



Making Your Case: The Art of Persuading Judges

By Supreme Court Justice Antonin Scalia and Bryan A. Garner

BY DONNA BADER

I have to admit, appellate attorneys are an odd bunch. I was recently involved in a committee that examined pending legislation. When it was my turn to speak, rather than discussing the subject of the proposed legislation, I spent several minutes analyzing why the word *any* was unacceptable. It seemed clear to me that the rest of the room had not spent much time thinking about this seemingly minor point.

Rather than congratulating me on my keen insight, one trial attorney whispered to another, "Do you suppose that is what appellate attorneys do all day long?"

The other attorney shook his head. "I think so. Rather sad, isn't it?"

It then occurred to me that appellate lawyers were perceived as the eggheads of the legal profession, not far behind tax attorneys. Trial lawyers, some of whom have faced weeks of trial on a daily basis, have expressed awe that an appellate attorney would spend so many hours researching a point. Or that the attorney might have to answer questions from three or more appellate court judges or justices during oral argument.

A case in point:

In *Making Your Case: The Art of Persuading Judges*, authors Associate Justice Antonin Scalia and Bryan A. Garner describe a spirited debate about using contractions in a brief. Can you imagine that? Who thinks about these things? Well, unfortunately, appellate attorneys do as should anyone who is going to prepare an appellate brief. Not that one can-

not (or can't) help but be amused that so much time is spent on this topic. (Okay, after reading this section, I did think about it. I try to avoid contractions in a brief, if possible, because they may make my presentation seem a bit too informal. On the other hand, there are times that the language seems unnatural without the contraction. In those circumstances, I am not ashamed to say that I have resorted to the use of contractions.)

Both authors are extremely qualified on the subject of appellate advocacy and should not be ignored. Associate Justice Antonin Scalia has served on the United States Supreme Court since 1986. If anyone knows anything about persuading a justice, it should be him. After all, attorneys try to impress him all day long. Bryan Garner has written extensively on the subject of legal writing, from *The Elements of Legal Style* to *The Winning Brief*. As he points out, he has taught advocacy to more than 90,000 lawyers over the past 18 years. Politics aside, both gentlemen have impressive credentials, which make this slim volume, packed with 115 "tips" well worth reading.

The book is divided into four major sections: General Principles of Argumentation, Legal Reasoning, Briefing, and Oral Argument. The inexperienced practitioner will find the tips valuable. While the experienced attorney might think that some of the tips are obvious and based on common sense, I have found that many attorneys ignore the obvious and lack common sense. In other words, I have seen many attorneys commit the errors described in these pages. That these mistakes occur over and over again is

proof that common sense does have a place in a book about persuading justices.

Know your audience

In the first part on "General Principles of Argumentation," Scalia and Garner urge attorneys to "Know Your Audience." Good point. While the personal details about a justice never come up during oral argument (you certainly wouldn't discuss the best golf courses with a justice), "These details will humanize the judge for you, so that you will be arguing to a human being instead of a chair." To go one step further, if you see the justice as a human being, imperfect as we all are, it will help to diminish anxiety and confirm the need for your assistance in analyzing the issues.

Scalia and Garner address a harsh reality of having trial attorneys argue appeals. Trial attorneys simply cannot rely on the impassioned closing argument that won over the jury below. While the authors advise against using a jury argument and a blatant appeal to a justice's emotions, that doesn't eliminate an appeal to the justice's sense of justice. It is the "facts" that should arouse emotion, not your emotional pleas.

The use of the syllogism

In the section on "Legal Reasoning," Scalia and Garner discuss the application of logic, particularly the use of the syllogism. While that may be a fancy title for what we have been doing throughout our careers, attorneys might find it beneficial to chart out arguments in the form of syllogisms, and to also create negative syllogisms for arguments against the



opponent's case. They describe the format of a syllogism:

Major premise: All S is P.

Minor premise: This case is S.

Conclusion: This case is P.

Having set the stage, the authors then discuss "Briefing." An issue that frequently arises in preparing a responding brief is whether to follow the order of the points raised in Appellant's Opening Brief. While an attorney will want to "clear the underbrush," as they phrase it, by quickly addressing an appellant's arguments, this approach may not always work if the appellant's organization is weak. They note the importance of letting the Court know immediately what the issues are by including a section on "Questions Presented," even if court rules do not require it. (Only the United States Supreme Court has such a requirement.)

The major portion of the book is spent on "Oral Argument," and with good reason. It is the one area that holds the most mystery – and anxiety – for attorneys. Our quest is to find an oral argument that gives the justices exactly what they want.

Well, Justice Scalia is a justice who still hears oral argument. Even if Justice Scalia has his own idiosyncrasies (and indeed he does), his authority on the subject is invaluable. Making Your Case offers tips of practical value, such as closing on a strong note, rather than, as many attorneys do, saying "If there are no further questions . . ." or "For the reasons discussed, . . ." They also deal with tone, civility, physical aspects of an oral presentation, and finally, answering questions.

This book is easy to read, conversational in tone and even contains some

humor. But do not be deceived; the tips are carefully considered, and if you master each one, you will be ahead of the game. Making Your Case satisfies the primary purpose of an appeal – and this book: how to persuade the judges or justices.



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