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Book Note

MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, by Antonin Scalia & Brian A. Garner¹

CARLY FIDLER

ORAL AND WRITTEN ADVOCACY are key tenets in the practice of law. For litigators particularly, it is the ability to argue persuasively that will ultimately shape their careers, success, and reputations. This book is a guide for all litigators on the proficiency of making arguments before a court.

Current US Supreme Court Justice Antonin Scalia and noted legal writer Bryan A. Garner are the authors of this valuable, informative, and accessible book. The authors declare their objective by first recognizing the long history of scholarship on persuading judges and further stating that “[o]ur purpose is to make the best earlier advice—with perhaps a few suggestions of our own—readily available to the modern practitioner and to adapt it to the circumstances of modern American litigation.”²

The book covers the basics and intricacies of legal reasoning, briefing, and oral advocacy at all levels of the litigation process. The authors walk the reader through every step of the process from formulating an articulate and persuasive syllogism on which to base legal argumentation, to what to do after a lawyer has concluded his or her case. The authors each present their opinions on the appropriate and most effective means of argumentation. Due to the authors’ expertise they are able to examine and break down misconceptions, assumptions, and in-applicable rules. The authors are also able to provide advice that may not otherwise be known to judicial outsiders.

The first and second chapters cover the general principles of argumentation and the fundamentals of legal reasoning, respectively. The authors stress the underlying notions of preparation and knowing the audience. Most importantly,

1. (United States of America: Thomson West, 2008) 206 pages.

2. *Ibid.* at xix.

litigators must know, and show respect for, the particular judge. The authors give suggestions about proper argumentation, including breaking down the argument, being clear and direct, and appealing to rules as well as common sense. The authors describe the relationship between an advocate and a judge as one similar to a junior associate addressing a senior associate. The essential message to litigators is to be likeable, just as he or she is in everyday life.

The third chapter is devoted to briefing. The authors systematically address the requirements for brief writing, followed by a structural analysis of the process. This chapter addresses a judge's perspective on what makes a good brief. The first rule is always to follow the applicable rules of the particular court and to inquire about any ambiguities. The authors stress the differences between the various types of briefs and discuss how best to approach the argumentation in each case. For example, in a petition for *certiorari*, the task is not to convince the court how the case was wrongly decided on factual points, but rather to show the importance of the issue at hand. The authors suggest that briefs be written logically, similar to the way a person would tell a story to friends in a comfortable setting. The book highlights brevity, simplicity, respect, and clarity as the cornerstones of proficient style in brief writing.

The authors conclude the book with a chapter on oral argumentation. Oral argument is important because it fills in the gaps and provides emphasis that briefs cannot. It is most important for the litigator to demonstrate capability, preparation, flexibility, and trustworthiness to the court. This is accomplished through practice, the substance and manner of argument, and the way in which the litigator answers questions from the bench. Litigators must always be aware of the basics of public speaking including pace, volume, pitch, enunciation, and pronunciation. With respect to preparation, litigators must know the record, be ready to be interrupted by the court, and consider hypothetical situations. In general, litigators must always be cognizant of how and why they structure and execute their arguments in a particular way because advocates "[a]rgue not just for the day but for reputation."³

Overall, the authors address the essential elements of legal argumentation and persuasion in a directed and useful manner while including entertaining anecdotes. This book also provides resources for further research on the addressed topics.

3. *Ibid.* at 206.