

Ohio Northern University
Law Review
Book Review

How to Persuade Judges in the Real World

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Making Your Case: The Art of Persuading Judges.
By Antonin Scalia & Bryan A. Garner. Thomson/West. 2008.
Pp. xxiv, 245. \$29.95

Let's put the bottom line first: Is the new book by Justice Antonin Scalia and Bryan Garner worth reading and owning for any litigator or law student? Yes. One might expect this book to contain the same ideas Bryan Garner has offered in his other ample materials on legal writing, repackaged with a celebrity co-author's name on the cover. That thought is understandable, but wrong.

In about 200 pages, *Making Your Case*¹ offers guidance on virtually all facets of written and oral advocacy. The first section of the book covers "general principles of argumentation."² It answers many of the following questions: Which arguments to put first, last, and in the middle? How much to concede? Should one call the opponent "the Plaintiff" to depersonalize him? How best to conclude? The authors address all of this and much more by drawing on their own ideas and experiences as well as ancient and modern experts on rhetoric.

The second section discusses legal reasoning. Specifically, it details how to think syllogistically and how to establish one's premises so judges will reach one's desired conclusion.³

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1. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

2. *Id.* at 1-38.

3. *Id.* at 39-56.

The third section, on briefing, offers extensive advice on “architecture and strategy.”⁴ For example, the authors suggest that an attorney should always put a statement of the questions presented at the very beginning of any brief unless the rules forbid it.⁵ One should also always include a summary of argument if the rules allow.⁶ And, of course, the authors have a great deal to say on writing style that is consistent with advice Garner has offered in his past works.

In its fourth section, the book covers all facets of oral argument: preparation, substance, the manner of argument, how to handle questions, and what to do afterward.⁷ The authors address questions any advocate is likely to have, and some concerns one might not otherwise conceive such as what to take to the lectern (an empty manila folder, nothing more), how to handle a difficult judge (politely), and what to wear (not a sport jacket). Their most important piece of advice may be that an advocate’s “argument” should really be a conversation with the judges, much like the conversation a junior partner in a law firm would have with an intelligent senior partner.⁸

The book stands out not only for its comprehensive advice on all of the above, but also for its own style. The book is not only useful as a reference work; it is also a pleasure to read straight through. The authors demonstrate a love for writing and for words, which they encourage the reader to cultivate as well. Their bibliography suggests additional worthwhile sources—and not only the obvious ones—to aid in the development of one’s ability to think, speak and write.⁹

Another great advantage of this book over other works on legal writing lies in its subtitle. It’s focused on what will actually help attorneys *persuade judges* in the real world. Sometimes academics who study legal writing become so focused on scientific research regarding which fonts, font sizes, font combinations, line spacing, and other formatting tricks will allow a reader to get through a brief the fastest, that they seem to forget about the particular human beings who actually read lawyers’ briefs and make decisions based on them.¹⁰ Garner, and especially Scalia, understand that judges do not want

4. *Id.* at 82-102.

5. *Id.* at 83.

6. SCALIA & GARNER, *supra* note 1, at 97.

7. *Id.* at 137-206.

8. *Id.* at 179.

9. *Id.* at 213-18.

10. See, e.g., Ruth Anne Robbins, *Painting With Print: Incorporating Concepts of Typographic and Layout Design Into the Text of Legal Writing Documents*, 2 J. ASSN. LEGAL WRITING DIRECTORS 108 (2004). In fairness to Ms. Robbins, the United States Court of Appeals for the Seventh Circuit has endorsed her approach, which entails unusual line spacing and varying fonts and font sizes within the same document. See PRACTITIONER’S HANDBOOK FOR APPEALS 79 (2003), available at <http://www.ca7.uscourts.gov/Rules/handbook.pdf>.

lawyers to reinvent the wheel—and few things are as likely to slow a judge down as a brief that looks different from every other brief he has ever seen.

