

**ORAL ARGUMENT BEFORE THE TEXAS SUPREME COURT:
GOALS, PREPARATION, AND PRESENTATION**

Presented By

ROBERT M. “RANDY” ROACH, JR., *Houston*
Cook & Roach, L.L.P.

HON. WANDA MCKEE FOWLER, *Houston*
Justice, 14th Court of Appeals

HON. J. WOODFIN JONES, *Austin*
Alexander, Dubose, Jones & Townsend

Written By

ROBERT M. “RANDY” ROACH, JR.
Cook & Roach, L.L.P.

Houston
1111 Bagby, Suite 2650
Houston, Texas 77002
(713) 652-2800
(713) 652-2029 - Fax

Austin
1004 West Avenue
Austin, Texas 78701
(512) 479-5966
(512) 479-0409 - Fax

State Bar of Texas
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Houston Office
1111 Bagby, Suite 2650
Houston, Texas 77002
Telephone (713) 652-2800
Facsimile (713) 652-2029

Robert M. (Randy) Roach, Jr.
COOK & ROACH, L.L.P.

Austin Office
1004 West Avenue
Austin, Texas 78701
Telephone (512) 479-5966
Facsimile (512) 479-0409

EDUCATION:

Georgetown Univ., BA in Philosophy (1977) (magna cum laude)
University of Texas School of Law, JD (1981) (Texas Law Review; Hildebrand Moot Court Champion)

PROFESSIONAL ACTIVITIES:

Board Certified in Civil Appellate Law and Personal Injury Trial Law
Former Chair of Appellate Practice Section, Houston Bar Association
Treasurer: Appellate Practice and Advocacy Section, State Bar of Texas (2002-)
Director of Appellate Advocacy, University of Houston Law Center (1994-)
Adjunct Professor of Law, Appellate Advocacy, University of Houston Law Center (1990-)
Adjunct Professor of Law, Appellate Advocacy, University of Texas School of Law (2000-)

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Author/speaker for University of Texas CLE programs on the following Appellate topics: Oral Argument before the Supreme Court of Texas - 2002; Oral Argument Preparation - 2001; Appellate Ethics - 2000; Hot Tips - 1997; Appellate Lawyers at Trial - 1996; Oral Argument Questions - 1995; Oral Argument Survey of Texas Appellate Judges -1993

Author/Speaker for State Bar of Texas CLE Programs on the following Appellate topics: Supreme Court Advocacy - 2003, 2002, 2001; Appellate Procedure - 2001; Mandamus - 2003, 1999; Appellate Briefs - 2003, 1998; Appellate Lawyers at Trial - 1997; Error Preservation - 1997; Daubert Challenges - 1997; Oral Argument -2003, 2002, 1995, 1994, 1992, 1991; Attorneys Fees - 1996; Motions for Rehearing - 1995, 1993; ADR - 1994

Author/Speaker for Houston Bar Association CLE programs on the following Appellate topics: Oral Argument - 2000, 1998, 1996, 1997, 1995; Appellate Lawyers at Trial - 2002, 1998; Appellate Rules - 1997; Error Preservation - 2001; Motions for Rehearing - 2001; Texas State Survey of Appellate Judges -1997; Evaluating Potential Appeals - 1993; Statewide Appellate Court Funding and Redistricting - 2003

Author/Speaker for American Bar Association CLE programs on the following Appellate topics: Appellate Lawyer at Trial - 2001; Appellate ADR; Appellate Oral Argument - 1997; Insurance Appeals - 2001

Author/Speaker at over 30 CLE programs Trial Procedure topics including discovery strategy, ethics, coverage litigation, budgets, investigating catastrophic accidents, evidence, ADR, Mary Carter agreements, bifurcating punitives, and products liability - 1990-2003

Author/Speaker for South Texas College of Law CLE programs on the following topics: Appellate ADR - 2002; Appellate Oral Argument - 1999; Discovery - 1993, 1989

Author/Speaker on Insurance Coverage topics at CLE programs sponsored by: State Bar - 2003, 2002; University of Texas - 2002, 2000, 1999, 1998; American Bar Association - 1997, 1996; Univ. Of Houston - 2003, 2002; South Texas College of Law - 1999; Anderson Kill - 1995; Houston Intellectual Property Law Association - 2002

Co-author of "Technology Risks and Liabilities: Are You Covered?" SMU Law Review; Volume 54, No. 4, Fall, 2001

PROFESSIONAL MEMBERSHIPS:

Product Liability Advisory Council; International Association of Defense Council; Federation of Defense and Corporate Counsel; Fifth Circuit Bar Association; District 4I Grievance Committee, 1993-1998.

