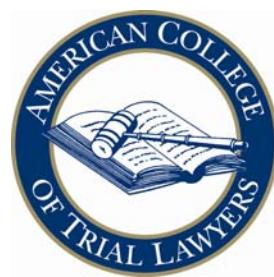


**PERSUASIVE ADVOCACY THROUGH
EFFECTIVE WRITING**





PERSUASIVE ADVOCACY THROUGH EFFECTIVE WRITING

WASHINGTON UNIVERSITY SCHOOL OF LAW

**OCTOBER 28, 2008
1:00 P.M. – 4:30 P.M.**

PERSUASIVE ADVOCACY THROUGH EFFECTIVE WRITING

Moderator: William Jay Riley, FACTL
Judge, United States Court of Appeals for the Eighth
Circuit

Washington University School of Law



October 28, 2008
1:00 p.m. - 4:30 p.m.



I. Introduction
Honorable William J. Riley

II. The Art of Persuasion in Legal
Writing
Professor Timothy Terrell
Emory University School of Law

III. How to Get Started: Outlining
Sylvia H. Walbolt
FACTL
Carlton Fields, P.A.

IV. How to Craft an Effective
Opening
Bryan Finlay, Q.C.
FACTL
WeirFoulds LLP

V. How to Argue the Facts
Brian B. O'Neill
FACTL
Faegre & Benson LLP

VI. How to Argue the Law
Bruce S. Rogow
FACTL
Nova Southeastern University Law
Center

VII. How to Edit. And Then Edit
Again.
Professor Michael Koby
Washington University School of
Law

VIII. Closing Remarks
Honorable William J. Riley

FACULTY BIOGRAPHIES

Honorable William J. Riley

Professor Timothy P. Terrell
Emory University School of Law

Sylvia H. Walbolt
FACTL
Carlton Fields, P.A.

Bryan Finlay, Q.C.
FACTL
WeirFoulds LLP

Brian B. O'Neill
FACTL
Faegre & Benson LLP

Professor Bruce S. Rogow
FACTL
Nova Southeastern University Law Center

Professor Michael H. Koby
Washington University School of Law

Riley, William J.

Born 1947 in Lincoln, NE

Federal Judicial Service:

Judge, U. S. Court of Appeals for the Eighth Circuit

Nominated by George W. Bush on May 23, 2001, to a seat vacated by Clarence A. Beam;
Confirmed by the Senate on August 2, 2001, and received commission on August 3, 2001.

Education:

University of Nebraska, B.A., 1969

Nebraska Law School, J.D., 1972

Professional Career:

Law clerk, Hon. Donald Lay, United States Court of Appeals, Eighth Circuit, 1972-1973

Private practice, Nebraska, 1973-2001

Adjunct professor, Creighton University, College of Law, 1991-present

Race or Ethnicity: White

Gender: Male

Curriculum Vitae

TIMOTHY PRATER TERRELL

Office:
Emory University School of Law
Atlanta, Georgia 30322
(404) 727-6812

Home:
1386 Cedar Post Court
Decatur, Georgia 30033
(404) 636-9274

Personal Data

Date of birth: October 2, 1949

Education

- | | |
|------------|--|
| 7/67-6/69 | United States Military Academy
West Point, New York |
| 9/69-6/71 | University of Maryland, College Park, Maryland
Degree: B.A.
Major: Government and Politics |
| 9/71-5/74 | Yale Law School, New Haven, Connecticut
Degree: J.D.
Activities: Editor, <i>Yale Law Journal</i>
Coauthor of Note, "Administration of Pretrial Release
and Detention: A Proposal for Unification," 83 YALE L.
J. 153 (1973) |
| 10/79-7/80 | Oxford University, Oxford, England
Degree: Diploma in Law
Honors: This endeavor was made possible in part by a
Fulbright-Hays Fellowship |

Employment Experience

- | | |
|--------------|--|
| Summer, 1972 | Research assistant for Professor Daniel J. Freed,
Yale Law School (principal topic: pretrial release projects) |
| Summer, 1973 | Same as above (principal topic: juvenile justice issues) |
| 6/72-6/74 | Adjunct Instructor, Political Science Department, University of New Haven, West Haven, Connecticut (while in law school, taught courses in American Government and Constitutional Law to undergraduates) |
| 6/74-6/76 | Associate, Kilpatrick & Cody, Atlanta, Georgia |
| 11/74-1/75 | Active duty, U.S. Air Force, JAG Corps, Robins AFB, Georgia (as part of reserve obligation) |
| 8/76-Present | Emory University School of Law, Atlanta, Georgia
Assistant Professor, 1976-78
Associate Professor, 1978-83
Tenure, 1982
Professor, 1983-Present |
| Summer, 1979 | Visiting Professor, University of Iowa
College of Law, Iowa City, Iowa |
| Fall, 1985 | Visiting Professor, Faculty of Law, University of Newcastle Upon Tyne, England |
| Spring, 1989 | Visiting Professor, University of San Diego School of Law, San Diego, California |
| 5/86-12/91 | Director of Professional Development
King & Spalding, Atlanta, Georgia |

Publications

Books:

Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition (with D. Freed) (1977) (one volume of ABA-IJA Juvenile Justice Standards Project)

Military Law in a Nutshell (with C. Shanor) (West Publishing Co. 1980)

Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing (with S. Armstrong) (first edition, 1992; second edition, 2003, Practicing Law Institute)

Articles:

"Pretrial Release in Georgia: Proposed Legislative Reform of an Inefficient Process," 14 GA. St. BAR J. 64 (1977) (with W. T. Walsh)

"Petitioning Activities on Military Bases: The First Amendment Battle Rages Again," 28 EMORY L. J. 3 (1979)

"'Property,' 'Due Process,' and the Distinction Between Definition and Theory in Legal Analysis," 70 GEORGETOWN L. J. 861 (1982)

"Causes of Action as Property: *Logan v. Zimmerman Brush Co.* and the Government-as-Monopolist Theory of the Due Process Clause," 31 EMORY L. J. 491 (1982)

"Symposium Introduction: Violence, Human Rights, and the Rule of Law," 32 EMORY L. J. 383 (1983)

"Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles," 72 CALIFORNIA L. REV. 288 (1984)

"Liberty: The Concept and its Constitutional Context," NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 545 (1985) (central paper for Liberty Fund, Inc., conference on "Liberty as a Value in Constitutional Law")

"Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue," 34 EMORY L. J. 1 (1985) (with J. Smith)

"Conceptual Analysis and the Virtues and Vices of Prof. Westen's Linguistics," 1986 DUKE L. J. 660

"Courts Martial Jurisdiction: Will the 'Service Connection' Test Survive?" PREVIEW of U.S. SUP. CT. CASES, 1986-87 term, No. 11, Mar. 27, 1987, p. 295

"Judicial Review of Military Administrative Proceedings: How Separate is the Military Community?" PREVIEW of U.S. SUP. CT. CASES, 1986-87 term, No. 16, June 26, 1987, p. 452

"Liberty and Responsibility in the Land of 'New Property': Exploring the Limits of Procedural Due Process," 39 FLORIDA L. REV. 351 (1987) (paper delivered at conference on "Procedural Due Process: Liberty and Justice," Feb. 13-14, 1987)

"Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution," 36 EMORY L. J. 541 (1987) (paper delivered as part of Emory University Sesquicentennial Colloquium "Creativity and Responsibility: Covenant, Contract, and the Resolution of Disputes")

"Of History and Heritage" (review of D. Lutz, *The Origins of American Constitutionalism*), 39 EMORY L. J. 253 (1990)

"What Does and Does Not Happen in Law School to Prepare Students to Practice Law: A View From Both Sides of the Academic/Practice Dichotomy," 83 LAW LIBRARY JOURNAL 493 (1991) (keynote speech to Mead Data Central's "Graylyn Conference" for academic law librarians, November 1989)

"Rethinking Professionalism," 41 EMORY L. J. 403 (1992) (with J. Wildman) (this essay was presented to the ABA Commission on Professional Responsibility at the ABA Annual Meeting, 1991, and was the central paper for a symposium edition of the *Emory Law Journal*)

"When Duty Calls?" (review of M. Glendon, *Rights Talk* (1991)), 42 EMORY L. J. 1111 (1992)

"Transovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice," 17 FORDHAM INTERNATIONAL LAW JOURNAL 459 (1994) (with B. McNamee) (this article was delivered as an invited paper for the symposium "Lawyers' Ethics and International Human Rights Violations: Reconciling Professional Detachment and Moral Anguish," held at Fordham University School of Law on October 20, 1993)

"A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students," 34 WASHBURN LAW JOURNAL 1 (1994) (this article was delivered as the "Foulston & Seifkin Lecture," an endowed lecture to the Washburn Law School community, on April 15, 1994)

"Ethics With an Attitude: Comments on New Directions for Keck Philanthropy," 58 LAW AND CONTEMPORARY PROBLEMS 355 (1996)

"Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel," 46 EMORY L. J. 1005 (1997)

"Organizing Clear Opinions: Beyond Logic to Coherence and Character," 38 THE JUDGES' JOURNAL 4 (Spring 1999).

"Negotiation Ethics: Honesty, Facts, and Truth," *The Professional Lawyer* (Symposium Issue, 1999).

"Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the Metaethics of Legal Ethics," 49 EMORY L. J. 87 (2000).

"Privacy, Technology, and Terrorism: *Bartnicki, Kyllo*, and the Normative Struggle Behind Competing Claims to Solitude and Security," 51 EMORY L. J. 1469 (2002) (with A. Jacobs)

"Toward Duty-Based Lawyering?: Rethinking the Dangers of Lawyer Civil Disobedience in the Current Era of Regulation," 54 ALABAMA L. REV. 831 (2003)

"Statutory Epistemology," 53 EMORY L.J. 523 (2004).

"Confronting the Legal Meaning of Religious Faith: Wringing Universal Values Out of Pluralism Itself," 54 EMORY L.J. 337 (2005).

Articles on Legal Writing (all with S. Armstrong):

"Resisting the Devil's Voice -- Write Short, Simple Sentences," 3 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 46 (Winter, 1995)

"Conjugosis and Declensia," 4 PERSPECTIVES 8 (Fall, 1995)

"Editing: Avoiding the Dr. Strangelove Syndrome," 5 PERSPECTIVES 77 (Winter, 1997)

"Fighting 'Tippism,'" 6 PERSPECTIVES 71 (Winter 1998)

"Just One Damned Thing After Another: The Challenge of Making Legal Writing 'Spatial,'" 7 PERSPECTIVES 119 (Spring 1999).

"Writing Persuasively About the Facts," 24 *The Trial Lawyer* 110 (2001)

"The Dangers of Defaults," 10 PERSPECTIVES 126 (Spring 2002)

"Sweating the Small Stuff," 11 PERSPECTIVES 128 (Spring 2003)

"The Subtlety of Rhythm," 12 PERSPECTIVES 174 (Spring 2004)

"To Get to the 'Point,' You Must First Understand It," 13 PERSPECTIVES 158 (Spring 2005)

"The Perils of E-Mail," 14 PERSPECTIVES 166 (Spring 2006)

Other Publications:

Videotape program in legal ethics: "Ethics and Professionalism in the Pretrial Stages of Criminal Prosecution and Defense: The Case of the Blue Lagoon Nightclub" (this is a twenty minute videotape of a series of events in a hypothetical criminal case that raises several issues of legal ethics and professionalism; it is the basis for a three-hour program in continuing legal education for practicing lawyers; the program is supported by a comprehensive "Instructor's Manual" discussing all the issues raised by the videotape; the project was funded by the State Bar of Georgia's Commission on Professionalism)

Videotape program in malpractice and legal ethics: "Reducing Malpractice and Ethical Risk for Law Office Staff" (this is a three videotape series that, along with extensive supporting written material, provides a comprehensive training course for law office staff in issues relating to malpractice and legal ethics; distributed by Entaire Global Media, Inc., with strong backing by the ABA Center on Professional Responsibility)

"Instructor's Manual" for videotape-based program in continuing legal education entitled "Who's on First? Ethical Dilemmas in the Era of Healthcare Integration, Mergers, and Multiple Clients," produced by the American Academy of Healthcare Attorneys, Chicago, IL (involving, among other issues, multiparty representation in a medical malpractice action, and confidentiality and conflict of interest problems in merger and acquisition situations) (1996)

Editor of "Transcript of Proceedings: Liberty Fund, Inc., Conference on the Common Law History of Landlord-Tenant Law," 69 CORNELL L. REV. 623 (1984)

"Notes from Oxford," 3 EMORY LAWYER 18 (Spring 1980)

Work in Progress:

Book: *Being and Becoming: Investigating the "Human Variable" Within Political Philosophy* (this book will integrate a number of articles I have published and others that are underway)

Article: "The Lex Mundi Professionalism Project: Identifying the Universal Values of the Legal Profession" (an extension of the articles on professionalism noted above that has been commissioned by, and developed at the conferences of, the international "Lex Mundi" association of independent law firms)

Article: "Statutory Epistemology Redux: Assessment of Proposals for a Restatement, Federal Rules, and Similar Strategies for Resolving the Interpretation Debate" (an extension of the article at 53 Emory L. J. 523)

Article: "Babe Pinelli's Moment of Truth: An Essay on the Art of Legal Reasoning and the Angst of Judging"

Article: "Stresses and Fractures in International Law Practice" (with Bernard Greer of Alston & Bird)

Recent Academic Conference Participation

Moderator and Presenter, "Symposium on Teaching Ethics and the Legal Profession," sponsored by the W. M. Keck Foundation and Duke University School of Law, Durham, North Carolina, November 2-3, 1995

Moderator, Emory Law School's Thrower Conference and Symposium on "The Role of the Corporate General Counsel," February 20, 1997

Panelist and Presenter, "The Ethics of Negotiation," at the 25th Annual Meeting of the ABA's Center on Professional Responsibility, San Diego, CA, June 4, 1999

Moderator and Presenter, panel discussion on "Unplain Meaning, Cheap Talk, and Loose Canons: The Continuing Clash Over Statutory Interpretation and Proposals for Resolving It," 2005 ABA Annual Meeting, Chicago, IL, Aug. 6, 2005

Consulting and Community Activities

Consultant to the law firm of King & Spalding, Atlanta, Georgia, concerning legal writing, the firm's summer associate program, and the training process for new permanent associates, May 1986 - December 1991 (referred to as "Director of Professional Development" during this period)

Regularly conduct programs in legal ethics and professionalism for law firms and bar organizations (about five to ten presentations annually)

Member, Formal Ethics Advisory Opinion Board, State Bar of Georgia, 1993-1999

Consultant to numerous law firms as an expert witness (affidavits and testimony) in litigation involving issues of legal ethics and lawyer malpractice

Presenter and discussion moderator at conferences of the international "Lex Mundi" association of independent law firms on the topic of "legal professionalism," 2003-present (assisting the association in developing a set of values of the legal profession that transcend borders and cultures)

Frequently conduct programs in "Advanced Legal Writing and Editing" and "Writing to Persuade" for law firms, bar associations, corporate law departments, and judicial organizations, including, for example:

- Government organizations and agencies such as the National Association of Solicitors General, the Department of Justice, the National Labor Relations Board staff (nationwide), and the New York Attorney General staff, ;
- Judicial audiences such as the Institute of Judicial Administration at New York University Law School, the Tenth and Eleventh Circuit Courts of Appeal judges and clerks, the Iowa Judicial Institute, the appellate courts of Colorado, Florida, Georgia, Illinois, Indiana, Maine, Massachusetts, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, Oregon, South Carolina, Tennessee, Texas, Virginia, Wisconsin;
- Conferences of the international "Lex Mundi" association of independent law firms (presentations made in Canada, the Czech Republic, Ecuador, Italy, and New Zealand, among others);
- Numerous private law firms in all parts of the United States; and
- Private law firms in the following countries: Belgium, Canada, Costa Rica, the Dominican Republic, Finland, Latvia, Lithuania, Norway, Sweden, Switzerland, the United Kingdom, the United Arab Emirates

