

Course Syllabus
Persuasion
Law 243.9

Spring 2013 / Thursdays 8 – 9:50 a.m. / Classroom: TBD

Instructor: James J. Brosnahan (JJB)
Phone: 415-268-7189
Email: jbroshnahan@law.berkeley.edu

INSTRUCTOR PROFILE

James J. Brosnahan is a senior partner at Morrison & Foerster in San Francisco. Mr. Brosnahan received his B.S.B.A. degree in 1956 from Boston College and went on to attend Harvard Law School, earning his LL.B. degree in 1959. Mr. Brosnahan has 50 years of expertise in both civil and criminal trial work and has tried more than 140 jury cases to verdict and won over 90 percent of his cases. He has argued twice in the United States Supreme Court. In 2012 Mr. Brosnahan received a Lifetime Achievement Award from *The American Lawyer* magazine.

Mr. Brosnahan has served as a faculty member or lecturer in many programs and seminars about effective trial advocacy. Mr. Brosnahan participates regularly in programs sponsored by the National Institute of Trial Advocacy (NITA) a prominent, nationwide organization that specializes in teaching trial skills to practicing attorneys. For 35 years, he has served as Master Advocate on the faculty of NITA and was honored as NITA teacher of the year.

Other honors include his induction into the State Bar of California's Trial Lawyers Hall of Fame and the Samuel E. Gates Award by the American College of Trial Lawyers for his "significant, exceptional lasting contribution to the improvement of the litigation process." In 2001, he was named "Trial Lawyer of the Year" by the American Board of Trial Advocates, and the following year, the San Francisco Lawyers' Club honored Mr. Brosnahan with its inaugural "Legend of the Law" award. He was named one of America's most influential trial lawyers by the National Law Journal. In 2007, he received the American Inns of Court Lewis F. Powell Award for Professionalism and Ethics to recognize a "lifetime devoted to the highest standards of ethical practice, competence, and professionalism."

Mr. Brosnahan's lecture series, "Great Trials and Great Trial Lawyers," has been featured with The Teaching Company's America's SuperStar Teachers. He wrote the *Trial Handbook for California Lawyers* and has written extensively on issues of lawyer training and other substantive subjects.

COURSE DESCRIPTION

This course will expose you to classical and modern techniques aimed at increasing your personal abilities to persuade others. Through lecture and student exercises, there will be opportunities for you to develop and expand your persuasive skills for use in many legal situations, with an emphasis on persuasion in trial and appellate courts. We will cover a history of great advocates, voice training, the use of rhetorical devices (including the uses of emotion), presenting witnesses, argument, and other related subjects. Exercises will include examples from intellectual property and criminal law.

GENERAL FORMAT

Actual student presentations stressed with supportive critique in all aspects of persuasion geared to various litigation, trial and appeal venues. Some lectures and demonstrations will be given by Mr. Brosnahan.

COURSE READINGS

All materials will be available on the course bSpace page. No purchase required.

GOALS OF THE CLASS

1. Learn self critique.
2. Improve verbal skills.
3. Open minds to a life long respectful study of lawyer techniques.
4. Learn brevity
5. Establish that the use of emotion in argument is sometimes appropriate.
6. Develop the uses of the voice, improving the five elements.
7. Be comfortable in taking up one side of a legal controversy.
8. Introduction to the history of advocacy.

METHOD OF ASSESSMENT

Presentation on the subject of a great advocate = 20%

Presentation of a final argument in a criminal case = 20%

Participation in class exercises = 30%

Improvement in skills = 30%

Improvement in skills from beginning levels will be recognized in the grading. Presentations will be graded on several factors: 1) Persuasiveness of your theme, 2) Adaptation of the material for your audience, 3) Invention, 4) Word selection and 5) Delivery.

CLASS SCHEDULE (subject to amendment)

Class 1 - January 10

Brief Introduction of the Course.