PROGRAM CHAIR:

Annual Meeting Committee, Appellate Advocacy Section, ABA Tort and Insurance Practice Section 2000-2001; Judicial Liaison Committee, Insurance Section of State Bar of Texas, 2000-2001; University of Texas Insurance Law Seminar, 1998

PROFESSIONAL LISTINGS:

Who's Who in American Law; Who's Who in the World; AV rated by Martindale-Hubbe

WANDA MCKEE FOWLER, JUSTICE
Fourteenth Court of Appeals

EDUCATION

New York University School of Law Appellate Judges Seminar, 1998, 1999.

Attorney-Mediators Institute, Inc., 1990.

Southern Methodist University School of Law, J.D. 1981: Delta Theta Phi legal fraternity; International Law Society.

Baylor University, BA (Economics) 1978: MORTAR BOARD SENIOR HONOR SOCIETY –President; OMICRON DELTA KAPPA NATIONAL HONOR SOCIETY – Outstanding Sophomore, Member; LEAKEY LEADERSHIP LAB - Participant, Staff, Selection Committee; DEAN'S DISTINGUISHED HONOR LIST; DELTA DELTA DELTA SOCIAL SORORITY –Panhellenic Representative, Scholarship Chair; BAYLOR CHAMBER SINGERS.

Texas Public Schools

PROFESSIONAL CAREER

Appellate Judge of the Year, HOUSTON CHAPTER OF THE TEXAS ASSOCIATION OF CIVIL TRIAL AND APPELLATE SPECIALISTS, May 2003.

Justice, FOURTEENTH COURT OF APPEALS, January 1995 to present.

Attorney, FOUTS & MOORE, commercial litigation and mediation, 1988-1994.

In-House Counsel, GTE MOBILNET, 1986-1988.

Staff Attorney, FIRST COURT OF APPEALS, 1985-1986.

Attorney, GILPIN MAYNARD PARSONS POHL & BENNETT, commercial litigation, 1983-1985.

Briefing Attorney, FIRST COURT OF APPEALS, for Chief Justice Tom Coleman and the Honorable Arthur D. Dyess, 1981-1983.

PROFESSIONAL AND COMMUNITY AFFILIATIONS

State Bar of Texas; Houston Bar Association; College of the State Bar of Texas; Fellow, Texas and Houston Bar Foundations; Charter Member-Institute for Responsible Dispute Resolution.

ST. PAUL'S UNITED METHODIST CHURCH: Administrative Board; Choir (Soloist); 4th grade Sunday School Teacher.

CONTINUING LEGAL EDUCATION PAPERS AND PRESENTATIONS

Panelist/Moderator on Appellate Issues: *Winning Appellate Advocacy: Keeping or Attacking the Verdict*, CIVIL/APPELLATE BENCH BAR CONFERENCE, Houston Bar Association, May 2003, 2002; CIVIL APPELLATE SEMINAR: APPELLATE PRACTICE FOR TRIAL AND APPELLATE COUNSEL, Corpus Christi Bar Association; 10th ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS, U.T. Law School, June, 2000; ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, State Bar of Texas, September 2003, 1998, 1997; HOUSTON BAR ASSOCIATION APPELLATE LAW SECTION SEMINAR, March, 1998; CIVIL APPELLATE LAW FOR TRIAL PRACTITIONERS, South Texas College of Law, December 1999, 1997, 2002; HBA LITIGATION & APPELLATE SECTIONS LUNCHEON, July, 2003, November, 1998, March, 1996; HOUSTON CHAPTER OF CIVIL TRIAL & APPELLATE SPECIALISTS, January, 1996.

Speaker: *Supreme Court Update*, WINTER REGIONAL CONFERENCES AND ANNUAL CONFERENCE, Texas Center for the Judiciary, January, February, & September 2003; *What do Jalapeno Hal, Chester's Way and Mike Mulligan Have in Common?: A Fresh Approach to Brief Writing*, HOUSTON BAR ASSOCIATION APPELLATE SECTION, July 2003; *Supreme Court Update*, HOUSTON BAR ASSOCIATION LITIGATION SECTION, April 2003 *An Update on Sanctions in Texas*. TADC CONFERENCE, SEPTEMBER, 2000. *Summary Judgments and Death Penalty Sanctions: Preserving Objections to Dispositive Motions*, IDENTIFYING AND PRESERVING ERROR FOR APPELLATE REVIEW IN TEXAS, Lorman Education Services. July 25, 2000.

Speaker/Co-Author, *'Come On and Let Me Know ... Should I Stay or Should I Go?'* *Judicial Removal on Mandamus and on Appeal*, 26TH ANNUAL ADVANCED CIVIL TRIAL COURSE, State Bar of Texas, November, 2003, 12TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, *State Bar of Texas*, September, 1998; *Appealing Default Judgments*, ADVANCED CIVIL APPELLATE LAW COURSE, State Bar of Texas, September, 1997.

PERSONAL Married, two daughters.

