

**A COURT-CENTERED APPROACH
TO APPELLATE ADVOCACY**

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I. Introduction

A. Charting a Sea Change

Approximately 20 years ago, we began writing and speaking about appellate advocacy. We collaborated in developing the appellate advocacy curriculum at the University of Houston Law Center, and that curriculum, albeit revised, is still being taught today at the University of Houston as well as the University of Texas School of Law. We also began writing and speaking on appellate advocacy at CLE programs. At that time our thoughts about advocacy were largely informed by our prior experiences as competitive debaters, as moot court participants and coaches, and as trial lawyers. Although each of those activities provided valuable experience for becoming an appellate advocate, they also contributed to an attitude about advocacy that focuses too much on the performance of the advocate. Although never articulated in this way, implicit in our writings and speeches at the time was a view that if the advocate can control the dialogue, emphasize the favorable arguments and artfully avoid the difficult issues, and write and speak and perform with sufficient eloquence and charm and cleverness, the audience would be impressed, manipulated and ultimately persuaded.

A number of things happened over the next 20 years to temper that view. We handled a lot more appeals. We heard the thoughts of a lot of appellate judges, in surveys, in CLE presentations, and in private conversations. The caliber of the appellate judiciary unquestionably improved. Appellate courts became more engaged and demanding in oral argument. We listened to, and became disciples of George Gopen's view of reader-centered writing. We talked to a lot more appellate lawyers about the craft of appellate advocacy. And we probably also matured a little, and acquired a little more wisdom from approaching appellate advocacy in a thoughtful manner for another 20 years.

As a result, each of us over the following 20 years, independently arrived at significant changes in our attitudes about appellate advocacy. At a seminar several

years ago one of us spoke about brief-writing and the other about oral argument, and while we both thought we were blazing new trails and proposing almost revolutionary new ideas, we realized that we were saying essentially the same thing.

The essence of our current approach is the realization that appellate judges and their legal staffs are, for the most part, intelligent, competent, principled lawyers who, in most appeals, are confronted with more than one reasonable legal position. They take seriously their obligation to confront those difficult questions and arrive at answers that will both fairly resolve that case and make good law for future cases. The advocate's highest and best use in that process is not to pull the wool over the judges' eyes and attempt to dazzle them and manipulate them, but to assist the court in identifying and confronting the difficult questions and to engage in a reasoned dialogue that will assist the court in performing its difficult job. This means that the advocate does not try to hide from the hard issues, but instead gives the Court a way to deal with them. The advocate does not demonize or trivialize its opponent, but instead acknowledges that there are reasonable arguments and authorities on both sides. The focus is *not* on the advocate's performance, but instead on the advocate's ability to assist the court to come to the right decision, in the right way.

Appellate advocates, like most writers and speakers, have a tendency to focus on themselves, and what they have learned, thought about, or felt compelled to express. Those things are certainly important, for without the advocate learning and thinking and expressing, there would be nothing for the advocate to offer, and nothing for the audience to receive. But the focus of both written and oral presentations should be on the audience, and how it will receive and perceive the discourse. To be an effective communicator *to the audience*, an advocate should understand who its audience is, the conditions under which it works, the goal of written and oral presentations to them, and how the audience uses that product to do its job. Understanding those concepts will put advocates in a better position to apply some common sense to the performance of their job so that the fruits of their labors will make it easier for the audience to do its job. The fruits of the advocate's labors, in turn, will be better opinions from the audience, which are more likely to do justice between the parties and to more wisely mold or maintain the jurisprudence of the State.

Understanding your audiences first entails clarifying who it is. Then it requires an appreciation of how it receives your work, and how it uses that work to do its job.

B. Identifying your audience.

The first step in understanding your audience is to identify who your audience is. Although you may sometimes feel like you are writing and speaking to please several different people, there is only one audience that matters for an appellate brief or oral argument: the appellate court.

