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The Behavioral Psychology of Appellate Persuasion

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I. Introduction

83. What is the goal of appellate advocacy? The novice answer is "to win the case." The expert answer is "to have the court say exactly what you want." Leading an appellate court to say exactly what you want is a difficult task, but your odds are much better if you understand how appellate decisions are made and precisely how to maximize your impact on the decision-making process.

84. As will be seen below, there are any number of fields in which insights from behavioral psychology research have been applied to create powerful new tools to improve performance. Behavioral psychology research focuses on the way in which human beings have evolved to think and make decisions. This same research is incredibly important in recognizing the best tools to be a highly effective appellate advocate.

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85. This article will use such research to work backward from how appellate decisions are made to how oral argument, briefing, and argument design can have the maximum impact on the decision makers. Appellate judges are human beings who have the same basic cognitive processes as any others. Understanding these processes is the key to understanding how to best utilize the few minutes of argument and few pages of briefing that you have to affect what the decision in a case will say.

86. Part I will start at the end by reviewing how decisions are made. Part II will move a step backward to discuss how oral argument — the step closest to the decision — should be structured. Part III turns to the brief and how it sets up the oral argument. Part IV focuses at the beginning of the process by examining how to find the most powerful arguments upon which to build your case. Finally, Part V takes the insights of behavioral biology and turns to the issue of how we can improve our advocacy skills.

II. Putting Words in Their Mouths

87. At first, an appellate court may seem like a black box. Briefs and arguments go in; months later, a decision comes out. However, it is not hard to find a description of how decisions are made.[2] Judges in most courts freely explain that after argument, they retire to a conference room where they discuss the case they heard and make a preliminary decision. Commonly, the junior judge speaks first, and says in five minutes or less what he or she thinks the case is about and how it should be decided. The other judges then speak in turn, stating their additional points of concern and possible disagreement. At the end, a basic decision is reached, and the author begins to work on an opinion that follows the agreed-upon outline.

88. The details vary by court, and there is much that happens between the conference and the issuance of the opinion, but the conference is generally where the decision is made. Therefore, the essence of effective advocacy is influencing the conversation that occurs in the conference room after oral argument. That is exactly where the case is won or lost, and where its focus is determined.

89. To influence that conversation requires two elements. First, the argument presented must be designed based upon how human beings make such decisions. Second, the argument must then be packaged so that it has the maximum impact on the conversation. Quite literally, the goal of this design and packaging is to put words into the mouths of the judges who will dominate the conversation of how the case is decided.

2 See, e.g., Robert A. Leflar, The Multi-Judge Decisional Process, 42 Md. L. Rev. 722 (1983).

A. How Appellate Decisions Are Made

90. How do human beings make decisions? They simplify. The mental shortcuts we use to unconsciously reduce complex problems to more manageable ones are called "heuristics;" and they are one of the most important aspects of cognition to understand when it comes to decision making.[3] Despite our best intentions, it is utterly impossible to make every decision by carefully weighing every relevant fact. Some problems are simply too complex and life is far, far too short to think about every choice we have. In evolutionary terms, a large portion of the evolution of intelligence has been learning to make quick decisions that are probably right in order to capture prey or escape predators, rather than starving or being eaten while making up our minds searching for the perfect solution. Of course, we don't always think this way, but simplification in order to make a decision and move on is deeply embedded in human decision making, especially when working under time pressure.[4]

91. Appellate decisions themselves are clearly exercises in simplification. They may be complex in many ways, but, ultimately, one side wins and the other loses. Before that, pages or volumes of messy evidence and complex laws are pared down to manageable issues, until they can be resolved by simple rules or the application of multi-part tests. It is no accident that legal opinions are reduced to parentheticals. The essence of the law-giving function of appellate courts is to use complex cases to announce simple rules that guide behavior and make future cases easy to resolve. Deciding on the simple propositions for which a case will stand (or that already control the case) is what happens in the conference where the judges decide the case.

B. Influencing the Decision-Making Process

92. So if the conference is about simplifying the case into a straightforward holding, how do you influence its outcome? As noted above, the conference tends to begin with one judge giving his or her version of how to simplify the case. The goal of briefing and argument is to suggest the simplified version of the case that will be first proposed at the conference, and to have the other judges agree. If the first judge to speak in the conference says exactly what you want him or her to say and the others agree, then you will obtain the result you want.

93. First, though, what does "simplify" really mean? Again, the answer comes from evolution. A classic study from the 1950s showed that the maximum number of items

3 See Daniel Kahneman, Thinking, Fast and Slow (2011).

4 See, e.g., Jörg Rieskamp & Ulrich Hoffrage, Inferences Under Time Pressure: How Opportunity Costs Affect Strategy Selection, 127 Acta Psychologica 258 (2008).

that a person can remember is about seven.[5] Once the list becomes longer than seven, it is likely that at least one of the items will be forgotten. Indeed, follow-on research showed that the actual number may be closer to only four for more complex items.[6] A simple case is one that has been reduced to a manageable number propositions — seven or (ideally) fewer. In practical terms, then, a case needs to be reduced to seven or fewer simple sentences. Those are the sentences that you want the first judge to say when the conference begins.

