ORAL ARGUMENT

Presented By

JUSTICE DALE WAINWRIGHT
SUPREME COURT OF TEXAS
201 West 14th Street, Room 104
Austin, Texas 78701
(512) 463-1332 (Telephone)
(512) 463-1365 (Telefax)

Written By

RICHARD R. ORSINGER
ATTORNEY AT LAW
310 S. St. Mary's St., Ste. 1616
San Antonio, Texas 78205
(210) 225-5567 (Telephone)
(210) 267-7777 (Telefax)
Email: richard@orsinger.com

Of Counsel to McCurley, Kinser,
McCurley, & Nelson, LLP
5950 Sherry Lane, Ste. 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)
Email: richard@mkmn.com

State Bar of Texas
PRACTICE BEFORE THE TEXAS SUPREME COURT
April 4, 2003
Austin, Texas

CHAPTER 13

JUDGE DALE WAINWRIGHT
BIOGRAPHY

On January 6, 2003, when Dale Wainwright was sworn into office by U.S. Supreme Court Justice Sandra Day O'Connor, he became the newest justice on the Texas Supreme Court. He was elected to the Supreme Court on November 5, 2002, garnering almost 2.5 million votes statewide.

He has extensive legal experience, impressive credentials and a hearty work ethic. Justice Wainwright was appointed to the 334th Judicial District Court in 1999 by then Governor George W. Bush. As a District Court judge, Wainwright resolved over 3,000 cases with amounts at issue as high as a billion dollars. In 2001, Governor Rick Perry appointed Judge Wainwright to a temporary commission as Justice on the Texas Supreme Court. Prior to that, in 1995, Chief Justice Tom Phillips appointed him to a task force of the Texas Commission on Judicial Efficiency.

Prior to becoming a judge, Dale Wainwright practiced law primarily at the firms of Haynes and Boone and Andrews & Kurth for almost a dozen years. He handled tort and commercial cases in federal and state courts in Texas, California, Ohio, Colorado, Tennessee and Mississippi and defended multimillion dollar securities fraud cases in arbitration before the NASD and New York Stock Exchange.

Dale also excelled in his academic pursuits. He earned his law degree from the University of Chicago School of Law, while working part-time all three years. He earned his undergraduate degree from Howard University, *summa cum laude*, in 1983 and studied at the London School of Economics and Political Science in the Great Britain. He graduated number one in his high school graduating class in 1979, and was the first African American to do so.

Judge Wainwright also has a long history of public service, having co-founded the Aspiring Youth Program (a program to assist inner-city youth), served on the board of directors of the Houston Bar Association and Texas Young Lawyers Association and served as president of the Houston Young Lawyers Association (when he was a young lawyer). He received the Legal Excellence Award in 2000 from the NAACP and was recognized for outstanding legal service by the Houston Lawyers Association. He has also volunteered at the YMCA and coached little league baseball.

He and his wife Debbie have three sons – Jeremy (15), Phillip (12) and Joshua (5). They attend Second Baptist Church.

NEWSPAPER QUOTES

Dallas Morning News

Judge Wainwright "has been a strong voice for scholarly fairness, pledging not to legislate from the bench. He consistently has received high ratings from the Houston Bar Association. He was educated at the University of Chicago School of Law and London School of Economics… Judge Wainwright's strong qualifications give him the edge."

Corpus Christi Caller-Times

“In the Supreme Court race, Dale Wainwright is a clear standout. Appointed to the district court bench in Houston by then-Gov. George W. Bush and later named to fill a Supreme Court vacancy by Gov. Rick Perry, Wainwright would be a solid choice …for Texas.”

Longview News-Journal

"Wainwright's educational and legal qualifications are impressive and he is ranked highly in the Houston and Dallas bar polls. He has a reputation for thoroughness and clarity. *The Longview News-Journal* endorses Wainwright.”

San Antonio Express News Endorses Judge Wainwright

Judge Dale Wainwright is an "excellent candidate" who would be a "welcome addition to the court." "He brings solid legal experience and a record of community service to the court

Midland Reporter-Telegram

”We were tremendously impressed by Judge Wainwright. When it comes to the law, he vows to try to interpret the laws as they have been written and not try to legislate from the bench. We would be honored to see Judge Wainwright serve in our state's highest court. “

Austin American-Statesman

"Wainwright['s] educational background -- he attended the London School of Economics -- is impressive. Wainwright has all the makings of a Texas political star."

