Positioned squarely between the forces of competing litigators is the judge (or, in some cases, the mediator or arbitrator). The judge naturally has significant discretionary influence over the proceeding, and how effectively a litigator appeals to the judge has considerable consequences for the client.

A judge begins with the applicable case law, statutory language, constitutional principles, and procedural rules to serve as guideposts. The judge’s primary job is to ensure that the procedural rules are followed and that the process is an equitable search for resolution. Judges typically pick up a new case not knowing how it will be resolved. They alternately lean one way and then the other as they consider the various arguments being presented by counsel.

By the end of the process, the judge has read the parties’ briefs and the primary precedents, considered the difficult issues, and wrestled
with how the case fits into applicable legal principles. At the core of the system is the conviction that, above all else, justice should be objective and evenhanded.

A. The Legal Argument

What Are the Keys to Courtroom Success?
To think like the judge, the litigator must first know the judge. The more familiar the litigator is with the personality and proclivities of the judge before him, the smoother will be his dealings with the court. There are a number of basic, but time-tested, suggestions for success in the courtroom.

Preparation. Every time litigators appear before the court, their professional reputations are on the line. If the litigator is unprepared, the judge is going to know it immediately, and the litigator will lose credibility that likely can never be regained.

Language. The litigator must use language that the judge and jurors hear in their everyday lives. Attempts to impress them with an extensive vocabulary are counterproductive. The litigator must never let the jury get the impression that he is talking down to them.

Pace. If the litigator speaks too hurriedly, it will be difficult for those listening to understand, and eventually they may stop trying.

Discipline. Litigators must train themselves to stand still with nothing in their hands. They should use their hands to add natural emphasis to what they are saying.

What Are the Most Effective Tools of a Litigator?
The primary tools of a litigator’s trade are words. A litigator who uses them well maintains a distinct advantage over his adversary—whether it’s in the courtroom, at the negotiating table, or in an appellate brief.
A litigator starts with the words of others—statutes, judicial opinions, contracts, and the vast ocean of language that eventually forms the litigation at hand. Effective advocates strive to legitimately parse and interpret this body of information to the advantage of the client, and they do this by using their own words to craft an effective argument that will prove persuasive to those deciding the case.

What Constitutes a Good Legal Argument?
Legal argumentation is much more than a random collection of assertions that are, on the one hand, vaguely positive for the advocate’s client, and on the other hand, vaguely negative for the opposing party. These assertions are an argument only when they coalesce into a coherent presentation that firmly convinces the judge and jury of its truth and fairness.

How Critical Is the Litigator’s Preparation of the Argument?
It is impossible for litigators to write or speak more clearly than they think. Taking care in expressing what they want to say will avoid the hazy arguments that a less disciplined approach produces. The goals are clarity, conciseness, and forcefulness.

To write or speak clearly, litigators must not only gather their arguments and carefully organize them, but litigators must also think deeply about them. The litigator must study the relationship of facts and law to one another, evaluate the importance of one point over others, and then construct a logical plan of presentation.

It will take considerable time for the litigator to digest, organize, and think through the implications of the material before beginning to write or speak. Only when litigators see what is central or significant to the argument can they persuade the court to focus on those specific points, instead of casting its attention over the wide morass of details in which nothing significant stands out.
How Does a Litigator Lay the Foundation of the Argument?

Skilled advocates suggest a few ways to effectively prepare the foundation of the argument.

Research. Before presenting a legal analysis, it is essential to conduct a thorough search of potentially relevant arguments, so that all of the appropriate cases, statutes, and regulations are considered and discussed.

Theory. After gathering all of the relevant information about the case, the litigator must carefully analyze it. During this often lengthy and painstaking process, he must identify the reason why his client should win in the end.

Themes. As litigators scour the materials they have gathered for trial, they should develop short, fact-based statements of why equitably—rather than legally—their client should prevail. The best themes are those grounded in common sense and shared human experiences like fairness and honor, and they should resonate emotionally with the judge and jury.

A few other suggestions about themes: They should be brief, pithy, and partisan without appearing contrived and manipulative. They should be consistent. They should be repeated often, but not so much as to become annoying.

What Are the Principles for Developing a Well-Honed Legal Argument?

