§ 16.1 In General

Oral argument is one of the more challenging aspects of appellate practice. Second in importance only to the written brief, oral argument deserves careful study and preparation.

§ 16.1:1 Purpose of Oral Argument

The purpose of oral argument depends on the perspective of the participant. For counsel, the object of oral argument is to persuade the court both intellectually, by convincing the court of the soundness of his legal arguments, and viscerally, by showing the court the fairness and equity of his client's position.

For appellate justices, the object of oral argument is to learn more about the parties' positions by confronting advocates face-to-face, clarifying parts of the argument that are unclear from the briefs, and probing unexplored aspects of the parties' positions. Justices cannot cross-examine briefs, and they rarely contact attorneys to ask for clarification of argument. In most cases, oral argument presents justices and advocates with their only opportunity to confer about the problems of the case.

§ 16.1:2 Value of Argument

Most appellate justices will admit that in the vast majority of the cases they decide, oral argument does not change their initial impression of the case. Oral argument is nevertheless a valuable part of the appellate process. Justices state that they cannot identify in advance the cases in which their initial impression will be influenced by oral argument. When it does influence the court, oral argument may be decisive. Moreover, although no amount of oral argument could change the result in many cases, in some cases skillful oral advocacy may make a difference.

Appellate advocates have only two opportunities to persuade: in the written brief and in oral argument. The chief difference between the two involves the quantity and depth of the contents. Because of time limitations and the nature of the spoken word, oral argument must be shorter than the brief; it can cover fewer arguments in less detail. Yet oral argument often may have a greater effect on a decision than do words on paper.

In most appellate courts, a case is assigned to one of the justices before oral argument. Thus, the advocate can only be assured that one justice on the panel has studied the case. Even that justice may only scan the briefs at home in the midst of reading a large stack of briefs in other cases. Under those conditions, the justice's attention may wane, and he may not always be affected by the words on the page. The

only time the advocate can command the attention of the entire panel deciding his client's case is when he is face-to-face with the justices during oral argument.

In some instances, oral argument can permit the advocate to gauge how the case is being received by the appellate court. Although the advocate usually cannot discern the justices' impressions of the case, he at least may be able to determine the identity of the justice to whom the case has been assigned and any problems that the court may be having with the case. Oral argument may reveal whether a party should file a supplemental brief to clarify issues the court finds particularly troubling or, in the worst scenario, whether counsel should recommend that his client settle the case.

§ 16.1:3 Deciding Whether To Argue

Litigants may waive the right to present oral argument. In fact, in most Texas courts of appeals, the advocate must specifically request oral argument when the brief is filed. See § 15.4:3. Even if such a request is timely made, the court often will contact the advocate immediately before oral argument to determine whether he still intends to argue. Thus, there are several times during the appellate process when the advocate must decide whether to present oral argument.

An appellate advocate often waives oral argument because he believes that the facts and legal issues are so clearly in his client's favor that his client will prevail without the necessity of oral argument. The attorney who waives oral argument for this reason is taking a significant risk. The attorney writing an appellate brief can develop an inflated view of the strength of his client's position. Even a completely objective attorney must bear in mind that to prevail he not only must combat the arguments raised in his opponent's brief but must also deal with the court's concerns about the case. The only way for an attorney to deal with those concerns is to give the court an opportunity to raise questions about the case, which the attorney can answer either during argument or in a supplemental brief. If the attorney waives oral argument, he may never be privy to the specific concerns of the justices, and the case may be decided on an issue that he never had the opportunity to address.

§ 16.1:4 Requesting Argument

To be safe, counsel should request a copy of the court's local rules as soon as the appeal is perfected. In some courts, the request for oral argument can be made orally to the member of the court's staff who accepts the brief for filing; in others, the request must be contained in the

brief. In some courts, the request must be on the cover of the brief. See § 15.4:3. In others, the request must be made in separate correspondence accompanying the brief. The failure to timely comply with the court's rules may waive counsel's right to present oral argument.

§ 16.1:5 Deciding Who Should Argue

In most cases, counsel advocating the same side of a controversy should not divide argument, because separate arguments may confuse the court, produce choppy presentations, and deprive counsel of the time necessary to establish a rapport with the court. It is better to designate one attorney to present the oral argument. Ideally, the attorney handling oral argument should be one who--

1. wrote the brief and updated the research,
2. studied the appellate record thoroughly,
3. is experienced and skilled in appellate advocacy, and
4. is known and respected by his peers and the appellate court.

The person who wrote the brief usually knows the most about the issues on appeal. In most cases, he has thoroughly researched the issues and has carefully considered which arguments to include and the best way to articulate each argument. The brief writer is aware not only of the arguments that appear in the brief but also of the ones that are not included and the reasons they were omitted.

If the brief writer does not argue the case, the attorney who does should read the brief and every case it cites and should also discuss the case with the brief writer. This discussion should yield knowledge of the standards of review, additional information about arguments omitted from the brief, suggested responses to the opponent's arguments, and helpful authority not cited in the brief but useful to rebut assertions raised by the opponent.

Appellate courts sometimes will raise questions in oral argument about how, when, or why something occurred during the trial court proceedings. A thorough knowledge of the appellate record is, therefore, as important as is knowledge of the brief. Even the appellate advocate who appeared before the trial court should not rely on his memory of past events. Even if he believes that he can accurately recall these events, he should bear in mind that the appellate court was not present when these events took place and that it must judge the case on the basis of what appears in the appellate record. Accordingly, before argument, counsel should become intimately familiar with the record on appeal.

Appellate advocacy is different from trial advocacy, both in form and in substance. Thus, an experienced appellate lawyer rather than a veteran trial lawyer should be chosen to argue an appeal.

There is also value in selecting an appellate attorney who has some ability as a public speaker, is comfortable in front of an audience, and can think quickly on his feet. Thus, a good speaker who simply has not had the opportunity before to present an appellate argument might be a better choice than an appellate lawyer who specializes in writing briefs but lacks stage presence. Although experience is usually helpful, if an attorney has presented many oral arguments and has done it badly each time, the sheer number of performances would not measure the attorney's ability. The optimal choice, therefore, is an attorney who is both an accomplished public speaker and an experienced appellate advocate.

Sometimes, particularly in more substantial cases, clients and trial lawyers are tempted to bring in a well-known attorney to lend his name and presence to the appeal. Other times, clients and their lawyers consider retaining an appellate counsel who is personally acquainted with one or more members of the appellate panel. These tactics are overrated, particularly if the "big gun" does not take the time to become thoroughly familiar with the facts of the case and the applicable law. Most appellate justices would prefer to hear an unknown attorney who has prepared for argument, rather than have their time wasted by a famous lawyer who gives an infamous performance.

Nevertheless, situations exist in which this tactic may be of some value. If, for example, a case involves a question of first impression in the area of tort law and one side retains the professor who wrote the textbook on torts the justices used in law school, the justices may have a special interest in the professor's views. The appellate court may also have a high degree of confidence in a well-known appellate lawyer with a reputation for legal scholarship.

Although counsel should avoid retaining personal friends of individual justices in an effort to engender and benefit from cronyism, it does make sense to hire an attorney who has appeared before the court on several occasions and who is regarded by the court as competent and ethical. The benefit resulting from that kind of association is not inappropriate or unethical; it merely capitalizes on the justices' natural tendency to pay close attention to someone they know and respect.

§ 16.2 Preparing Oral Argument

Thoroughly preparing for oral argument is of paramount importance. To be effective, oral appellate advocacy requires the mastery of several different elocutionary skills, as discussed at § 16.5:5. It is one of the few areas of law in which any attorney simultaneously must be the advocate for his client and the target of interrogation. Juggling these skills and abilities is difficult enough if the attorney is fully prepared; if he is not, he invites disaster.

