LEGAL ARGUMENT

The Structure and Language of Effective Advocacy

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The Structure and Language of Effective Advocacy

Second Edition

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PREFACE

In the fifteen years since I wrote the first edition of this book, a new generation of law students has appeared, with different strengths, weaknesses, and outlooks than their predecessors. Teaching these students how to litigate has forced me to alter my own approach to teaching legal argument, and has convinced me that a new edition of this book is now necessary.

The cohort of students for whom I originally developed this material seemed to need help mainly with the construction of legal arguments. Many of them got stuck right at the starting line, but once they got over the initial hump by jump-starting an argument, they often could take things from there. Today's students still often get stuck at the same initial point, but I also find them getting hung up more than their predecessors at another point in the advocacy process: at the point where it comes time to translate their conceptual arguments into well-written briefs.

Consequently, this edition of *Legal Argument* retains at its core the syllogistic method of argument construction as the basic vehicle of instruction. However, because today's students need more direct instruction in how effectively to present in writing a well-constructed legal argument, the main changes I have made in this edition are directed primarily at providing more information and instruction concerning how to write a good legal argument once it has been constructed.

Those who have used the book before will find the first eight chapters virtually unchanged from the first edition, except that Chapter 8 now includes an additional example of how to construct a complete argument, this one drawn from a complex statutory scheme, the Endangered Species Act. The formula for and extended example of briefwriting likewise remain the same, and are now contained in Chapter 10.

The new material appearing for the first time in this edition is designed to supplement the account of how to build an argument by providing much more information about how to write an argument. Chapter 9 openly and expressly distinguishes the enterprise of constructing an argument from the enterprise of writing it, a subject that was treated in the first edition mainly through implication, and goes on to offer direct, easily digested advice on how to tell a good story. Chapter 11 contains substantial new advice on how to avoid the most common problems of briefwriting. Chapter 14 also is new, and deals with several advanced techniques of legal writing including how to present the law persuasively, how to frame issues effectively, and what to emphasize (or not) in the course of a written argument. Finally, Chapter 15 deals with maintaining professionalism in advocacy, a topic that anyone who has taught legal writing to law students in the last five or ten years knows requires separate and emphatic presentation.

Many people have helped me in ways too numerous to recount with the development of the material in this book, but I owe by far the biggest debt of gratitude to the hundreds of students who over the years have taken my classes in Litigation Practice, Federal Litigation, and Environmental Litigation. They, more than anyone else, taught me how to teach this subject.

JAG
Buffalo, N.Y.
July 17, 2007

INTRODUCTION

"So you want to be a lawyer? It's easy. Here's a problem. Go out and do the research. Then come up with some arguments. Then write them down in a brief. Have a nice day."

If this is how you experience law school, you are not alone. Many students experience their legal education primarily as a disjoint series of exposures to apparently unconnected bodies of substantive law, threaded together badly, or not at all, by haphazard exposure to some unarticulated common methodology. There is *something* we do in all those classes that is the same — but what is it? Nobody ever seems to come right out and identify or explain the common enterprise.

But just what is it that law students aren't being taught? By the end of the first year most law schools have done a reasonably creditable job of teaching students how to read legal materials and extract from them the relevant rules of law. Most law schools also do a good job of teaching students how to perform research in legal materials; within a few months students usually can navigate a law library and do basic research in familiar materials. Law schools also give students at least some early exposure to the practice of legal writing. So what's missing?

For students who feel confused by their legal education, the missing part often lies in the middle. These students can read and understand cases and statutes, and they can write up and defend sound legal arguments. The difficulty lies in *producing* the arguments. I can read and understand the cases, they say to themselves, and I would be delighted to write a brief making the best possible arguments, but what are those arguments? How do I identify them? How do I build an argument that is sound, and persuasive, and well-fortified against attack? Cases and statutes don't yield this information. Once you have assembled them, they just lie there, inertly, on the desk. How, the ambitious law student wants to know, do I make those little suckers stand up and dance?

If you are with me so far, then this book is for you. The book has two main purposes. The first is to explain how lawyers construct legal arguments. In this regard, the book is meant to be a purely practical guide to the seemingly mysterious process by which lawyers take the raw materials of litigation — cases, statutes, testimony, documents, common sense — and mold them into instruments of persuasive advocacy. The book's second purpose is to explain how to take a well-constructed legal argument and present it, in writing, in a way that legal decision makers will find persuasive. The book, in other words, is concerned with how to (1) build, and (2) present winning legal arguments.

I must stress immediately that these are two very different skills. *Building* an argument is a feat of architecture and craftsmanship. The goal

of argument-building is to construct something that is solid and well-made, that sits on stable foundations, that will weather harsh conditions, and which can therefore be used with confidence. *Writing* arguments, in contrast, is a task of salesmanship; its goal is to persuade a judge to rule for your client. There is no necessary connection between the skills of construction and sales. In most lines of work, designers do not also sell their products: architects build houses and realtors sell them; engineers design cars for sale by dealers. The capable lawyer, in contrast, must master both kinds of skills.

