

# Professionalism on Appeal

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## 1. The importance of *ethos*.

Our point for this presentation: professionalism results in more effective advocacy because professionalism enhances the advocate's *ethos* or credibility before the court.

So what is *ethos*, and what makes it persuasive? The answer dates back to Aristotle (384–322 B.C.) and remains true today. But don't take our word for it. Consider these quotable quotes:

**Aristotle, *The Art of Rhetoric* (translated by H.C. Lawson-Tancred):**

But since the objective of rhetoric is judgment (for men *give* judgment on political issues and a court case *is* a judgment), we must have regard not only to the speech's being demonstrative and persuasive, but also to *establishing the speaker himself as of a certain type and bringing the giver of judgment into a certain condition*. For this makes a great difference as regards proof, especially in deliberative oratory, but also in court cases—this appearance of the speaker to be of a certain kind and his making the audience suppose that he is disposed in a certain way towards them, and in addition the condition that they are themselves disposed in a certain way to him....

There are three causes of the speakers' themselves being persuasive; for that is the number of the sources of proof other than demonstration. They are *common sense, virtue and goodwill*. For men lie about what they are urging or claiming through either all or some of the following: they either have the wrong opinions through stupidity, or, while having the correct opinions, through perversity they fail to say what they think; or they have common sense and integrity but are not well-disposed, whence they might not give the best advice. So it must be that the man who is thought to have all of our first list is persuasive to the audience.<sup>1</sup>

**Robert N. Miller, *Judges and Briefs* (1955):**

Almost everybody develops a habit of sizing-up each person he has occasion to deal with: Is he honest? Is he intelligent? Has he been willing to do the necessary work on the matter in hand? Judges, consciously or unconsciously, form similar conclusions as they read each brief. A brief has a character of its own, and good character will carry it a long way. A brief which does not stand the character test is handicapped just as is an individual of poor character.<sup>2</sup>

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<sup>1</sup> Aristotle, *The Art of Rhetoric* 140–41 (H.C. Lawson-Tancred transl., Penguin Books 1991).

<sup>2</sup> Robert N. Miller, *Judges and Briefs* (1955), in *Classic Essays on Legal Advocacy* 413, 419 (George Rossman ed., Lawbook Exchange edition 2010).

**James C. Raymond, *Writing (Is an Unnatural Act)* (1980):**

As Aristotle pointed out long ago, most people do not have the patience or intelligence to follow a logical argument very closely. Most people will be persuaded neither by reason nor by emotion but by the *ethos*—the character—of the author.<sup>3</sup>

**Edward P.J. Corbett and Robert J. Connors, *Classical Rhetoric for the Modern Student* (1999):**

A third mode of persuasion was the ethical appeal. This appeal stemmed from the character of the speaker, especially as that character was evinced in the speech itself. A person ingratiated himself or herself with an audience—and thereby gained their trust and admiration—if he or she managed to create the impression that he or she was a person of intelligence, benevolence, and probity. Aristotle recognized that the ethical appeal could be the most potent of the three modes of persuasion. All of an orator’s skill in convincing the intellect and moving the will of an audience could prove futile if the audience did not esteem, could not trust, the speaker.<sup>4</sup>

The ethical appeal must pervade all parts of the discourse, but it is nowhere more important than in this part where we are seeking to prove our case or refute the opposition. So important is the ethical appeal in effecting persuasion that Aristotle said “it is more fitting for a good man to display himself as an honest fellow than as a subtle reasoner” (*Rhetoric*, III, 17). Sometimes when our case is weak, the ethical appeal, exerted either by the image of the writer or by the tone of the discourse, will carry the day.<sup>5</sup>

**Ruggero J. Aldisert, *Winning on Appeal* (1999):**

[In oral argument,] the lawyer has the opportunity of conveying to the court the quality that Aristotle called *ethos*, the personal character of the speaker... [O]ral argument is the only opportunity the lawyer has to personally motivate the judges by force of his or her personality, and to convey what Bettinghaus described as

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<sup>3</sup> James C. Raymond, *Writing Is an Unnatural Act* 60 (1980), reprinted in Bryan A. Garner, *The Winning Brief* 696 (3rd ed. 2014).

