Oral Argument:
Patterns Seen & Lessons Learned from a Survey of Judicial Questioning

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Robert M. (Randy) Roach, Jr. is the founding partner in Roach & Newton, L.L.P., a litigation boutique formed in 1993, now with offices in Houston, Austin, and Beaumont, Texas specializing in appellate issues, insurance coverage, and other complex legal issue law litigation. Randy is a fellow in the American Academy of Appellate Lawyers, and has taught appellate advocacy at the University of Texas School of Law since 2000 and at the University of Houston Law Center since 1990. He is a 1977 graduate of Georgetown University (Magna Cum Laude) and a 1981 graduate of the University of Texas School of Law, where he was a member of the Texas Law Review and the winner of its Hildebrand Moot Court Championship. Before law school, Randy served on the staff of the U.S. Supreme Court and the Senate Select Committee on Nutrition. He has been the Chair of numerous, bar groups, including the State Bar of Texas Appellate Section, and the Houston Bar Appellate Section, and he also served as Chair of the Council of Chairs for the State Bar of Texas. He has been listed in Best Lawyers in America for both Insurance and Appellate, recognized in Chambers USA as a leading lawyer in both Insurance and Appellate, designated a top 100 lawyer for the Houston area in Super Lawyers, and named as a Tier 1 Best Lawyer by US News. He has served on the amicus committees of the International Association of Defense Counsel and the Texas Association of Defense Counsel, and he has written amicus briefs on behalf of those organizations, the Product Liability Advisory Council, the American Petroleum Institute, and numerous other national and Texas-based industry trade associations. He has also authored over 170 CLE papers and law review articles on topics such as appellate advocacy, insurance litigation, and trial procedure.

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A. Introduction

This paper is the product of a combination of practical experience and purposeful study. The author has been a student of oral argument for thirty years. This paper is based in part on the author's preparation and participation in oral arguments at the state and federal appellate courts; live and recorded observations of oral arguments; and formal and informal interviews with members of the judiciary and their current and former staff. The author's development and continued teaching of an Appellate Advocacy class at the University of Texas School of Law and the University of Houston Law Center also inform this paper. Finally, this paper is also the product of an intense study of the transcripts and video recordings of a selection of oral arguments given to the Texas Supreme Court.

1) Court–centered focus of appellate advocacy

This paper is premised on the principle that the focus of any attorney's approach to oral argument should be based primarily on the needs and concerns of the audience–the Court. The overriding goal of an advocate's oral argument should be to help the Court do its job.

This court-centered approach to oral argument is shared by many very skilled appellate attorneys who regularly practice before the appellate courts. Over the years, many of these attorneys have generously submitted to interviews by this author concerning their various approaches to oral argument before the appellate courts, both in preparation and in performance. Their views are strikingly similar and may reasonably be said to constitute a consensus concerning how oral argument should be approached. Many of the current and former appellate judges and justices (and their staff) who have also participated in discussions with the author have endorsed this general approach To all the appellate judges, justices, court staffers, and appellate attorneys who have so generously contributed their thoughts, the author is deeply indebted and thankful.

2) Oral argument as a dialogue

Ideally, a court-centered oral argument takes the form of a dialogue between the Court and the advocate rather than an advocate presenting a prepared speech. In most of the Texas Supreme Court arguments studied for this paper, the justices initiated between fifty and sixty exchanges during a single argument. Facilitating this dialogue begins with thorough–and smart–preparation. Preparing for a dialogue while keeping the Court and its needs in mind requires more and different preparation than preparing a speech. Preparing answers to anticipated questions is fundamental to a successful dialogue. Developing answers that raise other potential questions–a more advanced technique–may give the advocate an opportunity to indirectly steer the Court to issues that the advocate believes will are key to understanding the case. A transition sentence connecting the answer to the next point also facilitates the Court's involvement in a dialogue.

During argument, an effective advocate must embrace the Court's questions as the most important part of oral argument–because they are! These questions are the only way the Court communicates its concerns to the advocate–until the opinion issues. Thorough preparation will allow the advocate to better understand the Court's stated question. If preparation includes consideration of *why* the Court might ask a specific question and *how* the Court might use the answer, the advocate gains a better understanding of the possible unstated subtext of the question. As discussed more specifically below, inadequate preparation can shut down the dialogue or even mislead the Court.

3) Methodology and structure of this paper

This paper attempts to summarize the some of the patterns the author has observed in oral arguments generally, as well as during a survey of select Texas Supreme Court arguments specifically. This paper identifies five basic types of questions that are more frequently asked by appellate judges and justices in oral argument. The author recognizes that oral argument questions could be categorized in different ways but uses this categorization because it provides a convenient structure for sharing the questioning patterns observed.

Within each question type, the paper describes common patterns in the way justices and judges tend to ask those questions, common pitfalls to avoid, suggested techniques for more effective preparation for and anticipation of those questions, as well as some performance tips for use during argument itself.

B. Five categories of questions asked at oral argument

This study identified five categories into which most questions fall: (1) identification and clarification of position, (2) clarification of the facts and the record, (3) contours of the proposed rule or holding, (4) impact of the proposed rule and outcome, (5) basic details about the posture, history, and review of the case.

1) Identification and clarification of position

One of the most common types of questions asked by the Court in the surveyed cases concerns the core of what the advocate hopes to communicate to the Court during argument: the advocate's position on the issues in the case and the supporting arguments of that position. If the Court adopts the advocate's position, these pillars can become the structure of the opinion itself. Thoughtful preparation for these questions is a must.

i) Fundamental: Frame the issue

The ability to frame an issue can be instrumental in determining the outcome of that issue. There are literally dozens of ways that an issue could be framed, each with its own intended or unintended emphases. Picking the right angle on the issue gives an advocate the power to point the discussion in a particular direction.

To help the Court do its job, the issue should be framed in as pointed and in as incisive a way as possible. General statements of the issue, by definition, do not penetrate to the level of the specific decisional ruling. By framing the issue with respect to the narrowest ultimate point of decision, the advocate moves the Court immediately to the dispositive issue in the case, avoids wasting time on developing the issue, and helps the Court spend the maximum amount of time on exploring the pros and cons of each side's proposed decisional rule of law.

Although ideally the statement of the issue will address or at least suggest where the opposing positions of the parties meet, a well-prepared advocate will also prepare a concise response to the other side's major arguments. If amici have filed briefs, the advocate should be prepared with concise responses addressing those briefs as well. Considering how to transition from this response to another point will allow the advocate to answer the Court's question and smoothly refocus the Court on the next point.

ii) Patterns: Rephrasing your position

Failure to do be prepared with a concise statement of the issue, its major supporting points, and a response to the other side's major points can lead to a frustrated panel and wasted oral argument time. Stumbling over answers to these questions

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