6th generation Texan. *Earlier claims to fame*: Member National Champion Sub-Junior Rifle Team (age 11); Ranked 2nd in Women's Doubles in Texas in "over 30" division; District Champion in Tennis, 3 years; Houston Concert Chorale (soloist); Bach Choir of Houston (soloist); All State Choir, 2 years.

J. Woodfin "Woodie" Jones
Alexander Dubose Jones & Townsend LLP
515 Congress, Suite 1720
Austin, Texas 78701
512/482-9300 (phone –main)
512/482-9302 (phone – direct)
512/482-9303 (fax)
wjones@adjtlaw.com

Woodie Jones served for twelve years as a Justice on the Austin Court of Appeals and was the top-rated judge on that court. During his tenure on the court, Judge Jones authored more than 1,500 opinions and participated in deciding roughly 5,000 appeals. During his last two years on the court, he acted as the Senior Justice, presiding over one of the court's three-judge panels. In addition to his present appellate practice, Judge Jones is also an experienced arbitrator.

EDUCATION

- B.A. with Honors in Liberal Arts (Plan II), Phi Beta Kappa, The University of Texas at Austin, 1972
- J.D., The University of Texas School of Law, 1975
- LL.M., Master of Laws in Judicial Process, The University of Virginia School of Law, 1995

PROFESSIONAL ACTIVITIES

- Partner, Alexander Dubose Jones & Townsend LLP, Austin, Texas, June 2003 - present
- Partner, Scott, Douglass & McConnico, Austin, Texas, March 2001 – May 2003
- Justice, Third Court of Appeals, Austin, Texas, Oct. 1988 - Dec. 2000
- Partner, Sneed, Vine, Wilkerson, Selman & Perry, Austin, Texas, 1981-88
- Associate, Bracewell & Patterson, Houston, Texas, 1976-81
- Briefing Attorney for Hon. J. Curtiss Brown, Chief Justice, Fourteenth Court of Appeals, Houston, Texas, 1975-76
- President, Travis County Bar Association, 1987-88
- Life Fellow of the Texas Bar Foundation

LAW RELATED PUBLICATIONS & APPEARANCES

- Co-author, *The Duty of a Business Invitor to Protect Business Invitees from the Criminal Acts of Third Parties*, 54 Tex. Bar J. 820 (Sep. 1990)
- Author/speaker for SMU Law School 1992 CLE course: "Real Estate Law: Leases- in Depth" (Topic: Liability of Owners for On-Premises Criminal Acts)
- Author/speaker for State Bar of Texas PDP 1992 & 1993 Advanced Administrative Law Course (Topic: Findings of Fact and Conclusions of Law)
- Co-author, *Parents Beware: Minors and Social Host Liability in Texas*, 56 Tex. Bar J. 1110 (Dec. 1993)
- Speaker for Travis County Bar Association January 1994 "Docket Call Seminar" (Topic: Appellate Tips)
- Speaker for Travis County Bar Association March 1994 Litigation Section luncheon (Topic: Appellate Tips)
- Speaker for Travis County Bar Association 1994 Bench-Bar Conference (Topic: Appellate Tips)
- Author/speaker for Travis County Bar Association 1994 Administrative Law Seminar (Topic: The Administrative Record)
- Speaker for Travis County Bar Association- Administrative Law Section 1995 CLE Course: "Ninth Annual Administrative Law Seminar" (Topic: Judicial Perspective on Admin. Law)
- Speaker for Travis County Bar Association 1995 CLE Course: "Primer for Handling Civil Appeals in State Court" (Topic: Appellate Do's and Don'ts: A View from the Bench)
- Author, *The Absurd-Results Principle of Statutory Construction in Texas*, 15 The Review of Litigation 81 (1996)
- Co-author, *Cash or Clients: The Ethics of Financial Disincentives in Attorney Noncompetition Agreements*, 59 Tex. Bar J. 516 (June 1996)
- Speaker for Travis County Bar Association 1997 Bench-Bar Conference (Topic: Summary Judgments)

