Introduction

Judges can be persuaded only when three conditions are met:

(1) They must have a clear idea of what you're asking the court to do.
(2) They must be assured that it's within the court's power to do it.
(3) After hearing the reasons for doing what you are asking, and the reasons for doing other things or doing nothing at all, they must conclude that what you're asking is best—both in your case and in cases that will follow.

To provide the reasons that will persuade the court to conclude in your favor, you must know what *motivates* the court, and that's not always easy to discern. To be sure, following precedent is a concern for all judges, especially in the lower courts. So you must always seek to persuade the court that the disposition you urge is required by prior cases—or at the very least is not excluded by them.

Beyond stare decisis, however, it becomes a matter of some speculation what motivates a particular judge. In a question of first impression, to be resolved within a court's common-law powers, *all* judges would agree that the decision must be driven by (1) fairness to the litigants and a socially desirable result in the case at hand, and (2) adoption of a legal rule that will provide fairness, socially desirable

results, and predictability in future cases. How much weight a particular judge may give to (1) or (2)—or to their subparts—may vary. But all judges will surely give *some* weight to all those considerations, and you can be confident that you're not wasting your time in addressing them.

But unconstrained common-law decision-making is an increasing rarity. Courts are usually confronted with interpreting a governing text, whether a constitutional provision, a statute, an agency regulation, or a municipal ordinance. And in these cases, what motivates a judge cannot be so readily determined. Some judges believe that their duty is quite simply to give the text its most natural meaning—in the context of related provisions, of course, and applying the usual canons of textual interpretation—without assessing the desirability of the consequences that meaning produces. At the other extreme are those judges who believe it their duty to give the text whatever permissible meaning will produce the most desirable results. Most judges probably fall somewhere between these two extremes, perhaps adopting the most natural meaning except when policy consequences affect an area that they consider particularly important (e.g., environmental protection or sex discrimination), or perhaps consulting policy consequences only when the most natural meaning is not entirely clear. Unless you know for sure what sort of judge you're dealing with, you're well advised to argue (if possible) *both* most-natural-meaning *and* policy-consequences-*cum*-permissible-meaning.

As we'll discuss in some detail, your arguments must make logical sense. Your legal and factual premises must be well founded, and your reasoning must logically compel your conclusion. But while computers function solely on logic, human beings do not. All sorts of extraneous factors—emotions, biases, preferences—can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are).

An ever-present factor, however, and one that you can always influence, is the human proclivity to be more receptive to argument from a person who is both trusted and liked. All of us are more apt to be persuaded by someone we admire than by someone we detest. In the words of Isocrates: "[T]he man who wishes to persuade people will not be negligent as to the matter of character; he will apply himself above all to establish a most honourable name among his fellow-citizens; for who does not know that words carry greater conviction when spoken by a man of good repute?"[1] Aristotle further noted that character makes a special difference on disputed points: "We believe good men more fully and more readily than others: this is true . . . where exact certainty is impossible and opinions are divided."[2]

Your objective in every argument, therefore, is to show yourself worthy of trust and affection. Trust is lost by dissembling or conveying false information—not just

1 Isocrates, *Antidosis* (ca. 353 B.C.; George Norlin trans.), in *Readings in Classical Rhetoric* 47, 49 (Thomas W. Benson & Michael H. Prosser eds., 1988).

2 Aristotle, *Rhetoric*, Book 1, ch. 2 (ca. 330 B.C.), in *Rhetoric and Poetics of Aristotle* 25 (W. Rhys Roberts & Ingram Bywater trans., 1954).

intentionally but even carelessly; by mischaracterizing precedent to suit your case; by making arguments that could appeal only to the stupid or uninformed; by ignoring rather than confronting whatever weighs against your case. Trust is won by fairly presenting the facts of the case and honestly characterizing the issues; by owning up to those points that cut against you and addressing them forthrightly; and by showing respect for the intelligence of your audience.

As for affection, you show yourself to be likable by some of the actions that inspire trust, and also by the lack of harsh combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior, your forthright but unassuming manner and bearing at oral argument—and, perhaps above all, your even-tempered good humor. Some people, it must be said, are inherently likable. If you're not, work on it. (It may even improve your social life.)

1. Be sure that the tribunal has jurisdiction.

Nothing is accomplished by trying to persuade someone who lacks the authority to do what you're asking—whether it's a hotel clerk with no discretion to adjust your bill or a receptionist who cannot bind the company to the contract you propose. Persuasion directed to an inappropriate audience is ineffective.

So it is with judges, whose authority to act has many limitations—jurisdictional limits—relating to geography, citizenship of the parties, monetary amount, and subject matter. From justices of the peace to justices of supreme courts, judges face as a first task to be sure of their authority to decide the matters brought before them and to issue the orders requested. If they don't have that authority in your case, you don't just have a weak case, you have no case at all.

Most weak points in your case will be noted by opposing counsel, giving you a chance to reflect on them and respond. If opposing counsel does not protest a particular point, the defect will often be regarded as waived. But a defect in subject-matter jurisdiction is a different matter altogether. An opposing party often has no interest in challenging jurisdiction, being as eager as you are to have the court resolve the dispute. But in many courts (including all federal courts), absence of subject-matter jurisdiction, unlike most other defects, cannot be waived. And in some of those courts (including all federal courts), even if no party raises the issue, the court itself can and must notice

it. Nothing is more disconcerting, or more destructive of your argument, than to hear these words from the bench: "Counsel, before we proceed any further, tell us why this court has jurisdiction over this case." You need a convincing answer to this question—and preferably a quick and short one—or else you're likely, in the picturesque words of the lawyer's cliché, to be poured out of court.

Two caveats about jurisdiction: (1) Jurisdictional rules apply in appellate courts as well as in trial courts. The Supreme Court of the United States, for example, has jurisdiction over a state-court decision (involving a federal question) only when that decision is final, and only when there is no adequate and independent state-law ground for the judgment. (2) Defendants and appellees are much more likely to ignore jurisdictional requirements than are plaintiffs and appellants. But jurisdiction is just as important to them, and they must attend to it.

The rules of the Supreme Court of the United States require briefs to set forth, immediately after the description of the parties, the basis for the Court's jurisdiction. Even if the court before which you are appearing has no similar rule, it's good practice to pretend that it does and to identify the law, and the facts, that render this original action, or this appeal, properly brought before that court. Keep that information handy in case the court asks.

2. Know your audience.

A good lawyer tries to learn as much as possible about the judge who will decide the case. The most important information, of course, concerns the judge's judicial philosophy—what it is that leads this particular judge to draw conclusions. Primarily text, or primarily policy? Is the judge strict or lax on stare decisis? Does the judge love or abhor references to legislative history? The best place to get answers to such questions is from the horse's mouth: read the judge's opinions, particularly those dealing with matters relevant to your case. Also read the judge's articles and speeches on relevant subjects.

> "It may surprise you, but many firms keep 'book' on all the judges before whom they appear. This book includes much more than a biographical sketch which you might find in *Who's Who*: Does the judge listen with patience, or does he seem absorbed in other matters or half asleep? Does he treat the government as just another litigant, or does the government have a preferred or, sometimes, a prejudiced position? Does he seem impressed by the reputation or prestige of the lawyer making the argument? These and many other impressions are recorded for future reference."
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> —Samuel E. Gates

Besides judicial philosophy, learn all you can about how the judge runs the courtroom. Is the judge unusually impatient? If so, you might want to pare down your arguments to make them especially terse and pointed. Is the judge an old-school stickler for decorum? If so, you might refer to opposing counsel as "my friend." One federal judge had a practice of fining counsel $20 (no notice in advance) for placing a briefcase on the counsel table. It's good to know of such peculiarities. Some of these courtroom characteristics you can (and should)

observe by sitting in on one of the judge's hearings. Beyond that, however, talk to colleagues at the bar who are familiar with the judge's idiosyncrasies.

