

EFFECTIVE ADVOCACY FROM A JUDGE'S POINT OF VIEW

Moderator

HON. ANN C. McCLURE, *El Paso*
Justice, Eighth Court of Appeals

HON. JOHN CAYCE, *Fort Worth*
Justice, Second Court of Appeals

HON. DIANE DEVASTO, *Tyler*
Justice, Twelfth Court of Appeals

HON. SUSAN B. DUNCAN, *San Antonio*
Justice, Fourth Court of Appeals

HON. GEORGE C. HANKS, JR., *Houston*
Justice, First Court of Appeals

State Bar of Texas
**19TH ANNUAL ADVANCED
CIVIL APPELLATE PRACTICE COURSE**
September 8 – 9, 2005
Austin

CHAPTER 8

CURRICULUM VITAE OF ANN CRAWFORD McCLURE

CERTIFICATION BY THE TEXAS BOARD OF LEGAL SPECIALIZATION

Board Certified in Family Law [1984]

Board Certified in Civil Appellate Law [1987]

EDUCATIONAL BACKGROUND

Juris Doctor, University of Houston, 1979

Bachelor of Fine Arts, Texas Christian University, 1974 [Magna Cum Laude]

HONORS AND AWARDS

2005 Samuel Pessara Jurist of the Year – Texas Bar Foundation

2005 Gene Cavin Award – State Bar of Texas

2004 Jurist of the Year – American Academy of Matrimonial Lawyers/Texas Chapter

2004 Texas Center Professionalism Award – Texas Center for Legal Ethics and Professionalism and El Paso Bar Association

2004 Professionalism Award – El Paso Young Lawyers Association

2002 Judge Sam Emison Award B Texas Academy of Family Law Specialists

2000 Community Service Award, Black El Paso Democrats

2000 Dan T. Price Award B Family Law Section, State Bar of Texas

2000 Sarah T. Hughes Award B Women and the Law Section, State Bar of Texas

1999 Distinguished Alumna Award B Texas Christian University

1999 Civil Rights Award, NAACP B El Paso Local Chapter

1999 Honoree of Women in Law, Texas Tech University School Of Law

1998 State Bar of Texas Presidential Certificate of Merit

1998 State Bar of Texas Presidential Citation

1996 Extra Miler Award, Boy Scouts of America Yucca Council, Polaris District

1993 State Bar of Texas President=s Special Recognition

APPOINTMENTS

Governor=s Task Force on Indigent Defense 2002-2005

Member, Texas Judicial Council 2001-2005

Vice-Chair, Texas Board of Legal Specialization Civil Appellate Law Advisory Commission 2005-2006

National Brief Judge, ABA (Law Student Division) National Appellate Advocacy Competition 2005

Supreme Court Rules Advisory Committee 1999-2002

Chair, Supreme Court Special Subcommittee on Implementation of Chapter 33, TEX.FAM.CODE 1999-2002

Member, Texas Board of Law Examiners 1991-1995

Member, Board of Disciplinary Appeals 1991-1993

Member, Family Law Specialization Exam Commission 1989-1993

LEGAL ASSOCIATION ELECTED POSITIONS

President-Elect, El Paso Bar Association, 2005-2006

Chair, Judicial Section B Appellate Division B State Bar of Texas, 2001-2002

Chair, Appellate Section, State Bar of Texas 2000-2001

Chair, Family Law Section, State Bar of Texas 1997-1998

Director, El Paso Bar Association 1996-1999

President, Trans-Pecos Bar Association 1995-1997

Director, Texas Academy of Family Law Specialists 1992-1995

COURSE DIRECTORSHIPS

Course Director, 2005 New Frontiers in Marital Property Law [Scheduled October 2005]

Course Director, 2002 Advanced Civil Appellate Seminar

Course Director, 2000 Judicial Section Annual Conference [Appellate Track]

Course Director, 1995 Marriage Dissolution Seminar

Co-Course Director, The Ultimate Trial Notebook, 1994 State Bar of Texas Annual Meeting

