You Talkin’ to Me? The Art of Effective and Professional Communication

Cosponsored by the Professionalism Commission

Friday, December 6, 2013
9 a.m.–11 a.m.

Oregon State Bar Center
Tigard, Oregon

2 Ethics credits
YOU TALKIN’ TO ME? THE ART OF EFFECTIVE AND PROFESSIONAL COMMUNICATION

PROGRAM PLANNERS

Planning Chair: Honorable Daniel L. Harris, Harrang Long Gary Rudnick PC, Eugene
Honorable John V. Acosta, U.S. District Court for the District of Oregon, Portland
Honorable Kathleen M. Dailey, Multnomah County Circuit Court, Portland
Scott N. Hunt, Busse & Hunt, Portland

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2. Judge-Friendly Briefs: 12 Easy Steps ................................ 2–i  
   — Michael A. Greene, *Rosenthal Greene & Devlin PC, Portland, Oregon*
SCHEDULE

8:30  Registration

9:00  Faith in Fairness: Assessing the Real Costs of Incivility
     Honorable Robert “Skip” Durham, Senior Judge, Portland

9:45  Exploring the Values of Effective Communication
     Honorable John V. Acosta, U.S. District Court for the District of Oregon, Portland
     Honorable Daniel L. Harris, Harrang Long Gary Rudnick PC, Eugene
     Julia M. Hagan, Gevirtz Menashe Larson & Howe PC, Portland
     Richard J. Vangelisti, Vangelisti Law Firm LLC, Portland

11:00 Adjourn
Honorable John V. Acosta, *U.S. District Court for the District of Oregon, Portland.* Judge Acosta was appointed a Magistrate Judge for the United States District of Oregon on March 5, 2008. Before his appointment to the bench, he was in private practice as a civil litigator and trial lawyer for 20 years. Judge Acosta has served on the Oregon State Bar’s Joint Bench/Bar Commission on Professionalism since 2006 and has been active in the community through service on the boards of several nonprofit social services organizations and legal profession associations, by teaching as an adjunct professor at the University of Oregon Law School, and by coaching high school mock trial students, among other volunteer activities. He currently serves on the University of Oregon School of Law Dean’s Advisory Council.

Honorable Robert “Skip” Durham, *Senior Judge, Portland.* Justice Durham was an Associate Justice with the Oregon Supreme Court from 1994 through 2002; prior to that he was a judge on the Oregon Court of Appeals from 1991 through 1994 and in private practice in the areas of civil trial and appellate litigation with an emphasis on labor and employment matters. Justice Durham is an adjunct faculty member at Lewis and Clark Law School and a mediator with the Oregon Appellate Settlement Program. He is a member of the Oregon Law Institute Board of Directors, past chair of the Committee on Revision of Code of Judicial Conduct, past chair of the Committee on Judicial Rule 4, and past president of the Oregon Appellate Judges Association. Justice Durham holds an LL.M. from the University of Virginia School of Law.

Julia M. Hagan, *Gevurtz Menashe Larson & Howe PC, Portland.* Ms. Hagan practices family and juvenile law. Ms. Hagan is a member of the Oregon State Bar House of Delegates, Oregon Women Lawyers, the Multnomah, Washington, and Clackamas County bar associations, the National Association of Counsel for Children, the Oregon Criminal Defense Lawyers Association, and the Oregon State Bar Family Law and Juvenile Law sections. She is a past member of the Multnomah Bar Association Board of Directors and the Oregon Bench-Bar Commission on Professionalism. She serves as a court-appointed attorney for children in juvenile and domestic relations cases. Ms. Hagan is the 2012 recipient of the Oregon State Bar Juvenile Law Section Leadership Award, and she chaired the Multnomah Bar Association Judicial Screening Committee that received the 2009 Award of Merit.

Honorable Daniel L. Harris, *Harrang Long Gary Rudnick PC, Eugene.* Judge Harris recently retired as a Jackson County Circuit Court judge after 16 years on the bench. He now works as a mediator, arbitrator, and civil trial attorney. Before his judicial service, he was a civil trial attorney for 14 years, primarily in Ashland. Judge Harris is a member and past chair of the Oregon Bench and Bar Commission on Professionalism. In 2011, he formed the Southern Oregon chapter of the American Inns of Court and was its first president. He also served on the Council on Court Procedures for 12 years. He is on the faculty of an annual seminar to train new judges, where he teaches civil jury trial management, professionalism, and what new judges need to know to survive. He is a regular speaker around the state on professionalism, ethics, and effective advocacy. Judge Harris is the 2010 recipient of the Wallace P. Carson, Jr., Award for Judicial Excellence.