Presenter at the annual Coverdell Leadership Institute, 1999-2004

Legal Writing Committee, State Bar of Georgia, 1988-1996

Criminal Law committee, Younger Lawyers Section, State Bar of Georgia: Vice-Chairperson, 1977-78, Chairperson, 1978-79
Consultant to the Fiduciary Law Section, State Bar of Georgia, 1982-83, 1987-89 (acting as "reporter" for the Trust Code Revision Committee which rewrote the entire portion of the Georgia Code dealing with trusts)

Presentations on Georgia mental health law to state employees in Georgia's Department of Human Resources who deal with guardianships and commitment of the

TIMOTHY PRATER TERRELL Page 9

mentally ill, Summer, 1979

Present a lecture annually on the topic of constitutional interpretation to students enrolled in an interdisciplinary course at Auburn University entitled "The Human Odyssey"

Honors

Student Bar Association Award for Most Outstanding Faculty Member, academic year 1978-79

Fulbright-Hays Fellowship, academic year 1979-80, for study at Oxford University, England

Fulbright Grant-in-Aid, Fall 1985, for lecturing and research at the Faculty of Law, University of Newcastle Upon Tyne, England (during this term I also lectured at four other universities in England)

Courses Taught

Current:

Property I
Jurisprudence
The Legal Profession (Professional Ethics and Malpractice)
Legal Methods

Past:

Constitutional Law I and II
Constitutional Theory: Equality and Liberty
Trusts and Estates
Juvenile Justice Clinical Workshop
Seminar in Military Law
Seminar in Economic Theory and Principles of Justice
Seminar: "Ethics by Contract"

Law School and University Activities and Committees

- (a) Secretary and Board Member of the recently-established Institute for General Counsel Studies, a non-profit organization housed at Emory Law School. The Institute will focus on research involving the unique ethical challenges presented to corporate and government general counsel.
- (b) Director of the Emory Law School's "Hugh M. Dorsey, Jr., Fund for the Study and Development of Professionalism," a fund created by a gift from the family of Hugh M. Dorsey, '35L, who, among other honors, was a President of the State Bar of Georgia.
- (c) Serving or have served on the following committees:

Academic Standing
Student Scholarships
Curriculum (Chair, 1999-2005)
Dean Search
Appointments (Chair, 1984-85)
Research and Colloquia (Chair, 1981-83, 91-92)
Library
Dean's Advisory
Promotion and Tenure
Policy Goals
Faculty Retreat
University Research Council
University Luce Professorship Nominating Committee
Faculty Advisory Board to Emory University's Center for
Ethics in Public Policy and the Professions
University Senate and Faculty Council

- (d) Participant in Emory University's "Luce Faculty Seminar" in the Spring Semester, 1993.
- (e) Law School's representative to Emory University's Human Rights Year program in 1983, and in connection with these activities, I (1) presented a lecture on "Human Rights and the Rule of Law" as part of the University Lecture Series "Rethinking Human Rights: The Dilemmas," April, 1983; and (2) organized a symposium and conference on the topic "Human Rights Amid Human Wrongs: Investigating the Jurisprudential Foundations of a Right to Violence." The articles generated by that symposium were published in volume 32 of the *Emory Law Journal*.
- (f) Organized and moderated a two-day interdisciplinary conference in political

theory at Emory Law School in September 1988 entitled "Rethinking Liberalism." The conference was prompted by and focused on a book then soon to be published by Prof. James S. Fishkin of the Department of Government of the University of Texas at Austin, entitled *The Dialogue of Justice: Toward a Self-Reflective Society* (1989).

- (g) Faculty advisor to the "Justice Discussion Group," a student organization.
- (h) Emory Law School representative to the group forming the "Center for Corporate Counsel Innovation," which includes Ernst & Young, King & Spalding, and the American Corporate Counsel Association.

January 2008



Tampa
swalbolt@carltonfields.com
ph: 813.229.4255
fax: 813.229.4133

PRACTICES

- Appellate Practice and Trial Support
- Class Action Litigation
- Health Care
- Insurance Litigation and Regulation
- Business Litigation and Trade Regulation
- Antitrust & Trade Regulation

INDUSTRIES

- Health Care
- Insurance

BAR ADMISSIONS

- Florida

COURT ADMISSIONS

- U.S. Court of Appeals, Eleventh Circuit
- U.S. District Court, Middle District of Florida
- United States Supreme Court
- U.S. Court of Appeals, D.C. Circuit
- Florida State Courts
- Florida Supreme Court

Sylvia H. Walbolt

Shareholder

Practice Experience

- Sylvia Walbolt has extensive experience handling appeals, in both federal and state court, in all areas of the law, including tort, products liability, business disputes, constitutional, and employment discrimination cases. She has appeared as counsel in more than 290 published opinions, and has also appeared on behalf of *amici curiae* in many appeals.
- Ms. Walbolt is Board Certified in Appellate Law and in Antitrust Law. She was former president of the American Academy of Appellate Lawyers and is a Fellow of the American College of Trial Lawyers.

Reported Decisions

- Morgan Stanley & Co. v. Coleman Holdings, Inc., 955 So.2d 1124 (Fla. 4th DCA 2007). Conspiracy and aiding and abetting fraud.
- Sourcetrack, LLC v. Ariba, Inc., 958 So. 2d 523 (Fla. 2nd DCA 2007). Breach of contract and tortious interference.
- Bland v. Health Care and Retirement Corporation of America, 927 So.2d 252 (Fla. 2d DCA 2006). Nursing home arbitration agreement with limitations on statutory remedies.
- RTM Media, L.P. v. Hillsborough County, Florida, Clear Channel Outdoor, 926 So.2d 1284 (Fla. 2d DCA 2006). Antitrust claim regarding county ordinance on billboards.
- Werneck v. Worrall, 918 So. 2d 383 (Fla. 5th DCA 2006). Improper opening statements and closing arguments.
- Transamerica Leasing, Inc. v. Institute of London Underwriters, 430 F.3d 1326 (11th Cir. 2005). English maritime insurance policy.
- General Motors Corp. v. Porritt, 891 So. 2d 1056 (Fla. 2d DCA 2004). Product liability action involving expert witness issues.
- FLA Orthopedics, Inc. v. American Ins. Co., 896 So. 2d 1 (Fla. 3d DCA 2004). Claim against insurer for negligent supplying of information.

- Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324 (11th Cir. 2004). Preservation issues in action under Americans With Disabilities Act.
- Grenitz v. Tomlian, 858 So.2d 999 (Fla. 2003). Expert witness issues in medical malpractice case.
- Edward Brochu v. City of Riviera Beach, et al., 304 F. 3d 1144 (11th Cir. 2002). Section 1983 employment retaliation case.
- Humana Health Ins. Co. of Fla., Inc. v. Chipps, 802 So. 2d 492 (Fla. 4th DCA 2001). Punitive damages and discovery sanctions issues.
- Columbia/JFK Medical Center, Inc. v. Spunberg, 784 So. 2d 541 (Fla. 4th DCA 2001). Breach of medical staff bylaws and tortious interference.
- Rosario Donato v. American Telephone and Telegraph Company, 767 So. 2d 1146 (Fla. 2000). Claim under Florida's statute prohibiting discrimination based on marital status.

Representative Pro Bono Matters

- Colwell v. Head, Case No. 2001-V-847 (Butts County, Georgia Superior Court). Death penalty case for mentally ill inmate.
- Ronnie Lee Jones v. State of Florida, Supreme Court of Florida, 740 So. 2d 520 (Fla. 1999). Death penalty case involving mental competency issue and prosecutorial misconduct.
- Matilda Lacayo, as Administratrix of the Estate of Encarnacion Rodrigues, Jr., v. Sodoma Farms of North Carolina, Incorporated, 122 F. 3d 1061 (4th Cir 1997). Wrongful death action for widow of migrant farm worker.
- In Re: Holocaust Victims Assets Litigation. Thomas Weiss, David Mermelstein, et al. v. Union Bank of Switzerland , et.al., United States Court of Appeals for the Second Circuit, Docket No. 00-9593, 00-0613, 00-9614. U.S. holocaust survivors' class action settlement of claims against a Swiss bank.

Publications

- Co-Author: "I Must Dissent." Why?, The Florida Bar Journal, Vol 82, No. 10 (November 2008).

- Co-Author, "Statutory Construction In Florida: In Search Of A Principled Approach," WL 9FLCLR435, Florida Coastal Law Review, Volume 9, No. 4 (Summer 2008).
- Co-Author, "Off The Record," The Florida Bar Journal, Volume 81, No. 10 (November 2007).
- "The Ten Commandments of Writing An Effective Appellate Brief," Paraclete (St. Petersburg Bar Association Magazine) (February 2007).
- Co-Author, "Petitions for Extraordinary Relief," Chapter 17, A Defense Lawyer's Guide to Appellate Practice (DRI) (2004).
- Co-Author, "Jury Instructions: A Road Map for Trial Counsel, Litigation," The Journal of the ABA Litigation Section Vol. 30, No.2 (Winter 2004). This publication was selected to be reprinted, in digest form, in the September 2004 "Best of ABA Sections" Issue of GPSolo Magazine. "Best of ABA Sections" is a compilation of some of the best magazine, journal, and newsletter articles published by the American Bar Association's sections, forums, and divisions.
- Co-Author, "Amicus Briefs Revisited," 33 Stetson Law Review 171 (2003).
- Co-Author, "Amicus Briefs: Friend or Foe of Florida Courts?" Published in a special edition of the Stetson Law Review on Appellate Advocacy, Volume XXXII (Winter 2003).
- Co-Author, "When It's Your Last Chance: Tips on Obtaining Discretionary Review," American Bar Association Litigation Magazine (Spring 2001).
- Co-Author, "Pointers On Preserving the Record," American Bar Association Litigation Magazine (Winter 1999).
- Co-Author, "Extraordinary Writs and Remedies," Florida Civil Practice Before Trial, Chapter 25, The Florida Bar.
- Co-Author, "Common Law Certiorari - Where an Appeal Will Not Provide an Adequate Remedy," The Florida Bar Journal (October 1996).

Speaking Engagements

- "*Persuasive Advocacy Through Effective Writing*," American College of Trial Lawyers Seminar, Washington University, St. Louis, Mo. (October 28, 2008).
- Moderator: Ethical Standards in Federal Court, 2008 Federal Civil Seminar, Federal Bar Association, Tampa Chapter, Hyatt Regency, Tampa, FL (September 19, 2008).

- Speaker, UF Public Interest Week at Levin College of Law, Gainesville, FL (February 20, 2008).
- *"Advocacy of Seeking Extraordinary Writs and Remedies,"* The Civil Practice and Litigation Techniques in Federal and State Courts Seminar presented by ALI ABA and sponsored with the cooperation of the Federal Judicial Center. She also participated as a panel member in the Advanced Procedural and Litigation Issues session.
- *"What You Should Know About Brief Writing and Appellate Ethics,"* Hillsborough County Bar Association, Appellate Practice Section Seminar (Tampa, FL, May 24, 2006).
- *"Writing an Effective Appellate Brief,"* 20th Annual Federal Practice and Advocacy Seminar (New Orleans, LA, 2005).
- *"Trial Errors Through the Eyes of the Appellate Bench,"* ABA Section of Litigation's Women in Products Liability Regional CLE Workshop (New York, NY, November 9, 2004).
- *"Extraordinary Writs,"* Supreme Court Advocacy Seminar (June 3, 2002).
- *"Preservation of Error: A Workshop for Trial Counsel,"* Speaker, 5th Circuit Appellate Practice & Advocacy Seminar (February 7, 2002).
- *"Preserving Error: A Case Study In Jury Instructions,"* Speaker, 2001 DRI Appellate Advocacy Seminar (San Francisco, CA, October 25-26, 2001).
- *"Appellate Mediation,"* ABA Seminar (December 1, 2000).
- *"Technology in the Court,"* Presentation with Dean Andrew M. Coates for the Anglo-American Exchange (September 17, 2000).
- *"Devolution,"* Presentation with Justice Clarence Thomas for the Anglo-American Exchange (September 12, 1999).
- *"Amicus Briefs,"* Florida Supreme Court Advocacy Seminar (June 11, 1999 and June 9, 2000).
- *"Demonstration and Analysis of Oral Argument Style and Strategy,"* Successful Advocacy Seminar, sponsored by the Appellate Practice and Advocacy Section of The Florida Bar and Stetson University College of Law (July 22-25, 1998).
- *"Preservation of Error,"* Inside the Eleventh Circuit Seminar, sponsored by The Appellate Practice and Advocacy Section of The Florida Bar (April 17, 1998).

Professional Recognition

- Board Certified by The Florida Bar in Appellate Law
- Board Certified by The Florida Bar in Antitrust Law
- Phi Beta Kappa
- Mortar Board
- Order of the Coif
- AV Rated by Martindale-Hubbell
- Top 10 Women Litigators - *National Law Journal* (December 2001)
- 2009 St. Petersburg Bar Foundation Heroes Among Us Service Award. This award is given to a fellow attorney who best exemplifies the legal profession through extraordinary contributions and community pro bono service to others.
- 2008 Member, The Warren E. Burger Society of the National Center for State Courts. The Warren E. Burger society honors individuals who have demonstrated exemplary contributions of service or support to the NCSC.
- 2008 Tobias Simon Pro Bono Service Award Recipient The Tobias Simon Award is given annually by the Chief Justice of the Florida Supreme Court to the one attorney in Florida who has given the most outstanding service in the area of pro bono legal assistance.
- ABA Section of Litigation 2006 John Minor Wisdom Public Service and Professionalism Award - This award recognizes outstanding contributions to the equity of justice, ensuring that the legal system is open and available to all.
- 2003 George C. Carr Memorial Award - This award is given by the Tampa Chapter of the Federal Bar Association to recognize excellence in federal practice and distinguished service to the federal bar.
- Herbert G. Goldburg Outstanding Trial Lawyer of the Year Award, 1998 - This award is given every year by the Hillsborough County Bar Association Trial Lawyers Section as they recognize a lawyer who epitomizes the qualities exhibited by Herbert Goldburg: professionalism, ethics, courtesy and love of the profession.
- Stetson University College of Law 2005 Wm. Reece Smith, Jr. Public Service Award - Stetson established the William Reece Smith Jr. Award in 1990 to recognize and honor individuals who have demonstrated exemplary achievements in public service. Wm. Reece Smith Jr., the award's

namesake and its first recipient, is the past president of the American, International and Florida Bar Associations and is Chair Emeritus of Carlton Fields.

