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Thoughts on Legal Writ. from the Greatest: Scalia & Garner—Part I

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Thoughts on Legal Writing from the Greatest of Them All: Antonin Scalia and Bryan A. Garner—Part I

The Legal Writer continues its series on what we can learn from the great teachers of writing. In this column, we highlight two masters: Antonin Scalia and Bryan A. Garner. In particular we focus on the advice they give in their preeminent book, Making Your Case: The Art of Persuading Judges. In Part I of this column we’ll address the principles of persuasion. In Part II, we’ll address persuasive-writing techniques and style. No one’s better to teach the skills of effective appellate and trial advocacy than Scalia and Garner. These two legal-writing powerhouses teamed up to offer invaluable advice to advocates in The Art of Persuading Judges.

Since publication in 2008, The Art of Persuading Judges has consistently received positive feedback from lawyers and scholars. One reviewer described it as akin to Strunk and White’s seminal Elements of Style. Another reviewer wrote that the book is like “a first-rate continuing legal education program.”

Antonin Scalia, former Associate Justice of the Supreme Court of the United States, is best known for his straightforward and engaging writing style. Before taking the bench as a Justice, Scalia had a notable career as an assistant attorney general, University of Chicago law professor, and United States Court of Appeals for the District of Columbia Circuit judge. In 2016, Scalia passed away at 79. His legacy as one of the Court’s greatest writers lives on.

Bryan A. Garner, the world’s leading English-language legal-writing expert, is a lawyer, teacher, and lexicographer. A former director of the Texas/Oxford Center for Legal Lexicography at the University of Texas School of Law, Garner founded LawProse Inc., a nationwide provider of CLE training in legal writing, editing, and drafting for lawyers and judges. In 1995, Garner became the editor in chief of Black’s Law Dictionary, America’s most widely used law dictionary. Throughout his prominent career, Garner has authored many classics on legal writing, including The Winning Brief and Legal Writing in Plain English.

PRINCIPLES OF PERSUASION

“Lawyers possess only one tool to convey their thoughts: language.”

All of Scalia and Garner’s 21 pieces of advice on argumentation stand out. They teach the basics — that lawyers must know their audience, their adversary’s case, and their most defensible terrain. Below are some of Scalia and Garner’s expert suggestions that go beyond the basics.

**Attend to the standard of decision**

Advocates should pay close attention when varying presumptions and burdens of proof govern issues. For example, in a criminal trial the prosecution must prove the defendant’s guilt beyond a reasonable doubt. When the applicable standard favors your case, emphasize that to the court. Remind the court that you and your adversary are on unequal playing fields. Advocates shouldn’t treat the standard of review as boilerplate. They should point out that the appellant is applying an incorrect standard. State this clearly in your standard-of-review, introduction, and summary-of-argument sections.

**Don’t overstate your case**

“[S]how the merits of [your] case and the defects of [your] opponents’ case — and let the object of the weak-
ness of the latter speak for itself.” Overstating your case can directly harm your credibility. “So err, if you must, on the side of understatement, and flee hyperbole.” Avoid stating an unqualified “never” unless you’re 100 percent certain of a fact.

**Stick to the age-old rule of advocacy**

“[T]he first to argue must refute in the middle, not at the beginning or end.” By refuting first, you’ll be on defense. If you refute last, the judge will “focus on your opponent’s arguments rather than your own.” But don’t refute an argument your opponent might not have thought of.

**Make space for the judge to read your argument**

If you're arguing after your adversary, “design the order of positive case and refutation to be most effective according to the nature of [your] opponent’s argument.” Leave room for the judge to listen to your main argument, especially when your opponent makes a convincing case. First, quickly demolish your opponent’s compelling argument. Then, deliver “your take on the case, your major premise, and your version of the central facts.”

“Never, never waste the court’s time.” Make arguments as clear and concise as possible. Minimize the risk of irritating the judge. Once you’ve conveyed your argument, don’t linger “over [it] like a fine glass of port.” Successful legal arguments rarely contain “iteration and embellishment.” Don’t assess the brevity of your arguments on a page or word count, either. It’s good to have a “reputation as a lawyer who often comes in short of the limits.” The judge knows that the writing contains no padding.

**Show how your client prevails under the law and this result is reasonable**

“Explain why it is that what might seem unjust is in fact fair and equitable.” Some judges might decide based on their “moral sense” favoring a change in the law. But most will decide based on governing authorities. How a judge ultimately decides is never certain. So strive to both convey to the court that you prevail under the law and that the result you seek is rational. Make it easy for the judge to explain its rationale to a non-lawyer friend.

**Don't attempt emotional appeals**

An emotional appeal is “misguided because it fundamentally mistakes [the judge’s] motivation.” Avoid making a “jury argument” before a judge. But there’s a difference between an overt appeal to emotion and presenting facts...
in a way that might unintentionally appeal to emotion. For example, “you may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home.”

**Close powerfully**

Tell the court what you think it should do. Don’t use trite phrases like “for all the foregoing reasons.” Treat the conclusion as a reminder to the judge of your principal arguments on the rule of law, and why the judge should rule in your favor. Argue that a court’s ruling otherwise would leave lower courts with uncertainty or produce frivolous litigation in the future.

**LEGAL REASONING**

“Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought.”

**The most persuasive and rigorous form of logic is syllogism**

The clearer the syllogism, the better. The winning party is the one who can convince the judge that its syllogism is closer to the main legal issue. Identify the main legal issue and convince the court of it. Don’t spend time arguing for a rule that applies to a subordinate issue.

**Master the weight of precedent**

It’s impossible to cite case law without knowing its precedential weight. Governing authorities strengthen an advocate’s persuasiveness. At the appellate level, the most important decisions to a case will be the ones decided by that same court. At the trial court level, the most important decisions will be the ones immediately superior to that trial court.

**DON’T IGNORE DICTA**

“The most persuasive nongoverning case authorities are the dicta of governing courts . . . and the holdings of governing courts in analogous cases.” Moreover, the most persuasive cases will be the ones in which a litigant who’s similar to your client lost at the trial level but won on appeal.

This column continues in the next edition of the *Journal* with Part II. The *Legal Writer*, in which we address Scalia and Garner’s techniques and style of persuasive writing.