Richard J. Vangelisti, *Vangelisti Law Firm LLC, Portland.* Mr. Vangelisti focuses his practice on plaintiff’s personal injury and wrongful death matters in Oregon and Washington. He is a member and past chair of the Oregon Bench-Bar Joint Commission on Professionalism and president of the Multnomah Bar Association. He received the 2009 Judge James M. Burns Federal Practice Award. Mr. Vangelisti is a frequent lecturer and author on trial practice and professionalism.
Chapter 1

It Was a Dark and Stormy Night—Creating the Persuasive Argument

Honorable Donald C. Ashmanskas
U.S. Magistrate Judge
Portland, Oregon

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2Judge Ashmanskas (1935–2011) served as a United States Magistrate Judge of the United States District Court for the District of Oregon. Prior to his appointment in 1992, he served 17 years as a district and circuit judge of the State of Oregon for Washington County, including service as presiding judge of both courts. He served on the Governor’s Task Force on Corrections, on the Oregon Advisory Commission on Prison Terms and Parole Standards, and as chair of the Oregon Community Corrections Advisory Board and the Oregon Revised Statutes Revision Committee. Judge Ashmanskas participated as a continuing legal education speaker, author, and editor for the Oregon State Bar and received its President’s Service Award for his volunteer work toward improving the practice of law. He was a Master and past president of the Owen M. Panner American Inn of Court.
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Appendix—“Lawyer Cited for Purple Prose” (From the *National Law Journal*, August 2, 1999) . . 1–11
I. BRIEF WRITING

A. Concede Nothing

Judges are impressed by tough lawyers. Make your opponent fight for every inch of ground, no matter how indefensible your position. If your opponent says today is Monday, move to strike for lack of personal knowledge. If you are persistent, you’ll eventually wear the other side down.

B. Use the Shotgun Approach

Make as many arguments as possible, no matter how weak. When in doubt, most judges just tote up the points, e.g., “plaintiff has ten arguments in her favor, defendant only one, so plaintiff must have the stronger case.”

C. Phrase Every Argument in the Alternative

If the complaint accuses your client of violating NEPA by not preparing an environmental impact statement, you should simultaneously argue that your client: (1) fully complied with all NEPA requirements for this project; (2) fully complied with NEPA for a prior project, and this is just a continuation of that project; (3) was not required to comply with NEPA; (4) complied with NEPA in spirit; (5) plaintiff lacks standing to contest your failure to comply with NEPA; or (6). . .

D. Don’t Give Away the Surprise Ending

Briefs are like mystery novels—you don’t want to ruin the suspense by revealing the surprise ending too early. Use the first 34 pages of your brief to lay out the most complicated legal puzzle imaginable. Only after you have completely befuddled the other side (and the judge as well) should you play your ace in the hole. “In any event, this is all academic because [fill in the blank].” The judge will be awed by your legal tour de force.

E. Use All 35 Pages

One of the most embarrassing things you can do as a lawyer is to file a 15-page brief when the local rules allow up to 35 pages. Your little brief looks wimpy sitting on the table next to your opponent’s power brief with its 49 attached exhibits all housed in deluxe imitation wood-grain binders. You might as well attach a note saying: “Sorry, but my client has a very weak case and I can’t think of any other arguments to make on her behalf.” If you run out of things to say, just repeat the same arguments over again. No one will notice.

F. Always Attach Exhibits

Exhibits lend an air of authority to a brief. It is no longer just a lawyer making an argument; now you have documentary proof of your client’s position. If you don’t have any exhibits, invent some. It really doesn’t matter what you use because, if they are fat enough and contain lots of technicsounding fine print and rows of numbers, no one will read them anyhow.

G. Ignore Controlling Authority

A lot of lawyers assume they have an ethical duty to cite controlling authority contrary to the position advocated by their client; that is nonsense. By definition, if the judge doesn’t follow a case, then it is not controlling. If it is not controlling, then you have no ethical obligation to cite the case. Seems simple enough to me.

H. Use String Citations

Anyone can cite the latest Ninth Circuit authority. What really impresses the judge is citing a long list of pre–World War II cases from district courts in Louisiana and Mississippi that your law clerk cribbed from an old ALR article.
I. **Cite Corpus Juris Secundum**

Can’t find a case on point? Just cite CJS. It is comprehensive, authoritative, and those Latin titles get the judge every time. It always worked for Perry Mason. In a pinch, the Harvard Law Review will suffice.

J. **Don’t Shepardize**

Shepardizing is expensive. If you cite a few dozen cases in a brief (or for you string-citers, perhaps a few hundred cases), that adds up to a lot of pocket change, not to mention the time involved. Don’t waste your money—the odds are that the key cases you cited are still good law. If they aren’t, you’re cooked and there is nothing you can do about it anyhow, so why throw good money after bad?