Finally, learn as much as you readily can about the judge's background. Say you're appearing before Judge Florence Kubitzky. With a little computer research and asking around, you discover that fly-fishing is her passion; that her father died when she was only seven; that her paternal grandparents, who were both professors at a local college, took charge of her upbringing; that she once chaired the state Democratic Party; that she enjoys bridge; that she has been estranged from her brother and sister for many years; that she graduated from Mount Holyoke College and took her law degree from the University of Michigan; that she's an aficionado of good wines; that her favorite restaurant is the Beaujolais Room; that she was counsel for a craft union before coming to the bench; and so on. Going in, all these data seem irrelevant to how the judge might decide your breach-of-contract case, but you might well find some unpredictable uses for this knowledge over the course of a lengthy trial. You might want to stress, for example, that the defective contract performance your client is complaining about violated basic standards of the craft and reflects shoddy workmanship. At the very least, these details will humanize the judge for you, so that you will be arguing to a human being instead of a chair.

Apart from judges' personal characteristics, there are also characteristics of individual courts. Can the appel-

late court you are appearing before be relied on to read the briefs before hearing argument? If not, you might devote more argument time to the facts than you otherwise would, or deal with some legal points that are so basic that you'd normally pass over them in oral argument. Is it the practice of the appellate court to assign the opinion to a particular judge before the case is even argued? If so, you can probably assume less familiarity with the facts and issues on the part of the other judges, and you might want to lay out your argument in a more rudimentary fashion for their benefit. Is the court notoriously dismissive of higher-court precedent? Stress the public-policy benefits of your proposed disposition.

Bear in mind that trial judges are fundamentally different from appellate judges. They focus on achieving the proper result in one particular case, not on crafting a rule of law that will do justice in the generality of cases. And they will pursue that objective principally through their treatment of the facts (if the case is tried to the court) and discretionary rulings. In most jurisdictions, trial judges are more disposed than appellate judges to strict observance of governing caselaw—perhaps because their work is subject to mandatory review. So at the trial-court level you are well advised to spend more time on the facts and on the discussion of precedent (from the relevant courts) and less time on policy arguments. That's one reason why a good trial brief can rarely be used before an appellate court without major changes.

3. Know your case.

Have you ever tried buying equipment from a salesperson who didn't know beans about it? You might understandably have fled the store. Although lawyers aren't selling equipment, they are selling their cases.

Judges listen to counsel because, at the time of briefing or argument, counsel can be expected to know more about the legal and factual aspects of the case than anyone else. But if it becomes clear that this is not so, judicial attention will flag. If you're asked about a fact in the record that you're ignorant of, or a clearly relevant case that you're unfamiliar with and have failed to mention in your brief, don't expect the court to give your argument much weight. Your very first assignment, therefore, is to become an expert on the facts and the law of your case. If you're a senior partner who hasn't the time to do this, assign the case to the junior partner or associate who knows it best.

> "I am constantly amazed, during Supreme Court arguments, to hear an attorney virtually struck dumb by questions from the bench that anyone with any knowledge of the case should have anticipated. It is as if the attorney has become so imbued with the spirit of his cause that he has totally blinded himself to the legitimate concerns that someone else might have in adopting his position."
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> —E. Barrett Prettyman Jr.

At the appellate stage, knowing your case means, first and foremost, knowing the record. You never know until it is too late what damage a gap in your knowledge of the record can do—not only at oral argument (see § 62), but even in your brief. Richard Bernstein of Washington, D.C., tells of a case in which the plaintiff-appellees, represented

by a prominent firm first retained on the appeal, made the theoretically plausible argument that one reason they should receive an injunction for patent infringement was that damages were difficult to prove. Unfortunately, as the appellant's reply brief carefully (oh-so-carefully) explained, the appellee's own expert had told the jury that in this case damages were easy to prove and calculate. Needless to say, the appellee did not press the point at oral argument.

Don't underestimate the importance of facts. To be sure, you will be arguing to the appellate court about the law, but what law applies—what cases are in point, and what cases can be distinguished—depends ultimately on the facts of your case. If you're arguing an appeal, you must have a firm grasp of what facts have been determined below or must be accepted as true, and what facts are still unresolved.

Knowing a case also means knowing exactly what you're asking for—and how far short of that mark you can go without bringing back to your client a hollow victory. Say a member of an appellate panel asks, "Counsel, if we agree with your petition, would you be content with a remand for the lower court to consider *X*, an issue not decided below and not briefed or argued here?" You must know whether your opponent ever raised that issue below. If not, you must insist on outright reversal and entry of judgment in your favor. If you fail to do so, the court may cite your failure as a concession that your adversary hasn't forfeited the issue. If, however, your adversary raised the point but the lower court didn't reach it, you should graciously concede that remand

is a possibility but go on to explain why the appellate court should reject that disposition—as by showing, for example, that the facts could not possibly support a judgment on that ground. By conceding what must be conceded, you establish your credentials as a reliable and even-handed counselor.

4. Know your adversary's case.

No general engages the enemy without a battle plan based in large part on what the enemy is expected to do. Your case must take into account the points the other side is likely to make. You must have a clear notion of which ones can be swallowed (accepted but shown to be irrelevant) and which must be vigorously countered on the merits. If your brief and argument come first, you must decide which of your adversary's points are so significant that they must be addressed in your opening presentation and which ones can be left to your reply brief or oral rebuttal. Of course, a principal brief or argument that is all rebuttal is anathema.

At the trial stage, you must initially discern your adversary's positions from the pleadings, the conferences, and discovery, and by using common sense. At the appellate stage, you can rely on what was argued and sought to be proved below. Bear in mind, however, that lawyers tend to develop new arguments, and revise their theories, as the case proceeds upward. Constantly ask yourself what *you* would argue if you were on the other side.

Don't delude yourself. Try to discern the real argument that an intelligent opponent would make, and don't replace it with a straw man that you can easily dispatch.

5. Pay careful attention to the applicable standard of decision.

The separate issues involved in your case may be subject to varying presumptions and burdens of proof. In a criminal trial, the prosecution must establish guilt beyond a reasonable doubt. An adversary who seeks to overturn the judgment you obtained below on the basis of an erroneous jury instruction to which there was no objection must establish not just error but plain error. An appellant who attempts to set aside federal-agency action as contrary to statutory authority must often show not merely that the best reading of the statute favors reversal, but that the agency's reading is not even within the bounds of reason. And so forth.

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. Don't let the discussion slide into the assumption that you and your adversary are on a level playing field when in fact the standard of review favors you. Say, for example, that you are asked, in a case involving review of federal-agency action favoring your client, whether you don't think an interpretation of the statute different from the agency's makes more sense. You should respond somewhat as follows: "I don't think so, Your Honor, but it really makes no difference.

The question here is whether the agency's interpretation is a reasonable one, not whether it is the very best. And on that point there is little room for doubt." Remind the court of the favorable standard of review in your summation.

Appellees' briefs commonly treat the standard of review in boilerplate fashion. If your opponent is fighting against a clearly-erroneous or arbitrary-and-capricious standard, make a big deal of it. Point out that the appellant is attempting to retry the case, or to have the court of appeals substitute its judgment for that of the district court or the agency. Say this explicitly, not only in your standard-of-review section but in your introduction and summary of argument.

