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The Winning Brief

THIRD EDITION

100 Tips for Persuasive Briefing in Trial and Appellate Courts

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OXFORD
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Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research,
scholarship, and education by publishing worldwide.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States of America by
Oxford University Press
198 Madison Avenue, New York, NY 10016

Library of Congress Cataloguing-in-Publication Data is available upon request.

978–0–19–937835–7

3 5 7 9 8 6 4 2

Printed in the United States of America on acid-free paper

THE WINNING BRIEF

OTHER BOOKS BY THE AUTHOR

Black's Law Dictionary
(Thomson/West, 10th ed. 2014, abridged ed. 2010, 4th pocket ed. 2011)

Garner's Dictionary of Legal Usage
(Oxford Univ. Press, 3d ed. 2011)

Garner's Modern American Usage
(Oxford Univ. Press, 3d ed. 2009)

Reading Law: The Interpretation of Legal Texts
with Justice Antonin Scalia (Thomson/West, 2012)

Making Your Case: The Art of Persuading Judges
with Justice Antonin Scalia (Thomson/West, 2008)

The Redbook: A Manual on Legal Style
(West, 3d ed. 2013)

Garner on Language and Writing
(ABA, 2009)

Legal Writing in Plain English
(Univ. Chicago Press, 2d ed. 2013)

The Elements of Legal Style
(Oxford Univ. Press, 2d ed. 2002)

The Winning Oral Argument
(West, 2009)

Ethical Communications for Lawyers
(LawProse, 2009)

The Chicago Manual of Style, ch. 5, "Grammar and Usage"
(Univ. Chicago Press, 16th ed. 2010)

HBR Guide to Better Business Writing
(Harvard Business Review Press, 2013)

Securities Disclosure in Plain English
(CCH, 1999)

The Rules of Golf in Plain English
with Jeffrey Kuhn (Univ. Chicago Press, 3d ed. 2012)

BOOKS EDITED BY THE AUTHOR

Quack This Way:
David Foster Wallace and Bryan A. Garner Talk Language and Writing
(RosePen, 2013)

A New Miscellany-at-Law
by Sir Robert Megarry (Hart, 2005)

Texas, Our Texas: Remembrances of the University
(Eakin Press, 1984)

In memory of Mariellen Griffin Garner
1931–1994

"The persuasive style requires two qualities: clearness and simplicity. If it is lacking in either of these it fails to persuade."

—Demetrius of Phalerum, *On Style* 250 ¶ 221 (ca. 300 B.C.; T.A. Moxon trans., 1943).

"If by a better method of communication, [a lawyer] has the advantage of his adversary, it is an advantage to which he is entitled."

—Samuel Johnson, as quoted in 5 James Boswell, *The Life of Samuel Johnson, LL.D.* 11 (1791; Henry Morley ed., 1891).

"If all the blunders of clever advocates were to be told, the student would come to the conclusion that practice makes us most imperfect; and that the art is more calculated to benumb the faculties than to quicken them. No one is more conscious of his faults than he who commits the fewest. One thing is certain: Advocacy never can be *mastered*; and the most we can do is to learn a little and unlearn a great deal."

—Richard Harris, *Hints on Advocacy* 312 (17th ed. 1937).

"[T]he written word is irrevocable. If it fails to convince or persuade the reader, there is no opportunity to switch to other ground. You make your play, and you cannot renege."

—Edward N. Teall, *Putting Words to Work* 146 (1940).

"Your brief should be a written argument with three missions: to win your case; to save the judge as much drudgery as possible in reaching his decision; and to enhance your reputation as a lawyer."

—Mortimer Levitan, "Effective Brief Writing," in *Lawyer's Encyclopedia* 995, 995 (1963).

"[T]here are many good briefs that don't win cases, and assuredly there are poor ones (including some exceptionally poor ones) that do. But a brief that didn't win, however close to perfection it may have come, just wasn't an effective brief. . . . [I]t didn't persuade the court . . . ."

