

FEATURES

Making Your Case

BY ANTONIN SCALIA AND BRYAN A. GARNER

MAY 2008

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Bryan Garner and Antonin Scalia.

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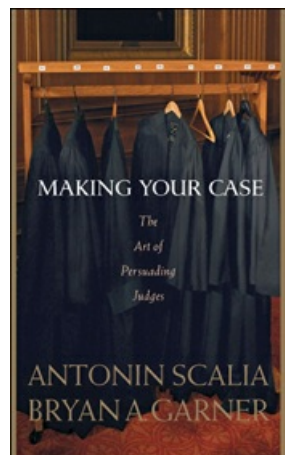
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In his 21 years on the U.S. Supreme Court, no one has seriously accused Justice Antonin Scalia of being unable to express himself. Cass R. Sunstein, the University of Chicago law professor, has likened his writings to those of Justices Robert H. Jackson and Oliver Wendell Holmes. University of Wisconsin law professor Ann Althouse says she “constantly dearly” wishes Scalia’s colleagues had his sense of wit and style.

From the bench he’s an acute—and sometimes withering—questioner. On the printed page, he’s a direct and engaging writer. And from the lectern he’s a smooth and self-assured orator—a self-professed fan of harsh truths skillfully articulated, even when they are not his own.

In his new book, *Making Your Case: The Art of Persuading Judges*, Scalia teamed with Bryan A. Garner, editor-in-chief of *Black’s Law Dictionary*. Excerpted here, the book reveals ways in which clear writing, clear speaking and—above all—clear thinking can help you make your case.

—Allen Pusey



Value clarity above all other elements of style. In brief-writing, one feature of a good style trumps all others. Literary elegance, erudition, sophistication of expression—these and all other qualities must be sacrificed if they detract from clarity. This means, for example, that the same word should be used to refer to a particular key concept, even if elegance of style would avoid such repetition in favor of various synonyms. It means that you must abandon interesting and erudite asides if they sidetrack the drive toward the point you are making. It means that you should never use a word that the judge may have to look up.

It means that nothing important to your argument should appear in a footnote.

Further, it means shunning puffed-up, legalistic language. Make your points and ask for your relief in a blunt, straightforward manner.

Wrong:

The undersigned counsel do hereby for and on behalf of their clients, for the reasons explained hereinbelow, respectfully request that this Honorable Court consider and hereby rule that no issues of material fact do exist in the instant controversy, and that a final judgment be entered in favor of the client of the undersigned counsel (sometimes herein referred to as "Defendant" or "Cross-Plaintiff") and against Plaintiff.

Right:

Johnson requests entry of summary judgment.

Clarity is amply justified on the ground that it ensures you'll be understood. But in our adversary system it performs an additional function. The clearer your arguments, the harder it will be for your opponent to mischaracterize them. Put yourself in the shoes of a lawyer confronting an opposing brief that is almost incomprehensible. You struggle to figure out what it means—and so does the court. What an opportunity to characterize the opposing argument in a way that makes it weak! This can't happen to you—your opponent will not be able to distort what you say—if you are clear.

USE PARAGRAPHS INTELLIGENTLY; SIGNPOST YOUR ARGUMENTS

Section headings are not the only means of mapping your argument. Within each captioned section, paragraph breaks perform the same function. The first sentences of paragraphs (your fifth-grade teacher called them "topic sentences") are as important as captioned section headings in guiding your readers through your brief—telling them what next thought is about to be discussed. Paragraph breaks should not occur randomly, inserted simply because the last paragraph was getting too long. They should occur when you are moving on to a new subpoint and wish to signal a change of topic.

One writer on brief-writing (who must remain nameless) suggests that no paragraph should be more than five sentences long. We think that's bad advice. Your readers didn't make it to the bench by reading only Classic Comics. Judges are accustomed to legal argumentation, which often—indeed, usually—requires more than five sentences to develop an idea. Use as many sentences as the thought demands. If the paragraph is becoming unusually long (say a page of your brief), break the idea into two paragraphs if possible. (¶ "Another factor leading to the same conclusion") Some ideas will take only five sentences—indeed, some may take only three. But a brief with paragraphs of rigidly uniform length is almost sure to be a bad brief.

USE WHAT IT TAKES

In helping the reader follow the progression of thought—both between and within paragraphs—guiding words are essential. Consider the difference between the following two progressions: (1) "He is not a great sprinter. He came in third." (2) "He is not a great sprinter. But he came in third." The word *but* signals that the next thought will somehow qualify the point just made. Or your second sentence might have been "After all, he came in third"—the *After all* signifies that the upcoming thought will affirm the previous one. Or you might have used a subordinating conjunction: "Although he is not a great sprinter, he came in third."