- 2005 James C. Adkins Appellate Practice Award from The Florida Bar - The James C. Adkins Award is presented to a member of The Florida Bar who has made significant contributions to the field of appellate practice in Florida.
- Florida Bar President's 2007 Pro Bono Service Award for the Thirteenth Judicial Circuit
- Listed in *Best Lawyers in America* (for more than 20 years)
- Listed in *Florida Trend's* 2004, 2005, 2006, 2007, and 2008 Florida Legal Elite
- Listed in *Chambers USA Guide to America's Leading Business Lawyers* 2006-2007, 2007-2008, and 2008 (Appellate Litigation)
- Selected for inclusion in *Florida Super Lawyers* 2006, 2007 and 2008
- Annual participant in by-invitation-only National Conference on Appellate Justice (Washington, D.C., since 2005)
- Participant in Anglo-American Exchange (1999-2000) - The Exchange is a program that convenes every five years to allow the United States and the United Kingdom to share information as to legal developments on both sides of the ocean. Five American attorneys and five American judges comprised this country's delegation, led by Justice Anthony Kennedy and Justice Clarence Thomas of the United States Supreme Court.
- Inaugural inductee, Pinellas County Business Women's Hall of Fame, 2003
- Suncoast Girl Scout Council Woman of Distinction, 1995

Professional and Civic Activities

- American Academy of Appellate Lawyers, Fellow (former President)
- The Florida Bar
Appellate Practice Certification Committee (Charter Member, former Vice-Chair)
Antitrust Committee (former Chair)
Corporation, Business and Banking Section (former Chair)
Special Antitrust Committee (former Chair)
Attorney-Client Privilege Task Force

- Supreme Court of Florida
Committee on Standard Jury Instructions in Civil Cases
(former Chair)
Criminal Discovery Commission (former Member)
Jury Innovations Committee (former Member)
- American Bar Association
Antitrust Law Section (former Vice-Chair)
Health Care Committee (former Chair)
Council (former Member)
Standing Committee for the Federal Judiciary
(former Eleventh Circuit representative)
Assessment Team, American Bar Association's Death Penalty
Moratorium Implementation Project (Member)
- American College of Trial Lawyers (Fellow)
Access to Justice Committee (former Chair)
Florida State Committee (former Chair)
Samuel E. Gates Award Committee (former Chair)
Courageous Advocacy Committee (former Chair)
Long-Range Planning Committee, Nominating Committee
(former Member)
Access to Justice Committee (Member)
Teaching Trial and Appellate Advocacy Committee (Member)
- The Florida Bar Foundation (former President)
- American Bar Foundation, Fellow
- American Law Institute
Consultative Group for Aggregate Litigation Project (Member
& AAAL liaison for project)
Life Member
- Attorneys Liability Assurance Society (former Director)
- Board of Trustees, Bayfront Medical System (former
Member)
- Lawyers' Committee for Civil Rights Under Law
Board of Trustees (Honorary Lifetime Member)
Board of Directors (Former Member)
- National Center for State Courts, Co-Chair of The Lawyers'
Committee
- Board of Trustees, Florida Supreme Court Historical Society
(Member)
- Board of Trustees, Chester Bedell Memorial Foundation
(Member)
- National Association of Women Lawyers

Committee for the Evaluation of Supreme Court Nominees
(Member)

- H. Lee Moffitt Cancer and Research Institute (Member)
(Founding Member) (Former Director)
- Southern Legal Counsel, Inc., Board of Directors

Education

- University of Florida College of Law (J.D., 1963)
Notes Editor, *Florida Law Review*
- University of Florida (B.A., 1961)

Bryan Finlay QC



Bryan Finlay QC is the head of the firm's litigation practice. He is recognized as one of the top litigation lawyers in Canada.

"Mr. Finlay, with his usual consummate skill..." (Ontario Court of Appeal)

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999) 45 O.R. (3d) 417, at p. 419

Bryan's counsel practice is broad and has engaged the most complex commercial, constitutional, tort and public law issues. These have included issues of corporate espionage, spoliation, fraud, shareholder rights, directors and officers' responsibilities, financial reporting obligations, responsibilities and obligations of government and its various agencies, securities regulation, fiduciary obligations, defamation, policing, and competition law issues.

Notable Mandates

Acted for the Appellants in *R. v. Kapp* in the Supreme Court of Canada on appeal from the British Columbia Court of Appeal in what is now the leading case on sections 15(1) and 15(2) of the *Charter*. The Court has signaled a return to *Andrews* and established a completely new test and approach for section 15(2). See *R. v. Kapp*, [2008] 2 S.C.R. 483; 2008 SCC 41; [2008] 3 C.N.L.R. 346; see also [2006] 10 W.W.R. 577, (2006), 141 C.R.R. (2d) 249; [2006] 3 C.N.L.R. 282; (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277 (June 8, 2006).

Acted for the Law Society of Upper Canada in its attack against the regulation establishing the Canadian Society of Immigration Consultants (an organization responsible for governing immigration consultants). This case raised the issue of independence of the bar: see *Law Society of Upper Canada v. Canada (Minister of Citizenship and Immigration)*, 295 D.L.R. (4th) 488; [2008] F.C.J. No. 1093 (C.A.) (QL); see also (2006), 58 Admin L.R. (4th) 293, 59 Imm. L.R. (3d) 179, [2007] 4 F.C.R. 132, 2006 FC 1489, (Fed. Trial Div.).

Acts for various defendants in *Nicholas Shaw v. Terena Shaw et al.* (cross-border litigation) and was successful in obtaining an order obtaining carriage of foreign litigation: see *Shaw v. Shaw*, [2006] O.J. No. 1716 (S.C.J.); leave to appeal denied [2007] O.J. No. 73 (Div. Crt); and in obtaining an anti-suit injunction with respect to litigation in the U.S. notwithstanding the defendants were not parties to that litigation: see *Shaw v. Shaw*, [2007] O.J. No. 2758 (S.C.J.).

Acts for one of the former senior officers in Nortel Networks Corporation and Nortel Networks Limited in proceedings before the Ontario Securities

Partner

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Practice Areas

Litigation

Called to the Bar

Ontario (1969)

Education

University of Toronto
LL.B. 1967

University of Toronto
B.A. (Hons) 1964

Commission and various related litigation arising out of Nortel's various restatements.

Acted for the Commissioner of Competition at first instance in *The Commissioner of Competition v. Labatt Brewing Co. Ltd. et al.*, 2007 Comp. Trib. 9. This decision is ranked in the Top Ten Business Cases of 2007 in Canada by Lexpert.

Acted as Ontario counsel for WestJet in its litigation with Air Canada: See (1) (2006), 267 D.L.R. (4th) 483. This decision is ranked as #1 in the Top Ten Business Cases of 2006 in Canada by Lexpert; see also (2) (2005), 20 C.P.C. (6th) 141; (3) [2005] O.J. No. 2310; and (4) *Air Canada v. WestJet Airlines Ltd.* (2004), 72 O.R. (3d) 669. This case has now settled.

Acted successfully for the parents of two autistic children against the government respecting the process involved in the government's funding decisions: *N. (R.) (Litigation Guardian of) v. Ontario* (2004) 70 O.R. (3d) 420; 238 D.L.R. (4th) 73 (Ont. Div. Ct.); 184 O.A.C. 348.

Retained by Davis Webb Schulze & Moon LLP on behalf of its client to seek to set aside the largest cost award made by the Ontario Municipal Board against a party following a hearing. The application for Judicial Review was dismissed by the Divisional Court (June 13 and October 6, 2003).

Retained by a major U.S. motion picture distributor in the Competition Bureau's (*Competition Act*) inquiry into the Motion Pictures Industry. Complainants alleged that practices by the major motion picture distributors and certain exhibitors resulted in distributors not supplying commercially valuable motion pictures to other exhibitors. The Bureau's inquiry, which took place from April 2000 to October 2002, was discontinued on December 12, 2002. The Bureau was unable identify any anti-competitive activity.

Retained by Miller Thomson LLP as counsel for its client, the appellant Bloorview MacMillan Centre, in its appeal to the Court of Appeal in *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre*. The lower Court decision is reported at (2002), 44 E.T.R. (2d) 155 and 175; 22 B.L.R. (3d) 182 (Pitt J.). The case settled following argument. The case raised significant issues concerning the relationship between a hospital and its foundation.

Retained by Davies Ward Phillips & Vineberg LLP in the Court of Appeal in *Chapters Inc. v. Davies Ward & Beck LLP* (2001), 52 O.R. (3d) 566; 10 B.L.R. (3d) 104; 141 O.A.C. 380. This is the leading Ontario case on the application of the *Martin* test (for conflict of interest).

Retained by the former President, CEO and Director of YBM Magnex International, Inc. to act for him in all litigation in Ontario including before the Ontario Securities Commission. (see *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; 46 C.P.C. (4th) 388; 76 C.R.R. (2d) 153)

Retained by The Toronto-Dominion Bank in the Court of Appeal in *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee Of)* (1999), 178 D.L.R. (4th) 634; (1999), 45 O.R. (3d) 417 (C.A.); 124 O.A.C. 87. The trial had taken over one year. The Bank was seeking compensation in the amount of approximately \$80 million pursuant to Comfort Letters provided to it by a multinational.

Acted in the Supreme Court of Canada in *Colborne Capital Corp. v. 542775 Alberta Ltd.* (1995), 30 Alta. L.R. (3d) 127, [1995] 7 W.W.R.

671, 171 A.R. 241, 22 B.L.R. (2d) 226 (Q.B.), varied (1999), 228 A.R. 201, 188 W.A.C. 201, 45 B.L.R. (2d) 21 (Alta. C.A.) This case raised issues concerning the scope of the powers of a director of a single shareholder company and the standard conduct governing competitors for the control of a corporation; and where tortious conduct was found, the appropriate level of damages. The trial took 97 days.

Acted as counsel for the Roman Catholic Hospitals across Ontario with respect to the restructuring of health care. The reported cases are as follows: *Russell et al. v. Health Services Restructuring Commission (Ont.)* (1998), 114 O.A.C. 280, 13 Admin. L.R. (3d) 196 (Div. Ct.), aff'd (1999), 175 D.L.R. (4th) 185, 121 O.A.C. 283 (C.A.), leave to appeal refused by the Supreme Court of Canada (2000), 181 D.L.R. (4th) vii; *Pembroke Civic Hospital v. Ontario* (1997), 36 O.R. (3d) 41 (Div. Ct.); *Wellesley Central Hospital v. Ontario* (1997), 151 D.L.R. (4th) 706 (Div. Ct.).

Acted for the defendants in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (1998), 39 O.R. (3rd) 487 (Trial: MacFarland, J.); 160 D.L.R. (4th) 697; see also (1990), 74 O.R. (2nd) 225 (Div. Ct.). The issue was whether the police had acted negligently in a criminal investigation and had breached a constitutional duty of care to a rape victim by failing to warn her of the likelihood that she might be assaulted by a serial rapist.

In *Dell Holdings Limited v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32; 31 O.R. (3d) 576; 142 D.L.R. (4th) 206, acted for the developer in its successful appeal against the Authority which had delayed the development of its lands. This was the first Ontario expropriation case heard by the Supreme Court of Canada since 1989 and established an important new principle.

Acted for the Government of Ontario in the inquiry into police conduct which resulted in the *Report of the Commission of Inquiry into Events of March 18, 1996 at Queen's Park ("Estey Commission")*, October 22, 1996.

Acted for the securities dealer in *Re E.A. Manning Limited v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (C.A.); 125 D.L.R. (4th) 305; 80 O.A.C. 321. All members of the Ontario Securities Commission appointed before a particular date were prevented from presiding at a disciplinary hearing because of apprehended bias.

In *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130; 24 O.R. (3d) 865; 126 D.L.R. (4th) 129, appeared in the Supreme Court of Canada for an unsuccessful appellant. This is a leading case in defamation. (Also appeared as counsel in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the companion case to *Hill v. Church of Scientology*).

Acted for the successful plaintiff in *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3rd) 104 (C.A.); 121 D.L.R. (4th) 79; 77 O.A.C. 155, which dealt with the administrative law principles concerning the jurisdiction of a tribunal to make policies/rules. It gave rise to a Task Force which made recommendations, since acted upon, for sweeping amendments to the *Securities Act*.

Additional significant Supreme Court of Canada cases:

Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 (intervenor); 114 D.L.R. (4th) 385; 22 Admin L.R. (2d) 1.

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research), [1990] 1 S.C.R. 425; 72 O.R. (2d) 415; 67 D.L.R. (4th) 161.

Re An Act to Amend the Education Act, [1987] 1 S.C.R. 1148; 40 D.L.R. (4th) 18; 22 O.A.C. 321.

Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181; 41 D.L.R. (4th) 429; 24 Admin L.R. 91.

Multiple Access Ltd. c. McCutcheon, [1982] 2 S.C.R. 820.

Roman Corp. v. Hudson's Bay Oil & Gas Co., [1973] S.C.R. 820.

Publications

B. Finlay, Q.C., T.A. Cromwell, *Witness Preparation Manual*, 2nd ed., (Aurora: Canada Law Book Inc., 1999).

Awards & Recognition

Fellow of the American College of Trial Lawyers (1996).

Honorary Overseas Member of the Commercial Bar Association (England and Wales).

Recognized by The Best Lawyers in Canada as one of only 39 lawyers across Canada in the prestigious category of "Bet-the-Company" litigators.

Recognized by *Lexpert* as one of the 100 Most Creative Lawyers in Canada.

Recognized as one of the Leading 100 Canada/US Cross-Border Litigators in Canada by *Lexpert* and Thomson-Carswell.

Recognized as one of the Leading 500 Lawyers in Canada by *Lexpert* and American Lawyer Media.

Identified in The Canadian Legal *Lexpert* Directory in the categories of Corporate Commercial Litigation, Securities Litigation, Public Law Litigation and Directors and Officers Liability (Toronto).

Identified in the International Who's Who of Commercial Litigators, Law Business Research and in PLC Global Counsel 3000.

Recognized as a leading lawyer in Commercial Litigation by The Chambers Global Guide to the World's Leading Lawyers.

Recognized in four categories in The Best Lawyers in Canada.

Identified in the Canadian Who's Who.

The first recipient of the McMurtry Medal (2004) from Pro Bono Law Ontario for outstanding contribution to the delivery of pro bono legal services.

Bryan clerked for Justice Spence of the Supreme Court of Canada (1969-70). He has practised continuously at WeirFoulds LLP except for two years (1982-84) when he acted as special counsel to the Federal Department of Justice.

Bryan was granted his Q.C. by Her Majesty the Queen in Right of Canada (1983).

Bryan is the founding chair of the Dickson Circle, a group of senior litigation lawyers dedicated to acting in significant cases as counsel (pro bono) on behalf of those with disabilities.

Bryan was a member of the Fairness Committee (also known as the Osborne Committee) appointed by the Ontario Securities Commission to advise on whether any changes, structural or otherwise, needed to be made to the Commission in light of its recently increased sanctioning

powers. The other two members were The Honourable Coulter A. Osborne Q.C. and Professor David J. Mullan. The committee which was active through 2003 delivered its report to the Commission in March 2004.

Professional Activities

A Canadian Trustee of the Harold G. Fox Education Fund

Editor in Chief, Credit and Banking Litigation, Federated Press

Member of the Faculty for the Appellate Oral and Written Advocacy Continuing Legal Education programs

Lecturer in numerous other Continuing Legal Education Programs

Affiliations

American College of Trial Lawyers

Commercial Bar Association (England & Wales): Honorary Overseas Member

Canadian Bar Association

Advocates' Society

Ontario Bar Association



Brian B. O'Neill

Partner

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Minneapolis Office
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

Education

University of Michigan
J.D., Law Review (managing editor), magna cum laude,
Order of the Coif (1974)

United States Military Academy
at West Point
B.S. (1969)

Bar Admissions

Michigan
Minnesota

Court Admissions

U.S. Court of Appeals for the
District of Columbia Circuit
U.S. Court of Appeals for the
Eighth Circuit

U.S. Court of Appeals for the
Eleventh Circuit

U.S. Court of Appeals for the
Federal Circuit

U.S. Court of Appeals for the
Ninth Circuit

U.S. Court of Appeals for the
Seventh Circuit

U.S. Court of Appeals for the
Sixth Circuit

U.S. Court of Appeals for the
Tenth Circuit

U.S. Court of Federal Claims

U.S. Court of Military Appeals

U.S. Court of Military Review

Experience

EMPLOYMENT

- 1969-1977, served to Captain, U.S. Army, Field Artillery (Meritorious Service Medal)
- 1974-1977, Assistant to General Counsel, Department of the Army
- 1977-1981, Associate, Faegre & Benson
- 1981 to present, Partner, Faegre & Benson (Litigation group head since 1993)

PRACTICE

General trial and appellate practice for plaintiffs and defendants. Experience in complex commercial, intellectual property, and environmental cases with trials in the following areas: securities, antitrust, environmental, admiralty, bankruptcy, contract, Uniform Commercial Code, patent, trademark, copyright, constitutional, products liability, trade secrets, bank robbery, and civil rights. Tried cases in various Minnesota, Alaska, and California courts, and the federal district courts in Minneapolis, St. Paul, Anchorage, Chicago, Philadelphia, Lexington, Los Angeles, St. Louis, the Claims Court, and the District of Columbia.

