequer Chamber or before the King's Bench. Following the same procedure, Congress, through the Federal Judiciary Act of 1789, commanded that all appeals in the United States be by writ of error. The nature of the procedure was complicated and involved repleading and a separation of facts and law in a manner that was quite different from modern day appellate practice.

Today the writ of error has been abolished. Basically, there are now three methods by which an appeal may be taken in our courts: certiorari, appeal and certification.

The effective presentation of an appeal is an accomplished art. If few

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members of the bar know the history of the appellate tribunal, not many more know how to apply the shadings and proper touches of advocacy to a case on appeal. *Briefing and Arguing Federal Appeals* is aptly titled and fulfills its function of explaining "how to brief and how to argue a Federal case on an appeal. Its primary purpose is to explain to the lawyer how he can best persuade a Federal appellate court to decide a case in his favor."<sup>1</sup> Although the author limits his discussion to appeals in federal courts, the principles and techniques of briefing and arguing federal appeals are applicable to an appeal in a state court or other local forum.

Wiener's book makes a significant contribution to the legal profession. The substance and organization of the book are excellent. His manner of illustrating points is clear, interesting and meaningful. Although at times Wiener has a tendency to belabor the obvious, one will not be offended because one will become absorbed in the many fine extracts from actual briefs or oral arguments, which the author presents in the illustrations. However, there is much more to this book than specimens from actual briefs and oral arguments. Qualitative analyses and suggestions are dominant.

The entire experience of preparing a brief—pre-research stage, research stage, writing stage—and the entire experience of preparing the oral argument is refreshingly presented with illustrations of proper and improper technique. Wiener devotes chapters to the Essentials of an Effective Appellate Brief and The Finer Points of Brief Writing. He takes a similar approach when treating oral argument. Such an approach to this subject matter is helpful to the inexperienced, as well as to the initiated, in learning or reviewing the principles of appellate advocacy. Indeed, it is an effective method of presenting the subject matter.

The chapter dealing with the essentials of an appellate brief begins by listing the essentials of brief writing and follows with a detailed discussion of each point. The most difficult aspect of brief writing is presenting a clear, cogent argument. In evaluating effective technique in presenting arguments on the facts of a case, Wiener suggests the approach of "assertion, presentation, and conclusion."<sup>2</sup> This simple formula has been translated by first year law students to mean, *tell the court what you are going to tell them, tell them, and tell the court what you have told them*, and when properly applied, it will mark almost any argument with distinction. The author should have specifically suggested the same technique for the presentation of case law and oral argument, as it is also a helpful technique for developing a well organized argument.

In a final section of the chapter discussing essentials of the appellate brief, Wiener comments that the real test of an effective brief is whether it wins the appeal. He relates a humorous anecdote to illustrate

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1. F.B. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* 3 (1967).

2. *Id.* at 114.

his point that: “[C]lients don’t pay off on good losing briefs.”<sup>3</sup> Here, Wiener is wrong. The mark of a supreme advocate is not necessarily the obtaining of victory in a particular case, but rather the recognition that a case has been prepared and presented in the best possible light.

In reviewing the finer points of writing the brief, the author examines such problems as the number of and manner in which citations should be used, the use of quotations and footnotes. This is a somewhat technical chapter, but it complements the author’s earlier chapter on the essentials of brief writing. One point which the author treats particularly well is the avoidance of excess citation of cases in the written brief. Often lawyers include too many cases in support of a particular proposition when a court would only be interested in the two or three most recent opinions. Benefit from this chapter can best be obtained by referring to it while actually writing a brief or shortly prior thereto.

To argue or not to argue is the first topic in Wiener’s discussion of oral argument and is followed by a list of the essentials of oral argument and a detailed discussion of each point. Some of these points are general principles of common sense and the accomplished advocate might cover these points by simply glancing at section headings.

One subject worthy of careful attention is the *effective opening*. Wiener points out that the opening should encompass the main thrust of the advocate’s argument, leaving details for later. He suggests that a good opening is more important when the advocate represents the appellee because the court is eager to understand the respondent’s reply to the argument made by appellant. Wiener notwithstanding, the importance of an effective opening by appellant should not be ignored and the author seems to be rendering his personal opinion rather than authoritative principle.

It is the ability of the appellate lawyer to respond to questions posed to him from the bench that demonstrates his superior skill and proves that he is a master of the art of appellate advocacy. If there is one flaw in Wiener’s discussion of oral argument, it is his superficial treatment of the advocate’s response to questions from the bench. The author does include a small section on this topic in a later chapter, but a topic of such importance might have been thoroughly discussed within the chapter on the essentials of oral argument.