The attorney's degree of preparation conveys a subtle message to the court. An unprepared attorney causes the justices to doubt his competence and credibility in all aspects of the appeal. Moreover, his lack of preparation suggests that he does not feel strongly about the case or the issues presented. Finally, the court may resent the attorney who wastes its time by appearing for oral argument without being adequately prepared.

§ 16.2:1 Reviewing Appellate Record

The appellate court derives all its official knowledge about the facts of a case from the transcript and the statement of facts. See generally § 17.4. Because the appellate court may question an advocate about any portion of the record at any time, the attorney should be thoroughly familiar with the record. As noted above, being present during the trial court proceedings and recalling what was filed and what was said are never adequate substitutes for studying the record on appeal.

In Texas, the appellate record contains two components: (1) the transcript that is prepared by the district clerk and contains pleadings, motions, orders, and the trial court's judgment and (2) the statement of facts that is recorded and transcribed by the court reporter and consists of the trial testimony, exhibits, arguments of counsel, and rulings by the court. See chapter 12 for more information about the appellate record. Appellate counsel should understand the difference between these two components of the record and be familiar with both when presenting oral argument.

Unless an extra copy of the transcript is requested, only one copy is sent to the appellate court after the appeal is perfected. Counsel of record can and should check out the transcript from the appellate court while the brief is being prepared. Because only one copy of the transcript exists, however, the court usually will insist that counsel return it soon after he completes briefing. While counsel has the transcript checked out, he should either copy it in its entirety or copy its index and transcribe the indexed page numbers onto copies of the trial pleadings in the trial attorney's file.

Appellate counsel should make a list of significant matters in the transcript and their corresponding page numbers. If one or two passages in the transcript are certain to be discussed in oral argument, those page numbers should be memorized. If counsel refers to those matters during oral argument, whether in his planned presentation or in answer to questions, he should refer to the passages by transcript page number and not by the name and page number of the document in the trial court. If a justice wants to examine a matter in the transcript, for example, he may have difficulty in quickly locating "page seven of Defendant's Second Amended Answer to Plaintiff's Fourth Amended Original Petition." If he is referred to page seventy-three of the transcript, however, he can locate that reference quickly and easily.

Most attorneys read and abstract the statement of facts when they are writing the appellate brief. See § 15.2:2. All too often attorneys preparing argument rely on this initial review rather than reread the statement of facts just before argument. Because the facts play an important role in many appeals, counsel should review the statement of facts immediately before argument. Since time constraints may preclude rereading the entire statement of facts, counsel should, at a minimum, read his notes or abstracts of the relevant facts and reread particular passages significant to the appeal. As with the transcript, significant passages and their page numbers should be listed; if only a few pages are particularly significant to the appeal, counsel should commit them to memory. The court may wish to refer to those passages during oral argument and can more easily find page 258 of the statement of facts than locate the "middle part of the landlord's testimony right after lunch on the second day of trial."

In addition, counsel should be prepared to locate and read significant passages of the statement of facts during oral argument. If he has purchased a copy of the statement of facts from the court reporter, he should have it tabbed or indexed; if he has checked out the court's copy, he should have photocopies of significant pages. If opposing counsel misquotes or misinterprets the statement of facts, it is particularly effective for the attorney to pull out the document and quote the disputed language during oral argument.

§ 16.2:2 Reviewing Applicable Law

To "know the law" at oral argument, the appellate advocate must both read and understand the law before argument and compile necessary legal authorities for consultation during argument. These tasks are an essential part of the process of preparing for argument.

Appellate advocates must be thoroughly familiar with relevant law. Studying one's own brief is only the first step in preparing for oral argument; all other briefs filed before argument should be carefully studied as well. More importantly, appellate counsel should try to read all the significant authorities cited in the briefs, independent of the context in which they were cited. Whether the result of a deliberate intent to deceive or of careless drafting, it is not uncommon to find legal authorities cited for propositions they do not support. Checking for this kind of discrepancy will ensure that all authorities are properly cited.

An attorney who relies on case law during argument should become familiar with the entire case, not just a cited passage. It may be dangerous to lift one favorable passage out of a case; another passage from another page may be deadly. An attorney must also be prepared to answer questions from the court about the cases on which he relies. Lifting one supportive sentence out of context from a case may prompt the court to ask what the case was about. If the attorney cannot answer that question or if the referenced case provides only weak support for his position, his credibility is compromised.

To fully prepare for questions about legal authority that arise during oral argument, counsel should bring to argument copies of every significant legal authority cited in the briefs. These materials are of little use if they are disorganized; instead, they should be contained in a tabbed and indexed notebook.

§ 16.2:3 Reviewing Local Rules and Procedures

Most Texas courts of appeals have local rules that govern various aspects of the appellate process, including oral argument. When the appeal is filed, counsel should contact the court to obtain a copy of these rules. In courts that have no local rules, counsel should ask the court clerk about the court's informal rules and procedures.

At the outset of the appellate process, counsel should determine how to preserve the right to present oral argument. See § 16.1:4. After oral argument has been scheduled, counsel should determine what time limits the court places on oral argument. He should also determine whether the court automatically grants time for rebuttal or whether the first speaker for the appellant specifically must reserve time. If the court does set aside time for rebuttal, counsel should determine whether that time is deducted from the time allotted for the first presentation or if it is in addition to the initial presentation.

Counsel should also learn about the court's preparation for oral argument. In some courts, all the justices read the

briefs and review the appellate record before argument, specifically inform counsel that they are familiar with the facts of the case, and ask counsel to refrain from reciting the facts during argument. In other courts, although one justice may be thoroughly familiar with the case, other justices may have only a passing familiarity culled from a summary prepared by a briefing attorney or a short conference with the other justices. In those circumstances, a recitation of the facts during oral argument is appropriate.

§ 16.2:4 Studying the Justices and Courtroom

Before appearing for argument, an attorney should learn about the court--both the physical room in which it sits and the justices who make up the panel. Familiarity with the court minimizes the possibility of surprise that can distract the advocate and disrupt his concentration during argument.

Counsel should attempt to discern the justices' views on matters that will affect their decision. Even though information can be gleaned from conversations with other lawyers who have had cases before the justices, a more thorough approach is to study the justices' past decisions. Computer-assisted research now enables counsel to quickly compile a complete list of opinions authored by each panel member. That list can be further refined to reflect only cases involving the particular subject matter to be addressed in argument. If a justice has written an opinion on a closely related issue, counsel should be prepared either to rely on that case or to distinguish it.

It also helps to know something about each justice's demeanor. If a justice aggressively questions an advocate who is accustomed to more passive judges, the advocate may think that the justice is upset with him. If, however, the advocate is aware in advance that the justice behaves similarly in almost all cases, the advocate will not be distressed by the justice's behavior.

Conversely, an extremely passive justice who asks no questions may cause an advocate to think that he is not reaching the justice. But if the justice usually sits impassively during argument, his demeanor should not cause concern.

An attorney should visit the courtroom before argument to determine the physical features and furnishings in the courtroom. These observations should include--

1. location of counsel table and appropriate place to be seated,
2. size and style of the lectern and where materials may be placed without sliding off,

3. existence of storage space under the lectern for additional materials, and
4. distance of the lectern from the bench and from each justice sitting on the bench.