Course Director, 1991 Law and Tactics Seminar

Assistant Course Director, 1990 Advanced Family Law Seminar

Course Director, 1989 Family Law for the Experienced Non-Specialist

FREQUENT AUTHOR AND SPEAKER

AT STATE BAR FAMILY LAW AND APPELLATE LAW SEMINARS



JOHN CAYCE

Tarrant County Justice Center
Suite 9000
Fort Worth, Texas 76196

- Chief Justice, Court of Appeals, Second District of Texas (January 1, 1995 - present).
- Member, Supreme Court Rules Advisory Committee (1999-2002).
- Member, Texas Judicial Council (1997-2003).
- Commissioned by Governor George W. Bush to serve as a justice on the Supreme Court of Texas in *In re George*, 28 S.W.3d 511 (Tex. 2000).
- Chair, Council of Chief Justices of Texas (1995-96).
- Board certified, Civil Appellate Law.
- Partner, Shannon, Gracey, Ratliff & Miller, L.L.P. (1987-94); associate, McDonald Sanders, P.C., Fort Worth, Texas (1983-87).
- Briefing attorney for Justice Charles W. Barrow, Supreme Court of Texas (1982-83).
- Editor in chief, *St. Mary's Law Journal* (1981-82).
- J.D., St. Mary's University School of Law (1982); B.A., University of Texas at Arlington, *summa cum laude* (1978).
- Judge Cayce is board certified in civil appellate law and he is a frequent author and speaker on legal topics. In addition to the many CLE papers he has authored, Judge Cayce has written articles appearing in the Baylor Law Review, St. Mary's Law Journal, the Texas Bar Journal, the Texas Insurance Law Journal and the Appellate Advocate.
- Professional activities and memberships include the American Law Institute; Dean's Advisory Council, Texas Wesleyan University Law School; Eldon B. Mahon Chapter of the American Inns of Court; American Judicature Society; Texas Bar Foundation; State Bar College; Tarrant County Bar Association; State Bar of Texas; American Bar Association.
- Honorably discharged from the U.S. Navy Seabees in 1975.
- Born March 17, 1953. Attended public schools in Fort Worth and graduated from high school in 1971. Judge Cayce and his wife, Diane, have two daughters and one granddaughter.

Diane DeVasto
Justice, 12th Court of Appeals
1517 W. Front St. #354
Tyler, TX 75702
(903) 593-8471
diane.devasto@courts.state.tx.us

Diane DeVasto has been a lawyer and judge since graduating from Baylor University in 1972 and from Baylor University School of Law in 1974. She has served in the trial courts of Texas as the Presiding Judge of the City of Tyler Municipal Court, Judge of the Smith County Court at Law, and Judge of the 241st Judicial District Court. Justice DeVasto was elected in 1994 to the County Court at Law and was appointed by then Governor George W. Bush to the 241st District Court in December 1995. She has been elected in uncontested elections in 1996, 1998 and 2002. On June 26, 2003, she was appointed by Governor Rick Perry to serve as a Justice on the 12th Court of Appeals and was elected to a full six-year term on the court in 2004.

During her years of service on the bench, Justice DeVasto has been involved in local and state bar associations as well as many judicial organizations. She has served on the Board of Directors of the State Bar of Texas Judicial Section and currently serves on the Board of Directors of the Texas Center for the Judiciary. She has also served on many State Bar of Texas Committees during her career and has been a fellow of the Texas Bar Foundation since 2000. At the present time she serves on the Pattern Jury Charge Committee - Malpractice, Premises and Products. Much of Justice DeVasto's experience is in the field of judicial education where she has served as faculty for the State Bar of Texas, the Texas Center for the Judiciary and the Texas Municipal Courts. In 1991, Justice DeVasto received the Supreme Court of Texas Award for her contribution to judicial education. Justice DeVasto has received an excellent rating in every bar poll conducted by the Smith County Bar Association and was named "The Judge in Tyler Most Lawyers Like to Appear in Front Of" in the June 23, 2003 issue of *Texas Lawyer*.

Justice DeVasto is a member of the American Bar Association, Judicial Division, Appellate Judges Conference. She is also a member of the American Judicature Society, Texas Supreme Court Historical Society and the Institute of Judicial Administration.

SARAH B. DUNCAN

Fourth Court of Appeals
3200 Dolorosa, Suite 3200
San Antonio, Texas 78205

phone: 210.335.2635
sarah.duncan@courts.state.tx.us

BACKGROUND, EDUCATION, AND PRACTICE

Justice Sarah B. Duncan was sworn in as a justice on the Fourth Court of Appeals on January 1, 1995. Before joining the court, Justice Duncan specialized in civil appellate law in the state and federal appellate courts, having been certified by the Texas Board of Legal Specialization in civil appellate law continuously since 1989.

