General Principles of Argumentation ............................. 1
  1. Be sure that the tribunal has jurisdiction. .................... 3
  2. Know your audience. ................................................... 5
  3. Know your case. ......................................................... 8
  4. Know your adversary's case. ...................................... 10
  5. Pay careful attention to the applicable standard of decision. ...................................................... 11
  6. Never overstate your case. Be scrupulously accurate. .............................................................. 13
  7. If possible, lead with your strongest argument. ........ 14
  8. If you're the first to argue, make your positive case and then preemptively refute in the middle—not at the beginning or end. ............................................... 15
  9. If you're arguing after your opponent, design the order of positive case and refutation to be most effective according to the nature of your opponent's argument. ................................ 17
 10. Occupy the most defensible terrain. ............................ 19
 11. Yield indefensible terrain—ostentatiously. ................... 20
 12. Take pains to select your best arguments. Concentrate your fire. .............................................. 22
 13. Communicate clearly and concisely. ............................ 23
14. Always start with a statement of the main issue before fully stating the facts. .................................25
15. Appeal not just to rules but to justice and common sense. .................................................26
16. When you must rely on fairness to modify the strict application of the law, identify some jurisprudential maxim that supports you. ...........30
17. Understand that reason is paramount with judges and that overt appeal to their emotions is resented. ........................................31
18. Assume a posture of respectful intellectual equality with the bench. .................................33
19. Restrain your emotions. And don’t accuse. .................34
20. Control the semantic playing field. .................................35
21. Close powerfully—and say explicitly what you think the court should do. .......................37

Legal Reasoning ................................................................................................................. 39

In General
22. Think syllogistically. ......................................................41

Statutes, Regulations, Ordinances, Contracts, and the Like
23. Know the rules of textual interpretation. .................44
24. In cases controlled by governing legal texts, always begin with the words of the text to establish the major premise. .............................................46
25. Be prepared to defend your interpretation by resort to legislative history. ..............................48

Caselaw
26. Master the relative weight of precedents. .....................52
27. Try to find an explicit statement of your major premise in governing or persuasive cases. .......55

Making Your Case: The Art of Persuading Judges
## Contents

**Briefing**........................................................................................................................................... 57

**Introduction**
28. Appreciate the objective of a brief. ........................................ 59

**Preparatory Steps**
29. Strengthen your command of written English. ........ 61
30. Consult the applicable rules of court. ................................. 64
31. Set timelines for the stages of your work. ...................... 66
32. In cooperation with your opponent, prepare the Joint Appendix. .................................................. 68

**The Writing Process**
33. Spend plenty of time simply “getting” your arguments. ......................................................... 69
34. Outline your brief. ................................................................. 70
   - Opening Brief ...................................................................... 71
   - Responding Brief .................................................................. 71
   - Reply Brief ........................................................................... 73
   - Petition for Discretionary Review .................................... 75
   - Response to a Petition for Discretionary Review ........... 79
35. Sit down and write. Then revise. Then revise again. Finally, revise. ........................................ 80

**Architecture and Strategy**
36. Know how to use and arrange the parts of a brief. .... 82
   - Questions Presented .......................................................... 83
   - Statement of Parties in Interest ........................................... 89
   - Table of Contents; Table of Authorities .......................... 89
   - Constitutional and Statutory Authorities ....................... 90
   - Statement of Jurisdiction .................................................. 91
   - Introduction or Preliminary Statement ........................... 91
   - Proceedings Below ............................................................. 92
   - Statement of Facts ............................................................ 93
   - Summary of Argument ..................................................... 97
Making Your Case: The Art of Persuading Judges

Argument ................................................................. 98
Conclusion ............................................................... 100
Appendix ................................................................. 101

37. Advise the court by letter of significant authority arising after you’ve filed your brief. .......... 101
38. Learn how to use, and how to respond to, amicus briefs. .......................................................... 102

Writing Style
39. Value clarity above all other elements of style. ....... 107
40. Use captioned section headings. .............................. 108
41. Use paragraphs intelligently; signpost your arguments. .......................................................... 109
42. To clarify abstract concepts, give examples. ............ 111
43. Make it interesting. ................................................ 112
44. Banish jargon, hackneyed expressions, and needless Latin. .................................................. 113
45. Consider using contractions occasionally—or not. .......................................................... 114
46. Avoid acronyms. Use the parties’ names. ............... 120
47. Don’t overuse italics; don’t use bold type except in headings; don’t use underlining at all. ........ 122
48. Describe and cite authorities with scrupulous accuracy. ..................................................... 123
49. Cite authorities sparingly. ....................................... 125
50. Quote authorities more sparingly still. ...................... 127
51. Swear off substantive footnotes—or not. .............. 129
52. Consider putting citations in footnotes—or not. .... 132
53. Make the relevant text readily available to the court. ..................................................... 135
54. Don’t spoil your product with poor typography. .... 136
Oral Argument .................................................................................. 137