K. **Cite Out-of-Circuit Authority**

I don’t know why people think the Ninth Circuit is so special—it’s just one of thirteen circuits. If Ninth Circuit case law doesn’t favor your client, then cite a circuit that is more hospitable. Timid attorneys may want to put a little “but cf XYZ (9th Cir. 1993)” at the end of the string citation to avoid possible ethical problems. Alternatively, point out that the Ninth Circuit’s position has not been followed by other circuits and urge the trial judge to overrule the Ninth Circuit.

**Example:** “The circuits (with the sole exception of the Ninth Circuit) are unanimous in holding that the Civil Rights Act of 1991 is not retroactive. The Ninth Circuit’s position is clearly an aberration and should not be followed.”

L. **Attack Your Opponent**

Your opponent is a sleazebag who should not be believed, and that is reason enough to rule against him. So be sure you attack your opponent in the brief, call him names, and impugn his motives.

M. **Whine**

Few federal judges are young enough to still have small children at home, but all it takes is a pair of whining lawyers to bring back those nostalgic memories of two six-year-olds squabbling. “Judge, his brief is one page too long.” “Judge, he pretended to be negotiating with me while he was secretly preparing a complaint.” It will make the judge feel twenty years younger.

N. **Omit No Defense**

Defenses were put on this earth for only one purpose—to be used by defense attorneys. There’s no sense letting them go to waste.

**Example:** A prisoner filed a civil rights action alleging that female clerical employees at a local jail had been viewing strip searches of male inmates through a peephole window. The defendants promptly moved to dismiss the inmate’s claim on grounds of qualified immunity, i.e., they didn’t know that such conduct was wrong. Some attorneys might have trouble asserting that defense with a straight face—but that’s what junior associates are for.

O. **Don’t Read Cases You Cite**

You’re thumbing through the Federal Digest and you find the perfect headnote—you couldn’t have written a better holding if you’d tried. Should you read the case just to be sure it really stands for that proposition? Of course not! Why spoil perfection? A lot of bad things can happen when you go beyond the headnote and read the actual case. You might discover the court was applying Washington law instead of Oregon law or that there were some distinguishing circumstances. Ignorance is bliss.
P. Employ See Creatively

This is one of the most useful signals in brief writing. For instance, you can cite a terribly complicated case to support an obscure procedural point (which the case does not stand for). No one who reads the case can “see” in it what you could—but is he going to admit that? Of course not, because he doesn’t want to admit he is not smart enough to see the brilliant point you are making. This strategy works particularly well with law clerks who graduated from big name law schools but are haunted by subconscious feelings of inadequacy.

Q. Argue Issues Not Before the Court

This strategy works for both briefs and oral arguments. If the issue before the court is not your strongest, don’t fight a losing battle. Change the subject and argue some other issue where you have a chance of prevailing. For instance, if the issue is change of venue, argue the merits of the case, e.g., there is no point transferring this case because defendant can’t win in any court.

R. A Little Latin Goes a Long Way

1. Because plaintiff has not shown he suffered measurable injury, his claim must be denied.
2. *De minimis non curat lex. Damnun absque injuria. Cadit quaestio.*

Which paragraph sounds more authoritative? The second one, of course. *Vel caeco apparat.* (It would be apparent even to a blind man.) Would you rather tell the jury that your client was “caught between a rock and a hard place,” or “a fronte praeclippitium a tergo lupi” (“a precipice in front, wolves behind”)? If the defendant calls your client a “lying cur,” just smile and say: “*Proprium humani ingenii est odisse quem laeseris.*” (It is human nature to hate a person whom you have injured.) Everyone will assume that if you’re smart enough to use all these Latin phrases, the rest of your arguments must be of similar caliber. *Experto credite.*

If you don’t know any Latin, ask your local bookstore to order copies of Eugene Ehrlich’s *Amo, Amas, Amat and More: How to Use Latin to Your Own Advantage and to the Astonishment of Others* (Harper & Row 1985); Richard A. Branyon’s *Latin Phrases & Quotations* (Hippocrene Books 1994); and Henry Beard’s *Latin for All Occasions* (Random House 1990) and *Latin for Even More Occasions* (Random House 1991).

S. Don’t Search for Recent Decisions

The job of a law clerk can be tedious. One of the few pleasures they get is to uncover a recent decision that neither party cited. Why deprive them of that pleasure by reading slip opinions or doing a Westlaw search?

T. Let Your Opponent Do Your Research

Don’t have time to research the theories of your case? No problem. Include the whole kitchen sink in your complaint, and let the other side sort it out in its motion to dismiss. Or maybe the judge’s law clerk can figure out which theories are viable.