Presenting an effective legal argument is generally considered as much an art as a science. The advice of seasoned practitioners may be helpful.

Audience. In a litigator’s attempts to persuade the judge or jury, logic has its place, but it isn’t everything. Litigators must craft the argument to the specific audience they seek to persuade.
Preparation. Litigators who are perceived as knowledgeable about the case will prove far more persuasive. They can best do this by organizing their arguments logically, explaining the source of their facts, and corroborating all of their assertions.

Trustworthiness. The advocate must be scrupulously honest in how he presents the facts and the law. Opposing counsel will no doubt be quick to point out any misstatements, distortions, or omissions, and if they succeed, the court will lose confidence in the reliability of the advocate.

Concession. When litigators are forthcoming about problems or weaknesses in their case, they enhance their credibility. Initially disclosing bad facts significantly minimizes their impact.

Posturing. It is tempting for litigators to argue their client’s position in the strongest possible terms while belittling the opposing argument. But litigators rise above the fray if they give their adversaries their due while arguing their own case in a moderate and reasonable light.

Visual aids. Studies show that individuals are persuaded by what they see. As appropriate, advocates should use charts, graphs, and other helpful graphic aids to enhance comprehension and render their points of argument more memorable.

Where Does Efficiency Enter into the Litigator’s Presentation?

Litigators work with difficult legal and factual situations that must be explained to a judge and jury who have limited time to devote to the resolution of the complicated issues before them. This makes it imperative that the litigator present the best argument in the most efficient way possible.

If attention is drawn to faults of logic or expression, the litigator’s case will suffer as a result. The risk is too great that if the argument is
not made effectively, the busy decision maker may misinterpret what the litigator is trying to say. The decision maker simply does not have time to decipher a poorly prepared argument, and the litigator’s credibility will be damaged in the process.

The litigator’s legal analysis must provide a quick and clear view without unnecessary distractions. The final product will be evaluated by how well it educates and convinces the listener that the reasoning and authorities contained within it are correct. The key to building a great argument is to design a logically reasonable theory and then back it up with compelling propositions and authority.

How Can a Litigator Predict Which Arguments Will Appeal to the Decision Maker?

The ultimate lesson in dealing with a decision maker is this: Before arguing a case, litigators must set aside their adversarial roles and try to think like a judge. But not just any judge—they must think like the judge before them. The litigator has to project himself into the mind of the particular individual who will hear the case.

The judicial system depends on the good-faith cooperation of litigators in complying with the rules and in moving cases toward resolution. When matters are manipulated for delay, harassment, or unfair advantage, the system breaks down. Judges appreciate counsel’s efforts to make their jobs easier, and clients benefit handsomely as a result.

Is the Sequence of the Presentation Important?

If the positions were reversed and the litigator sat where the judge does, the litigator must think of what she would want to know about the case, including the order in which the story should be told, how the case should be unraveled, and what would facilitate an approach to a true solution.

As the advocate for the client, the litigator must consider these and many other questions in order to make the case clear to the judge. If the advocate forces the court to prepare its own flowchart to grasp
the issues of the case, the advocate has not succeeded. The judge and jury should not have to work that hard.

B. Presentation to the Tribunal

What about the Intimidation of Presenting the Case?

For some litigators, arguing a case is a frightful experience. The setting can be overwhelming, and often it is not a particularly congenial scene for communicating ideas.

In spite of these factors, the litigator must concentrate on the primary issues at hand without being distracted by the personalities involved. This is easier said than done, but the litigator must keep in mind that his primary goal is effective communication. This requires concentrating on the case, the opponent’s argument, and questions posed by the court—all at the same time.

Where Does the Litigator Find Useful Information about the Judge?

The best source of information about the judge, arbitrator, or mediator is likely that which comes from practitioners. Previous law clerks may also be a good source of information, but the litigator should be aware of their propensity to remain loyal to the judge, which may cloud their judgment. Opinions of former partners and colleagues of the judge are frequently helpful, but the same admonition applies. The litigator should be examining a number of areas.

Professional background. The litigator will want to know what kind of clients the judge represented while he was in private practice and the cases he won and lost. But the litigator must be careful with this information. Stereotypes do not always hold true, and sometimes the judge’s philosophy belies the background.