- Speaker for State Bar of Texas PDP 1997 Advanced Administrative Law Course (Topic: New Rules of Appellate Procedure)
- Author/speaker for State Bar Legal Assistants Division 1998 Advanced Personal Injury Law Seminar for Legal Assistants (Topic: New Rules of Appellate Procedure)
- Author/speaker for Capital Area Paralegal Association 1998 Advanced Seminar for Attorneys, Paralegals, and Other Professionals (Topic: New Rules of App. Procedure)
- Co-author/speaker for State Bar of Texas PDP 1998 Advanced Administrative Law Course (Topic: The Constitution and the Relative Roles of the Legislature, the Agency, and the Courts)
- Speaker for Travis County Bar Association March 1999 Civil Appellate Section Luncheon (Topic: Practice Before the Third Court of Appeals)
- Speaker for Travis County Bar Association May 1999 Solo/Small Firm Section Luncheon (Topic: Tips on Practice Before the Third Court of Appeals)
- Speaker for State Bar of Texas PDP 1999 Advanced Administrative law Course (Topic: Case Update)
- Speaker for Travis County Bar Association 2000 Bench-Bar Conference (Topic: Administrative Law)
- Speaker for Travis County Bar Association March 2000 Civil Litigation Section Luncheon (Topic: Practice Before the Third Court of Appeals)
- Speaker for University of Texas School of Law 2000 Annual Conference on State and Federal Appeals (Topic: Judicial Perspectives on Appellate Practice)
- Speaker for Travis County Bar Association June 2000 Advanced Administrative Law Seminar (Topic: Administrative Appeals at the Third Court of Appeals)
- Speaker at “Legal Assistant University” presented by the Legal Assistants Division of the State Bar of Texas, September 2000 (Topic: Appellate Law)
- Panelist for State Bar of Texas PDP 2000 Advanced Administrative Law Course (Topic: Appeal of Administrative Cases)
- Speaker for Travis County Bar Ass’n Administrative Law Section 2001 course on Nuts & Bolts of Admin. Law (Topic: Appellate Procedures Before the Third Court of Appeals)
- Panelist for State Bar of Texas Appellate Law Section 2001 Annual Meeting at State Bar Convention (Topic: “*Appellately Incorrect*”)
- Co-author/speaker for State Bar of Texas 24th Annual Advanced Civil Trial Course 2001 (Topic: Practical Tips from an Appellate Lawyer)
- Speaker for Dallas Bar Association April 2002 Civil Appellate Section Luncheon (Topic: Appellate Mediation)
- Speaker for Texas Trial Lawyers Association May 2002 *Staying in the Forefront* Seminar (Topic: “*How to Make Your Appeal Sexy*”)
- Speaker for State Bar of Texas Course Practice Before the Supreme Court of Texas June 2002 (Topic: “*Drafting a Petition for Review*”)
- Co-author/speaker for State Bar of Texas 25th Annual Advanced Civil Trial Course 2002 (Topic: Appellate Practice)
- Author/Speaker for State Bar of Texas 16th Annual Advanced Civil Appellate Practice Course 2002 (Topic: Appealing from a Summary Judgment)
- Speaker for Travis County Bar Association 2003 Bench-Bar Conference (Topic: Mandamus)
- Panelist for University of Texas 13th Annual Conference of State and Federal Appeals, 2003 (Topic: Oral Argument demonstration)

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ORAL ARGUMENT TO THE TEXAS SUPREME COURT: GOALS, PREPARATION, AND PRESENTATION

I. INTRODUCTION

For many lawyers, the pinnacle of their practice is presenting an oral argument before the Texas Supreme Court. There are many reasons why an oral argument in the Supreme Court is viewed by lawyers so highly. It is the highest court of the state and the court of last resort concerning Texas law. This is the court that can and frequently does change Texas jurisprudence and is often the most prepared and most challenging court in which to appear.

This author has been a student of Supreme Court oral argument for over 20 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 the Texas Supreme Court. More importantly, this paper is also based on the expressed views of many Supreme Court justices. Through surveys of Texas appellate judges on the topic of oral argument, the views expressed by Supreme 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, the Justices of the Texas Supreme Court have provided a treasure trove of information directly from the proverbial horse's mouth.

A. Court-centered 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 the Texas Supreme Court do the Court's job.

This court-centered approach to oral argument is shared by many very skilled appellate attorneys who regularly practice before the Texas Supreme Court. In the past, many of these attorneys have generously submitted to interviews by this author concerning their various approaches to oral argument before the Texas Supreme Court, 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.

B. Structure of 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.

II. THE GOALS OF ORAL ARGUMENT BEFORE THE TEXAS SUPREME COURT.

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 the Texas Supreme Court.

A. Helping the court 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. Because the Supreme Court has discretion whether or not to take a case, any case that the Court takes is presumably one that the Supreme Court considers to present an important issue of jurisprudence. If there was only one answer to the problem presented by the case law, a per curiam decision would be far more likely than an invitation for oral argument. Therefore, when the Supreme Court extends an invitation to the parties to present oral argument, the Court will be making a decision to choose between two competing proposals on how the case should be resolved. The consensus view among Supreme Court advocates is that helping the Court to do

its job and to make that decision should be the primary goal of both sides in an oral argument.

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.

B. 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 Court 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 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.

C. 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.

D. 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 the Court 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.

E. Focus on the jurisprudential issues.

Another goal of the oral argument before the Texas Supreme Court should be to focus on the jurisprudential issue on which the Court granted the petition for review. 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.