The difference between the academic and practical perspectives on legal writing reveals itself at several points in the book where Scalia and Garner write separately, because they disagree. One of their disputes concerns the placement of citations: Garner holds the unconventional view that citations should be placed in footnotes, but Scalia wants citations where they've always been, in the body of the text.¹¹ Garner believes that citational footnotes improve readability, but Scalia wins the argument by pointing out that “the conclusive reason not to accept Garner’s novel suggestion is that it is novel. Judges are uncomfortable with change, and it is a sure thing that some crabby judges will dislike this one.”¹² Scalia reminds the reader that an attorney’s focus must be on serving the client. As he puts it, “[y]ou should no more try to convert the court to citation-free text at your client’s expense than you should try to convert it to colorful ties or casual-Friday attire at oral argument.”¹³ Scalia’s position receives support from the practice of judges: undoubtedly many have heard of Garner’s suggestion, but few have adopted it. Judge Richard Posner has objected to Garner’s proposal on several grounds in addition to novelty: footnotes force the reader to work harder for the same information; they do not unduly lengthen judicial opinions; and they are the hallmark of scholarly writing, and judicial opinions are not, according to Posner, scholarship.¹⁴ One could say the same for briefs.

Scalia and Garner take opposing views on substantive footnotes: Garner categorically opposes them, but Scalia does not.¹⁵ According to Garner, if something is worth mentioning at all, it is worth mentioning in the body.¹⁶ Scalia generally agrees, but believes an exception should be made for “courts with a relatively limited docket, accustomed to issuing detailed and exhaustive opinions[. . .]”¹⁷ Substantive footnotes can be useful, for example, if they include extra details that support an argument, but which are not essential to it, or if they anticipate arguments that the other side has made or that may

11. SCALIA & GARNER, *supra* note 1, at 132-34.

12. *Id.* at 134-35.

13. *Id.* at 135.

14. Richard A. Posner, *Against Footnotes*, 38 COURT REVIEW 24, 24 (2001). Judges who have used citation footnotes, as Garner suggests, include Fifth Circuit Court of Appeals Judges John Minor Wisdom and Alvin Rubin, from whom Garner apparently got the idea and Ohio Court of Appeals Judge Mark P. Painter. See Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES J. LEGAL WRITING 97, 97 (1998/2000); Mark P. Painter, *The Crusade Continues: Judges See the Light*, OHIO LAW WEEKLY Oct. 27, 2003, at 3, available at <http://www.judgepainter.org/legalwriter17.htm>. Courts in Alaska and Delaware have adopted this approach as well. See *id.*

15. SCALIA & GARNER, *supra* note 1, at 129-31.

16. *Id.* at 130.

17. *Id.*

arise in a judge's mind.¹⁸ It is more difficult to see a winner in this dispute than in the others between Scalia and Garner, but Garner probably has the better view. Some judges are on record as sharing Garner's view, so including footnotes would irritate those judges, to the potential detriment of the attorney and the client. On the other hand, it seems unlikely that any judge would read a brief that thoroughly supports its arguments in the body but wish that it had footnotes.

The authors' dispute over the use of contractions in legal writing is similar to their dispute over citational footnotes. Garner favors contractions because they make for easier reading and a more natural style, while Scalia opposes them because the lawyer has nothing to gain, and much to lose, from using them.¹⁹ No judge will see lack of contractions as too formal, but some judges may view the use of contractions as too informal. Scalia wins this one: prose may flow better with some contractions, but the gains do not outweigh the potential losses from annoying a judge and harming a client. And what's wrong with some formality, anyway? "Formality bespeaks dignity," Scalia writes.²⁰ Elsewhere, Scalia has added that contractions make the lawyer seem as though he is trying to be "buddy-buddy" with the judge, which is inappropriate and off-putting.²¹

The authors also disagree about "gender-neutral language," which Garner favors and Scalia considers unnecessary.²² Scalia loses this dispute for the same reason that Garner lost the earlier ones: he fails to consider that some judges will—rightly or wrongly—be offended by language that is not gender-neutral, but no judge will be offended by language that is subtly gender-neutral, even if the gender-neutral prose is slightly less elegant. Even if Scalia is right that no one should be offended by the use of "he" to mean "he or she" (this reviewer agrees with him), the reality is that some people are insulted. To Garner's credit, he suggests editing one's text so that the elimination of masculine words isn't noticeable; he does not suggest using politically correct language such as "he or she," or, worse, "she" in place of "he."²³ Unlike some

18. *Id.* at 131.

