

U.S. Court of Appeals for the Fourth Circuit

Appellate Practice Webinar



September 8, 2021
Richmond, VA

1.

Agenda



FOURTH CIRCUIT APPELLATE PRACTICE WEBINAR

SEPTEMBER 8, 2021, 9:00 A.M. – 12:00 P.M.

Introduction: Circuit Judge James A. Wynn, Jr.

9:00 **Insights on Supreme Court and Appellate Practice**

Chief Judge Roger Gregory leads a conversation with Michael Dreeben, former Deputy Solicitor General in charge of the government's criminal docket. During his 30-year career with the Office of the Solicitor General, Mr. Dreeben argued over 100 cases before the U.S. Supreme Court, becoming known for the brilliance of his intellect, his mastery of the art of oral argument, and his commitment to the ideals of justice. In this session, Mr. Dreeben shares his insights on Supreme Court and appellate practice and on representing the United States before the Supreme Court.

*Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit
Michael R. Dreeben, Co-Chair, White Collar Defense and Corporate Investigations Practice, O'Melveny & Myers LLP*

Introduction: Circuit Judge James A. Wynn, Jr.

10:00 **Effective Advocacy before the Fourth Circuit**

Circuit Judge Albert Diaz moderates a panel discussion with Circuit Judges Paul Niemeyer and Stephanie Thacker and appellate attorneys Kannon Shanmugam and Jennifer May-Parker. The panel shares the dos and don'ts of briefing and argument, answers questions about Fourth Circuit practice and procedure, and offers strategies for effective representation on appeal.

*Albert Diaz, Circuit Judge U.S. Court of Appeals for the Fourth Circuit
Paul V. Niemeyer, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Stephanie D. Thacker, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Kannon K. Shanmugam, Chair, Supreme Court and Appellate Practice Group, Paul, Weiss, Rifkind, Wharton & Garrison LLP
Jennifer P. May-Parker, Assistant U.S. Attorney, Office of the U.S. Attorney for the Eastern District of North Carolina*

Introduction: Circuit Judge James A. Wynn, Jr.

11:10 **How to Write a Persuasive Appellate Brief**

Ross Guberman, author of [Point Made: How to Write Like the Nation's Top Advocates](#) and creator of [BriefCatch](#), demystifies appellate brief-writing and shares tips and Fourth Circuit examples for key junctures in written advocacy, including introductions, fact statements, and winning arguments.

Ross Guberman, President, Legal Writing Pro LLC; Founder, BriefCatch LLC

2.

Faculty

FOURTH CIRCUIT APPELLATE PRACTICE WEBINAR

FACULTY

HONORABLE ALBERT DIAZ is a Circuit Judge on the U.S. Court of Appeals for the Fourth Circuit. A native of Brooklyn, New York, Judge Diaz joined the Marines after high school. While in service, Judge Diaz attended New York University School of Law on a full scholarship. He received a B.S. in Economics from the Wharton School, and also holds an M.S. in Business Administration from Boston University.

In the Marines, Judge Diaz served as a prosecutor, defense counsel, appellate counsel, and military judge. He left active duty in 1995 for private practice and retired from the Marine Reserves in 2006 at the rank of Lieutenant Colonel. From 2001 to 2009, Judge Diaz served as a North Carolina Superior Court judge, where he also served on North Carolina's Business Court. President Obama nominated him to the Fourth Circuit in 2009, and he was confirmed on December 22, 2010. Judge Diaz is a member of the American Law Institute and is a past Chair of the ABA Judicial Division's Appellate Judges Conference and the Appellate Judges Education Institute. He has been recognized as a Legal Legend of Color by the North Carolina Bar Association, has received his local bar's Diversity Champion award, and was recently honored by the Elon University School of Law as a Leader in the Law.

MICHAEL R. DREEBEN is a partner at O'Melveny and Myers LLP and serves as Co-Chair of the White Collar Defense and Corporate Investigations Practice. He is also a member of O'Melveny's Supreme Court and Appellate Litigation Group. He served in the U.S. Department of Justice's Office of the Solicitor General for more than 30 years, including 24 years as the Deputy Solicitor General in charge of the government's criminal docket in the Supreme Court.

Mr. Dreeben has argued 105 cases in the Supreme Court on behalf of the United States. He has briefed hundreds more. These cases span the full range of substantive criminal law and procedure, including landmark cases on public corruption, private fraud, Fourth Amendment privacy, criminal sentencing, the Confrontation Clause, the right to counsel, and the First Amendment. The civil matters include the separation of powers, federal securities law, RICO, and labor law. In addition, Mr. Dreeben has argued cases in every regional federal court of appeals, including cases before ten en banc courts, and has argued appeals in the Montana Supreme Court, the Texas Court of Criminal Appeals, and the District of Columbia Court of Appeals. He has received the Department of Justice's John Marshall Award for the handling of appeals and has twice received the Department's Distinguished Service Award. He has also received the Rex Lee Advocacy Award and the Tom Clark Award for Outstanding Government Lawyer.

From 2017 to 2019, Mr. Dreeben served as Counselor to Special Counsel Robert Mueller, III, in the investigation of Russian interference in the 2016 presidential election and obstruction of justice. He led the team responsible for giving legal and strategic advice to the Special Counsel and all prosecution teams. He also had a leading role in defending the statutory and constitutional authority of the Special Counsel in district court and on appeal.

After graduating from the University of Wisconsin and earning a Master's degree at the University of Chicago in history, he received his J.D. degree from the Duke University School of Law, where he served as an Article Editor on the Duke Law Journal. He clerked on the U.S. Court of Appeals for the Fifth Circuit for Judge Jerre S. Williams. Currently, Mr. Dreeben serves as a Distinguished Visitor from Government at Georgetown University Law Center and a Lecturer on Law at Harvard Law School. He has previously served as an adjunct professor at Georgetown Law and a visiting professor at Duke Law School, where he taught appellate advocacy and a seminar on constitutional litigation in the Supreme Court. In 2019, he taught a seminar at the Faculty of Law at the Hebrew University of Jerusalem, Israel. He recently published an article entitled *Stare Decisis in the Office of the Solicitor General*, 130 Yale Law Journal Forum 541 (Jan. 15, 2021). He is a member of the American Law Institute.