<sup>4</sup> Edward P.J. Corbett and Robert J. Connors, *Classical Rhetoric for the Modern Student* 19 (4th ed. 1999).

<sup>5</sup> *Id.* at 280.

three factors which people use in judging a speaker’s credibility—trustworthiness, qualifications and personal characteristics.<sup>6</sup>

**Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008):**

Whatever the outcome of the case, the quality of your performance will have advanced or hindered your career. If you appear before the court in question with any frequency, the judges will remember you as fair-minded, reliable, and trustworthy—or the opposite. If the former, they will be more likely to grant discretionary review in a case that you assert to be worth considering; and when you appear to argue, the credibility you have developed will give you a leg up. If your argument has been uninformative and misleading, you may well begin your next case at a disadvantage.

So look upon this profession of advocacy as a long-term continuum, each individual case not standing in isolation but profiting from and building upon your prior success. Argue not just for the day but for your reputation.<sup>7</sup>

So how can lawyers build their *ethos*? Be honest:

“My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.”<sup>8</sup>

“We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities in any oral or written communication to the court.”<sup>9</sup>

“Never lie, under any circumstance.”<sup>10</sup>

“Don’t use euphemisms to disguise the truth.”<sup>11</sup>

“Avoid the use of hyperbole to distort the truth of your assertions.”<sup>12</sup>

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<sup>6</sup> Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 3.3, 30–31 (rev. 1st ed. 1999). Judge Aldisert served on the U.S. Third Circuit for 28 years.

<sup>7</sup> Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 205–06 (2008).

<sup>8</sup> La. Code of Professionalism ¶ 1.

<sup>9</sup> Code of Professionalism in the Courts. La. S. Ct. Rules, Part G, § 11.

<sup>10</sup> *The Sixteen Rules of Professionalism in Legal Writing*, from Steven D. Stark, *Writing to Win* 289 (Rev. 2012).

<sup>11</sup> *Id.*

“Always cite accurately.”<sup>13</sup>

“Do not misstate the facts or the law.”<sup>14</sup>

And be respectful toward the court, court personnel, opposing counsel:

“I will conduct myself with dignity, civility, courtesy and a sense of fair play.”<sup>15</sup>

“We will speak and write civilly and respectfully in all communications with the court.”<sup>16</sup>

“We will act and speak civilly to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they too, are an integral part of the judicial system.”<sup>17</sup>

## **2. Empathy builds *ethos*.**

The Oxford Online Dictionary defines *empathy* as “the ability to understand and share the feelings of another.” We will use *empathy* loosely to mean the ability to understand the feelings and perspectives of everyone we deal with professionally as lawyers: our own colleagues and co-workers, opposing counsel, judges, the judge’s law clerks and staff, and the good folks in the clerk’s office.

In briefwriting, empathy means identifying with the reader-judge. First, consider the times and places in which the judge may be reading your brief. Judge Aldisert described it this way:

Briefs are sometimes, but not very often, read in a cloistered setting, a quiet library room where the only sound is a soft ticking clock. Briefs usually must compete with a number of other demands on the judge’s time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message or another

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 290.

<sup>15</sup> La. Code of Professionalism ¶ 3.

<sup>16</sup> Code of Professionalism in the Courts.

<sup>17</sup> *Id.*

judge's draft opinion, the reviewing of which is given a higher priority than drafting your own opinion. The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading in the blue- or red-covered brief must await another moment. Or another hour. Or another day.

So briefs are wrapped and taken home, where they are to be looked at after the evening news but before your nine o'clock favorite television program. In the meantime, your spouse wants to talk with you, or the kids clamor for attention, or friends telephone. The briefs are rewrapped and set aside for another time. Or they are read in airport waiting rooms, or aboard a plane with the person in the next seat glancing across and saying, "Gee, I suppose you are a lawyer. Let me tell you about the claim that I have." Or the briefs are read late at night in hotel rooms with poor lighting, thus inviting soporific consequences.

