

Book Review



Reviewed by Richard A. Forsten, Esquire

Case Made: *Making Your Case, The Art of Persuading Judges*

by Antonin Scalia and Bryan A. Garner (Thomson/West, 2008)

If there is one legal book to read this year and add to your own law library, *Making Your Case, The Art of Persuading Judges* is it. Well-written, full of wit and insight, *Making Your Case* is destined to be required reading for all law students, and should be re-read every few years or so thereafter. Whether a new lawyer or a seasoned practitioner, all who read this book should benefit.

Of the two authors, Supreme Court Justice Antonin Scalia certainly needs no introduction. Love him or hate him, all must concede he is an excellent writer who knows how to turn a phrase. He is joined by Bryan A. Garner, the author of *The Elements of Legal Style*, himself an accomplished author. Together, they have produced a relatively short, highly readable treatise on the art of persuasion.

The authors have set forth one hundred and fifteen various rules and suggestions, and have grouped these maxims into four areas: General Principles of Argumentation, Legal Reasoning, Briefing, and Oral Argument. Although this may seem like quite a lot, their various suggestions are short, punchy, and to the point.

Some of the suggestions seem so obvious that one wonders why they are made—and yet, we've all seen lawyers make these classic mistakes or perhaps made them ourselves. For example, never tell a judge, "That's a good question." The authors correctly point out that all judges believe their questions are good questions—otherwise, they wouldn't have been asked! Similarly, don't answer a question by telling a judge you'll get to that point later; and, don't answer a

hypothetical question by simply saying, "That's not this case." (Of course it's not this case; that's why it's a hypothetical).

Other observations and suggestions are less obvious. The authors caution lawyers to "beware invited concessions." They write:

"Any judge who presses you for a concession might well use it against you. That judge may, for example, be testing the validity of your basic premise—or rather, the fidelity of your adherence to that basic premise. Let's say you're defending the lawfulness of an officer's traffic stop on the ground that there was an objectively valid basis for the stop, such as a broken taillight on the vehicle. Counsel for the defense contends that the stop was unlawful because the real reason for it was the officer's suspicion that the occupants of the car were drug-runners. You might get the following honey-coated inquiry from the court: 'Counsel, surely you would agree that an officer could not pull a car over—even a car with a broken taillight—solely for the purpose of harassing its occupants.' What a wonderful opportunity for you to show that you are just as reasonable a person as this judge. But if you rise to this bait, you will have abandoned the fundamental premise of your case: that whatever the subjective motivation for a stop, it is validated by objective indication of probable cause. For being so accommodating, you can expect the court's opinion excluding the evidence derived in the traffic stop to read: 'Counsel has acknowledged that the subjective intent of the arresting officer is relevant, and we see no difference between an invalidating intent to harass

and an invalidating intent to search for drugs without probable cause.'

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

The advice offered on writing briefs includes a mix of the obvious, and also the less obvious. Draft, revise, revise, and revise again. Value clarity above all else. Brevity counts. According to the authors (one of whom is, after all, a Supreme Court Justice): "Judges often associate the brevity of the brief with the quality of the lawyer. Many judges we've spoken with say that good lawyers often come in far below the page limits—and that bad lawyers almost never do."

At times, the authors do not agree and they each present their own advice. Garner believes, for example, that contractions are not (or aren't) inappropriate. Justice Scalia believes contractions have no place in legal writing. Garner also argues that all bibliographic information (*i.e.*, case citations and other references) should appear in footnotes, but not complete sentences. Justice Scalia opposes this approach, finding it distracting and believes lawyers are used to skimming over citations quickly. He does favor, however, avoiding inserting long citations into the middle of sentences.

All in all, *Making Your Case* is a book

filled with observations and suggestions that can only improve one's legal skills. Many of the observations may seem obvious, but even in reading them the suggestions will serve to reinforce good habits. Even the most seasoned litigator, though, is bound to come across some nuggets that he hadn't thought of before.

As their last maxim, the authors offer the following:

“Don't take the court's judgment as the measure of your competence. When the judgment is announced, and it turns out you have lost, don't take it too much to heart; and when it turns out you have won, don't let it go to your head. The court, after all, makes its judgment on the basis of what it believes to be the law, not on the basis of which side presented the better argument. The odds are always better with skilled counsel; but it's not uncommon for a client to win despite a shoddy lawyer, or to lose *despite* a superb lawyer—because neither the bad argument nor the excellent argument could obscure the clarity of the law or alter the facts.

“Whatever the outcome of the case, the quality of your performance will have advanced or hindered your career. If you appear before the court in question with any frequency, the judges will remember you as fair-minded, reliable, and trustworthy—or the opposite. If the former, they will be more likely to grant discretionary review in a case that you assert to be worth considering; and when you appear to argue, the credibility you have developed will give you a leg-up. If your argument has been uninformative and misleading, you may well begin your next case at a disadvantage.

“So look upon this profession of advocacy as a long-term continuum, each individual case not standing in isolation but profiting from and building upon your prior success. Argue not just for the day but for reputation.” 