Justice Duncan graduated with honors from the University of Texas School of Law (1984), where she was a member of the Texas Law Review (1982-84). Since graduation, Justice Duncan has served as a member of the Supreme Court Advisory Committee on the Texas Rules of Civil and Appellate Procedure (1993-97, 1999-2002, 2003-present), the Rules Committee of the Appellate Practice Section of the State Bar of Texas (1990-95), the Texas Commission on Judicial Efficiency's Task Force on Funding Parity and its Subcommittee on Appellate Court Performance Standards (1995-96), the Council of the Appellate Section of the State Bar of Texas (1996-98), the Appellate Court Technology Committee (1998-99), and as an officer of the Appellate Section of the San Antonio Bar Association (Secretary 1993-94; Program Chair 1994-95).

Justice Duncan is a member of the Bar of the United States Supreme Court, the Bar of the Fifth Federal Circuit Court of Appeals, the State Bar of Texas, and the San Antonio Bar Association and a fellow in the American, Texas, and San Antonio Bar Foundations. Justice Duncan frequently speaks, authors papers, and serves on planning committees for continuing legal education programs. She was a contributing author of the second edition of the Texas Appellate Practice Manual published by the State Bar of Texas in 1993.

Justice George C. Hanks, Jr.
Texas Court of Appeals, 1st District

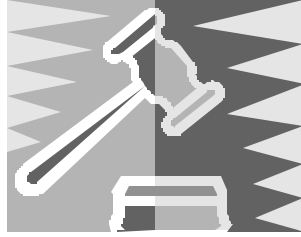
Justice George C. Hanks, Jr., is a native of Breaux Bridge, Louisiana. Prior to joining the First Court of Appeals, he served as judge of the 157th District Court in Houston. From 1996 to 2000, Justice Hanks was a shareholder in the law firm of Wickliff & Hall, P.C., specializing in commercial and medical malpractice litigation. He previously worked at the law firm of Fulbright & Jaworski. L.L.P.

Justice Hanks graduated first in his class from Louisiana State University, receiving a Bachelor of Arts in economics, summa cum laude. Justice Hanks attended Harvard Law School where he received the Legal Defense Fund/ Earl Warren scholarship and he was an editor of the Harvard Blackletter Law Journal. Upon graduation, he served two years as a law clerk for United States District Court Judge Sim Lake.

Justice Hanks currently serves on the Texas Judicial Panel for Multi-District Litigation. He is an adjunct professor at the University of Houston Law Center, a member of the American Law Institute, a faculty member of the National Judicial College, and a published legal author and lecturer at continuing legal education seminars throughout the country. Justice Hanks is admitted to the Texas and District of Columbia bars and is a Texas and Houston Bar Foundation Fellow. He is currently a member of the American Judges Association, National Bar Association, the College of the State Bar of Texas, the Fifth Circuit Federal Bar Association, the Houston Lawyers Association, and the Houston Bar Association. Justice Hanks is a former special disciplinary counsel for the Texas State Bar Commission for Lawyer Discipline and a former chairman and member of the District 4F State Bar Grievance Committee in Houston.

Justice Hanks has been active in the community as a volunteer and member of the board of directors of the Houston Chapter of the American Red Cross and chairman of the chapter's Military, International and Social Services committee. He has also served as a volunteer and a member on the board of directors of Big Brothers/Big Sisters of Houston, Sheltering Arms and the Ensemble Theatre.

Justice Hanks is an avid private pilot and student of World War II aviation history.



EFFECTIVE ADVOCACY FROM A JUDGE'S POINT OF VIEW

Hon. Ann McClure, 8th Court of Appeals
Hon. John Cayce, 2nd Court of Appeals
Hon. Diane DeVasto, 12th Court of Appeals
Hon. Sarah B. Duncan, 4th Court of Appeals
Hon. George C. Hanks, Jr., 1st Court of Appeals

EFFECTIVE BRIEFWRITING

PREPARATION

- Don't over-designate the clerk's record
- Thoroughly read the record
- Review the pertinent law
- Itemize potential issues for review
- Check to see if error has been preserved
- Cull the issues – use a rifle, not a shotgun



STYLE



- Package the product
- Refer to the parties by name or shortened version rather than Appellant, Appellee or an acronym
- Use short sentences and short paragraphs
- Use active rather than passive voice
- Don't list background facts in bullet format
- Don't embed long quotations in text

THE FOOTNOTE FRENZY

- Use footnotes sparingly
- Don't put substantive arguments into footnotes
- Drop string citations to footnotes, and include parenthetical description of relevance
- What about using footnotes for record references, case or statutory citation?

