Effective Oral Advocacy at the Trial and Appellate Level

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The Honorable Lee Yeakel

Judge Lee Yeakel is Judge of the United States District Court for the Western District of Texas, Austin Division. He was appointed by President George W. Bush and unanimously confirmed in 2003. Prior to his appointment, he was appointed by then-Governor of Texas George W. Bush as Justice on the Third Court of Appeals of Texas in 1998 and was elected to a full six-year term on that Court as Chief Justice in November 2000.

Prior to his service on the courts, Judge Yeakel was in private practice for 28 years in El Paso, Texas.

Among Judge Yeakel's many honors is receiving the Samuel Pessarr Outstanding Jurist Award in 2012 by the Texas Bar Foundation and being the namesake of the Honorable Lee Yeakel Intellectual Property American Inn of Court. Judge Yeakel is also a Past President of the Robert W. Calvert American Inn of Court; Past President of the Federal Bar Association, Austin Chapter; and Past President of the Austin Young Lawyers Association. He is a member of the American Law Institute.

Judge Yeakle earned his J.D. from the University of Texas School of Law and his B.A. from the University of Texas. He also holds an L.L.M. from the University of Virginia. He frequently writes or speaks at various professional development courses and regulatory conferences.

Judge Yeakle and his wife, the former Anne Riquelmy, have been married for 51 years. They have two adult children and three grandchildren.

Tillman Breckenridge

Tillman Breckenridge is a Partner in Pierce Bainbridge Beck Price & Hecht LLP's Washington, D.C. office, and concentrates his practice on appellate litigation at all levels. He has represented individuals, companies, organizations, and foreign, state, and local governments before the United States Supreme Court, every U.S. Court of Appeals, and many state appellate courts. Tillman's practice includes appeals in all substantive practice areas, including high-profile cases in insurance coverage, and work on patent, tax, regulatory, and commercial business appeals. He is the Immediate Past Chair of DRI's Appellate Advocacy Committee and serves on the Board of Directors of the National Foundation for Judicial Excellence.

Additionally, Tillman is an Adjunct Professor of Law at the William & Mary School of Law, where he founded and directs the Appellate and Supreme Court Clinic. The Clinic has filed briefs that have been profiled as the

National Law Journal Brief of the Week, relied on by the Supreme Court, and led to critical precedents in civil rights cases.

Tillman has been named to the Washington, DC Super Lawyers and Virginia's Legal Elite lists for appellate practice, and was named one of America's Most Influential Black Lawyers by Savoy Magazine in 2018 and one of the National Bar Association's 40 Trailblazers Under 40 in 2014. Tillman is AV rated in Martindale-Hubbell.

Charlie Frazier

Charlie Frazier is a partner in the Dallas office of the appellate law firm of Alexander Dubose Jefferson & Townsend, LLP, with offices also in Austin and Houston. Charlie has been board certified in civil appellate law by the Texas Board of Legal Specialization since 1994. For over 27 years, his appellate and litigation-support practice has covered many areas of civil law, including substantial experience in complex commercial and contractual disputes, insurance-coverage and bad-faith disputes, and professional-liability claims.

Charlie successfully argued before the Supreme Court of the United States on behalf of ten psychiatrists who were sued by a former patient under RICO, claiming that a pattern of racketeering activity existed to keep him under hospitalization. *Rotella v. Wood*, 528 U.S. 549 (2000). The Court rejected the patient's argument that accrual of a civil RICO claim is postponed until the pattern was or should have been discovered, thereby holding that the patient's claim was time-barred.

Charlie received his B.A., *magna cum laude*, from Baylor University and his J.D. from the Baylor School of Law, where he was published in the *Baylor Law Review*, on which he held various editorial positions. In between college and law school, Charlie received the M.A. in International Relations from the University of Kent, in Canterbury, England, on a Rotary International Scholarship. He has been listed since 2009 in *Best Lawyers in America* in Appellate Law and in *Super Lawyers* in Texas for nearly 20 years. Charlie is Chair of the FDCC Appellate Law Section, and currently holds, and has held, several leadership positions in the Appellate Advocacy and Commercial Litigation Committees of the DRI.