There are many such guiding words and phrases: moreover, however (preferably not at the head of a sentence), although, on the other hand, nonetheless, to prove the point, etc. These words and phrases turn the reader's head, so to speak, in the direction you want the reader to look. Good writers use them abundantly.

Normally, the very best guiding words are monosyllabic conjunctions: and, but, nor, or, so and yet. Professional writers routinely put them at the head of a sentence, and so should you. There's a myth abroad that you should never begin a sentence with a conjunction. But look at any species of reputable writing—whether it's a good newspaper, journal, novel or nonfiction work—and you're likely to find several sentences per page beginning with one of those little connectives. You can hardly achieve a flowing narrative or argument without them.

To clarify abstract concepts, give examples. Legal briefs are necessarily filled with abstract concepts that are difficult to explain. Nothing clarifies their meaning as well as examples. One can describe the interpretive canon *noscitur a sociis* as the concept that a word is given meaning by the words with which it is associated. But the reader probably won't really grasp what you're talking about until you give an example similar to the one we gave earlier: "pins, staples, rivets, nails and spikes." In that context, "pins" couldn't refer to lapel ornaments, "staples" couldn't refer to standard foodstuffs, "nails" couldn't refer to fingernails, and "spikes" couldn't refer to hairstyles.

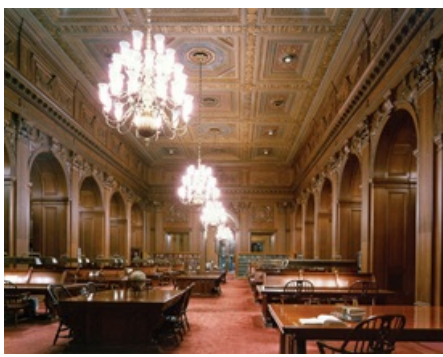


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MAKE IT INTERESTING

To say that your writing must be clear and brief is not to say that it must be dull. Of course, you should employ the usual devices of effective writing: simile, metaphor, understatement, analogy and antithesis. But you shouldn't use these or other devices of style for their own sake. They are helpful only if they cause the serious legal points you're making to be more vivid, more lively and hence more memorable.

Three simple ways to add interest to your writing are to enliven your word choices, mix up your sentence structures and vary your sentence lengths. With words, ask yourself whether there's a more colorful way to put it. With sentences, guard against falling into a monotonous subject-verb-object rut—especially when it's the same subject, sentence after sentence. And remember that an occasional arrestingly short sentence can deliver real punch (“This wolf comes as a wolf.”).

Banish jargon, hackneyed expressions and needless Latin. By “jargon” we mean the words and phrases used almost exclusively by lawyers in place of plain-English words and phrases that express the same thought. Jargon adds nothing but a phony air of expertise. A nexus, for example, is nothing more or less than a link or a connection. And what is the instant case? Does it have anything to do with instant coffee? Alas, to tell the truth, it's no different from this *case* or even *here*.

Write normal English. *Such* as a demonstrative adjective (such action) can almost always be replaced with the good old normal English *this* or *that*. And *hereinbefore* with *earlier*. And *pursuant to* with *under*. The key is to avoid words that would cause people to look at you funny if you used them at a party. Pretend that you're telling your story to some friends in your living room; that's how you should tell it to the court.

Give the reader credit for having a brain—and show that you have one, too. Don't leave your common sense at the door. If your brief repeatedly refers to the secretary of transportation and mentions no other secretary, it is silly to specify parenthetically, the first time you mention the secretary of transportation, “(hereinafter ‘the secretary’).” No one will think that your later references to “the secretary” denote the secretary of defense, or perhaps your own secretary.

Hackneyed expressions are verbal formulations that were wonderfully vivid when first used, but whose vividness—through overuse—no longer pleases but bores. Such-and-such a case “and its progeny” is a good example. Or the assertion that an argument is “fatally flawed” or “flies in the face of” something; that your adversary is “painting with a broad brush”; that a claim isn't “viable”; that the “parameters” of a rule aren't settled; or that something is true “beyond peradventure of doubt.” The test is: Have you seen the vivid phrase a lot? If so, odds are it's a cliché.

Some Latin expressions are convenient shorthand for rules or principles that have no English shorthand equivalent (*res ipsa loquitur*, for example, or *inclusio unius est exclusio alterius*). But avoid using other Latin phrases, such as *ceteris paribus*, *inter alia*, *mutatis mutandis* and *pari passu*. Judges are permitted to show off in this fashion, but lawyers must not. And the judge who does not happen to know the obscure Latin phrase you have flaunted will think you a twit.

MAKING THE ARGUMENT

APPRECIATE THE IMPORTANCE OF ORAL ARGUMENT, AND KNOW YOUR OBJECTIVES

Many lawyers view oral argument as just a formality, especially in courts that make a practice of reading the briefs in advance. Sure, it gives counsel a chance to show off before the client. But as far as affecting the outcome is concerned, what can 20 minutes or half an hour of oral argument add to what the judge has already learned from reading a few hundred pages of briefs, underlining significant passages and annotating the margins?