94. What are in those sentences? They should stand by themselves. You should be able to tell them to any attorney who knows nothing about the case and have him or her agreeing that your argument makes sense. You need the key facts, the controlling principle of law, and the essential application in the case at hand. Moreover, the controlling principle is the parenthetical that you want the court to feature in its opinion. Accordingly, those sentences need to be very articulate. They need to be easy to say and rhythmic enough to roll off the tongue.

95. Of course, cases do not usually look that simple at the outset. Rather, it is the job of the advocate to make them that simple. The way cases become simple is packaging the component parts into their own simple packages. The net result are cognitively manageable chunks that lead to the desired end result. Therefore, each of the final propositions may be built upon up to seven subpropositions. In turn, those subpropositions might be unpacked into up to seven more. Constructing an argument is about placing propositions into prioritized tiers, such that each component is not too complex.

96. In simple terms, you are building a Roman-numeral outline with no section or subsection going past either seven or the letter "g." The top-level propositions are the ones that you want to be used in the conference conversation. The rest are merely leading to the ones that matter most. In the majority of cases, judges will have particular concerns or issues that matter to them. Your outline is your guide to how those concerns either lead back to your central proposition or are simply not relevant to the outcome of the case.

97. In effect, influencing appellate decision making is about creating the simplest possible path to the outcome you want, and preparing the simplest trails back to that path for the judges who want to veer off course. Keeping the path simple involves whittling each level of argument down to as few essential points as possible and demoting everything else to supporting points.

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5 George A. Miller, The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information, 63 Psychol. Rev. 81 (1956).

6 See, e.g., Nelson Cowan, The Magical Number 4 in Short-Term Memory: A Reconsideration of Mental Storage Capacity, 24 Behavioral & Brain Sci. 87 (2001).

III. The Conversation Before the Conversation

98. The last bit of advocacy that occurs before the conference is the oral argument. This is your final chance to influence the conversation before it takes place. The secret to oral argument is that it is your chance to pretend that you are the first judge speaking at the conference. Your goal is to focus the judges on the simple propositions that you want to control their deliberations. People remember best what you say first, what you say last, and what you say most often. The first and last items in a list are more easily recalled than those in the middle. The tendency to remember the first items is the "primacy effect," and the tendency to remember the last items is the "recency effect."[7] Repeatedly exposing a person to something not only improves recall of that item, but also leads them to be more positively disposed to it. This is called the "familiarity" principle or the "mere-exposure" effect.[8] Therefore, you should structure your argument to make your central propositions the beginning and ending of your argument, and to walk each question back to them.

A. Oral Argument Strategy

99. A frequent mistake in oral argument it to clutter the central points with more than needs to be said. If you were to receive no questions at all, then your entire presentation should be no more than fourteen simple sentences. Ideally, it should be even fewer. You want to state the seven or fewer sentences that are your central propositions. You then want to state the seven or fewer sentences that identify why the opposing argument is incorrect. If there are no questions by that point, then you are done and you can sit down, even if you have spoken for fewer than five minutes. Saying anything more unnecessarily presents the judges with more propositions than can easily be recalled, and runs the risk that a central proposition will be displaced by a secondary or tertiary point. There is no requirement to use all the time allotted at oral argument. Judges are busy and appreciate brevity.

100. Of course, you should not be in a hurry to sit down. In most cases, judges will have questions (if only because some judges feel obligated to ask something). The goal of answering a question is to answer it directly, and then show either that the answer leads back to one of your central points or that the answer is not relevant to the outcome of the case at hand because it is disconnected from one of your central points. To the extent that a question is focused on one of your opponent's points, answer the question and walk it back to the central reason why your opponent's argument

7 See, e.g., D.A. Brodie & B.B. Murdock, Effects of Presentation Time on Nominal and Functional Serial Position Curves in Free Recall, 16 J. of Verbal Learning & Verbal Behavior 185 (1977).

8 R.F. Bornstein, Exposure and Affect: Overview and Meta-Analysis of Research, 1968–1987, 106 Psychol. Bull. 265 (1989).

is mistaken. Questions must be answered, but the key tactic is to use your answers to make sure that your central propositions are the statements that the judges hear most often.

101. Taking a question and walking back to one of your central points takes practice. A good technique to use is to take the Roman-numeral outline of your argument, copy it, cut it up into individual points, and throw those pieces of paper in a bag. Then you can pull out points and practice linking your answer to a specific issue back to your top-line focus, just as if you had received a question on that point. Also practice answering different questions about the same point. The goal is to identify the phrases you want to have handy for the subpoints that allow you to most naturally link back to your central thesis.

102. If you have time for a brief conclusion, finish with your central propositions. If you have more than a couple, you probably will not be able to repeat them all. Focus on the parenthetical or two that you are trying to make the heart of the court's opinion. Some of your central propositions are restatements of the relevant facts, and those are usually less important to reinforce. The last words that you say are the ones that are most important to have used in the conference that will occur afterward. Ultimately, your strategy is to use repetition to focus the conversation.