Counsel should also learn whether the courtroom is equipped with warning lights and how they are used. Many courts have a red light on the lectern that is illuminated when time has expired; some courts have warning lights as well. If counsel is unfamiliar with the court's system and a light suddenly comes on during his presentation, it may disrupt his train of thought. Counsel should not disregard warning or stop lights. If he does, the court may interrupt him to explain the lights or to tell him that his time is up.

Being familiar with these physical features of the courtroom will enable the attorney to present his argument without unnecessary distractions.

§ 16.2:5 Preparing the Outline

Any speaker must decide what prompts to have before him when he speaks. There are a wide range of possibilities depending on the speaker, the speech, and the forum. The possibilities range between two extremes: reading a text verbatim on the one hand and extemporizing on the other. Neither of these extremes is advisable for appellate argument; the advocate should try to find a comfortable middle ground instead.

It is difficult to execute an oral argument by reading from a prepared text. Any speaker reading from a prepared text runs the risk of losing his place and stumbling about trying to discover it. The likelihood of this happening is greatly increased in an appellate argument when the justices interrupt the speaker to ask questions. It is difficult, if not impossible, to respond spontaneously to those questions and then make a smooth transition back to the prepared text. The use of a prepared text also deprives the speaker of the flexibility necessary to address subjects about which the court expresses concern *when* the court expresses its concern. Extensive questioning by the court also can significantly increase the amount of time counsel must devote to collateral matters. As a consequence, he may be required to alter the approach he intended to take on the subjects he wishes to cover. This kind of flexibility is impossible when counsel delivers argument from a prepared text.

Finally, the most serious problem a speaker encounters by reading from a prepared text is the subtle effect that reading has on the audience. Such a speaker is perceived as ill-prepared and, perhaps, unconvinced of his argument. A speaker who talks to his audience in a conversational manner is much more likely to be perceived as someone sincerely

speaking the truth. In sum, reading a text makes it difficult to persuade an audience.

An appellate advocate who has prepared thoroughly for oral argument should be sufficiently familiar with the facts of the case, the applicable law, and his own contentions to present oral argument without reference to any written notes. The advocate should, however, take notes to the lectern because a barrage of rigorous questioning may interrupt the flow of argument and leave the advocate floundering. Even if the argument appears to go smoothly, important points can be omitted inadvertently. For these reasons, all but the most gifted advocates should take to the lectern notes outlining the points to be addressed during argument.

The outline's length will depend largely on the advocate's style, his experience, his degree of preparation, and the complexity of the case. There are, however, certain constraints on the length of an outline. On one hand, if the outline is too detailed and there are too many key phrases written word for word, the advocate may read from the outline. On the other hand, if the outline is too brief, the advocate faces the potential pitfalls of speaking without any notes.

Perhaps the best approach is to compose a fairly comprehensive outline and, after practicing the speech several times, to revise the outline. Many of the details will become so familiar that they will not need to be included in an outline. The revised outline should omit these familiar details or replace them with one or two words that will trigger the necessary information. The speech should then be practiced several times from this revised outline to determine whether it still contains unnecessary details. If necessary, the revised outline should be further edited. As a general rule, the outline that the advocate takes to the lectern should have at least one or two words that correspond to each point of the argument. The argument should have a clear structure with no more than two or three major points, each supported by a substructure of minor points. No point in this structural framework should be omitted from the outline.

Whether and to what extent the advocate should add to the outline beyond the basic structure of the argument depends on his personal style. As a general rule, the advocate should strive to make the outline fit on one notebook page or four note cards. A longer outline is probably too detailed and is only a step removed from a prepared text.

There are several advantages to limiting the outline to one page or a few note cards. The advocate can make his entire presentation without the distraction of turning pages, and when it is necessary to look at the outline, he need not worry about being on the right page. This approach also

facilitates responding to questions: the advocate can quickly move to a topic he had planned to cover later and give an immediate and full response to a question about that topic.

§ 16.2:6 Preparing Materials

Besides the outline, the advocate may need to take other materials to the lectern. If a question arises about specific language in the appellate record or applicable law, the advocate may find it more dramatic and persuasive to read from the source itself rather than from his outline. In those situations, the advocate may want to refer to a portion of the statement of facts or transcript, a volume of the statutes, or a book of rules.

He also may want to prepare some notes summarizing the cases on which he intends to rely and distinguishing the cases on which his opponent may rely. In addition, he may want to prepare some materials, either as part of the case summaries or as separate documents, that contain the citations of significant cases, so that if the court inquires about the citations, he need not go back to the counsel table and shuffle through papers.

Counsel representing an appellee or respondent or an appellant or petitioner on rebuttal will want to have with him notes made in anticipation of and during his adversary's argument.

Counsel should consider before argument what materials he needs at the lectern. If he knows what materials he will need, he should organize them in proper sequence before he leaves for the courtroom. If it is impossible to predict what materials will be necessary, he should organize all relevant materials so that he can locate those that are necessary at the counsel table while his opponent is speaking. Whatever method is chosen, when the court signals an advocate to proceed, he must not waste the court's time while organizing papers. Similarly, when counsel is at the lectern he should not have to shuffle through his materials to find particular items.

§ 16.2:7 Anticipating Questions

Attorneys preparing for oral argument tend to read and reread their own briefs. If the brief seems well written after lying dormant for several months, the attorney may be deluded into thinking that the position stated in the brief is so strong that he need only be familiar with that position to carry the day.

Counsel should not indulge the naive belief that the discussion with the court will start and end with his own carefully crafted theory of the case. His opponent will

attack that theory, as will the court. Even if a justice is inclined to agree with the position, he often will ask probing questions to explore the limits of the argument, not only to assure himself that the position is sound but also to prepare to defend that position in postsubmission conferences with the other justices. Counsel must assume that a mastery of the analysis expressed in his brief will not be sufficient to persuade the court and must be prepared to extend that analysis in answers to questions.

Accordingly, counsel must prepare for oral argument by playing devil's advocate and anticipating as many questions as possible. No argument is immune from challenge, and counsel who carefully critiques his work can pinpoint its weaknesses. Because it is difficult to be sufficiently critical, however, counsel should enlist the aid of other attorneys to challenge his position. As the number of anticipated questions and challenges increases, the likelihood of surprise during argument decreases.

Convincing answers to anticipated questions must be formulated. Counsel should consider a question with sufficient care to formulate multiple answers and then decide which answer is the most compelling. This process should be approached with the same degree of care exercised in preparing the rest of the oral argument.

Once the best answer has been chosen, counsel should prepare to comfortably articulate it when the question is asked. Some advocates suggest writing out answers to anticipated questions. Although writing the answer may increase the advocate's familiarity with it, written answers should not be memorized word-for-word or carried to the lectern. When a justice asks a question, he wants the advocate to give him an immediate and honest answer. He does not want to see the advocate floundering at the lectern in an attempt to find a canned response.

§ 16.2:8 Practicing the Argument

An advocate should, of course, practice the oral argument as many times as he can without becoming stale before going to the courtroom. He should not merely draft an outline heading that expresses a concept and assume that he will be able to articulate that concept when he rises to speak. Any idea can be expressed in many different ways. When an attorney practices an oral argument repeatedly, he can experiment with different ways of communicating his ideas. While it is useful to think about the issues and write them down, there is no substitute for practicing the argument aloud to hear how it sounds, even with a dictaphone or a tape recorder. Until an advocate expresses ideas aloud and hears how they sound, he cannot know whether he can gracefully articulate necessary concepts. Saying and hearing the words, moreover,

assist the learning process. Accordingly, going through the argument once is imperative; rehearsing it several times is strongly advised; and practicing it many times will greatly enhance performance.

