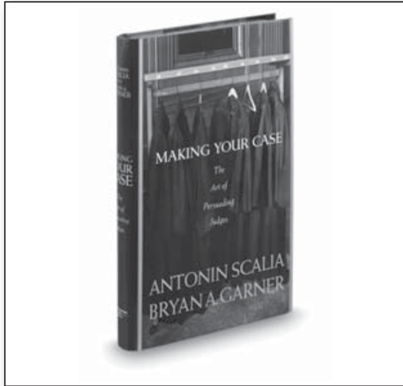
Making Your Case: The Art of Persuading Judges

Antonin Scalia and Bryan A Garner | Thomson / West | 2008



Whatever you think of Justice Scalia and his art of being a judge, I wager that you'll find this book an excellent aide to the practice of everyday advocacy, particularly in the early years. Justice Scalia and the well-known author, Bryan Garner, have joined forces to write what is a compact, accessible, and intensely practical book on written and oral advocacy. The authors readily acknowledge that, in writing on advocacy, they stand on the shoulders of giants (Cicero, Aristotle and Quintilian, among them). In an interview with the American Bar Association Journal, published in May 2008, Bryan Garner said that for the purpose of this book, they had canvassed every book and article on advocacy over the last several thousand years, as well as canvassing other judges and lawyers. Their authorial aim has been to adapt the best of advice, both ancient and modern, to modern circumstances, in the hope that it will be helpful to the bar and, in turn, benefit the bench.

This book is a quick, easy and enjoyable read, whether devoured in one sitting, or savoured in smaller portions over time. It manages to both educate and entertain, and is of general application to argument in any court or jurisdiction. Three important aspects of the book are its structure, brevity and conversational style. These significantly enhance its accessibility and utility, and make it a pleasure to read. The book has been written in four parts. The first two parts deal with principles applicable to advocacy generally. The third and fourth parts deal with written and oral advocacy, respectively. In total, the book comprises some 115 little sections or chapters, each of which is between a paragraph and a few pages in length. Like good written submissions, the heading of each chapter captures the essence of the relevant principle (e.g., 'Master the use of the pause', 'Welcome questions', 'Beware invited concessions', and 'If you're the first to argue, make your positive case and then pre-emptively refute in the middle – not at the beginning or end'). That has two great advantages. First, it makes the book a very convenient work for reference when specific questions arise. Secondly, it provides the advocate with an efficient summary of its substance. Just skimming the table of contents every now and then will give you a valuable refresher on the principles espoused by the authors. The book also includes a helpful and detailed index, and a list of recommended sources for further study, organised by topic.

It will probably come as no surprise to you that the authors do not always agree. However, they agree much more often than they disagree, and when they do the latter, they give the reader their respective views (e.g., on substantive footnotes in written submissions). One point on which their views are unanimous is that most legal writing is 'turgid', because lawyers don't read enough good prose. In an interview with the American Bar Association Journal, published in May 2008, Justice Scalia said (in trademark fashion):

> Of course, the average practitioner is … going to be reading some miserable judge who issued a terribly written opinion, the only virtue of which is that it is authoritative. And that is, as we point out in the book, one reason legal writing is so turgid and generally so bad, because we are reading the worst instead of the best. What we must read is not selected on the basis of whether it's well-written or even, for that matter, on whether it's well-reasoned. It's authoritative and that's why we have to read it. You read enough of this stuff, and you begin to write that way.
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> One of the more important recommendations in the book is that lawyers read other stuff. Read good literature; good current literature. If you read only legal opinions, you're going to write like legal opinions, which is not what you want to do, generally.'

On this and other issues, they spur us on.

I have found many topics of assistance in this book – from how to present jurisdictional issues, to how to deal with misleading arguments raised by opposing counsel (and whether or not to accuse). This book is now one of my favourite reference books on practical aspects of advocacy. It should be a valuable addition to any library. It deals with the nuts-and-bolts issues one faces when deciding how to present a case, in a way that is unique in my experience, and it has been of considerable practical help to me. I expect it's the kind of book that I will continue to refer to, until its principles have become second nature – or until I have the pleasure of dissenting from Justice Scalia.

Reviewed by Kylie Day

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