When the standard of decision is against you, acknowledge the difficulty but demonstrate concretely why the standard is met. Go beyond mere repetition of stock phrases. For example, if you're arguing that the judgment below was clearly erroneous, it does little good to say, "Here one does indeed have a definite and firm conviction that a mistake has been made." Cite a case in which an appellant met that standard and compare it to your own.

The standard of decision is particularly important when you're selecting the issues to pursue on appeal. Appealing a minor error that will be reviewed under an abuse-of-discretion standard will probably do nothing but divert time and attention from your stronger points. Sometimes, too, you can escape or neutralize the more lenient standard of review by framing your claim differently—as by arguing not

that the lower court abused its discretion, but that it made an error of law in considering certain factors.

6. Never overstate your case. Be scrupulously accurate.

Once you have worked long and hard on your case—and have decided not to settle—you'll probably be utterly convinced that your side is right. That is as it should be. But the judges haven't worked on the case as long (or, probably, as hard) and are likely, initially at least, to think it much more of a horse race than you do. That will be true in any case, but especially when discretionary review has been granted to resolve a divergence of views in the lower courts. You'll harm your credibility—you'll be written off as a blowhard—if you characterize the case as a lead-pipe cinch with nothing to be said for the other side. Even if you think that to be true, and even if you're right, keep it to yourself. Proceed methodically to show the merits of your case and the defects of your opponent's—and let the abject weakness of the latter speak for itself.

> "Nothing, perhaps, so detracts from the force and persuasiveness of an argument as for the lawyer to claim more than he is reasonably entitled to claim. Do not 'stretch' cases cited and relied upon too far, making them appear to cover something to your benefit they do not cover. Do not try to dodge or minimize unduly the facts which are against you. If one cannot win without doing this—and it is seldom he can by doing it—the case should not be appealed."
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> —Hon. Wiley B. Rutledge

Scrupulous accuracy consists not merely in never making a statement you know to be incorrect (that is mere honesty), but also in never making a statement

you are not *certain* is correct. So err, if you must, on the side of understatement, and flee hyperbole. Since absolute negatives are hard to prove, and hence hard to be sure of, you should rarely permit yourself an unqualified "never." Preface a clause like "Such a suit has never been brought in this jurisdiction" with an introductory phrase like "As far as we have been able to discover, ..."

Inaccuracies can result from either deliberate misstatement or carelessness. Either way, the advocate suffers a grave loss of credibility from which it's difficult to recover.

7. If possible, lead with your strongest argument.

When logic permits, put your winning argument up front in your affirmative case. Why? Because first impressions are indelible. Because when the first taste is bad, one is not eager to drink further. Because judicial attention will be highest at the outset. Because in oral argument, judges' questioning may prevent you from ever getting beyond your first point.

Sometimes, of course, the imperatives of logical exposition demand that you first discuss a point that is not your strongest. For example, serious jurisdictional questions must be discussed first: it makes no sense to open with the merits, and then to consider, at the end, whether the court has any business considering the merits. There is also a logical order of addressing merits issues. C may not be relevant unless B is established, which in turn is not relevant until A has been established. For example, you might have to prove that (A) the agency validly promulgated the regulation, (B)

the agency has interpreted the regulation to favor your client, and (C) the agency's interpretation is entitled to judicial deference. No other order of progression would make sense. Similarly, in defending a medical-malpractice judgment on appeal, your argument portion would not begin by justifying the amount of the award and then proceed to defending the judgment of liability.

If you're the appellant, even though logic has pushed your strongest argument toward the back of the line in your principal brief, bring it up front in your reply—which will often set the agenda for the oral argument.

And if you're an appellant at oral argument, begin with your strongest point regardless of what logical progression demands (see § 81). If the court wants logical progression at oral argument, it won't be shy about asking you to turn to a logically prior point; and there (unlike in briefing or bridge), if you don't show your ace of trumps first, you may never get a chance to play it.

8. If you're the first to argue, make your positive case and then preemptively refute in the middle—not at the beginning or end.

It's an age-old rule of advocacy that the first to argue must refute in the middle, not at the beginning or the end. Refuting first puts you in a defensive posture; refuting last leaves the audience focused on your opponent's arguments rather than your own.

So for the first to argue, refutation belongs in the middle. Aristotle observed that "in court one must begin by giving one's own proofs, and then meet those of the opposition by dissolving them and tearing them up before they are made."[3]

Anticipatory refutation is essential for five reasons. First, any judge who thinks of these objections even before your opponent raises them will believe that you've overlooked the obvious problems with your argument. Second, at least with respect to the obvious objections, responding only after your opponent raises them makes it seem as though you are reluctant, rather than eager, to confront them. Third, by systematically demolishing counterarguments, you turn the tables and put your opponent on the defensive. Fourth, you seize the chance to introduce the opposing argument in your own terms and thus to establish the context for later discussion. Finally, you seem more even-handed and trustworthy.

> "Every argument is refuted in one of these ways: either one or more of its assumptions are not granted; or if the assumptions are granted, it is denied that a conclusion follows from them; or the form of argument is shown to be fallacious; or a strong argument is met by one equally strong or stronger."
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> —Cicero

But anticipatory refutation has its perils. You don't want to refute (and thereby disclose) an argument that your opponent wouldn't otherwise think of. Avoiding this pitfall requires good lawyerly judgment.

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3 *Rhetoric* ch. 3.17, at 257 (ca. 350 B.C.; H.C. Lawson-Tancred trans., 1991; repr. 2004).

9. If you're arguing after your opponent, design the order of positive case and refutation to be most effective according to the nature of your opponent's argument.

Aristotle advised responding advocates to rebut forcefully in their opening words:

> [I]f one speaks second, one must first address the opposite argument, refuting it and anti-syllogizing, and especially if it has gone down well; for just as the mind does not accept a subject of prejudice in advance, in the same way neither does it accept a speech if the opponent seems to have spoken well. One must therefore make space in the listener for the speech to come; and this will be done by demolishing the opponent's case; thus, having put up a fight against either all or the greatest or most specious or easily refuted points of the opponent, one should move on to one's own persuasive points.[4]

This point applies to those who oppose motions, to respondents, and to appellees. If an opponent has said something that seems compelling, you must quickly demolish that position to make space for your own argument.

Caution: As a general matter, this advice applies to refutation of separate points that make your affirmative points academic—not to your opponent's contesting of your affirmative points themselves. If, for example, your case rests on the proposition that a particular statute creates a claim, you would not begin by refuting your opponent's argument that no claim was created; you would present your own

4 *Id.*

affirmative case to the contrary first. Suppose, however, that your opponent has argued, quite persuasively, that the court lacks jurisdiction and that the statute of limitations on any claim has expired. Judges don't like to do any more work than necessary. If they have a fair notion that they will never have to reach the question whether a claim was created, they aren't going to pay close attention to your oral argument on that point. And we have known judges to skip entirely over the merits section of the appellee's brief to reach the response to the appellant's jurisdictional or other nonmerits argument. You must clear the underbrush—or, as Aristotle puts it, "make space"—so that the court will be receptive to your principal argument.