19. *Id.* at 115-16, 118.

20. SCALIA & GARNER, *supra* note 1, at 118.

21. Nina Totenberg, *Justice Scalia: Be Likeable and Avoid Contractions*, NPR.org (Apr. 28, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90001031>.

22. SCALIA & GARNER, *supra* note 1, at 119.

23. This contrasts with the approach suggested by Richard K. Neumann, Jr., that writers use "her or his" instead of "his or her" so that the reader will not immediately picture a man in her or his head. Neumann writes: "A reasonable reader who sees ["her or his"] for the first time in your writing will probably understand that you are trying to write in a fair-minded way." RICHARD K. NEUMANN, JR., *LEGAL REASONING & LEGAL WRITING* 225 (2001). This misses the important point, which Scalia and Garner well appreciate, that a brief should never require a reader to stop and think about the wording instead of the substance.

other authorities, Garner does not here insist on any other capitulations to political correctness, but presumably some may be in order to avoid potential unnecessary offense.²⁴

All of this may seem trivial because judges, after all, are supposed to decide questions based on substance, not style. Indeed, if asked, judges will sincerely insist that they and their colleagues and clerks ultimately look for the right answer in each case—they do not decide cases by keeping score on stylistic points or usage of politically correct language. But style still matters, just as neatness counts, because a judge may not see that an attorney is substantively correct if the attorney is not communicating clearly and effectively. And, all other things being equal, sometimes minor points could make the difference, especially where a court is in a position to exercise discretion. The attorney's job is to remove every possible barrier to a judge deciding a matter in his client's favor and to do everything he can to make the judge want to decide in his favor.

Some readers may be concerned that this book will add little that cannot be found in other books by Bryan Garner that are already occupying space on their shelves. Their concern is unwarranted. This is Garner's only book that is a comprehensive guide to appellate advocacy. His *Dictionary of Modern Legal Usage*,²⁵ *Elements of Legal Style*,²⁶ and *Redbook*²⁷ are all essentially reference works related to legal writing, with some overlap between the latter two. These books, along with his *Legal Writing in Plain English*,²⁸ will aid lawyers in perfecting the writing style that *Making Your Case* urges them to cultivate. Similarly, Garner's *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts*²⁹ is a worthwhile supplement to *Making Your Case* because it digs deeper into advanced brief-writing techniques.

Some cynics may question the extent of Justice Scalia's involvement in writing this book. They shouldn't. As his former clerks would likely testify, Justice Scalia takes the business of writing most seriously, and his mark can be felt upon the book. His voice is of course clearly heard in the sections in which he and Garner write separately to disagree about certain issues, and his rhetorical flair is also evident throughout. Both Scalia and Garner have stated,

24. Still, one hopes it isn't necessary to follow one treatise's suggestion that one eliminate any reference to "bat boys" in listing various jobs at a baseball game. See LINDA H. EDWARDS, *LEGAL WRITING & ANALYSIS* 280 (2003). For more from Garner on avoiding offense, see BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 150-51 (2d ed. 2006).

25. BRYAN A. GARNER, *A DICTIONARY OF MODERN LEGAL USAGE* (2d ed. 1995).

26. BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (2d ed. 2002).

27. See GARNER, *supra* note 24.

28. BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* (2001)

29. BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* (2d ed. 2004).

and there is no reason to doubt, that they both wrote the book, sometimes literally working side-by-side.³⁰

Justice Scalia's originalist jurisprudential views should not scare off potential readers who don't share those views. Scalia does not promote those views here or assume that the reader shares them. Ever focused on the pragmatic, the book acknowledges that—Scalia's preference to the contrary notwithstanding—many judges do want to hear about legislative history when asked to interpret a statute, so the attorney should be prepared to discuss it.

Yes, some of what's in this book has been covered elsewhere by Bryan Garner and others. But never has the topic of how to persuade judges been addressed so concisely but thoroughly in one place by figures of such great authority. Appellate practitioners, including this reviewer, will return to it often before preparing briefs and giving arguments.

30. Tony Mauro, *Scalia to Join Supreme Court Book Club*, Law.com (Nov. 27, 2007), <http://www.law.com/jsp/article.jsp?id=1196071455831>.