HONORABLE ROGER L. GREGORY, Chief Judge of the United States Court of Appeals for the Fourth Circuit, formerly a partner in the law firm of Wilder & Gregory, grew up in Petersburg, Virginia and graduated from Virginia State College and the University of Michigan Law School. He is the first African-American to sit on the United States Court of Appeals for the Fourth Circuit, which includes the states of Maryland, West Virginia, Virginia, North Carolina and South Carolina. President William J. Clinton recess appointed him to the Court on December 27, 2000, and President George W. Bush commissioned his lifetime appointment to the Court in July 2001. Judge Gregory is the only person in the history of the United States to be appointed to a federal appellate court by two presidents of different political parties. Judge Gregory became Chief Judge on July 9, 2016. He is a member of the Judicial Conference of the United States that governs the Federal Judiciary.

Judge Gregory's past leadership positions include Chairman of the Industrial Development Authority of Richmond, President of the Friends Association for Children, President of the Black History Museum and Cultural Center of Virginia, Rector of Virginia Commonwealth University, and President of the Old Dominion Bar Association.

Judge Gregory presently serves as Trustee Emeritus for the University of Richmond.

Judge Gregory's numerous awards include the National Conference of Christians and Jews Humanitarian Award, the National Bar Association's Gertrude E. Rush and Equal Justice Awards, the Washington Bar Association's Charles Hamilton Houston Merit

Medallion, the Old Dominion Bar Association's L. Douglas Wilder Vanguard Award, the Thurgood Marshall College Fund Award of Excellence, the University of Richmond School of Law's William Green Award for Professional Excellence, and the College of William & Mary Law School's William B. Spong Award.

Judge Gregory is an inductee in the Virginia Interscholastic Heritage Association's Hall of Fame and a Fellow of the Virginia State Bar Foundation. He holds honorary degrees from Virginia Union University, Virginia State University, Virginia Commonwealth University, Widener University, Saint Paul's College, and The American University.

ROSS GUBERMAN is the president of Legal Writing Pro LLC and the founder of BriefCatch LLC. He has conducted thousands of top-rated writing and editing workshops on three continents for prominent firms, agencies, and courts. With degrees from Yale University and The University of Chicago Law School, Mr. Guberman is the author of bestselling books, the judiciary's choice to train new federal judges, an expert witness, a former lawyer at a top firm, a former law-school adjunct professor, a popular conference speaker, and a frequent commentator for *The New York Times* and other publications.

JENNIFER MAY-PARKER is an Assistant United States Attorney for the Eastern District of North Carolina. For 11 years she has been responsible for supervising attorneys who specialize in handling appeals and oral arguments in the U.S. Court of Appeals for the Fourth Circuit. Mrs. May-Parker has been with the office for 21 years and has also been the First Assistant U.S. Attorney, the Diversity Chairperson, and a criminal trial and appellate attorney, where she tried numerous cases to jury verdict, wrote hundreds of briefs, and argued numerous cases before the Fourth Circuit. She has been a member of DOJ's Appellate Chiefs' Working Group, which provides advice to the Department on legal strategy and key issues.

In 2013, Mrs. May-Parker was twice nominated by President Barak Obama to serve as a U.S. District Judge in the Eastern District of North Carolina. Prior to joining the U.S. Attorney's Office, Mrs. May-Parker served as an Assistant Attorney General in the Civil Environmental Division of the North Carolina Department of Justice. She began her legal career as an Assistant District Attorney in the New York County (Manhattan) District Attorney's Office from 1991 to 1998. Mrs. May-Parker received her J.D. in 1991 from the State University of New York at Buffalo Law School and her B.A. in Philosophy in 1988 from the State University of New York at Geneseo.

Mrs. May-Parker teaches appellate advocacy to new Department of Justice Attorneys at the Department of Justice National Advocacy Center and is an adjunct professor at NCCU Law School, where she teaches appellate advocacy to third year law students.

HONORABLE PAUL V. NIEMEYER has sat on the United States Court of Appeals for the Fourth Circuit for over 30 years. For seven of those years, he served on the Advisory Committee on the Federal Rules of Civil Procedure and for four, as its chairman. Before his judicial appointments, he chaired the project to rewrite the Rules of Procedure for Maryland and co-authored the Maryland Rules Commentary, which is now in its fifth edition. He is a Fellow of the American College of Trial Lawyers, and for 20 years, he lectured at the Duke University Law School on appellate advocacy.

KANNON SHANMUGAM is a partner at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison. He is chair of the firm's Supreme Court and appellate litigation practice and managing partner of the Washington office. Kannon is widely recognized as one of the nation's top appellate litigators. He has argued 32 cases before the Supreme Court, including four cases in the recently completed 2020-2021 term. Kannon was lead counsel in the successful constitutional challenge to the structure of the Consumer Financial Protection Bureau, described by the Wall Street Journal as the "constitutional case of the year." Beyond the Supreme Court, he has argued dozens of appeals in courts across the country, including arguments in all thirteen federal courts of appeals and in numerous state courts.

Prior to private practice, Mr. Shanmugam served as an Assistant to the Solicitor General at the U.S. Department of Justice. He also served as a law clerk to Supreme Court Justice Antonin Scalia and to Judge J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit. Born and raised in Lawrence, Kansas, he received an A.B. summa cum laude in classics from Harvard; an M. Litt. in classics from the University of Oxford, where he was a Marshall Scholar; and a J.D. magna cum laude from Harvard Law School, where he was executive editor of the law review and argued for the winning side in the moot-court competition.