B. Oral Argument Preparation and Execution

103. Having a strategy is very important, but you must also be ready to execute it. Preparing for oral argument is polishing and practicing all of your points so that they roll off your tongue. You never want to be grasping for a way to articulate a point. Your words should come naturally because they are easy to say and ingrained in your mind. To ingrain them, you have to practice them out loud. You use different parts of your brain when you speak compared to when you just think about phrases.[9] Like an actor rehearsing your lines, you need to drill them into your head by saying them out loud to the point that they come unbidden when you need them.

104. Repeated testing and practice of the phrases not only ensures that the phrases sound natural, it also frees up cognitive energy during oral argument. The more mental energy you spend at argument searching for phrases or reviewing your notes, the less you have to think through the questions being asked and to watch the bench for reactions to your statements. A judge may question something you say without uttering a word. Often you can tell from a facial reaction that a judge has doubts about something you have said. If you are paying attention, you can then unpack that proposition into its subpropositions without being asked.

9 See, e.g., Peter Hagoort & Willem J. M. Levelt, The Speaking Brain, Sci. 372 (Oct. 16, 2009).

105. Paying attention to the bench may also give you a chance to reinforce the phrases that are hitting home. If you are looking at the court instead of your notes, you may notice a judge start to write down something you are saying. If that is a key proposition or the answer to a hot question, it can be quite effective to say, "And I will repeat that because it is an important point." If you give the judge the time to write down your key proposition when you see him or her trying to do so, you dramatically increase your chances that the phrase will be central to the discussion that occurs afterward. Moreover, letting the judge first complete his or her note taking makes it easier for the judge to follow you when you move to the next proposition.

106. Ultimately, if you structure and deliver your argument correctly, then the conference should sound very similar to your conversation with the panel. That conversation will be dominated by the key phrases you have repeated, and those phrases will then make their way into the opinion.

IV. Planning Ahead

107. Of course, you should be thinking about the structure and delivery of your argument long before it is even scheduled. A good argument reinforces the propositions advanced in the brief. You should be quite content to have a minimal oral argument presentation because your brief stands on its own. Oral argument is where you let the court tell you which parts of your brief were less than fully effective. Therefore, your oral argument is in fact merely an extension of your brief.

A. Brief-Writing Strategy

108. The first step to drafting an effective brief is to figure out the fourteen or fewer sentences that you would say if you were to receive no questions at oral argument. These sentences should not come as a surprise. Judges use the briefs to prepare for oral argument, and so you want your argument to build on the same propositions that you have already established. Of course, in many cases, decisions are issued without any oral argument. Therefore, you need to control the conversation as if the decision will be made based upon your brief alone. However, you actually have the opportunity to do even more.

109. Brief writing is where you attempt to put words, phrases, sentences, and even whole paragraphs into the final opinion. Ultimately, the court will produce a written opinion. At oral argument, you must focus on the key phrases that you want to dominate that opinion. However, you do not have enough time there to say everything or even to go into complex issues in as much detail as you might like. Inevitably, the

opinion the court produces will be somewhat broader than the discussions in either the courtroom or the conference room. The principle of influencing the writing is the same as influencing the conversation: Do the work for the judge.

110. A well written brief has large chunks that could be cut directly from the body and pasted into the final decision. Writing a brief in the style of an opinion has many positive effects. First, you create the possibility that key passages will actually be cut and pasted from the brief. It almost goes without saying, but if your language and tone could not plausibly be used in an opinion, then you have sacrificed the chance to have the most direct impact on its content. More importantly, if you write your briefs in the more measured style of an opinion, then you establish an empathic connection with the judges by writing in their style. Human beings are more comfortable with patterns they recognize, and naturally tend to trust those who communicate in the forms most similar to their own. The tendency of human beings to shift their communication styles to be more similar to the audience to gain trust and acceptance is called "Communication accommodation theory."[10] A common language subliminally signals that you are part of the same group and builds trust. Human beings naturally favor those that they perceive to be part of their in-group.[11]

111. Conversely, when you use a structure or tone that is markedly different from the judicial tone, you force the judge to mentally translate the words you have written into words he or she could actually write. All sorts of problems can occur when this happens. Of course, the judge may simply choose different words than you would have preferred and produce an opinion that muddies the clear parenthetical that you were trying to place into the opinion. Even worse, your words could require more mental energy than the judge has at that moment, such that the translation does not occur at all.[12] In other words, a good brief reduces the burden on the judge of writing the opinion as much as possible.

112. Once your brief is targeted at allowing the court to copy directly from it, you can then further leverage this advantage. Before oral argument, you should clearly identify the pages that are most ripe for the plucking, particularly when it comes to complex analyses that may not be fully explored during argument. If the argument turns to one of these points, you can begin your answer with, "I analyze this issue more thoroughly at pages X & Y of my brief, but the essential point to remember is this . . . ." If you tell the judge exactly where to find your full argument, the judge may well turn to that section during the argument and post-argument conference.