Having made that space, however, you must then fill it. Proceed quickly to a discussion of *your* take on the case, *your* major premise, and *your* version of the central facts. As put by a perceptive observer, in the context of an appellee's argument:

> Nothing could be a more serious mistake than merely to answer the arguments made by counsel for the appellant. These arguments may be skillfully designed to lead counsel for the respondent off into the woods or they may lead him there unintentionally. The proper line of attack for counsel for the respondent to adopt is to proceed to demonstrate by his discussion of the law and the facts that the judgment is right and that it should be affirmed. All other considerations are secondary.[5]

5 Harold R. Medina, *The Oral Argument on Appeal*, 20 ABA J. 139, 142–43 (1934).

10. 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 your desired result, don't argue that it should be overruled if there is a reasonable basis for distinguishing it. If you're arguing for a new rule in a case of first impression, frame a narrow rule that is consistent with judgment for your client. (Why set yourself the task of providing a satisfactory answer to 100 hypothetical questions about the multifarious effects of a broad rule when you can limit the questions to 5 about the limited effects of a narrow one?) If the defendant has intentionally injured your client in some novel fashion, argue for the existence of some hitherto unrecognized intentional tort, not for a rule that includes negligent acts as well.

> "If your court is divided philosophically, . . . your best bet is to strive for a narrow fact-bound ruling that will not force one or two judges to revisit old battles or reopen old wounds. . . . You want to win unanimously; you do not want a messy dissent to provoke a petition for en banc or even certiorari. On a divided court, big forward or backward (depending on your point of view) leaps in the law come usually only in en bancs, or if they do come in a panel, often end up in en bancs. Take your narrow, 'for this case only' holding, hug it to your bosom, and run."
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> —Hon. Patricia M. Wald

Taking the high ground does not mean being noncommittal—saying, for example, that you win under any of three different possible rules, without taking a position about which rule is best. The judge writing an opinion, especially an appellate judge, cannot indulge that luxury, but must say what the law is. Be helpful. Sure, point out that you win under various rules, but specify what the rule

ought to be. If you fail to do that, you leave the impression that all your proposed rules are problematic.

Don't let your adversary's vehement attacks on your moderate position drive you to less defensible ground. If, for example, your position is that an earlier case is distinguishable, don't get muscled into suggesting that it be overruled. And don't let your adversary get away with recharacterizing your position to make it more extreme (a common ploy). If you are arguing, for example, that lawful resident aliens are entitled to certain government benefits, don't leave unanswered your opponent's suggestion that you would reward illegal aliens. Respond at the first opportunity.

On rare occasions it may be in the institutional interest of your client to argue for a broader rule than is necessary to win the case at hand. When you take this tack, the court is likely to ask why it should go so far when a much narrower holding will dispose of the case. Have an answer.

11. Yield indefensible terrain—ostentatiously.

Don't try to defend the indefensible. If a legal rule favoring your outcome is exceedingly difficult to square with the facts of your case, forget about it. You will have to consume an inordinate amount of argument time defending it against judges' attacks, and you will convey an appearance of unreasonableness (not to say desperation) that will damage your whole case.

Rarely will all the points, both of fact and of law, be in your favor. Openly acknowledge the ones that are against

you. In fact, if you're the appellant, run forth to meet the obvious ones. In your opening brief, raise them candidly and explain why they aren't dispositive. Don't leave it to the appellee to bring them to the court's attention. Fessing up at the outset carries two advantages. First, it avoids the impression that you have tried to sweep these unfavorable factors under the rug. Second, it demonstrates that, reasonable person that you are, you have carefully considered these matters but don't regard them as significant.

> "[G]rasp your nettles firmly. No matter how unfavorable the facts are, they will hurt you more if the court first learns them from your opponent. To gloss over a nasty portion of the record is not only somewhat less than fair to the court, it is definitely harmful to the case. Draw the sting of unpleasant facts by presenting them yourself."
> —Frederick Bernays Wiener

Suppose, however, that you're the appellee and those damaging points have already been noted by your adversary. Don't pass them by in sullen silence. Make a virtue of a necessity. Boldly proclaim your acceptance of them—thereby demonstrating your fairness, your generosity, and your confidence in the strength of your case, and burnishing your image as an eminently reasonable advocate: "We concede, Your Honor, that no notice was given in this case. The facts cannot be read otherwise." (*Huzzah!* thinks the court. *An even-handed fellow!*) You then go on, of course, to explain why the conceded point makes no difference or why other factors outweigh it.

Bear in mind that a weak argument does more than merely dilute your brief. It speaks poorly of your judgment and thus reduces confidence in your other points. As the

saying goes, it is like the 13th stroke of a clock: not only wrong in itself, but casting doubt on all that preceded it.

12. Take pains to select your best arguments. Concentrate your fire.

The most important—the very most important—step you will take in any presentation, whether before a trial court or an appellate court, is selecting the arguments that you'll advance. A mediocre advocate defending a good position will beat an excellent advocate defending a bad position nine times out of ten. (We made up this statistic, but it's probably correct.) Give considerable thought to what your argument should be, and talk it over with your associates. Bear in mind that in an appeal, trial counsel is not necessarily the best person to make the call. Extreme attachment to a rejected point can color one's judgment about which rulings lend themselves to effective challenge. Think of the poker player who can't bear to fold three aces even after it has come to seem very likely that the opponent has a full house.

Scattershot argument is ineffective. It gives the impression of weakness and desperation, and it insults the intelligence of the court. If you're not going to win on your stronger arguments, you surely won't win on your weaker ones. It is the skill of the lawyer to know which is which. Pick your best independent reasons why you should prevail—preferably no more than three—and develop them fully. You might contend, for example, that (1) the breach-

of-contract claim is barred by the statute of limitations; (2) the performance complied with the contract; and (3) any deficiency in performance was accepted as adequate and hence waived. Of course, each point may be supported by several lines of argument.

> "We must not always burden the judge with all the arguments we have discovered, since by doing so we shall at once bore him and render him less inclined to believe us."
> —Quintilian

Lawyers notoriously multiply their points, just as they notoriously multiply their verbs ("give, grant, bargain, sell, and convey"). Some of the multifarious points often turn out to be just earlier points stated differently. Sometimes they result from including the pet theory of every lawyer on the case. Don't let that happen. Arm-wrestle, if necessary, to see whose brainchild gets cut. And don't let the client dictate your choice; you are being paid for your judgment.

On the surface, it might seem that a ten-point argument has been overanalyzed. In reality, it has been underanalyzed. Counsel has not taken the trouble to determine which arguments are strongest or endured the pain of eliminating those that are weakest.

13. Communicate clearly and concisely.

In an adversary system, it's your job to present clearly the law and the facts favoring your side of the case—it isn't the judges' job to piece the elements together from a wordy and confusing brief or argument. Quite often, judges won't take

the trouble to make up for your deficiency, having neither the time nor the patience.

The judges considering your case have many other cases in hand. They are an impatient, unforgiving audience with no desire to spend more time on your case than is necessary to get the right result. Never, never waste the court's time. Having summoned the courage to abandon feeble arguments, do not undo your accomplishment by presenting the points you address in a confused or needlessly expansive manner. They must be presented clearly and briskly and left behind as soon as their content has been conveyed—not lingered over like a fine glass of port. Iteration and embellishment are rarely part of successful legal argument.

> "Length dissolves vehemence, and a more forceful effect is attained where much is said in a few words . . . . Brevity is so useful in . . . style that it is often more forceful not to say something."
>
> —Demetrius

In a recent case before the Supreme Court of the United States, an appellant's brief took ten pages before mentioning the critical fact in the case, then took another seven pages to discuss peripheral matters before setting forth the legal rule that governed the case. No judge should have to cut through 17 pages of pulp to glimpse the core of the dispute.

Avoid the temptation to think that your brief is concise enough so long as it comes in under the page or word limit set forth in the court's rules—and more still, the temptation to insert additional material in order to reach the page or word limit. Acquire a reputation as a lawyer who often comes in short of the limits. "It's worth reading carefully

what this lawyer has written," the judges think. "There's never any padding."