Prior judicial opinions. This judicial profile should contain previous decisions of the court, reflecting opinions each judge rendered as the author and (to a lesser extent) as panel member. These judicial
decisions will reveal the judge’s values concerning the legal process. Litigators ignore to their great detriment the prejudices of the judge revealed here.

*Work habits.* The work habits of the judge are important. This would include how closely the judge reads briefs and supporting cases, how extensively he uses his law clerks, and to what extent he does his own research and writes his own opinions.

*Personal information.* The litigator must uncover as much personal background about the judge as possible. Because judges are public figures, basic information is readily available. This might include where the judge grew up, where the judge attended college and law school, the judge’s religious and political affiliations, and all of the other factors that go into a psychological profile. The litigator might also want to inquire about the judge’s personality, financial and investment interests, social acquaintances, military service, and previous occupations.

### What about the Court’s Internal Operating Procedures?

Every court has internal operating procedures, and very few courts consider this guarded information. Most courts publish these procedures, and trial judges naturally expect the litigator to be fully familiar with the rules of court.

This is also true of appellate courts. To be effective, the advocate should also know how each judge regards oral argument. Some enjoy it, while others don’t. Some judges arrive better prepared than others, and this will have an effect on how the litigator approaches them.

### How Important Are the Judge’s Initial Impressions?

The initial pretrial conference provides the court with the opportunity to understand the case and assess its counsel. Everything the litigator does contributes to the impression the court has about whether the litigator can be relied upon. The most effective litigator is one who
is credible, confident of his client’s position, and above pettiness and grasping for unfair advantage.

Some litigators approach these pretrial conferences not with the spirit of candor and cooperation, but with an aggressiveness that is not persuasive to judges. In the end, litigators hurt their case by being discourteous with their adversaries and the court. Worse yet, a judge will see incivility as an effort to obstruct rather than to fairly present the facts and the law. The end result is that the judge views the presentation with skepticism.

What Is Meant by “Civility of Counsel”?  
In a word, it is common courtesy. For example, a litigator should wait for the opportunity to speak and address the court, rather than interrupt either the judge or opposing counsel.

Some litigators apparently believe that if they disagree with a proposition, they should indicate their disapproval by vigorously shaking their head back and forth. Such mannerisms mark them as either insecure with their positions or unwilling to persuade the court as to the merits of their case. Judges contrast those approaches with those litigators who wait to speak and express their positions concisely and confidently.

Judges prefer a litigator who briefly remarks that opposing counsel is mistaken and that he will either explain if the court wishes or brief the issue. This is far more persuasive than the disruptive antics of less-than-civil advocates.

What Is Considered the Most Effective Courtroom Methodology?  
The tools that the litigator utilizes in the courtroom—the degree of preparation, manner of speaking, body language, method of movement, and choice of words—have a significant impact on how the message is received. A few suggestions have been made for characteristics that distinguish a great litigator from a good one.
Preparation. Judges can immediately detect an unprepared litigator, and they are far less inclined to be persuaded by such counsel. Judges also speak to one another, and when a litigator tries a good case, they tell their colleagues about it. Likewise, when a litigator arrives inadequately prepared, the word quickly spreads.

Demeanor. Litigators must remember that they are on stage and being watched at all times. They should sit up, look alert, and appear interested in the proceedings. The jury is picking up important clues even if the litigator is not aware of it.

It’s best, however, for the litigator not to appear too friendly or easygoing with the other litigators in the courtroom. The jury is not going to understand this chumminess between opposing counsel, and psychologically the litigator conveys the wrong message.

Respect. The advocate must remember that the jury is on the judge’s side. The jury respects the judge, and if they get the impression that the advocate agrees, they will be more inclined to accept his position.

Reactions. The jury will carefully watch the litigator’s reaction to an adverse ruling from the judge. It is best for the litigator to remain emotionless, as any facial expression will cause the litigator to lose the psychological edge.

Distractions. When the litigator enters the courtroom, he should empty his pockets to avoid making noise and distracting the attention of his audience.

Summary. Litigators should conclude their remarks—whether it be opening statement, direct examination, cross-examination, or closing statement—and sit down. Rambling on has caused many litigators great grief in the end.