PREPARING FOR ORAL ARGUMENT: A SURVEY OF LAWYERS AND JUDGES

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I. INTRODUCTION

This paper addresses the results from an oral survey of well-respected appellate lawyers and judges from across the State of Texas. The survey was conducted to determine how successful appellate advocates prepare for oral argument. The responses were surprisingly consistent with regard to many aspects of preparation. Likewise, the strategies and tools utilized by the lawyers in the survey were supported by opinions of the judges who participated.

The first section of this paper will present the basic preparation techniques employed by virtually all of the lawyers surveyed. The latter sections will deal with the differences in their preparation, as well as presentation considerations that should be kept in mind throughout the process of preparation.

A special thank you is due to the lawyers and judges for their participation. The lawyers interviewed were:

Doug Alexander
David Holman
Pam Barron
Don Hunt
Beth Crabb
Kevin Dubose
Lynn Liberato
David Gunn
Rusty McMains
Warren Harris
Dean Bill Powers
Mike Hatchell
Roger Townsend

The Justices interviewed were:

Justice Deborah Hankinson
Justice Nathan Hecht
Justice Sarah Duncan
Justice Woodie Jones
Justice Mack Kidd

Without the willingness to participate and the remarkable candor of these lawyers and Justices, this paper would not have been possible.[1]

II. THE BASICS OF ORAL ARGUMENT PREPARATION

The survey participants all described the same basics of oral argument preparation. The first step in preparation is to gather all of the briefs, all of the record, and all of the cases that were used in the briefing process. The next step is to read all the briefs. Most practitioners read chronologically from the first brief to the last. Generally, they read about six to twelve of the key cases to get the background of the important cases. Then they read chronologically, the pertinent excerpts from the record, based on what they anticipate will be important in oral argument.

Almost all practitioners then focus on two or three key points that are most likely to produce a win for them, regardless of how many points were briefed. On these key points, special attention is paid to what questions will be raised by the court during oral argument. At one time or another, most practitioners also consult with colleagues to discuss the argument and to help anticipate potential questions from the court. Finally, the advocate creates an outline of the argument.

Once this process is completed, the next step is to practice. Some advocates practice privately; others practice in front of someone else. All agree that practice makes perfect. Throughout the process of practicing, the advocate streamlines and polishes the argument to the greatest extent possible. Finally, the advocate gathers the materials he or she will take to the podium, and goes to court.

This general process reflects the unsurprising similarities of what every good oral advocate does. What, then, are the similarities in the answers to the survey that are surprising?

II. Surprising Similarities

A. Similarities in Preparation Techniques

1. Practice and Anticipation

[1] Additionally, I wish to thank Sean Cox and Robert Dubose for their insights and assistance in preparing this paper.

Of all the practitioners surveyed, almost everyone, without prompting, said that they try to set aside at least two weeks before the argument to start preparing. Over-preparation is the rule. No one surveyed believed they could ever do a sufficient amount of preparation. Everyone approaches the process from the standpoint of: 'I have to master everything.' So the truth really is over-preparation. The commonality is total immersion. It might be expected that the total immersion is focused on the briefs; however, most of the persons surveyed reported a redevelopment of their thinking on the argument based on their oral argument preparation. There are often significant and material changes in the argument between initial brief preparation and oral argument. The primary concern throughout the oral argument preparation is addressing the concerns of the court.

The most commonly recited key to oral argument is anticipation. None of the participants in the survey believe that what *they* want to say is the most important part of preparation. They all believe that the absolute focus of their argument is the *court's* concerns and questions.

The lawyers also uniformly agreed that constant practice and input from colleagues is essential to successful preparation. Virtually every lawyer surveyed practices in every way and in every place imaginable. All lawyers outline their argument and continually rehearse and refine it. Many will write their argument in order to carefully tailor the words for presentation, or perhaps to carve out the perfect phrase to repeat to the court throughout the argument. Regardless of the approach towards outlining, constant practice and refinement is essential.

2. Flexibility

Anticipating the questions of the court must be tempered with flexibility. Every lawyer in the survey spoke about 'needing to go where the court wants to go, so you have to build in flexibility.' A lawyer cannot be tied to a particular outline or particular logical flow.