SIGNIFICANT TRIALS

- *Kodiak Island Borough v. Exxon Corp.*, District Court, (Shortell), Anchorage, Alaska (2002). Claim for city services provided to an oil spiller. Tried to jury for one month. Defense verdict.
- *Peterson v. BASF*, District Court, Norman County (Kroker), Ada, Minnesota (2001). Consumer class action. Trial to jury. Verdict against client for \$45 million.
- *Pioneer Hi-Bred International, Inc. v. Monsanto Company*, U.S. District Court (Webber), St. Louis, Missouri (2000). Breach of contract case. Trial to jury. Verdict for opponent Monsanto, but no damages.
- *In re the Exxon Valdez*, U.S. District Court (Holland), Anchorage, Alaska (1994 and 1996). Oil spill by vessel *Exxon Valdez*. Trial to jury. Four separate trials over six months. Verdict for clients for \$5.3 billion. After review, judgment entered for \$4.5 billion (2003) and \$2.5 billion (2006). Profiled in D. Lebedoff, *Cleaning Up* (Harper and Row) and W. Smith, *Fighting For Public Justice* (TLPJ).
- *In re the Glacier Bay*, U. S. District Court (Holland), Anchorage, Alaska (1991). Oil spill by the tanker *Glacier Bay*, tried 16 test case fisherman information claims (of 805 represented), verdict for fishermen, cases settled for \$51 million,

U.S. District Court for the
District of Alaska
U.S. District Court for the
District of Minnesota
U.S. Supreme Court

first American maritime oil spill case tried to a jury. Opinions at 746 F. Supp. 1379; 741 F. Supp. 800; 944 F.2d 577, and at 118 Bankr. 683 (*In re Apex Oil*).
• *Gopher Oil Co. v. Union Oil Co.*, U. S. District Court (Doty), Minneapolis, Minnesota (1990). Hazardous waste site case tried to a jury, verdict for client/plaintiff, case settled after appeal for \$3.2 million and clean-up of site by defendant, first Minnesota CERCLA case tried to jury. Opinions at 757 F. Supp. 988, 757 F. Supp. 998, 955 F.2d 519.
• *Friends of the Boundary Waters Wilderness v. Temple*, U. S. District Court (Magnuson), St. Paul, Minnesota (1990). Injunction against Air Force for overflights of BWCA, tried to court.
• *Jurgens v. McKasy*, U.S. District Court (Renner), St. Paul, Minnesota, Minnesota (1989). Patent and trademark infringement case (goose decoys) tried to a jury, verdict for client/plaintiff for royalties and injunction. Opinions at 927 F.2d 1552, 905 F.2d 382.
• *Faribo Cap-Tech, Inc. v. Capspray, Inc.*, U. S. District Court (Magnuson), St. Paul, Minnesota (1989). Patent and trademark infringement (paint guns) tried to a jury, verdict for client/plaintiffs for royalties (judgment for \$1 million) and injunction, case settled by purchase of infringing company.
• *Mentor Corp. v. Cox-Uphoff Corp.*, U. S. District Court (Curtis), Los Angeles, California (1988). Trial to jury over validity and infringement of breast implant patents, verdict for client/plaintiff for \$2.1 million, injunction, fees and accounting, verdict vacated on motion for j.n.o.v. and reinstated on appeal by C.A.F.C. (unreported opinion).
• *Medical Engineering Corp. v. Mentor Corp.*, U. S. District Court (MacLaughlin), Minneapolis, Minnesota (1987). Patent infringement case over surgical devices tried to jury, verdict against client/defendant for royalties (\$1.8 million) and injunction.
• *Hayes v. Northwood Panelboard Company*, District Court, Clearwater County, Minnesota (1987). Breach of contract, tried to jury.
• *Dr. Henry Jenny v. Mentor Corporation*, District Court, Santa Barbara, California (1986). Ownership of breast implant designs, tried to jury.
• *United States v. Robinson*, U. S. District Court (Renner), St. Paul, Minnesota (1986). Trial to jury of alleged client/bank robber, verdict for government. Opinion at 830 F.2d 885.
• *FATE v. Commissioner of Natural Resources*, District Court, Ramsey County, Minnesota (1986). Elk preservation tried to court.
• *Mentor Corporation v. American Medical Systems*, U.S. District Court (Becker) St. Paul, Minnesota (1984). Ownership of penile prosthesis patents and antitrust claims, tried to jury, favorable settlement for client.
• *In re Whitney-Forbes*, U. S. District Court (Kocoras), Chicago, Illinois (1984). Ownership of patents for paint spray guns; tried to bankruptcy court, judgment for client/patent owner, patents sold for \$1.2 million Opinion at 770 F.2d 692.
• *Toro Company v. R & R Products Co.*, U. S. District Court (Renner), St. Paul, Minnesota (1984). Copyright infringement action tried to a jury against client for \$3.4 million in lost profits and injunction, jury finding of liability but no damages. Opinions at 600 F. Supp. 400, 787 F.2d 1208.
• *Tenant Company v. Advance Machine Company*, District Court (Winton), Hennepin County, Minnesota (1983). Theft of customer lists from garbage can, tried to jury, verdict for client/plaintiff for \$500,000, including punitive damages, first successful "theft of trade secrets from a garbage can" case in United

- States. Opinion at 355 N.W.2d 720.
- *Hopkins Dodge v. Tenant Company*, District Court (Bowen), Hennepin County, Minnesota (1983). Construction of a garage, tried to court twice.
 - *Wagner Spray Tech v. Menard*, U. S. District Court (Magnuson), St. Paul Minnesota (1983). Patent infringement case over paint guns, tried to court, judgment for client/plaintiff for injunction, fees and royalties. Opinion at 221 U.S.P.Q. 226.
 - *Wilson v. LaBelle and Louckes*, U. S. District Court (Magnuson), St. Paul, Minnesota (1983). Securities fraud claim against client/Chairman of Board of Baxter American, Vernon Louckes, tried to jury, defense verdict.
 - *Pillsbury Company v. Illinois Central Gulf Railroad*, U. S. District Court (Boline), Minneapolis, Minnesota (1981). Test case against railroad on contaminated flour shipments, tried to court, verdict for client/plaintiff. Opinion at 687 F.2d 241.
 - *Ely-Moose Lake Wilderness Canoe Trips v. United States*, Claims Court (Yock), Washington, D.C. (1981). Takings case tried to court.
 - *Haskell's v. Sopsick*, District Court (Maxwell), Ramsey County, Minnesota (1980). Constitutional challenge to Cash Beer Law, tried to court. Opinion at 306 N.W.2d 555.
 - *Padgett v. John Deer Co.*, District Court, Hennepin County, Minnesota (1979). Business losses due to faulty equipment, tried to jury. Favorable settlement for client.
 - *Chess Music v. Sipe.*, U. S. District Court (Larson), Minneapolis, Minnesota (1978). Copyright case tried to court. Opinion at 442 F. Supp. 1184.
 - *Northwestern Bank v. Shuster*, U. S. District Court (Lenertz), Scott County, Minnesota (1978). Securities fraud, commercial paper case tried to court, verdict for client/plaintiff. Opinions at 388 N.W.2d 370, 307 N.W.2d 767.
 - *Fund for Animals v. Andrus*, U. S. District Court (McNulty and Lord), Duluth, Minnesota (1978). Injunction against government for killing of wolves, tried to court. Opinion at 11 Env't.
 - *National Ass'n of Government Employees v. Rumsfeld*, U. S. District Court (Newcomer), Philadelphia Pennsylvania (1976). Plaintiffs sued to enjoin closure of Frankford arsenal on environmental grounds, trial to court, decision for client/Army. Opinion at 418 F. Supp. 1302
 - *Breckenridge v. Rumsfeld*, U. S. District Court (Moynahan), Lexington, Kentucky (1976). Congressman sued to enjoin closure of Army Depot in Lexington, trial to court, decision for client/Army. Opinion at 537 F.2d 864.

SIGNIFICANT ARBITRATIONS AND ADMINISTRATIVE TRIAL PROCEEDINGS

- Special Master in *Alsea Veneer, et al. v. State of Oregon, ABC Roofing Co., Inc. et al. v. State of Oregon, Portland, Oregon*. (1997) (fees).
- Special Master in *Vogl v. Department of Revenue*, Portland, Oregon (fees).
- Federal Mediation Panel on Boundary Waters Canoe Area Wilderness and Voyageurs Region National Park (1996-1997).
- *James R. Schwebel v. T.S. Development Corp.* American Arbitration Association (arbitrators Leslie, Hunegs, Nys), Duluth, Minnesota (1988). Action for securities fraud, tried to arbitrators. Award for client/Schwebel for \$1.3 million.
- *Rogers v. Mentor Corp.* American Arbitration Association, Minneapolis,

Minnesota (1984). Arbitration for patent royalties on medical device, decision for client/Mentor.

- *In re Ericson Development*, before a hearing examiner for the Environmental Quality Board, State of Minnesota (1980). Administrative trial over shopping center, decision for client/developer.
- *In re Rules for Abandoned Property*, before a hearing examiner for the Commerce Commissioner (1980). Administrative trial over banking rules, decision for client/Norwest Bank.

SIGNIFICANT APPEALS

U.S. Supreme Court

- Exxon Shipping Co. v. Baker, 128 U.S. S. Ct. 2605 (June 25, 2008)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (application of Endangered Species Act to U.S. projects overseas; standing).

Federal Appeals Courts

- *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006) (punitive damages).
- *Voyageurs Region National Park Association v. Norton*, 381 F.3d 759 (8th Cir. 2004) (park management policies).
- *Monsanto Co. v. Pioneer Hi-Bred International, Inc.*, No. 01-1283 (CAFC, argued February 2002) (patent licenses).
- *In re: The Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001) (punitive damages).
- *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (litigation over environmental groups' rights to intervene and to defend action seeking to remove national monument designation from Grand Staircase Escalante National Monument).
- *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001) (FAA regulations).
- *In re: The Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000) (validity of settlements).
- *In re: Pioneer Hi-Bred Int'l.*, 238 F.3d 1370 (Fed. Cir. 2001) (mandamus).
- *Baker v. Exxon Corp.*, 239 F.2d 985 (9th Cir. 2000) (appeal from class distribution plan).
- *Seahawk Seafoods, Inc. v. Exxon Corp.*, 206 F.3d 900 (9th Cir. 2000) (jury misconduct).
- *Seahawk Seafoods v. Exxon Corp.*, 2000 U.S. App. LEXIS 33810 (9th Cir. 2000) (distribution plan).
- *Seahawk Seafoods v. Exxon Corp.*, 2000 U.S. App. LEXIS 6389 (9th Cir. 2000) (distribution plan).
- *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000) (appeal of district court order removing wolves from Yellowstone).
- *Friends of the Boundary Waters v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999) (forest plan appeal).
- *Par Aide v. R&R Products*, 1999 U.S. App. LEXIS 4550 (8th Cir. 1999) (trade dress).
- *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166 (9th Cir. 1997) (civil procedure).
- *Shakopee Mdewakanton Sioux Community v. Babbitt*, 107 F.2d 667 (8th Cir. 1999) (Indian Reorganization Act).
- *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996) and 125 F.3d 661 (8th Cir.

1997) (park management).

- *Friends of the Boundary Waters v. Thomas*, 53 F.3d 881 (8th Cir. 1995) (fees).
- *Gopher Oil Company, Inc. v. Union Oil Company*, 955 F.2d 519 (8th Cir. 1992) (hazardous waste site).
- *Friends of the Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484 (8th Cir. 1992) (motorized portages in the Boundary Waters).
- *In re The Glacier Bay*, 944 F.2d 577 (9th Cir. 1991) (oil spill/admiralty).
- *Jurgens v. McKasy*, 927 F.2d 1552 (Fed. Cir. 1991), 905 F.2d 382 (Fed. Cir. 1990) (patent infringement).
- *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), and 851 F.2d 1035 (8th Cir. 1988) (application of Endangered Species Act to U.S. projects overseas; standing).
- *Defenders of Wildlife v. Administrator, Environmental Protection Agency and American Farm Bureau Federation*, 882 F.2d 1294 (8th Cir. 1989) (injunction against EPA's nationwide registration of strychnine).
- *Hartley v. Mentor Corp.*, 869 F.2d 1469 (Fed. Cir. 1989) (patent infringement).
- *United States v. Robinson*, 830 F.2d 885 (8th Cir. 1987) (bank robbery).
- *Toro Company v. R&R Products Co.*, 787 F.2d 1208 (8th Cir. 1986) (copyright).
- *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985) (injunction against federal government on wolf season).
- *In the Matter of Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (bankruptcy).
- *The Pillsbury Company v. Illinois Central Gulf Railroad*, 687 F.2d 241 (8th Cir. 1982) (contaminated flour shipments).
- *Ely-Moose Lake Wilderness Canoe Trips v. United States*, 703 F.2d 584 (C.A.F.C. 1982) (takings).
- *State of Minnesota v. Alexander v. Block and Sierra Club*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982) (canoes and motorboats in the Boundary Waters).
- *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976) (military base closure).
- *United States v. Holland*, 23 U.S.C.M.A. 442 (1975) (validity of plea agreement).
- *United States v. Stam*, 50 C.M.R. 90 (1975) (bad checks).

State Appeals Courts

- *Peterson v. BASF*, 618 N.W.2d 821 (Minn. App. 2000) (consumer fraud).
- *In re: Spent Fuel Storage Installation*, 501 N.W.2d 638 (Minn. App. 1993) (licensing of nuclear storage facility).
- *In re: Guardianship of Sharon Kowalski*, 478 N.W.2d 790 (Minn. App. 1991) (civil rights).
- *Red Wing Shoe Company, Inc. v. Shearer's, Inc.*, 769 S.W.2d 339 (Tex. App. - Houston [1st Dist.] 1989) (antitrust).
- *Hayes v. Northwood Panelboard Company*, 415 N.W.2d 687 (1987) (breach of contract).
- *Tenant Company v. Advance Machine Company, Inc.*, 355 N.W.2d 720 (Minn. App. 1984) (theft of trade secrets from garbage cans).
- *FATE v. Nichols*, 350 N.W.2d 489 (Minn. App. 1984) (rules on fur farming).
- *Haskell's, Inc. v. Sopsic and Minnesota Beer Wholesalers Association*, 306 N.W.2d 555 (Minn. Sup. Ct. 1981) (constitutional challenge to liquor

regulations).

- *Superwood v. Sempelkamp*, 311 N.W.2d 159 (Minn. Sup. Ct. 1981) (economic loss rule in contract cases).

Other

- *In re: Bruce Edward Babbitt* (U.S.C.A., for the District of Columbia Circuit, No. 88-1, August 22, 2000) (representation of grand jury witnesses).
- *Sierra Club v. Pena*, 1 F. Supp. 2d 971 (D. Minn. 1998) (injunction against bridge construction over St. Croix River).
- *United States v. Shabazz*, U.S. District Court (Rosenbaum) (1996) (defense of murder for hire charge).
- *Defenders of Wildlife v. Babbitt*, U.S. District Court (Alsop) (1993) (suit to enjoin U.S. assistance to China for Three Gorges Dam, assistance halted).
- *Voyageurs Region National Park Ass'n v. Arnett*, 609 F. Supp. 432 (D. Minn. 1985) (park management).
- *Vincent v. Schlesinger*, 388 F. Supp. 370 (D.D.C. 1975) (successful defense of President Ford's Vietnam Amnesty Program).
- *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) (federal water pollution control act case leading to Corps § 404 program).

