

# Contents

<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxi</i>
<b>Part I: The Art (and Science) of Advocacy</b>	<b>1</b>
<b>Chapter 1: Introduction to Rhetoric and Bias</b>	<b>3</b>
§ 1.1 Rhetoric	3
§ 1.1.1 The Greeks (425 BCE to 225 BCE)	4
a. Syllogism	4
b. Enthymeme	5
c. Antithesis	5
d. Anadiplosis	5
e. Anaphora	6
f. Antistrophe	6
§ 1.1.2 The Romans (35 CE to 410 CE)	7
§ 1.1.3 The Middle Ages (426 CE to 1320 CE)	7
§ 1.1.4 The Renaissance (1426 CE to 1623 CE)	7
§ 1.2 Using Rhetoric Today	8
§ 1.2.1 Storytelling/Narrative	8
§ 1.2.2 Priming	8
§ 1.2.3 Negativity Bias	9
§ 1.2.4 Confirmation Bias	9
§ 1.2.5 Racial Bias	10
§ 1.3 Ethics of Using Implicit Biases to Support Your Position	11
<b>Part II: Motion Briefs</b>	<b>15</b>
<b>Chapter 2: Motion Briefs</b>	<b>17</b>
§ 2.1 Audience	17
§ 2.2 Purpose	18
§ 2.3 Conventions	18
§ 2.4 Generative Artificial Intelligence (GenAI)	18
§ 2.5 <i>State v. Patterson</i>	19

<b>Chapter 3:</b>	<b>Deciding on a Theory of the Case</b>	<b>23</b>
<b>Chapter 4:</b>	<b>Drafting the Caption and the Introduction</b>	<b>25</b>
§ 4.1	The Caption	25
§ 4.2	Introductory Paragraph/Preliminary Statement	26
<b>Chapter 5:</b>	<b>Drafting the Statement of Facts</b>	<b>29</b>
§ 5.1	Select the Facts	30
§ 5.1.1	Background Facts	30
§ 5.1.2	Legally Significant Facts	30
§ 5.1.3	Emotionally Significant Facts	30
§ 5.2	Select an Organizational Scheme	31
§ 5.3	Present the Facts in a Light Favorable to Your Client	31
§ 5.3.1	Prime the Judge to Rule in Your Client's Favor	32
§ 5.3.2	Create a Favorable Context	32
§ 5.3.3	Tell the Story from the Client's Point of View	33
§ 5.3.4	Emphasize the Facts That Support Your Theory of the Case, and De-emphasize Those That Do Not	34
	a. Airtime	34
	b. Detail	35
	c. Positions of Emphasis	36
	d. Sentence Length	37
	e. Active and Passive Voice	38
	f. Dependent and Main Clauses	38
§ 5.3.5	Select Words Both for Their Denotation and Their Connotation	39
§ 5.4	Checklist for Critiquing the Statement of Facts	40
<b>Chapter 6:</b>	<b>Ordering the Issues and Arguments</b>	<b>41</b>
§ 6.1	Present the Issues and Arguments in a Logical Order	41
§ 6.2	Decide Which Issues and Arguments Should Be Presented First	42
<b>Chapter 7:</b>	<b>Drafting the Issue Statements or Questions Presented</b>	<b>43</b>
§ 7.1	Select the Lens	43
§ 7.2	Select a Format	44
§ 7.3	Make Your Issue Statement Subtly Persuasive	45
§ 7.4	Checklist for Critiquing the Issue Statement	47
<b>Chapter 8:</b>	<b>Drafting the Headings</b>	<b>49</b>
§ 8.1	Use Your Headings to Answer the Questions Set Out in the Issue Statements	49
§ 8.2	Use Your Headings to Define the Structure of the Argument	50
§ 8.3	Use Your Headings to Persuade	51
§ 8.4	Make Your Headings Readable	52