F. Manage the precious time effectively.

The Supreme Court currently gives 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. Supreme Court 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 ruthlessly edit prepared remarks into the most concise and incisive remarks possible. Complex thought must be simplified. Long sentences must be turned into short sentences. Unnecessary thoughts and phrases must be discarded. Time management must be one of the advocate's overriding concerns.

G. Identify the 6 to 12 key points in support of the proposed holding.

While there may be countless points that could be offered in support of the advocate's proposed holding, one goal for the oral advocate should be to identify the 6 to 12 most persuasive points. Because time is limited, and because the Court's questions deserve attention more than the advocate's own prepared remarks, a real premium should be placed on identifying the most persuasive points. One universally experienced post argument thought is, "I wasn't able to make all the points I really wanted to make." Identifying the most persuasive points is the first step toward finding a way to actually make many of those points as possible during oral argument.

H. Extend the argument beyond the briefs.

The Supreme Court obviously is not interested in a regurgitation of the information contained in the briefs. Because the Court expects the parties to join the issue and discuss the advantages and disadvantages to the jurisprudence of adopting one holding as opposed to the other, the goal of oral argument should be to make the oral argument start where the briefs end. To do this, the oral advocate will not only have to join the issue, but will have to synthesize the clash of respective positions into an oral argument concerning the decisive point on which the choice between decisional rulings will ultimately turn.

I. Provoke questions and issues with answers to questions.

Because time is short and the Court will spend most of its time asking questions, the opportunity to make points needs to be developed from the opportunity to answer particular questions. Some of the advocate's statements can be calculated to provoke questions from the Court that would elicit the opportunity to give particular answers. Those answers can, in turn, provoke additional questions in order to give answers that make additional points that the advocate believes will further develop the presentation.

J. To be persuasive, be comprehensible.

In order to persuade, the advocate will have to be understood. To be understood, given the shortness of time and the complexity of the issues, clarity and conciseness in oral expression is key. Two methods of preparation help an advocate be comprehensible. First, in order to formulate an answer that can be expressed with the appropriate level of economy and clarity, the advocate will need to have anticipated the question in advance. Second, it helps to rehearse the argument before an audience. If colleagues or even family members listen to the argument and do not understand it, the advocate probably will not be all that comprehensible or persuasive to Supreme Court.

K. Protect and enhance your credibility.

The oral argument will have to be devised so that credibility is maintained at all times, and enhanced if possible. Beyond candor, concessions concerning the limitations of the facts or the existing case law should be made strategically. Statements concerning the record and the law must be completely accurate.

L. Be the master of the record and the law.

The advocate before the Supreme Court should have mastered the body of relevant law to the point where he or she is the state's most knowledgeable expert on that area of law at the time of oral argument. The advocate should be prepared to discuss the facts and opinions of any particular case that might be raised by the opponent or the Court. Similarly, if there are questions concerning what is contained in the trial record, the advocate should have anticipated the question to the point where the record page cites can be offered. Also, it requires a mastery of the record to be able to truthfully to say that there is nothing else in the record beyond X and Y.

III. PREPARATION FOR ORAL ARGUMENT

Keeping in mind the above listed goals, the essential foundation for the oral argument is the advocate's preparation. Advocates frequently spend two full weeks preparing for oral argument. Based on the author's survey on preparation for Supreme Court oral argument, virtually all oral advocates focus on the following basics of preparation.

A. Basics.

The first step in preparation is to gather all the briefs, all of the record, and all cases that were used in the briefing process. The advocate first re-reads those briefs. Most practitioners always read chronologically from the first brief to the last, although some always reverse the process and begin with the petitioner's reply brief. Six to twelve of the key cases are then read in order to establish the background of these most important cases. An abstract of the record is then reviewed. Additional excerpts may be culled based on what the advocate anticipates will be the object of questions or otherwise be important in oral argument.

Even though the briefs contain many arguments, most experienced practitioners will only focus on two or three issues that they believe are most important to the Court. On these key issues, the advocate tries to identify all the questions that could be raised by the Court during oral argument. All possible answers are identified, and then those possible answers are ranked and ordered from the most persuasive to least persuasive in descending order. The advocate will consult with colleagues to discuss the argument and to help anticipate potential questions and to evaluate the potential answers. Normally, no more than two answers will be given to a particular question during oral arguments. The advocate then creates an outline of the argument.

Once this process is complete, the next step is to practice. Some advocates practice privately; others practice in front of someone else. Advocates generally adhere to the motto that practice makes perfect. The advocate streamlines and polishes the argument to the greatest extent possible.

B. The importance of preparation.

Most supreme court advocates try to set aside approximately two weeks before oral argument to start preparing. Over-preparation is the rule. Advocates approach the process from the viewpoint of, "I have to master everything." The common experience is one of total immersion in the law and the record. Also, most oral advocates redevelop their thinking concerning their argument based on their oral argument preparation.

Most advocates make significant and material changes between initial brief preparation and the oral argument.