—Frederick B. Wiener, *Briefing and Arguing Federal Appeals* 125 (rev. ed. 1967).

Preface to the Third Edition

> "[E]very righteous lawsuit that is lost through the carelessness or incompetence of counsel makes an anarchist of the defeated litigant."
> —Hon. Andrew A. Bruce, *The American Judge* 156 (Richard T. Ely ed., 1924).

Persuasion is a complicated matter of conscious and unconscious effects. This book explains how you can most likely achieve the effects you desire. It does so in a novel way: a catalogue of tips, or pointers, with bountiful illustrations.

There's a lot to it, this matter of persuading judges and of projecting an image of utter reliability and professionalism. A lot more than many suspect. You will have defeats—but never let them result from a lack of rhetorical skill. Never.

And don't let the subliminal effects of a less-than-virtuoso performance cause the brief-reader to tune you out—which may well happen if you aren't a virtuoso. All aspects of a brief—its basic ideas, its tone, its sentence structure, its word choice, its punctuation, its page layout—matter. Let other lawyers think these things unimportant. They'll suffer, and you'll best them.

In this third edition, I've consolidated some material to make room for nine entirely new tips:

- #1 Know thy reader.
- #9 Allow time for a full citation check of both the record and the caselaw.
- #16 If your major premise is so well known that any reasonable judge would already know it, use an enthymeme: state the issue as a factual premise followed by a question.
- #61 Know how to use brackets and ellipses.
- #72 Answer your opponent's arguments—and flay them if possible.
- #78 Know when to capitalize *court*—and master other nuances of judicial terminology.
- #87 Whenever you're responding, make your brief fully intelligible on its own—without assuming that the judge has just read your opponent's brief.
- #93 Marshal and discuss authorities with savvy and attention to detail.
- #94 Know how to arrange the ideal argument on statutory or contractual interpretation: text, structure, purpose, and history.

This new material, which contains some of the book's most useful advice, helps round out the coverage of what brief-writers need to know. See especially Tip #94, on arguments over statutory and contractual interpretation. The know-how developed by the U.S. Solicitor General's office should be spread more widely throughout the profession—and the copious examples provided here should enable more practitioners to gain a mastery of it.

The other major new feature in this edition is the inclusion of summary checklists at the end of each tip—recaps that crystallize the subpoints just covered and suggest further ideas for improvement.

Then, of course, improved explanations and upgraded examples appear throughout the book, reflecting work in all types of law practice. The sheer wealth of material here may seem daunting at first, but remember that any skill as multifaceted as effective written advocacy must be broken down into isolated subskills for real improvement to take place. In these pages, the subskills are pinpointed as precisely as you'll find anywhere in print, so that you can read about any one tip in two to five minutes. Try putting yourself on a regimen: one tip per day for 100 days, and you'll find that your gradual accumulation of knowledge and skill will appear more and more in each successive motion or brief that you write. You'll implement what you're learning, adapting it, transmuting it, and making it your own. Soon you'll be ready to start the regimen all over again, and you'll pick up more ideas that you didn't fully grasp or integrate in your earlier efforts—or even ideas that you once used but have somehow forgotten. Writing is like that.

Perhaps the most misunderstood feature of this book is the "Quotable Quotes" section introducing each chapter. Why is it there? To help settle debates. To give you overwhelming authority when you argue points of style with colleagues. The fact is that you'll face resistance if you take my advice. You see, my touchstone for including any tip in this book was that I had to believe, based on decades of experience, that a fair percentage of big-firm lawyers—say, at least half—get the point wrong. (Solo practitioners and government lawyers can benefit from all the guidance here, but admittedly I wrote with the big-firm lawyer in mind.) I imagine the user of this book saying to a colleague, one who wants to adopt some retrograde stylistic convention, something like this: "What's your authority for wanting to do it that way? I have [5, 6, 7] authorities advising to the contrary." I further imagine that your colleague will have no authority other than some half-remembered untruth about writing. I want you to win these debates.