10 See Howard Giles & Philip Smith, Accommodation Theory: Optimal Levels of Convergence, in Howard Giles & Robert N. St. Clair, Lang. and Soc. Psychol. (1979).

11 See, e.g., Elliot Aronson et al., Soc. Psychol. (8th ed. 2012).

12 See, e.g., I Think It's Time We Broke For Lunch . . . Court Rulings Depend Partly on When the Judge Last Had a Snack, The Economist (Apr. 14, 2011).

This will make it even easier for you to turn a judge's agreement with your essential points at argument into the precise phrases you want to see in the opinion.

113. Ultimately, the more your brief can lower the transaction costs of adopting your argument,[13] the more likely the court will liberally borrow from it. This maximizes the chances that you will get the specific result you want.

B. Brief-Writing Execution

114. A well written brief utilizes a host of more subtle techniques to further support the central goal of selling the specific analysis that you want the court to use. Each of these techniques maximizes the brief's impact and leads the judge toward the ultimate, desired outcome.

Structure

115. An important structural aspect to remember is that brief writing is not fiction writing. A surprise twist at the end is not effective. It leaves the judge wondering how the logic of your argument could really make sense, when it should be clear from the beginning where your argument is going and how it will get there.

116. A common mistake is to state the issue in a generic way in the question presented and the section headings, rather than letting the judge know where the argument is going. This is a major problem because it increases the mental energy necessary to understand your brief. There is an old brain teaser that I first heard in grade school, which goes like this: "Suppose you are a school bus driver. At the first stop two children get on. At the second stop, three children get on. At the third stop, five children get on, which is one fewer than normal. At the fourth stop two children get on, but one gets off. At the fifth stop, no one gets on or off. What is the bus driver's name?" When you do not know where this brain teaser is going, it is very easy to pay attention to the wrong information and forget that at the beginning you are told that you are the school bus driver.

117. Bad briefs make the same mistake. They try to tell a story without first letting the reader know what framework to use to extract useful information from the story. Some extra details can build a powerful narrative, but they can also create a really confusing mess if the proper context is not provided. It should be clear at the beginning to an experienced judge which legal test is at issue and what the key fact (or two) is going to be at the heart of the case.

13 Of course, the problem of transaction costs preventing parties from reaching ideal outcomes was famously described by Ronald Coase. Ronald Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

118. Clearly signaling the key part of the analysis not only reduces the mental burden on the judge, but also takes advantage of pattern recognition, the tendency of human beings to look for familiar patterns in new material.[14] Science has shown that once people are primed to expect to see a particular pattern, they are more likely to interpret ambiguity in favor of seeing what they expect to find.[15] A good brief promises the reader a specific conclusion, and then builds steadily toward it.

Modifiers

119. Another important technical aspect of writing a good brief (as well as designing a good argument) is to avoid unnecessary modifiers. Naive advocates think that flowery adjectives and adverbs are important to good advocacy because they tell a vivid story. However, they are more often a trap. Adding modifiers creates an unnecessary opportunity for the judge to disagree. You create the risk that the judge will discount a perfectly valid argument because they reject your characterization of the facts.

120. Most appellate issues turn on nouns and verbs. Even when the governing legal standard is based upon an adjective like "reasonable," judges tend to focus their rulings on the objective aspects of the case rather than the subjective ones. This provides clearer guidance when the court is in the role of law giver, and creates less risk that the court will act inconsistently. The subjective aspects of the case are usually the province of the fact finder and entitled to great deference from the appellate court. An appellate court will rarely be able to reject a subjective aspect of the fact finding. This is why most appellate arguments focus on legal issues rather than factual ones. Therefore, relying heavily on nouns and verbs is better approach to brief writing for this stage.

Quotations

121. An important technique in brief writing is to quote liberally from the record, the applicable law, and the opposing brief. Every day, judges see paraphrasings of facts, cases, and arguments that are not entirely accurate. When you paraphrase something, the judge will often wonder whether your statement is accurate. Many will assume (from experience) that you are trying to spin or gloss over something.

122. At this point, one of two things will happen. The first is that the judge will adopt a suspicious mentality and continue reading your argument, but with a more critical mindset than he or she would have had otherwise. Even minor issues, such

14 See, e.g., Michael Shermer, Patternicity, Sci. Am. (Dec. 2008).

15 What we observe depends tremendously on what we look for and what we expect to see. See Joseph T. Hallinan, Why We Make Mistakes 21–24 (2009).

as typos, will be magnified and impeach the credibility of your argument. The other possibility is that the judge will put down your brief to go find whatever it was that you were paraphrasing. Even if your paraphrasing was impeccable, the flow of your narrative and logic is interrupted, and it becomes harder for the judge to return the favorable mindset toward which you had been building.

123. Of course, once you have quoted something, you can paraphrase it more easily later, but crucial material must still be quoted. Even if you can paraphrase later, it is often beneficial to continue to quote the most important facts and authorities. This essentially shifts the focus of your brief. Instead of the judge thinking about whether he or she agrees with you, the judge is now confronted with whether he or she will reject the record or the authorities upon which you are relying.