This skepticism has proved false in every study of judicial behavior we know. Does oral argument change a well-prepared judge's mind? Rarely. What often happens, though, is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference. It makes the difference because it provides information and perspective that the briefs don't contain.

A brief is logical and sequential. If it contains five points, they will often be addressed in some logical order, not necessarily in the order of their importance. The amount of space devoted to each point, moreover, has more to do with

its complexity than its strength. Someone who has read your brief, therefore—and especially someone who has read it some days ago—may have a distorted impression of your case. The reader may think that point No. 1, which takes a third of your brief to explain, is the most significant aspect of your argument, whereas in fact point No. 3, which covers half as many pages, is really your trump card. Oral argument can put things in perspective: “Your Honors, we have four points to our brief, all of which we think merit your attention. But the heart of our argument is point No. 3, on issue preclusion, and I’ll turn to that now.”

Oral argument also provides information that the brief can’t contain. Most obviously, it gives the appellee an opportunity to reply to responses and new points contained in the appellant’s reply brief. At least as important, it provides both sides the opportunity to answer questions that have arisen in the judges’ minds.

The most obvious of these should have been anticipated and answered in the briefing, but repetition of the answer to a persistent doubter can be helpful. And the judges are bound to have in mind questions unanticipated by the briefs—either because the answer is too obvious or because the question is too subtle. Oral argument is the time to lay these judicial doubts to rest. And finally, the quality of oral argument can convey to the court that the brief already submitted is the product of a highly capable and trustworthy attorney, intimately familiar with the facts and the law of the case.

In descending order of importance, your objectives in oral argument are these:

1. To answer any questions and satisfy any doubts that have arisen in the judges’ minds.
2. To answer—if you’re counsel for the appellee—new and telling points raised in the appellant’s reply brief. Oral argument is your only chance.
3. To call to the judges’ minds and reinforce the substantive points made in your brief.
4. To demonstrate to the court, by the substance and manner of your presentation, that you are trustworthy, open and forthright.
5. To demonstrate to the court, by the substance and manner of your presentation, that you have thought long and hard about this case and are familiar with all its details.
6. To demonstrate to the court, mostly by the manner of your presentation, that you are likable and not mean-spirited.

HAVE YOUR OPENER DOWN PAT

Anyone who has done public speaking knows that the hardest part is the opener. Your adrenaline is pumping. You’re trying to keep nervousness out of your voice and manner, establish eye contact with your audience and project a steady, even tone. This is no time to worry about what you’re going to say. For this part of your presentation, commit your words to memory (though try not to deliver them as though by rote). Even for the opener, however, don’t read from a prepared text.

Your opening should usually consist of, or at least contain, a brief outline of the subjects you intend to address: “I hope to discuss this morning, first, why this court has jurisdiction, then why the trial court’s finding of negligence was unsupported, and finally why the damages awarded are plainly excessive.” You should be under no illusion that you will actually get to reach all these subjects—that ultimately depends on the court (which is why you should put your strongest point first). But setting forth at the outset the full range of what you hope to address may induce the judges to make their questions more concise.



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BE CAUTIOUS ABOUT HUMOR

Never tell prepared jokes. They almost invariably bomb. In *Roe v. Wade*, an assistant attorney general for the state of Texas, who was arguing against two women lawyers, led with what he probably considered courtly Southern humor:

“Mr. Chief Justice, and may it please the court, it’s an old joke, but when a man argues against two beautiful ladies like this, they’re going to have the last word.” No one laughed. Onlookers said that during an embarrassing silence, Chief Justice Burger scowled at the advocate.

As for uncanned humor, we have heard counsel with an easygoing sense of humor break the tension and foster amicable discourse by an unscripted witticism—always gentle and often self-deprecating. The problems are that (1) Only someone with a genuinely good sense of humor, and a feel for when humor is appropriate, can pull this off; (2) Many of us who

think we have those qualities don't; and (3) Some judges have no sense of humor. All in all, the benefit is not worth the risk. You should, of course, display restrained appreciation for any attempt at humor by the court.

NEVER POSTPONE AN ANSWER

Perhaps the most annoying of all responses to a judge's question is this: "Your Honor, I'll get to that point later. First," Go where the court wants you to go! Besides offending the court's dignity, you invite the judge to conclude (as most will) that you have no effective response. And you invite suspicion that the promised "later" will never come. (Justice John M. Harlan asserted that the usual result of a postponed answer was a never-addressed question.) At the very least the questioner is distracted from your ensuing discussion, waiting eagerly for that to be done with and for the question to be addressed. As elegantly described by Ben W. Palmer, a Minneapolis practitioner of the mid-20th century, "Everything you may say thereafter may be suspended in the air like a levitated body or more likely a corpse—the corpse of your dead case."