Some of the people spoke specifically of modules. They prepare questions and answers in discrete modules so it does not make a difference whether the court asks them about module number three first or module number ten first. The flexibility is built into their outline.

3. Provocation

Many of the participants described their approach to oral argument as wanting to 'sow questions in the mind of the court'. Everyone was concerned about being provocative. Everyone was concerned about steering the court. Some utilize the opening framework to provoke the court to ask the questions the lawyer feels are important and which the lawyer wants to answer.

4. Core Principles Concerning Jurisprudential Effect

The most important point of agreement for both lawyers and judges is the step beyond the anticipation and practice. That step is the analysis of the jurisprudential consequences resulting from a particular rule of law argued by the advocate.

In an oral argument there are two competing sets of jurisprudential interests. The goal is to frame the issues in a manner that presents these competing sets of jurisprudential interests. If the argument can be framed in this manner, the issues become easier for the court to address.

For many judges, including Justice Hecht, the most important practice of a good advocate is to focus on the weaknesses of his or her case, as opposed to ignoring the weaknesses and focusing only on the strengths of the case. All of the lawyers surveyed agreed that the most important tasks they faced in analyzing and preparing to present the problem are understanding their position's own weaknesses and vulnerabilities, and being prepared to either defend them or concede them.

The next most important task, from the perspective of both judges and lawyers, was to focus on the consequences of their proposed rule versus the rule offered by the opposing lawyer. How is the proposed rule going to change the law? How is it going to 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, or is the law in other respects consistent with the proposed rule? Good lawyers focus their energy and arguments on answering these questions for the court. This approach of viewing the result from a

jurisprudential perspective was consistent among the entire survey group.

One of the most insightful comments in the survey was Justice Duncan's comment about how to effectively frame the issues in a case. She said, 'the single biggest problem is that you get two ships passing in the night. Both in the briefing and oral argument. There is just no joinder.' The solution, as she framed it, involves two things: 'Identify where the parties disagree and more importantly, explain to the court why they disagree. It is the why of the disagreement that is really what's really important to us. That's what we care about and that's the way that we are going to decide the case.'

The lawyers surveyed were very conscious of trying to make the argument simple for both the court and themselves. The constant concern in oral argument is to focus the court, as clearly as possible, on the point with which it must wrestle in order to decide the case. The method to do this is to contrast the lawyer's argument with the opposing side's argument and to demonstrate the consequences of a decision in favor or against their proposed rule. Through practice, anticipation, and understanding the jurisprudential consequences and the clash of those issues, a lawyer can become confident that he or she will be able handle any potential questions from the court. In reaching this point, lawyers consistently prepare to concede their weaker points to prevent the court from being distracted, and to draw the attention to the real issues of the case in the limited time allotted for oral argument.

The goal is to abandon the weaknesses as quickly as possible and thereby avoid the peripheral issues that distract from the core of the case. As Doug Alexander explained, 'I want to limit the battlefield as closely as possible. When missiles come in that are not aimed at my battlefield, but are outside it, I'm not going to put up any defense on that, but the missiles that do come into the battlefield that I have to protect, I will fight to the death on those.'

Ultimately, through this process of anticipation and analysis, both offensively and defensively, everyone is refining their position, crystallizing issues, limiting their position for explanation to the court.

The most important step is to refine the proposed decisional rule. Everyone has a rule that they want the court to adopt and that rule should sound as attractive as possible to the court. David Gunn calls this process 'finding the primary decisional point,' largely because it involves identifying for the court the shortest route to take in granting the relief sought. Focusing on the primary decisional point, the point that if won will decide the case, in effect creates a shortcut around some of the issues raised by opposing counsel and perhaps some of the more peripheral issues raised by the advocate themselves.

As Rusty McMains said, 'the most important thing that any advocate can do is to steer the court by framing the issue.' If an issue is framed one way, it may have a great deal more persuasive impact than an alternative way.

B. Similarities in Presentation Techniques

1. The Beginning of Oral Argument

The beginning of the argument is when most people focus the majority of their memorization. Lynn Liberato said, 'I try to reduce my case to a one sentence description of the argument and when I have that, I feel like I can at least get my position out at the very beginning of the argument.' Most lawyers surveyed will hone to perfection the first ninety seconds of argument, many even practice and recite it to themselves while sitting in the courtroom during the morning of oral arguments. This memorization places them more at ease, secure in the knowledge that they will be able to start out the argument as they wish, and also steer the court to the issues where they want to focus. The most important task in the first ninety seconds is to let the court know why the lawyer's argument is the winning position. This is the opportunity to place the argument in the best possible light for winning.