Introduction
55. Appreciate the importance of oral argument, and know your objectives. ................................................................. 139

Long-Term Preparation
56. Prepare yourself generally as a public speaker. ................. 142
57. Master the preferred pronunciations of English words, legal terms, and proper names. ... 144
58. Master the use of the pause. ....................................................... 146

Preliminary Decision: Who Will Argue?
59. Send up the skilled advocate most knowledgeable about the case. ................................................................. 147
60. Avoid splitting the argument between cocounsel. ... 148

Months and Weeks Before Argument
61. Prepare assiduously. .......................................................... 150
62. Learn the record. ............................................................... 151
63. Learn the cases. ................................................................. 152
64. Decide which parts of your brief you’ll cover. .............. 153
65. Be flexible. ........................................................................ 153
66. Be absolutely clear on the theory of your case. ............... 155
67. Be absolutely clear on the mandate you seek. ............... 156
68. Organize and index the materials you may need. .... 157
69. Conduct moot courts. ........................................................... 158
70. Watch some arguments. ......................................................... 159
71. On the eve of argument, check your authorities. ..... 160

Before You Speak
72. Arrive at court plenty early with everything you need. ................................................................. 161
73. Make a good first impression. Dress appropriately and bear yourself with dignity. .................................................. 162
74. Seat only cocounsel at counsel table. ................................. 163
75. Bear in mind that even when you’re not on your feet, you’re onstage and working. ............... 163
76. Approach the lectern unencumbered; adjust it to your height; stand erect and make eye contact with the court. ....................... 164

Substance of Argument
77. Greet the court and, if necessary, introduce yourself. ...................................................... 166
78. Have your opener down pat. .................................................. 167
79. If you’re the appellant, reserve rebuttal time. .......... 167
80. Decide whether it’s worth giving the facts and history of the case. .............................. 168
81. If you’re the appellant, lead with your strength. ...... 169
82. If you’re the appellee, take account of what has preceded, clear the underbrush, and then go to your strength. .................................. 170
83. Avoid detailed discussion of precedents. ....................... 171
84. Focus quickly on crucial text, and tell the court where to find it. .............................. 172
85. Don’t beat a dead horse. Don’t let a dead horse beat you. .................................. 172
86. Stop promptly when you’re out of time. ................. 173
87. When you have time left, but nothing else useful to say, conclude effectively and gracefully. ..... 173
88. Take account of the special considerations applicable to rebuttal argument. ......................... 175

Manner of Argument
89. Look the judges in the eye. Connect. ......................... 178
90. Be conversational but not familiar. ......................... 179
91. Use correct courtroom terminology. ......................... 180
Contents

92. Never read an argument; never deliver it from memory except the opener and perhaps the closer. .......... 181
93. Treasure simplicity. ....................................................... 182
94. Don’t chew your fingernails. ................................. 183
95. Present your argument as truth, not as your opinion. ...................................................... 184
96. Never speak over a judge. ...................................................... 184
97. Never ask how much time you have left. ..................... 185
98. Never (or almost never) put any other question to the court. .......................... 186
99. Be cautious about humor. ...................................................... 186
100. Don’t use visual aids unintelligently. ................................. 187

Handling Questions
101. Welcome questions. ...................................................... 189
102. Listen carefully and, if necessary, ask for clarification. ...................................................... 191
103. Never postpone an answer. ...................................................... 192
104. If you don’t know, say so. And never give a categorical answer you’re unsure of. ......................... 193
105. Begin with a “yes” or a “no.” ...................................................... 193
106. Never praise a question. ...................................................... 194
107. Willingly answer hypotheticals. ...................................................... 194
108. After answering, transition back into your argument—smoothly, which means not necessarily at the point where you left it. .......... 195
109. Recognize friendly questions. ...................................................... 196
110. Learn how to handle a difficult judge. ...................................................... 196
111. Beware invited concessions. ...................................................... 199
Making Your Case: The Art of Persuading Judges

After the Battle
112. Advise the court of significant new authority. ...........201
113. If you’re unhappy with the ruling, think about filing a motion for reconsideration. ..............................201
114. Learn from your mistakes. ........................................205
115. Plan on developing a reputation for excellence. ......205

Sources for Inset Quotations .................................................207

Recommended Sources .......................................................213

Index .....................................................................................219