HONORABLE STEPHANIE D. THACKER is a Circuit Judge on the U.S. Court of Appeals for the Fourth Circuit. Judge Thacker graduated magna cum laude from Marshall University in 1987. She then graduated Order of the Coif from the West Virginia University College of Law where she served as a member of the West Virginia Law Review, and the editor of the coal issue of the West Virginia Law Review. For the 20 plus years she practiced law, Judge Thacker worked both in the civil and criminal litigation arenas. Judge Thacker served as a federal prosecutor for 12 years, both at the United States Attorney's Office for the Southern District of West Virginia and at the Department of Justice in the Child Exploitation and Obscenity Section. During her tenure with the United States Attorney's Office, Judge Thacker served as part of the trial team in the first federal domestic violence prosecution in the country. She also coordinated a number of prosecution initiatives aimed at combating crimes of particular import in West Virginia, including domestic violence, child support, and federal coal mine safety violations. In addition to the obvious charges, these types of crimes included prosecutions for firearms violations, tax evasion, fraud, and money laundering. While

with the Department of Justice, Judge Thacker rose through the ranks from trial attorney to Principal Deputy Chief of the Child Exploitation and Obscenity Section. During her time with the Department, Judge Thacker prosecuted and went to trial on cases in multiple jurisdictions, spearheaded several nationwide initiatives, and ultimately was awarded the Attorney General's Distinguished Service Award. Following her tenure with the Department of Justice, Judge Thacker was a member of the law firm of Guthrie & Thomas in Charleston, West Virginia where she engaged in litigation practice concentrating on complex litigation, environmental and toxic tort, and criminal defense. In September 2011, Judge Thacker was nominated by President Obama to fill a vacancy on the Fourth Circuit Court of Appeals. She was confirmed by the United States Senate on April 16, 2012.

HONORABLE JAMES A. WYNN, JR. is a Circuit Judge on the United States Court of Appeals, Fourth Circuit. Appointed by President Obama, Judge Wynn was confirmed in August 2010 by the United States Senate to serve on the United States Court of Appeals for the Fourth Circuit. Previously, he served for twenty years as an appellate judge on both the North Carolina Court of Appeals and the Supreme Court of North Carolina. He was in the private practice of law before becoming a state appellate judge. His legal career also includes thirty years in the U.S. Navy Reserves where he served as a military judge and retired at the rank of Navy Captain. He holds degrees from UNC-Chapel Hill (B.A.); Marquette University School of Law (J.D.) and the University of Virginia School of Law (L.L.M.).

3.

Insights on Supreme Court and Appellate Practice

A Conversation with

Hon. Roger L. Gregory, Chief Judge, U.S. Court of Appeals for the Fourth Circuit

and

**Michael R. Dreeben, Co-Chair, White Collar Defense and Corporate Investigations Practice,
O'Melveny & Myers LLP**

Preparing For And Delivering An Effective Appellate Argument

Michael R. Dreeben, Partner, O'Melveny and Myers LLP

Oral argument is a vital stage of the appellate process. At its best, appellate argument is a focused conversation in which the judges explore the advocates' contentions, test their views, and clarify the stakes and options for a disposition. The time is brief, and the dynamics are complex and unpredictable. What should you do in the weeks leading up to the argument and in the precious minutes when you come face-to-face with the judges to be ready? Here is guidance and advice on three key topics: (1) framing your preparation; (2) preparing for your argument; and (3) delivering your argument.

Framing Your Preparation

It is important to frame your approach by thinking about the purposes of oral argument and the goals of preparation.

Purposes of Oral Argument

Thinking through the purposes of oral argument from the appellate court's perspective helps frame your strategy for preparation.

In appellate courts, the core purposes of oral argument generally fall into three categories:

- (1) clarifying the facts and the procedural posture of the case;
- (2) clarifying the parties' legal positions and the principles that animate those positions; and

(3) assessing the practical consequences of a ruling.

Judges on multimember panels pay close attention to their colleagues' concerns and often ask questions to expose weaknesses in a position in an effort to persuade their fellow panelists. Hypothetical questions frequently play the role of illuminating the limits and consequences of a position and, if not carefully answered, can reveal that a position is unclear, extreme, or unworkable. At other times, panel members search for common ground or ways to narrow the scope of a ruling. Appellate argument is often as much a dialogue *between* the judges as it is a conversation *with* the advocates. To participate in that conversation and influence its direction requires attentive listening, clarity of expression, and flexibility. Preparation is the key.

Goals of Oral Argument Preparation

An advocate should have two central goals in mind in preparing for oral argument:

- (1) developing a list of affirmative points that you would like to make—and return to regularly—over the course of the argument; and
- (2) developing responses to weaknesses in your argument that will allow you to allay doubts and then pivot back to your affirmative points, or adjust them in light of concerns that emerge about frontline positions.

Preparing for Your Argument

The preparation process can be divided into four phases that build toward the goal of a logical, well informed, and credible presentation at the podium.

Phase 1: Question Harvesting

During this first phase, you should step out of your advocate shoes and try—as neutrally as possible—to identify what is challenging about your case. To do this, you should read through the other side’s briefs, amicus briefs, blog posts etc., without judgment. As you read, make a note of any questions raised by what you are reading: What is potentially problematic about your position in this case? What is the other side saying that might resonate with a judge or Justice? Your goal at this stage is not to develop answers to these questions; it is simply to keep track of them as they occur to you.

Phase 2: Conventional Preparation

The second phase is devoted to conventional preparation. It involves reading through the record, briefs, cases, and any other relevant legal materials and annotating in whatever way you find most helpful (e.g., highlighting, underlining, tabbing, etc.).

Your attitude during this phase is no longer neutral—you should be interrogating the materials to find what is most useful for your case as well as what is likely to be used against you.

Phase 3: Conversion

The goal of the third phase is to translate your written points into points you can make orally. This process involves thinking about how to convey complex issues and ideas in the simplest, most direct, and most persuasive way possible. You should also think through how you will prioritize your points in a face-to-face conversation with the court: What are your most important and compelling points? Which are less important? What are the things that you cannot say? What are things you can give up and still reach your goal?

