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TELL THE STORY: PERSUASIVE WRITING AND SPEAKING ACT LIKE YOU'VE BEEN THERE BEFORE

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I. Introduction.

A. The purpose.

The purpose of this presentation is to provide a coherent strategy for approaching appellate briefing and argument. The key to this strategy is organization, picking and framing the issue, weaving the facts of your case into the fabric of the law, and basic storytelling.

The title of this presentation comes from legendary Texas Longhorn Coach Darrell Royal. In the 1960s NCAA Rule Committee, a controversy broke out over end zone celebrations. For a while, all celebrations were banned. Later some discreet celebrations were allowed. Evidently, one longhorn player asked Coach Royal what he should do. Royal calmly replied, "If you are lucky enough to get into the end zone, act like you have been there before."

B. Thanks.

As with all CLE articles, this presentation stands on the shoulders of previous articles. I have shamefully stolen much of this presentation from the following articles:

- Talmage Boston, *The Power of Words*, 82 Texas Bar Journal 498 (July, 2019);
- Allyson Ho and Randy Roach, *Preparing and Delivering a Persuasive Oral Argument in the Texas Supreme Court: A Court-Centric Approach*, State Bar of Texas, 2018 Advanced Civil Appellate Practice Course (September, 2018);
- John Messinger and Brian Wice, *Oral Argument as a Contact Sport: Tips From Both Sides of the Aisle*, State Bar of Texas, Advanced Criminal Law Course (July, 2018);
- George McCall Secrest, *Writing is Easy, Editing is Hard: The Lost Art of Persuasive Brief Writing*, State Bar of Texas, Advanced Criminal Law Course (July, 2018);
- Wanda McKey Fowler, *Storytelling for Appellate Lawyers When Writing a Brief*, State Bar of Texas, Advance Civil Appellate Practice Course (September, 2017); and
- Robert Dubose, *Brief Writing in the 21st Century*, State Bar of Texas, Advanced Criminal Law Course (July, 2017).

II. Know your audience.

Both in brief writing and oral argument, your audience will be overworked judges/justices, bored permanent staff attorneys, and inexperienced law clerks—certainly a diverse group. But all share a single desire—to quickly understand your argument and to find the keys to resolving the appeal.

Unlike in the trial court, where you will not know the jury members before you start, it is possible to know the makeup of the appellate court. Obviously, if you were arguing in the Texas Court of Criminal Appeals—you will know all members of the court. If, on the other hand, you are arguing in one of the fourteen courts of appeal, panel assignments will be made weeks before the argument. Knowing the makeup and legal philosophy of the judges is important. As a result, it is best to research previous opinions to get an idea of the justices' basic philosophy.

III. Preparing for the brief and oral argument.

A. Make sure the record is complete.

1. Review the trial court's docket.

Review the trial court's docket to make sure you have everything you need in your first request for the clerk's and the court reporter's records. Fortunately, online dockets give you a good look of what is available. However, a call to the court reporter is always helpful to ensure that you have the transcripts of all the preliminary hearings you might need. Fortunately, the Texas Rules of Appellate Procedure provide very liberal amendments of the record and,

prior to oral argument, you can basically request at will. On the other hand, it is much better to have a complete request from the start.

B. Learn the record backwards and forwards.

Whether you were the trial lawyer or not—a complete read of the record is critical. On a personal note, in all serious appeals I read the record myself, because the first-hand knowledge of what happened (or did not happen) at trial is invaluable. Taking notes or making summaries of the records is important because it focuses attention on what is important and provides a handy guide to later retrieving important information for citations. As a result, I keep notes by page numbers of both the court reporter's and the clerk's records.

Everyone does this differently, and there is not one right way to do it. Personally, I find that dictation helps because the reading and notetaking flow better. When I finish, we have a complete summary of the testimony and the filings—which we can refer to later when providing citations to the record.

Because it is finite, it is possible to know the record better than anyone else—even the trial lawyers. In order to write a persuasive brief and deliver an effective oral argument, it is important to take time to know the record inside and out.

IV. Learn the rules of the road.

It goes without saying, you must know the specific court rules for brief writing. Appellate courts are becoming very explicit in their briefing rules. Even minor violations can cause a brief's rejection. In these days of e-filing, the courts of appeals' local rules may add additional requirements. You should have a good idea of all of these rules before you start to write the brief.

The standards of review for individual appellate issues are also important to know in advance. Otherwise, you cannot know the legal effect of your argument. Likewise, the consequences of your appellate issues are crucial to the court's decision. For example, does the error in the trial court demand a rendition, remand or affirmance? While more significant in civil appeals, knowing what you're asking for is always important.

V. Identify the appellate issues.

Identifying the appellate issues is the most important part of the appeal. In identifying the issues, you should consider: What went wrong? What prevented your client from getting a fair trial? Is the issue more of a technicality or more about fairness?

Once you have made that decision, it is important to know whether the issue has been preserved for appeal. For example, was there an objection and a ruling on the record? If it was the exclusion of testimony, was there an adequate offer of proof?

As George Secrest said in his recent paper, "less is more." A litany of issues is seldom helpful. Courts seem to "tune out" when there are an over-abundance of appellate issues to resolve. Remember, more issues mean additional work for the court.

And not all appellate issues are created equal. Some will make a difference in the trial court's judgment and others probably won't. Weaker issues tend to drag down strong reasons for reversal. At judges' CLEs, a frequently repeated joke is that an appellate judge wanted to write an opinion that went something like this, "In this case there are three issues. Appellant's issue number one is silly and therefore it is overruled. Issue two is equally silly and it is also overruled. Issue three is actually quite good, but the taint of silliness from issues one and two carryover and demand issue three be overruled as well."

Nonetheless, weeding out issues is difficult. Sometimes, the client's feeling is the trial judge was so bad, and the errors were so many, that pointing them out will demand a retrial. This is seldom true.

VI. Drafting the appellate issues.

Once the issues have been identified, it is important to take time to carefully draft the issues. Framing the issues is an important strategic exercise. Robert Dubose suggests that issues be framed "positively and persuasively."

Title search: Tell the Story: Persuasive Writing and Speaking

Also available as part of the eCourse
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