There is, however, one important connection between building and writing arguments, between construction and sales: it is easier to sell a well-made product. Someone who has a quality product to sell can sell it simply by showing it, clearly and honestly, to the buyer; the seller has nothing to hide and everything to reveal. When the buyer is knowledgeable — like a judge — a truly fine product sells itself. The seller of an inferior product, in contrast, must conceal poorly constructed features, direct the buyer's attention away from the product's weaknesses, and rely on puffing and other forms of deception to close the deal. Consequently, this book emphasizes heavily the construction of arguments that are not flashy and clever, but merely coherent and solidly grounded — arguments that plod on, point by point, clearly and relentlessly, to the finish line. Such arguments are the true workhorses of legal practice.

But what about those flashy arguments — the clever one-liners, the brilliant, discussion-stopping retorts? The truth is that they don't exist. Twenty years of teaching have convinced me that many students make their way through law school suffering from a fundamental misimpression of what successful legal argument is all about. They seem to believe that winning a legal argument is simply a matter of finding just the right argument — that out there in the universe of all possible arguments lies the one argument that, if only they can find it, will by its mere utterance, in a single, satisfying blow, utterly devastate the other side and thereby win the case. This, some students seem to believe, is what law professors really know, and what they are hiding from their students.

This belief is false, though the impulse to believe is understandable. Wouldn't we all like to know, like Harry Potter, the incantation for a spell that paralyzes our opponents, or to be able, like Mr. Spock on the old *Star Trek* television show, to pinch people's necks so that they slump instantly into unconsciousness? Once we acquire knowledge of this sort we become unbeatable. Who wouldn't want to be initiated into such mysteries? In the actual practice of law, however, as in most areas of life, disputes are almost never settled by the delivery of a decisive, knockout blow. Legal fights usually go the distance, and are won on points. The winner is the contestant who is fitter, better prepared, and more determined, and who lands the most good blows. That is why this book focuses on craft — the craft of

constructing legal arguments that are sound, sturdy, and coherent. Those are the kinds of arguments that persuade judges and win cases.

The centerpiece of the book is a step-by-step method, based on the construction of syllogisms, designed to walk the advocate through the process by which such a winning argument may be crafted. Before introducing this method in Part I, however, I need to issue a warning lest the reader misconstrue the book's method as the very kind of magic bullet I have just claimed does not exist. Unlike a spell or secret grip, the book's method does not save the user work, thereby making effective advocacy easier. On the contrary, it *creates* work, making advocacy harder, though in the end more effective. It does this by forcing advocates to think through issues that they might not otherwise consider, and to do so thoroughly and systematically. In doing this, the method enforces a kind of discipline to which all good advocates inevitably must adhere, though many of them do it intuitively rather than by following a protocol laid out in the pages of a book.

So just what issues does this protocol force people to contemplate that they might otherwise overlook? It forces advocates to conduct a kind of research *within themselves*. It forces them, in other words, to figure out *what they think*.

Law schools invest substantial time and resources in teaching students directly and explicitly how to conduct research in case law, statutes, administrative regulations, and other legal materials. This is research students conduct outside themselves, as it were, to assemble information for use in legal advocacy. But there is another resource in which advocates must do substantial research before they can mount a good legal argument: they must look, carefully and deeply, within themselves to figure out what they think about the legal question under investigation, and, more importantly, why they think it. It is easy enough to blurt out what you think, and every advocate must do so. It is quite another thing, however, to know *why* you think what you think, and it is the ability to analyze and effectively defend the subterranean infrastructure of one's beliefs that in advocacy distinguishes the good from the mediocre. The students who get most roughed up in a Socratic law school class — and the lawyers who get most roughed up in court — are the ones who know what they think, but not why they think it. These are the people who can always answer the first question, but never the second.

The method of argument construction set out in this book is nothing more than a heuristic that forces advocates to do the necessary internal research. Indeed, the entire first seven chapters of this book amount to nothing more than an elaborate exhortation to advocates to keep asking themselves "Why do I think that?," over and over, until the question eventually becomes pointless and can no longer be answered. If you already know how to do this — to ask yourself "why?" until you reach the absolute end of the line — then you probably don't need to read any further.

For those who choose to read on, the book is organized into five parts. Part I sets out a general methodology for constructing legal arguments. This methodology centers on the use of syllogisms and the process of what I call "grounding" their premises. Part II focuses more closely on the construction of persuasive, well-grounded legal premises, and covers the effective integration of legal doctrine and evidence into the argument's structure. Part III shows how to put the method to work by giving two detailed examples of the construction of complete legal arguments from scratch.

The book then turns to a very different task: after you have done your research, both external and internal, how do you present it persuasively to a court? Part IV provides a detailed protocol for reducing well-constructed legal arguments to written form, along with a concrete illustration of that process. It also provides concrete advice on how to recognize and avoid a host of common mistakes in the written presentation of legal arguments. Part V, the final part, moves from the basics into more advanced techniques of persuasive legal argument. These include rhetorical tactics of framing and emphasis, how to respond to arguments, maintaining professionalism in advocacy, and the ethical limits of argument.

A final warning is in order. This book provides a methodology for constructing legal arguments, but no methodology, in this discipline or any other, can ever be more than a reliable rule of thumb. A methodology can provide highly useful guidance to the initiate and the expert alike, but it is never a substitute for practiced judgment based on real experience. The true master of a craft knows when to deviate from the rules as well as when to follow them, when to cut corners and when to proceed more strictly. The advice contained in this book should be taken in this spirit.

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