The power of brevity is not to be underestimated. A recent study confirms what we all know from our own experience: people tend not to start reading what they cannot readily finish.[6]

14. Always start with a statement of the main issue before fully stating the facts.

Cicero advised that you must not spring at once into the fact-specific part of your presentation, since "it forms no part of the question, and men are at first desirous to learn the very point that is to come under their judgment."[7]

In 1981, the rules of the Supreme Court of the United States were amended so that the first thing a reader sees, upon opening the cover of a brief, is the question presented. Many court rules, however, don't require issues or questions presented to be up front or even to be set forth at all. That's regrettable, because the facts one reads seem random and meaningless until one knows what they pertain to. Whether you're filing a motion in a trial court or an appellate brief—or, for that matter, an in-house memorandum analyzing some point of law—don't ever begin with a statement of facts. State the issue first.

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6 *See* Susan Bell, *Improving Our Writing by Understanding How People Read Personally Addressed Household Mail*, 57 Clarity 40 (2007).

7 Cicero, *Cicero on Oratory and Orators* 143 (ca. 45 B.C.; Ralph A. Micken,trans., 1986).

> "The greatest mistake a lawyer can make either in briefing or oral argument is to keep the court in the dark as to what the case is about until after a lengthy discussion of dates, testimony of witnesses, legal authorities, and the like. Few judges, after eventually finding out what the case is about, can back up in their mental processes and give proper consideration and evaluation to such narrative matter."
>
> —Hon. Luke M. McAmis

But while your statement of the issue should come before a full statement of the facts, it must contain enough of the facts to make it informative. "Whether the appellant was in total breach of contract" is a little help, but not much. Fill in the facts that narrow the issue to precisely what the court must decide: "The appellant delivered a load of stone two days late under a contract not providing that time was of the essence. Was the appellee entitled to reject the delivery and terminate the contract?"

15. Appeal not just to rules but to justice and common sense.

Courts have been known to award judgments that seem to be unjust or to defy common sense. A defective statute, or a defective Supreme Court precedent, can (in the eyes of most judges, at least) require such a result. But don't count on it. Consider the philosophy of Lord Denning, regarded by many as one of the greatest of 20th-century British judges:

> My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule—or even to change it—so as to do justice in the instant case

> before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case.[8]

To be sure, Denning was a renowned judicial activist—or a notorious one, if that is your view of things. But a similar, if not quite identical, approach was endorsed by the famous Chancellor James Kent of New York:

> I saw where justice lay and the moral sense decided the cause half the time, and then I sat down to search the authorities until I had exhausted my books, and I might once in a while be embarrassed by a technical rule, but *I most always found principles suited to my views of the case* . . . .[9]

Now you may think that the "principles" contained in the "authorities" ought to *lead* a judge to his or her conclusion, rather than merely provide later support for a conclusion arrived at by application of the judge's "moral sense." And you'd be entirely right. We're giving advice here, however, not to judges but to the lawyers who appear before them. You can bet your tasseled loafers that some judges, like Lord Denning, will be disposed to change the law to accord with their "moral sense"; and that many more will, like Chancellor Kent, base their initial decision on their "moral sense" and then scour the law for some authority to support that decision. It is therefore 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. So you must explain why it is that what might seem unjust

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8 Lord Denning, *The Family Story* 174 (1981).

9 *An Unpublished Letter of Chancellor James Kent*, 9 Green Bag 206, 210 (1897).

is in fact fair and equitable—in this very case, if possible—and, if not there, then in the vast majority of cases to which the rule you are urging will apply. 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.

Rely fully on the procedural and technical points that support your case. If, for example, a particular constitutional objection was not raised below and was not addressed by the lower court, *say so*. Whenever possible, however, accompany the procedural or technical objection with an explanation of why the pretermitted point is in any event wrong (or at least weak) *on the merits*. Judges will indeed dispose of cases on procedural or technical grounds—but they will do so much more reluctantly if it appears that the claim thereby excluded is a winner. If you cannot make a plausible case on the merits, then point out how the procedural or technical bar is necessary to ensure the correct result in the long term.

A real-life example: In a recent arbitration in Arkansas, the discovery cutoff came and went on February 15, by which time the parties had taken lengthy depositions and made voluminous production of documents. Counsel had one month left to prepare for the March 15 arbitration, which was slated to last two weeks. On March 8, the defendants issued subpoenas to four witnesses employed by the plaintiffs, requiring them to produce within five days all sorts of documents that the defendants had never before requested. The plaintiffs objected on grounds that the dis-

covery cutoff had passed. But the arbitrators ordered the plaintiffs to produce the documents.

The result? During the week before trial (yes, in terms of the work required an arbitration is essentially a trial), while the defendants' lawyers were readying themselves—preparing their witnesses and assembling the documentary evidence—the plaintiffs' lawyers were scrambling to gather the documents required by the 11th-hour subpoenas.

The argumentative mistake? In objecting to the subpoenas, the plaintiffs' lawyers argued merely the obvious: (1) the discovery deadline had passed, and (2) the defendants could have requested these documents much earlier. The objections seemed hardly to register in the three arbitrators' minds. Here's what the plaintiffs could have—and should have—argued:

> Plaintiffs' counsel should not be forced to stop preparing for trial, one week away, and travel to four cities on both coasts to find documents that the defendants never requested before the expired discovery deadline. There is a reason for discovery deadlines: they level the playing field. If the defendants succeed in this last-minute stratagem, the plaintiffs' team will be severely prejudiced. One week from the trial date, we should not be forced to conduct a frenetic scramble for newly subpoenaed documents. Nor should we be forced, in order to avoid that consequence, to request a deferral of the agreed-upon trial date, further delaying the justice our client is seeking. Although we are sure the defense lawyers mean well, the effect of what they have done is major-league sandbagging. We urge the panel to quash the subpoenas.

That might have worked. Certainly it stood a better chance than merely harping on the deadline. If there is prejudice, never fail to identify and argue it.

16. 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. Whenever possible, dress up the appeal with citation of some venerable legal maxim that supports your point. Such maxims are numerous, mostly derived from equity practice. For example:

> When the reason for a rule ceases, so should the rule itself.
>
> One must not change his purpose to the injury of another.
>
> He who consents to an act is not wronged by it.
>
> Acquiescence in error takes away the right of objecting to it.
>
> No one can take advantage of his own wrong.
>
> He who takes the benefit must bear the burden.
>
> The law respects form less than substance.

The State of California has codified many of these maxims with case summaries exemplifying their application.[10] Courts in other states are no less familiar with such maxims, and you can almost always find one to support a defensible position.

10 Cal. Civ. Code §§ 3509–3548.

17. 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. The reason is rooted in the nature of what we typically think of as "jury argument"—a blatant appeal to sympathy or other emotions, as opposed to a logical application of the law to the facts. Before judges, such an appeal should be avoided.

Some authorities (though not most) defend some degree of appeal to emotions:

> Every argument . . . must be geared so as to appeal both to the emotion and to the intellect. I think the basic difference between a competent advocate and a great one is that a competent advocate can only do one or the other, or thinks only one or the other is important. You get competent advocates who are very good in emotional cases, because they are adept in appealing to the emotion. You get competent advocates who are successful in cases that are on the dry side because they have the knack of appealing to the intellect. But a great advocate is one who can appeal to both and knows how to press the two appeals in such a way that one will not get in the way of the other.[11]

We hold strongly to a contrary view:

> It is both folly and discourtesy to deliver a jury speech to [the New York Court of Appeals]. It will surely win no votes. You are fortunate if the judges will attribute such misconduct

11 Whitman Knapp, *Why Argue an Appeal? If So, How?*, 14 Record N.Y.C.B.A. 415, 417 (1959).

to your ignorance rather than to the vulnerability of your case.[12]

Appealing to judges' emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges. So either way, overt appeal to emotion is likely to be regarded as an insult. ("What does this lawyer think I am, an impressionable juror?")