§ 8.5	Follow the Conventions: Number, Placement, and Typefaces	53
§ 8.6	Checklist for Critiquing the Argumentative Headings	54
<b>Chapter 9:</b>	<b>Drafting the Arguments</b>	<b>55</b>
§ 9.1	Identify Your Assertions and Your Support for Those Assertions	55
§ 9.1.1	Setting Out Your Assertion	56
§ 9.1.2	Supporting Your Assertion	56
§ 9.2	Select an Organizational Scheme	58
§ 9.3	Present the Rules in the Light Most Favorable to Your Client	62
§ 9.4	Present the Cases in the Light Most Favorable to Your Client	65
§ 9.5	Present the Arguments in the Light Most Favorable to Your Client	67
§ 9.5.1	Present Your Own Arguments First	67
§ 9.5.2	Give the Most Airtime to Your Own Arguments	68
§ 9.5.3	Use Language That Strengthens Your Arguments and Undermines the Other Side's Arguments	68
§ 9.5.4	Use the Same Persuasive Techniques You Used in Setting Out the Facts, Issues, Rules, and Analogous Cases	69
§ 9.6	Checklist for Critiquing the Argument	69
<b>Chapter 10:</b>	<b>Drafting the Prayer for Relief and Signing the Brief</b>	<b>71</b>
§ 10.1	The Prayer for Relief	71
§ 10.2	Signing the Brief	72
<b>Chapter 11:</b>	<b>Sample Briefs</b>	<b>73</b>
§ 11.1	Briefs from the <i>Patterson</i> Case	74
§ 11.2	Briefs from a Civil Case Seeking Motion for Summary Judgment	98
<b>Part III:</b>	<b>Appellate Briefs</b>	<b>119</b>
<b>Chapter 12:</b>	<b>Practicing Before an Appellate Court</b>	<b>121</b>
§ 12.1	Types of Appellate Review	122
§ 12.2	Time Limits for Filing the Notice of Appeal or Petition for Discretionary Review	123
§ 12.3	The Notice of Appeal or Notice for Discretionary Review	123
§ 12.4	Scope of Review	124
§ 12.5	The Record on Appeal	124
§ 12.6	Types of Briefs	125

<b>Chapter 13: Drafting an Appellate Brief: Audience, Purpose, and Conventions</b>	<b>127</b>
§ 13.1 Audience	127
§ 13.2 Purpose	128
§ 13.3 Conventions	129
<b>Chapter 14: Getting the Case: <i>United States v. Josephy</i></b>	<b>133</b>
<b>Chapter 15: Preparing to Write the Brief</b>	<b>137</b>
§ 15.1 Reviewing the Record for Error	137
§ 15.2 Selecting the Issues on Appeal	139
§ 15.2.1 Was There an Error?	139
§ 15.2.2 Was the Error Preserved?	140
§ 15.2.3 What Is the Standard of Review?	140
§ 15.2.4 Was the Error Harmless?	142
§ 15.3 Preparing an Abstract of the Record	143
§ 15.4 Preparing the Record on Appeal	144
§ 15.5 Researching the Issues on Appeal	144
<b>Chapter 16: Planning the Brief</b>	<b>147</b>
§ 16.1 Analyzing the Facts and the Law	147
§ 16.2 Developing a Theory of the Case	149
§ 16.3 Selecting an Organizational Scheme	151
§ 16.3.1 Deciding on the Number of Issues and Headings	151
§ 16.3.2 Ordering the Issues and Arguments	152
<b>Chapter 17: Beginning the Appellate Brief: The Cover, Tables, and Jurisdictional Statement</b>	<b>155</b>
§ 17.1 Preparing the Cover	155
§ 17.2 Preparing the Table of Contents	155
§ 17.3 Preparing the Table of Authorities	156
§ 17.4 Drafting the Jurisdictional Statement	156
<b>Chapter 18: Drafting the Statement of Issues Presented for Review</b>	<b>159</b>
§ 18.1 Select a Format	160
§ 18.2 Make the Issue Statement Subtly Persuasive	161
§ 18.2.1 State the Question So That It Suggests the Conclusion You Want the Court to Reach	161
§ 18.2.2 Emphasize the Facts That Support Your Theory of the Case	163
§ 18.2.3 Emphasize or De-emphasize the Burden of Proof and Standard of Review	163
§ 18.2.4 Make Sure the Issue Statement Is Readable	164

<b>Chapter 19: Drafting the Statement of the Case and Statement of Facts</b>	<b>165</b>
§ 19.1 Check the Rules	165
§ 19.2 Draft the Statement of the Case	166
§ 19.3 Draft the Statement of Facts	166
§ 19.3.1 Select the Facts	167
a. Legally Significant Facts	167
b. Emotionally Significant Facts	167
c. Background Facts	168
§ 19.3.2 Select an Organizational Scheme	168
§ 19.4 Present the Facts in the Light Most Favorable to the Client	168
§ 19.4.1 Prime the Judges to Rule in Your Client's Favor	169
§ 19.4.2 Create a Favorable Context	169
§ 19.4.3 Tell the Story from Your Client's Point of View	171
§ 19.4.4 Emphasize Those Facts That Support Your Theory of the Case and De-emphasize Those That Do Not	173
a. Airtime	173
b. Detail	174
c. Positions of Emphasis	176
d. Sentence and Paragraph Length	177
e. Sentence Construction	178
f. Active and Passive Voice	179
§ 19.4.5 Choose Words Carefully	180
§ 19.4.6 Be Subtly Persuasive	181
<b>Chapter 20: Drafting the Summary of the Argument</b>	<b>183</b>
<b>Chapter 21: Drafting the Argumentative Headings</b>	<b>185</b>
§ 21.1 Use the Argumentative Headings to Outline the Argument for the Court	185
§ 21.2 Use the Argumentative Headings to Persuade	186
§ 21.2.1 Make a Positive Assertion	186
§ 21.2.2 Provide Support for Your Assertions	188
§ 21.2.3 Make Sure That Your Headings Are Neither Too Specific nor Too General	189
§ 21.2.4 Make Your Headings Readable	189
§ 21.2.5 Use the Same Persuasive Techniques You Used in Drafting the Issue Statements and Statement of Facts	190
§ 21.2.6 Use Conventional Formats for Headings	191
<b>Chapter 22: Drafting the Arguments</b>	<b>193</b>
§ 22.1 Knowing What You Need, and Want, to Argue	193
§ 22.2 Selecting an Organizational Scheme	194
§ 22.3 Presenting the Rules in the Light Most Favorable to Your Client	198