TEACHING

Various CLEs, and lectures in law at University of Michigan, Harvard, Berkeley, Florida Coastal University, Tulane, University of Minnesota, University of Arizona, Vermont Law School, Hamline, William Mitchell, U.S. Army JAG School, and at American Association of Law Schools' annual meeting. Bridge Week Professor, University of Michigan, 1995. Sperling Lecturer, University of Michigan, 1998. Graduation Speaker, Northland College, 1999. Address at American College of Trial Lawyers Spring Meeting 2002.

Professional Recognition

- *Chambers USA: America's Leading Lawyers for Business* (Litigation: General Commercial), 2007
- Top 100 Super Lawyer, Minnesota Law & Politics
- Fellow, American College of Trial Lawyers (formerly State Chair, Regent)
- Fellow, International Academy of Trial Lawyers
- Advocate, American Board of Trial Advocates
- 1995 Trial Lawyer of the Year, by Trial Lawyers for Public Justice
- *National Law Journal's Ten Best Trial Lawyers in America* for 1994
- Listed in *The Best Lawyers in America®* 2008, Anti-Trust Law; Bet-the-Company Litigation; Commercial Litigation; Environmental Law; Oil & Gas Law
- Doctor of Public Service, Northland College, Wisconsin
- Sierra Club William O. Douglas award, 1985
- First in class, U.S. Army JAG School, 1974
- Super Lawyer, Minnesota Law & Politics
- 2004 John Benson Award

Civic Associations

- Board of Visitors, University of Michigan Law School, 1994-2006.

- Dean's Advisory Council, University of Michigan Law School, 2006 to present
- Board of Directors, Defenders of Wildlife, 1984-2004
- President, Minneapolis Golf Club, 2004-2005
- Minnesota State Bar Association
- Trustee, Supreme Court Historical Society

BRUCE ROGOW

Bruce Rogow has been a professor of law at Nova Southeastern University Law Center in Fort Lauderdale, Florida, since 1974. In 1978-79, he was co-dean of the Law Center, and in 1984, Acting Dean. Before joining Nova, he was on the faculty at the University of Miami. Mr. Rogow has taught Civil Procedure, Federal Jurisdiction, Constitutional Law, Appellate Practice, Criminal Law and Legal Ethics.

In addition to teaching, Mr. Rogow has litigated extensively over the past 44 years. He has argued hundreds of civil and criminal cases in federal and state appellate courts, including eleven cases in the Supreme Court of the United States. He was Supreme Court counsel in *Beach v. Ocwen Federal Bank*, *Seminole Tribe v. State of Florida*, *Florida Bar v. Went For it Inc.*, *Campbell v. Acuff-Rose*, *Argersinger v. Hamlin*, *Gerstein v. Pugh*, *Ingraham v. Wright*, *Mathews v. Diaz*, *Davis v. Scherer*, co-counsel in *Fuentes v. Shevin*, and was appointed by the Supreme Court to represent the petitioner in *Francis v. Henderson*. In two cases, *Waldron v. United States*, and *Arthur v. Hillsborough County*, the Supreme Court granted certiorari and reversed the decisions below without argument. In the 2000 Presidential election litigation, he was counsel in the Supreme Court for the Palm Beach County Canvassing Board in *Bush v. Palm Beach Co. Canvassing Bd.* He was co-counsel in *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, decided favorably in April 2007. In December 2007 he was retained by the Kentucky Retirement System to prepare its lawyer for a January 2008 Supreme Court argument in *Kentucky Retirement System v. EEOC*. The case was decided in favor of the Kentucky Retirement System.

Mr. Rogow has been listed in every edition of *The Best Lawyers In America* for the past twenty years. In the newest edition he has been named in four categories: Appellate Law, Commercial Litigation, White Collar Criminal Defense and First Amendment Law. He is also listed in *Chambers USA, America's Leading Lawyers for Business*. He is one of three lawyers in Florida to have been Board Certified in both civil and criminal appellate law and was elected to the American Academy of Appellate Lawyers. Mr. Rogow is also a Fellow of the American College of Trial Lawyers. Mr. Rogow has also won numerous awards over the years for his public service, litigation, and teaching, including the Reginald Heber Smith Award from the National Legal Aid and Defender Association and the Playboy Foundation First Amendment Award. In 2000, he was awarded the James C. Adkins Award, given to Florida's outstanding appellate jurists or practitioners. He was the first practicing lawyer to receive the award. In 2006 he was a finalist for Most Effective Appellate Lawyer in South Florida and in December 2007 he was named the Most Effective Appellate Lawyer in South Florida. In 2008 he was chosen as one of Florida Trend's 2008 Florida Legal Elite.

Mr. Rogow has represented governmental entities, public officials, trial and appellate judges, law firms, lawyers (including F. Lee Bailey), and corporations in major trial and appellate work. His clients in 2007– 2008 included Morgan Stanley, Merrill Lynch, Donald Trump, Don King, David Koch (Koch Industries), Kentucky Derby winning jockey Jose Santos (whose defamation case against the Miami Herald he settled in March 2008 for a confidential sum), Richard Scrushy, the former CEO of HealthSouth Corp., a State Senator (whose convictions he reversed in December

2007), a mayor and three municipalities and all the pari-mutuels in Dade and Broward counties. In March 2007, representing Morgan Stanley, he reversed the \$1.5 billion judgment entered against it in West Palm Beach with directions to enter a judgment in favor of Morgan Stanley. In 1995 he secured the reversal of a \$52 million judgment against Florida's largest sugar companies, and the reversal of a \$1.7 million contempt judgment against an attorney. In 1993 and 1994 he won Florida Supreme Court victories for a mayor denied municipal pension benefits, and for a special taxing district denied self-governing authority. In 1997 he reversed a million dollar federal judgment against Palm Beach County. In 1998 he obtained reversal of an order quashing charging liens, allowing lawyers to pursue their claims to 25% of Florida's \$11 billion tobacco settlement. In 1996 his Florida Supreme Court victory for a brain damaged child led to a \$9 million settlement and in 1998 he was appellate counsel in a civil rights case against the State which was settled for \$17.75 million. In July 1999, he obtained a federal appellate affirmation establishing Indian Tribes' immunity from suits by the State under the Indian Gaming Regulatory Act. In February and March 2006 he reversed a potential billion dollar class action against Wyeth Pharmaceuticals and obtained a jury defense verdict in a \$25 million suit against Jet Aviation International, Inc. and Hirschmann Industrial Holdings, Ltd., major Swiss companies. In May 2006 he reversed a multi-million dollar award against a physician and won an appellate decision for the Mayor of Miami -Dade County allowing a strong Mayor change of government to be presented to voters. In December 2006, he reversed an obscenity conviction and obtained the release of a Russian entrepreneur who had been incarcerated on the charge.

Since May 2006 Mr. Rogow has argued fifteen appeals in the various Florida District Courts of Appeal and the United States Court of Appeals for the Eleventh Circuit. He argued four cases in the Florida Supreme Court in 2007-2008 and in March 2008 reversed a trial court and prevailed in the Fourth District Court of Appeal for the City of Hollywood, Florida in a major eminent domain case, and upheld a \$5 million fraud judgment against a corporation and its principal. He lectured in Tallahassee on Appellate Practice Before the Supreme Court of Florida in June 2006, June 2007 and June 2008; was a featured speaker for the Florida County Judges Conference in July 2006 and the Florida District Court of Appeal Judicial Conference in June 2007. In October 2006 he was a panelist for the State Bar of Georgia's "11th Circuit Appellate Practice Institute" in Atlanta. The subject was "Characteristics of Effective Oral Argument."

In Nov. - Dec. 2000 he represented Palm Beach County Supervisor of Elections Theresa LePore and the Palm Beach County Canvassing Board in numerous cases in the United States District Court for the Southern District of Florida, the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of the United States and the Supreme Court of Florida. In July 2000, he obtained a federal permanent injunction against enforcement of the Miami-Dade County "Cuba Affidavit," which required applicants for cultural grants to swear they had no ties to any Cuban nationals. He successfully defended Palm Beach County on appeal in a Title VII employment discrimination case in April 2000; and in 1999, he won a defense decision for the City of Boca Raton in United States district court in the first trial under the Florida Religious Freedom Restoration Act of 1998; a decision affirmed by the United States Court of Appeals in 2005. Earlier, he successfully defended the Chief of the Seminole Tribe of Florida against federal and state Endangered Species Act criminal charges for killing a Florida panther on the Reservation, and 2 Live Crew in their federal and state obscenity trials and appeals. He obtained the acquittal of a

South Florida mayor charged with theft in office. He successfully represented the Cuban Museum against the City of Miami's attempt to evict the Museum for its artists' political views, obtaining a federal injunction against the City. He also obtained the first federal court appellate decision declaring that a musical work was not obscene. His Supreme Court success in *Campbell v. Acuff-Rose Music* established copyright protections for commercial parodies.

Among Mr. Rogow's successful criminal appeals are *Siplin v. State* (Fla. 5th DCA 2007) (reversing convictions with order to acquit); *Pizzo v. State* (Fla. 2d DCA 2005 and Fla. Sup. Ct. 2006) (reversing fraud convictions); *Billie v. State* (Fla. 3d DCA 2003) (reversing second degree murder conviction and life sentence); *Hebel v. State* (Fla. 2d DCA 2000) (reversing conviction and 12-year sentence for sexual battery) (in February 2001, he tried the case in Arcadia, Florida, and obtained an acquittal); *United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997) (reversed money laundering and Travel Act and conspiracy, for *Brady* violation); *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996) (reversed money laundering conviction and 20 year sentence, reversed \$9 million forfeiture); *DeFreitas v. State*, 701 So. 2d 593 (Fla. 4th DCA 1997) (reversed agg. assault w/ firearm for prosecutorial misconduct; fundamental error). Over the years Mr. Rogow has handled numerous criminal trials and appeals as well as federal habeas corpus proceedings and appeals, and has been repeatedly appointed by the Florida Supreme Court to represent indigent prisoners. In November 2007, in *Spera v. State*, he reversed an 11-0 4th DCA *en banc* decision with a 7-0 Florida Supreme Court victory and in July 2008 he established the right in Florida to seek post-conviction relief for defendants whose lawyers advise them to reject a favorable plea offer (*Morgan v. State*).

Mr. Rogow has served as a consultant to lawyers and legal aid organizations, and as an expert witness on attorneys' fees; has lectured to judges and lawyers; writes, and has been President of the Legal Aid Society of Broward County, Florida, and Special Counsel for the American Civil Liberties Union Foundation of Florida, Special Counsel to The Florida Bar and a Special Assistant Attorney General.

Mr. Rogow's professional career began in 1965-66 when he was staff counsel for the Lawyers' Constitutional Defense Committee, representing civil rights workers in Mississippi, Alabama and Louisiana.

MICHAEL H. KOBY

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PROFESSIONAL EXPERIENCE

Director, Trial and Advocacy Program	St. Louis, Missouri
Associate Director, Legal Practice Program	2001-Present
Senior Lecturer in Law	
School of Law, Washington University in St. Louis	
Courses: Legal Practice I and II, Introduction to U.S. Law and Method, Advanced Legal Writing, Individual Rights and the Constitution, Religion and the Constitution, Lawyering Practice Externship, Judicial Clerkship Externship.	
Director, Lawyering Skills Program	Washington, D.C.
Columbus School of Law, The Catholic University of America	1994-2001
Courses: Lawyering Skills, Advanced Legal Writing and Research, Externship Seminar, Advocacy for the Elderly Clinic.	
Fulbright Scholar, La Universidad de Murcia	Murcia, Spain
Lectured in American Constitutional History	1992-93
Faculty, International Law Institute	Washington, D.C.
Developed standardized curriculum for a seminar on the United States legal system for foreign attorneys preparing to attend LL.M. programs in the United States. Lecture each summer on U.S. legal method, government and constitutional law.	Summers, 1995-Present
Adjunct Faculty, The George Washington University	Washington, D.C.
Graduate Studies Program	Spring, 1995-97
Courses: Constitutional Law and Civil Procedure	
Adjunct Faculty, The Washington College of Law, American University	Washington, D.C.
Course: Legal Methods	9/93-6/94
U.S. Commission on Security and Cooperation in Europe (Helsinki Commission)	Washington,
D.C.	
Special Counsel	7/98-10/99
Monitored international human rights trends within the participating countries of the Organization for Security and Cooperation in Europe (OSCE). Advised Congress on taking appropriate action in response to human rights violations.	
Coalition Against Insurance Fraud	Washington, D.C.
Legislative Counsel	10/97-11/99
Tracked legislative trends in the area of criminal insurance fraud. Analyzed state and federal legislative initiatives to combat criminal fraud. Wrote practice manual for use by government officials in the prosecution of insurance fraud.	

Pro Bono Attorney	Washington, D.C.
Represented Spanish-speaking indigent defendants in criminal matters.	10/94-4/99
Los Angeles Unified School District	Los Angeles, CA
Teacher in Bilingual Education	1988-89

Taught second-grade class in inner-city Los Angeles. Taught core subjects in Spanish.

EDUCATION

The Washington College of Law, The American University Washington, DC
J.D., May 1992

Biola University, B.A., Intercultural Studies, May 1988 La Mirada, CA

La Universidad de Valencia, Studied Spanish history and culture, 1986 Valencia, Spain

LANGUAGES: Spanish

BAR MEMBERSHIP: Illinois, Washington, D.C.

PUBLICATIONS

Constitutional Conversations and New Religious Movements: A Comparative Case Study, 38 VANDERBILT J. TRANSNAT'L L. 615 (2005)(with Leigh Hunt Greenhaw).

Contributor, *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES*, Paul Finkelman, Gen. Ed. (Routledge 2006) (*Tax Exemption for Religious Groups, Refusal of Medical Treatment and Religious Belief, and Equal Protection and Religious Groups*).

Contributor, *Children's Online Privacy Protection Act* in *MAJOR ACTS OF CONGRESS* (Macmillian Press 2003).

Memorializing Our Nation's Heroes: A Legislative Proposal to Amend the Commemorative Works Act, 17 J. L. AND POL. 102 (2001)(with Ash Jain).

Contributor, *RELIGIOUS FREEDOM IN THE WORLD: GLOBAL REPORT ON FREEDOM AND PERSECUTION*, Paul Marshall, Gen. Ed. (Boardman & Holman 2000)

The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique, 36 HARV. J. ON LEGIS. 369 (1999)

Religious Liberty in Central Asia, 22 CSCE Digest 33 (1999).

The Supreme Court Cries "Foul" to Patronage Contracting: Where Have you Gone Joe McDonough? 32 NEW ENG. L. REV. 1 (1997)(with Paul Fischer).

I. Introduction

Honorable William J. Riley
FACTL
Judge, United States Court of Appeals
for the Eighth Circuit

II. The Art of Persuasion in Legal Writing

Professor Timothy Terrell
Emory University School of Law

PERSUASIVE ADVOCACY THROUGH EFFECTIVE WRITING

St. Louis, MO

October 28, 2008

Presentation on

The Art of Persuasion in Legal Writing

By

Timothy P. Terrell
Professor of Law
Emory University School of Law
Atlanta, GA

of

LAWriters

POWERFUL COMMUNICATION THROUGH SUPERIOR WRITING

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction: Thinking Strategically About Persuasion	1
II. Rhetoric and Clarity: Summaries.....	3
III. Rhetoric and Introductions: Professional <i>Pathos</i>	4
A. Getting the Reader’s Attention: Of Legal and Practical Points	5
B. Making the Reader Comfortable: The Language of Justice	5
IV. Rhetoric and Organization: Professional <i>Logos</i>	11
V. Rhetoric and “Style”: Professional <i>Ethos</i>	13

I. INTRODUCTION: THINKING STRATEGICALLY ABOUT PERSUASION

THE SITUATION: What are your current circumstances?