Appellate advocacy should not be undertaken to give voice to the pain or frustration of your client. It should not be to convince opposing counsel that you are right and they are wrong. It should not be an attempt to intimidate the opposing party to settle. It should not be presented to impress other attorneys in your firm, or co-counsel. And most of all, it should not be undertaken to entertain yourself. Appellate advocacy may incidentally accomplish any or all of these goals, but if it is undertaken with these purposes in mind, the likelihood of achieving the real purpose of the advocacy will be diminished.

The only acceptable purpose of appellate advocacy is to assist the appellate court to write an opinion that is consistent with the applicable law and, hopefully, favorable to your client. Accordingly, the advocacy should be presented as if the *only* audience is the appellate judges and staff attorneys. Any temptation to pander to one of the other audiences or purposes mentioned in the preceding paragraph should be banished from your consciousness. Your sole obligation is to further the interests of your client, and anything calculated to further *your* interests, *your* career, or *your* ego is likely to be counter-productive to the paramount goal of serving your client.

C. Understanding your audience's working conditions and mindset.

Aware that the only audience that matters consists of appellate justices and court attorneys (a term we will use to refer to briefing attorneys, law clerks, staff attorneys, research attorneys, and any other attorneys employed by appellate courts), consider some of the things that appellate judges and court attorneys say about themselves:

- They almost universally feel overworked, underpaid, over-extended, understaffed, and underappreciated.
- Normally, they will not make nearly as much money from working on your case as you will.
- They have much, much less time to spend on your case than you have spent on it. More importantly, they have much less time to spend on your case than you would like for them to spend on it.

- They almost always read your brief as part of a stack of other briefs, and hear your oral argument as one of several others they are hearing that day.
- They know much less about the facts of your case than you do.
- They probably knew considerably less about the particular area of the law involved in your case when they started working on it than you knew when you finished working it.
- Although they care deeply about getting each case right, they unavoidably care much less about your case coming out the way you want than you do.
- They are much less likely to be impressed with your clever or impassioned advocacy than you are. They are not reading your brief or listening to your oral argument to be entertained, but to obtain the information they need to dispose of your case as quickly as possible.
- In every case, a court attorney checks the citations in your brief and oral argument thoroughly, verifying record cites, reading the law that is cited, and conducting independent legal research.
- Despite what you might have heard or imagined about personal prejudices and agendas, appellate judges almost universally care about following the law and reaching a just result, within the framework of whatever personal biases or prejudices any human being brings to any decision-making process.

In short, you are writing for and speaking to an audience that is always pressed for time and that is fundamentally concerned with getting the law right. Accordingly, it becomes particularly important to write and speak concisely so that you do not waste the reader's precious time; that you be clear and simple enough that you easily can be understood; that you at least give the appearance of objectivity; that you provide thoughtful reasons for reaching a desired result, rather than a shallow presentation of words lifted out of context from cases, rules or statutes; and that you reflect a sense of fairness and justice. Those realities regarding your audience should have a profound impact on how you write your briefs and present oral argument.

D. The purpose of appellate advocacy.

An appellate lawyer should write a brief or present an oral argument with two goals in mind, and, *most importantly*, those goals should be in this order: (1) to assist the Court to reach the right result, and (2) assist the Court in reaching a result that favors your client. All too often, advocates blow past the first goal in their haste to reach the second goal. What they do not realize is that adherence to the first goal makes the realization of the second goal much more likely.

If the appellate court begins to believe that an advocate is willing to say anything in order to win—whether or not it is supported by the record, whether or not it is supported by the applicable law, whether or not it makes any sense—then the advocate loses all credibility, and the court ceases to believe, or to be persuaded by, anything the advocate has to say.

