

Presented:
2015 Robert O. Dawson
CONFERENCE ON CRIMINAL APPEALS

May 27-29, 2015
Austin, Texas

Effective Oral Argument:

What I knew as an appellate advocate;
What I've learned as an appellate judge

Justice J. Brett Busby

Papers by:

Lisa C. McMinn
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711-3046
lisa.mcminn@spa.texas.gov

Brian W. Wice
440 Louisiana, Suite 900
Houston, Texas 77002
wicelaw@att.net

Speaker contact information:
Justice J. Brett Busby
Texas Court of Appeals, 14th District
301 Fannin Street, Ste. 245
Houston, Texas 77002

brett.busby@txcourts.gov
713-274-2823

TABLE OF CONTENTS

Appellate Oral Advocacy: Tips and Techniques (by Lisa C. McMinn)

I.	Introduction	1
II.	Deciding whether to request argument.....	1
III.	How to request argument	1
IV.	Will the Court grant argument?	2
V.	Preparation	2
VI.	Your “prepared” argument	3
VII.	Questions from the bench.....	4
VIII.	Rebuttal	4
IX.	Exhibits / visual aids	5
X.	Delivery	5
XI.	Supplemental briefs.....	5

Oral Argument 101: A Top Ten List to Winning the Moot Court Round (by Brian W. Wice)

	Oral Argument: An Overview	6
	The Top Ten List.....	6
1.	Getting Oral Argument is Half the Battle	6
2.	Either Take the Time to Prepare or Don’t Bother to Show Up.....	6
3.	Know Your Audience and Know Your Adversary	7
4.	Use an Outline and Do Not Try To Argue More Than Two Points.....	7
5.	Do Not Divide the Argument Between Two Lawyers	8
6.	Remember that Your Forum is an Appellate Court and not a Trial Court.....	8
7.	Frame the Issue and Come Out Smoking.....	8
8.	Responding to the Court’s Questioning is the Key to Success	9
9.	The Art of Rebuttal is Knowing How to Clash.....	9
10.	There is No Excuse for Not Winning the Moot Court Round	10

APPELLATE ORAL ADVOCACY: TIPS AND TECHNIQUES

by Lisa C. McMinn

I. Introduction

This paper is written primarily from my perspective as a frequent observer of oral argument in the Court of Criminal Appeals. As an assistant State Prosecuting Attorney and a former staff attorney for the Court of Criminal Appeals, I have watched hundreds of oral arguments. I also have first-hand experience arguing before the Court of Criminal Appeals and some hazy memories of arguing before the Fort Worth Court of Appeals from my days as an assistant Tarrant County District Attorney.

This paper will address objective matters, such as the rules of appellate procedure and various appellate courts' rules and policies, as well as my personal opinions and experiences. I also interviewed some judges from the Court of Criminal Appeals to get their views on oral argument.

II. Deciding whether to request argument

Obviously, not all appeals are argued. When you are the appealing or petitioning party, you must decide whether the case is worthy of argument. Some lawyers dread oral argument, so they are hesitant to request it. Others think oral argument will improve their chances of winning any case. But arguing a case just to provide more exposure to your case and your viewpoint won't help if you put the judges to sleep, insult or annoy them, or concede too much in argument.

When you are not the appealing or petitioning party, you will usually only request argument if the your opponent requested argument. Even if you don't think the case is worthy of argument, if your opponent requested argument, you should too. If the judges have questions about the case, you don't want your opponent providing all the answers.

Some cases naturally lend themselves to oral argument. Others do not. Cutting edge issues are good candidates for oral argument. For example, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004), was a groundbreaking opinion. As a result, cases with *Crawford* issues are often argued in the courts of appeals and in the Court of Criminal Appeals. As a general rule, you should ask for

argument if your case involves the constitutionality of a statute, statutory construction, a novel or unsettled issue, or a case in which you are asking the Court to overrule existing precedent. Sometimes complex legal issues are easier to communicate and conceptualize orally than in writing.

III. How to request argument

A. Courts of Appeals:

TEX. R. APP. P. 39.7. Request and Waiver. A party desiring oral argument must note that request on the front cover of the party's brief. A party's failure to request oral argument waives the party's right to argue. But even if a party has waived oral argument, the court may direct the party to appear and argue.

TEX. R. APP. P. 38.1(e). Any statement regarding oral argument. The brief may include a statement explaining why oral argument should or should not be permitted. Any such statement must not exceed one page and should address how the court's decisional process would, or would not, be aided by oral argument. . . .