Here, it is helpful to talk about your case to intelligent non-lawyers or lawyers who are not involved in the case. Explaining your position to them will force you to communicate in a way that is understandable while still being persuasive. It is also a helpful way of generating questions that you might not otherwise have considered.

Phase 4: Moots

Although the number of moots you do depends on your comfort level and personal preference, you should plan to do *at least* one. If you do multiple moots, they should never be back-to-back. You want to give yourself time to recover mentally and do any additional research or preparation that proves necessary. Your final moot should also be at least a couple of days before your argument—again, so that you have time to recover and to internalize any feedback you receive.

Advocates have different methods for preparing for moots. One strategy is to prepare one's argument in modules: Identify natural divisions of issues that embrace a series of questions and organize those questions into units. Then, because questions will not be asked in linear order, practice shifting between modules.

Some advocates like to type out answers. Others prefer to imagine questions and answers. Still others practice out loud in conference rooms. Whatever your style, give yourself enough time to explore as many variations of a question as you can think of. Whenever you identify an area for further research, write it down and keep track of your new questions.

Generally, your themes and answers at the first moot will involve a trial-and-error process. You don't need to be as prepared for this moot as you will be on the argument date—the goal is to try out some potential answers and to work through which options are the best. If you end up going down a problematic rabbit hole by giving a planned or spontaneous answer that leads to follow-up questions that you can't answer, consider resetting and trying again, perhaps with the opposite answer to see where that goes.

Your later moots should be as much like the actual argument as possible, down to the time of day. Prepare and dress as if you are delivering the actual argument. Recruit "judges" who are new to the case and who have a variety of perspectives. Stay in role for the duration of the question-and-answer part of the moot court (30 minutes to 1 hour). After the moot, ask your judges what you said

that they found persuasive, what answers troubled them (and how to improve), and whether there is anything else to say. (And if you are a judge, be encouraging!)

Final Steps to Readiness

If you have diligently followed the four phases above, you know your case, your position, your fallbacks, your redlines, and your rhetorical moves. You also will have prepared summary notes to review in the final days. And you will have researched the backgrounds of the judges on your panel—reading recent and relevant opinions—to know their judicial attitudes and anticipate their likely perspective on your case. Many courts put audio of arguments on line and listening to your panel members can provide invaluable insight. But there is one more thing to do: visit the courtroom before your argument. Become familiar with the layout and feeling of the room as well as the position and angle of the podium. If you have time to observe an argument, it will provide invaluable information about the conventions and style of the court. You can also study the location of the timing lights and learn the acoustic characteristics of the room. When it comes time for your argument, the room and the nature of the experience will feel familiar.

In your last 24 hours, do something relaxing. Walk your dog, have dinner with your family, and get some sleep!

Delivering Your Argument

Remember that oral and written communication are different. To succeed in oral argument, you need to make a connection with and have a conversation with the judges: Maintain eye contact, listen to—and answer—their questions, and speak conversationally. If a question calls for a “yes” or “no” answer, provide that answer first whenever possible, and then explain.

If a judge asks a hypothetical question, do not answer it by saying “that is not this case.” Instead, think about why the judge is asking the question: What principle is she trying to test? Which of your positions is she trying to probe? Hypothetical questions are designed to explore the limits of a principle. With that in mind, you should always answer the hypothetical directly if you can—but if you cannot, it is better to acknowledge the difficulty of the question and explain how your principles would resolve it.

Whether you use notes during oral argument is up to you and will depend on your comfort level. If your case turns on constitutional or statutory language, you’ll want to have access to the exact text. The same is true for key quotations from cases or the record. Knowing where to find these things is reassuring even if you never have to refer to them. If you do bring notes to the podium, just make sure you are not reading your entire argument from them.

4.

**Effective Advocacy before the Fourth
Circuit**

Moderator: Hon. Albert Diaz, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit

Panel:

**Hon. Paul V. Niemeyer, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Hon. Stephanie D. Thacker, Circuit Judge, U.S. Court of Appeals for the Fourth Circuit
Kannon K. Shanmugam, Chair, Supreme Court and Appellate Practice Group, Paul, Weiss,
Rifkind, Wharton & Garrison, LLP
Jennifer P. May-Parker, Assistant U.S. Attorney, Office of the U.S. Attorney, EDNC**

Effective Advocacy before the Fourth Circuit

Honorable Albert Diaz, Circuit Judge

1. In most cases, a well-prepared judge has some sense of what the result should be. But my own experience has been that in a fair number of the close difficult cases (and our court tends to limit argument to those cases), I remain uncertain before the argument. And in those cases, a well-prepared, thoughtful advocate can make all the difference.

You must be the best prepared lawyer in the courtroom. This is your one case before our court. I will be prepared, but there is no way that I should know the record, the briefs, and the cases better than you.

2. Think long and hard about the case, its strengths and weaknesses. Be prepared to explain why your proposed disposition of the case is fair and right not just for your facts but for others that may follow.
3. Anticipate the questions (including the dreaded hypotheticals) and be ready with thoughtful responses that are in fact responsive, but nonetheless move the ball in your favor.
4. Participate in at least one moot court argument. Get lawyers to moot you who know nothing about the case, but who are willing to prepare as a judge would. They will open your eyes to points (some

obvious, others not so much) that you've either overlooked or not emphasized enough.

5. Be clear about what you want the court to do when the smoke clears. Affirm, reverse, vacate in full or in part, etc. Your brief should spell it out in detail but be prepared to explain it at argument.
6. Accept the standard of review. If you're the appellant, you can't run from an abuse of discretion or clear error standard. Nor can the appellee ignore de novo review. You have to own the standard (good or bad) and explain why you win either because or in spite of the standard of review.
7. Speak slowly and clearly, but don't scream at us. I've seen the extremes, the Machine Gun Kellys, the shouters, and the mimes in the courtroom. None is effective, even when they have something important to say. Come up for air occasionally, and let your voice be heard. For you trial lawyers--get someone actually versed in appellate arguments to make the case. But if you insist on doing it yourself, remember that a three-judge panel (or a 15-judge en banc one) is not a jury. It's not a closing, but rather a conversation. Treat it as such.