The first part of the class will be a discussion of the techniques of persuasion developed over the last 2,400 years and their modern uses including the following:

1. The first rule of rhetoric is "know your audience." Judge, jury, arbitrators, opponents, clients.
2. The development of themes and story telling and relating those themes to the audience.
3. Students will make a short argument in the U.S. Supreme court aimed at Justice Kennedy.
4. Selecting the right word. A high art. Examples from poetry and legal argument.
5. The uses of emotion in argument.
6. The great importance of voice. What students do at the New England conservatory of music and the NYU school for dramatic arts. How Demosthenes trained his voice. Why and how you can do it.
7. Observation of the world as preparation for persuasive presentation. Word pictures. The super realist approach.
8. Case analysis of a criminal case. Good facts, bad facts, good

witnesses, bad witnesses. Students present a criminal argument.

9. Students present a seven minute piece on a great advocate.

Grading system discussed.

Class picks a juror in an actual case. The first application of know your audience. No preparation required.

JJB explains self-critique and a form, which will be distributed. Students complete the form and prepare to discuss in class 3. This is the beginning of developing the habit of self-critique.

Reading:

1. Article: "Why not teach law students how to represent clients," pgs 42-44
2. Excerpts from Cicero's "On the Orator," pgs 241-243, 288-289, 329-334
3. Article: "Basic Principles of Advocacy," pgs 249-258
4. "Jury Selection," pgs 1-22
5. "Great Trial and Great Trial Lawyers" (8 hour recording) to be listened to over the duration of the course leading to the final presentation by students on a great legal advocate.

Assignment: N/A

Class 2 – January 17

The first rule of rhetoric is, know your audience.

Reading:

1. Chapter on *Roper v. Simmons* from Justice Kennedy's Jurisprudence, pgs 28-37
2. Opinion written by Justice Kennedy, *Roper v. Simmons* 543 US 551 (2005), pgs 1-8
3. Article: "Judges forced to Revisit Juvenile's Life Sentences," pgs 1-2

Assignment: Prepare a 4 minute argument in the U.S. Supreme Court aimed at persuading Justice Kennedy in the *Roper v. Simmons* case. You can take either the side of the prosecution or the defense.

Class 3 – January 24

Discussion of self critique.

Discussion of various rhetorical devices. Some are so important that they will be covered in detail in future classes.

1. The importance of the beginning – primacy
2. Invention
3. Style
4. Spontaneity
5. Memory
6. Retaining credibility
7. Organization
8. Building up to a point
9. Clarity
10. Preparing the other side of the argument

11. Simplification
12. Argument and Theater
13. The use of analogies
14. Importance of themes
15. Body language
16. Selection of words
17. Story telling and witnesses
18. Sequence
19. Using everyday language
20. Pathos
21. Ethos
22. The importance of the ending – recency

Performances: Students will perform their 4 minute argument in the U.S. Supreme Court aimed at persuading Justice Kennedy in the *Roper v. Simmons* case.

Reading:

1. Materials on rhetoric from Quintilian, 22 pages total
2. Materials on rhetoric from Aristotle, pgs 3-18, 24, 25, 60, 155, 165
3. Materials on Opening Statements, pgs 75-85, 92-99, 113-114
4. Chapter on Rhetoric and Diction from Using Rhetoric, pgs 190-210

Assignment: N/A

Class 4 – January 31

Selecting words.

Similarities between poets and lawyers. How to select the right word; why it matters.

Reading:

1. Sample of poetry: Ogden Nash, pgs 1-5
2. Samples of poetry: Mary Oliver, pgs 6, 12
3. Samples of poetry: Walt Whitman, pgs 9, 23
4. Materials on Direct Examination, pgs 115-123, 135-142, 171-176, 284-289
5. Sample of Poetry: Li Ch'ing Chao, pgs 96, 143
6. Speech by Robert Emmet, pgs 22-25
7. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (U.S. 1981), pgs 1-24

Class Exercise: Having read *Lassiter*, 452 U.S. 18 (1981), a case denying a mother counsel in a matter where she was deprived of custody rights as assigned reading, if representing the mother, what words would you use? What word would you not use? Class participates as a group in drawing up the two lists.

Assignment: Write out 5 short questions on direct examination using good words to examine the mother in *Lassiter*.