124. It is important to keep your quotations short. Readers tend to skip past block quotations. I did not want to believe this fact at first, but I kept finding myself doing it. Pay attention to how you read others' writing. You will learn a lot.[16] Therefore, your brief should not be huge blocks of quoted text. However, quoting key phrases and sentences goes a long way toward establishing trust by proving that you are not trying to mislead the court.

Going On the Offensive

125. The final brief writing technique that is almost always overlooked is seeding your brief with questions that you want the court to ask the opposition at argument. Imagine the questions that you would ask the other side if you were on the bench, and then take those questions and turn them into explicit, declaratory statements challenging the other side, such as "The appellant/appellee cannot cite a single case that rules in favor of his position where X was true," or "The appellant/appellee cannot cite to a single page in the record that supports the proposition that the jury could have found that Y occurred in this case." If you directly challenge your opponent in such a way, you will quickly find that judges will read your statements directly from your brief at oral argument. (You will also be shocked at how often your opponent does not have a prepared answer when confronted with an allegation directly from your brief.)

126. At the end of the day, there are many, many aspects of great brief writing. However, they all build upon working with how human beings read and process arguments in briefs. A great brief makes it as easy as possible for the judge to digest what is being said and to use it to write the final opinion in the case.

16 See, e.g., Daniel M. Friedman, Winning on Appeal, in John G Koeltl & John Kiernan The Litigation Manual: Special Problems and Appeals 156 (1999).

V. Designing Your Argument

127. There is a limit to how much you can do with rhetorical skill. Fundamentally, the content will have a huge impact on whether the appellate court accepts the argument. However, there is a lot that can be done to design and craft the argument that leads to your ultimate goal. Framing the problem in a way that leads to your preferred holding can be crucial. In addition, once the framing has been chosen, there are important choices to be made in shaping the details. Finally, the argument design process must also craft a response to the opposing argument.

A. The Importance of Narrative

128. Building an argument to take advantage of behavioral psychology is a much harder skill to learn and practice. It is not about the mental shortcuts that people use to process information, but how they evaluate human behavior and make judgments about whether that behavior was appropriate. As described below, human beings naturally use three different frameworks to evaluate the behavior of others. However, regardless of the framework, designing an argument — either from whole cloth or in response to the appellant — is about constructing a narrative.

129. Human beings are natural storytellers, and we respond to narratives about what human interaction is at the heart of a case.[17] Therefore, argument design must begin by identifying the human interaction that is the focus of the argument. Every legal case as about some sort of interaction between the human beings, whether it was a contract, a tort, a government enforcement action, or something else. Each case involves stories about what actually happened and might have happened differently. Ultimately, an appellate opinion settles the case or controversy before the court by telling a story about what happened and whether one or more of the characters in that story could have acted differently.

130. Choosing the proper story to tell is vital. Sometimes the most important interaction in a legal issue is not the one that precipitated the action on appeal. For the appellee in particular, it is often critical to challenge the story and present an alternative view of what interaction is at the heart of the narrative. Focusing on a different narrative will often allow you to acknowledge that the other party has a legitimate grievance, while redirecting the emotional element of the case to a different party.

131. One technique for identifying the interaction upon which to focus is to ask what should have happened. How could things have played out such that no one would feel

17 See James D. Ridgway, Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law, 35 S. Ill. U. L.J. 269, 279–82 (2011).

aggrieved? This type of thought experiment will help you focus on which interactions were the opportunities to achieve a different outcome. These interactions may be remote from the immediate facts of the case, however. In particular, many cases may boil down to choices made by the legislature in drafting a statute or the executive in crafting a regulation, rather than choices made by the parties themselves.

132. This technique of structuring arguments around stories of human interaction is based upon how we think. Research shows that we evaluate the behavior of others using the parts of our brains that we would have used if we were performing the action ourselves. This function is performed by "mirror neurons." Shermer theorizes that these neurons not only enable us to copy behavior, but also to infer the intent that motivated the person to perform the action.[18] Describing the key interaction that should have gone differently will put the judge in the shoes of the person taking that action, and allow him or her to more easily imagine the alternative reality that demonstrates what could have happened to avoid the case at hand.

B. Identifying a Narrative

133. Evolutionary biology also has more specific lessons than simply the importance of basing arguments upon narratives. Research in this area teaches us that human beings interact in only three basic ways: competitively, cooperative, and accidentally.[19] People compete when each wants something that cannot be shared; people cooperate when they work together to create a benefit that they can share; and people interact accidently when they act without realizing the consequences their behavior will have on the affected party. Evolutionary biology identifies these three fundamental types of narratives and when to use them in your arguments.

134. Each of these interactions has its own evolved narrative that human beings use to evaluate whether the interaction went as it was supposed to have done. If you misidentify the type of interaction or use the wrong type of narrative to describe it, then you are presenting an argument that will have a very hard time engaging the court. For example, if parties were clearly competing with each other in some way, using a narrative appropriate to a cooperative interaction is very likely to strike the court as unconvincing. Understanding the elements that comprise the three narratives is therefore critical to crafting an effective argument strategy.