CURRICULUM VITAE OF RICHARD R. ORSINGER

Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

Board Certified by the Texas Board of Legal Specialization
Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-2001) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (June, 2002)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002)
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94) and Advanced Civil Trial Course (1990-91)
Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar's Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001)

State Bar's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

State Bar's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002)

State Bar's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002)

State Bar's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!", (1997); The Lawyer As Master of Technology: Communication With Automation (1997); If You Don't Know Where You Are Going, It Doesn't Matter How You Get There: Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: State Bar of Texas Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); State Bar of Texas Advanced Civil Trial Course: Offering and Excluding Evidence (1995); State Bar of Texas Advanced Civil Trial Course: New Appellate Rules (1997); State Bar of Texas Advanced Civil Trial Course: The Communications Revolution: Portability, The Internet and the Practice of Law (1998); State Bar of Texas Advanced Civil Trial Course: Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); State Bar of Texas In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Association: Proving It Up and Getting It In: Foreign Law and Foreign Evidence (2001)

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ORAL ARGUMENT

by

Richard R. Orsinger

Board Certified in Family Law
and Civil Appellate Law
Texas Board of Legal Specialization

I. INTRODUCTION

It is sometimes said that you can't win a case in oral argument, but you can lose it. While it is certainly true that an advocate can damage his or her case in oral argument, a good oral presentation in the Texas Supreme Court can help to win a case. The present practice of the Texas Supreme Court is to confer shortly after oral argument where a tentative vote is taken. While Justices often will hold to their prior assessments based on the written submissions, sometimes Justices will change their position based on oral argument. This paper explores oral argument in the Texas Supreme Court, and suggests ideas that may help you not only to avoid losing the case in oral argument but also to help win it.

II. THE OFFICIAL PURPOSE OF ORAL ARGUMENT

TEX. R. APP. P. 59.3 states the purpose of oral argument in the Texas Supreme Court:

> Oral argument should emphasize and clarify the written arguments in the briefs. Counsel should not merely read from a prepared text. Counsel should assume that all Justices have read the briefs before oral argument and should be prepared to respond to the Justices' questions.

Breaking this down into parts:

- emphasize and clarify written arguments in the briefs
- do not read from a prepared text
- assume all Justices have read the briefs
- be prepared to respond to the Justices' questions

III. WHAT WORKS IN CORPUS CHRISTI

The Corpus Christi Court of Appeals is the only Texas court of appeals with published local rules suggesting how to make an effective oral argument:

> In presenting oral argument, it is helpful to the Court for the parties to present the common sense rationale for the positions on the major points at issue rather than restate the material covered in the briefs. Repetition is generally not helpful but the ability to answer questions candidly and logically is generally beneficial.

Tex. App.–Corpus Christi Local Rule V.

IV. BEFORE YOUR FIRST ARGUMENT

Unless you are a wizened advocate, there is something exciting and possibly even intimidating about making your first argument to the Texas Supreme Court. Here are some suggestions for the first time advocate.

A. Get the Feel of the Courtroom

Consider going into the Supreme Court courtroom on a prior day. This courtroom is the public space of the highest court for civil litigation in Texas. It is meant to be imposing, and it is. Only a blasé lawyer does not feel on his or her first visit the impact of the architecture, the weight of the heavy doors, the thickness of the carpeting that swallows each step and imposes quiet on the courtroom, the immensely high ceilings that diminish the individual, the imposing portraits of former justices, the solitary podium that faces the massive bench that runs from wall to wall and is elevated high above the floor. If the courtroom is not in use, walk up to the podium, place your hands on each side, and see how it feels to stand in the advocate's spot.

There is one thing you will not experience during this private visit. It is the rumbling sound of the Justices, as they walk up the wooden planks behind the wall and then suddenly emerge from the wall and take their seats high above the floor.

B. Write out Your Speech

If this is your first argument to the Supreme Court, you should write out your entire speech to the Court. Write it like you're saying the words with your mouth. When you read it back to yourself, read it like your listening to it with your ears. Break the speech down into short paragraphs, with one to three sentences each. Print it in large letters so that it will be easy to read. Be sure to cover every point you wish to make to the Court. If you are the petitioner, include your refutations of all important parts of the court of appeals' opinion, and any points in respondent's brief that might defeat your effort. If you are the respondent, include your refutations of each important argument made in petitioner's brief.

C. Evaluate Your Speech

Once your speech is written, critically appraise it. Does it present all your important points? Is it balanced in covering what you wish to say about the facts, about the record, about the court of appeals' opinion, about your brief, and about your opponent's brief? Does the speech make clear the rule of law you want the Court to announce? Does it make clear the relief you want the Court to grant in favor of your client? If not, then edit it more until you are satisfied.