The fact that an advocate's understanding of the issue develops after the brief is completed, but before oral argument, may be attributable to the oral advocates focus on addressing the concerns of the Court. Focusing on the Court's likely concerns and questions makes advocates more sensitive to the vulnerability of their position as expressed in the brief. Determining what points would have to be conceded in order to maintain their credibility and coherence makes advocates think more deeply about the core truth of their position.

Briefs tend to focus on advancing the party's position. This is particularly true of the petitioner's reply brief, which is the brief least likely to focus on rebutting the other side's position. Even the respondent's brief may focus more on supporting the lower court's decision rather than responding to and contesting the position advanced in the petitioner's brief. The petitioner's reply brief will likely respond to and rebut the respondent's positions, but is again likely to focus on establishing the importance of the case jurisprudentially in the hope that the Supreme Court will take the case. Given these circumstances, it is not surprising that oral argument preparation becomes a more focused opportunity for an objective assessment of the relative merits of the opposing parties' positions.

The focus on self-criticism during oral argument preparation is furthered by obtaining input from colleagues in informal moot court sessions. Receiving pointed criticisms from colleagues about the weaknesses of certain positions and areas of concern not previously appreciated by the advocate often generates additional insight into how to better articulate a position and how to better justify it.

C. Developing a flexible approach to answering the Court's questions.

Anticipating the Court's questions must be tempered with flexibility. The good oral advocate will go where the Court wants to take the advocate. Advocates who resist directly answering the Court's concerns risk alienating the Court and missing the opportunity to persuade. The need to build in a significant amount of flexibility to address the Court's concerns during argument suggests that an advocate should not prepare a particular script or try to adhere to one particular logical flow of the argument.

D. Question and answer Modules.

Preparing questions and answers in discrete modules is one means of building flexibility into an oral

argument outline. Instead of constructing an outline that has a long logical flow, particular questions and points may be developed discretely. This modular approach to answering the Court's concerns necessarily requires that the advocate consider alternative transitions from point to point, instead of just following one particular flow of points.

E. Sowing questions in the mind of the Court.

If the focus of preparation is on the Court instead of on the advocate, it requires a fair amount of skill for the oral advocate to steer the Court. Some advocates call this skill being provocative; others call it sowing questions in the mind of the Court. Preparing answers to anticipated questions that raise other potential questions may indirectly steer the Court. The Court may or may not take the opportunity to follow a provocative statement with a particular question. When that happens, however, the Court and counsel have connected in a very meaningful way.

F. Focusing on the jurisprudential consequences that flow from a proposed rule of law.

Analyzing the jurisprudential consequences that result from a particular decisional rule of law is one of the most important tasks in preparing for oral argument. Articulating a rule of law raises a number of natural questions. How is the proposed rule going to change law? How will it be consistent with the law? How will it be applicable to another set of facts? Is the rule consistent with what other states are doing? Is the law in other respects consistent with the proposed decisional rule? Good lawyers prepare for oral argument by analyzing both sides' respective proposed decisional rules and by anticipating these questions.

G. Framing the issue for the Court.

One of the most important things any advocate can do in an attempt to steer the Court is to frame the issue. If an issue is framed one way, it may have a great deal more persuasive impact than framing it another way. A well framed issue will focus on the primary decisional point. Each side has a rule they want the Court to adopt. The key to framing the issue is to both identify where the parties disagree and to explain to the Court why they disagree. Ultimately, it is the "why" of the disagreement that becomes the most important issue to the Court in deciding the case.

The primary decisional point is the point that, if won, will decide that case. By focusing on the primary decisional point, the advocate can create a shortcut

around some of the issues raised by opposing counsel and some of the issues that are more peripheral to the case.

H. Identify the weak points that can be conceded.

After identifying the primary decisional point, the advocate should identify the weak and peripheral issues that distract the Court from the core of the case. Doug Alexander describes this process as limiting the battlefield to as small an area as possible. When missiles come in from the other side that are not aimed at the advocate's battlefield, and are outside of it, the advocate chooses not to defend against those attacks. Missiles that do come into the battlefield, however, will be vigorously contested. Preparing an argument with a keen eye toward abandoning weak issues and focusing on the core of the case furthers the goals of utilizing the limited time to the best possible advantage.

I. Formal and informal moot courts or practice arguments.

Because the great majority of the time in oral argument before the Supreme Court will be spent answering questions, it can be very helpful to prepare for oral argument with formal or informal moot courts or practice arguments. Most lawyers prefer discussing the case with colleagues rather than bringing in outside attorneys to conduct a formal moot court. Some lawyers believe that informal discussions, with their more conversational tone, is more similar to the actual interaction with the Court. Some favor this approach because they believe moot courts are unlikely to replicate the actual questions that would be asked by the Court. In contrast, supporters of formal moot court point to the fact that the moot court replicates the stress inherent in actual oral argument. Retired judges can be brought in to judge a moot court to accomplish that objective. Regardless of the approach, focusing on questions and answers is a key aspect of preparing for effective oral argument. Oral advocates previously surveyed vary in how much time they spend in preparing for questions and answers, from 40 to 90 percent of their total preparation time.