U. Always Get the Last Word

If your opponent files a reply brief, then you must file a supplemental response. If she files a surreply brief, then you immediately file another supplemental response. Following oral argument, send the judge a letter responding to your opponent’s points. A letter is more effective than a brief because the judge won’t realize it is a brief in disguise until after he has begun to read it. The better letters start by discussing some innocuous procedural matter and then digressing to merits almost as an afterthought, or so the reader should believe.
V. Assume the Judge Knows Everything About Your Case

You’ve been working on this case for months. You know the facts and the relevant law, and so should the judge. After all, if she wasn’t so smart, she wouldn’t be a judge. So, when writing a brief, just dive right into your arguments without any introduction or background. Don’t bother including a capsule summary of your argument at the beginning—the judge will figure it out eventually.

Conversely, you should assume the judge knows nothing about basic legal principles. A classic example is a major law firm that devoted ten pages of a brief to explaining the concept of stare decisis to a veteran trial judge. Unfortunately, the “controlling” case was construing California law, and the judge was applying Oregon law. Oh well, non omnia possumus omnes. (No one can be an expert in all things.)

W. File Your Brief Late

The best time to file a brief is Friday afternoon at 4:30 for an oral argument on Monday. That’s particularly effective when the judge’s law clerk has already finished her memo and now has to stay all weekend to revise it. You are assured of getting the last word. You should also mail a copy to your opponent on Friday afternoon. With some luck, he won’t receive it until oral argument is over.

X. Cite Unavailable Materials

When citing unpublished district court opinions or similar materials, never attach a copy to your brief. If the judge can’t read the case you’ve cited, he’ll have to take your word on its contents. That also applies to obscure 19th-century treatises or $600/year industry newsletters.

Y. Move to Strike

Federal judges love motions to strike. Don’t like something in your opponent’s complaint? Move to strike the offending words. If your opponent files affidavits opposing your summary judgment motion, move to strike the entire affidavits or particular sentences in them. If you prevail on the motion to strike, you win the case since your summary judgment motion is now unopposed.

Don’t make the mistake of thinking a motion to strike is unnecessary because the judge knows the rules of evidence and is perfectly capable of ignoring irrelevant statements, hearsay, or argument. The judge will be grateful for an opportunity to rule on another motion. Nowadays, federal judges have so little on their calendars they look forward to all the extra work they can get.

A novel spinoff is to file a motion to strike your opponent’s affidavits on grounds the facts stated therein were wrong—and thus there are no disputed material facts and you are entitled to summary judgment as a matter of law.

Z. Don’t Proofread Your Brief

Some attorneys waste valuable time proofreading a brief in the mistaken belief that typographical or collating errors reflect badly on the quality of their legal research. Wrong, wrong, wrong! Experienced attorneys know these errors actually make a brief more effective. Why? Because if the pages are out of order, the law clerk can’t just whiz through the brief—she has to stop and sort the pages. Smart lawyers not only collate the pages out of sequence, but also make sure the pages are not numbered. Now the law clerk must read each page carefully to ensure one idea follows the next. What more could you ask?

Another tip: If you omit key words, paragraphs, or sentences, the law clerk must try to decipher what you meant to say—and he may come up with a better argument than the one you had in mind. You also get to file an amended brief with the corrections, which the law clerk must read carefully to determine what changes you made.

AA. Don’t Identify the Changes in Amended Documents

When filing an amended document (e.g., complaint, brief), do not attach a cover letter listing the changes. That way the reader must carefully compare the two documents, one line at a time, to
Chapter 1—It Was a Dark and Stormy Night—Creating the Persuasive Argument

determine what changes you have made. Sure, that’s rude, but at least you know the law clerk will carefully read your brief.

**BB. Put the Wrong Case Number in the Caption of Your Brief**

If the case number is wrong, the brief may be sent to the wrong judge or incorrectly docketed. That holds true for any filing. A surefire way to maximize confusion.

**CC. The End of the World Is Near**

No brief is complete without a description of the parade of horrors that will result if your opponent prevails. This is not just a motion to extend discovery. The future of the universe is at stake.

**DD. Always Request Expedited Consideration**

If you file a plain-vanilla motion, it will ordinarily not be heard for another five weeks. Smart lawyers always request “expedited consideration.” Most of the time, it really is an emergency because you waited until the last minute to file the motion. Even if it isn’t a true emergency, you should still act like it is. You don’t want the judge to get the idea that your motion isn’t very important. See “The End of the World Is Near,” supra.

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**II. ORAL ARGUMENT**

**A. Demand Oral Argument Whether You Need it or Not**

That adds a lot of billable hours (e.g., travel time).

**B. Read Your Brief to the Judge**

The judge may say she’s read your brief, but she’s just trying to make herself look good. Deep down, you know she’s lying. So read her your brief word-for-word. You’ll be glad you did.

**C. Don’t Let the Judge Interrupt Your Presentation**

You’ve spent all week preparing your presentation—and it’s a work of art. No one who hears your speech could possibly rule against you. The problem is, the judge won’t let you give your speech. He keeps interrupting you with questions on subjects you don’t even care to discuss. How rude! Tell the judge politely but firmly that you will be happy to answer any of his questions, but only after you’ve finished making your presentation.