8. Don't bring a library with you to the podium. Former SG Paul Clement, who has argued in our court on a number of occasions, brings himself to the podium, that's it. You don't need to go that far, but neither should you back a truck up to the podium full of your materials. They are likely to stray from the podium, crash to the floor, and annoy both you and the judges. A notebook with an outline and the principal record excerpts and cases should do.
9. Avoid reading your argument. It's Ok to glance at your notes from time to time, but the reality is you're not going to get very far in your prepared remarks before the questions come—or at least you hope that's how it will go. You should memorize your introduction and conclusion, but that's it.
10. Zero in on the points that matter. Identify in advance where the heart or theme of your argument lies and hammer those points home in the argument.
11. Don't split an argument. Sometimes it's unavoidable, it's almost never effective and detracts from the conversation.
12. Expect a hot bench prepared with questions. You must answer them!!! Rather than wince, you should **stop** and rejoice when the court asks questions. As Supreme Court Justice Robert Jackson once observed, if a judge is asking a question, it means he's not asleep!! And when you're done rejoicing, answer the court's questions--I repeat answer the panel's questions!!!! Don't restate

it, evade it, or worse yet, ignore it. Don't say you'll get to it later. And never answer a question with one of your own (Believe me, I've seen it happen). If you're unsure of what's being asked, say so. But once the fog clears, answer the question!!!!

The answer to the question should always begin with "yes" or "no". Only then, should you deign to explain or qualify.

Oral argument isn't a boxing match where you get points for ducking and weaving. When done right, an argument is a conversation between the advocate and the panel. And that conversation is at its most effective when the advocate eagerly anticipates and yes, forthrightly answers the judges' questions and in doing so, explains why she should prevail. This gets back to preparation, for a lawyer who has prepared well for argument will have largely anticipated where the weaknesses are in his case (and believe me, there almost always is a weakness in a case that our court has set for argument) and is ready to address them head on.

13. Even the best prepared lawyer will occasionally be stumped by a question. What then? Honesty is the best medicine. That is, say so, rather than give an uninformed or idiotic answer. In the words of Abraham Lincoln, it's generally better in such an instance to remain silent and be thought a fool than to speak out and remove all doubt.

14. Similarly, if you make a mistake during the argument (i.e. you misstate something in the record, or the holding of case), admit it, preferably right away, but certainly in writing if you can't clear it up during the argument. We all make mistakes, judges included. I've been on panels where we've gone back and granted panel rehearing to fix a mistake. If we can do it, surely you can too.
15. Don't argue with the panel or interrupt a judge. There will come a time where you have exhausted your powers of persuasion and a judge (or worse the entire panel) is not buying what you're selling. Time to take it on the chin, move on (respectfully) and stop the bleeding. Be patient. Stop, listen to what the judge is saying (whether asking a question or waxing poetic), be sure he/she has stopped, and then respond. It's such a simple courtesy, but one often overlooked, to the advocate's detriment.
16. A good advocate knows when to concede a point that doesn't matter, and when the flag must be planted without surrender. Here again, preparation is the key, for if you know your case backwards and forwards, you will know on which hills you must fight, and which can be retreated from gracefully.
17. Know when to hold them, and when to fold them. If a panel is with you, don't snatch defeat from the jaws of victory!!! I've seen a few lawyers get up to the podium, and having taken the temperature of the room, make a very brief statement, and then ask the panel if

they have questions. They answer them, and then sit down!!! How refreshing!!

18. Pay attention to all members of the panel during your argument and when answering questions. Remember the math--you need two votes to win, so focusing your attention on one judge will not do. In the same way, be respectful of the panel no matter how silly you may think the questions to be.

Look the judges in the eye--don't engage in a staring contest but let them know that you see them and wish to engage (respectfully) in a conversation with them.

Know your panel. Their names, titles, etc. It's Judge, not Justice, Diaz, not Dieazzz. It's embarrassing when you butcher a judge's name or title.

19. Don't attack your opponent—attack his arguments. Make your point without making it personal. As tempting as it may be, don't roll your eyes, shake your head vigorously (I've seen all of these, or my clerks have), or make any other public display of disdain for your opponent's argument. Don't mistake civility for weakness.
20. Treasure your credibility. We will presume good faith on your part as a lawyer and officer of the court. But the quickest way to rebut

that presumption is to misrepresent something or make a ridiculous argument.

21. Finally, enjoy the moment! At our last judicial conference, I had a young lawyer come up to me and gush over her first argument before our court. It was the highlight of her career. That she found it to be such a positive experience (even though, as she admitted, she lost) is what I hope all lawyers will be able to say when they argue a case.

5.

How to Write a Persuasive Appellate Brief

Ross Guberman, President, Legal Writing Pro LLC; Founder, BriefCatch LLC

Additional Link: [Nov-15-8.00am-2018-08-Guberman-Judges-Speaking-Softly-survey-on-legal-writing.pdf \(duke.edu\)](#)

Fourth Circuit Appellate Conference

ROSS GUBERMAN

President, Legal Writing Pro

ROSS GUBERMAN is the president of Legal Writing Pro LLC and the founder of BriefCatch LLC. From Alaska and Hawaii to Paris and Hong Kong, Ross has conducted thousands of workshops on three continents for prominent law firms, judges, agencies, corporations, and associations. His workshops are among the highest rated in the world of legal education.

Ross holds degrees from Yale, the Sorbonne, and the University of Chicago Law School.

Ross's *Point Made: How to Write Like the Nation's Top Advocates* is an Amazon bestseller that reviewers have praised as a "tour de force" and "a must for the library of veteran litigators." Ross also wrote *Point Taken: How to Write Like the World's Best Judges*, which *Court Review* called "the best book . . . by far . . . about judicial writing." He coauthored *Deal Struck: The World's Best Drafting Tips* with Gary Karl and created the online contract editor ContractCatch.