Another thing about the quotable quotes. I devoted some 18 months of my life to collecting them. I had no help from research assistants, nor would I have entrusted others with such an important task as locating the wisest statements available on any given point. Readers familiar with my other work should find it no surprise to learn that my first step in writing a book is to learn the existing literature through and through—a Sisyphean task when the field is writing and rhetoric. It helped, of course, having the LawProse library, which now stands at 36,000 volumes, 6,500 of which deal with writing and rhetoric. We own all the books cited here—and use them. These choice, brief passages could not have been assembled in any other way than the old-fashioned one of wide reading and close study.

A tip having many quotations, such as #12 or #59, is one that I imagine will incite no small degree of strife in many a law office. In any event, a great deal of selectivity was involved: I rejected many more quotational candidates than I included.

A final point about using the book. Think of it as 100 tutorials. Most tips take no more than five minutes to read. If you read tips a few at a time, you'll come to know the book—really know it. Then, as you gain seniority in the profession, you can train your juniors. When you edit their drafts, circle "TWB #58" in the margin, or "TWB #63." You'll save time as a mentor because each reference will take your junior colleague to a short essay on a subject of concern.

Imagine the quality of motions and briefs that judges would see if brief-writers took their skills as seriously as first-rate musicians do—practicing hours every day to acquire a virtuoso mastery. Imagine. The quality of justice would greatly improve. The downside is that you'd find it harder and harder to stay equal to your colleagues at the bar.

But that's not going to happen anytime soon. Instead, they'll probably find it harder and harder to stay equal to you, if you're up to the task ahead.

—B.A.G.
Dallas, Texas
October 2013

Preface to the Second Edition

In law, the quality of writing matters. Good writing can win marginal cases, and bad writing can lose good ones. To some, this notion is self-evident. But to others it's dubious at best.

What explains these markedly divergent views? Ultimately, the disagreement hinges on the extent to which a given lawyer understands how language molds every human thought. Language is embedded in the very way we perceive the world. So it's impossible for a lawyer or a judge to focus exclusively on "the merits" of a case without being affected by the language used to express those merits.

When you write a brief, your implicit promise is that you'll give the judge good reasons for ruling as you request. This is all that matters: successfully persuading the judge to rule in your client's favor. Brief-writers tend to pity themselves and to complain about judicial readers and their shortcomings—not reading closely enough, not allowing you enough pages, delegating study to law clerks, etc. But good brief-writers turn their complaints into challenges—challenges to mastering the writer–reader relationship. An objective observer would probably sympathize with some degree of self-pity because of the immense challenges you face. But an objective observer would probably pity your readers, too.

Until you understand why brief-readers should be pitied, you can't possibly write good briefs. Think of the judge's reading life. An endless stream of paper passes before the judge's eyes, with too little time to study each case in searching detail before the stream stagnates, becomes a massive stack of paper, threatening to become a fire hazard. And what does the stack consist of? Lots of rote phrases at the beginning and end of each document, loads of boring sameness, with salient points obscured by being spread gradually throughout the middle—because the writers either can't or won't summarize. Sometimes law clerks read the briefs, not judges. It doesn't matter. Whoever the reader is, one thing is certain: run-of-the-mill brief-writing is pretty bad. It's slow, dull, abstract, and digressive.

It's sobering to think that bad briefs can lose strong cases. But this surely happens all the time. Judge Thomas M. Reavley of the Fifth Circuit convincingly cites a case in point—a case that was very nearly decided wrongly because of bad briefing.

It was a wrongful-death case against the federal government, involving a patient who had been negligently misdiagnosed by Veterans Administration doctors. They told him he had a hernia that couldn't be operated on until he first lost weight. Actually, though, he had a tumor in his colon, which soon burst. He underwent emergency surgery and survived, but his blood transfusion infected him with HIV, and he eventually died of AIDS.