An attorney can practice his oral argument alone in his office, at home in front of a mirror, in the car during rush-hour traffic, or on the jogging trail. He should also practice the argument at least once in a fairly realistic moot court setting, standing behind a lectern, with judges interrupting to ask questions, and a timekeeper giving the same time warnings that will be given by the court. It is also a good idea to present the argument at least once before a nonlawyer. Although appellate justices certainly have a more sophisticated knowledge of the law than do laypersons, attorneys should strive for a clarity of communication that makes the argument comprehensible to anyone. If a nonlawyer understands the argument, the court will understand it.

§ 16.3 Framing the Argument

§ 16.3:1 Relationship of Argument to Brief

Appellate justices frequently say that an oral argument should not be a regurgitation of the appellate brief. This does not mean, however, that the oral argument should bear no relationship to the brief. The major points urged in the oral presentation should be argued in some form in the appellate brief. The points need not be worded in the same way, presented in the same order, or bolstered with the same supporting arguments as in the brief. But if points are not raised in the brief, they are not properly before the court and seldom will form the basis of the court's decision. If an argument cannot be used to decide the case, an advocate wastes his time--and that of the court--by raising it during his oral presentation.

The brief and the oral argument do differ, however, in certain significant respects. Time constraints on oral argument and the limited capacity for aural perception of detail permit only argument of the most important parts of the stronger points in the brief. A brief is like a shotgun blasting at scattered points; oral argument should be like an arrow striking at the heart. The brief should thoroughly cover all arguments with ample citations to legal authority. The oral argument should include only the strongest arguments and should contain only limited citations to legal authority.

Accordingly, counsel must select only the most important two or three points for argument. In a complex case, selecting these points can be difficult. Counsel should keep in mind that some points simply do not lend themselves to easy oral presentation. Once the points are selected, counsel

should remember to present his best argument first, for the arrow cannot strike its target before the archer draws the bow.

The brief and the oral argument also differ in emphasis. The brief writer should strive to rationally and analytically explain what the law is and why his client is entitled to prevail under the law. The oral advocate is more concerned with persuading the court, through personal contact, that his client not only *can* prevail under the law, but also that he *should*.

Finally, oral argument presents the advocate with the opportunity to emphasize points and themes that are made in the brief. In some instances, panel members never read the brief; if an advocate has an argument he wants all members of the panel to consider, the only time that he can be assured that he can reach them is during his oral presentation.

§ 16.3:2 Emphasizing Reasoning, Policy, and the "Big Picture"

As stated above, appellate counsel has two opportunities to persuade the court that his position is sound. The first comes with the brief, which should set forth the best articulation of the position possible at the time it is filed. Over time, however, most arguments can be improved. In most cases, several months will elapse between the filing of the brief and the preparation for oral argument. During this time, the brief usually is put away and forgotten. When it is reread a week or two before argument, counsel can approach it with a fresh perspective and with increased experience of both life and the law.

When counsel drafts a brief, he may become enmeshed in finding and citing cases, marshaling the facts contained in the appellate record, and anticipating and responding to questions that may arise. In the final stages of brief preparation, counsel frequently is preoccupied with eliminating grammar, spelling, and punctuation errors and no longer has the time or the inclination to consider the big picture. The months that pass between brief preparation and oral argument should provide an opportunity to develop the perspective necessary to hone the argument.

The second opportunity to persuade comes at oral argument. Counsel should be prepared to converse with the court, not only about what the law is but also about what the law should be. The conversation should be tailored to fit the circumstances of the case. If counsel is arguing a case in which there are compelling facts in his client's favor, he may want to emphasize those facts to suggest that fundamental fairness requires that his client prevail. If the facts of the case are not particularly compelling, but a decision

adverse to the client could result in gross injustice to litigants in slightly different situations, that result should be stressed by the use of hypotheticals. If the court's decision could have far-reaching implications for society as a whole, those consequences should be explained through the use of public policy arguments. If counsel urges a position that would produce an odd result but is clearly consistent with existing law, he should be prepared to argue the importance of stare decisis in case law and the exclusive role of the legislature in changing statutory law.

Appellate justices, like all human beings, make decisions by forming an intuitive or emotional response and using reason to confirm or reject that response. With that in mind, the oral advocate should strive to induce the justices to *want* to decide the case in his client's favor. The desired response is seldom affected by citing more cases, rattling off more arguments, or reading more documents than does opposing counsel. Instead, it can be accomplished by stepping away from the minutia of the issues, perceiving what the case is really about, and conveying that perspective to those deciding the case.

§ 16.3:3 Confronting Opponent's Arguments

An appellate argument is not a jury trial or a debating contest, yet it is an adversary proceeding. Ultimately, one party wins and one loses. Counsel advances his client's cause not only by defending his own arguments but also by discrediting those of his opponent.

Thus, in the course of oral argument, counsel must be prepared to clash directly with the potentially dispositive arguments raised by his opponent. His initial presentation as counsel for the appellant or petitioner must respond to the best arguments raised in his opponent's brief. Counsel for the appellee or respondent must then directly confront the strongest points just made by his adversary. Rebuttal should be devoted almost exclusively to attacking the position just stated by the appellee's counsel.

Appellee's counsel and appellant's counsel on rebuttal should resist the temptation to rely on prepared remarks in lieu of listening carefully to the opponent's argument and responding to it. If persuasive arguments are made by the other side, it should not be assumed that the court, on its own, will reject those arguments. When an advocate acknowledges his opponent's arguments and responds directly to them, he facilitates a decision in his client's favor.

This suggestion--to directly confront the opposing counsel's arguments--is subject to two caveats. First, counsel should not become so preoccupied with responding to his opponent's arguments that he fails to affirmatively state

his own. Instead, counsel should structure his presentation along the lines of his own arguments and weave his responses into that structure. If an attorney spends all or most of his time responding to the arguments as articulated by his adversary, he concentrates on defense and assumes a posture of weakness. As a consequence, he lends credence to his opponent's position and undermines the strength of his own. Second, when responding to an opponent's arguments, counsel must take care to attack the arguments themselves and not attack the person who made them or the person on whose behalf they were made. Appellate argument should operate on the level of an academic discussion in which ideas, not people, are subjected to scrutiny.

§ 16.3:4 Responding to Court's Concerns

The questions asked by appellate justices often reflect their thoughts about the case. As a consequence, the advocate must not view those questions as irritants that must be dealt with as quickly as possible, so that he can return to the matters he wishes to discuss. Rather, the justices' questions should guide the way an advocate articulates his position. See § 16.5:3.

Just as the attorney must listen to the questions directed to him, so, too, should he pay close attention to the questions asked of his opponent. Through its questions the court may suggest arguments that the attorney had not considered and that should be added to his presentation. Other questions may be predicated on an argument counsel had considered and planned to mention only briefly. After the court's expression of concern, however, counsel may choose to emphasize the argument. Finally, questions posed by a justice may indicate that he is concerned about a specific issue. When counsel reaches that issue in his presentation, he can make eye contact with that justice or, better yet, make specific reference to the question asked by that justice.

Discerning counsel also can capitalize on his knowledge of the court's concerns if he has the opportunity to give a rebuttal. He should, of course, give the best response he can when the question is asked. If he later formulates a better response, however, he can state it in rebuttal. If the court was concerned enough about the issue to ask a question about it, counsel should make every effort to allay the court's concern, even if his best response is articulated in later argument or a supplemental brief.