THE FONT *FRENZY*

- Don't use tiny fonts in footnotes!
- **Don't** utilize *frequent* font changes!
- Use *italics*, **boldface type**, **CAPITAL LETTERS** and underscoring sparingly!
- Limit exclamation marks!

STRUCTURE

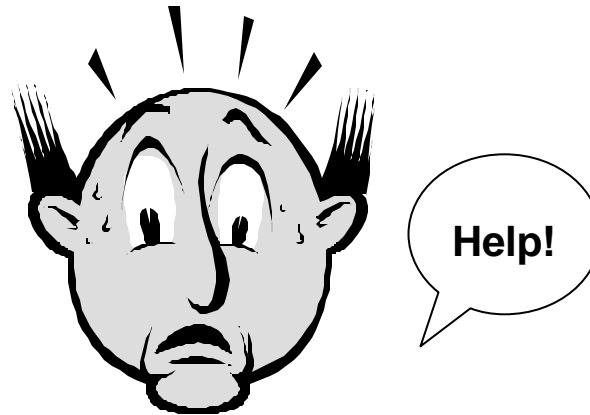
- Remember your audience
- Outline your argument in the table of contents
- State clearly how or why oral argument will assist the court in deciding the case
- Identify the proper standard of review
- Give a clear and concise explanation of what this case is about

EXAMPLE

STATEMENT OF THE CASE

- Mary and John were married on October 12, 1985. Two children were born of the marriage. Their son, John Jr., was born on December 1, 1991 and their daughter, Amy, was born on March 3, 1995.
- **It's a divorce case.**
- Mary and John were divorced in 2003 and named joint managing conservators. Mary was granted the right to establish the children's primary residence. Amy has significant talent in gymnastics. The closest gymnastics program is thirty miles from the family's home. To eliminate the transportation burden, Mary considered moving but because John has objected, she has not yet done so.
- **No, it's a relocation case.**
- On June 7, 2004, Mary picked up Amy from gymnastics class. While driving home, their compact car was rear-ended by a pick-up truck driven by an unlicensed teenager. Amy did not suffer serious injuries, but Mary suffered a broken leg and required surgery and extensive physical therapy.
- **Looks like a personal injury case.**
- Mary was not able to return to work for seven months. Her employer has a personnel policy providing that employees may be discharged if they are absent from work for more than six months. Mary was fired effective December 31, 2004.
- **I guess it's a wrongful discharge case.**

JUST TELL US WHAT IT IS



- Develop a theme
- Write a factual narrative that “tells a story”
- Use effective subheadings
- Don’t use stream of consciousness writing
- Define unfamiliar terms
- Use jump cites
- Include cross points in your brief on the merits

IS HUMOR EVER EFFECTIVE?

- Point of Error One: Appellant's detention and arrest were illegal and the complainant's pretrial identification was the tainted fruit of that illegal arrest.



*Sittin' and staring out the hotel window
Gotta tip their gonna' kick the door in again
I like to get some sleep before I travel
But if you got a warrant, I guess you're gonna' come in*

Grateful Dead, *Truckin'*; AMERICAN BEAUTY (1970)

- Point of Error Two: Appellant was denied reasonably effective assistance of counsel at trial in violation of his constitutional rights.

*Busted down on Bourbon Street
Set up like a bowling pin
Knocked down gets to wearin' thin
They just won't let you be*

Grateful Dead, *Truckin'*; AMERICAN BEAUTY (1970)

PRELIMINARY STATEMENT

This is an appeal from a jury verdict. Appellants claimed that on August 31, 1986 four year old A.A. fell off of a ramp on playground equipment. . . . The jury returned a verdict that Appellee (the salesman) was not negligent and was not liable.

Citing one case on the sufficiency standard and using one sentence with 38 words, Appellants ask this Court to reverse the jury's verdict as to Appellee.