On the other hand, if the advocate rigorously adheres to the record and the applicable law, even when they do not support his position; if the advocate makes candid admissions and concedes some non-dispositive points; if the advocate acknowledges the other side's best arguments and turns them to advantage rather than ignoring them; then the court begins to get the feeling that the advocate is not an obstructionist adversary trying to hide the truth, but, instead, is the court's ally in trying to reach the right result. An advocate who achieves that status has a much greater chance of being an effective and persuasive advocate.

One of the worst mistakes an advocate can make in appellate argumentation is to ignore facts or legal arguments that may hurt. Just because they are not mentioned in your brief or oral argument does not mean that your adversary will not mention them, or, even if they do not, that court attorneys will not uncover those matters on their own, without any guidance from you about how to put them in context. You are much better addressing unfavorable arguments and coming to grips with them.

Sometimes an opposing argument is simply wrong, and you need to say so. But other times you know an opponent's argument rings true, and you will only lose credibility by resorting to the knee-jerk reaction of saying that everything the other side says is wrong. In those situations it is extremely effective to admit the point, embrace it, and then try to find a way to turn your opponent's argument to your advantage.

By now most readers are probably wondering what happens when reaching the correct result and reaching the result that favors your client are at odds with one another. This question is understandable, but it naively assumes that every case has

only one issue, only one right result, and only one way to get there. Your challenge as an advocate is to find a way to make the result favoring your client to be *a* right result in the case, even if not the only right result. If that challenge cannot be met, you should seriously consider your willingness to undertake your client's representation in the appeal, and you should counsel with your client about whether the appeal is worth pursuing.

There are no tricks to persuading an appellate court. You simply need to present the most logical, compelling argument, and do so in a credible and professional manner. It is a wonderful thing for a lawyer to be passionate about the plight of his client. But if you are truly passionate about obtaining a favorable result for your client, you will reign in the passionate prose in your briefwriting and oral argument. If the audience is already inclined to agree with you, it may be entertained by vigorous attacks on the other side or emotional wailing about the end of the world as we know it. But if it already agrees with you, then you have not advanced the ball in any kind of meaningful way. On the other hand, if the audience is leaning against you and is sympathetic to the other side, it will be offended by strong language—it certainly will not be persuaded to change its mind. And if the audience is undecided, it probably will wonder why you have to resort to histrionics rather than calm, rational reasoning, and become concerned that there must be something wanting in your argument.

Nevertheless, there is something to be said for arguing with legitimate conviction and confidence. If you do not sound like you are convinced by an argument, the court is not likely to be. Courts expect lawyers to be advocates to a certain extent, and if you write and speak as if you are afraid to take a position, the court will believe that there is no favorable position to take. So you need to write with both reason and passion.

Legal writing is much more persuasive when the writer writes with wisdom rather than with cleverness. Cleverness is shallow, insubstantial, and trivializing. It often results in failed attempts at humor, or annoyingly technical “gotcha” arguments that the audience is likely to perceive as something you resort to because you have no good arguments. Wisdom is deeper, more honorable, and makes the reader feel like he is a part of something good and noble. A wise argument is not only substantively sound, but it also explains why it is the right thing to do.

Another important element in persuasion is credibility. If the audience believes you are credible, it will be receptive to believing what you say and to being persuaded by your position. If you lose credibility with that audience, everything you say will

be viewed with skepticism, and must be verified before being accepted as true. An appellate lawyer's reputation for credibility may take years to cultivate. It reportedly can be lost in a single sentence. The only way to avoid that consequence is to be meticulously accurate and scrupulously honest in everything you write and say.