D. Practice Your Speech

When you are finished writing the speech, read it to yourself several times, maybe even out loud until you are comfortable with it. It needs to flow, and sound mellifluous. You need to be comfortable with the transitions from one point to the next. TRAP 59.3 says that you cannot merely read your speech. So you need

to be practiced enough to move through the speech just glancing at it, without looking like you're reading it.

E. Put Your Speech Aside

Once you have written, revised, assessed, and practiced your speech until you are satisfied with it, then SET THE SPEECH ASIDE.

There is an apocryphal story about the American officer in World War II who received General Eisenhower's plan for the D-Day invasion. The officer studied the plan for two days, then called his staff together, and handed them copies of the plan, telling them:

> Gentlemen, here is the plan for Operation Overlord. You must study it, and learn it well. But remember this. The only thing we know for sure about our landing on the coast of Normandy is–whatever happens, it won't be what's in this plan.

So it is with your speech and the Texas Supreme Court. Because of questions from the Court, or because you lose your place, or because you run short of time, or because of other unforeseen difficulties, you will not be able to give your speech. But you will have the emotional comfort of knowing that you have mastered the occasion in advance, and you will have the strength of this framework to fall back on when the structure of your presentation breaks down during the event.

F. Do an Outline

Having written your speech, and having realized that you likely won't be able to deliver it as written, use the speech to create an outline of the points you wish to make during your oral argument. The outline can be on one or two sheets of paper, or on note-cards, or some other convenient medium. Print it large enough to read while standing at the podium. Critically appraise your outline. It should break your contentions into usable chunks. It should have a logical sequence, but must recognize that important points must go first, in case time runs short. You will take this outline with you to the podium, and it will be the map you follow.

V. WHAT WOULD ARISTOTLE DO?

Appellate lawyers tend to visualize appellate argument as a process in which the justices are persuaded by superior reasoning reflected through the words of the better advocate. Long ago Aristotle stated a contrary view, in his work on "Rhetoric," or the study of persuasive speech:

> . . . .[S]ince rhetoric exists to affect the giving of decisions -- the hearers decide between one political speaker and another, and a legal verdict *is* a decision -- the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers, who are to decide, into the right frame of mind.

Book II, Chap. 1. Elsewhere in his book on Rhetoric, Aristotle says:

> Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third on the proof, or apparent proof, provided by the words of the speech itself.

Book I, Chap. 2. [The following passages have the same citation] Aristotle goes on to explain these three parts of persuasion.

The "personal character" of the speaker (ethos), is his or her believability:

> Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided.

The audience's frame of mind involves appeals to the emotion:

> Secondly, persuasion may come through the hearers, when the speech stirs their emotions. Our judgements when we are pleased and friendly are not the same as when we are pained and hostile.

Proof from the words themselves involves persuasive argument:

> Thirdly, persuasion is effected through the speech itself when we have proved a truth or an apparent truth by means of the persuasive arguments suitable to the case in question.

It is useful to remember Aristotle's views in preparing and delivering oral argument. For example, our concept of "personal character" would include the advocate's reputation as a lawyer, that may be known to some members of the Court. But Aristotle's focus was on "personal character" that can be projected by a person unknown to the Justices, through: physical stature; body posture and movements; voice quality, tone, and modulation; eye contact; politeness in addressing others; directness and candidness in answering questions; and other qualities of the speaker and the speech. In Book 2 of Rhetoric, Aristotle suggests that the sources of trust in a listener are intelligence, character, and good will. No Supreme Court Justice will consciously decide a vote based purely on "personal character," but it can plainly be a factor in the overall decision-making process.

As to emotions, it would not be advisable to make an obvious appeal to emotion during oral argument.

That would be less effective in the Supreme Court than at almost any other level of the judicial system. And yet since the Supreme Court is often setting policy, emotional components of litigants' circumstances can have some impact. In the Supreme Court it is perhaps fewer emotions arising from the oral argument, than emotional aspects of the facts, or of the issues in contention, that can affect the outcome of the case. You should define your posture on the issues with a sensitivity to emotional issues, and if emotions favor you then speak into them, while if emotions hurt your position then be careful to negate them in a sensitive manner.

Persuasive argument is the easiest of Aristotle's triad to attain, since our law school training and reading of case law are all training for persuasive argumentation. That will involve effective use of constitutional or statutory language, prior case law, appeals to good policy, etc.

VI. APPROACHES TO PREPARATION

Here are some suggestions on how to prepare for oral argument. It is universally believed that preparation is key to a successful oral argument.

