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**A Strategic Look at Post-Submission Briefing:
Considerations for the Appellate Practitioner**

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TABLE OF CONTENTS

	Page
Introduction	1
I. Start early: Considerations when preparing for oral argument	1
A. Outline the key points and identify incomplete arguments/responses	2
B. Use oral argument exhibits as a substitute for post-submission briefing	2
C. Address new authority in a pre-submission brief	2
D. Make arrangements to preserve the oral argument	3
II. Stay alert: Considerations during oral argument	3
A. Volunteer to file a post-submission brief	3
B. Understand any request from the court for further briefing	3
C. Debrief with a neutral observer	3
III. Stay objective: Considerations after oral argument	3
A. Review the oral argument questions/recording/transcript	3
B. Mandatory: When a post-submission brief should be filed	4
C. Prohibited: When a post-submission brief should not be filed	4
D. Optional: Checklist for evaluating whether to file a post-submission brief	5
IV. Tips for post-submission briefs	6
V. Considerations when a case is submitted without oral argument	7

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By Pamela Stanton Baron

In a recent survey of Texas appellate judges, participants were asked how often post-submission briefs affect the outcome of an appeal.¹ Of the justices responding, 65% thought post-submission briefs rarely affect the disposition of the case, 33% agreed that such briefs sometimes affect the disposition, and 2% believed that such briefs never affect the disposition.² The survey reflects neither an overwhelming embrace nor a flat rejection of post-submission briefs. They have their uses sometimes.

This paper takes a strategic look at post-submission briefs in an effort to identify when and how they can be most effective. The object is to limit the use of post-submission briefing to those situations where they can in fact impact the ultimate disposition of the appeal.

This paper does not address the mechanics of post-submission briefs, such as whether a motion for leave is required. There are other sources covering those topics, including a recent paper on the subject³ and the “Practice Before the Court” information found on each appellate court’s website.

I. Start early: Considerations when preparing for oral argument

A practitioner who first thinks about post-submission briefing after the argument has started too late. Many valuable insights and opportunities arise when preparing for the argument.

A. Outline the key points and identify incomplete arguments/responses.

In preparing for argument, it is helpful to outline the arguments on an issue-by-issue basis, beginning with the opening brief, moving to the response, and ending with the reply. This process should reveal any gaps in the arguments made and in the responses to those arguments. For the appellant/petitioner, the focus will be whether the reply brief covered all of the arguments raised in the response. For the appellee/respondent, the focus will be on whether the reply brief raises arguments or authorities not addressed in the response or whether it misstates the record or the law.

Once incomplete arguments/responses are identified, the question is whether they can be covered during the oral argument. If they are critical to the main points, the practitioner should

¹ Scott Rothenberg, Kent Rutter, JoAnn Storey, *Results of the 2015 Judicial Survey*, Univ. of Tex. School of Law, 25th Annual Conference on State and Federal Appeals (June 2015). Seventy-eight percent of Texas appellate judges responded to the survey. *Id.* at 1.

² *Id.* at 5.

³ Amy J. Schumacher, *Post-Submission Briefs: Rules & Strategies*, Univ. of Tex. School of Law, 24th Annual Conference on State and Federal Appeals (June 2014).

definitely incorporate them into the argument. If they are secondary points or corrections, they may be better addressed in a short post-submission brief. Or, as discussed in the next subsection, counsel may be able to incorporate these points into the oral argument exhibits.

B. Use oral argument exhibits as a substitute for post-submission briefing.

Oral argument bench books are an underused tool. When e-filed a day or two before the submission date, they provide the court a preview of your key argument points. The court will still have the bench book after the argument is over and can refer to it when deciding the case and drafting the opinion.

The bench book can also at times substitute for a post-submission brief. For example, suppose the appellant's primary argument is that there is no evidence of damages. And, even though appellee has briefed this point in the response, the appellant still claims in the reply that the evidence is legally insufficient. The appellee in this situation could include in the bench book a chart listing the damage evidence and exhibits, together with the record cites in support. The court will then have in hand what it needs to review the evidence on damages before, during, and after the argument – certainly more effective than a brief submitted after the argument.

C. Address new authority in a pre-submission brief.

If there is new controlling or persuasive authority on point that is not cumulative, it should be brought to the court's attention promptly. Filing new authority in a pre-submission letter brief provides the court the opportunity to review the new cases, evaluate their impact, and explore at argument whether they impact disposition of the appeal. This approach is much preferable to springing new authority on the court and opposing counsel during the argument, where the argument essentially grinds to a stop while everyone writes down the cite and where there is no real opportunity for the court to explore the impact of the new authority on the appeal.

D. Make arrangements to preserve the oral argument.

As discussed in the next section, part of evaluating whether to file a post-submission brief is reviewing the argument and, in particular, the questions asked from the bench. Most courts record oral arguments. Video recordings of oral arguments at the Supreme Court of Texas are posted on-line later the same day. The Fort Worth Court of Appeals posts the audio of oral arguments on its website. The El Paso Court of Appeals videotapes oral arguments and makes copies available for a fee. Most but not all of the intermediate appellate courts audiotape the arguments and will provide a copy for a nominal fee. The Eastland and Amarillo Courts of Appeals state on their websites that they do not record oral arguments.

As backup, or for those instances in which audio or video recording will not be available from the court, it is always a good idea to have someone present at the argument whose sole job is to write down all the questions from the bench and to identify which justice asked each question. It is also helpful to have that person take notes on the basic arguments of counsel. But making sure to preserve the questions is key.

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