§ 16.3:5 Matters To Avoid

a. Facts outside the record

The appellate court may consider only the facts set forth in the appellate record. See § 16.2:1. Sometimes that record does not tell the whole story, and appellate advocates, particularly those who were also trial counsel, may attempt to slip in a few extra details they believe will assist the court. This behavior is highly improper and usually offends appellate justices. Rather than referring in argument to matters outside the record, the advocate should build a record that contains all the necessary facts or avail himself of the provisions for record supplementation (see § 14.4:4) and judicial notice (see § 17.4:1).

b. Personal attacks

As indicated in § 16.3:3, an appellate argument should be an academic discussion of issues rather than an attack on the integrity or ability of the opposing counsel, the opposing party, or the lower-court judge. Advocates who refrain from referring to attorneys and judges by name can successfully avoid engaging in personal attacks. For example, when an advocate says, "Mr. Smith's argument about jurisdiction is naive and shortsighted for three reasons," it sounds as if the advocate might be accusing attorney Smith of being naive and shortsighted. A less offensive way to frame the same argument would be, "The appellant's argument about jurisdiction ignores three important factors."

Counsel should refer to a lower-court judge by name only when it advances his client's cause. If a judge has a poor reputation, the appellant's counsel can refer to the judge by name, while the appellee's counsel can say "the trial court" or "the court of appeals." If a judge has a good reputation, the advocates should do the opposite.

c. Citations

Counsel should refrain from excessive reliance on authorities in oral argument. Reference to a few significant authorities may be necessary, but string citations are never appropriate. In oral argument the court is more concerned with the conceptual approach to a problem than with the authorities supporting that approach.

For an authority cited during oral argument, the precise citation need not be given if it is contained in the brief. A case or statute can be referred to by its title, by its popular name, or by a short description. The court need not be burdened with statute numbers, page numbers, volume numbers, or dates during oral argument.

By contrast, when an authority used in oral argument is not contained in a brief, its precise citation should be provided to the court. Counsel should indicate that the authority is not contained in the brief and should give the citation slowly, so that the members of the court can write it down. As an alternative, counsel can deliver a typewritten citation to the clerk and opposing counsel immediately before argument. If a significant authority is located or published after the brief is filed, counsel should send a letter or supplemental brief to the court and opposing counsel discussing the authority.

d. Quotations

A few well-chosen quotations can be used effectively in oral argument. Quotations may be chosen because they are particularly eloquent or because they provide strong support for a party's position. But quotations fitting these criteria should be used sparingly and must be brief. The court is more interested in hearing what counsel has to say about his position than in listening to dramatic readings from selected works.

e. Sarcasm and obscenity

Sarcasm and obscenity are never appropriate in any court of law and are particularly inappropriate in the dignified setting of an appellate court. Their use demonstrates an absence of taste and a lack of judgment. Appellate judges uniformly consider the use of such language unprofessional and unseemly.

f. Humor

In this serious setting, humor should be employed judiciously. An attorney should never tell a joke solely to entertain the court. If, in answering questions, counsel spontaneously provokes smiles or laughter, he may forward his argument. On the other hand, canned humor may be perceived as contrived and inappropriate. As any stand-up comedian knows, a successful joke may evoke a positive response, but a failed attempt at humor can embarrass everyone in the room.

§ 16.3:6 Special Tips for Appellee's Counsel

Although counsel for the appellee[1] should respond to the appellant's argument (see § 16.4:2), he need not couch his entire presentation as a reply to that argument, responding point by point to the appellant's presentation. Instead, if a matter is dealt with adequately in his brief, counsel

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[1]The term *appellee* will be used here to include also the respondent.

should so state, indicate that he does not wish to regurgitate the brief, and then launch into the affirmative side of his client's case.

If the appellant has submitted a reply brief, counsel for the appellee may want to use part of his time rebutting any effective or misleading matter in that brief.

Appellee's counsel should not restate the facts. He need only point out the differences between his version of the facts and that of his adversary and direct the court to any crucial parts of the record not already in his brief. Appellee's counsel can counter any serious distortion of the record and, at the same time, effectively undermine his adversary's credibility by turning to the record and reading the relevant portion along with the court.

If the appellant's counsel has anticipated opposing arguments in his opening remarks, appellee's counsel should show either that appellant's counsel has not stated those arguments correctly or that those arguments should hold more weight than appellant's counsel would ascribe to them. In any event, appellee's counsel should rephrase his arguments so that it will not seem that his adversary had stated them correctly.

§ 16.3:7 Special Tips for Rebuttal

Appellant's counsel should reserve time for rebuttal to answer unanticipated arguments and to correct errors in his adversary's presentation. Rebuttal time should not be misused. Counsel need not feel that he must use his rebuttal time; he should waive it if he has nothing important to add. Above all, he must not use rebuttal time to address a new area that may reveal weaknesses in his client's case or to reopen an area he already addressed adequately.

§ 16.4 Structure and Format of Argument

Persuasive oral presentations adhere to a coherent, but flexible, structure. Because orally transmitted information can be difficult to comprehend, it must be presented in an organized fashion.

Organization minimizes the time and energy that the listener must spend figuring out what is being said and how it fits into a pattern of information. The speed of oral communication renders organization particularly important. A reader can control the speed at which he receives written information and can reread an unclear passage. A listener, however, must process information as quickly as it is being delivered by the speaker. If the listener is bogged down trying to assimilate ideas into a logical structure, more

information will be delivered before the listener can comprehend what already was said, and the message is lost. A structured presentation minimizes this risk.

A rambling, disorganized, stream-of-consciousness presentation leaves the court with a perception of a jumble of arguments. This kind of argument is difficult for the court to comprehend and, therefore, difficult for it to remember. In short, it does the advocate's client little or no good. In contrast, a highly structured argument can leave such a clear impression of the advocate's position that each justice can easily recite the major points without consulting notes.

Counsel should deliver argument in a way that encourages note-taking and makes it easy for the justices to outline the argument's major points. His argument will stay with them longer if written and, therefore, will more likely influence their decision. An unstructured argument, by contrast, makes it extremely difficult for the justices to take notes, even if they are so inclined, and, therefore, is less likely to influence their decision.

Unfortunately, approaching an oral argument with a tight structure and communicating that structure to an audience are two different things. Many an appellate advocate has structured his argument, but that structure never comes across to the court. Counsel should unabashedly communicate his structure to the court throughout his presentation. He can begin by telling the court where he is going; he then can tell the court where he is every step of the way; and, at the conclusion of the presentation, he can remind the court where he has been. The structure should be abundantly clear so that the listener can focus on the meaning of what is being said rather than on how it fits into a pattern of organization.

§ 16.4:1 Appellant's Argument

a. Introduction

The first task in oral argument is identifying both the speaker and the parties. After formally recognizing the court by stating "May it please the court," the attorney should identify himself and cocounsel participating in the argument, unless the marshal has just introduced the attorney. There is no need to introduce the party represented unless there are multiple parties represented by different attorneys on a side.

b. Statement of the case and issues

Because the court usually will hear argument in several different types of cases on the same day, counsel should describe to the court in general terms what kind of case he will discuss. The description can consist of a brief label,

such as medical malpractice, products liability, suit on a note, boundary dispute, or breach of contract. Counsel should also briefly identify the key issues raised by the appeal that will be discussed.

c. Preview of argument

At this point, counsel should identify the first major point or points he will urge during argument. These points should be expressed in complete sentences that affirmatively state a specific complaint.

d. Statement of facts

The statement of facts in oral argument can follow the same general pattern employed in the brief. However, only the most salient facts should be addressed in argument. Thus, the facts should be limited to those necessary for an understanding of the case and the arguments counsel intends to present. All unnecessary and irrelevant facts should be omitted. Instead, counsel should emphasize a few dispositive, attention-grabbing facts. He should not stray from the record by injecting additional facts or misstating facts. The facts should be reported in an objective manner without unsupported conclusions. Nevertheless, without distorting the record counsel should state the facts as favorably as possible to his client's position.

e. Argument

Counsel should put his best arguments first and his best reasons first under each argument. It is important not to argue everything but to concentrate on the one or two best arguments.

f. Summary and prayer for relief

After completing the discussion of all major points (or on learning that time is running out), the attorney should conclude with a statement of the specific relief requested, remembering that different forms of relief can be argued in the alternative. The specific relief requested should be spelled out clearly for the court so that the justices need not speculate about what has been requested.