A. What the Justices Seek from Oral Argument

Experienced U.S. Supreme Court practitioner Stephen M. Shapiro lists the following goals of oral argument from the standpoint of the justices:

- clarification of the record
- clarification of the substance of claims
- clarification of the scope of claims
- examination of the logic of claims
- examination of the practical impact of claims
- lobbying for or against particular positions.

Mr. Shapiro listed the following goals of oral argument from the standpoint of the advocates:

- motivating the justices to view the case sympathetically
- simplifying information needed to decide in counsel's favor
- laying to rest concerns or difficulties raised by the justices
- making a positive and memorable personal impression
- demonstrating that the argument hangs together under fire.

Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, <http:// www. appellate.net>.

B. Re-read the Court of Appeals' Opinion

Some of the Justices may have the court of appeals' opinion clearly in mind during oral argument. As a petitioner you may in some instances want to treat the court of appeals' opinion as if it is invisible and argue the underlying issues as you wish to characterize them. However, you have already had one court look at your arguments and reject them, so you should be prepared to explain exactly where the court of appeals got "it" wrong. It helps that logic and statistics suggest that if the Supreme Court grants review then there is some concern that the court of appeals got "it" wrong.

C. Re-read Your Brief

In preparing for oral argument, you must have your brief in mind, since that's your formal position before the court. The brief represents the ultimate distillation of all your best arguments and evidence. However, your oral argument should be something different from your brief. Not just a short oral version of the brief. But a simpler way of looking at the case, where the issues are made clearer, and the reasons for a favorable ruling are drawn in more direct terms.

D. Re-read Your Opponent's Brief

Abraham Lincoln said:

> When I am getting ready for an argument, I spend one third of my time thinking about what I am going to say, and two thirds about what my opponent will say.

Lincoln was a successful trial and appellate advocate, and political speaker, and a deep thinker to boot. There is a danger in focusing too much on your own point-of-view and not enough on your opponent's point-of-view. This may result in your not anticipating the weaknesses in your position which may be brought to bear in questioning from the Court. If you find yourself in oral argument under attack from the Court on a weakness you did not anticipate, and you must cast around for an escape, and you fail to effectively refute the challenge, then the credibility of your cause may be damaged more than if you had given a weak argument in support of your own position.

If you are the respondent in the Supreme Court, you will naturally think in terms of refuting what the petitioner says in argument. The opposing brief is a starting place, but if your opponent is a good oral advocate, he or she will be winnowing that down, finding a shorter and more effective way to state those arguments. You'd better be thinking along those same lines, if you want to be prepared with responses to what the petitioner argues.

Also, some members of the Court may confront you with your opponent's arguments. You need to anticipate those questions from the Justices, so that you can maximize the opportunity the questions give you to meet the countervailing arguments brought against you.

E. Study the Appellate Record, Just in Case

While it is unlikely that your case will rise or fall on an issue involving the appellate record that comes up in oral argument, it is important to your credibility that you know your appellate record well enough to answer questions relating to the record. Sometimes a Justice will ask "Is that in the record?" or "Where is that in the record?" That question will normally be asked only on important points, and you should have anticipated them in preparation for oral argument. You might prepare a

list of important evidentiary or procedural events in the trial court, with record references, or have at the podium a photocopy of the critical testimony, summary judgment affidavit,
exhibit, etc. that is likely to draw inquiry.

F. Don't Bite off More than You Can Chew

If you are the petitioner, you are asking the Supreme Court to overturn the court of appeals and possibly the trial court. If you are asking for an extension of existing law, or a new interpretation of an old rule of law, be sure to ask for only just enough to win the case. By asking for more than you need, you may lose the vote of justices who would have voted to give you a victory upon less of a request. As Abraham Lincoln said: "In law it is a good policy to never *plead* what you *need not*, lest you oblige yourself to *prove* what you *cannot*."

G. In One Sentence, Why Should You Win?

It is good mental discipline to be able to state in one sentence why you should win the case. If you can say it in one sentence, then perhaps it should be your first sentence, or your last, or both your first and your last. If you have several independent reasons why you should win, then try to get to where you can list them succinctly, in one, two or three short points.

H. Know the Holding You Want

In a case where new law is being considered, sometimes a Justice will ask you what holding you want the Supreme Court to make. "If you could write the rule of law you want us to announce, what would it be?" If this happens, you'd better not stammer while you try to do the very thing you are asking the Court to do. Write out the proposed holding in advance, re-write it, polish it, limit it, memorize it, and take a copy of it with you to the podium.