Another commonly stated strategy is to put the best argument first for fear that, if a weaker argument is placed first, the lawyer may never reach his or her best argument because of questions from the court. The lawyers surveyed believe that the court has an expectation that the best argument will come first, and the judges surveyed confirmed this belief.

The general consensus is that, when crafting an argument, the lawyer should keep the facts in as skeletal a form as possible. One approach is to view the facts of an argument as merely reminder facts. Getting bogged down in facts can waste valuable time for argument. The same is true for case citations. Many lawyers include only a limited number of cases in the structure of their outline. However, all the lawyers surveyed insisted that these are merely generalizations, as the variety of cases is tremendous and some may call for additional emphasis on the facts or cases applicable to the situation.

While generalizations may be appropriate in discussing the uses of facts and case citations in an outline, one area in which generalizations should not be made is with regard to panel sensitivity. Panels can range from hot to cold. The Supreme Court of Texas is almost always hot. Some courts of appeals are known for asking few questions. Effective advocates will adjust their argument preparation accordingly.

Often, courts will have decisional memoranda that are circulated before oral argument. Often, the memoranda will predispose the panel against a lawyer's position. One way to address this is to attempt to anticipate the content of the decisional memoranda and address the deciding issue first. For instance, if it was anticipated that the memoranda indicated affirmance because of waiver, the lawyer should first address waiver and try to convince the court that the memoranda is incorrect. If successful, this might open the judges' minds to consider some of the more substantive issues that would have been losing arguments had the court found waiver.

Another key preparation technique is to investigate whether panel members have written a decision on point. This will help in framing an argument by determining how the court had framed the jurisprudential issues previously. If the court has framed the issues in a manner beneficial to the lawyer's side in the past, this will give a strong foundation to build upon. If the court has framed the issues in a manner antagonistic to the lawyer's position, they can use the argument structure to suggest an alternative framing that might motivate a shift in the court's disposition.

Other considerations include whether the lawyer will be the appellant or appellee and whether the opposing side has presented a good or poor argument. This is the time to pay close attention to the other side's argument. If they have done a poor job, clashing with their argument may not be in the lawyer's best interest, strategically. It may only serve to shine light on a poorly elucidated argument and inspire the court to take the lawyer to task on the other side's argument, distracting from the desired focus.

2. Performance

Most people surveyed believe that performance is very important. Most agreed that the style should be more of a learned conversational approach. The speaking style suggested by most is the style a lawyer would adopt with a colleague in discussing their preparation for oral argument. A surprising number of people spoke of spontaneity or 'being in the moment.' Roger Townsend stressed that he felt that being spontaneous and in the moment was the most important skill in oral argument. It is very important for the lawyers not to appear as if they are presenting a canned speech, but rather a unique conversation developing between the lawyer and the panel. An essential element of spontaneity is maintaining eye contact with the panel. If eye contact is broken, the lawyer loses the ability to persuade and dissolves the conversational posture between the lawyer and the court. The obvious corollary to this is not to rely on notes at the podium.

One technique that requires the utmost spontaneity is humor. Everyone agrees that planned humor sounds stilted or canned, and the chances are it will not be effective. Spontaneous humor, however, can be an effective tool of provocation. It can inspire the court to engage the lawyer and help relax the atmosphere of the courtroom. If the atmosphere is not relaxed, persuasion is less likely, and the advocate is limited in his or her effectiveness.

3. Visual Aids

The use of posters or enlargements was resoundingly rejected by almost all of the lawyers and judges surveyed. Handouts were the rule. If any kind of visual aid is used, it should be a handout, although many would prefer to use no

visual aid at all. One of the commonly cited regarding problems with visual aids is that they distract from the presentation of the advocate and result in a panel of disengaged observers.

III. MAJOR DIFFERENCES

Most of this paper has been dedicated to the topics on which the survey participants agreed. The remainder will address the major differences in their views.