18 Michael Shermer, The Mind of the Market 131, 132–136 (2008).

19 See James D. Ridgway, Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law, 35 S. Ill. U. L.J. 269, 282–90 (2011).

Competition

135. The first type of interaction is competition. People compete for things that cannot be shared. People compete for contracts, property, and educational and employment opportunities. These are zero-sum games.

136. The archetypal narrative of competition is fairness.[20] Depending upon your position, you will want to portray a competitive interaction as involving either a fair or unfair process. However, there is no single correct way to evaluate fairness. People of different ideological persuasions may look either very narrowly or very broadly to determine fairness. Some tend to focus on the immediate competition, while others tend to focus on whether a person had historic disadvantages that need to be addressed. Whatever view of fairness you take, an argument about a competitive interaction needs a fairness narrative.

137. You must be careful with fairness narratives, however. A mistake that is frequently made is to think that every legal issue is about competition because the parties are now in an adversarial posture. However, in many legal cases, the parties were not in competition at the time of the relevant interaction. Often, they were trying to cooperate. Do not assume that a case should always be presented as being about fairness. Nonetheless, if the interaction is truly competitive, then fairness should be the theme of the argument.

Cooperation

138. The second interaction is cooperation. This is where, at the time of the relevant interaction, the parties were trying to work together to make the pie bigger so that everyone could have a larger slice. Contracts are obviously rooted in cooperation, but so are many other activities. Law making, in particular, tends to involve disparate interests trying to cooperate to solve a problem. Therefore, narratives about what legislators intended often involve stories of cooperation.

139. In these types of interactions, the fundamental human instinct is to maximize the gain produced for the group.[21] Therefore, if the relevant interaction in a case were cooperative, then the argument would need to be about maximizing the gain. These arguments can be very tricky because the story of how to maximize the gain can be very different depending upon who is defined as a relevant party to the interaction and exactly what point in time you look at the choices available to the parties. However,

20 See James D. Ridgway, Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law, 35 S. Ill. U. L.J. 269, 285–88 (2011).

21 See James D. Ridgway, Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law, 35 S. Ill. U. L.J. 269, 284–85 (2011).

a very effective argument is to show that your opponent is effectively trying to take what should be a cooperative interaction and turn it into a competitive one. You can turn the tables on a fairness argument by accusing the other party of taking a selfish approach to what should have been a cooperative interaction.

Accidents

140. The final interaction is accidental. These are the situations in which neither party was intentionally trying to affect the other. The most familiar accidents in law are negative ones, such as automobile accidents or professional malpractice. However, not all accidents are negative. Although tort cases are often about accidents that cause loss, other accidents cause a gain. For example, the patent system is about encouraging positive accidents by giving inventors a financial incentive to make their ideas public, so that they might inspire others to invent even more productive ideas.

141. Whether positive or negative, the fundamental way we think about accidental interactions is in terms of whether the outcome was foreseeable.[22] We put ourselves in the position of the person who took the action that had an accidental effect, and ask whether that was a reasonable action based upon the foreseeable consequences. This is where pure cost/benefit arguments have the greatest rhetorical power. Often the key to such an argument is identifying the moment in time to use when framing the issue of foreseeability. Whether the consequences were apparent and whether the party had any ability to act differently at that moment are the essence of the argument.

142. Once you are familiar with the three fundamental interactions and the associated narratives, you have an advantage, but effectively using this knowledge takes practice. Of course, identifying the correct type of interaction can be extremely tricky. With just two parties, the interaction can shift rapidly from trying to make the pie bigger to competing for the biggest slice. Adding a party can quickly shift what the relationships look like. As the number of parties increases, the number of interactions increases exponentially. The number of connections in a network, x, is based upon the number of nodes, n, where $x=n(n-1)/2$. The skill of attorneys is to find the best narrative that explains the relationships involved in the case and to tell the most convincing story to the court. Fortunately, this is a task that becomes much easier if you can identify a fundamental mistake by the opposing side in either identifying the relevant interaction or choosing an appropriate narrative.

22 See James D. Ridgway, Patternicity and Persuasion: Evolutionary Biology as a Bridge Between Economic and Narrative Analysis in the Law, 35 S. Ill. U. L.J. 269, 288–89 (2011).

C. Dealing With Opposing Arguments

143. The final aspect of constructing an argument is addressing the other side. This is one of the most common mistakes that is made in advocacy. I cannot count the number of arguments I have heard in which the two parties simply argued past each other without engaging. Similarly, the most frequent complaint I hear from judges about oral arguments is that the parties argue apples and oranges. This is a terrible, wasted opportunity.

144. Before beginning to write an appellee's brief or a reply brief, I first address how to complete the following sentence: "My opponent's argument would be correct if …" This is perhaps the single most powerful statement that is omitted from briefs and oral arguments. No matter how clear a case looks to you as a partisan, it is very unlikely to be that obvious to the court. From the court's point of view, both sides have at least a kernel of a reasonable position, and the judge must find a basis for choosing between the sides.

