

Crafting Winning Arguments: Tips from an Appellate Court Judge

The sheer volume of litigation facing most courts today requires lawyers to provide well-prepared arguments which can be understood quickly and then confidently ruled upon by the court, whether it be during the trial phase or in the appeal.

Crafting complete, clear, and concise written arguments is particularly vital, as more cases than ever, in both the trial and appellate courts, are now being decided **without** oral argument.

What are the biggest mistakes lawyers make in preparing their case for litigation?

The biggest mistake is failing to provide the court with a brief and concise view of the law and facts, without unnecessary distractions. It is impossible, of course, to write more clearly than you think. Painstaking care in expressing what you want to say will help you avoid the hazy writing which a less careful approach produces.

The argument will ultimately be evaluated by how well it educates and convinces the judge that the reasoning and authorities contained within are correct. The key to building a great argument is to design a logically reasonable theory, and then reinforce it with compelling propositions and, of course, the all-important legal authority. The most persuasive arguments are not necessarily the most emotionally or morally moving. They are simply the ones with which the court is most likely to agree.

With the continued growth of litigation in all courts, it is necessary to stress the increasing importance of clarity in a legal argument.

Lawyers often work with complicated situations which must be explained to a judge who obviously has a limited amount of time to resolve such issues. This makes it imperative that the litigator present the clearest argument possible. If not, there is a substantial risk that the busy judge may unwittingly misinterpret it.

A judge simply doesn't have time to decipher (unwind) a poorly prepared argument, and the lawyer's credibility with the court will be damaged in the process. When the lawyer's communication even slightly obscures the message, there is a risk of immediate rejection by the court. This is so even though the lawyer might have obtained agreement from the court had the lawyer simply been more clear. When it comes to clarity, the advocate rarely gets a second chance.

Good organization is the key to an effective legal argument, and a chronological presentation isn't always the best way to structure such an analysis.

In general, it's best to first present the issues on which you are most likely to win. Within those issues, you should present your strongest points first. And within those points, you should correspondingly cite your best authority first.

The overall goal should be to focus the judge's thoughts on the most appealing theory. An effective legal argument is not just a collection of stray thoughts, so you cannot afford to let the judge lose sight of how your propositions are related one to the other. You must enable the judge to clearly see your train of thought. Soon after you begin to discuss each issue, you must remind the judge exactly as to what your theory is.

I know a great many judges who will tell you that the summary is one of the aspects which counsel commonly neglect. While drafting a summary can seem mundane to many lawyers, you might ask the question, why should close attention be paid to it?

A good summary provides a bird's-eye view of the verbal landscape which lies below. It makes the argument more palatable and less intimidating than it might appear at first glance.

The summary becomes useful because it does help to cement the argument's main points in the judge's mind and provides tidiness to the development of the argument. Judges, like all readers, appreciate a helpful wrap-up of the material before them. Its aim is to impress the court with the soundness and justice of one's cause. Here, if anywhere, lies the perfect place for displaying eloquence and wit, and memorable lines can have a powerful impact on the judge.

How does a lawyer's ability to set up the background information on his or her case impact the court?

Legal controversies are ultimately about people, and if the judge can visualize real people doing actual things, he or she usually will begin to take sides.

Facts are ultimately important because they drive and move the court's decision. The most effective fact statement convinces through organization, which emphasizes important facts over irrelevant ones, and word choices favorable to your client, but whose veracity cannot be disputed by your adversary. Effective statements of fact will lead the court to conclude the equities are on

your side. And when a judge finds himself or herself in such a position, the judge's mind is often receptive enough so as to rule in your favor.

What is the best way for a lawyer to explain the procedural history of the case?

Balance is everything. It is your job to provide enough detail to promote your theory of the case, but not so much that the critical points of the argument are lost in the morass. To describe the previous ruling in a light which persuasively advances your case is undoubtedly the challenge. You must do so forthrightly, of course, so your adversary can never accuse you of misrepresenting the facts. But detailing the case's history offers a tremendous opportunity to breathe life into a story which concerns real people. The history of the case should foreshadow the contentions you are about to advance in your argument.

What part of building a case do you think receives less attention than it should?

Preparing an introduction to a legal argument sounds like a boring and mundane task, but the opportunities it offers for persuading the court are enormous. The beginning of an argument greatly influences how its later passages will be read, and courts tend to read submissions most carefully at the beginning. Because judges are pressed for time, they come to expect the strongest arguments first. Should they find themselves initially considering weak points, they will either form an adverse opinion – or worse – stop reading altogether. Time spent in preparing the introduction therefor is well worth the effort.

Is there a best way to challenge your opponent's argument? Do you suggest framing it by showing a weakness in it or by arguing the positive merits of your argument?

Generally speaking, your argument will be better received if you frame it first, before attacking the positions of opposing counsel. The court's impression should be you deserve to win, rather than your adversary deserves to lose. A defensive tone can quickly undermine an otherwise commendable argument. A frontal attack, on grounds that the precedent is poorly reasoned or that changes in public policy have made it irrelevant – is almost always a losing battle. Judges invariably prefer distinguishing and reconciling precedent as opposed to flatly overruling it. An elaborate analysis of your opponent's points may show over-concern as to their actual importance. You should dispense those points as quickly and as forcefully as you can – and then move on.

What is the best advice for lawyers in building their argument?

To write clearly, you must not only gather your material and carefully organize it, but you must think deeply about it. You must ponder the relationship of facts and law to one another, evaluate the importance of one point over another, and then construct a logical plan of presentation. Considerable time has to be spent digesting, organizing, and thinking through the implications of the materials before you even begin to write. Only when you see clearly what is central to the argument can you persuade the court to focus on those points, instead of disbursing attention over a morass of details in which nothing of significance stands out.

Distributed by Eighth U.S. Circuit Court Judge **Kermit Edward Bye**
at MSBA Antitrust Law Section Seminar
"Perspectives on Antitrust Litigation from the Federal Bench"
Wednesday, February 23, 2011
Minneapolis, Minnesota