Judge-Centric Oral Argument

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Presented in connection with Oral Argument from Both Sides
Co-Presented with
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Fourteenth Court of Appeals

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Robert M. (Randy) Roach, Jr. is the founding partner in Roach & Newton, L.L.P., a law and judge-focused litigation boutique formed in 1993 combining appellate advocacy and advanced trial skills. Randy is a fellow in the American Academy of Appellate Lawyers. He 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 the Hildebrand Moot Court Championship. Before law school, Randy served on the staffs 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 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 presented papers and law review articles at over 200 CLEs on topics such as appellate advocacy, insurance litigation, fraud, contract disputes, fiduciary duty, professional negligence, punitives, and trial procedure.

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A. Introduction

For many lawyers, the pinnacle of their practice is presenting an oral argument before an appellate court. There are many reasons why an appellate oral argument is viewed by lawyers so highly. An appellate court can and frequently does change Texas jurisprudence and appellate justices are often the most prepared and most challenging to appear before.

This author has been a student of oral argument for over 30 years. This paper is based in part on the author's personal experiences attending oral arguments, listening to audio tapes of oral arguments, and making oral arguments before appellate courts. More importantly, this paper is also based on the expressed views of many appellate justices. Through surveys of Texas appellate judges on the topic of oral argument, the views expressed by appellate court justices in continuing legal education panels concerning oral argument, and lectures by justices at the author's Appellate Advocacy class at the University of Texas School of Law, appellate court justices have provided a treasure trove of information directly from the proverbial horse's mouth.

1) Judge–centric focus of appellate advocates.

It is the author's personal prejudice, albeit shared by many appellate advocates, that the focus of any attorney's approach to oral argument should be based primarily on the needs and concerns of his or her audience, the Court. Although it is true that the attorney can only account for his or her own conduct and performance in oral argument, the more important aspect of the argument is the decision that will ultimately come from the court. Accordingly, the focus of this paper will be how the lawyer can best help appellate court justices do their job.

This judge-centric approach to oral argument is shared by many very skilled appellate attorneys who regularly practice before appellate courts. In the past, many of these attorneys have generously submitted to interviews by this author concerning their various approaches to appellate oral argument, 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. This paper will attempt to identify those areas of agreement, but it will also identify some areas where different lawyers pursue their shared goals differently. Were it not for their candor and generous contributions, the views expressed herein would not be done so with nearly as much confidence. To all the justices and all the appellate attorneys who have so generously contributed their thoughts, I am deeply indebted and thankful.

2) Structure of this paper.

This paper divides oral argument into three separate sections. The first section concerns the goals of oral argument. It addresses the general and specific goals for oral argument that are the objectives or the targets at which the advocate aims. The second topic is preparation. Preparation is divided into substantive preparation and performance preparation. The third and final topic is presentation. Presentation can be divided into the substance of the presentation and presentation skills.

B. The Goals of Oral Argument Before Appellate Judges.

The general and specific goals of oral argument will largely dictate the focus of oral argument preparation and presentation. By understanding the goals to be accomplished, the advocate can better prepare for oral argument. The better the oral argument preparation, the better the oral argument presentation. The following are some of the primary goals articulated by accomplished advocates before appellate judges.

1) Helping the judges to the greatest possible extent.

The ultimate goal of oral argument should be to help the Court do its job. The Court's job is to write opinions on important issues of jurisprudence.

The goal of helping the Court do its job can also be understood in comparison to the opposite approach–one that focuses on the advocate instead of the Court. Law students engaged in moot court are understandably more focused on how their presentation is going to be judged than on how the case should be decided. In the real world, however, where it is the decision that matters and not the advocate's performance, the court-oriented approach is the better approach.

2) Proper framing of 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. There are few considerations in oral argument more important than how the advocate frames the issue.

From the Court's perspective, the proper framing of the issue would join the issue as it is addressed by both sides. Because the ultimate job of the judge is to decide between two competing views on how the Court should state and interpret the law, the best way to frame the issue would be to encompass both sides' competing approaches in a unified statement of the issue.

To help the judges do their 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.

3) Propose and defend the proper decisional rule of law.

The basis of the Court's ultimate decision and opinion will be the Court's decisional rulings of law. Focusing on the rule of law the advocate wants the Court to hold in its opinion helps the Court to more easily decide the ultimate issue in the case. In contrast, if the Court does not understand what holding is being requested, the Court, at best, will have to spend considerable time trying to understand the advocate's position. By making the proposed holding of law crystal clear at the outset, an advocate quickly progresses to the most fruitful topic of discussion – the reasons for and against the proposed decisional rule of law.

4) Make the best use of the first ninety seconds.

The first ninety seconds of the advocate's oral argument may be the only opportunity that the advocate has to frame the issue, focus on the proposed decisional rule of law, and provoke appellate judges into analyzing the case along the initial lines suggested by counsel. Particularly in the Supreme Court, where the judges always come prepared to ask many pointed questions, the first ninety seconds is a unique opportunity for the advocate. Because the Court may listen to the first ninety seconds and then ask questions that take the attorney in a different direction, the first ninety seconds present the best opportunity to engage the Court along the advocate's own preferred angle on the issue. If the Court believes the advocate is offering a truly valuable insight into the issue at hand and into the choice the Court must make, then the advocate may win an additional minute or minutes from the Court to develop that particular idea.

Condensing the argument into one sentence, and then stating that sentence at the very beginning of the argument has many advantages. It focuses the Court on the precise angle on the issue that the advocate wants the Court to consider. It may intrigue the Court enough to allow the advocate to expand and elaborate on his or her approach to the issue. It communicates a level of insight and preparation on the part of the advocate that may lead to sharply focused questions at the heart of the case as the advocate has just framed it. By focusing on the heart of the issue at the outset, precious time is saved, and the ball is advanced into the reasons for the competing decisional rulings of law being proposed by the opposing sides.

5) Focus on the jurisprudential issues.

Another goal of the oral argument should be to focus on the jurisprudential issue. Straying away from that jurisprudential issue probably wastes time and distracts the Court's attention from the arguments and points that can make the difference in the Court's ultimate decision. Focusing on how the jurisprudence would be more coherent with the advocate's proposed decisional rule of law, and why the opponent's proposed ruling is not coherent with the surrounding fabric of Texas jurisprudence, can give the Court an important basis to rule in the advocate's favor. Some of the most persuasive arguments focus on the fairness and justness of a proposed holding, and in particular on the fairness or appropriateness of the result that would come from applying that holding to the facts of other cases that may later come up for review.

6) Manage the precious time effectively.

Most appellate courts currently give both sides only twenty minutes to argue, and petitioner will usually have fifteen minutes for the opening argument if it wants to save the maximum five minutes for rebuttal. Appellate advocates almost always would prefer to have more than twenty minutes to argue their case to the Court, but the reality of time limits is otherwise. The advocate's task must be to develop a strategy for oral argument that will manage that precious and small amount of time as effectively as possible. Because there literally is no time to waste during oral argument, the advocate must

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