Look at the numbers.... Each active judge on the court [U.S. Third Circuit] now has to decide over 300 appeals a year, participate in standing panels for pro se cases and motions, and sit in 7 scheduled sittings a year with 39 counseled appeals on the merits per sitting. This means that each judge must read approximately 500 briefs a year written by lawyers, plus at least 50 briefs written by pro se litigants and a like number of counseled responses, and frequently many briefs in reply to appellees' briefs. In many of the state intermediate courts, the caseload is even more formidable.<sup>18</sup>

Indeed, counting writ applications, the typical Louisiana appellate judge reads several hundred briefs a year. We crunched some numbers and came up with these estimates:

Total judges La. Cts. App. [1]	53
Total appeals in 2016 [2]	1,783
Total writ apps in 2016 (excluding pro se) [2]	2,081
Total briefs 2016 [3]	8,471
Briefs / 3-judge panel in 2016 [4]	479

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<sup>18</sup> Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* § 2.5, 24–25 (rev. 1st ed. 2005).

[1] See La. R.S. 13:312.1.

[2] La. Supreme Court's 2016 Annual Report.

[3] We assume 3 briefs per appeal and 1.5 briefs per writ application.

[4] Total number of briefs divided by total number of judges and multiplied by 3.

So in counseled cases, we estimate that the typical appellate judge in Louisiana reads 479 briefs per year. These numbers do not include pro se writ applications (1,589 filed in Louisiana appellate courts in 2016, or 88 per year per three-judge panel). Judge Gravois estimates that, when pro se writ applications are added, he reads about 550 briefs per year.

Besides considering the judges' brief-reading environment, consider the judges themselves: what they know and what they don't know. The judges don't know as much about the case as you do because they have not spent nearly as much time on it as you have. Many writers—not just legal writers—fail to understand this. They write as if the reader already knows everything they know and feels the same way about it as they do.

Is the lack of this sort of empathy a cause of bad briefwriting? Perhaps. It's been identified as a cause of bad writing in general:

**John R. Trimble, *Writing With Style* (2000):**

Most of the novice's difficulties start with the simple fact that the paper he writes on is mute. Because it never talks back to him, and because he's concentrating so hard on generating ideas, he readily forgets—unlike the veteran—that another human being will eventually be trying to make sense of what he's saying. The result? *His natural tendency as a writer is to think primarily of himself—hence to write primarily for himself.* Here, in a nutshell, lies the ultimate reason for most bad writing.<sup>19</sup>

**Steven Pinker, *The Sense of Style* (2014):**

Call it the Curse of Knowledge: a difficulty in imagining what it is like for someone else not to know something that you know....<sup>20</sup>

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The curse of knowledge is the single best explanation I know of why good people write bad prose. It simply doesn't occur to the writer that her readers don't know

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<sup>19</sup> John R. Trimble, *Writing with Style: Conversations on the Art of Writing* 4 (2d ed. 2000).

<sup>20</sup> Steven Pinker, *The Sense of Style* 59 (2014).

what she knows—that they haven’t mastered the patois of her guild, can’t divine the missing steps that seem too obvious to mention, have no way to visualize a scene that to her is as clear as day. And so she doesn’t bother to explain the jargon, or spell out the logic, or supply the necessary detail.<sup>21</sup>

...

How can we lift the curse of knowledge? The traditional advice—always remember the reader over your shoulder—is not as effective as you might think... But imagining the reader over your shoulder is a good start.<sup>22</sup>

Empathy, as we’ve described it, leads to more professional behavior and more effective advocacy.

An advocate with empathy “will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.”<sup>23</sup>

An advocate with empathy will not waste the court’s time, but instead will get to the point as quickly as possible.

An advocate with empathy will never make personal attacks on the other side.<sup>24</sup> Judges don’t like personal attacks, not just because it’s bad behavior, but because it wastes the judges’ time. Judge Alex Kozinsky (U.S. 9th Cir.) once described how making personal attacks is a good way to lose an appeal:

[L]et’s face it, a good argument is hard to hold down. So what you want to do is salt your brief with plenty of distractions that will divert attention from the main issue. One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. The key thing is to let the court know that what’s going on here is not really a dispute between the clients. No, that’s just there’re to satisfy the case and controversy requirement. What is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent.<sup>25</sup>

An advocate with empathy (and without the curse of knowledge) will never write something like this in a brief:

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<sup>21</sup> *Id.*, at 61.