**D. Cite New Cases and Theories**

Use oral argument as an opportunity to surprise your opponent (and the judge) by citing new theories and cases you didn’t mention in your briefs. If you’re lucky, your opponent will be unable to refute your argument because he has never even heard of the case you just cited.

**E. Badmouth the Judge in Front of His Staff**

One of our more flamboyant local attorneys warmed up for oral argument by loudly complaining about: (1) having been removed to federal court; and (2) having to appear before a magistrate judge who is not even a real judge. The attorney made sure the judge’s law clerk, courtroom deputy, and judicial assistant were all present to witness the performance.

**F. Ignore the Standard of Review**

Standards of review are a real pain. They take up valuable space in your brief, they interrupt the flow of your argument, and they are a pain to research. My advice is to ignore them. If it is a summary judgment motion, everyone knows the standard of review, so you don’t need to include it. If it is any other type of motion, you probably have no idea what the standard of review is and don’t really care either. If the other side is so concerned about the proper standard of review, let them research it.
Should the judge be so foolish as to inquire at oral argument (and thereby admit that he doesn’t know the standard), simply say: “The standard of review is irrelevant, Your Honor, because my client would prevail regardless of which standard is applied.”

G. Cancel at the Last Minute

If you know two weeks before oral argument that you’ll be withdrawing your motion or have reached a stipulation with your opponent, why spoil the fun by calling the court to cancel the argument? Leave it on the calendar so the judge won’t be bothered by booking other engagements and the law clerk isn’t deprived of a chance to write a fascinating memo on the Nonappropriated Fund Instrumentalities Employees’ Retirement Credit Act of 1986.

H. Talk Fast So the Court Reporter Can’t Keep Up

Self-explanatory.

I. Use It or Lose It

You’ve written the speech of your life but, before you can deliver it, your opponent stands and announces that he won’t contest your motion or the judge announces that he’s inclined to rule in your favor—and you haven’t even said a word. What rotten luck! Now no one will have an opportunity to hear your great speech. There is no satisfaction from the meek surrender of a cowardly foe—you want to vanquish him on the field of battle. Even worse, your client is in the audience and you’re wondering how on earth you will be able to justify that huge bill you’re going to send her.

My advice is to give the speech anyhow. Refuse to accept your opponent’s meek capitulation. The calendar shows one-half hour allotted for oral arguments and, by golly, you’re going to use it even if the outcome is a foregone conclusion. Your client will be impressed, and don’t worry about all those horror stories of lawyers talking their way out of a victory they had already won—that only happens to other lawyers.

III. MAGISTRATE MAXIMS

A. Magistrate Maxims I

1. Brevity. “Pray state this day, on one side of a sheet of paper, how the royal Navy is being adapted to meet the conditions of modern warfare.” Memo to the First Lord of the Admiralty (1941) by Winston Churchill.

2. Less Is More. “In your day-to-day negotiations with clients and colleagues, fight for the kings, queens and bishops, but throw away the pawns. A habit of graceful surrender on trivial issues will make you difficult to resist on those rare occasions when you must stand and fight on a major issue.” Confessions of an Advertising Man by David Ogilvy.


4. Practice Tip. Don’t cross-examine just because it’s your turn.

5. Don’t Whine. “No sniveling!” “Mutual tellers are not concerned about what you should have done.” Signs at Off-Track Betting Parlor.

6. Excellent Advice. “It is a good thing to take one’s work seriously. It is a fatal mistake to take oneself seriously.” Judge Harold Medina. “Listen to the voice of the magistrate. . . .” Cardozo, Law and Literature, 52 Harv. L. Rev. 471, 476 (1939).

B. Magistrate Maxims II—Keeping One’s Perspective

“A lawyer without history or literature is a mechanic, a mere working mason; if he possessed some knowledge of these he may venture to call himself an architect.” Sir Walter Scott.
“Lawyers need conscience as well as craft. To borrow an old but picturesque phrase, skilled lawyers without conscience are like loose guns on a sinking ship; their very presence is so disconcerting that they wreak damage whether or not they hit anything.” Dean Derrick A. Bell, Jr., May 1980 Commencement Day Address to the University of Oregon School of Law.

And those opinions cause us to doubt and criticize and question the value of professional life—not its cash value; that is great; but its spiritual, its moral, its intellectual value. They make us of the opinion that if people are highly successful in their professions they lose their senses. Sight goes. They have no time to look at pictures. Sound goes. They have no time to listen to music. Speech goes. They have no time for conversation. They lose their sense of proportion—the relations between one thing and another. Humanity goes. Money making becomes so important that they must work by night as well as by day. Health goes. And so competitive do they become that they will not share their work with others though they have more than they can do themselves. What then remains of a human being who has lost sight, sound, and sense of proportion? Only a cripple in a cave.