145. Finding a clear basis to offer the court for making a choice addresses another problem in how we have evolved to think. An essential failing of human thinking is confirmation bias. We almost always think our cases are stronger than they really are because we tend to leap to conclusions first, and then give too much weight to points that support our initial conclusion and too little weight to those that contradict it.[23] This leads advocates to be so dismissive of the opposition that they do not engage the other side. To overcome this bias requires conscious effort.

146. Forcing yourself to walk through the case in the other person's shoes fights this overconfidence. Often it will help you realize that your first instinct was not the best. Sometimes it is because you have overestimated the strength of the main argument that you wanted to make. Other times, you realize that there is a flaw in how the opposition framed the case, and attacking their framing is stronger than buying into it.

147. A vital aspect of appraising the other side's case is to distinguish between your impression of the argument and what the brief actually says. After first reading my opponent's brief quickly, I would almost always be shocked at how ridiculous it was and how easy it was to point out the flaws in it. However, in most every case, my confirmation bias was betraying my analytical skills. When I reread the other brief more carefully, I discovered that I had unfairly portrayed what it actually said, even though I knew that it was a trap that I should have been trying to avoid.

23 See Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Rev. of Gen. Psychol. 175 (1998); see also Michael Shermer, The Mind of the Market 90–92 (2008).

148. One technique that I found to be highly effective in combating my natural tendency to read the opposing brief in the worst light was to go back and type the key passages of the opposing brief into my own draft, so that I would have to directly confront them later. When you paraphrase an opposing argument, you almost always fail to give it enough credit. It is rare for an opposing argument to be as bad as you wish it would be. When you deal with it word-for-word, you are much more likely to appreciate its full strength and address it with the care it deserves.

149. Particularly if you are the appellee, you should not even begin to do more than outline your brief until you can complete a sentence that identifies the smallest change to the facts or law that it would take for the other side to be correct. If you invest too much energy in one line of argument before you really understand how you will engage the opposing side, you will be reluctant to abandon your initial investment of time, even when a better argument is available. It is simply human nature to avoid realizing a lost investment, even when it is the most profitable thing to do.[24]

150. However you complete that sentence, it is vital to treat the other side with as much respect as you possibly can. Usually, we only make ourselves look foolish when we treat the other side as fools. There are many different ways to complete your preliminary argument sentence that show respect for the other side: "My opponent's argument would be correct if the regulations had used [word X] as it did in this other context, instead of [word Y]" "My opponent's argument would be correct if [this] had happened before [that]." "My opponent's argument might be persuasive if this were an open issue, but the legislature has chosen how this issue should be resolved, rather than leaving it to the courts." "My opponent's reliance on that case would be correct except that [X fact] is missing from the facts at hand." Of course, having multiple alternative versions of this sentence to use is also an effective way to show that something would have to be different for the other side to be correct. However you present it, giving your opponent credit and giving the court a precise way to explicitly reject your opponent's argument in addition to accepting yours, creates a clear path for the court to go where you want it to go.

151. There are occasional cases in which the opposing position is truly outrageous, if not unethical. In such cases, it is better to calmly lead the judge to that conclusion than to fly into righteous indignation. Unfortunately, every day judges read briefs that make unfounded accusations of fraud and unprofessionalism. So many of these allegations are frivolous that it is hard to pay much attention to them. In other words, so many other advocates cry wolf, that judges have largely become numb to these allegations.

24 See Terrance Odean, Are Investors Reluctant to Realize Their Losses?, 53 J. of Fin. 1775 (1998).

152. Demonstrating that an opposing argument is deceitful or unethical is really no different than a normal demonstration that it is without merit. Rely heavily on quotations. Instead of shouting fraud, simply state something like: "At page X of appellant's brief, he states ['insert quotation from the brief here']. However, the only evidence in the record on that point is at page A of the record, where Mr. B testified that ['insert contradictory quotation here']." Make it clear that you are not attempting to spin anything. Let the judge reach the conclusion that the other side is acting unethically. In my experience, the court will be much more invested in pursuing something that looks like misconduct if they feel like the concern arose sua sponte.

153. At the end of the day, a powerful argument has two key features. It has a narrative that is correctly built upon a human interaction, and it explicitly addresses how to distinguish the opposing argument while still giving it as much credit as possible.

VI. Improving Your Advocacy Skills

154. The last lesson from behavioral psychology to understand is that we as advocates are also humans. The way we get better at tasks is feedback. Learning is the first step to improving. Training is how we actually become better. This involves acting first, and then receiving accurate feedback on how well we performed so that we correctly memorize what works.[25] There are two important techniques we can use to give ourselves feedback on our advocacy skills.

A. Training Your Instincts

155. The first technique examines our argument design skills. After you have read the record or the appellant's argument, write out the parenthetical of the case that governs each issue. This tests your legal instincts. Once you have written out the parenthetical, you have three alternative goals: (1) to find the case in your research that supports that parenthetical, (2) to focus your argument on having the opinion in this case support that parenthetical, or (3) to learn why that parenthetical is unsustainable based upon the law as it currently exists.