II. Briefwriting

A. Assisting the court in doing its job.

An appellate judge or court attorney who reads your brief is probably either preparing a pre-submission memo, preparing for oral argument, or preparing to write an opinion. In order to do any of those things, there is certain information that they need from your brief. To give the court what it needs, a brief should fulfill several minimum requirements:

- It should tell the court everything it needs to know about the underlying facts and procedural developments with precise citations to the Reporter's Record or the Clerk's Record to support every factual statement. It should point the court to exactly where in the record error was preserved. The reader should not have additional questions that are unanswered by the brief.
- It should attach copies of all critical documents in an Appendix. This not only includes the documents required by the rules (judgment, jury charge, etc.), but also things like contracts, real estate documents, expert reports, or selected pages from the Reporter's Record. The reader should not have to go pull the record to make sense out of an argument. Neither should the reader have to wade through a voluminous, un-indexed, un-tabbed appendix searching for relevant documents.
- It should provide citations and analysis of the relevant law, including, where applicable, the most recent law from the supreme court, the most recent law from the courts of appeals (if it has been a while since the supreme court addressed the issue), and the most frequently cited authority on the subject. Authorities that do not appear to support your position should be disclosed and distinguished, not disregarded. Although the court will confirm your research, your brief should leave no doubt about where to start the research, and there should be no major surprises as the research progresses.

- It should contain arguments that make sense, that sound fair and reasonable, and that the court would be proud to express in an opinion as its own.
- It should address every non-frivolous argument raised by the opposing party.

In short, a helpful brief should provide everything that the court needs to write a thorough and well-reasoned opinion without having to start the process from scratch.

B. Assisting the court in doing its job efficiently.

Appellate judges and court attorneys have limited time and energy to devote to reading your brief. If you want them to read it, get something out of it, use it while writing the opinion, and have a favorable opinion of you and your client while going through the experience of reading your brief, you should do everything you can to make that experience as easy and pleasant as possible. Among other things, try to:

- Structure the argument so that it can be easily followed and understood. The human mind cannot process and retain unstructured information. Even brilliant thoughts, if spilled out onto the page in a rambling stream of consciousness, will be lost on the reader. Structure your thoughts, present them in a logical order, and give the reader signals to make your structure clear through the use of headings and subheadings.
- Write with simplicity and clarity. Those two qualities are not the same—it is possible for an argument to be simple, but still unclear, and it is possible (though quite difficult) to make a complex argument clear. But simplicity and clarity often go hand in hand, and the writer should strive for both. It is virtually impossible for a writer to accurately judge the clarity of her own work. When she reads it she is reminded of the thought she had when writing it, and that connection is clear in the mind of the person who conceived it. Having others read what you have written is the only reliable way to determine whether the meaning is clear and whether misunderstanding is possible. If one reader reads something the wrong way it is possible that a reader on the court will have the same response. Try to write and re-write with the goal of minimizing all possibilities of misunderstanding.
- Write prose that flows, analytically and lyrically. The goal should be a

product that the reader can read from beginning to end without stopping, without having to re-read a sentence because the meaning is unclear, without having to go back and re-read prior portions of the prose to make sense of the current sentence, and without having the feeling that something is jarringly out of context. An entire brief that flows is easy to read; but it is extremely difficult to write. A product of that sort requires a lot of work.

- Strive for brevity. Most readers of briefs would rather be doing something other than reading briefs. Even when reading a good brief, there is exultation in completion, and unnecessary length delays that feeling. In choosing words, constructing a sense, crafting a paragraph, or drafting an argument, remember that shorter is often better. It may not satisfy your ego as much, but it will be appreciated by your reader.
- Create a product that is easy on the eyes. Make sure there is ample whitespace on the page. Make liberal use of spacing. Choose fonts that are comfortable to look at, and large enough to be read by readers with declining vision. Make sure the document filed with the court is clean, and free of distracting errors.

In short, create a product that is easy to read and easy to understand, that flows smoothly from one thought to the next, and that does not feel like too much of an imposition on the reader. And keep foremost in your mind the importance of providing the court with what needs to reach a decision and write a good opinion.