I. Craft Your Opening Statement

In some cases, you may get well into your argument before you are interrupted by questions. In others, you may barely get words out of your mouth before the first question arrives. Craft your opening statement so that it could last an entire minute, but also so that the first sentence, if it's all you get out of your mouth, performs the work of the introduction. The opening statement might be a one sentence statement of the issue before the court, or the reason why you should win. Or it might set a tone, such as an emotional component of the case. Or it might pose the key policy question in the case, and give the answer you seek. Or it might say that the difficult issue need not be reached because a procedural step is missing.

J. Craft Your Closing Statement

The closing statement is not as important as the opening statement, because 1) you may not be able to give your closing statement if you are answering questions when your time expires; or 2) one or more of the Justices may have quit listening to you by the time you get to your closing statement. Still, it might be handy to have that last arrow in the quiver if you have the opportunity to use it and you haven't yet hit the bull's eye.

K. Anticipate Questions

Answering questions is one of, if not, the most important parts of oral argument. Because there are nine Justices, and you may receive questions from six or more of them, and many of the questions will reflect different perspectives on the issues, you must prepare in advance for possible questions. This can be done by looking at the issues raised in the court of appeals' opinion, or the opposing party's brief. You should imagine questions that might be asked. Look for dissents or concurrences in other cases in the area, to see if they raise questions. Look at out-of-state precedent, or law review articles, to see if they raise questions that might be asked. Stephen Shapiro suggests that you ask yourself the following questions the justices might ask: What is the case about? What do you want? Is there any other rule of law that would satisfy you? How would your rule work? Can the Court do that? Why should we do that? *See* Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, <http://www. appellate. net>.

L. Rehearse

Many advocates rehearse their oral argument. Some do it to their law partners, some to their spouses, some to the mirror in the bathroom. In other instances, advocates, even seasoned advocates, will conduct moot courts with mock adverse counsel and with lawyers acting as justices. If you rehearse out loud the night before argument, be sure that you don't weaken your voice. You will want it to be full strength in the courtroom.

VII. TIPS FOR THE ORAL ARGUMENT ITSELF

1. Eliminate distractions–in the moments before you begin your argument, double-check to be sure your cellular phone is turned off. Empty change and keys out of your pockets so you aren't tempted to jingle them while you talk.

2. Papers at the podium–in addition to your outline, or notes, anticipate papers you might need to quote, or might be asked about, and take them with you to the podium, or have them sorted out within easy grasp on the counsel table.

3. Where to stand–stand behind the podium, and use it to support your papers. It is fine to grasp the podium with one or both hands, and to touch and to some extent even thump the podium for emphasis while you talk. But you should stay connected to the microphone and don't move out from behind the podium (except to retrieve papers from counsel table in an emergency if done quickly).

4. Your first words–are "May it please the court."

5. Maintain eye contact–it makes you more believable, and you need to see the Justices' in order to get non-verbal feedback on how the Justices are reacting to what you are saying.

6. How much time?–Typically, the Court allows each party 20 minutes to argue. The petitioner may reserve up to half of its time for rebuttal. The Clerk of the Court will set the timer for the amount of time requested by a party. The green light will appear on the speaker's podium when a party has five minutes of argument remaining. The red light indicates that a party should finish and sit down. It is a good idea to jot down on your notes as you are standing up to speak your ending time (better than beginning time). And you can glance at your watch, if you remember, to see how you are faring on time. Radio Shack sells small timers that can be set to count down to zero. However, if the Justices are "hot" during your argument, you may find that you don't look down at the timer or your watch until almost all of your time is gone.

7. Don't waste time on facts–the Justices will likely be conversant with the basic facts, so you should take the time to describe the facts only generally, and then further to the extent that a fact should be kept in mind to appreciate the remainder of your argument.

8. Know proceedings in the lower courts–when a Justice asks about some part of the proceedings in the lower courts, it is bad to say "I don't know." It's worse to say "I'm just handling the appeal and don't know what happened in the trial court." You should know what happened in the lower courts well enough to answer any question you anticipate a Justice might ask.

9. Know your record–you should know where the record supports everything you say in oral argument. You should know in advance what you're going to say, and be sure it's supported by the record and that if asked you can assure the Justice it is supported by the record, and even better where in the record it can be found.

10. Updating cases–if you must give the Court additional citations not in your brief, hopefully it will be cases decided after your brief was filed. This should probably be done near the very front of the argument, since you may lose control of the argument to questions and run out of time to give the cites. However, you squander premium attention span at the start of your argument if you spend it citing cases rather than grabbing the Justices' attention or imagination with a great opening.

11. Demonstrative aids & hand-outs–Demonstrative aids are not usually effective, because the Justices are too far away to see the details of what's depicted on a poster board. However, hand outs can be effective. They should be given to the Clerk of the Court prior to oral argument so that they can be distributed to the Justices before argument begins. You are not allowed to "approach the bench" during oral argument..