*Three Guineas* by Virginia Woolf.

Extreme busyness . . . is a symptom of deficient vitality; . . . There is a sort of dead-alive, hackneyed people about, who are scarcely conscious of living except in the exercise of some conventional occupation. Bring these fellows into the country, or set them aboard ship, and you will see how they pine for their desk or their study. They have no curiosity; they cannot give themselves over to random provocations; they do not take pleasure in the exercise of their faculties for its own sake; and unless Necessity lays about them with a stick, they will even stand still. It is no good speaking to such folk; they cannot be idle, their nature is not generous enough; and they pass those hours in a sort of coma, which are not dedicated to furious moiling in the gold-mill. . . . They have been to school and college, but all the time they had their eye on the medal; they have gone about in the world and mixed with clever people, but all the time they were thinking of their own affairs. As if a man’s soul were not too small to begin with, they have dwarfed and narrowed theirs by a life of all work and no play; . . . Look at one of your industrious fellows for a moment, I beseech you. He sows hurry and reaps indigestion; he puts a vast deal of activity out to interest, and receives a large measure of nervous derangement in return.

*Virginibus Puerisque and Other Papers, 1881 (“An Apology for Idlers”)* by Robert Louis Stevenson.

**IV. THEME—TRIAL STRATEGY**

A. *The Grammatical Lawyer* by Morton S. Freeman

The words *strategy* and *tactics*, although primarily applicable to military operations, are used in many areas of life.

*Strategy* has to do with an overall plan; *tactics*, with the specific means by which the plan is put into effect: “Brower’s strategy for handling the crisis is brilliant. His aides, we’re sure, will use effective tactics to carry it out.” In business, political, financial, or domestic life, strategy is the adept use of stratagems, tricks or schemes, to attain an end or to gain an advantage over an adversary. Tactics is the technique whereby strategy is implemented, that is, it secures or processes what has been planned.

B. *The Advocate’s Handbook* by Irving Younger

Every lawsuit involves a story of human beings in conflict. Sometimes the story is obvious; sometimes it is hidden and needs to be brought out. All stories, however, have certain properties in common. The study of literature and drama can give us useful insights into how some of those properties can be used to advantage in the courtroom.
Every good story, be it a novel, short story, epic, or play, has a unifying theme. When we pull
the theme out and state it separately, it is always absurdly simple in comparison with the
complexity of the finished work. That is why artists themselves will never discuss
their themes. All the same, unity in the story enhances the story’s effect upon the audience;
and for the artist, the theme is a device that serves to provide that unity. Once the artist
has a theme, he must let it do the job of unification for him. No matter how wonderful
a character or a scene or a turn of the plot may be otherwise—if it is not related to the
theme, it stays out, or it goes into the notebook for the next novel. The artist knows that
each piece of material unconnected with the theme detracts from the total aesthetic effect.

Exactly the same is true of a trial. The trial must have a theme—a central idea that gives unity
to the drama we shall unfold before the jury. Like the literary artist, the trial lawyer must let
the theme do its job. Every witness, every exhibit, every bit of testimony must share a
relationship to the theme.

We must think about what is possible, what will make the best impression, how we can
make best use of the witnesses, and so on. Once we have the theme, it operates as a
principle of exclusion. It tells us what not to put in, namely, anything not related to that
theme.

C. Trial Notebook by James W. McElhaney

Never do anything inconsistent with your theory of the case.

The theory of the case is the basic, underlying idea that explains not only the legal theory
and factual background, but also ties as much of the evidence as possible into a coherent
and credible whole. Whether it is simple and unadorned or subtle and sophisticated,
the theory of the case is a product of the advocate. It is the basic concept around which
everything else revolves.

D. Basic Instinct: Case Theory and Courtroom Performance by Edward D. Ohlbaum

“The theme . . . may be expressed through statements, phrases, or words that aphoristically
capture a key image and that may be strategically repeated during the course of the trial. A case’s theme
is its mantra.”

V. CARDOZO OPENING GAMBITS

A. Palsgraf

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go
to Rockaway Beach. A train stopped at the station, bound for another place. Two men
ran forward to catch it. One of the men reached the platform of the car without mishap,
though the train was already moving. The other man, carrying a package, jumped aboard
the car, but seemed unsteady as if about to fall. A guard on the car, who had held the
doors open, reached forward to help him in, and another guard on the platform pushed
him from behind. In this act, the package was dislodged, and fell upon the rails. It was
a package of small size, about fifteen inches long, and was covered by a newspaper. In
fact it contained fireworks, but there was nothing in its appearance to give notice of its
contents. The fireworks when they fell exploded. The shock of the explosion threw down
some scales at the other end of the platform many feet away. The scales struck the plaintiff,
causing injuries for which she sues.