B. Court of Criminal Appeals:

1. Petition for discretionary review:

TEX. R. APP. P. 68.4(c). Statement regarding oral argument. The petition must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived. If a reply or cross-petition is filed, it likewise must include a statement of why oral argument should or should not be heard.

2. Direct appeal:

TEX. R. APP. P. 71.3. Briefs. . . . The brief must include a short statement of why oral argument would be helpful, or a statement that oral argument is waived.

Your statement about why argument would be helpful doesn't need to be too long or involved. One or two sentences is sufficient. Example: "Because this case presents novel issues this Court has not previously addressed, oral argument would be helpful." More than likely, the judges will grant or deny argument based on their own views about whether argument would be helpful, not on your statement. Some judges may not even read the statement regarding oral argument.

C. Late requests

You may be able to request argument even if you did not originally request it in your petition or brief. With regard to petitions for discretionary review in the Court of Criminal Appeals, TEX. R. APP. P. 75.2. provides:

If a case is not designated for oral argument but counsel desires oral argument, counsel may — within 30 days of the date of the clerk's notice — petition the Court to allow oral argument. This petition must contain specific reasons why oral argument is desired.

IV. Will the Court grant argument?

Of course, just because you requested argument doesn't mean the court will grant it.

A. Courts of Appeals:

TEX. R. APP. P. 39.8. Cases Advanced Without Oral Argument. In its discretion, the court of appeals may decide a case without oral argument if argument would not significantly aid the court in determining the legal and factual issues presented in the appeal.

B. Court of Criminal Appeals:

TEX. R. APP. P. 75.1. Notification of Argument or Submission. Oral argument will be permitted only in cases designated by the Court of Criminal Appeals.

In recent years, the Court of Criminal Appeals has permitted argument in 30-50% of the PDRs granted. Some Court of Criminal Appeals judges don't like oral argument. Others say whether argument is helpful depends on the case and the skill of the lawyers involved. Allocation of responsibility among liable parties and application of settlement credits can be among the trickiest judgment formation battlegrounds.

V. Preparation

This is the most important aspect of argument. You must know your case, the law, and the rules of your court. It also helps to know the views of the judges on your court or panel.

A. Know your court

If you've never had an oral argument before a particular court, it is helpful to attend and observe

some arguments. Scout out the courtroom, know where you'll sit and stand, familiarize yourself with the acoustics, figure out how the timer/warning light system works, and see the court in action. Being there is best, but if it is not possible to personally observe an argument, some courts audiotape or videotape their arguments and make the recordings available to the public. For example, you can listen to recorded arguments in the 2nd Court of Appeals on their website.

Know the rules of the court. Several of the courts' websites set out their local rules and procedures. Different courts allot different amounts of time for argument and rebuttal. Some allow 20 minutes per side plus 10 minutes of rebuttal for the moving party. Some allow only 15 minutes, inclusive of rebuttal. Different courts have different docket call procedures as well, so be sure you know how your court operates. The Court of Criminal Appeals' website has a link entitled, "Oral argument instructions." The Seventh Court of Appeals has a link to a "nuts and bolts seminar," which includes oral argument tips.

B. Know your judges

It is helpful to know which judges on your court (or panel) have written opinions (majority, concurring or dissenting) on issues involved in your case. This gives you an idea about how they might rule in your case or at least what kind of questions they might ask.

Obviously oral argument in the Court of Criminal Appeals is going to be different from argument in a court of appeals. Your preparation will be different. You will be arguing in front of nine judges, and they all specialize in criminal law. The questions will be more informed, focused, and esoteric. But in the courts of appeals, the panels are smaller and some of the judges' backgrounds may be in civil law. If you have new judges on your panel who have little exposure to criminal law, you may need to do more educating and explaining.

C. Know your case

You should know everything there is to know about your case. In the Court of Appeals you should know the record and the applicable law. If you prepare enough, you'll find a different or better way to say what you've already said in your brief. Reread your brief, your opponent's brief, and all the main cases. Check to see if there are any new opinions relevant to your case. Visit the Court of Criminal Appeals' website to see if the Court has granted review on a

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Effective Oral Argument: What I Knew as an Appellate Advocate; What I've Learned as an Appellate Judge

Also available as part of the eCourse

[Effective Oral Argument](#)

First appeared as part of the conference materials for the
2015 Robert O. Dawson Conference on Criminal Appeals session
"Effective Oral Argument"