The following example illustrates many of the practice pointers discussed above.

May it please the court: I'm Bozo Rebozo. This case arises from a rape at a townhome complex. The apartment management company, Terry Property, appeals from a judgment

in excess of $7 million. There are several serious, substantive legal errors about liability and damages that require reversal. They are discussed in the reply brief we filed last week, and I shall address them later in the argument. But the simplest reversal stems from a procedural error--though one of constitutional proportions. It is an error that can affect plaintiffs and defendants alike. It involves the constitutional requirement of twelve jurors unless they are excused by death or are "disabled from sitting."

Past cases have restricted that phrase to mean essentially "physical or mental disability." The supreme court's *Waller* decision, though old, has never been repudiated. We have cited the several cases following it in our brief. This court's *Peralez* decision similarly found a juror "disturbed and unable to serve." There really is no dispute in the case law concerning the meaning of this phrase.

By contrast, juror Pickett was not "physically or mentally disabled." He simply saw the defendant talking with a friend whom he knew to be in the insurance business. For all he knew, it was a casual conversation, unrelated to the case. In fact, he could not even have been challenged for cause successfully. In a small town, everyone knows everyone. This, standing alone, has never been considered grounds for disqualification. Judge Smileast expressly said that he was satisfied juror Pickett would follow his instructions. Nevertheless, the judge excused Pickett rather than grant a mistrial.

The real issue on appeal is whether the error is reversible. The error occurred on the second day of trial before the direct examination of the first witness was completed. It could have easily been handled by granting a mistrial. The plaintiff also moved for a mistrial. We suspect that if the verdict had gone the other way, the plaintiff's counsel would have argued the sanctity of this constitutional right and that its reversibility is obvious.

Be that as it may, there is a presumption of reversible error if the right to trial by jury as defined by the Texas Constitution is involved. The *Van Zandt* case from the supreme court so holds. It was written by Justice Calvert, who was the leading proponent of the harmless-error rule. Nevertheless, he recognized an exception in *Van Zandt* for the constitutional right to trial by jury. You also see this exception recognized in cases involving jury demands that were not honored; the appellate courts reverse and remand for a new trial as long as there is a fact issue. They presume harm.

More recently, in *Powers*, the supreme court enforced the constitutional right to trial by jury in favor of the juror's right to serve on the jury--with no discussion whatsoever of harmless error. In *Powers*, the parties had received a complete trial before a twelve-member jury. But the error in striking minority panel members following voir dire impinged on a constitutional right to trial by jury and was automatically reversible.

Rule 81(b)(1) of the Texas Rules of Appellate Procedure was designed to cover situations like this in which a party is prevented from making a showing of harm. In that instance it presumes harm. We cannot prove juror Pickett would have caused a different result since juror Pickett never got to deliberate. Thus affidavits would be meaningless: he never heard all the evidence, so what could he say? The other jurors can't know what effect his deliberations might have had since he wasn't allowed in the jury room. There is nothing they could say. We know from the movie *Twelve Angry Men*, as well as from our own experiences, that even one voice in the jury room can make a vital difference. Even a reduction in damages would have benefited Terry Property.

Although verdicts by ten jurors are allowed, the constitution still requires a jury of twelve except in cases of death or disability. There must be an important reason why this requirement is in the constitution. There must be a reason why only something as serious as death or disability permits a fewer number of jurors.

To hold this error harmless renders the constitutional requirement of twelve jurors a nullity. The requirement will exist, but there will be no remedy for its breach. Our constitution should not be so casually treated. This case should be reversed and remanded for a new trial on all issues.

As I mentioned earlier, the judgment in this case exceeds $7 million. Interest is accruing at nearly $2,000

per day. It is, by anyone's reckoning, an unusually large judgment.

What led up to this large judgment? Let's begin by looking at *undisputed* facts: a hardened criminal scaled a locked gate and broke through a locked window to get to the keys. He then used burglar's tools to force his way through another door to find the plaintiff's lease and select the plaintiff as his victim.

In premises cases involving intervening criminal conduct, the plaintiff faces the initial hurdle of whether the defendant owed a duty. This is a question of law for the court. In this case, Judge Smileast skipped past that hurdle. He submitted negligence against Terry Property, even though Texas law says no duty is owed unless there has been a history of prior, similar crimes in the area. He submitted express warranty against Terry Property, when only the owners made any promises in the contract. He submitted DTPA against the property management company when, at most, Terry--acting as the owners' agent--breached the contract between the plaintiff and the owners by not providing the lock the contract required. He then instructed the jury to award damages for the criminal's escape from jail, which put the plaintiff in the hospital for a week from fear. This placed a duty on Terry Property to make sure criminals don't escape from custody.

Terry Property's only duty was to adequately protect the plaintiff from dangers that are reasonably foreseeable. The

plaintiff's problem in this case is the absence of reasonable foreseeability. The plaintiff lacks the proof of reasonable foreseeability required either by Texas law or the *Restatement of Torts*. We have quoted at pages 18 through 21 of our opening brief all the evidence pertaining to foreseeability. There is testimony that crime in general is foreseeable and that rapes--unfortunately--occur in this city, sometimes at apartment complexes. But there is no evidence that a rape was reasonably foreseeable at the Tamestone Townhomes. Perhaps that is why the DTPA claim was not added until after the plaintiff had subpoenaed the police records for this area and discovered that it was a low-crime area.

Foreseeability by itself is not the test; anything can happen. Reasonable foreseeability is the test that means, at a minimum, that there is a specific reason to foresee the specific crime. All cases cited in the briefs without exception required a high-crime area, past similar violent crimes, or some specific reason for there to have been an expectation that the crime would occur. There was no such reason. This was a low-crime area. In the past two years, there have been only three incidents of violence--all domestic arguments. There had been no other break-ins of Terry Property's offices.

The *Ronk v. Parking Concepts* case cited at page 19 of our reply brief is perhaps the most dispositive, for it considers the *Restatement* arguments made in the plaintiff's brief and reiterates the requirement of reasonable foresee-

ability as shown by past similar crimes. It is well worth reading closely as a summary of Texas law on this subject.

To prevail, the plaintiff needs this court to make new law. That request is more properly made in the supreme court or before the legislature. Under existing Texas law, Terry Property owed no duty. This court should reverse this unjust judgment.

§ 16.4:2 Appellee's Argument

Counsel for appellee should begin with "May it please the court," introduce himself and cocounsel, if necessary, and identify the party that he represents in a multiappellee case.

a. Statement of the case

By the time the appellee's counsel speaks, the court should have an idea of the nature of the case and the issues presented. Accordingly, it is usually unnecessary for the appellee's counsel to include a statement of the case in oral argument. In some cases, however, it may be appropriate. Thus, in some cases, the parties may disagree about the fundamental nature of the case. For example, there could be litigation arising from a business dispute that one party regards as a simple, good-faith breach of contract but that the other party characterizes as a case of fraud. In that circumstance, although it would not be appropriate at this point in the argument to engage in a full-blown dispute about the nature of the case, counsel might simply state his characterization of the case in a subtle attempt to influence the court's view.

b. Statement of facts

Once again, by the time counsel for the appellee speaks, the court has already heard something about the facts of the case from the counsel for appellant; accordingly, appellee's counsel usually need not discuss the facts of the case. If the facts were reported fairly by appellant's counsel, appellee's counsel should not address them at all. If the facts of the case strongly favor the appellant, appellee's counsel should avoid spending any time discussing them, because that may be the weakest part of his client's case. But if the appellant's counsel has omitted significant facts essential to the arguments that appellee's counsel will make, appellee's counsel should make sure that the court hears those facts. They can either be discussed at this stage of the oral

argument or be reserved for the portion of the argument to which they apply.