12. Put extreme arguments last–if you have alternative arguments, and some are "more of a stretch" than others, mention the most defensible arguments first and the least defensible arguments last. If you don't, members of the Court may tie you up with questions on your least reasonable arguments, and you may never get to your more reasonable arguments.

13. Be on the lookout for questions–watch the Justices' eyes and body language to anticipate when a question may be coming. While some Justices will unmistakably assert their questions, others may start to offer a question and if you don't notice, or start, move on, or seem to ignore their intentions, they might let the question go. Every question is a friend–it gives you an opportunity to speak to that Justice directly about his or her concerns regarding your case. Be open to questions, since they help you to refine and focus your oral argument on the points that concern the Justices.

14. Listen carefully to the question–it is frustrating and unproductive and perhaps even counterproductive for the advocate to field a question from a Justice, misunderstand it, and then answer the wrong question. Listen carefully to the question, and if you are uncertain about the meaning, briefly explain your understanding of the question and ask if that was the intended meaning.

15. Answer when asked–sometimes an advocate is asked a question, and he or she will say "I'll address that question in a later part of my argument." Or will say "My co-counsel will address that question during her part of the argument." Sometimes a Justice will say in response "I'm sorry," as if they've done something wrong. The Justice is always right to tell you the question he or she has in mind, and your time to answer that is now, while everyone is thinking about it. It's somewhat offensive and definitely gives up persuasive impact to defer answering a question, and if you never get back to answer it, so much the worse.

16. Give direct and candid answers–you may expect Justices to ask you questions that confront you with difficulties in your position. They may do this because they are troubled by them, or sometimes it seems just for sport. Occasionally they may do this to help you focus on weaknesses in your case if you are not doing an adequate job on your own. Answer the question directly. Giving an evasive answer to avoid a negative admission fools nobody and degrades your credibility. Don't be unwilling to admit that

adverse case law is adverse, or that a certain hypothetical application of the principle you espouse would lead to unfortunate results. Then either distinguish the adverse authority, or challenge its correctness. As to the hypothetical, distinguish it from your case, or alter it in a way that ameliorates your stance.

17. If you don't know an answer, admit it–if a Justice asks you a question you don't know the answer to, admit it rather than "hemming and hawing." You might be able to get away with asking co-counsel at the counsel table to find something in the record while you continue to talk, or you might offer to look something up later and ask permission of the Court to submit the answer in a letter. Or maybe you have to say "I don't know" and just leave it at that.

18. Fielding "dumb questions"–at the Supreme Court level, there are no dumb questions. If you think a question misses the point, answer the question at its own level, and then explain why you think a different answer might be more applicable to your case. If the question is based on a faulty premise, answer the question on the premise given, but explain that the premise should be changed and that it would lead to a different answer. Do not be condescending. Not only would that damage your credibility, but it is also unfair to the Justice who must know a lot about all the cases that come before the Court, while you have the luxury of knowing a lot about your specific case. You have had months if not years to become familiar with your case, and you can bet that you spent more time preparing for oral argument than any particular Justice did. You only have one case to argue that day, but they have seven cases to listen to. Give them a break.

19. Don't turn down help–occasionally in oral argument one Justice will ask you a question, which you don't field particularly well, and another Justice will give you a little assistance. If that happens, jump for joy and follow up on the suggestion with gusto.

20. The "runaway" Justice–very occasionally one or more Justices will be so intent on a point they will monopolize your attention to the point so that it jeopardizes your overall argument. This is a difficult problem, but you must somehow politely extricate yourself from the continuing inquiry. One time an advocate extricated himself from such a trap by saying words to the effect of, "I see that I've lost your vote. If I may, I'd like to spend the rest of my time with the remaining Justices." At the conclusion of argument counsel were told to remain. The Justices left, and after a short meeting, they returned and the Chief Justice reprimanded the lawyer for his impertinence.

21. Looking for that "bright line"–if the Justices are having a hard time envisioning the "bright line" rule that will allow your client to win, remember that the "wisdom of the common law" is the incremental development of legal principles as appellate courts solve particular problems in specific cases over a period of time. Sometimes all the Court needs to do is solve the problem in the case, and the wisdom of the common law will develop the "bright line," over time.

22. The "slippery slope"–if you are being harried by "slippery slope" inquiries, Dean Powers suggests that you 1) get off the slope, or 2) show that the slope is not slippery, or 3) say the judge or jury can set appropriate limits, or 4) argue that the alternative position is a worse slippery slope. William Powers, Jr., Advanced Civil Appellate Course 2000, chap. 18, p. 6 (2000).