B. **Hynes**

On July 8, 1916, Harvey Hynes, a lad of 16, swam with two companions from the Manhattan to the Bronx side of the Harlem River, or United States Ship Canal, a navigable stream. Along the Bronx side of the river was the right of way of the defendant, the New York Central Railroad, which operated its trains at that point by high-tension wires, strung on poles and cross-arms. Projecting from the defendant’s bulkhead above the waters of the river was a plank or springboard, from which boys of the neighborhood used to dive. . . . For more than five years swimmers had used it as a diving board without protest or obstruction.

On this day Hynes and his companions climbed on top of the bulkhead, intending to leap into the water. One of them made the plunge in safety. Hynes followed to the front of the springboard, and stood poised for his dive. At that moment a cross-arm with electric wires fell from the defendant’s pole. The wires struck the diver, flung him from the shattered board, and plunged him to his death below. His mother, suing as administratrix, brings this action for her damages.


C. **Palsgraf Revisited**

On a hot Sunday in August, Helen Palsgraf decided to escape her basement flat and take her two youngest children, Elizabeth and Lilian, to the Rockaway Beach. A janitor and single parent with an annual income of $416, she chose the most economical means of transportation, the Long Island Railroad, a subsidiary of the Pennsylvania Railroad. After buying the tickets, Mrs. Palsgraf led her two children onto the crowded station platform, 12 to 15 feet wide.

The Palsgraf family stood near an ordinary penny scale of the type often found on railroad platforms. The explosion either knocked it over or the stampede of the panicked crowd caused it to fall. According to Mrs. Palsgraf: “Flying glass—a ball of fire came, and we were choked in smoke, and I says, ‘Elizabeth, turn your back,’ and with that the scale blew and hit me on the side.” She testified: “Well, all I can remember is I had my mind on my daughter, and I could hear her holler, “I want my mama!”—the little one (Lilian).”

Mrs. Palsgraf sued for the injuries. At the trial, the jury awarded her $6,000. The Supreme Court Appellate Division upheld the award.

Professor Louis J. Siricco, Jr., of Villanova School of Law.
APPENDIX—“LAWYER CITED FOR PURPLE PROSE” (FROM THE NATIONAL LAW JOURNAL, AUGUST 2, 1999)

Words pour like fetid water in annual writing contest. Legal training said to help.

By Michael D. Goldhaber
National Law Journal Staff Reporter

Legal training, useful for many things, appears to prepare writers for prizewinning badness: A Seattle lawyer has won this year’s Purple Prose prize in the Bulwer-Lytton Fiction Contest.

“I’ve had an interest in bad writing for many years,” said winner David Hirsch. “Law school put a certain polish on my badness, and 20 years of practice helped.” The contest, named after novelist Edward Bulwer-Lytton, who began a book with “It was a dark and stormy night,” awards prizes for the worst opening sentences of imaginary novels.

Here is Mr. Hirsch’s: “Rain—violent torrents of it, rain like fetid water from a God-sized pot of pasta strained through a sky-wide colander, rain as Noah knew it, flaying the shuddering trees, whipping the white capped waters, violating the sodden firmament, purging purity and filth alike from the land, rain without mercy, without surcease, incontinent rain, turning to intermittent showers overnight with partial clearing Tuesday.”

“If people really want to master bad writing,” said Mr. Hirsch, a public defender, “they should study Justice Clarence Thomas’ majority opinion in Kansas v. Hendricks.” That case upheld the commitment of sexual predators.

This is not the first time that an attorney has won. Professor Scott Rice, of San Jose State University, the contest’s founder, said that they have been among its leading performers.

“Drawing farfetched analogies is part of an attorney’s craft,” he theorized.

Bob Perry, a lawyer from Milton, Mass., won the grand prize last year. Patrick Finnegan, a lawyer from Victoria, British Columbia, won a dishonorable mention in 1986 with a 107-word sentence, taken largely from Canada’s Income Tax Act.
Chapter 2
Judge-Friendly Briefs: 12 Easy Steps

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A trial lawyer since 1972 and Multnomah County judge pro tem since 2000, Mr. Greene also serves as amicus curiae lawyer for the American Diabetes Association. He wishes to acknowledge the valuable input he received for this article from Multnomah County Circuit Court judges Richard Baldwin, Edward Jones, Henry Kantor, Jerome LaBarre, Adrienne Nelson, Susan Svetkey, Youlee You, and John Wittmayer.
Almost daily we read and write court briefs. This is one of the most common tasks for a trial lawyer. As a trial attorney for 38 years and as a judge pro tem for the last 10 of them, I have written and read thousands of briefs. By brief, I mean any written argument to a judge on any subject, including a variety of formats, from a formal memorandum to a more informal letter. As a result of my work as a judge pro tem, I now more fully appreciate the importance of writing briefs that are “judge-friendly.”