Appellee's counsel should pay particular attention to whether counsel for appellant includes the jury or trial court findings in his statement of facts. In the court of appeals, those findings almost always will be in the appellee's favor, so the appellant's counsel will be inclined to discuss the underlying facts in as favorable a light as possible, while neglecting to mention that the fact-finder did not accept his version of the facts. In these circumstances, appellee's counsel should always point out what the trier of fact found after considering all the evidence and hearing the witnesses. Most appellate courts are reluctant to undo factual findings. If the trier of fact has found in the appellee's favor, his attorney should stress that finding.

c. Preview of argument

Appellee's counsel can follow the same practice as does appellant's counsel in previewing major points. Each point should be a positive statement of the appellee's position. Although these points should be responsive to the points made by appellant's counsel, they should not be expressed by repeating the opposing argument and stating how that argument will be attacked. When a statement is repeated, it becomes likely that it will be remembered and, perhaps, believed.

d. Argument

The structure and style of the appellee's argument can follow the same guidelines as an appellant's argument. Counsel should approach the major and minor points one at a time, make it clear to the court where he is in the structure of his argument, and preview and summarize each individual major and minor point as he works his way through the structure.

e. Summary and prayer

If time allows, appellee's counsel can summarize his arguments at the conclusion of his presentation in the same manner as did appellant's counsel. Unless he has cross-points requesting additional relief, appellee's counsel can simply request that the appellate court affirm the judgment of the trial court or the intermediate appellate court.

§ 16.4:3 Rebuttal

a. Introduction

The rebuttal also should begin with the words, "May it please the court." Counsel need not introduce himself, unless he did not present the opening argument. Similarly, counsel should omit a statement of the case and a statement of facts,

because this information should have been imparted to the court by this time.

b. Argument

There are two theories about how to argue on rebuttal. Each has advantages and disadvantages; the choice of approach often depends on counsel's personal style, the complexity of the case, or the circumstances of the oral argument up to that point. An effective advocate will be familiar with both approaches and select the one that best fits his case.

One approach is to use the same structure of argument that was used in the first presentation for the appellant. When reviewing each point, the attorney can discuss his opponent's response to that point and then offer his rebuttal to that response. If there are any points to which his adversary did not respond, he can so state to the court and allow the court to conclude that this point, since uncontroverted, should be accepted as true. The advantage of this approach is that it reinforces the structure of the argument and increases the chance the justices will remember the argument. This approach also highlights those portions of the argument that were not disputed by the other side.

Another approach to rebuttal is to limit it to the strongest responses to the arguments presented by opposing counsel. These points may concern instances in which the appellee's counsel miscited a case, misquoted an authority, or made an argument that sounded plausible on its face but that could be exposed as foolish under scrutiny. If this approach is chosen, the attorney should limit his points to four or five strong arguments that support his position and undermine that of the appellee. These rebuttal points also can be used as a springboard in restating the essential points of the appellant's position.

c. Summary and prayer for relief

If, on rebuttal, counsel chooses to return to the initial structure of his argument, then the entire rebuttal should be a summary. If counsel chooses the second approach discussed above, the arguments may be somewhat random and not easily summarized. In any event, counsel probably can dispense with a summary at the end of the rebuttal. He can, however, restate briefly his major points and restate the specific relief that he is requesting. Because counsel's words in rebuttal will be the last that the court hears in oral argument, they should not be wasted.

§ 16.5 Delivering Oral Argument

§ 16.5:1 Appearance

An attorney should present a serious, undistracting appearance to the court. The court should be able to devote its full attention to the arguments presented and should not have any reason to be aware of the advocate himself. If the advocate is neatly groomed and conservatively attired, he will suggest to the court that he is serious about his presentation, and he will avoid distracting the justices and permit them to concentrate on the arguments he presents.

§ 16.5:2 Tone and Style

Appellate justices often say that lawyers should treat oral argument like a conversation with learned colleagues; appellate argument is not a jury argument. Appellate justices are more sophisticated than the average juror, and they prefer advocates who appeal to their reason rather than those who pander to their emotions. Nevertheless, if any speech is entirely dry, lifeless, and drained of emotion, the audience will have a hard time listening to it and a harder time being persuaded by it.

Achieving the proper tone and style is an exercise in moderation. Any extreme attitude or behavior is likely to distract or, even worse, offend. Counsel should avoid calling attention to himself and diverting attention from his argument. On the other hand, without injecting some personality into the argument, counsel will never reach and motivate the audience.

A nervous and anxious speaker may be perceived as unprepared or lacking confidence in his position. Additionally, he discomfits the audience, which either pities or resents him. A relaxed oral advocate will avoid eliciting these types of responses. On the other hand, an advocate should not be so relaxed that he slouches over the lectern, uses colloquial language, or is overly familiar with the court. An advocate should maintain a degree of dignity and formality sufficient to convey to the court that he takes the case seriously and respects the court.

A court is not likely to believe a position if the advocate does not believe it. Confidence, therefore, is an essential tool of the art of persuasion. If an advocate devotes the time necessary to construct a well-crafted argument and to become thoroughly familiar with the appellate record and the applicable law, he should be confident. He should not, however, equate confidence with arrogance. Moderated confidence, when justified, can be impressive and persuasive; arrogance will be offensive.

Counsel should be sufficiently earnest to demonstrate that he is serious about the case and considers it important. Appellate argument is, nevertheless, not a place for emotional outbursts.

By virtue of their positions in their profession and the responsibility they must fulfill, appellate justices are entitled to be treated with dignity and respect. Each should be addressed as "Your Honor" and should be treated with some degree of formality throughout argument. This does not mean that an advocate should treat the justices like royalty. He need not refer to "this honorable court" or "these learned justices." Similarly, he should not lavish exaggerated praise and flattery on the court or waste time with remarks like, "As I am sure that such a distinguished court as this is well aware . . ." Appellate justices deserve respect, which is best demonstrated by effective delivery of a well-prepared presentation.

§ 16.5:3 Answering Questions

Answering questions is certainly the most challenging, probably the most important, and potentially the most rewarding aspect of appellate argument. The questions asked by the court directly reflect the court's concerns about a case. When an advocate responds to those questions, the court can generally be assured that he is not delivering a prepared speech but is instead engaging in open colloquy about his position. The effective appellate advocate receives questions courteously, gives direct and candid answers, and weaves those answers back into the fabric of his speech.

As stated above at § 16.3:4, counsel must not regard questions as irritants that must be disposed of quickly or evaded entirely. He should never put off answering a question by telling a justice that he will get to that subject later in argument. He should talk about what the justice wants to talk about, when the justice wants to talk about it. He should not simply refer the justice to the brief for an answer to the question or tell the justice that he already addressed that topic. Similarly, he should not respond to a question by asking the justice a question, unless he needs to clarify the justice's question or to make a point rhetorically.