Class 5 – February 7

Using emotion in argument.

The difference between the speaker being emotional and the speaker arguing in a way that affects the listener's emotions.

Performances: Students will ask their 5 direct examination questions and learn about the importance of direct examination.

Reading:

1. Opening statement from *The United States v. Timothy McVeigh*, Criminal Action No. 96-CR-68-M, pgs 1-3
2. Clarence Darrow's final argument in the *Sweet* murder case, pgs 229-263
3. Michael Frost, "Ethos, Pathos & Legal Audience," pgs 1-25
4. Jonah Lehrer, How We Decide, pgs 70-92

Assignment: Prepare a 3 minutes argument designed to affect the emotions of the jury in the *Sweet* case.

Class 6 - February 14

The Voice

The first of 2 sessions on the voice. JJB lectures. JJB plays recorded voices and asks class for reactions. Voices of one man and one woman. The essential elements of the voice are discussed.

Performances: Students will perform their argument to affect the emotions of the jury in the *Sweet* case.

Reading:

1. Intellectual property case file: *Cranbrooke v. Intellex*, pgs 1-158
2. Voice training section from article: "Suggestions for enriching the teaching of trial advocacy," pgs 197-202

Assignment: Prepare a 5 minute final argument for the patent case.

Class 7 - February 21

The Voice

Second voice session. JJB plays some recorded voices of advocates, poets, political leaders and calls for class comments. Reminds class of the elements of voice.

Performances: Students will perform their 5 minute final arguments for the patent case.

Class 8 - February 28

Cross Examination

Reading:

1. "Demosthenes," *Plutarch's Lives*, 1 page total
2. "Demosthenes' Youth," *Demosthenes the Orator*, pgs 18-22
3. "Cross-examination: It's not as hard as it seems," pgs 133-144
4. "Cross-examination," *Trial Techniques*, pgs 364-385
5. "Purposed and order of cross-examination," *Trial Techniques*, pgs 254-264
6. Pigott Cross - examination: *The Life of Lord Russell of Killowen*, pgs 218-240

Performances: Students will continue to perform their 5 minute final arguments for the patent case.

Assignment: Prepare 5 short leading questions for Pigott.

Class 9 - March 7

Exercises in observation and articulation.

Students assigned to go out in the hall and observe an object, painting,

or other thing. Come back in the class and describe it. Super realist painting discussed and an example shown.

Point = absolute accuracy. Main point of class is the creation of word pictures, concept explained. Take the listener to the place. Class participation, each student describing something in the room. JJB gives a demonstration.

Performances: Students will ask Pigott their 5 short leading questions and learn about the importance of cross-examination.

Class 10 - March 14

Criminal case analyzed. First point, case analysis from the practice of law. Second point, extract the major themes in the case.

Class Exercise: Students will break down into prosecutor and defense lawyers and the class will form 2 groups. The groups will meet together and discuss key witnesses, main points, themes, and positive & negative points. Class reconvenes as a whole and discusses the material.

Reading:

1. Criminal case file: *State v. Jackson*, pgs 1-99

Assignment: Prepare a 7 minute final argument for the criminal case.

Class 11 - March 21

Final Argument

JJB does a 15 minute demonstration of final argument in the criminal case *State v. Jackson*.

Performances: Students give 7 minute final arguments in the criminal case *State v. Jackson*.

Assignment: Prepare a 7 minute presentation on your favorite legal advocate.

(March 25 - March 29)

SPRING BREAK

Class 12 - April 4

Final Argument

Performances: Students conclude 7 minute final arguments in the criminal case *State v. Jackson*.

Class 13 - April 11

Famous Legal Advocates and Presentations

JJB presents 3 historic examples of famous advocates.

Performances: Students begin 7 minutes presentations on their favorite legal advocates, seeking to persuade the class their pick was indeed a great advocate and why.

Class 14 - April 18

Presentations

Performances: Students conclude 7 minute presentations on their favorite legal advocates.

Exercises and presentations will be recorded and uploaded to bSpace for student review and critique.