UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2021 Robert O. Dawson Conference on Criminal Appeals

May 13-14, 2021
Austin, Texas

Every Fool is Quick to Quarrel: Tips to Avoid Argument at Argument

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I. Oral arguments matter.

Although oral argument is sometimes colloquially referred to by some practitioners as the Amoot court round,@ it is anything but academic. Jurists invite argument when they believe it will be helpful to resolving the issues in the case. It is about them. The purpose of this paper is to help you help them by accepting this reality.

The first part is philosophical, elaborating on the reason for argument. The second part is practical, setting the framework for how you can justify the argument granted in your case. The third part is technical, containing tips, warnings, and the author's style preferences. As advocacy is art as well as science, however, reasonable minds can disagree on the finer points.

The paper distinguishes practice in the Court of Criminal Appeals (CCA) from that in the intermediate courts where appropriate.

II. Argument is for the Court's benefit, not yours (or even your client's).

A. You have no right to argument.

A criminal trial is almost exclusively based around a defendant=s rights: to counsel, to discovery, to an impartial jury, to confront accusers, to proof beyond a reasonable doubt, etc. And, subject to few exceptions, he has the right to appeal a conviction. Even the State has the right to appeal some pretrial rulings. But no one has the right to argument.

It didn't use to be this way. Prior to 1998, an intermediate court of appeals had to permit oral argument in a criminal case upon timely request. Following the federal appellate courts' model of Aless is more,@ however, the rules of appellate procedure were amended to permit a court of appeals to submit an appeal on the briefs without oral argument if it decides argument is unnecessary. Tex. R. App. P. 39.1. The burden is on the party to explain why argument is necessary. *See* Tex. R. App. P. 38.1(e), 68.4(d).

B. So why would a court grant it?

As one might imagine, appellate courts grant fewer requests for oral argument when given the choice. This is mostly because they are swamped but also, sadly, because the parties are not always helpful. Both reasons lead to the truth about oral argument: if it is granted, it is only because the court wants or needs help deciding the issue enough to set aside valuable time to prepare for and host an argument.

This leads to the conclusion that the most important rule of advocacy might flow from a rule of appellate procedure: Rule 47.1. It directs courts of appeals—which includes the CCA—to "hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." Tex. R. App. P. 47.1. Of course, a memorandum opinion pursuant to Rule 47.4 is an option for cases involving settled issues, but those do not require much advocacy. The cases that require advocacy are listed as exceptions to Rule 47.4's coverage:

> "An opinion must be designated a memorandum opinion unless it does any of the following:
>
> (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases;
>
> (b) involves issues of constitutional law or other legal issues important to the jurisprudence of Texas;
>
> (c) criticizes existing law; or
>
> (d) resolves an apparent conflict of authority."

Tex. R. App. P. 47.4. These are the cases in which the court needs the most help. They are thus the cases where your advocacy matters most, and where the court would benefit most from oral argument. If the judges did not want help doing that, they would not have invited you to argue. Again, the decision to grant oral argument is not about you—it is about the court.

This reality applies equally to the intermediate courts and CCA, albeit for different reasons. The justices on the courts of appeals come primarily from a civil background. Depending on the issue, you may be the most experienced and/or knowledgeable person in the room, sometimes by far. In such a case, you should be a teacher as much as an advocate. Moreover, the court is often in the same boat as you, *i.e.*, trying to make sense of the CCA case law they are bound by.

Even when dealing with the judges on the CCA, the most interesting cases it hears deal with interpreting new law or reconsidering its own decisions. This is the perfect time to be genuinely helpful in guiding the court to the proper conclusion—the one you want.

C. Give them what they want.

If you are granted oral argument, the best way to help your client is to help the court do its job. This means giving the judges a way to write an opinion that addresses every issue raised and necessary to adequately explain their decision. Give them an argument that "writes." A gut feeling about how the case should end up is not enough; a judge needs something more. They must defend their opinions to their colleagues, and then the bench, bar, and electorate. Almost none of us will ever feel that pressure. If you can give them a defensible framework for your desired outcome, you have a shot. If you can address in conversation whatever problems judges may have with your argument, you have a better shot. You won't be guaranteed a win, but you will have done everything you can to make it a viable option.

To be clear, focusing your argument on the judges is not an abandonment of your duty to your client. The best way to serve your client at oral argument is to serve the court, especially the judge that will write the opinion. Help them help you.

III. Questions are a girl's best friend.

Once you understand that oral argument is about the court, you can focus on best serving the court. You do that by understanding that the best arguments are a discussion between the judges and the

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First appeared as part of the conference materials for the
2021 Robert O. Dawson Conference on Criminal Appeals session
"Every Fool is Quick to Quarrel: Tips to Avoid Argument at Argument"