If a question is asked that can be answered affirmatively or negatively but requires some explanation, a direct yes or no answer should first be given. The explanation can follow. Counsel must allow the justices to be in complete control of the proceedings. When a justice begins to speak, counsel should immediately stop talking even in mid-sentence. It is inappropriate to increase speed or volume to speak over the justice in order to finish a sentence. Although the justice has an absolute right to interrupt an advocate at any

point, an advocate should never interrupt the justice. Instead, the advocate should be certain that the justice has completed his question or comment before the advocate begins to respond.

In answering questions, the advocate must be candid with the court. If the advocate does not know the answer to a question, he should simply say "I don't know," rather than pretending to know, inviting further questioning, and ultimately being exposed not only as ignorant but also as dishonest. It is acceptable to admit minor damaging points when necessary; hence, it is important to know what may be conceded without irreparable damage. It is preferable to concede these points when they have been exposed as losers, rather than to blindly and adamantly insist on them and lose credibility with the court.

If the advocate does not understand a question, he should ask the justice to repeat or clarify it, rather than attempt to answer it. Pausing before answering a question is acceptable. A too-long pause, however, can be awkward and embarrassing for everyone in the room. But counsel should not feel compelled to respond immediately after a justice completes his question. A brief pause to collect one's thoughts, followed by a good answer, is preferable to immediate and ill-considered babbling.

Counsel should also be on the lookout for favorable questions. Sometimes a justice will agree with a position and will serve up a "fat pitch" to give counsel an opportunity to hit a home run. Some advocates assume such a combative and adversarial posture that they perceive every throw as a curve ball and end up fouling the easy pitch. An advocate need not attack the justice who is trying to help him.

§ 16.5:4 Timing Considerations

Oral argument is subject to strict time constraints. Most Texas courts of appeals allow either twenty or thirty minutes for oral argument. The Texas Supreme Court now uses a sliding scale, allotting anywhere from ten minutes to thirty minutes, depending on what the court thinks is appropriate for each individual case. Counsel should find out what the limits are in advance and plan accordingly to avoid surprises and omissions of significant material.

Counsel must not waste time just to fill up time. Courts do not require attorneys to speak for the maximum time allotted. Counsel should say what he has to say succinctly and clearly and sit down. If he speaks for only five or ten minutes, and those five or ten minutes are sufficient to convey his message, the court probably will view the presentation as a refreshing change. More importantly, the dramatic

effect of the argument will likely be increased as a result of its brevity.

When the planned presentation and the questions of the court are likely to fill the allotted time, counsel should take certain precautions. First, he should begin his argument with his strongest point. It is dangerous to save a strong point for last in order to close with a flourish; if the court asks many questions, there will be insufficient time to argue the strong points. As discussed above at § 16.3:1, the brief is the place for including and thoroughly covering all arguments; oral argument should cover only the strongest points.

When time expires, an advocate should finish his sentence and stop. This rule should not be abused by concocting a run-on sentence or by trying to squeeze in a summary and prayer. Instead, counsel should briefly conclude the sentence he originally intended and sit down.

In some exceptional instances, the appellate court, in its discretion, may grant counsel additional time to summarize and conclude, particularly if the court has taken up time with a significant number of questions. The time should be graciously accepted but should never be requested. When it is offered, it should not be abused or used to launch new arguments.

§ 16.5:5 Public-speaking Pointers

An oral argument is also a speech; accordingly, all the basic public-speaking pointers apply to appellate advocacy. The goal of an appellate argument is to persuade; before a speaker can persuade, he must first communicate. In order to communicate, he must speak in a clear and understandable fashion and avoid distracting his listeners from comprehending what he is saying.

As mentioned at § 16.3:1, counsel should keep the structure of his argument fairly simple; he should cover a limited number of points and develop analyses that are easily comprehended. Similarly, his sentence structure should be simple, and he should choose commonly understood language to express his message.

A speech delivered in the same tone of voice, at the same volume, and at the same speed is boring--all points, whether extremely important or insignificant, are given the same emphasis. A speaker who skillfully varies tone, volume, and speed is interesting and is capable of emphasizing the points that deserve attention.

Although the advocate should vary his speed, he should speak slowly enough that listeners can follow what he is say-

ing. The mind can transmit information to the mouth faster than the ear can transmit information to the brain. Anxiety and adrenaline may cause appellate advocates to speak too quickly to permit comfortable comprehension. The advocate should be aware of this tendency and compensate for it.

The advocate should never intentionally speak rapidly because he is running out of time and wants to squeeze in additional information. It is much better to speak at a normal and understandable speed, to say as much as can comfortably be said in the allotted time, and to stop when time expires.

The advocate should make eye contact with the justices as often as possible. A speaker who looks at his audience while he is speaking is perceived as a sincere and honest advocate. Moreover, eye contact enables the experienced advocate to gauge the court's reaction to the arguments.

Gesturing should be limited to what is reasonable and comfortable. Wild gesticulating, waving of arms, and pounding on the lectern may be appropriate for evangelical preaching or trial litigation but are inappropriate for appellate argument.

Some speakers unconsciously distract from their oral presentation. Brushing hair out of one's face, swaying from side to side, or other automatic mannerisms draw attention away from the speech itself. The listener initially gets annoyed and then begins to watch for the repetitious event instead of listening to what the speaker is saying. Counsel should become aware of these distracting actions by eliciting feedback from an audience or videotaping a presentation.

§ 16.5:6 Visual Aids

Many cases lend themselves to use of charts, exhibits, and demonstrative evidence. An aid should be used when it will clarify a matter that is hard to articulate, heighten the effect of words, or substantially shorten the oral presentation. Although visual aids should be used only when needed, the need arises more often than most lawyers realize.

Visual aids can illustrate a variety of points and situations. Each case should be searched for any matter that can be presented more effectively by a visual aid.

Visual aids come in three types. The first type is any matter that can be viewed by the whole court, such as drawings and large pictures. The second type is material that can be handed out to the individual members of the court, such as small pictures, the material words of a contract or statute, or any exhibit that must be viewed individually. The third type is a demonstrative exhibit, either created or

introduced at trial, that must be operated or manually demonstrated. This category includes slides, motion-picture film, or any matter that must be projected onto a screen.

Consideration must be given to the practical aspects of implementing the visual aid in the oral argument. Of course, the visual aid must be prepared beforehand. This preparation includes securing the necessary props. Easels are useful to display material to be viewed by the entire court, but this type of material also may be hung from the wall if facilities are provided. Other helpful props are pointers, marking pencils, and similar materials. A metal board and magnetic objects can be used to illustrate accidents or any other matters requiring graphic elements.

If individual exhibits will be handed out to each justice, enough copies must be made. For individual exhibits, all irrelevant matter should be eliminated, and the important words or features should be highlighted. Thus, as with all parts of oral argument, effective use of visual aids requires preparation and practice.

An attorney should practice using the visual aid while presenting the oral argument. The poster, chart, or board should easily fit on the easel to be used. Displays and demonstrative exhibits should be clearly visible to all members of the court. If there will be any kind of projection on a screen, counsel should practice with the projector and the screen. In short, the attorney should make sure that the visual aid works.

Last, some consideration should be given to the physical conditions under which the aid will be used: the size of the room and the availability of props, such as easels, projectors, and other hardware. Arrangements should be made to set up the props well before the argument is scheduled. The aid should only be in the court's view when counsel refers to it; at other times, it is distracting. If the aid must be assembled or set up beforehand, it should be turned away or hidden until the proper time when it can be revealed to the court. Afterward, it should again be removed so that it will not distract. If individual exhibits are used, the procedure for handing out material should be verified with the clerk or bailiff.