J. Practice and rehearsal.

Whether the focus is on answering questions or in preparing remarks, practice and rehearsal are key to oral argument preparation. Most advocates will spend a great deal of time alone, speaking their argument. Some argue in front of a mirror, and others argue to a video camera. Developing an easy connection between the brain and the tongue is an important part of these rehearsals. Sentences or phrases that have been uttered countless times before the actual oral argument presentation are

far less likely to make the advocate tongue tied. These rehearsals make the advocate more comfortable and confident when they actually appear before the Supreme Court.

K. Scripting and editing your argument.

Because time is short and because distractions must be strenuously avoided, the process of scripting and editing an argument can be a valuable tool. Sentences that are too long to be comprehensible to the human ear should be edited down to a digestible number of words. Arguments that do not ring well to the ear can be revised until they sing. This process focuses on the details of word choice that can promote comprehension and persuasion and avoid distracting and confusing the court. Most importantly, this script will ultimately be condensed into an outline. The script should never see the podium inside the Supreme Court building. While scripts are an excellent device for editing and sharpening the advocate's focus, an actual script on the podium impedes direct communication to the Court. The script should be thrown away before leaving for court.

L. Deciding on visual aids.

The process of thinking through the pros and cons of a visual aid also will help sharpen the focus in preparation for oral argument. If visual aids of any kind are going to be used, almost all lawyers and judges reject the use of posters or enlargements and prefer handouts. Many advocates prefer not to use any visual aid at all. They believe visual aids of any size can distract from the advocate's presentation and result in disengaged observers.

M. Focusing on the principal cases.

Although all advocates are concerned about mastering the principal cases that are likely to be discussed during oral argument, advocates differ on how they approach this task. Some advocates will master every case cited in all of the briefs, by memorizing the facts, the holdings, and the reasons for the holdings. Other advocates will focus just on a few key cases, choosing not to waste their time on cases that are not likely to be discussed during oral argument.

N. Identifying key portions of the record.

In any particular case, a few facts can be outcome determinative, and it is often helpful for the advocate to be precise concerning the key facts contained in a specific portion of the record. The ability to cite a page and line of the record concerning key testimony or an exhibit communicates to the Court that the advocate is

focused on the right issues and that they are completely attuned with the Court concerning the nuances and details of the record point at issue.

O. Identify cases written or authored by particular justices on aspects of your case.

Although prior Supreme Court cases are important sources for precedent and persuasion, it can be helpful to focus on related cases written by each current member of the Court so that the advocates can discuss those cases when responding to questions from that particular justice. Frequently, justices ask questions that bear on issues on which they have previously written. Being fully conversant with the nuances of their cases and how they apply to the case being argued is an important part of oral argument and preparation.

P. Preparation during the hours immediately preceding the oral argument.

Oral advocates differ significantly on how they approach the last few hours before their oral argument. Some advocates will cram as much information as possible into their heads in the final hours of preparation. These advocates believe this helps them better remember the argument and better achieve a higher intensity level for the argument. Other advocates, such as Roger Townsend, prefer to calm themselves and to clear their minds before the argument. These advocates believe that they can perform better if they are relaxed and open to the Court's concerns. My personal preference is to do whatever is necessary in preparation for oral argument to be as confident and comfortable as possible when I actually assume the podium.

IV. Presentation of Oral Argument

After all of the preparation is completed and the time for oral argument finally arrives, the actual presentation of the oral argument requires focus and flexibility. The keys to persuading the Court during your presentation are considered below.

A. Approach the podium with confidence and a minimum of materials.

As soon as the Supreme Court justices take their seats on the bench, advocates should assume they are being judged. To create the right initial impression, it is important to sit at counsel table with a completely professional and prepared demeanor. When the chief justice calls for the advocate's side of the argument, the advocate should already have the materials arranged for carrying to the podium. The advocate should not waste time arranging materials or waiting for the Court to look

up at the advocate. After waiting approximately 3 seconds, the advocate should invoke the familiar “May it please the Court” and then launch directly into the oral argument.

B. Use the first ninety seconds to engage the Court and to make your most important point before the Court begins asking questions.

Most lawyers believe that the first ninety seconds of their argument is the most important opportunity to frame the issue and steer the court. This is the time to place the argument in the best possible light for winning. Lynne Liberato believes that reducing the argument to a one sentence description will normally permit the advocate to at least state his or her position at the very beginning of the oral argument.