> "When a lawyer resorts to a jury argument on appeal, you can just see the judges sit back and give a big sigh of relief. We understand that you have to say all these things to keep your client happy, but we also understand that you know, and we know, and you know we know, that your case doesn't amount to a hill of beans, so we can go back there in the conference room and flush it with an unpublished disposition."
>
> —Hon. Alex Kozinski

There is a distinction between appeal to emotion and appeal to the judge's sense of justice—which, as we have said, is essential. *Of course* you should argue that your proposed rule of law produces a more just result, both in the present case and in the generality of cases. And there is also a distinction between an overt appeal to emotion and the setting forth of facts that may engage the judge's emotions uninvited. You may safely work into your statement of facts that your client is an elderly widow seeking to retain her lifelong home. But don't make an overt, passionate attempt to play upon the judicial heartstring. It can have a nasty backlash.

12 Simon H. Rifkind, "Appellate Courts Compared," in *Counsel on Appeal* 163, 178–79 (Arthur A. Charpentier ed., 1968).

18. Assume a posture of respectful intellectual equality with the bench.

The Solicitor General of the United States—the most frequent and often the most skilled advocate before the Supreme Court of the United States—is sometimes called the "tenth justice." Every advocate has the opportunity to deserve this description—to be so helpful to the court as to be a colleague of sorts, albeit a junior one. And that is the sort of relationship with the court, a relationship of respectful intellectual equality, that counsel should try to establish. Some appellate judges refer to oral argument as the beginning of the court's conference—an initial deliberative session in which counsel participate.

Intellectual equality requires you to know your stuff, to stand your ground, and to do so with equanimity. When you write your brief, or stand up to speak, have clearly in mind this relationship that you wish to establish. It is *not* the relationship of teacher to student—and if the judges get the impression that this is your view of things, you will have antagonized them. Nor is it the relationship of supplicant to benefactor. You are not there to cajole a favor out of the judges but to help them understand what justice demands, on the basis of your intimate knowledge of the facts and law. Perhaps the best image of the relationship you should be striving to establish is that of an experienced junior partner in your firm explaining a case to a highly intelligent senior partner.

Respect for the court is more effectively displayed by the nature of your argument (by avoiding repetition, for example, and by refraining from belaboring the obvious) than by such lawyerly obsequiousness as "if Your Honor please" or "with all due respect." Of course if you're going to err on the point, it is probably better to be unduly deferential than not deferential enough.

> "[A]n advocate should be instructive without being condescending, respectful without being obsequious, and forceful without being obnoxious."
> —T.W. Wakeling

19. 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. And it won't introduce into the proceeding the antagonism that judges heartily dislike. Nor will it impair your image as a reliably rational and even-tempered counselor. Ideally, you should evoke rather than display indignation.

Cultivate a tone of civility, showing that you are not blinded by passion. Don't accuse opposing counsel of chicanery or bad faith, even if there is some evidence of it. 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. It's imperative. As an astute observer on the trial

bench puts it: "An attack on opposing counsel undercuts the persuasive force of any legal argument. The practice is uncalled for, unpleasant, and ineffective."[13] This advice applies especially against casting in pejorative terms something that opposing counsel was fully entitled to do.

Nor should you accuse the lower court of willful distortion, even if that is obvious. A straightforward recital of the facts will arouse whatever animosity the appellate court is capable of entertaining, without detracting from the appearance of calm and equanimity that you want to project. If the court concludes that the law is against you, it will not award your client the victory just to embarrass a rogue trial judge.

20. Control the semantic playing field.

Labels are important. That's why people use euphemisms and why names are periodically changed. And that's why you should think through the terminology of your case. Use names and words that favor your side of the argument.

Consider American Airlines. Some lawyers who have represented the company call their client "AA" in briefs, perhaps as a space-saver. That passes up an opportunity for subliminal reinforcement. If American Airlines is your client, you have the opportunity to call your client "American"—knowing that every judge sitting on your case (unless you are in some international tribunal) will be an

13 Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 Tul. L. Rev. 207, 224 (1995).

American. Of course, if you're opposed to American Airlines, you will call your adversary "the Company," "the Corporation," or perhaps even "the Carrier"—never "American." If you can get your adversaries to use your terminology, so much the better.

Sometimes it's not a proper name at issue but an event. Some years ago, Warren Christopher represented Union Oil in connection with some major spills at offshore oil platforms in the Santa Barbara Channel. From the beginning, Christopher persistently referred to this potential environmental disaster as "the incident," and soon both the judge and even the plaintiffs' lawyers adopted this abstract word uniformly. Anything more concrete, from Union Oil's point of view, would have conjured up prejudicial images.

Judge James L. Robertson of Mississippi has recounted a splendid example of his use of disputational semantics when he was in practice. He was challenging some unduly restrictive outside-speaker regulations on Ole Miss's college campuses. During the proceedings, he and his partners kept referring to the lawsuit as the "speaker-ban case." Soon everyone was doing it.[14] That done, the outcome of the case seems to have been foreordained. Would you be inclined to vote for or against a speaker ban?

Of course, semantic astuteness must not degenerate into sharp practice. In a high-profile medical-malpractice action some years ago, a hospital executive named Lyman Sarnoski

14 Hon. James L. Robertson, "Reality on Appeal," in *Appellate Practice Manual* 119, 124–25 (Priscilla Anne Schwab ed., 1992).

(the last name is fictional) was accused of falsifying medical records. The plaintiff's lawyers repeatedly referred to him before the jury as "LIE-man," emphasizing the first syllable of his name to suggest, undoubtedly, that lying was part of his nature. It was not long before the judge ordered them to refer to the man as "Mr. Sarnoski"—and levied a $5,000 sanction on the lawyers. Even if the judge had not taken offense, the jurors probably would have.

21. Close powerfully—and say explicitly what you think the court should do.

Persuasive argument neither comes to an abrupt halt nor trails off in a grab-bag of minor points. The art of rhetoric features what is known as the peroration—the conclusion of argument, which is meant to *move* the listener to act on what the preceding argument has logically described. The concluding paragraph of a legal argument cannot, of course, be as emotional as the peroration of Cicero's first oration against Cataline. But it should perform the same function appropriately for the differing context. It should briefly call to the reader's or listener's mind the principal arguments made earlier and then describe why the rule of law established by those arguments must be vindicated—because, for example, any other disposition would leave the bar and the lower courts in uncertainty and confusion, or would facilitate fraud, or would flood the courts with frivolous litigation, and so on.

The trite phrase "for all the foregoing reasons" is hopelessly feeble. Say something forceful and vivid to sum up your points.

In General

22. Think syllogistically.

Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and hence the most persuasive, is the syllogism. If you have never studied logic, you may be surprised to learn—like the man who was astounded to discover that he had been speaking prose all his life—that you have been using syllogistic reasoning all along. Argument naturally falls into this mode, whether or not you set out to make it do so. But the clearer the syllogistic progression, the better.

Legal arguments can be expressed syllogistically in two ways. Some are positive syllogisms:

> Major premise: All S is P.
> Minor premise: This case is S.
> Conclusion: This case is P.