At trial, the decedent's family was awarded a judgment of $700,000. The VA appealed, filing what Judge Reavley called "a 28-page hide-the-ball brief." In it, the government lawyer danced around the real issues and made various irrelevant arguments. The plaintiffs' lawyer responded with

a 32-page brief that "didn't uncover the ball"—it too was cluttered with fuzzy fact summaries and unconnected legal points.

Neither side's brief accomplished what it was supposed to do: focus the appellate court's attention on the issues. And this in what Judge Reavley called "a very simple case":

> The judgment found clear support in the evidence. But you would not know it from reading the briefs. And the appellate judge who got the case on the summary calendar wrote an opinion reversing the judgment. Fortunately, the next judge on the summary panel chose to let the case be argued. I was on the oral-argument panel. The argument shed no more light than the briefs did. But I read the record and, seeing ample support for the findings, affirmed. It was an excellent example of what ails us, and I assure you that this is not an unusual story.[1]

If not for the careful judge on the summary-calendar panel—and then for Judge Reavley himself—the plaintiffs would have lost $700,000.

Stories like that one are played out in appellate courts throughout the country. When the plaintiff ultimately prevails, the plaintiff's attorneys regale each other about how wonderful their briefing was. When the defendant ultimately prevails, the defense attorneys do the same. But the truth in many cases—certainly in far more than the lawyers would care to acknowledge—is that the briefing was poor on both sides. It's just that somebody had to win.

You can't say, of course, that superb briefs will always prevail. The merits of the case surely have something to do with winning. But statistically, a good brief will improve your chances. It will help you highlight the merits for your side. It will entice judges by asking less of them—less elbow grease and less brain sweat.

All this can be pursued methodically. This book tries to chart the path.

This book—and the CLE course for which it was developed—resulted from three proximate causes. One was my nagging observation that, as writing is generally taught, even the most recurrent tips often surface merely by chance. They're part of the oral presentation but aren't to be found anywhere in the written materials. Or if they are there, they aren't in blackletter form. As one writing teacher has well said, "The means by which a person can gain help from the writing experience of others are not obscure; they are merely scattered."[2]

A second impetus was my continuing dissatisfaction with both the literature and the practice of brief-writing. Rarely does the literature relate the brief-writer's special concern—persuading judges—to the larger field of

1 Remarks of Judge Thomas M. Reavley, Pepperdine Law School, April 1997.
2 Charles W. Ferguson, *Say It with Words* 5 (1959).

rhetoric. And a large percentage of briefs are so poor that judges find them a grave disappointment: abject failures to persuade. Something must be done.

Third, my friend Jordan Cherrick of St. Louis urged me repeatedly to develop a CLE course designed exclusively for brief-writers. True, my "Advanced Legal Writing & Editing" course has long dealt with brief-writing. But it also deals with letters, memos, and reports. Jordan suggested in 1995 that I do a full day on nothing but briefs. And so, with his prompting, I decided to collect the 100 tips that I most commonly give to brief-writers.

The chief difficulty wasn't in reaching 100 tips. Hardly. As I had suspected, the chief difficulty was in narrowing the list down to 100: I could easily have made it 150.

Notice that I call them "tips." They're guidelines, not dogmas. Although I feel strongly about the advice given here, you are sure to encounter situations in which you'd be better off ignoring it.

Not all the tips are equal. Some are intellectually challenging (such as #7 and #11) and some are quite easy (such as #31 and #67) [tip numbers have been updated to correspond to the third edition]. Brief-writers should work on the challenging points and assimilate the easy ones.

In June 1996, we made our first national tour with the CLE program, holding it in eight cities: Chicago; Dallas; Houston; Los Angeles; New York; San Francisco; Seattle; and Washington, D.C. In later years, we added Atlanta; Boston; Charleston, South Carolina; Charleston, West Virginia; Cleveland; Columbus; Detroit; Kansas City; Miami; Minneapolis; Newark; New Orleans; Philadelphia; Sacramento; and San Diego. The course proved to be among the most popular CLE programs in the country.