156. At the end of your brief writing process, you must return to that parenthetical. If you found authorities that were directly on point, that teaches you that your instincts or recollection were good. If you did not find authorities to support that parenthetical, but you were able to design your case around advocating for that parenthetical, that tells you that you had good instincts about how the law works with the facts of your

25 See Joseph T. Hallinan, Why We Make Mistakes 172–73 (2009).

case. If you discover that your final argument was substantially different from what you thought it would be, that teaches you that there was something wrong with your instincts. You need to identify what that was and learn from it. Was the established law different from what you expected it to be? Did you end up focusing on a different interaction than you thought you would? In any event, you need that feedback on how much you can trust your instincts and what you need to learn.

157. In particular, if the argument develops in an unexpected way, then you need to honestly examine why that was and what led you in a different direction. Essentially, what you are trying to do is identify the heuristic that led you to the wrong conclusion so that you can start recognizing it and practice replacing it with a new way of thinking that will become a better heuristic once you ingrain it.

158. Identifying what it was that led you in a different direction has the additional advantage of helping you to complete your brief and prepare for oral argument. If you are an experienced advocate and your instincts are generally good, then there is a fair chance one of the judges on the panel will have had the same initial impression that you did. Knowing exactly what was wrong with this instinct prepares you to walk a judge from that starting point to your final path if it becomes apparent that the judge had the same initial reaction to the case that you did.

159. The more you train your skills in identifying the correct arguments to make, the more efficient an advocate you will be, and the more prepared you will be at argument or elsewhere when confronted with issues that were completely off your radar.

B. Training Your Skills

160. Not only do you need to train your analytical ability, but you need to train your communication skills. After the court decides a case, go reread your briefs and listen to your arguments again with the final result in hand. You cannot rely on your memory because human beings naturally edit our recollections to make our choices seem better to ourselves than they really were.[26] If the court did not do exactly what you wanted it to do, you must take responsibility and assume that you could have done something differently, even if it was not something that you understood at the time.

161. Advocacy is a form of communication. You can never blame the audience for not understanding you. You must continually look for new and better ways to connect to the audience you have. Understanding the basic principles and techniques is only the beginning. Successfully utilizing them is the goal of advocacy.

26 Mara Mather & Marcia K. Johnson, Choice-Supportive Source Monitoring: Do Our Decisions Seem Better to Us as We Age?, 15 Psychol. & Aging 596 (2000).

162. No matter how well you succeeded or failed, you must ask yourself the key questions: Will you be able to cite this opinion for the parenthetical you wanted? How closely did the court follow the argument that you were suggesting? Can you identify any language from your brief in the decision? Did the court focus on the same interaction that you did and did it characterize it in the same way?

163. There is no worse feeling as an advocate than being ignored. If the court simply adopts the argument of the opposing side without even addressing your argument, then you must admit that you failed as a communicator. Did you provide an explicit argument why the argument adopted by the court was incorrect? Sometimes you will lose on pure ideological grounds that cannot be reversed with advocacy in a single case, but you need to learn the embedded frameworks that the judges will use to evaluate future cases so that you can do your best to construct a narrative that works within the worldview of the court.

164. You must also look for points that you made that were mischaracterized by the court. If the court did not restate your argument correctly, it is because you gave them an opportunity to do so. How did they translate your brief and argument into the characterization of your position? Did they focus on one of your subpoints and lose the main theme of your argument? Did they misunderstand the narrative that you were using? You must compare the language they used to the language you used and think about how you could have drafted your argument differently.

165. Even if you succeeded, it is very important to closely examine your success. Were there any parts of the court's analysis that differed from your own? If the court phrased a point differently, do you need to do a better job on similar points in the future or should you recognize that using that phrasing will better connect with you in the future? When you recall that brief writing is about reducing the burden on the judge to translate your argument into the court's opinion, you realize how important it is to examine opinions closely even when you win.

166. If you repeat the same behavior without carefully analyzing whether it is good behavior, you run the risk that you are merely reinforcing bad habits. It is against human nature to recognize and recall our own flaws.[27] Therefore, we must take deliberate steps to evaluate the effectiveness of our advocacy and communication skills with techniques that force us to confront the difference between the rosy picture of what we would like to think happened and the less attractive reality of what actually happened.

27 See Joseph T. Hallinan, Why We Make Mistakes 56–75 (2009).

VII. Conclusion

167. Understanding that judges are human beings who use the same cognitive processes as anyone else is an incredibly powerful tool in advocacy. Ultimately, the job of judges is to make decisions, and there is a tremendous amount of research on how people make decisions. It is vitally important to be familiar with this research and how to apply it to the skills of oral advocacy, brief writing, and argument design. However, it is also important to remember that we, as advocates, are humans, too. As advocates, we will fall into our own traps if we are not careful. Knowing your audience begins with knowing yourself.

168. A great advocate not only leads the court to the desired outcome by the easiest possible path, but constantly works to improve his or her own advocacy skills. In the past, these skills were often developed by instinct or through trial and error. However, the insights of behavioral psychology now make it possible to become much better, much faster by understanding how the actual processes of decision making and persuasion work.