When following our advice not to postpone an answer, refrain from saying something like, "Your Honor, I was planning to address that point later on, but since you ask I shall come to it at once."

Frankly, the court doesn't care a fig whether you were planning to address it later or not—you'll get no points for that even if the judges believe you. And the clear suggestion that the nasty ol' judge has ruined your orderly plan of presentation will not be well-received. Just answer the question.

LEARN HOW TO HANDLE A DIFFICULT JUDGE

You will sometimes encounter a judge whose questions are designed not to obtain enlightenment but to demonstrate to colleagues the weakness of your case. During your exchange with such a questioner, be sure to maintain eye contact. Don't display your discomfort by looking down at some imaginary text whence will come your redemption. Look the judge straight in the eye and continue responding in a professional, firm manner.

It's always a mistake to evade questions, but especially so when the question comes from a difficult judge. That judge will persist, and you'll end up spending even more time reasoning with someone who will not be persuaded. Confront the question squarely with your best answer, and try to move on.

Sometimes such a questioner, after you have answered as best you can, will continue to press the same point, even though (indeed, because) you are unable to say anything more. You must devise a polite, nonalienating way to end this exchange, or it will consume much of your argument time. After a decent amount of time has been spent on the point, it would be appropriate to say, "Your Honor, I cannot respond to your objection with anything other than what I have already said."

A similar problem is presented when a judge's questions about one part of your presentation are so numerous that the time remaining for an important but yet-to-be-addressed portion is growing short. You must try, politely, to regain control of the subject matter. The court will not take it amiss if, after responding to one question, you continue quickly: "With the court's permission, I would like to turn now to"

Whatever else you do when confronted by a hostile and unreasonable judge, don't reply in kind. Don't become hostile yourself; don't display anger, annoyance or impatience. Keep telling yourself that you owe it to your client—because you do.

Even so, lawyers are entitled to take great delight in the wonderful comeuppances to judicial boorishness that some of their more rash predecessors have devised. Our favorite was also a favorite of Justice Robert H. Jackson. A noted barrister, F.E. Smith, had argued at some length in an English court when the judge leaned over the bench and said: "I have read your case, Mr. Smith, and I am no wiser than I was when I started."

To which the barrister replied: "Possibly not, My Lord, but far better informed." Smith, who later became a famous judge as the Earl of Birkenhead, could reportedly carry off such snappy rejoinders with impunity.

We doubt that, but in any case we don't recommend that you emulate him.

BEWARE INVITED CONCESSIONS

We've advised you to volunteer concessions that careful deliberation shows are necessary. But concessions that you're pressed to make on horseback, at oral argument, are something else. The unduly accommodating lawyer—a frequently observed creature, especially in appellate courts—has given away many a case. The law books are filled with affirmances that would have been reversals or remands for further proceedings were it not for the concession of a crucial fact by accommodating counsel. And propositions of law that might well have been exceedingly difficult for an opinion to establish have often been happily resolved (for purposes of the case at hand, at least) by foolish concessions.

Any judge who presses you for a concession might well use it against you. That judge may, for example, be testing the validity of your basic premise—or rather, the fidelity of your adherence to that basic premise. Let's say you're defending the lawfulness of an officer's traffic stop on the ground that there was an objectively valid basis for the stop, such as a broken taillight on the vehicle. Counsel for the defense contends that the stop was unlawful because the real reason for it was the officer's suspicion that the occupants of the car were drug-runners. You might get the following honey-coated inquiry from the court: "Counsel, surely you would agree that an officer could not pull a car over—even a car with a

broken taillight—solely for the purpose of harassing its occupants.”

What a wonderful opportunity for you to show that you are just as reasonable a person as this judge. But if you rise to this bait, you will have abandoned the fundamental premise of your case: that whatever the subjective motivation for a stop, it is validated by objective indication of probable cause. For being so accommodating, you can expect the court’s opinion excluding the evidence derived in the traffic stop to read: “Counsel has acknowledged that the subjective intent of the arresting officer is relevant, and we see no difference between an invalidating intent to harass and an invalidating intent to search for drugs without probable cause.”

It is not unusual for a judge to come to the bench, having read all the briefs, with a clear idea of what the judgment ought to be but for one missing fact, or but for one possible legal obstacle. If the judge can get you to concede that fact, or to concede a point that would make that legal obstacle irrelevant, the opinion is all but written. You should not cooperate in your own destruction.

Excerpted from *Making Your Case: The Art of Persuading Judges*, by Antonin Scalia and Bryan A. Garner. Published by Thomson/West (2008)

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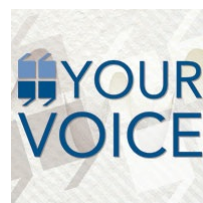
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