Since briefs are usually read by a judge before oral argument, they shape oral argument, stimulate questions, and create a framework for decision-making. Frequently, briefs are more important in affecting a judge’s decision-making than oral argument. Since oral argument is limited in many courts, it is all the more important to have effective briefs. Judges are always pressed for time. As a result, although they will read all briefs, judges often will give more weight to those briefs that are the most judge-friendly.

WHAT MAKES A BRIEF JUDGE-FRIENDLY?

1. Start with a Summary of Argument. This is what captures the attention of a judge and helps define the parameters for decision-making. This summary should be concise, carefully crafted, and no longer than a few sentences. Your strongest argument should be first. Ask a judge to make the specific ruling you want. Tell the judge what you want in your summary. Explain why in your argument. Remind the judge what you asked for in your conclusion. This is effective advocacy, not repetition.

2. Depersonalize Your Argument. Judges do not care about the petty differences between lawyers. They do care about the legal issues and your reasoning. Do not personalize or attack either the opposing attorney or party. Attacking the other side is not only a waste of time but diminishes the effectiveness of your argument and a judge’s opinion of your professionalism.

3. Provide a Table of Contents. The judge will want to reread different parts of the brief. A complete and detailed table of contents on any brief over five pages is very helpful.

4. Highlight with Captions, Headings, and Subheadings. Highlight your argument by breaking down the issues in an organized fashion with signposts. This will also make your table of contents more meaningful. If you have difficulty creating such signposts, you probably do not fully understand your best argument(s). Short, punchy statements work best.

5. Create Organizational Unity Among Briefs. Match up your argument with your opponent’s argument in your response and reply briefs. Give the judge organizational continuity among the briefs.

6. Shorter Is Better. Repetition is distracting. Brevity and crispness have the greatest impact. Repetition encourages a judge to skim over your comments. With few exceptions, briefs are too long and repetitious and need rigorous editing to be most effective. If you can narrow issues through stipulation, this will sharpen the focus of the brief. Try to get agreement on the real issue. Long, run-on sentences are difficult to read and understand. Be short and snappy, if possible.

7. Footnote Those Citations. The traditional brief intertwines citations throughout the text. This can make the brief more difficult to read and understand. Most judges prefer citations in indent. If you footnote citations, the argument flows more smoothly. String citations are usually not helpful. Cite only the most significant cases. Remember it is only a case holding that has precedential value. Dicta are not the holding and have little value unless the holding supports your argument. Focus on the leading case holding. Always attach a copy of the most meaningful non-Oregon or federal case(s).

8. Use Direct, Plain English. Legalese does not help readability or understandability. All legalese should be deleted. Herefore, hereinafter, hereto, etc., do not rivet a judge’s attention on what you are saying and who you are referring to. These terms are distracting, confusing, and excess baggage.
9. **Write in the Present Tense.** Writing in the past tense with words such as *have* or *had* is unnecessary. To make your writing lively, stay in the present tense whenever possible. This is a simple matter of clear writing and editing. The present tense is more action-packed and therefore more persuasive.

10. **Minimize Superlative Adjectives and Adverbs.** The use of words in the superlative is not helpful. These over-the-top words include *very, most, always, clearly, absolutely,* etc. They overstate and diminish the impact of your argument. It is not productive to tell a judge what he or she “must” do. The only “must” for a judge is to make a decision.

11. **Focus on Substance.** Legal hyper-technicalities can only distract from the substance of the issues. At the trial court level, judges are more interested in substantive issues, not technicalities. If you commingle procedural technicalities with substance, you can diminish the effectiveness of your argument. Of course, sometimes you must raise such technical issues, but be careful not to trivialize your briefs with an overemphasis on technicalities.

12. **Control the Result with an Alternative.** If the pivotal legal issue is not “black and white,” a well-stated alternative result can be helpful to minimize the risk of loss. An acceptable alternative, fallback position can be important to many judges. Consider this for a response or reply brief.

**CONCLUSION**

Following these guidelines will not guarantee a win. But they will assure that a judge better understands your argument and reasoning. Educating a judge is the essence of effective advocacy.

I offer the following suggestion. On your next brief, write it the way you normally do. Then do a rewrite following these guidelines. Have someone who is not involved in the case read both briefs. Then ask that person to compare the clarity, coherence, and persuasiveness of the two briefs.

Remember, judges get to know lawyers through their oral and written presentations. If a judge understands your written material, that judge is likely to look forward to argument knowing that you will reliably frame the important issues. The highest compliment a lawyer can receive is for a judge to sincerely comment on the clarity and effectiveness of a brief. We all know that the quality of our reputation is our greatest professional asset. Judge-friendly briefs enhance both our effectiveness and reputation with the court.