The author has previously studied how Supreme Court advocates use their first ninety seconds and cataloged the different approaches that advocates employ to utilize that time. There are basically five groups of approaches that advocates employ for their first ninety seconds. Those approaches are: law oriented, fact oriented, methodology oriented, context oriented, and attack oriented. Each of these approaches has variations, and they are briefly summarized below.

There are several different varieties of the law oriented approach. The first is the “here is legal issue” approach. This approach uses the first 90 seconds to frame the issue and may explain how the opponent has incorrectly framed the issue. The second variety focuses on identifying and applying the controlling case law. The third variety appeals to core precedent or legal doctrines. The final law oriented type of approach focuses on the correct jurisprudence for the Court to follow or the jurisprudential effect of the Court’s possible rulings. The fact oriented approach to the first ninety seconds may involve the advocate going straight to a key fact that is dispositive of the case. A second type of fact oriented approach uses the first 90 seconds to describe the facts of the case generally, but briefly.

The third approach to the first 90 seconds is the resolution oriented approach. The first variety says, “I have the simple solution to this mess that the other side has created.” The second variety presents a test that the advocate suggests that the Court use to resolve this case and similar future cases.

The fourth approach to the first 90 seconds is the context oriented approach. One variety of this approach offers a road map of the advocate’s argument. A second variety attempts to summarize the advocate’s argument for the Court. A third identifies the issue over

which the parties are clashing and attempts to explain why they are clashing.

The fifth category of approach is the attack approach. In one version of this approach, the advocate attacks the court of appeals’ judgment and reasoning. Another version of the attack oriented approach attacks the opponent’s credibility.

On some occasions, none of these approaches are utilized because the Court asks questions before the advocate has a chance to say anything. In each of these circumstances, the Court’s first question irrevocably changes the first 90 seconds of the oral argument.

C. Embrace the Court’s questions and make your case out of answers to those questions.

The key component of the Court oriented approach to oral argument is to embrace the Court’s questions as the most important part of oral argument. These questions certainly deserve primacy because they reflect the particular objects of the Court’s concern. Unlike the preparation phase, where the advocate attempts to anticipate the Court’s possible concerns, during the oral argument the advocate focuses on the Court’s questions, which are the concrete expressions of their actual concern. Thorough preparation will allow the advocate to better understand the Court’s stated question and possible unstated subtext. Drawing upon the advocate’s preparation, the advocate offers the very best and most concise answer first. If permitted, a second concise point may be offered in answer to the question.

D. Concede what you must.

Frequently, the Court will ask questions to see if the advocate is going to concede the perceived weaknesses of their argument or whether they will simply fight on every issue. The smart advocate will concede limitations or weaknesses of the argument and immediately follow by identifying the related core concept that is not part of the concession that they will vigorously defend.

E. Don’t talk over the Court’s questions.

The advocate should stop immediately if and when the Court begins to interrupt the speaker to ask another question. Consistent with the Court oriented focus, whatever the advocate is saying is of far less value than the Court’s question. This has the added benefit of signaling to the Court that the advocate appreciates the Court’s questions and values those questions and the opportunities they present to inform and to persuade.

F. Don't miss the softball questions.

One difference between good and not so good advocates is whether they recognize “softballs” – questions that are favorable to the advocate and permit them to make a key point to the rest of the Court. These softballs must be recognized and hit out of the park. Softball questions are often intended to be a means by which one justice communicates with another justice, using the advocate as foil. The unprepared advocate may mistake softballs as an attack on the advocate's position. The resulting argument on an issue that was otherwise favorable to the advocate could be one of the worst possible moments for any oral advocate.

G. Use an answer to one question to transition to another key point.

Draw upon your preparation to make the best use of the opportunity to answer questions and to transition from your answer to another important point. The initial answer cannot be given short shrift, but should instead fully answer the Court's question in one or two sentences. A transition sentence connecting the answer to the next point will probably be appreciated by the Court.

H. Focus on the justness of your position.

To bolster the jurisprudential argument, the good advocate will apply the proposed holding or reasoning to the facts of future, hypothetical cases and then demonstrate that the result of applying the advocate's proposed rule is far more just and jurisprudentially coherent than applying the opponent's rule. This furthers the goal of focusing on the jurisprudential issue which is at the heart of the Court's concern.

I. Don't go over the stop limit.

Treat the red light on the podium as a red light at an intersection. While the Supreme Court does not cite and ticket advocates for running the red light, the violation will be just as apparent. Smart advocates will begin their conclusion and summary when the yellow light goes on and will conclude their oral argument before the red light is turned on.

V. CONCLUSION

The goals, preparation, and presentation of the oral argument should all be of a piece. The opportunity to argue before the Texas Supreme Court and to affect Texas jurisprudence is truly one of the great professional experiences for any appellate advocate. With any luck, helping the Court to do its job will also pay dividends to the advocate and the advocate's client.