23. Don't give away the farm–despite the encouragement to answer questions directly, Justices will sometimes ask counsel to concede some of the issues in the case. You must be sure not to concede yourself out of court, but it's better if you anticipate the danger in advance and have thought out a safe harbor to sail to in the event of a storm.

24. Good quotations–if you can find some good, short quotations from someone that is universally respected, they might be used to good effect. For example, Abraham Lincoln said: "Nothing should ever be implied as law which leads to unjust or absurd consequences." Or, Lincoln said: "Important principles may and must be flexible." Or another Lincoln quotation: "It is as much the duty of government to render prompt justice a-gainst itself, in favor of citizens, as it is to administer the same between private individuals." Aristotle advocated the use of maxims. There are many legal maxims, and there are many maxims in our literary heritage, than might be used to effect. However, they should not be too long, or too trite.

25. Recovering from questions–questions from the Justices may collapse the structure of your argument, or may lead you down what you feel are "rabbit trails" where you end up far afield. This is where a good outline can help you. If answering a series of questions has led you away from the plan of your argument, glance at your outline and see what points you have not yet covered, and start your argument back up with them. Try not to let the sometimes wandering ways of a series of questions make you skip essential parts of your argument. If no time is left, then in closing refer the Justices to your brief for the points you didn't cover and just "let it go."

26. Answering your opponent's questions–whether as respondent, or petitioner during rebuttal, if you

take notes of the questions asked by your opposing counsel, and especially if you note the name of the Justice who posed the question, during your phase of rebuttal you can recall the questions that were addressed to your opposing counsel, restate them, and provide your own answers that favor your position in the case. "Justice Jones asked Respondent thus-and- so, and Respondent argued so-and-so. This question show the very weakness of Respondent's position, in that [etc.]."

27. Name game–it's respectful for you to use Justices' names if you are not obsequious about it. But you'd better get the names correctly. It's very embarrassing when you call one Justice by another Justice's name. If you can't be 100% sure about a name, then don't go there.

28. Discussing cases–you may intend to discuss certain precedents as part of your argument. Be alert to the possibility that a Justice might ask you about cases other than the ones you plan to mention. Know the cases in both briefs well enough to talk intelligently about them, if asked. Oral argument is not law school, but you should be prepared to exploit a question about a case by either showing how it does or does not apply.

29. Dividing time between co-counsel–don't. It's that simple. It can be particularly frustrating if the justices want to ask questions of an advocate and are told that the other counsel will be addressing those issues. If, due to forces beyond your control, argument must be split, the first attorney should clarify which lawyer will argue which issues. It may not eliminate the Justices' frustration at not being able to freely ask questions which are important to them, but it will avoid the embarrassment of counsel having to tell the Justice that he or she will have to wait to get an answer to a question.

    According to the TRAPS, only two counsel can argue per side, except with the permission of the Court. TEX. R. APP. P. 59.5. If more than two lawyers argue, it is highly likely that there will not be enough time for each advocate to make an effective presentation. As to rebuttal, only one lawyer can argue. TEX. R. APP. P. 59.5.

    In multi-party cases where the litigants have different positions under the trial court's judgment, an issue can sometimes arise as to who will use how much time on what topic. A request can be made to the Court to enlarge the time for oral argument, but don't raise your expectations too high. Absent an agreement, someone should apply to the Court for resolution of the question of how time will be allocated between the parties. In the Supreme Court, the Court can align the parties for purposes of presenting oral argument. TEX. R. APP. P. 59.4. The request for re-alignment should be made before the day of argument.

    Amicus curiae are not entitled to argue to the Court in their own right. However, a party to the case can voluntarily share time with an amicus curiae with leave of the Court obtained prior to submission. TEX. R. APP. P. 59.6.

30. Reserve time for rebuttal–the Petitioner should always reserve about five minutes for rebuttal. That is when you have the opportunity to follow up on questions that the Justices asked the opposing lawyer, and you can restate them and answer them in a way that favors your side.

31. Don't run a red light–watch the podium lights. When it turns red, you are supposed to stop. If you are still engaged in answering a question, and you notice the light turns red, continue until the exchange is over and then thank the Court. The Chief Justice will probably ask if there are any more questions, and if not, then indicate that you should sit down. You might have a little leeway in summing up in one sentence a request for relief, but after the red light comes on, tolerance is in short supply for an advocate who steals from the Court's time.