Ross's newest product, [BriefCatch](#), is a first-of-its-kind editing add-in. Its devoted users include lawyers, law firms, judges, courts, agencies, and corporations around the world. BriefCatch was named one of TechnoLawyer's Top 10 Products of 2019.

An active member of the bar and a former attorney at a top law firm, Ross has also worked as a translator, professional musician, and award-winning journalist. *Slate* called his investigative reporting about Fannie Mae "totally brilliant and prescient," and Pulitzer Prize-winner Gretchen Morgenson wrote that his article "made even the most jaded Washingtonian take note."

For nearly a decade, Ross has been invited to train all new federal judges on opinion writing. He has presented at many other judicial conferences and for the Association for Training and Development, the Professional Development Consortium, the Appellate Judges Education Institute, and the Corporate Counsel Summit, among others.

Ross is a founding "Trusted Adviser" for the Professional Development Consortium and consults for Caren Stacy's OnRamp Fellowship. He is often quoted in such publications as the *New York Times* and *American Lawyer*.

Ross won the Legal Writing Institute's 2016 Golden Pen award for making "an extraordinary contribution to the cause of good legal writing." He was also honored as one of the 2016 Fastcase 50 for legal innovators, and his feed is on the ABA's Best Law Twitter list.

A Minnesota native, Ross lives with his wife and two children outside Washington, DC. Family travel has taken them everywhere from Argentina and Bhutan to Greenland and Zambia.

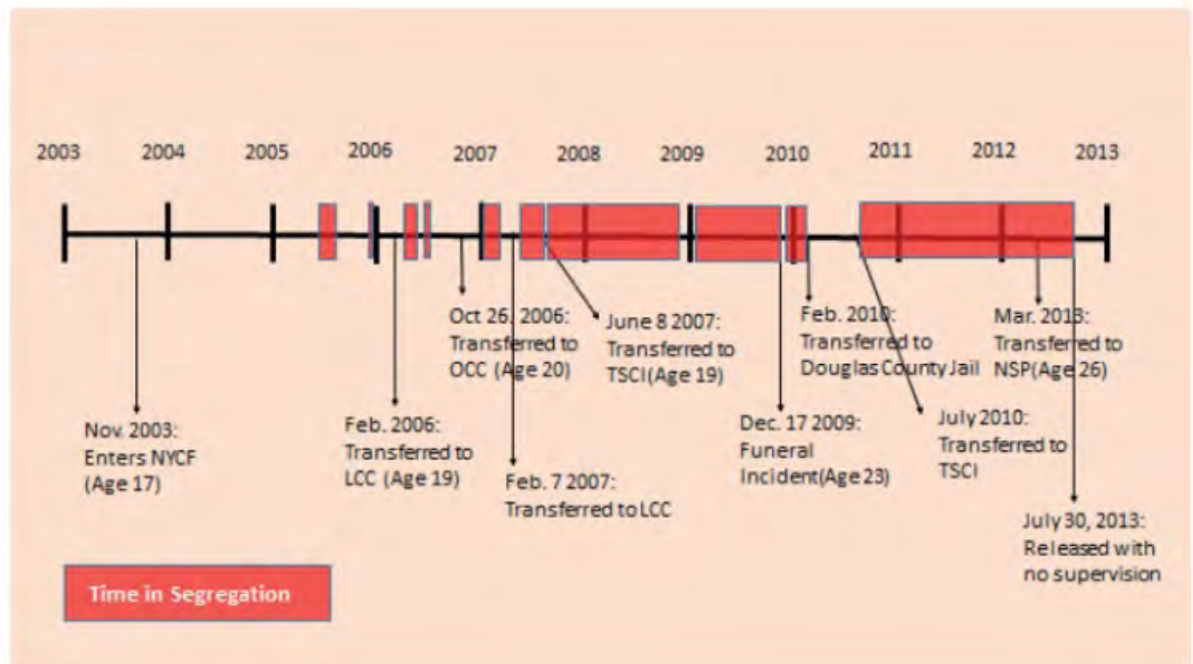
Warm-Up: Picture This

While Ashley’s claims are factually distinguishable from *Lithium Ion*, they are squarely on point with *In re Domestic Drywall Antitrust Litig.*, No. 13-2437, 2016 WL 3453147 (E.D. Pa. Jun. 22, 2016), an opt-out case in which the plaintiffs also sought to extend the end-date of an alleged conspiracy period:

Comparison of Issues: *Lithium Ion*, *Drywall*, and *Ashley Furniture*

	<i>Lithium Ion</i>	<i>Drywall</i>	<i>Ashley</i>
Was the underlying conspiracy in dispute?	No	Yes	Yes
Did the new claim extend past the date the first litigation began?	No	Yes	Yes
Did plaintiff plead “specific instances” of “sensitive, non-public information being exchanged”?	Yes	No	No

Sources: *Lithium Ion*, 2014 WL 309192, at *2-4, *12; *Drywall*, 2016 WL 3453147 at *1-3.



Pet. App. 270a.

Before reaching this question, we should have heeded what the Supreme Court has said about the matter. Many times, the Court has discussed the nature of *Miranda*. And the answer could not be clearer:

Supreme Court cases referring to <i>Miranda</i> warnings as “prophylactic”	Supreme Court cases referring to <i>Miranda</i> warnings as a “constitutional right”
<p><i>Michigan v. Payne</i>, 412 U.S. 47, 53 (1973) • <i>Michigan v. Tucker</i>, 417 U.S. 433, 439 (1974) • <i>Brown v. Illinois</i>, 422 U.S. 590, 600 (1975) • <i>Fare v. Michael C.</i>, 439 U.S. 1310, 1314 (1978) • <i>North Carolina v. Butler</i>, 441 U.S. 369, 374 (1979) • <i>United States v. Henry</i>, 447 U.S. 264, 274 (1980) • <i>South Dakota v. Neville</i>, 459 U.S. 553, 564 n.15 (1983) • <i>New York v. Quarles</i>, 467 U.S. 649, 654 (1984) • <i>Oregon v. Elstad</i>, 470 U.S. 298, 309 (1985) • <i>Connecticut v. Barrett</i>, 479 U.S. 523, 528 (1987) • <i>Arizona v. Roberson</i>, 486 U.S. 675, 681 (1988) • <i>Duckworth v. Eagan</i>, 492 U.S. 195, 203 (1989) • <i>Michigan v. Harvey</i>, 494 U.S. 344, 350 (1990) • <i>McNeil v. Wisconsin</i>, 501 U.S. 171, 176 (1991) • <i>Withrow v. Williams</i>, 507 U.S. 680, 691 (1993) • <i>Brecht v. Abrahamson</i>, 507 U.S. 619, 629 (1993) • <i>Davis v. United States</i>, 512 U.S. 452, 458 (1994) • <i>Montejo v. Louisiana</i>, 556 U.S. 778, 794 (2009) • <i>Maryland v. Shatzer</i>, 559 U.S. 98, 103 (2010) • <i>J.D.B. v. North Carolina</i>, 564 U.S. 261, 269 (2011) • <i>Howes v. Fields</i>, 565 U.S. 499, 507 (2012)</p>	

3

If affirmed, the decision below would reincarnate Indian Territory in the form of “Indian country” under 18 U.S.C. § 1151(a), cleaving the State in half. The decision below would create the largest Indian reservation in America today, which would include Tulsa—Oklahoma’s second-largest city:



That revolutionary result would shock the 1.8 million residents of eastern Oklahoma who have universally understood that they reside on land regulated by state government, not by tribes.

Affirmance would plunge eastern Oklahoma into civil, criminal, and regulatory turmoil and overturn 111 years of Oklahoma history. Since statehood, not a single criminal case involving an Indian has been tried in federal court on the theory that the eastern half of Oklahoma is a reservation. Rather, upon Oklahoma’s creation, Congress directed that the State, not the federal government, would try Indians for local crimes like murder. That’s why, starting in 1907, the federal territorial courts immediately transferred all non-federal cases involving Indians to state courts.

Big-Picture Command: The 4-D Opening

In your introduction or statement of the case, show how you win from four perspectives: (1) narrative, (2) logical, (3) pragmatic, and (4) contrasting.

From Barbara Underwood, Solicitor General of New York

INTRODUCTION

The apportionment of seats in the House of Representatives has always been based on the total population of each State, without regard to immigration status. This unbroken practice is compelled by constitutional and statutory mandates to count, for purposes of apportionment, the “whole Number of . . . Persons,” U.S. Const. art. I, § 2, cl. 3; the “whole number of persons in each State,” U.S. Const. amend. XIV, § 2; 2 U.S.C. § 2a(a); and the “total population,” 13 U.S.C. § 141(b). Those commands have been understood since their adoption to encompass all immigrants, including undocumented immigrants—the result of a clear choice to provide representation in the House to all persons affected and served by the federal government, and not only to citizens or voters.

The Presidential Memorandum at issue here defies these unambiguous mandates and breaks with more than two hundred years of history by excluding from the apportionment base millions of undocumented immigrants who indisputably reside in a State. The Memorandum bases this policy on purported “principles of representative democracy” (U.S. Br. App. (“App.”) 8a (reprinting *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020)), but the policy contravenes the actual “principle of representational equality” that was chosen by the Founders, reaffirmed by the Fourteenth Amendment’s framers, and codified by the Congress that enacted the 1929 Census Act: that “the basis of representation in the House” should be “every individual of the community at large.” *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016) (quotation marks omitted).

Bridging
Transitions:

This practice

Those commands

these mandates

this policy

Parallel Series:

a principle

(1) chosen . . . (2)
reaffirmed . . . and (3)
codified . . .

Narrative Opening:

"has always been
based on"

Pragmatic
Dimension:

Why should
anyone care?

Flashpoint of
Controversy:

Representational
Democracy vs.
Representational
Equality

Macro Logic Command: Argument

ARGUMENT	42
I. THE LANDOWNER’S INTENT—NOT THE PUBLIC’S USE— DETERMINES WHETHER LAND HAS BEEN IMPLIEDLY DEDICATED.....	42
A. Proponents Of Implied Parkland Must Demonstrate Both Dedication By The Landowner And Acceptance By The Public.....	43
1. Intent to dedicate.....	44
2. Acceptance	47
B. Appellants’ Proposed Legal Standard Is Deeply Flawed.....	48
1. Appellants’ proposed rule is unsupported by this Court’s implied-dedication case law.....	48
2. Appellants’ rule would have profoundly negative consequences.....	55
3. Appellants’ rule is singularly inappropriate in this case, where the landowner is the City and the property at issue is a street.....	59

Macro Narrative Command: Facts

III.	FACTUAL BACKGROUND.....	7
A.	<i>Parishioners Gather For Bible Study Class At Mother Emanuel.....</i>	7
B.	<i>Roof Kills Nine Parishioners.....</i>	9
C.	<i>Roof Flees And Is Arrested.....</i>	12
D.	<i>Roof Confesses</i>	13
E.	<i>Roof's Planning, Preparation, And Racist Website</i>	15
F.	<i>Other Physical And Forensic Evidence</i>	17
IV.	PRETRIAL PROCEEDINGS.....	18
A.	<i>Roof's Letter To Federal Prosecutors.....</i>	18
B.	<i>The First Competency Hearing</i>	20
C.	<i>Roof's Invocation Of His Right To Self-Representation</i>	21
V.	THE GUILT PHASE.....	22
A.	<i>Jury Selection</i>	22
B.	<i>Guilt Phase Evidence</i>	23

Micro Logic Command: Sections

Pam Karlan's Supreme Court brief for Petitioner, *Andrew F. v. Douglas County Sch. District*

¶ First Sentences

1. The Tenth Circuit erred in assessing the substantive adequacy of the School District's actions against a "merely more than de minimis benefit" standard.
2. The Tenth Circuit's standard also contravenes this Court's decision in *Bd. of*

Education v. Rowley, 458 U.S. 176 (1982).