To Appellants' contention of:

“IS NOT”,

Appellee responds in kind:

“IS SO”.

EFFECTIVE USE OF APPENDIX

- Ensure that it is complete
- Include copies of your primary authorities and key documentary evidence
- Attach the appendix to the brief if it is not voluminous; otherwise bind it separately
- Clearly reference the exhibits or authorities in the text of your brief

PRAYER FOR RELIEF

- Provide a clear statement of the specific relief you request
- Example:

*Truckin' I'm a going' home
Whoa baby back where I belong
Back home sit down and patch my bones
And get back truckin' on*

Grateful Dead, *Truckin'*, AMERICAN BEAUTY (1970)

Appellant respectfully prays that this Court reverse his conviction, and based on the legally insufficient evidence, render a judgment of acquittal.

PROOFREAD YOUR BRIEF

- Spell check can't catch it all
- Example:

“Spell-checkers R grate butt they mite knot ketch everything. This cent ants an thee won bee four it past my spell-checker.”

Hon. Donald C. Ashmanskas, *Creating the Persuasive Argument*, STATE BAR OF TEXAS SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE, Ch. 30, p. 10 (2000)

AND PROOFREAD IT AGAIN

- Your staff may not recognize mistakes
- Examples:
 - “Possessed reconserver” instead of “possessory conservator”
 - “Inaudible accident” instead of “unavoidable accident”
 - “Circumstated evidence” instead of “circumstantial evidence”
 - Was the juvenile court’s denial of Appellant’s request for a “continuous abuse of discretion?”

AND PROOF IT YET AGAIN

“I had one brief early on from some lawyer who on one page of his brief had “plaintiff” spelled three times three different ways. And you know, I don’t know if he knew how to spell “plaintiff” or not but he knew that it wasn’t right three different ways. He had to know that two of those were wrong.”

Oral history of former Chief Justice Max N. Osborn, September 3, 1997

EFFECTIVE ORAL ARGUMENT

PREPARATION

- Explain to your client that oral argument is the most expensive 20 minutes in history
- Reread the full record and the briefs
- Review key cases so you can discuss them fully and accurately
- Update citations
- Supply clerk and opposing counsel with any new cases you intend to discuss



STYLE

- Make the argument a conversation with the judges
- Don't read from the brief or a prepared text
- Acknowledge material weaknesses and explain why you should win anyway
- Call the judge by name [Judge Smith] as opposed to Mr. Chief Justice or Madam Justice. ["Hey, how's it goin'?" is a bit too informal]
- When discussing another court's opinion, know whether the authoring justice is a male or female
- Anticipate and diffuse your opponent's arguments
- Speak clearly, forcefully, and convincingly
- Don't make jury arguments

STRUCTURE

- If justices tell you they've read the briefs, take the hint and skip the facts
- If you must recite the facts, do it briefly and chronologically
- Cut to the chase. Identify principle issues and go right to the argument
- Know when to concede a point
- Should you argue your best point first or your weaker point first?

VISUAL AIDS

- Advise the clerk in advance
- Give judges mini-copies
- Blow-ups of disputed contractual provisions or maps can be effective
- Are PowerPoint presentations effective or overused?
- Be prepared to argue without your visual aids in case of electronic failure [Murphy's Law]

DEALING WITH QUESTIONS

- Anticipate questions and formulate answers
- Know a softball when you see it
- Don't say, "I wasn't trial counsel so I don't know."
- Don't say, "Judge, I'll get to that in a few minutes" or "My co-counsel will cover that."
- Better yet, don't divide your time with co-counsel
- Don't argue with the judge
- Don't try to avoid a question by saying, "Judge, I see that my time has expired."



TIME MANAGEMENT

- Expect that questions might disrupt your presentation
- Don't exceed your time allotment
- When granted a moment "to complete your thought", don't go back to your outline and pick up where you left off
- In multi-party or complex litigation, request additional time when you receive notice of the submission date, not when you walk in the courtroom



ETHICAL CONSIDERATIONS

- Don't misstate or overstate the law or the facts
- Don't disparage the trial judge, opposing counsel, or a litigant
- Handling *pro se* litigants
- Handling ethical violations
- Handling Rambeaux and Rambette
- Handling the ill-conceived motion for rehearing



WE WISH YOU GREAT SUCCESS



The End