§ 22.4	Presenting the Cases	201
§ 22.5	Constructing and Presenting the Arguments	206
§ 22.6	Using Quotations	209
§ 22.7	Responding to the Other Side's Arguments	211
§ 22.8	Avoiding the Common Problem of Neglecting to Make Explicit Connections	214
§ 22.9	Avoiding the Common Problem of Not Dealing with Weaknesses	216
§ 22.10	Avoiding the Mistake of Overlooking Good Arguments	217
<b>Chapter 23:</b>	<b>Completing the Brief</b>	<b>219</b>
§ 23.1	Drafting the Conclusion or Prayer for Relief	219
§ 23.2	Preparing the Signature Block	220
§ 23.3	Preparing the Appendix	220
§ 23.4	Revising, Editing, and Proofreading	221
<b>Chapter 24:</b>	<b>Sample Briefs</b>	<b>223</b>
§ 24.1	Appellant's Brief	224
§ 24.2	Appellee's Brief	249
<b>Part IV:</b>	<b>Oral Advocacy</b>	<b>267</b>
<b>Chapter 25:</b>	<b>Preparing and Presenting an Effective Oral Argument</b>	<b>269</b>
§ 25.1	Audience	269
§ 25.2	Purpose	270
§ 25.3	Preparing for Oral Argument	270
§ 25.3.1	Deciding What to Argue	270
§ 25.3.2	Preparing an Outline	270
§ 25.3.3	Practicing the Argument	271
§ 25.3.4	Reviewing the Facts and the Law	271
§ 25.3.5	Organizing Your Materials	271
a.	Notes or Outline	271
b.	The Briefs	271
c.	The Record	272
d.	The Law	272
§ 25.4	Courtroom Procedures and Etiquette	272
§ 25.4.1	Seating	272
§ 25.4.2	Before the Case Is Called	272
§ 25.4.3	Courtroom Etiquette	272
§ 25.4.4	Appropriate Dress	273
§ 25.5	Making the Argument	273
§ 25.5.1	Introductions	274
§ 25.5.2	Opening	274
§ 25.5.3	Statement of the Issues	274
a.	The Moving Party	274
b.	The Responding Party	275
§ 25.5.4	Summary of the Facts	275

	a. The Moving Party	275
	b. The Responding Party	275
§ 25.5.5	The Argument	276
§ 25.5.6	Answering Questions	277
§ 25.5.7	The Closing	278
§ 25.5.8	Rebuttal	278
§ 25.6	Delivering the Argument	278
§ 25.6.1	Breathe	278
§ 25.6.2	Do Not Read Your Argument	279
§ 25.6.3	Maintain Eye Contact	279
§ 25.6.4	Do Not Slouch, Rock, or Put Your Hands in Your Pockets	279
§ 25.6.5	Limit Your Gestures and Avoid Distracting Mannerisms	279
§ 25.6.6	Speak So That You Can Be Easily Understood	279
§ 25.7	Making Your Argument Persuasive	280
§ 25.8	Handling the Problems	280
§ 25.8.1	Counsel Has Misstated Facts or Law	280
§ 25.8.2	You Make a Mistake	281
§ 25.8.3	You Do Not Have Enough Time	281
§ 25.8.4	You Have Too Much Time	281
§ 25.8.5	You Do Not Know the Answer to a Question	281
§ 25.8.6	You Do Not Understand a Question	282
§ 25.8.7	You Become Flustered or Draw a Blank	282
§ 25.8.8	You Are Asked to Concede a Point	282
§ 25.9	A Final Note	282
§ 25.10	Checklist for Critiquing the Oral Argument	282
	<i>Glossary of Terms</i>	285
	<i>Index</i>	293