

Making Your Case

The Art of Persuading Judges

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1. Be sure that the tribunal has jurisdiction.	3
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4. Know your adversary's case.	10
5. Pay careful attention to the applicable standard of decision.	11
6. Never overstate your case. Be scrupulously accurate.	13
7. If possible, lead with your strongest argument.	14
8. If you're the first to argue, make your positive case and then preemptively refute in the middle— not at the beginning or end.	15
9. If you're arguing after your opponent, design the order of positive case and refutation to be most effective according to the nature of your opponent's argument.	17
10. Occupy the most defensible terrain.	19
11. Yield indefensible terrain—ostentatiously.	20
12. Take pains to select your best arguments. Concentrate your fire.	22
13. Communicate clearly and concisely.	23

14. Always start with a statement of the main issue before fully stating the facts. 25

15. Appeal not just to rules but to justice and common sense. 26

16. When you must rely on fairness to modify the strict application of the law, identify some jurisprudential maxim that supports you. 30

17. Understand that reason is paramount with judges and that overt appeal to their emotions is resented. 31

18. Assume a posture of respectful intellectual equality with the bench. 33

19. Restrain your emotions. And don't accuse. 34

20. Control the semantic playing field. 35

21. Close powerfully—and say explicitly what you think the court should do. 37

Legal Reasoning 39

In General

22. Think syllogistically. 41

Statutes, Regulations, Ordinances, Contracts, and the Like

23. Know the rules of textual interpretation. 44

24. In cases controlled by governing legal texts, always begin with the words of the text to establish the major premise. 46

25. Be prepared to defend your interpretation by resort to legislative history. 48

Caselaw

26. Master the relative weight of precedents. 52

27. Try to find an explicit statement of your major premise in governing or persuasive cases. 55

Briefing 57

Introduction

28. Appreciate the objective of a brief. 59

Preparatory Steps

29. Strengthen your command of written English. 61

30. Consult the applicable rules of court. 64

31. Set timelines for the stages of your work. 66

32. In cooperation with your opponent, prepare the Joint Appendix. 68

The Writing Process

33. Spend plenty of time simply “getting” your arguments. 69

34. Outline your brief. 70

Opening Brief 71

Responding Brief 71

Reply Brief 73

Petition for Discretionary Review 75

Response to a Petition for Discretionary Review 79

35. Sit down and write. Then revise. Then revise again. Finally, revise. 80

Architecture and Strategy

36. Know how to use and arrange the parts of a brief. 82

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37. Advise the court by letter of significant authority arising after you've filed your brief. 101

38. Learn how to use, and how to respond to, amicus briefs. 102

Writing Style

39. Value clarity above all other elements of style. 107

40. Use captioned section headings. 108

41. Use paragraphs intelligently; signpost your arguments. 109

42. To clarify abstract concepts, give examples. 111

43. Make it interesting. 112

44. Banish jargon, hackneyed expressions, and needless Latin. 113

45. Consider using contractions occasionally—or not. 114

46. Avoid acronyms. Use the parties' names. 120

47. Don't overuse italics; don't use bold type except in headings; don't use underlining at all. 122

48. Describe and cite authorities with scrupulous accuracy. 123

49. Cite authorities sparingly. 125

50. Quote authorities more sparingly still. 127

51. Swear off substantive footnotes—or not. 129

52. Consider putting citations in footnotes—or not. 132

53. Make the relevant text readily available to the court. 135

54. Don't spoil your product with poor typography. 136

Oral Argument 137

Introduction

55. Appreciate the importance of oral argument, and know your objectives. 139

Long-Term Preparation

56. Prepare yourself generally as a public speaker. 142

57. Master the preferred pronunciations of English words, legal terms, and proper names. ... 144

58. Master the use of the pause. 146

Preliminary Decision: Who Will Argue?

59. Send up the skilled advocate most knowledgeable about the case. 147

60. Avoid splitting the argument between cocounsel. ... 148

Months and Weeks Before Argument

61. Prepare assiduously. 150

62. Learn the record. 151

63. Learn the cases. 152

64. Decide which parts of your brief you'll cover. 153

65. Be flexible. 153

66. Be absolutely clear on the theory of your case. 155

67. Be absolutely clear on the mandate you seek. 156

68. Organize and index the materials you may need. 157

69. Conduct moot courts. 158

70. Watch some arguments. 159

71. On the eve of argument, check your authorities. 160

Before You Speak

72. Arrive at court plenty early with everything you need. 161

73. Make a good first impression. Dress appropriately and bear yourself with dignity. 162

74. Seat only cocounsel at counsel table. 163

- 75. Bear in mind that even when you're not on your feet, you're onstage and working. 163
- 76. Approach the lectern unencumbered; adjust it to your height; stand erect and make eye contact with the court. 164

Substance of Argument

- 77. Greet the court and, if necessary, introduce yourself. 166
- 78. Have your opener down pat. 167
- 79. If you're the appellant, reserve rebuttal time. 167
- 80. Decide whether it's worth giving the facts and history of the case. 168
- 81. If you're the appellant, lead with your strength. 169
- 82. If you're the appellee, take account of what has preceded, clear the underbrush, and then go to your strength. 170
- 83. Avoid detailed discussion of precedents. 171
- 84. Focus quickly on crucial text, and tell the court where to find it. 172
- 85. Don't beat a dead horse.
Don't let a dead horse beat you. 172
- 86. Stop promptly when you're out of time. 173
- 87. When you have time left, but nothing else useful to say, conclude effectively and gracefully. 173
- 88. Take account of the special considerations applicable to rebuttal argument. 175

Manner of Argument

- 89. Look the judges in the eye. Connect. 178
- 90. Be conversational but not familiar. 179
- 91. Use correct courtroom terminology. 180

- 92. Never read an argument; never deliver it from memory except the opener and perhaps the closer. 181
- 93. Treasure simplicity. 182
- 94. Don't chew your fingernails. 183
- 95. Present your argument as truth, not as your opinion. 184
- 96. Never speak over a judge. 184
- 97. Never ask how much time you have left. 185
- 98. Never (or almost never) put any other question to the court. 186
- 99. Be cautious about humor. 186
- 100. Don't use visual aids unintelligently. 187

Handling Questions

- 101. Welcome questions. 189
- 102. Listen carefully and, if necessary, ask for clarification. 191
- 103. Never postpone an answer. 192
- 104. If you don't know, say so. And never give a categorical answer you're unsure of. 193
- 105. Begin with a "yes" or a "no." 193
- 106. Never praise a question. 194
- 107. Willingly answer hypotheticals. 194
- 108. After answering, transition back into your argument—smoothly, which means not necessarily at the point where you left it. 195
- 109. Recognize friendly questions. 196
- 110. Learn how to handle a difficult judge. 196
- 111. Beware invited concessions. 199

MAKING YOUR CASE: THE ART OF PERSUADING JUDGES

After the Battle

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