Closely related to responding to questions posed from the bench is the nature of the advocate’s preparation for oral argument. Although the author devotes a more than adequate chapter to preparation for oral argument, he might have presented a more detailed explanation of how preparation for oral argument can assist one in responding to questions from the court. For example, one distinguished appellate advocate explained to me how thorough preparation for an oral argument in the United States Supreme Court proved invaluable. While

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3. *Id.* at 126.

practicing his argument the evening prior to the Supreme Court hearing, the advocate was unable to answer a question posed by a moot court judge, and he worked well into the night to develop a satisfactory reply. The next day the Supreme Court was overcrowded with observers because the case to be argued was significant and controversial. During the argument one of the Justices posed to the advocate the very question that he was unable to answer the night before. In view of the sensitive issues before the Court and the overwhelming sentiment of those in the court room, there was a hush throughout the Court, and everyone nervously awaited the response. The advocate, however, was confident but did not exhibit his confidence immediately. He looked at the Justice who posed the question, commented on how important the question was, rubbed his chin and then soundly and squarely answered the Justice's question. Everyone in the court room could sense that the advocate's reply resolved the Court's problem. By careful preparation, including perhaps moot court sessions prior to argument, the advocate fully exercises persuasion before the appellate court and can effectively respond to questions.

Another aspect of oral argument not emphasized by Wiener is the ability of the advocate to use a question posed from the bench as a method of stressing points the advocate had intended to make. There is skill resting in one's ability to respond to question after question using one's answers to develop the planned argument. In fact, this is the secret to an effective oral argument, and Wiener might have elaborated on this technique.

In the chapter considering *The Finer Points of Oral Argument*, Wiener discusses such problems as whether one should make a concession in oral argument and how to use the technique of rebuttal. The author also discusses the problem involved with attempts to dissect particular cases in open court. He suggests that the advocate present general propositions and reserve a detailed statement of cases for the rare occasion or for when a question from the court refers to a particular case. Essentially this chapter is stronger than the chapter discussing the essentials of oral argument because it includes sharper analysis of technique and discussion of basic skills which are really essentials and not finer points. Another technique of appellate argument might have been developed more thoroughly in the oral argument section by drawing a parallel between his earlier suggestion of "assertion, presentation, and conclusion"<sup>4</sup> in arguing the facts of one's case to the technique employed in presenting oral argument. By adopting this approach in oral argument, the advocate can feel secure that the court will consider the theory of his case, even if the advocate is frequently interrupted with questions and never has the opportunity to present the planned argument.

Two chapters in the book are particularly valuable to law students,

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4. *Id.* at 114.

Suggestions for Writing and Research and Preparation for Oral Argument, and a casual perusal of these chapters by any lawyer would certainly prove worthwhile.

In addition to offering instructive samples of appellate technique throughout the book, the author includes more comprehensive models in a separate section. Among the topics presented in that section is one concerning the use of the statement of facts in the brief to advance the case at bar; another is the presentation of an oral argument, complete with questions posed by the court and a critique by the author. At the conclusion of his work, Wiener furnishes an appendix of late authority as of 1967, which serves as a supplement to the authorities and examples cited throughout. The samples selected for the reader's attention were well chosen and usually supported with reasonable explanation. Although at times the reader will be reviewing what Frederick Bernays Wiener considers to be the best approach to a problem, usually a comment by the author pointing out that a particular case was successful or unsuccessful is persuasive evidence that the Wiener approach is probably the desirable one. Resort to many notable appellate briefs and arguments furnishes external authority as a counterweight to Wiener's personal opinions and perhaps his excessive enthusiasm for his own personality.

Wiener, a former assistant to the Solicitor General of the United States, has been described by former Supreme Court Justice Sherman Minton as an "able advocate . . . with wide experience in appellate work . . ."<sup>5</sup> The original version of *Briefing and Arguing Federal Appeals* was published in 1961, and that edition was the author's new version of *Effective Appellate Advocacy*.<sup>6</sup> Since the 1961 edition a reprinting with an appendix appeared in 1967. Recently a second printing of the 1967 format was released. Wiener has produced a quality-skills book which is a necessary addition to the library of any lawyer who is seriously desirous of developing or refining his ability as an appellate advocate.

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5. *Id.* at v.

6. F.B. WIENER, *EFFECTIVE APPELLATE ADVOCACY* (1950).