C. Consequences of not giving the court what it needs.

If you fail to provide judges and court attorneys with the information they need, the consequences will depend on the individual and the circumstances. In some instances they may assume that you have not provided supporting record citations or legal authorities because they do not exist. In many instances, they will expend the additional effort to search the record or do the legal research themselves. Not knowing your record or this particular area of the law as well as you should, they may not find what you make them look for. Even if they do, the extra effort you have made them go to as part of their job because you did not do your job may very well cause resentment, frustration, and a loss of respect and credibility. Those things, by themselves, are not likely to cause a decisionmaker to consciously change the outcome of a case. In a close case, however, the cumulative effect of those factors could erect an unconscious barrier that you should try to avoid.

D. Briefwriting conclusion

There is no secret to writing a winning brief every time. Every case is different, and every brief is different. There is no universal blueprint for writing a winning brief. There are no magic words that should be used in every brief, and no secrets to get into the mind of the appellate decision-maker to entice them to vote your way. The best thing you can do to become an effective briefwriter is to cultivate the attitude of a learned and conscientious colleague of the court, trying to assist the court in reaching a decision that correctly states the law for the bench and bar and fairly resolves the dispute between the parties. At all times try to put yourself in the role of an appellate judge or court attorney, reading a stack of briefs to prepare for drafting a pre-submission memo, hearing oral argument, or writing an opinion. Think about what you would find helpful, easy to read, and persuasive. And then write something that fulfills those goals, and gives the court what it needs.

III. Oral Argument

A. The Goals of Appellate Oral Argument

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.

1. 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 appellate courts have discretion whether to grant oral argument, and are granting oral argument in even smaller percentages of cases, any case in which a court grants oral argument is presumably one which the court considers to present a difficult and/or important issue of jurisprudence. If there was only one answer to the problem presented by the application of the law to these facts it is unlikely that argument would be allowed. Therefore, when an appellate court requests oral argument, the court will be choosing between two plausible competing proposals on how the case should be resolved. Helping the court to do its job and to make the selection between those two reasonable proposals should be the primary goal of both sides in an oral argument.

The goal of helping an appellate 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 competing 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. Framing the issues.

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 consequences. 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 is 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 the most pointed and incisive way 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. Focus on the jurisprudential issues.

Another goal of appellate oral argument should be to focus on the jurisprudential issues in the appeal. Straying away from jurisprudential issues 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.

5. Manage precious time effectively.

Most appellate courts in Texas give each side only 10-20 minutes to argue, and the appellant/petitioner will have even less time for the opening argument if it wants to save time for rebuttal. 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.

6. 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 more attention 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 as many of those points as possible during oral argument.

7. Extend the argument beyond the briefs.

Appellate courts are 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.

8. Provoke questions and issues with answers to questions.

Because time is short and the prepared 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 help the court.

9. Be comprehensible.

In order to persuade, the advocate has 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 an appellate court.

10. Protect and enhance your credibility.

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

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

An advocate before an appellate court should have mastered the body of relevant law to the point where he or she is a 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 facts X and Y.

B. Preparation for Oral Argument

Keeping in mind these oral argument goals, the foundation for an effective oral argument is the advocate's preparation. Advocates frequently spend two full weeks preparing for oral argument. Most oral advocates focus on the following keys to effective preparation.

1. The Basics - Become completely familiar with the arguments, the record, and the applicable law.

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 read chronologically from the first brief to the last, although some 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 should try to identify all the questions that could be raised by the court during oral argument. Answers are identified, and then those possible answers can be ranked and ordered from the most persuasive to least persuasive in descending order. The advocate should 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. After this preparation has been accomplished, the advocate then creates an initial outline of the argument.

Once this stage of the process is complete, the next step is to practice. Some advocates practice privately; others practice in front of someone else. The advocate streamlines and polishes the argument to the greatest extent possible.

2. Redeveloping your strategy based on a more objective assessment.

Frequently, 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 advocate's 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 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 appellant's/petitioner's brief, which is the brief least likely to focus on rebutting the other side's position. Even the appellee's/respondent's brief may focus more on supporting the lower court's decision rather than responding to and contesting the position advanced in the appellant's brief. The reply brief will likely respond to and rebut the respondent's positions, but is again likely to focus on establishing the importance of the appellant's case jurisprudentially. Given these circumstances for the briefing, 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.

