2. **Know your audience.**

A good lawyer tries to learn as much as possible about the judge who will decide the case. The most important information, of course, concerns the judge’s judicial philosophy—what it is that leads this particular judge to draw conclusions. Primarily text, or primarily policy? Is the judge strict or lax on stare decisis? Does the judge love or abhor references to legislative history? The best place to get answers to such questions is from the horse’s mouth: read the judge’s opinions, particularly those dealing with matters relevant to your case. Also read the judge’s articles and speeches on relevant subjects.

Besides judicial philosophy, learn all you can about how the judge runs the courtroom. Is the judge unusually impatient? If so, you might want to pare down your arguments to make them especially terse and pointed. Is the judge an old-school stickler for decorum? If so, you might refer to opposing counsel as “my friend.” One federal judge had a practice of fining counsel $20 (no notice in advance) for placing a briefcase on the counsel table. It’s good to know of such peculiarities. Some of these courtroom characteristics you can (and should)

“It may surprise you, but many firms keep ‘book’ on all the judges before whom they appear. This book includes much more than a biographical sketch which you might find in *Who’s Who*: Does the judge listen with patience, or does he seem absorbed in other matters or half asleep? Does he treat the government as just another litigant, or does the government have a preferred or, sometimes, a prejudiced position? Does he seem impressed by the reputation or prestige of the lawyer making the argument? These and many other impressions are recorded for future reference.”

—Samuel E. Gates
observe by sitting in on one of the judge’s hearings. Beyond that, however, talk to colleagues at the bar who are familiar with the judge’s idiosyncrasies.

Finally, learn as much as you readily can about the judge’s background. Say you’re appearing before Judge Florence Kubitzky. With a little computer research and asking around, you discover that fly-fishing is her passion; that her father died when she was only seven; that her paternal grandparents, who were both professors at a local college, took charge of her upbringing; that she once chaired the state Democratic Party; that she enjoys bridge; that she has been estranged from her brother and sister for many years; that she graduated from Mount Holyoke College and took her law degree from the University of Michigan; that she’s an aficionado of good wines; that her favorite restaurant is the Beaujolais Room; that she was counsel for a craft union before coming to the bench; and so on. Going in, all these data seem irrelevant to how the judge might decide your breach-of-contract case, but you might well find some unpredictable uses for this knowledge over the course of a lengthy trial. You might want to stress, for example, that the defective contract performance your client is complaining about violated basic standards of the craft and reflects shoddy workmanship. At the very least, these details will humanize the judge for you, so that you will be arguing to a human being instead of a chair.

Apart from judges’ personal characteristics, there are also characteristics of individual courts. Can the appel-
late court you are appearing before be relied on to read the briefs before hearing argument? If not, you might devote more argument time to the facts than you otherwise would, or deal with some legal points that are so basic that you’d normally pass over them in oral argument. Is it the practice of the appellate court to assign the opinion to a particular judge before the case is even argued? If so, you can probably assume less familiarity with the facts and issues on the part of the other judges, and you might want to lay out your argument in a more rudimentary fashion for their benefit. Is the court notoriously dismissive of higher-court precedent? Stress the public-policy benefits of your proposed disposition.

Bear in mind that trial judges are fundamentally different from appellate judges. They focus on achieving the proper result in one particular case, not on crafting a rule of law that will do justice in the generality of cases. And they will pursue that objective principally through their treatment of the facts (if the case is tried to the court) and discretionary rulings. In most jurisdictions, trial judges are more disposed than appellate judges to strict observance of governing caselaw—perhaps because their work is subject to mandatory review. So at the trial-court level you are well advised to spend more time on the facts and on the discussion of precedent (from the relevant courts) and less time on policy arguments. That’s one reason why a good trial brief can rarely be used before an appellate court without major changes.