

MAKING YOUR CASE

Judge Ben H. Hadfield First District

I. Introduction

Making Your Case, The Art of Persuading Judges Antonin Scalia & Bryan A. Garner

II. Everyone Was Inexperienced When They Began

III. Make it Easy for the Judge to Rule in Your Favor

IV. Articulate Specific Relief You Are Seeking

V. General Principles of Argumentation *Justice Scalia*

1- Be sure that the tribunal has jurisdiction

- Judges face as a first task to be sure of their authority to decide the matters brought before them.

2- Know your audience

- A good lawyer tries to learn as much as possible about the judge who will decide the case.
- Besides judicial philosophy, learn all that you can about how the judge runs the courtroom.
- Trial judges are fundamentally different from appellate judges. They focus on achieving the proper results in one particular case, not on crafting a rule of law that will do justice in the generality of cases.

3- Know your case

- Although lawyers aren't selling equipment, they are selling their cases.
- Your very first assignment is to become an expert on the facts and the law of your case.
- By conceding what must be conceded, you establish your credentials as a reliable and even-handed counselor.

4- Know your adversary's case

- Your case must take into account the points the other side is likely to make.

- 5- Pay careful attention to the applicable standard of decision**
- When the standard of decision favors your side of the case, emphasize that point at the outset of your discussion of the issue – and keep it before the court throughout.
- 6- Never overstate your case. Be scrupulously accurate**
- Once you have worked long and hard on your case, you’ll probably be utterly convinced that your side is right.
 - But the judges have not worked on the case as long (or, probably, as hard) and is likely, initially at least, to think it much more of a horse race than you do.
- 7- Occupy the most defensible terrain.**
- Select the most easily defensible position that favors your client.
 - Don’t assume more of a burden than you must. If, for example, a leading case comes out differently from you desired result, don’t argue that it should be overruled if there is a reasonable basis for distinguishing it.
- 8- Yield indefensible terrain – ostentatiously**
- Don’t try to defend the indefensible.
- 9- Take Pains to select your best arguments. Concentrate your fire.**
- A mediocre advocate defending a good position will beat an excellent advocate defending a bad position nine times out of ten.
 - Scattershot argument is ineffective.
 - Pick your best independent reasons why you should prevail – preferably no more than three – and develop them fully.
 - Lawyers notoriously multiply their points, just as they notoriously multiply their verbs (“give, grant, bargain, sell, and convey”)
- 10- Communicate clearly and concisely**
- The power of brevity is not to be underestimated.
 - A recent study confirms what we all know from our own experiences: people tend not to start reading what they cannot readily finish. *See Susan Bell, Improving Our Writing by Understanding How People Read Personally Addressed household Mail, 57 Clarity 40 (2007)*
- 11- Appeal not just to rules but to justice and common sense.**
- It is important to your case to demonstrate, if possible, not only that your client does prevail under applicable law, but also that this result is reasonable.
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- You need to
give the court

a reason you should win that the judge could explain in a sentence or two to a nonlawyer friend.

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

- A naked appeal to fairness in the face of seemingly contrary authority isn't likely to succeed.
- Dress up the appeal with citation of some venerable legal maxim that supports your point.
 - (1) "He who take the benefit must bear the burden."
 - (2) "The law respects form less than substance."

13- Understand that reason is paramount with judges and that overt appeal to their emotions is resented.

- It is often said that a "jury argument" will not play well to a judge. Indeed, it almost never will.
- Appealing to judges' emotions is misguided because it fundamentally mistakes their motivations.
 - (1) Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.
 - (2) Bad judges want to be regarded as good judges.
 - (1) So either way, overt appeal to emotion is likely to be regarded as an insult.
- There is a distinction between appeal to emotion and appeal to the judge's sense of justice.

14- Assume a posture of respectful intellectual equality with the bench.

- Respect for the court is more effectively displayed by the nature of your argument (by avoiding repetition and by refraining from belaboring the obvious) than by such lawyerly obsequiousness as "if Your Honor please" or "with all due respect."

15- Restrain your emotions. And don't accuse.

- Don't show indignation at the shoddy treatment your client has received or at the feeble and misleading arguments raised by opposing counsel.

- Describing that treatment and dissecting those arguments calmly and dispassionately will affect the court quite as much.
 - (1) And it won't introduce into the proceeding the antagonism that judges heartily dislike.
- Cultivate a tone of civility.
 - (1) Your poker-faced public presumption must always be that an adversary has misspoken or has inadvertently erred – not that the adversary has deliberately tried to mislead the court.
 - (2) An attack on opposing counsel undercuts the persuasive force

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16- Close powerfully – and say explicitly what you think the court should do.

VI. Preparation Can Trump Experience

VII. Bring Utah Court Rules Book to Court

Refer to URCP or URE whenever applicable

VIII. Be Reasonable

Discovery dispute — Opposing counsel contacted?

Objection to proposed order — Opposing counsel contacted?

IX. Good Exhibits Work Wonders

Do not throw a staple into 15 pages and call it “Exhibit 1”

Highlight the critical parts of Exhibit

Summary exhibits such as “Proposed Property Division” are sometimes excellent

Always provide courtesy copies to judge

X. Never Miss a Scheduled Hearing

XI. Be Creative

XII. Promptly Prepare and Submit Orders and Judgments