3. Develop 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 answering the court's concerns directly do so at the risk of 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.

4. Prepare 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, focusing on particular questions may help develop discrete points. 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.

5. Plan to sow 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.

6. Focus on the jurisprudential consequences that flow from a proposed rule of law.

Analyzing the jurisprudential consequences that result from a particular ruling 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 questions about them.

7. Frame 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 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 identify where the parties disagree and then 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 that are more peripheral to the case.

8. 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. Some advocates describe 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, but are outside of it, the advocate may choose 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.

9. Conduct formal and informal moot courts or practice arguments.

Because the great majority of the time in oral argument before the 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.

10. Practice, practice, practice.

Whether the focus is on answering questions or on 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 in front of 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 appellate court.

11. Script and edit your argument — then throw it away.

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, however, should never see the podium inside the courtroom. 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.

12. Make decisions about 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 considered, 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.

13. 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.

14. Identify 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.

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

Although prior cases decided by the supreme court or the court you are in front of are important sources for precedent and persuasion, it can be helpful to focus on related cases written by each current member of the court or the panel you are appearing before 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.

C. 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.

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

As soon as the 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.

2. 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. Some advocates believe 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.

There are five types of approaches that advocates employ in their first ninety seconds. Those approaches are: (1) law-oriented, (2) fact-oriented, (3) methodology-oriented, (4) context-oriented, and (5) attack-oriented. Each of these approaches has variations, which are summarized below.

Law-oriented opening. 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.

Fact-oriented opening. This approach 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.

Methodology-oriented. This technique is a 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 apply to resolve this case and similar future cases.

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.

Attack-oriented 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.

3. 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 sub-text. 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.

4. Concede what you must.

Frequently, the court will ask questions to see if the advocate is going to concede the perceived weaknesses of his argument or whether he 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.

5. 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.

6. 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 disagreement on an issue that was otherwise favorable to the advocate could be one of the worst possible moments for any oral advocate.

7. 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.

8. 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.

D. Conclusion - Oral Argument

The goals, preparation, and presentation of the oral argument should all be of a piece. The opportunity to argue before an appellate 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.

IV. Final Thoughts

As explained in the Introduction, we arrived at our current thinking about court-centered appellate advocacy independently of each other, and certainly independent of any socio-psychological research. Yet we recently have discovered that our general attitude apparently is supported by recent trends in psychological research. Dr. Dacher Keltner, a professor of psychology at the University of California at Berkeley has published an article called “The Power Paradox,” which contains these words that easily can be applied to appellate advocacy:

[W]e tend to believe that attaining power requires force, deception, manipulation and coercion. We might even assume that society demands this kind of conduct to run smoothly.

These seductive notions are wrong. A new science of power has revealed that power is wielded most effectively when it’s used by people who are attuned to and engaged with the needs and interests of others. When it comes to power, social intelligence—reconciling conflicts, negotiating, smoothing over group tensions—prevails over social Darwinism.

. . . Leaders who treat their subordinates with respect, share power, and generate a sense of comraderie and trust are considered more just and fair.

Dacher Keltner, *The Power of Paradox*, The Greater Good, Winter 2007-08, pg. 15. Although these remarks were written in the context of attaining power, persuasion is a form of attaining power, and these words are equally applicable to the art of persuading an appellate court. By changing a few words, we derive from Professor Keltner’s words the following principles:

- The belief that persuasion requires force, deception, manipulation and coercion is wrong.
- Persuasion is accomplished most effectively when it’s used by people who are attuned to and engaged with the needs and interests of their audience.
- Advocates who treat their audience with respect and generate a sense of comraderie and trust are considered more persuasive.

We believe that these principles, which form from the foundation of a court-centered approach to appellate advocacy, point the way to better advocacy and a better system of justice.