- Procedural: What is the posture of the case?
- Substantive: What are the issues? The facts? The burden of proof or standard of review?
- Practical: How much persuasive work are you going to have to do? What do you want? What will the judge require of you to get what you want?

THE STRATEGY: What perspective should you bring to your “persuasive” situation?

- Option A: Beat the audience into submission.
- Option B: Judge Posner’s formula:

Persuasive effort needed = distance x resistance

Hence: *Reduce* the amount of persuasive effort you will need to achieve agreement by:

- Reducing the distance from the judge=s starting place to your goal
- Reducing the judge=s resistance by:
 - making obstacles less difficult
 - making the goal more attractive
 - making your company along the way more agreeable

Correspondingly, increase the distance and resistance the judge perceives in your opponent’s argument.

THE TOOLS: What skills will you need to get what you want?

- **Thinking like a lawyer:** What are the strongest substantive aspects of your case?
- **Thinking like a rhetorician:** How can you make that substance more compelling?
- **Thinking like a writer:** How can you (a) capture the judge's attention and (b) make it easier for the judge to follow and remember your arguments?

In the materials that follow, we will generally assume that you have mastered the first skill, and therefore focus on the other two—not because you necessarily lack them, but because they are not sufficiently taught in law school or understood in law practice.

II. RHETORIC AND CLARITY: SUMMARIES

THE ELEMENTS OF PERSUASION

The difference between logic and persuasion:

Logic leaves your reader no choice but to agree with you.

But, since few readers believe themselves so trapped:

Persuasion makes your reader *want* to agree with you.

How do you make logic more persuasive?

Qualities of the:	Classical rhetoric for the polloi	Modern legal advocacy for the judge
Speaker	<i>Ethos</i> : deference to an attractive persona (looking “up”) <ul style="list-style-type: none">• popularity• prestige• righteousness	<i>Ethos</i> : respect for a credible persona (looking “at”) <ul style="list-style-type: none">• veracity, integrity• professionalism
Argument	Authority <i>Logos</i> : plausible reasoning (thinking “for”)	Authority <i>Logos</i> : systemic reasoning (thinking “with”) <ul style="list-style-type: none">• the legal “story”• consistency and coherence constraints
Audience	<i>Axios</i> : worthiness of results	<i>Axios</i> : principled results <ul style="list-style-type: none">• legal risk-avoidance• doing justice
	<i>Pathos</i> : invoking emotion	<i>Pathos</i> : evoking emotion

II. RHETORIC AND INTRODUCTIONS: PROFESSIONAL PATHOS

Unfortunately, the judge does not possess the luxury of time for leisurely, detached meditation. You'd better sell the sizzle as soon as possible; the steak can wait.

Ruggero J. Aldisert (retired Chief Judge of the U.S. Court of Appeals for the Third Circuit), *Winning on Appeal: Better Briefs and Oral Arguments* (1992)

Writing introductions is an art form, and no two should look the same. But it helps to approach them with method as well as inspiration. Part of that method must be rhetorical: Every reader – including judges – approach any document with an underlying set of “emotions” through which the document’s substance is filtered. That set is captured in the following three questions the reader asks:

- “*Bottom line*”: How will this help me—in concrete, practical terms?
- *Efficiency*: Will you waste my time?
- *Language*: Are we from the same planet? Do we speak the same language? Share the same assumptions? Want the same things?

Answering the first captures the reader’s attention – specifying the information’s relationship and relevance to the reader. Answering the second and third makes the reader comfortable enough to be willing to plow further into the document – establishing common ground with the reader and communicating respect.

A. Getting the Reader's Attention: Of Legal and Practical Points

and

B. Making the Reader Comfortable: The Language of Justice

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PANACEA

MIDWEST SEED, INC.,)	
)	
Plaintiff,)	No. C89-1572
)	
v.)	
)	
FIRST CITIZENS BANK, a banking)	MEMORANDUM IN SUPPORT
corporation; RELIABLE EXPRESS,)	OF DEFENDANT FIRST
INC., a Washington corporation;)	CITIZENS BANK'S MOTION
RESOURCE DEVELOPMENT COMPANY,)	<u>TO DISMISS THE COMPLAINT</u>
a Lebanese corporation,)	
)	
Defendants.)	

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff's alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank which issued a letter of credit in connection with the transaction. Plaintiff's attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations Act ("RICO") claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5) and 12(b)(6).

FACTS

Plaintiff, a Panacea corporation, sold 1000 metric tons of seed to

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #1 REVISED

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the letter could not be honored by First Citizens Bank (“FCB”), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations Act (“RICO”) claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff’s complaint should be dismissed as to FCB because it does not and could not allege that FCB—a Lebanese bank with no office or assets in the State of Panacea—has sufficient minimum contacts with the State for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to [].

FACTS

.....

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2

	X
BIG BANK, N.V.,	:
Plaintiff-Appellant,	:
-against-	:
MEGACORP,	:
Defendant,	:
-and-	:
MINICORP,	:
Defendant-Respondent.	:
	:
	X
MINICORP,	:
Third-Party Plaintiff,	:
-against-	:
MEGACORP, JOHN JONES, AND JILL JACKSON,	:
Third-Party Defendants.	:
	:

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

The instant appeal by Plaintiff-Appellant Big Bank, N.V. (“Big Bank”) relates to an Order issued by Hon. James Rogers, dated January 30, 1991 (the “Order”), pursuant to which Justice Rogers granted, in part, the motion by Defendant-Respondent Minicorp (“Minicorp”) which sought to invalidate Big’s assertion of the attorney-client privilege with respect to certain

documents and as to testimony concerning communications between Big and its attorneys.

As demonstrated below, however, the applicable legal principles do not support the decision of the lower Court, and instead fully support Big's assertion of the attorney-client privilege. The burden on a party seeking to invalidate the attorney-client privilege is extremely high, and Minicorp has simply not made the requisite showing for the abrogation of Big's attorney-client privilege. Specifically, Minicorp, not Big, has placed the issue of Big's reliance on counsel's advice in issue in this case. As such, and in accordance with the cases discussed in Point B (*e.g., Chase Manhattan Bank, N.A. v. Drysdale Securities Corp.*, 587 F. Supp. 57 (S.D.N.Y. 1984)), there has been no waiver of the attorney-client privilege by Big, and Minicorp's attempted wholesale invalidation of Big's attorney-client privilege should be rejected.

Moreover, Big's indication that it relied on counsel's advice demonstrates only that Big's counsel (in addition to Big itself) did have communications with Minicorp employees. As the court below noted (R. 16), Big has previously agreed that Minicorp is perfectly free to inquire as to these non-protected communications, and Minicorp has already had the opportunity to question Big's attorneys as to their contacts with Minicorp's employees. Minicorp should not, however, be permitted to invalidate Big's attorney-client privilege in its zeal to determine what its employees may or may not have told Big's representatives.

At any rate, Minicorp has itself repeatedly taken the position that only its own actions could create Mr. Smith's apparent authority. As such, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case. Therefore, nothing justifies Minicorp's attempted abrogation of Big's attorney-client privilege.

Accordingly, the decision of the Court below, to the extent that it compelled Big to produce documents as to which it had claimed the attorney-client privilege and had further required Big's representatives to provide testimony concerning communications between Big and its attorneys, should be reversed.

CRAFTING EFFECTIVE INTRODUCTIONS: COUNTER-EXAMPLE #2 REVISED

BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff-Appellant Big Bank, N.V. (“Big”) appeals from an Order issued by Hon. Richard Rogers that granted, in part, a motion by Defendant-Respondent Minicorp Securities Corporation (“Minicorp”) to remove the attorney-client privilege from certain documents and from testimony concerning communications between Big and its attorneys.

In the underlying action, Big seeks to recover approximately \$6,000,000 in loans to Minicorp. As an inducement to Big to make the loans, an employee of Minicorp executed a letter representing that Minicorp would maintain certain collateral. Minicorp does not dispute that the representation was fraudulent. It does claim, however, that the employee did not have apparent authority to make the representation. In its motion, it asked for a wholesale abrogation of the attorney-client privilege between Big and its attorneys on the basis that Big’s attorneys had communicated with Minicorp’s employees during the course of arranging the loan and that Big had subsequently relied on counsel’s advice in making the loan.

The burden on a party seeking to invalidate the attorney-client privilege is extremely high [*What is the burden?*]. For three reasons, Minicorp has failed to meet this burden.

First, Minicorp has itself repeatedly taken the position that only its own actions could create the employee’s apparent authority. As a result, any communications between Big and its attorneys are, according to Minicorp itself, irrelevant to the fundamental issue in this case.

Second, Minicorp itself—not Big—placed the question of Big’s reliance on counsel’s advice in issue in this case. Big cannot, therefore, be held to have waived the privilege.

Third, Big has agreed that Minicorp is free to inquire about communications

between Big's attorneys and Minicorp's employees, and Minicorp has already questioned the attorneys about these contacts. Minicorp does not need to attack the attorney-client privilege between Big and its attorneys in order to investigate the attorneys' communications with Minicorp.

Accordingly, the decision of the Court below should be reversed to the extent that it compelled Big to produce documents as to which it claims attorney-client privilege and required Big's representatives to provide testimony about communications between Big and its attorneys.

IV. RHETORIC AND ORGANIZATION: PROFESSIONAL *LOGOS*

Our minds are stocked with ready-made organizing patterns that we use more often than we should, especially when we're tired, bored or in a hurry. For example, when we write about facts we turn instinctively to chronology. When we respond to someone else's argument, we're tempted to adopt its structure as our own. When we write about a complicated analysis, it's easiest just to retrace the path we took in thinking through the issue. None of these organizing patterns is necessarily inadequate. But they are overused, and a good writer learns to regard them with suspicion.

AVOIDING “DEFAULT” ORGANIZATIONS: EXAMPLE

Before:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion.

Appellant relies upon E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978). The court there reversed the trial court and relieved the defendant from paying costs where he was not found negligent and had not prolonged the trial. The court held that:

C.C.P. Art. 1920 gives the court discretion to assess costs but limits this discretion. The general rule is that

After:

ASSESSMENT OF COSTS

Appellant admits that the assessment of costs is a discretionary matter for the trial judge but asserts that, under the particular facts, the trial court abused its discretion. As the court’s opinion demonstrates, however, the court correctly based its assessment on the principle that costs must be assessed on the basis of the results at trial.

This principle arises from LSA-C.C.P. Article 1920:

....

The principle is stated even more explicitly in Comment (b) to Article 1920:

....

Although Appellant rightly points to E. L. Gholar, et al. v. Security Insurance Co., et al., 366 So. 2d 1015 (La. App. 1st Cir. 1978) as an authoritative application of Article 1920, he ignores crucial differences between the facts of that case and of the present situation.

V. RHETORIC AND “STYLE”: PROFESSIONAL ETHOS

CHARACTER: FORMALITY

Example #1A:

This case comes before the Court on the third intermediate accounting of the trust under the will of Jane F. Smith. On a prior accounting, the West Carolina Supreme Court held that a provision in a will leaving property to “issue” of another is presumed not to include the adopted child of the daughter of the testatrix. We are now asked to reconsider the question based on subsequent changes in the decisional law of this State. The case raises a substantial, if not altogether novel, question of the duty of a court to enforce a prior holding, the legal reasoning of which has been undermined by later rulings.

Example #1B:

In this malpractice lawsuit the issue on appeal is whether the trial judge properly granted the defendant’s motion for summary judgment. The defendants filed a motion to dismiss because the complaint failed to state a claim on which relief could be granted. The defendants then filed four affidavits to support their motion and moved the court to treat the motion as one for summary judgment against them.

* * * * *

Example #2:

1. Prior to plaintiff’s purchase of the automobile, defendant’s salesman provided him with information about its previous owner that subsequently proved to be false.
2. Before the plaintiff purchased the automobile, the defendant’s salesman provided him with information about its previous owner that later proved to be false.
3. Before the plaintiff bought the car, the defendant’s salesman gave him information about its previous owner that turned out to be false.
4. The sucker got stuck with the lemon because the salesman fed him some @#\$!* about the guy who got rid of it.

CHARACTER: DISTANCE

Before:

Dear Mr. Richards:

In reference to your case, please be advised that defendant has agreed to a settlement, the preliminary terms of which are set forth in the document enclosed herein. Prior to the completion of the remaining details of the agreement, this office must be in receipt of the following documentation:

1. A written estimate from Dr. Jones for the completion of therapy in regard to plaintiff's leg injury.
2.

After:

Dear Mr. Richards:

As we discussed yesterday, Trust Us Auto Sales has agreed to settle your suit against it. The terms are set forth in the enclosed document, which you should review carefully. I believe the terms are favorable, but I urge you to think them through carefully and to phone me if you have questions.

In order to complete the details of the agreement, I will need the following documents by next Thursday:

1. A written estimate from Dr. Jones for the completion of therapy for your injured leg.
2.

CHARACTER: CONCISENESS AS THE LANGUAGE OF CONFIDENCE

Before:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price for such security. It has never been litigated whether the current independent bid price is the price at the time of the writing of the option or at the time of the exercise of the option. A Rule 10b-7 defense would succeed only if the court interpreted the current independent bid price to be the price at the time of the writing of the option.

After:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price. However, no court has yet determined whether this price is the price at the time of the option's writing or at the time of its exercise. A Rule 10b-7 defense would succeed only if the court chose the first interpretation.

Persuasive Advocacy Through Effective Writing

Oct. 28, 2008

**THE ART OF PERSUASION IN
LEGAL WRITING:**

**The Rhetorical Elements of Legal
Argument**

**Professor Timothy P. Terrell
Emory University School of Law
Co-Founder, LAWriters**

PERSUASION: THE STRATEGY

**Option A: Beat the judge and
your opponent into submission**

**Option B: Apply Judge Posner's
formula:**

**Persuasive effort needed =
distance x resistance**

PERSUASION: THE STRATEGY (cont'd)

Reduce the distance by moving

- your goal closer to the judge
- the judge's starting place closer to you

PERSUASION: THE STRATEGY (cont'd)

Reduce the resistance by making

- the goal more attractive
- the obstacles less difficult
- your company along the way
more agreeable
- the road smoother, straighter
and faster

THE ELEMENTS OF PERSUASION

Qualities of the:

- ✓ *Speaker*
- ✓ *Argument*
- ✓ *Audience*

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Speaker*

Classical Rhetoric for the Polloi:

Ethos: deference to an attractive persona (looking “up”)

- *popularity*
- *prestige*
- *righteousness*

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Speaker*

Modern legal advocacy for the judge:

Ethos: respect for a credible persona (looking “at”)

- *veracity*
- *integrity*
- *professionalism*

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Argument*

Classical Rhetoric for the Polloi:

Authority

Logos: plausible reasoning
(thinking “for”)

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Argument*

Modern legal advocacy for the judge:

Authority

Logos: systemic reasoning (thinking “with”)

- *the legal story*
- *consistency and coherence constraints*

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Argument*

Classical Rhetoric
for the Polloi:

Authority

Axios: worthiness
of results

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Argument*

Modern legal advocacy for the judge:

Authority

Axios: principled results

- *legal risk-avoidance*
- *doing justice*

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Audience*

Classical Rhetoric for the Polloi:

Pathos: invoking emotion

THE ELEMENTS OF PERSUASION

Qualities of the:

✓ *Audience*

Modern legal advocacy for the judge:

Pathos: evoking emotion

RHETORIC AND INTRODUCTIONS: Professional Ethos

SMART

Point

Legal

ATTENTIVE

Practical

Positive

COMFORTABLE

Non-Negative

Language

JUDGES

WHAT THEY WANT

- To do justice ... safely ... *quickly*

WHAT THEY WANT FROM YOU

- The context: the big picture
- The crux: the specific issues
- The summary: your argument

RHETORIC AND ORGANIZATION: Professional Logos

The most common “defaults”:

- Chronology
- History of your research or thinking
- Someone else's analysis

RHETORIC AND “STYLE”: Professional *Ethos*

- **Syntax:** Sentence Structure
- **Diction:** Word Choice

III. How to Get Started: Outlining

Sylvia H. Walbolt
FACTL
Carlton Fields, P.A.