VIII.LISTEN TO OTHERS

It might be helpful to experience other oral arguments, to see how the advocate fared. Northwestern University has posted on the World Wide Web the oral argument, with transcription, of the oral argument in Bush v. Gore: <http://oyez.nwu.edu/>. The argument reflects a well-organized presentation that is interrupted by questions and then becomes more of a give-and-take between the justices and counsel. The U.S. Supreme Court has posted transcripts of recent oral arguments at <http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html>. Other prominent oral arguments are dotted around the World Wide Web. For example, the oral argument in Griswold v. Connecticut is at <http://members.aol.com/abtrbng2/oa/griswoldoa.htm>, and the oral argument from Roe v. Wade is at <http://members.aol.com/ abtrbng2 / oa/ roe oa2.htm>. The Texas Supreme Court records its oral arguments, and copies of the tapes can be obtained from the Supreme Court Clerk's office.

IX. FURTHER READING

There are a number of materials available to the appellate practitioner who would like to sharpen his or her skills of persuasion. Continuing legal education courses will occasionally presentation and articles on oral argument. *See e.g.*, William Powers, Jr., *Oral Advocacy Strategy and Tips*, ADVANCED CIVIL APPELLATE PRACTICE COURSE Chapter 18 (2000); Eugene A. Cook, *Texas Supreme Court Practice*, STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE, V--21-24 (1991); Murray B. Cohen & Russell H. McMains, *Argument on Appeal*, UNIVERSITY OF TEXAS SCHOOL OF LAW TECHNIQUES FOR HANDLING APPEALS IN STATE AND FEDERAL COURT, Tab 17 (1991); Joe R. Greenhill, *Oral Argument*, STATE BAR OF TEXAS ADVANCED

APPELLATE PRACTICE COURSE I-1 (1987). There is one Texas Bar Journal article on the subject. *See* Cook, *Improving Your Oral Advocacy Before the Supreme Court*, 53 TEX. B.J. 243 (1990). And there are books on appellate advocacy which discuss approaches to making an effective oral argument. *See e.g.*, Appellate Practice Manual, at 239-296 (1992) (published by the Litigation Section of the American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611).

X. WHAT THEY TEACH IN LAW SCHOOL

The Wake Forest University School of Law has posted at its web site a checklist for evaluating moot court arguments made by law students. It's not a bad example of what you might want to keep in mind when developing your oral argument before the Texas Supreme Court. This checklist was adapted from the UCLA HANDBOOK OF APPELLATE ADVOCACY 168-70 (2nd ed. 1986). <http://www.law.wfu.edu/lrwfrontpage/oral_argument_ checklist.htm>

Trial/Pretrial Oral Argument Checklist

I. Organization
Did counsel make necessary introductory remarks?
Did counsel preview the issues and highlights of the argument for the court?
Did counsel present the arguments in as simple and logical way as possible?
Did counsel effectively incorporate rebuttal of opponent's arguments, where appropriate?
Did counsel conclude the argument with a summary of his/her theme and a request for relief?

II. Development of the argument
Did counsel understand the essential elements of the case?
Did counsel understand the procedural posture of the case?
Did counsel make maximum effective use of the strongest points available?
Did counsel accurately face weak points but treat them so as to minimize any detrimental impact?
Did counsel effectively apply law to facts?
Did counsel use and properly analyze the best authorities?
Did counsel effectively distinguish contrary authority?
Was counsel prepared to discuss the details of relevant authority?
Did counsel effectively present policy arguments, when appropriate?

III. Responses to questions from the bench
Was counsel able to adjust the argument to address the court's concerns?
Did counsel listen to the court's questions and understand the elements that the court considered troublesome?
Did counsel answer questions directly?
Was counsel prepared to answer all reasonable questions?
Did counsel handle irrelevant questions properly?
Did counsel admit lack of knowledge when he/she did not know?
Did counsel improperly concede important points?
Did counsel make the most of friendly questions?
Did counsel's answers lead the court back into counsel's argument?

IV. Speaking ability
Did counsel effectively communicate with the court?
Did counsel speak clearly and with conviction?
Did counsel maintain composure throughout the argument?
Was counsel's use of notes appropriate and not distracting?
Was counsel respectful to the court and opposing counsel?

XI. IN THE GROOVE

Alan L. Dworsky, in THE LITTLE BOOK ON ORAL ARGUMENT 1-2 (1991) made the following comparison:

> A brief is like classical music; the notes remain the same no matter what the situation or who's listening. Oral argument is like jazz. It's imperfect, unpredictable, and risky, yet immediate, personal, and powerful . . . . [W]hen you're up there all alone - just you and the judges - you'll be able to improvise the music on your own.