A. Differences in Preparation

Surprisingly, few lawyers said that formal moot courts or practice arguments are an effective tool in preparing for oral arguments. Most prefer discussions with colleagues, because the conversational nature of the discussion is most similar to the desired interaction with the court. Many participants believed that moot courts often serve as more of a distraction because, as a practical matter, the difficult questions a moot court might concoct are unlikely to be replicated by an actual court. Only a few lawyers believe that practice arguments are an effective preparation tool.

Everyone agreed that questions and answers are the key to an effective argument, but only a few said that preparing for questions should constitute the bulk of oral argument preparation time. A few advocates report that they spend ninety percent of their argument time in preparing for questions and answers as opposed to prepared remarks, but most reported a 40/60 split between time devoted to preparing for questions as opposed to time devoted to the presentation of rehearsed remarks.

Another significant difference appeared in the focus of preparation. Some attorneys try to master every possible issue so that they are not vulnerable in any exchange with the court. Others will prepare on the key issues only. If any unanticipated issue arises, they ask to address it through post-submission briefings.

Advocates also disagreed on their focus in reading the principal cases. Some read the principal cases to get a sense of the policy that motivates the courts. Others focused on the holding of the principal cases and how those holdings are consistent and coherent with the rule that they are asking the court to follow in the particular case.

Different advocates have sharply different approaches to last minute preparation. Some prefer to 'cram' as much information into their heads as possible in the final hours of preparation. These advocates believe that this helps them better remember the argument and helps them achieve a high intensity level for the argument. Others prefer to calm themselves, often by clearing their minds of the argument. These advocates believe that they can perform better if they have calmed their mind.

Similarly, advocates also disagree about how preparation affects their primary arguments. For some, the process of preparing rarely changes the focus of the primary arguments. For others, the preparation process can profoundly change both their articulation of the primary arguments as well as their evaluation of which points are the most important support for their argument.

B. Differences in Presentation

One sharp difference in oral argument techniques is the degree to which advocates are willing to use obfuscation as a tool in oral argument. Some advocates, and some judges, candidly recognized that advocates in some instances promote their position by obfuscating an issue — particularly when that issue is one that the advocate is likely to lose if it is understood by the court. Others believe that it never should be the role of the advocate to obfuscate, but instead always to clarify the issues facing the court.

Another significant difference is the attitude toward notes. Some people will take no notes to the podium. Those who do not use notes believe that eye contact and the other methods of engaging the panel are more important. Many lawyers who use notes at the podium use a manilla folder with the outline attached on the right side of the folder and case information attached on the left side. Some lawyers will take special care to design their notes, emphasizing with color highlights particular points or stages in their argument, or color coding cases for whether they are for them, against them, or in between. Almost no one, however, would ever take a script of the argument up to the podium.

Another difference in technique is how the advocate views his or her role as an advocate before the court. Some practitioners take on the role of an

'objective insider,' or an ally of the court, whose role is to clarify the issue and the arguments before the court. Many of these practitioners cite maintaining their credibility as an important goal of oral argument. Other practitioners view their role as a 'partisan salesperson.' They view their job as primarily one of advocacy and persuasion, not objectivity.

One surprising difference concerned the ordering of arguments. Many advocates acknowledge that they follow the general rule that the best argument should be presented first. Some advocates, however, indicated that other factors should determine the order of arguments, such as making the 'cleanest' or simplest argument first.

Finally, advocates also disagreed about whether it is a sound strategy to focus on arguments or authorities not contained in the brief. Some advocates often focus on ideas and arguments that do not appear in the brief. Some of these advocates maintain that making arguments not in the brief can give the court additional reasons for ruling in the advocate's favor. They also maintain that they may not fully understand the real argument until after the briefing process is completed. After full briefing, the advocate may understand new arguments that resolve the conflicting positions. Other advocates insist on focusing on the arguments contained in their brief. Many of these advocates believe that the court is not likely to listen to or understand arguments that do not appear in the briefing.

IV. CONCLUSION

After completing this survey, it became clear that what good appellate advocates do in preparing for oral argument is surprisingly similar to each other and to what the court wants from them. Even the differences among them can be best explained as personal attempts to accomplish the same goal — to give the court as much help as possible in deciding the case.