How To Get Started On Your Written Argument

You have an issue in your case that needs to be resolved by the judge. You have read your record and researched the issues. How do you get started on your written argument?

Good legal writing begins long before you put pen to paper (or finger to keyboard). It is the product of deliberate thought about the case, not just your own argument.

Turn the case over in your mind in the shower, jogging, driving to work. Kick it around with others cold to the case.

Think about your audience – you will stress different points and make a different kind of appeal depending on who your audience is. You cannot take a trial memo and turn into appellate brief. What is the standard of decision the court will apply in resolving the issue? How can the judge, court write most easily in your favor?

What relief are you seeking? What is your objective aside from winning?

Think about the effect on over-all jurisprudence of ruling you seek -- does your argument require creation of exception in law? Does it create "slippery slope" issues? Would a ruling against you change the law? What will likely concern your judge, both from the standpoint of deciding the case-specific issues and from a jurisprudential standpoint?

What questions will judge likely have as he/she reads your piece? What is the hardest question you could be asked at a hearing? Answer it in your mind and see if you can answer it deftly in your written argument so the question is answered before it comes to the reader's mind.

What is your most compelling point -- factual, legal? If you cannot win on your strongest point, you won't win on your weaker points. But think about all of your arguments -- can weaker ones work together to strengthen your best point, rather than be asserted as an independent or fall-back point? Are there points you should concede in advancing your argument?

Remember -- your very busy judge likely will be a generalist, and almost

certainly will not know the case, area of law as well as you - - how can you simplify the issue for the judge, while persuading the judge? How do you get your points across in the most straight forward way?

Think about what your opponent will say in response to your argument. What questions will your opponent's argument raise for the judge about your argument? You will want to craft your argument in light of likely response of your opponent, especially if you will not get written rebuttal or a hearing.

Think about what legal authority is controlling and where do you start your legal argument - - statute, common law? What facts have to be known by the court to fit your case within the controlling authority?

In short, don't start writing your draft too soon. Justice Scalia says:

"That tends to freeze the deliberative process, closing off alternative approaches that ought to have been explored. Jot down new ideas as they occur to you, but don't begin writing or even

outlining your brief until you have fully exhausted the deliberative process."

Which bring us to outlining.

Legal writers have to know how they will organize their facts and their argument in a logical, cogent and persuasive manner, that can be properly absorbed by a busy, skeptical judge. An outline forces you to be disciplined and stay on track in your writing.

If you start with a written plan of organizing your argument, it will help your writing when you get to drafting the argument. You need to know what your argument is and where it is going, factually and legally.

Outlining does that – as to your facts, it helps you develop the story in such a subtle way that the only sound conclusion to be reached by the end of it is that your client wins. As to the legal argument, it separates the discussion of each point and then sub-points. It allows you as the writer to visualize how the arguments flow, how they tie together (or don't tie together). It allows the writer to quickly determine

if an argument should fall out of the brief.

Outlining also serves another valuable purpose – it helps the writer get started on paper, and often that is the hardest part of the writing. It helps you get something done, and often that is half the battle. Once you have a solid outline, the brief writes itself. It provides natural sub-headings and a table of contents. It should tell a story.

Outlining will help you make the structure of your case explicit and visible to the reader, which advances the reader's understanding. The very attempt to articulate in brief fashion an unclear concept will suggest facts to be checked and ideas to be pursued. Remember – logic is not enough. What you say must be coherent and persuasive as well as logical. The outline allows you to provide the context within which you will fill the details that does that. And, you need to do that at every level.

The structure provided by the outline will keep the writer, and ultimately reader, on track. It will eliminate tangential points that don't advance your argument. It should develop the

court's understanding of why the issue should be resolved in the manner you propose.

Think of an outline as a "simple spine" of your principal points, in due order, strongest to weakest. Think in terms of the headings and how they will look in the Table of Contents. The headings should flow and tell your story all by themselves. When the reader reads your Table of Contents, he should be convinced that you win. That is what outlining helps you achieve. The outline grows as it is fleshed out with authorities, ideas, illustrations, references, etc.

Outlining gives you something to show someone else for critiquing before you start drafting. Ask a person to read it cold, does this make sense, does this convince you? It will make sure you are on the right track before you have sent long hours going down the wrong track.

Justice Scalia says eliminating the step of outlining "is false economy. The time you save will be more than counterbalanced by the time consumed in deletions and revisions that will be required if you charge ahead with no plan in mind."

Many ways to outline – traditional Roman-style method involves thinking process that is left brain dominant. Strong right-brain thinkers often find this difficult to do. They should use another method, finding one that works for them, but they still should outline (whenever I hear a young lawyer say “I can’t outline,” I know I will get back a disorganized draft).

Although the various methods of outlining are very different in style, they all have the same core purpose: they force you to think about how to organize the argument, rather than just start putting words on paper. That will in turn ultimately help you develop the arguments and add other arguments to strengthen your position. Outlining is an extra step but it is an essential one for good writing.

Roman-style traditional - main points are listed and then ordered in the logical pattern consistent with the requirements of the governing rule that establishes the framework for the analysis. Then sub-points are included under the main points they best support.

The order may be determined by what point logically comes first, by what point is more significant than others, or by what point is stronger than others. You may start dropping weak points at this stage, or see how they write fleshed out.

Don't worry about getting it right the first time. Don't worry that it is rough. Use this technique to get all of your ideas on paper. Then you can work on getting them organized. In fact, if you don't revise your outline before you start drafting, you almost certainly have not truly grappled with all the issues.

Eventually try to write your points in the outline in the most direct and fullest language you can use.

Justice Scalia suggests setting each point in a full sentence, rather than merely using key word or phrase. This format "(1) it helps you understand your own organization at a glance; (2) it often flushes out redundancies, weak links, and inconsistencies; and (3) once you've completed it, it allows you to feel as though the brief is halfway written."

After your first outline is on paper, go back to the record and your facts and

authorities and add details that help bring your case within your controlling authorities. Then revise your outline, flesh it out, and correct any conceptual errors exposed by the application of your additional factual and legal review. Ordinarily, revising, supplementing your outline will lead to a near final draft brief. [Humana].

One final suggestion. When you do your first draft from the outline, don't try to make it perfect. Try to get all the points on paper, in proper organization. You can/will polish later. If you get writer's block on some issue or point, just leave a place holder [to be added] and keep on moving.

IV. How to Craft an Effective Opening

Bryan Finlay, Q.C.
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WRITING EFFECTIVE OPENINGS

Examples

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Supreme Court of Canada

OVERVIEW

- 1.** Absent any application of ss. 25 and 15(2), where, as here, the differential treatment is being imposed on the basis of a bloodline, the impugned state action is discriminatory and the analysis should move directly to whether the discrimination can be justified under s. 1. There is no need to engage in the full third stage of the *Law*¹ test to establish whether the action is discriminatory.
- 2.** The full *Law* test is appropriate in cases where the discrimination alleged is complex and needs the special tools provided by *Law*. But the full *Law* test was intended as a guideline and not meant to interfere with the purposeful application of 15(1) which allows a clear case of discrimination to move directly to s. 1 for any justification. This approach is important because in clear cases it shifts the burden to the government and away from the person who has been discriminated against.
- 3.** The discrimination here cannot be justified under any test. The discrimination, which violates the human dignity of the Appellants, has resulted in the segregation of the British Columbia commercial fishery and has led to an invidious breakdown in that fishery.
- 4.** The Appellants ask this Court to restore the findings of the trial judge, to hold that racial segregation of the commercial fishery is a violation of s. 15 of the *Charter* and to restore the judicial stay of proceedings issued by the trial judge. This will be the first step to reunite the British Columbia commercial fishery and ensure that all fishers share common interests in fishery conservation and management and are judged by their ability and character, not their race.

¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*].

5. There is no s. 35 Aboriginal or treaty right – nor is there any other right or freedom protected by s. 25 – at issue in this appeal. Nor does the Crown claim that the race-based commercial fishery is an ameliorative program under s. 15(2) of the *Charter*.

6. The Appellants do not challenge the Aboriginal Fisheries Strategy (“AFS”),² the *Aboriginal Communal Fishing Licences Regulations* (“ACFLRs”) in general,³ or the Minister’s authority to allocate fish between various user groups. The Appellants do, however, challenge the legitimacy of a commercial user group to which access is restricted by the irrelevant characteristic of race. The trial judge correctly stated the benefit being withheld from the Appellants: they object to the loss of “their right to participate as equals in the public commercial fishery.”⁴

7. Membership in the Musqueam, Tsawwassen and Burrard Bands (“M/T”)⁵ does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. Any cultural significance of M/T fishing activity (i.e., fishing for food, social and ceremonial purposes) is dealt with by the doctrine of Aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*. However, the distinction by the Minister for purposes of the commercial fishery can be supported neither as proper fisheries management nor proper accommodation of Aboriginal uniqueness. It is a simple arbitrary preference made on the basis of race. Hence, it is discriminatory.

² For background on the AFS, see Department of Fisheries and Oceans, “Backgrounder: Aboriginal Fisheries Strategy” (October 1997), Appellant’s Record [hereinafter A.R.] Vol. X, Exh. 3, Tab 13 at 1767-68.

³ SOR/93-332, as amended. The Appellants do challenge the provisions of the ACFLRs to the extent that they permit fishing for the purpose of sale: see para. 137(b) of this Factum.

⁴ Reasons for Judgment of Kitchen P.C.J., Provincial Court of British Columbia (28 July 2003), A.R. Vol. I, 2ff, para. 203 [hereinafter Trial Reasons].

⁵ *Ibid.*, para. 194. The Burrard band does not participate in the pilot sales fishery. Thus the “M/T” rather than “M/B/T.”

Ontario Court of Appeal

THE APPEAL IN A NUTSHELL

1. The elements of the tort of abuse of process are: (a) the use of the legal process for an improper and collateral purpose; and (b) an overt act, being a definite act or threat in furtherance of the illegitimate purpose.
2. With respect to the first element, improper purpose, Nordheimer J. erred in finding that "purpose" and "motive" are different. They are the same. With respect to the second element, overt act, he erred in missing several of the key overt acts pleaded and in failing to understand others. The end result was that rather than receiving a generous reading as is the rule on a motion to strike, WestJet's Statement of Claim received the opposite.
3. Here, it is pleaded that the tort of abuse of process was committed through the bringing of the Air Canada Action against WestJet, the purpose of which is not to seek a remedy for the alleged wrongful taking of confidential information, but, rather, to damage the business and reputation of WestJet, to damage WestJet's ability to compete with Air Canada, and ultimately to destroy WestJet as a competitor of Air Canada. The overt acts as pleaded include anti-competitive deeds, a business plan, breaches of the deemed undertaking rule and steps within the action with which they have no rational connection. On any fair reading of the Statement of Claim, the criteria for the tort of abuse of process are met.
4. Nordheimer J. also erred in construing the pleading of the claims for intentional interference with economic interests and conspiracy.

Ontario Superior Court of Justice

THE RESPONDENTS' POSITION IN A NUTSHELL

1. The allegation of fraud upon the Court is entirely without merit. The evidence shows nothing more than an inadvertent error. This error could have been identified by Mr. Dockrill, Mr. Shaw's lawyer, and the confusion cleared up with a simple letter from Terena's solicitor, David Buchanan. Instead, this allegation was made in open Court and has been given to the Court to decide.
2. Mr. Shaw alleges that Terena has attempted to further this fraud by: (1) answering a question taken under advisement (June 29, 2007) close to the hearing of the motions (on July 3 and 4, 2007); and (2) serving reply affidavit material late (June 14, 2007) so that Mr. Shaw, James Cheung ("Mr. Cheung") and Chameleon Inc. ("Chameleon") would not have an opportunity to respond to the allegations contained in the reply affidavit before Terena's cross-examination held on June 18, 2007. Mr. Shaw claims Terena did all this in hope that the groundlessness of the alleged fraud would not be caught.
3. These further allegations are baseless. *First*, Mr. Shaw's counsel dictated the schedule for the cross-examination (and therefore the timing of giving answers to undertakings). *Second*, Terena's affidavit was served in reply to the further responding affidavit materials of Mr. Shaw, Mr. Cheung and Chameleon (the last of which was served just two days before Terena's affidavit was served). *Third*, Mr. Shaw, Mr. Cheung and Chameleon delivered subsequent affidavits in which they had full opportunity to respond to Terena's affidavit.

Ontario Superior Court of Justice

THE MOVING PARTIES' POSITION IN A NUTSHELL

1. On January 9, 2006 Shaw commenced the Main Action herein in Ontario claiming an accounting and damages, amongst other things, for breach of a licensing agreement relating to certain patents. He named a number of defendants including the Moving Parties and several parties out of the jurisdiction. All have come into Ontario to defend this action. There are counterclaims and crossclaims naming Shaw, Cheung and Chameleon. Cheung and Chameleon have also come into Ontario to defend without reservation. Pleadings have been completed and the case is being hotly contested.
 2. In February, 2006, Shaw and Chameleon commenced actions in New Jersey alleging patent infringement against customers of the Moving Parties which actions, since amendments made in New Jersey on March 28, 2007, rest squarely on Shaw's claims in Ontario being found valid. The Moving Parties are not parties to the New Jersey litigation.
 3. Shaw has been unsuccessful to date in the Ontario action and now wishes to press on with his New Jersey actions where he hopes to circumvent the Ontario Court. It is submitted that in the circumstances this is an appropriate case for an anti-suit injunction to be granted to the Moving Parties.
-

Ontario Court of Appeal

THE APPEAL IN A NUTSHELL

1. This appeal raises two issues of contract interpretation: (1) how is the annual variation in support calculated; and (2) is there an annual minimum of support and if so, how is it to be calculated. The proper interpretation for both issues is based on two principles. First, to adopt the reasoning of the Trial Judge results in an absurdity: no support for Mrs. MacDougall when Mr. MacDougall stops working even though he will continue to enjoy a substantial income. The second is that the contract is required by its terms to be interpreted so that the support to be paid to Mrs. MacDougall is liberal and generous and reflect the standard of living enjoyed by the parties during their marriage.

Ontario Superior Court of Justice

1. Bogatin asks this Court to exercise its discretion to grant a stay of the Canadian Civil Proceedings for at least seven months. This is because if both the criminal and civil proceedings were taking place either in Canada or the United States he would receive the constitutional protection against self-incrimination. However, in the circumstances here, where the criminal investigation is in the United States and the civil proceedings are in Canada, he is at substantial risk of receiving no protection. Bogatin says that the right to a protection guaranteed by both Constitutions should not be lost simply because of this “cross-over” aspect. The result is unjust and warrants a stay in the terms sought.

Federal Court of Appeal

SUMMARY OF APPELLANT'S POSITION

1. The Tribunal made two errors of law in interpreting section 100. The Tribunal adopted a test that is inconsistent with the scheme of the *Act* and the plain wording of section 100. It also failed to properly recognize the legislative history of section 100. The Tribunal's errors have increased the Commissioner's burden beyond that required by the *Act* so that, for all practical purposes, paragraph 100(1)(a) is unuseable. The Tribunal erred and its Order should be set aside.
-

U.S. Supreme Court Justices speak...

www.lawprose.org/supreme_court.php

WeirFoulds^{LLP}

V. How to Argue the Facts

Brian B. O'Neill
FACTL
Faegre & Benson LLP

NO MATERIALS

VI. How to Argue the Law

Professor Bruce S. Rogow

FACTL

Nova Southeastern University Law Center

PERSUASIVE ADVOCACY
THROUGH EFFECTIVE WRITING

HOW TO ARGUE THE LAW

BRUCE S. ROGOW

There are a number of books and articles about Appellate brief writing and argument and, for the most part, they all seem to emphasize the same points: clarity and honesty. But I have found several books to be helpful. My old favorite is Frederick Bernays Wiener's *Briefing and Arguing Federal Appeals*, BNA (1967). A newer favorite, which has an extensive bibliography, is Steven Wisotsky's *Professional Judgment on Appeal, Bringing and Opposing Appeals*, Carolina Academic Press (2002). And, of course, the new best seller – Antonin Scalia and Bryan Garner's *Making Your Case, The Art of Persuading Judges*, Thompson/West (2008) – is a fun read for appellate practitioners. An introductory quote the authors attribute to Dionysus of Halicarnassus is apropos: "No rules in the handbooks are capable in themselves of making brilliant performances out of those who intend to dispense with practice and exercise."