Others are negative:

> Major premise: Only S is P.
> Minor premise: This case is not S.
> Conclusion: This case is not P.

If the major premise (the controlling rule) and the minor premise (the facts invoking that rule) are true (you must

establish that they're true), the conclusion follows inevitably.

Legal argument generally has three sources of major premises: a text (constitution, statute, regulation, ordinance, or contract), precedent (caselaw, etc.), and policy (i.e., consequences of the decision). Often the major premise is self-evident and acknowledged by both sides.

The minor premise, meanwhile, is derived from the facts of the case. There is much to be said for the proposition that "legal reasoning revolves mainly around the establishment of the minor premise."[15]

So if you're arguing from precedent, your argument might go:

Major premise: Our cases establish that a prisoner has a claim for harm caused by the state's deliberate indifference to serious medical needs.

Minor premise: Guards at the Andersen Unit ignored the plaintiff's complaints of acute abdominal pain for 48 hours, whereupon his appendix burst.

Conclusion: The plaintiff prisoner has a claim.

Or if you're arguing text:

Major premise: Under the Indian Commerce Clause of the U.S. Constitution, states cannot tax Indian tribes for activities on reservations without the express authorization of Congress.

Minor premise: Without congressional authorization, South Dakota has imposed its motor-fuel tax on tribes that sell fuel on reservations.

Conclusion: South Dakota's tax is unconstitutional.

15 O.C. Jensen, *The Nature of Legal Argument* 20 (1957).

Or if you're arguing policy:

Major premise: Only an interpretation that benefits the handicapped serves the policy objectives of the statute.

Minor premise: The defendant's interpretation of the statute requires each wheelchair user to buy additional equipment at a cost of $1,800.

Conclusion: The defendant's interpretation does not serve the policy objectives of the statute.

Figuring out the contents of a legal syllogism is a matter of finding a rule that works together with the facts of the case—really, a rule that is invoked by those facts. Typically, adversaries will be angling for different rules by emphasizing different facts. The victor will be the one who convinces decision-makers that his or her syllogism is closer to the case's center of gravity. What is this legal problem *mostly* about? Your task as an advocate is to answer that question convincingly.

> "[T]o put an argument in syllogistic form is to strip it bare for logical inspection. We can then see where its weak points must lie, if it has any."
> —F.C.S. Schiller

Statutes, Regulations, Ordinances, Contracts, and the Like

23. Know the rules of textual interpretation.

Paramount rule: Before coming to any conclusion about the meaning of a text, read the *entire* document, not just the particular provision at issue. The court will be seeking to give an ambiguous word or phrase meaning *in the context of the document in which it appears*. Often a later provision will reveal that the earlier provision must bear a particular meaning.

Here are the frequently expressed rules of interpretation:

- Words are presumed to bear their ordinary meanings.
- Without some contrary indication, a word or phrase is presumed to have the same meaning throughout a document.
- The provisions of a document should be interpreted in a way that renders them harmonious, not contradictory.
- If possible, no interpretation should be adopted that renders the provision in question—or any other provision—superfluous, unlawful, or invalid.
- If possible, every word should be given effect; no word should be read as surplusage.

- Legislative provisions should be interpreted in a way that avoids placing their constitutionality in doubt.
- A federal statute should not be read to eliminate state sovereign immunity or to preempt state law in an area of traditional state action unless that disposition is clearly expressed.
- Legislative provisions defining crimes and punishments will, in case of ambiguity, be given that interpretation favoring the accused (the rule of lenity).

You must also take into account the famous canons of construction. In a particular case, various canons may point in different directions. This does not prove that they are useless—only that all valid clues don't necessarily point in the same direction. It will be your job to persuade the court that most indications—from the canons and the principles of statutory construction—favor your client's interpretation. The most frequently used canons are the following:

(1) *Inclusio unius est exclusio alterius.* "The inclusion of one implies the exclusion of others." A sign that reads "open to persons 21 and over" implies that the place is *not* open to persons under 21.

(2) *Noscitur a sociis.* "A word is known by the words with which it is associated." In the phrase "staples, rivets, nails, pins, and stakes," the word "nails" obviously does not refer to fingernails.

(3) *Ejusdem generis.* "Of the same kind." A general residual category following a list of other items refers to items of the same sort. In the phrase "staples, rivets, nails, pins, stakes, and other items," the "other items" don't include balloons, but only other types of fasteners.

(4) *Ut magis valeat quam pereat.* "So that it may survive rather than perish." An ambiguous provision should be interpreted in a way that makes it valid rather than invalid.

24. In cases controlled by governing legal texts, always begin with the words of the text to establish the major premise.

As an example of textual interpretation, consider the positions that advocates might take in a case that is easy to visualize. Let's say that the Jacksons, a couple living in Santa Fe, are divorcing.[16] John is an unemployed carpenter, and his wife Jill is a successful novelist who has written five best-selling mysteries. John lays claim to half her future income on those novels, all of which were written during the marriage. Jill's attorney uncovers a curious provision in the Copyright Act:

> When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that author, no action

16 For much of the analysis that follows, we're indebted to Francis M. Nevins, *To Split or Not to Split: Judicial Divisibility of the Copyright Interests of Authors and Others*, 40 Fam. L.Q. 499, 513 (2006).

> by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under the copyright, shall be given effect under this title . . . .[17]

This provision becomes the major premise in Jill's attorney's syllogism:

Major premise:	Section 201(e) of the Copyright Act nullifies any government's attempt to "transfer . . . any of the exclusive rights" conferred by an author's copyright.
Minor premise:	Treating Jill Jackson's royalties as marital property would transfer her exclusive right to those royalties conferred by her copyright.
Conclusion:	Section 201(e) of the Copyright Act nullifies New Mexico's attempt to treat Jill Jackson's royalties on her books as marital property.

An excellent argument. But the debate doesn't end there.

It turns out that the only federal appellate case on point is against Jill. In *Rodrigue v. Rodrigue*, the Fifth Circuit held that the Copyright Act does not preempt state community-property doctrines.[18] The Fifth Circuit's syllogism, on which John's lawyer relies, shows the importance of reading the entire statute before interpreting one of its provisions. That syllogism was as follows:

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17 17 U.S.C. § 201(e).

18 218 F.3d 432, 436–37 (5th Cir. 2000).

Major premise: Section 106 of the Copyright Act defines only five "exclusive rights": reproduction, adaptation, publication, performance, and display.

Minor premise: The future income stream from Jill Jackson's copyrighted works is not a right of reproduction, adaptation, publication, performance, or display.

Conclusion: The future income stream from Jill Jackson's copyrighted works is not an "exclusive right" insulated from state transfer by § 201(e).

Both sides have begun with the words of the statute, but they have crafted different arguments by emphasizing different aspects of the language—as is possible with even such a short, seemingly straightforward provision. By the way, the perceptive reader will have observed that neither Jill's syllogism nor John's takes account of the fact that § 201(e) protects not just "exclusive rights" but also "rights of ownership"—a fact that might favor Jill.

25. Be prepared to defend your interpretation by resort to legislative history.

One of your authors has described legislative history as the last surviving legal fiction in American law. The notion that the members of a house of Congress were even aware of, much less voted in reliance on, the assorted floor statements and staff-prepared committee reports that are the staple of legislative-history analysis is—not to put too fine a point on it—absurd. (And of course neither chamber could, even if it wished, *delegate* the details of a law to a committee

or a floor manager.) Here again, however, we're advising not judges but the lawyers who appear before them. Since most judges use legislative history, unless you know that the judge or panel before which you are appearing does not do so, you must use legislative history as well. That is so, alas, even when the text of the statute seems entirely clear. You cannot rely on judicial statements that legislative history should never be consulted when the text is clear—not even when those statements come from opinions of the court before which you're appearing. Clarity too often turns out to be in the eye of the judicial beholder.