Like its earlier incarnations, this new edition owes much to the extraordinary skill and industriousness of my LawProse colleagues: Tiger Jackson, Jeff Newman, and David W. Schultz. Also, the book shows the strong influence of two other LawProse colleagues, both English professors at the University of Texas: Dr. Betty S. Flowers and Dr. John R. Trimble. Flowers, of course, laid the groundwork for the Flowers paradigm (Tips #2 though #6, #8, #10). And Trimble's aura as an editor and teacher has greatly influenced me: not only is he quoted in various tips, but his seminal ideas pervade the book as a whole. I also thank Karen Magnuson for her excellent help in copyediting.

Finally, I continually learn from the participants in this and other seminars. I'm still collecting good examples of brief-writing, and I'm always grateful to participants who send me their work. So if you try to follow the principles in this book—or if you have an opponent who flouts them laughably—send me more stuff.

—B.A.G.
Dallas, Texas
November 2003

Acknowledgments

This third edition has benefited from a thorough reconsideration of everything in the book—from organization to coverage to source materials. For prompting ideas and approaches, I'm grateful to many:

- to the hundreds of lawyers who, having used the book, have sent me their briefs with explanatory comments;
- to the some 180 state and federal judges I've formally interviewed on the subject of lawyerly persuasion, including nine justices of the Supreme Court of the United States;
- to my coauthor on two other books, Justice Antonin Scalia, who in collaborating and team-teaching with me has taught me so very much about advocacy;
- to Theodore B. Olson, who as Solicitor General of the United States gave me the opportunity to teach from this book to the SG's Office, from whose lawyers I've learned a good deal, especially about point headings;
- to the American Academy of Appellate Lawyers, who in 2012 made me an honorary fellow, thereby bringing me into touch with dozens of highly skilled advocates I wouldn't otherwise have known;
- to the hundreds of LawProse clients who have engaged me to revise trial and appellate briefs and to train their lawyers, thereby allowing me to continually refine the practicality of the advice here given;
- to my dear friend and LawProse cofounder, John R. Trimble, who read and commented on galleys;
- to my lawyer-colleagues at LawProse, namely Jeff Newman (who laid out and edited the book), Tiger Jackson (who edited and indexed it), Becky R. McDaniel (who managed the project and engaged in extensive fact-checking), Heather C. Haines (who typed most of the new passages I added), and Karolyne H.C. Garner (who contributed ideas and discussed with me every important facet of the book as I was revising it);
- to my LawProse paralegal, Ryden McComas Anderson, who edited the entire text;
- to the Garner Law Scholars at Southern Methodist University School of Law, namely Christina Gigliotti, Ryan P. Graney, Barry A. McCain, Charles S. North, and Peter R. Thompson;
- to Shmuel Gerber and Karen Magnuson, who copyedited the text with great skill and care;
- to my editors at Oxford University Press, Casper Grathwohl and Damon Zucca, who oversaw the book's production and marketing; and

- to all the advocacy teachers who assign the book in law schools, thereby spreading the currency of the ideas explained here.

My intellectual and practical debts are copious and vast.

At least one of them is ancient. When I was just ten years old, in 1969, my maternal grandfather, retired Texas Supreme Court Justice Meade F. Griffin (1894–1974), was hired by Texas Attorney General Crawford Martin to help the assistant attorneys general with their brief-writing. More than once that year, I heard my grandfather complain that most lawyers didn't know how to write good briefs. An idea was planted in my preadolescent mind, where it took root. I later vowed to pursue a legal career in his footsteps. When I became a member of the bar ten years after my grandfather's death, I found that nothing had changed. Nor has much changed in the succeeding 29 years. But the real point here isn't the perennial nature of the problem—or that it's a national problem, not a state one. Rather, the point is that without that grandfatherly influence—lodged in my young mind only through a couple of offhand comments—I seriously doubt that this book, which is lovingly dedicated to the memory of my grandfather's daughter, would ever have come into existence. Life is funny that way.

—B.A.G.

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