So looking for advice on How to Argue the Law is not difficult; applying it in the crucible of the appellate contest is the key. The principles are easy: lead with your best case and boldly distinguish the case or cases that your opponent relies upon.

In my view, what is most helpful is an understanding of the process of appellate decision making. So I offer the following as the approach I think best enables an appellate advocate “to argue the law.”

The Theory of Appellate Decision Making

In order to persuade an appellate court one must not only know the facts and the law of the case at hand, but one must also consciously understand, and be able to articulate, the factors which govern appellate decision making.

Many writers have discussed the subject, but I find that Karl Llewellyn’s book, *The Common Law Tradition*, Little, Brown (1960), offers the best insights. I am especially taken with what he calls “major steadyng factors” in our appellate courts. I have found that thinking about Llewellyn’s analysis, and his articulation of the fourteen steadyng factors he enumerated, assists one in better understanding the theory of appellate decision making, and thus enhances one’s persuasive powers on appeal.

Below I list each of the Llewellyn steadyng factors, with my own brief, less sophisticated discussion of what they mean.

1. Law Conditioned Officials

Judges, like the rest of us, have been trained in a certain fashion by law schools. But judicial perspectives, while sharing the bar’s general approach to

“handling” the law, are affected by each appellate judge’s legal upbringing.

The differences between the law school educational emphases, the differences between practice experiences, and the differences between lifestyles developed during the years leading to judicial appointment, will change each person’s response to “the law” despite the fact that we are all, theoretically, similarly law conditioned.

Thus, an appellate practitioner must not take for granted that his or her “law conditioning” leads an appellate bench to see through the same “law spectacles” as the advocate. Nevertheless, the commonality of all of our law conditioning is a steadyng factor to be carefully considered and applied. Recognizing that one is speaking to people who have shared similar legal training experiences makes it easier to communicate because we are communicating in a language that all have shared since the first day in law school.

2. Legal Doctrine

The body of law which we all share access to, and the accepted notion that “the deciding should strive to remain moderately consonant with the language and also with the spirit of some part of that body of doctrine” (Llewellyn at 20), creates a starting point for all attempts at appellate persuasion, including arguing the law.

Of course, that theorem also provides a touchstone for the advocate seeking a departure from former doctrine. One must acknowledge the force of the theorem and

then convincingly demonstrate why a retreat from its precepts is necessary. Scalia and Garner say “when the governing authority is flatly against you, if you think it is wrong you should say so.” Add to that Llewellyn’s admonition to explain why the laws should be looked at anew, and you have the formula: accept and embrace the law that helps you; reject the cases that hurt your argument and explain why the court should join your campaign.

3. Known Doctrinal Techniques

Although we have developed certain doctrinal techniques with which to approach precedent, legislation, constitutional law development, those techniques do offer various leeways which can erode their utility in predicting outcome. However, strictly adhered to, some of the techniques may dictate a sure result.

For example, grasping the importance of the standard of review doctrines used by appellate courts to state their authority on appeal will enable the advocate to have a fairly reliable impression of the likelihood of success for the particular point in question. *De novo* review allows one greater latitude, abuse of discretion cramps one’s appellate options.

What constitutes “governing” precedent is another doctrinal technique, and “dicta,” the use of unpublished opinions, or the use of *per curiam* opinions all are part of the array of ways that impact the strength or weakness of arguing the law. An

opponent's reliance on dicta or an unpublished opinion undermines his or her argument. Reliance on a *per curiam* opinion has been said by Judge Posner to imply "a lesser commitment to that opinion." *See*, Wisotsky at p. 37, n.78. Knowing the doctrinal techniques is essential in arguing the law.

4. Responsibility for Justice

Appellate judges are highly aware of their responsibility for justice. Unlike trial court judges, whose words are mostly unrecorded, appellate judges place their views on an open tablet. This heightens their responsibility to achieve a just result, and bolsters the duty to be just shared by all judges.

Of course, the notion of what is "justice" is subject to the vagaries of time, nature and personality. Thus, while the concept has great appeal, it may not be as utilitarian as other factors, but it should not be discounted. The recent Connecticut Supreme Court opinion holding it unconstitutional under the Connecticut constitution to deny gay couples the right to marry is a prime example of the responsibility for justice felt by four members of that seven person court. Consider these words in the majority's conclusion:

The drafters of our constitution carefully crafted its provisions in general terms, reflecting fundamental principles, knowing that a lasting constitution was needed. Like the framers of the federal constitution, they

also “knew [that] times can blind us to certain truths, and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the [c]onstitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Lawrence v. Texas*, supra, 539 U.S. 579. Not long ago, this court made the same essential point, explaining that “as we engage over time in the interpretation of our state constitution , we must consider the changing needs and expectations of the citizens of our state.” *State v. Webb*, 238 Conn. 389, 411, 680 A.2d 147 (1996).

* * *

Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.

Elizabeth Kerrigan et al. v. Commissioner of Public Health et al., No. SC 17716

(Conn. officially released October 28, 2008). There could be no better or, more contemporary, example of a judicial statement by a court majority of their “responsibility for justice.”

5. One Single Right Answer

In an honestly arguable case there is no “single right answer.” Espousing a single right answer is a dangerous concept because it connotes an infallibility which the law cannot claim. To the extent that a lawyer argues that there is a single right answer it obscures the search for the better or best answer, which is what a good advocate advocates.

Some cases, of course, admit to only one answer. But in the honestly arguable case, the proper approach is to recognize the other ways the law could be applied, and then to lead the court to the better answer: yours. That takes courage sometimes, but avoiding the single right answer syndrome is the right way to argue the law in an honestly arguable case.

6. An Opinion of the Court

I quote Llewellyn:

[T]he opinion has as one, if not its major office, to show how cases are properly to be decided in the future. . . . If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise

seems good.

Id. at 26.

Thus the presence of the opinion serves to force the court to come out in the open and display its application of the doctrinal techniques, and answer to its responsibility for justice. An opinion allows the reader to know if the court has distorted facts, ignored authority, or selectively used principles out of context. The opinion is the ultimate check and balance on appellate decision making and the lawyer's arguments must create the canvas for the court's opinion. The highest compliment to a brief is to see it essentially adopted in the court's opinion.

7. A Frozen Record

Nothing aids predictability and the ability to argue the law as much as the frozen record upon which appellate courts operate.

Understanding the importance of the frozen record, and then mustering the law to those developed facts, gives the appellate advocate an enormous advantage over a trial lawyer. In a trial the facts are developing in front of your eyes. In an appeal, all eyes are reading the same facts. Therefore applying the law to those established facts is a stabilizing force that makes it easier to argue the law.

Of course, if a court abuses the frozen record by expansive supposition, or ignores the facts, then the frozen record may lose much of its value in a particular

case. So in arguing the law one must be careful to focus the court on the record that supports one's position in order to assure that the law is being applied in light of the real facts in the case.

8. Issues Limited, Sharpened, and Phrased in Advance

Unlike the trial process, the appellate court receives a very refined case. The leeways for differing views are seriously limited by that refinement process, and underscores the appellate advocate's need to formulate issues on appeal with clarity, focus, sharpness and emotional and legal appeal. That supports brevity. The better brief is shorter, but not so short that one misses the better/best answer approach. Of course in the true single right answer case (*per curiam affirmed*), short can be very short.

9. Adversary Argument by Counsel

Recognizing the importance of oral argument is essential to arguing the law. Fudging a point in a brief, or misstating the facts of a case in the brief may be exposed at argument, damaging the case. Thus arguing the law in the brief must adhere to the highest professional standards to avoid being embarrassed at argument.

10. Group Decision

Unless one judge dominates a group, the process of three, seven or nine judges seeking an answer produces a wide perspective, ultimately leading to fewer extremes.

The human dynamics of group decision tends to bring consensus closer, and limits the ability of a single member deviating from the record or approved doctrinal techniques.

The group decision steadies a court and insures continuity and consistency within the court's body of decisions. One cannot underestimate the momentum for conformity with precedent that a group decision generates, as opposed to an individual trial judge's wider ranging latitude. Therefore in arguing the law at an appellate level, the lawyer must remember that he or she is writing for a group often unknown at the time, so the approach must be designed to bring together, not isolate the judges from one another.

11. Judicial Security and Honesty

The perceived immunity of appellate judges to political pressure is an important theoretical steadyng factor, although sadly the perception may have changed in the recent past.

However, ambition may play a role in the judge's decision making process, so while he or she may be immune from falling out of favor with the electorate, there is vulnerability insofar as a judge may seek to please "the powers that be" in the hope for greater professional office. The influence of political philosophy is a force to be considered in arguing the law, but the advocate must be optimistic and expect judges

to follow the rules and not use the leeways to achieve a desired result.

12. A Known Bench

Especially with a court that always sits *en banc*, as opposed to the appellate courts comprised of initial three judge panels, the ability to know the bench *via* their written opinions provides a steadyng factor which an appellate advocate can effectively use in arguing the law.

Over a period of time the *en banc* bench accumulates a style and a way of looking at things which forms its future course. A rapid change in personnel can create a new bench, which then must be relearned by the advocate, and the new court's receptiveness to legal arguments may change. But the known bench is a major aid in arguing the law.

13. The General Period Style and Its Promise

I quote Llewellyn, who describes this factor as:

[T]he general and pervasive manner over the country at large, at any given time of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavor of the working and the results. It is well described as a "period style"; it corresponds to what we have long known as period style in architecture or the graphic arts or furniture or music or drama. Its slowish movement but striking presence remind me

also of shifting “types” of economy (“agricultural,” “industrial,” e.g.) and of the cycles or spirals many sociologists and historians discover in the history of political aggregations or of whole cultures.

Id. at 36.

These thoughts underscore the creativity, imagination and historical perspective needed for appellate practice. While the general period style rarely shifts in the several year period required for appeal, subtle changes can occur which may affect the outcome. Thus an appellate advocate must be sensitive to those nuances of changes which may ripen when his or her case is finally decided, and the approach to arguing the law may have to be adjusted to accommodate the changes.

14. Professional Judicial Office

Judicial appellate office is bolstered by the rituals, roles, architecture, courtroom arrangement and supporting staff which imprint the importance of the office both on the office holder and the public.

The respect and decorum of appellate courts reinforce the duty judges have to “justice.” While one may have different opinions about what is “just,” paying heed in the brief to the decorum gains an appellate advocate an advantage in persuasion. If the appellate judge treats his or her duty with importance and respect, the lawyer who presents his or her case with the same care will more likely receive a receptive ear.

CONCLUSION

I am a believer in using “the voice of the court” in arguing the law. If a case has the words that support your position, a direct quote is better than your own paraphrasing. That does not mean long block quotes; it means short bursts of a court’s words that echo, or support your legal argument. If precedent counts, then allowing the reader to see the actual language of the precedent is powerful.

As technology advances, hyper-linked briefs make it easier for the court to check the accuracy and relevancy of your citations, but you do not want a reader to be distracted from the flow and glow of your brief. No footnotes, no sarcasm, no *ad hominem*, no hyperbole, no humor, no convoluted sentences are among the no’s. The yes’s include candor, accuracy, forceful and clear sentences and respect for your client, your adversary and the court.

Everyone has heard the old saying that you argue the facts when you are weak on the law, and argue the law when you are weak on the facts. But whatever the situation may be, you will still have to argue the law, so do it with grace, elegance and hope that you have the better, or best, answer.

VII. How to Edit. And Then Edit Again

Professor Michael H. Koby
Washington University School of Law

How to Edit. And Then Edit Again.

Michael H. Koby
Director, Trial & Advocacy Program
Washington University School of Law

1. Readers prefer shorter sentences and paragraphs. They can better digest the material in more manageable components.

In the first month of his marriage, the defendant, who was only eighteen at the time and who had not completed high school or developed a trade and who had just lost his part-time job, was charged with robbing a convenience store at the corner of Forsyth and Jackson Avenue.

Revised: In the first month of his marriage, the defendant was charged with robbing a convenience store at the corner of Forsyth and Jackson Avenue. He was only eighteen at the time. He had not completed high school or developed a trade, and he had just lost his part-time job.

2. Focus on meaningful words and consider deleting meaningless words.

A trial by jury was requested by the defendant.

Revised: The defendant requested a jury trial.

The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues that were vital.

Revised: The trial judge's ruling was prejudicial error because it cut-off cross examination on vital issues.

The testimony that was given by Glickman went to the heart of the defense that he asserted, which was his lack of specific intent to escape.

Revised: Glickman's testimony went to the heart of his defense that he had no specific intent to escape.

In the event that there is a waiver of the attorney-client privilege by the client, the letters must be produced by the attorney for the purpose of inspection by the adversary party.

Revised: If the client waives the attorney-client privilege, the attorney must produce the letters for inspection by the adversary party.

It is interesting to note that . . .

It is important to remember that . . .

It seems that . . .

It is clear (or obvious) that . . .

It is widely understood that . . .

As noted above . . .

As to . . .

With respect (or regard) to . . .

It is unethical to spend a client's money on a personal vacation.

Revised: Spending a client's money on a vacation is unethical.

There are four defendants seeking dismissal on procedural grounds.

Revised: Four defendants are seeking dismissal on procedural grounds.

3. The passive voice should be avoided...I mean, lawyers should avoid using the passive voice.

A contract was signed by Mr. England.

Revised: Mr. England signed a contract.

It was insisted that the contract had been breached.

Revised: Mr. England insisted that Ms. Glickman had breached the contract.

4. Not only should lawyers avoid using the passive voice, they should consider using effective transitions.

Generic Transitions

For Contrast

however	nevertheless*	but
on the other hand	conversely	still yet
by (in) contrast	notwithstanding	instead
on the contrary	nonetheless*	though
contrary to _____	alternatively	although
unlike _____	even so*	even though
despite _____	rather	

For Comparison

similarly	analogously	in like manner
likewise	in the same way	
	for the same reason	

For Cause and Effect

therefore*	accordingly	hence
consequently*	thus*	since
as a result	because	so for

For Addition

also	moreover	besides
further	too	and
in addition	additionally	
furthermore		

For Examples

for example	to illustrate	specifically
for instance	namely	that is*

For Emphasis

in fact	certainly	still*
above all	indeed	clearly

For Evaluation

more important	surprisingly	unquestionably
unfortunately	allegedly	
fortunately	arguably	

For Restatement

in other words	more simply	to put it differently
that is*	simply put	

For Concession

granted	of course	to be sure
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For Resumption After a Concession

still*	nonetheless*	all the same
nevertheless*	even so*	

For Time

subsequently	later	earlier
recently	eventually	afterwards
meanwhile	shortly thereafter	until now
initially	simultaneously	since
formerly	at the time	by the time

For Place

adjacent to	here	nearby
next to	beyond	opposite to

For Sequence

first, second, third	next	then
former, latter	final	later
in the first place	finally*	primary, secondary

For Conclusion

in summary	in brief	thus*
in sum	in short	therefore*
to sum up	to conclude	consequently*
finally*	in conclusion	to (in) review

*Generic transition that falls under more than one category.