Conducting a thorough review of the history of major legislation is often very time-consuming, hence costly. If you have a cost-conscious client and what you consider to be an irrefutable clear-statement case, you might want to defer that task (if possible) until you see what opposing legislative history the other side comes up with. If there is nothing, it's probably a waste of time to demonstrate that the legislative history says what the statute says. But the court may not consider the text to be as crystal-clear as you do. So if money is no object, you should argue that the clarity of the text is confirmed by the legislative history.

To exemplify a legislative-history battle, let's return to the Jackson divorce case. John Jackson's attorney discovers that what triggered the enactment of § 201(e) was the Soviet Union's announcement in February 1973 that it would adhere to the Universal Copyright Convention. In literary circles, this was seen as a cunning strategy to suppress the

works of Soviet dissidents, such as Alexander Solzhenitsyn, who had not yet emigrated. If the Soviets passed legislation nationalizing all overseas rights in dissidents' writings, then the Soviets could sue in the United States to enjoin publication of those "infringing" works. That is what it was all about originally. Nothing more.

The original bill, in March 1973, referred to "a foreign state or nation which purports to divest the author . . . of the United States copyright in his work."[19] In May 1975, the Copyright Office proposed extending the language to encompass any government, "including the United States or any subdivision of it."[20] And finally, before enactment, the language evolved into "any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright."[21] The legislative history of these revisions makes no mention of disabling a family court in a divorce case from awarding to a nonauthor spouse interests in the author spouse's copyright. And as late as 1981 only one commentator seems to have foreseen that consequence.[22]

So John Jackson's attorney argues that (1) the legislature intended to protect Soviet dissidents, not American

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19 S. 1359, 93d Cong., 1st Sess. 58, 119 Cong. Rec. 9387 (1973).

20 Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 2078 (1975).

21 17 U.S.C. § 201(e).

22 See William Patry, *Copyright and Community Property: The Question of Preemption*, 28 Bull. of the Copyright Soc'y 237, 267 (1981).

authors seeking to deprive ex-spouses of their rightful share of marital property; (2) there is no public-policy reason to treat copyrights differently from patents or other marital property; and (3) nobody in Congress seems to have envisioned this startling result, which has more to do with the Gulag than with the Jacksons' hearth and home.

And Jill Jackson's attorney argues that (1) the words of the statute are as clear as can be; (2) the early legislative history is largely irrelevant because whatever the purpose of the original proposal, it was *purposely* broadened to include *all* governments; and (3) this broadening came at the recommendation of the Copyright Office itself.

How will the case turn out? As always, that depends on how the judges react to several factors, but especially to the gravitational pull of the differing premises. Textualists will tend to rely on the words of the statute in favor of Jill. Purposivists will probably gravitate toward John's position. Each side will try to make its premises the case's center of gravity.

Caselaw

26. Master the relative weight of precedents.

From a juridical point of view, case authorities are of two sorts: those that are governing (either directly or by implication) and those that are persuasive.

Governing authorities are more significant and should occupy more of your attention. At the appellate level, at least, the decisions most important to your case will be those rendered by the very court before which you are appearing. (That is obviously true at the court of last resort, and in intermediate appellate courts it is often the rule that one panel cannot overrule another.) The next most important body of governing decisions (the most important at the trial-court level) is that of the court immediately superior to the court before which you are appearing. It is no use arguing at length in a trial court that your point is sustained by a proper reading of a supreme-court opinion, if the intermediate appellate court to which an appeal would be taken has already rejected that reading. Of course, when the intermediate appellate court has not spoken on the point, supreme-court opinions will be the most important.

One caveat: even when the governing authority is flatly against you, if you think it is wrong you should say so, lest on appeal you be held to have waived the point. If, for example, you are appearing before a district court bound

by a prior court-of-appeals precedent, it is of little use to argue at length that this precedent mistakes the law. Still, you should place in the record your view that it does so. And you should do the same in the intermediate appellate court so that there will be no doubt of your entitlement to raise that issue in the highest court of that jurisdiction.

Among the precedents that are nongoverning, there is a hierarchy of persuasiveness that far too many advocates ignore. The most persuasive nongoverning case authorities are the dicta of governing courts (quote them, but be sure to identify them as dicta) and the holdings of governing courts in analogous cases. Next are the holdings of courts of appeals coordinate to the court of appeals whose law governs your case; next, the holdings of trial courts coordinate to your court; finally (and rarely worth pursuing), the holdings of courts inferior to your court and courts of other jurisdictions.

Of the decisions rendered by these various categories of courts, the *most* persuasive within each category will be those in which the party situated like your client lost in the trial court but won reversal in the appellate court. With this kind of case, the implicit argument to the court is, "Your Honor, if you do what my adversary is asking here, you will be reversed on appeal—just as in this other case I cite." The next most persuasive decisions will be those in which the party situated like your client won in the trial court, and the appellate court affirmed. The implicit argument to the court is, "Your Honor, if you do what I am asking

here, you will be affirmed on appeal—just as in this other case I cite."

If you're arguing to an appellate court, decisions of lower courts will almost never be persuasive as authority unless (1) they are numerous and virtually unanimous, or (2) the cited case was written by a judge renowned enough to be named in parentheses after the citation (e.g., Learned Hand, J.). Lengthy discussion of conflicting lower-court decisions is largely a waste of time. One should say something like this: "The decisions below are in conflict. [Compare _____ with _____.] This is a question of first impression for this court. The correct view is that taken by _____."

Another consideration for citations is freshness. In some rare situations, the older citation will be the better one. A constitutional-law opinion by Joseph Story on circuit, for example, might be more persuasive than a more recent opinion of a federal court of appeals. But at least where opinions of governing courts are concerned, the more recent the citation the better. The judge wants to know whether the judgment you seek will be affirmed by the current court, not whether it would have been affirmed 30 years ago.

When you rely on nothing but persuasive authority, it is more important than ever to say why the rule you're promoting makes policy sense. For example:

> The plaintiff's being underage tolls the statute of limitations. Though the supreme court has not had occasion to hold to this effect, it clearly expressed that view in [cite] (dictum). Minority is similar to other grounds of disability to which tolling is applied in this jurisdiction. See [cites]. And it is

> uniformly held to toll the statute in our sister states. [cites] Any other rule would result in unfairness to those unable to protect their own interests. [Etc.]

27. Try to find an explicit statement of your major premise in governing or persuasive cases.

It is often quite easy to find a governing case with a passage that says precisely what you want your major premise to be. Say you're defending a municipality against a § 1983 suit alleging unconstitutional racial discrimination. The facts of your case, while showing some racially disparate effects of the practice in question, are entirely devoid of any indication—or even allegation—of intent to discriminate. Your syllogism might begin with this major premise:

> For violation of the Equal Protection Clause, "[a] purpose to discriminate must be present." *Washington v. Davis*, 426 U. S. 229, 239 (1976) (quoting *Akins v. Texas*, 325 U.S. 398, 403 (1945)).

When direct quotation is not possible, set forth the major premise in your own words, supported by citation of a case from a governing court. That case must clearly *hold* to that precise effect. In the example just given, if the quoted language from *Washington v. Davis* did not exist, you might argue:

> To prove a violation of the Equal Protection Clause, the plaintiff must show intentional discrimination. *Washington v. Davis*, 426 U. S. 229, 239 (1976).