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Oral Argument: Organization and Preparation

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A. Introduction.

“May it please the Court” is how we start arguments. Unfortunately, many of our arguments are not pleasing to the court because we forget that the proper purpose of any oral argument is to aid the court in making a decision.

1. Thanks, Randy!

As usual, this paper stands on the shoulders of previous wonderful presentations. I have borrowed liberally from two papers authored by Randy Roach of Roach & Newton: Roach, *Texas Supreme Court Oral Argument: A Court-Centered Approach*, 9th Annual Advanced Consumer and Commercial Law Course (State Bar of Texas 2013); and Roach, *Oral Argument: Patterns Seen & Lessons Learned from a Survey of Judicial Questioning*, Advanced Civil Appellate Practice Course (State Bar of Texas 2012).

In the first paper, Randy draws conclusions from his experiences and from those of other noted Supreme Court practitioners, including Lynne Liberato, Doug Alexander, and Roger Townsend. In the second paper, Randy shares the results of a judicial survey. The paper gives invaluable insight into what judges and justices expect in an oral argument.

2. This Presentation’s Structure:

In separate sections, this paper addresses the goals of oral argument, preparation for oral argument, questions that are likely to arise, and creating the “feel” of oral argument. Hopefully, the paper will provide a general guideline for preparing effective oral presentations.

B. Help the Court Rule for Your Client.

1. Court-Centered Advocacy:

Randy Roach believes the focus of the oral argument should be on the audience – the court. I agree.

2. Fabric of the Law:

Remember, the function of an appellate court is not only to decide who wins or loses, but also to fit the legal rulings into the fabric of the law so as to drive future decisions and be true to precedent. This is true even in situations in which the court is asked to weigh the sufficiency of the evidence. Because appellate decisions are almost always reported, the author must consider how his or her opinion impacts future cases. One of the greatest fears of an appellate judge/justice is having his or her opinion branded as an “outlier.”

C. Goals of Oral Argument.

1. Help the Court Do Its Job:

The appellate court's job is to write opinions on important legal issues. By providing a pathway to a rational decision that fits within the fabric of the law, you will aid the court in making a decision and writing an opinion. Over the years, I have come to the conclusion that aiding the court wins more cases than simply advocating a position.

2. Frame the Issue:

Simply advocating that your client should win is never enough. Instead, framing the issue provides the parameters in which a judicial decision can be made.

Years ago, Jim Kronzer suggested that if he were allowed to ask the question, he could guarantee the answer. But Jim was talking about jury charges, not appellate arguments.

AN EFFECTIVE ISSUE PRESENTS THE TWO COMPETING VIEWS IN A UNIFIED QUESTION. This is easier said than done, but it is well worth the effort. A concise statement of the issue can drive the legal discussion of a case.

3. Tell the Court What You Want:

It is one thing to frame the issue and it is quite another to tell the court the relief you want. For better or worse, courts are more focused on the relief than on the advocates. A court that understands what specific relief is being requested can more quickly grasp what it must decide.

4. The First 90 Seconds:

In the first 90 seconds, the court should understand the issue being presented and the relief the advocate wants. Because members of the court are more likely to refrain from questions in the first moments of the argument, the first 90 seconds provides an opportunity to define the battlefield.

5. Manage Time Effectively:

Most arguments are 20 minutes and the petitioner/appellant generally reserves five minutes for rebuttal. The oral argument strategy requires editing the ideas into concise remarks that drive the court's decisions. To do this, I like to prepare with several ideas in mind:

- Deemphasize facts unless they TRULY drive the decision.
- Pick one or two key issues and tell the court in the first 90 seconds what they will be.
- Concentrate on the major legal theories and the rationale behind them.

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