3. *Rowley* also makes clear that the IDEA's mandate to provide an "appropriate" education requires accounting for the Act's expressed objectives and implementing provisions.
4. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.
5. The "substantially equal opportunity" standard is also eminently workable.
6. Finally, the "substantially equal opportunity" standard leaves school officials ample leeway to craft the particulars of educational programs to meet each child's needs, while protecting the inherent dignity and worth of every child.

Style Command

→ What did Justice Kagan use in place of the boldfaced language?

In each of these two cases, a state court held that it had jurisdiction **with respect to** Ford Motor Company (**hereinafter, "Ford"**) in a products-liability suit **that was the result of** a car accident. The accident **transpired** in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—**inter alia**, advertising, selling, and servicing the model of vehicle the suit claims is defective. **Nevertheless**, Ford contends that jurisdiction is improper **due to**

the fact that the particular **car that was involved** in the crash was not **initially** sold in the forum State; **moreover, it was not** designed or manufactured there. We reject that argument. **Where** a company **similar to** Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts can entertain the **suit that results therefrom.**

United States v. Stevens: Patricia Millett's brief for Robert Stevens

Replace the boldfaced terms with something tighter or punchier. Aim for vivid verbs and fewer adverbs.

This is not a case **regarding** dogfighting or animal cruelty. The government and Stevens stand together **taking a firm stance against** that. The question **in this case** is more fundamental: **whether or not** the government **has the ability to** send an individual to jail for up to five years just for making films—films that are not obscene, pornographic, inflammatory, defamatory, or even untruthful. They are controversial. But that is supposed to invigorate, not **substantially limit**, the First Amendment's protection.

The Solicitor General **adamantly claims**, however, that, **with regard to** a subject as topical as the humane treatment of animals, Congress has the power to roll back the First Amendment's protection based **upon** no more than a legislative weighing of the speech's pros and cons. **Nevertheless**, the notion that Congress can suddenly strip a broad swath of never-before-regulated speech of First Amendment protection and send its creators to federal prison, based on no more than an ad hoc balancing of the "expressive value" of the speech against its "societal costs" is alien to constitutional jurisprudence and a dangerous threat to liberty.

That is just the beginning of this statute's problems. Neither the government nor its amici can really believe the foundational premise on which their constitutional arguments rest: that images of animals being intentionally wounded or killed are valueless and harmful. One need look no further than the websites of the government's animal-rights amici, which use such images to inform, educate, and raise funds. Documentaries and photographs depicting **significantly** more

gruesome dogfights . . . have fueled the animal rights movement, **provided support for** legislation, and **actively encouraged** vigorous public debate. Similar images **are commonly found in** our media, from Hemingway to hunting videos, from Charge of the Light Brigade to Conan, the Barbarian, and from the reports of investigative journalists to the work of independent documentary makers.

The government's only answer is to ensure that prosecutors and juries will inevitably agree that depictions **similar to** Conan, the Barbarian have "serious value." That is debatable. **Additionally, it** misses the point. As the seven "value" exceptions **indicate**, Congress implicitly concluded that this speech was not valueless based on its content, but only based on its viewpoint or speaker identity.

Therefore, Congress enacted a statute, the effect of which is to **make** the freedom to speak **contingent upon** the speaker's willingness to run the gauntlet of value assessments by prosecutors and juries with a five-year felony sentence hanging over his head.

- Replace a phrase with a word
- Replace a longer word with a shorter word
- Replace a vague verb with a precise verb
- Replace a vague verb and an adverb with a single precise verb
- Replace a long transitional word with a punchier transitional word
- Shift a transitional device to add variety in sentence structure
- Replace flat language with a vivid image
- Replace a “fake” verb phrase (“TAKE into account,” “PROVIDE an illustration of”) with a strong verb (“consider,” “illustrate”)
- Replace a “to be” phrase (“IS indicative of”) with a single strong verb (“suggests”)
- Create a parallel sequence of strong verbs or strong nouns

Micro Logic Command: Transitions

Paul Clement's brief in *HHS v. Florida*:

Contrary to the federal government's assertions, the Court has not hesitated to strike down laws that are not proper, even when they are integral components of otherwise permissible regulatory schemes. _____ this Court has done so while rejecting challenges to the balance of the regulatory scheme. I _ / a __ / e _____ the federal government's attempts to prove that the mandate is a necessary and proper regulation of the health care market only underscore why it is not.

[. . .]

The federal government's basic argument is a simple one: Congress has a uniquely strong interest in forcing individuals to maintain health care insurance because most people are likely to need health care services sometime in their lives but cannot predict the timing and magnitude of that need in advance, and may shift the costs of such services if they do not

have insurance when the need arises. A ___/___/t___/___/b___/___, but the health care market is hardly the only market that fits that description. ___/___, life insurance and burial insurance both finance far more universal needs that are every bit as likely to arise “from a bolt-from-the-blue event,” and will be paid for one way or another even if individuals fail to plan for them.

The problem with the guaranteed issue and community ratings provisions is not that they would be ineffective without the individual mandate. Q___/t___/c___, the problem is that those provisions would work far too well—many would “tak[e] advantage of” those guarantees by “wait[ing] to purchase health insurance until they needed care.” [. . .]

Contrary to the federal government’s assumption, penalties do not become taxes—or valid exercises of Congress’ tax power—simply because they are housed in the tax code and collected by the Internal Revenue Service. T___/___/s___, Congress may invoke its tax power (in

conjunction with its power under the Necessary and Proper Clause) to impose penalties that enforce tax laws.

In any event, the federal government's effort to reconceptualize the mandate as a tax does not provide the limiting principle it otherwise lacks or help it locate a historical analogue for this unprecedented power. T __ / b _ _ _ _ _ / 1 _ _ _ is that Congress