<sup>22</sup> *Id.*, at 63.

<sup>23</sup> Code of Professionalism in the Courts, La. S. Ct. Rule G § 11.

<sup>24</sup> See La. Code of Professionalism ¶ 7, La. Dist. Ct. R. 6.2 § (k)(7) (“I will not engage in personal attacks on other counsel or the court.”).

<sup>25</sup> Alex Kozinsky, *The Wrong Stuff*, 1992 *BYU L. Rev.* 325, 328 (1992)



LBE's complaint more specifically alleges that NRB failed to make an appropriate determination of RTP and TIP conformity to SIP.<sup>26</sup>

(Commenting on this passage, Judge Kozinsky said, "Even if there was a winning argument buried in the midst of that gobbledygook, it was DOA."<sup>27</sup>)

So do as Judge Aldisert advised: "When you start to plan your brief, place yourself in the judge's shoes."<sup>28</sup> Do what John W. Davis recommended 77 years ago:

If the places were reversed and you sat where [the judges] do, think what it is you would want first to know about the case. How and in what order would you want the story told? How would you want the skein unraveled? What would make easier your approach to the true solution?<sup>29</sup>

### **3. Excellence builds *ethos*.**

Rule 1.1 of the Rules of Professional Conduct states that "[a] lawyer shall provide competent representation to a client." But a true professional is not satisfied with competence. A true professional makes a career out of the pursuit of excellence. Consider this bit from the screenplay of *Chariots of Fire*. To set the scene: sprinter Harold Abrahams, who must maintain amateur status to participate in the 1924 Olympic Games, is being accused by Cambridge University officials of having "adopted a professional attitude." His response:

You know, gentlemen, you yearn for victory just as I do. But achieved with the apparent effortlessness of gods. Yours are the archaic values of the prep-school playground. You deceive no one but yourselves. I believe in the pursuit of excellence. And I'll carry the future with me.<sup>30</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Ruggero J. Aldisert, *Winning on Appeal* 20 (rev. 1st ed. 1996)

<sup>29</sup> John W. Davis, *the Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940), quoted in Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 21 (rev. 1st ed. 1996).

<sup>30</sup> Colin Welland, *Chariots of Fire* (1981).

Others have recommended making the pursuit of excellence a lifelong pursuit. Two examples:

**Hon. Robert H. Jackson, *Advocacy Before the Supreme Court* (1951):**

[D]o not let your preparation wait upon a retainer. There is not time to become an advocate after the important case comes to you. Webster, when asked as to the time he spent in preparing one of his arguments, is said to have replied that his whole life was given to its preparation. So it is with every notable forensic effort.<sup>31</sup>

**Bryan A. Garner, *The Winning Oral Argument* (2007):**

Don't ever assume that you've mastered your full potential as an advocate. You'll never do that. So continue honing your skills—everything from strengthening client communications to analytical thinking to powerful speaking techniques. Stock up your mind. And practice.<sup>32</sup>

If you pursue excellence, you will naturally behave more professionally because you will strive to win the right way. You will never lie. You will never misstate the facts or the law. You won't have the time or the inclination to engage in personal attacks or procedural gamesmanship. You will confront unfavorable facts and law head-on. You won't have to memorize the codes of professional behavior because you will have absorbed the basic principles underlying the rules.

And if you pursue excellence, it'll show in your briefing and your oral argument. You'll be perceived by the court as being credible and trustworthy. You will build your *ethos*. And that, in turn, will make you a better advocate.

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<sup>31</sup> Hon. Robert H. Jackson, *Advocacy Before the Supreme Court*, 37 ABA J. 801, 863 (Nov. 1951), reprinted in Bryan A. Garner, *The Winning Oral Argument* 163 (2007).

<sup>32</sup> Bryan A. Garner, *The Winning Oral Argument* 163 (2007).