Don Miller

Don Miller is the managing partner of the Louisville and Lexington, Kentucky offices of Quintairos, Prieto, Wood & Boyer, P.A. His practice has focused for many years on defending insurers in coverage and extra-contractual

("bad faith") claims. His practice also includes defense of claims of long-term health care negligence, medical negligence, and legal malpractice, and includes long-term health care negligence for insurers and self-insured clients. He has extensive appellate experience in both state and federal appellate courts including the United States Supreme Court. Don also handles trucking claims and his experience extends to the defense of drug and medical devices along with other product liability litigation. He has first chaired many jury trials and appellate arguments.

Don is a member of the Firm's Appellate Practice Group. He has extensive appellate experience and has received recognition for his expertise in that practice area. Numerous cases in which he has participated have resulted in published opinions of various federal and state appellate courts. Don has been selected as one of Kentucky's Super Lawyers® and is rated AV® Preeminent™ by Martindale-Hubbell. He has also secured approval of that Preeminent™ rating from the judiciary. He is the author of numerous articles regarding various tort related subjects and is a frequent speaker at continuing legal education seminars and presentations for clients and other personnel.

Don received his J.D. *summa cum laude* from the University of Louisville, Louis D. Brandeis School of Law and his B.S., with honors, from the University of Louisville.

Don is admitted to practice law in the Commonwealth of Kentucky and in the State of Indiana. He is admitted in the U.S. District Court for the Eastern and Western Districts of Kentucky; the U.S. District Court for the Northern and Southern Districts of Indiana; the Second, Sixth and Seventh Circuit United States Courts of Appeals; and the United States Supreme Court.

Don is a fellow of the American College of Coverage and Extracontractual Counsel, an honorary organization of the country's top insurance coverage lawyers. He is a member of the Federation of Defense & Corporate Counsel, Defense Research Institute, Trucking Industry Defense Association and Council on Litigation Management.

EFFECTIVE ORAL ADVOCACY AT THE TRIAL AND APPELLATE LEVEL

> Oral Argument – the chance to make a difference in result – is extremely valuable to litigants. If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide. . . .

Moles v. Regents of Univ. of Cal., 32 C3d 867, 872, 187 CR 557 (1982).

I. Oral Advocacy in the Trial Court

A. The Twin pillars: balance between control and being flexible.

- Too much control results in a speech-maker or off-the-cuff-commentator presentation.
- But if you are *too* flexible, you may wind up depending too much on questions from the court to organize your argument.
- A middle approach permits you to confidently and concisely convey your key points with time to respond to the court's questions to persuasively clarify the court's understanding.

B. A significant portion of trial court advocacy concerns protecting the record for appeal, which in turn will help you try a better case.

- Jury selection
  - Make challenges for cause and secure a ruling on the record.
- Motions in limine

- Object to evidence you anticipate your opponent will attempt to introduce.

- Offers of proof
  - Make the court aware of the substance of the evidence you sought to introduce but was excluded, offer that evidence, and secure the court's ruling on either denying or admitting the offer of proof.

- Jury instructions
  - Tender what you wish the court to submit to the jury and make clear, specific objections and arguments concerning the court's submissions that you believe are incorrect.

- Directed verdict
  - Made after close of plaintiff's proof and then again after all parties' proof.

- *Daubert* hearings on experts
  - Is the expert qualified, and are his/her proposed opinions helpful to the jury?

- Legal vs. factual issues
  - Legal issues argued to the court; factual issues to the jury.

C. Suggestions for effective oral advocacy in the trial court.

- Anticipate the evidentiary and legal issues and have your arguments and points organized beforehand.

- Anticipate major points raised by the court and opposing counsel so that you can respond.

- Lead with your theme: Why your client is morally entitled to win.
  - This is a case about…

- Then present your legal theory: Why the law supports your client's position.
    - The court should rule for [my client] for two reasons…
- The court's questions provide a window into what the court is thinking and where it needs clarification. Take advantage of that opportunity!
- Your initial answer to a court's question should be short and direct; then as (or if) the colloquy continues, provide a more developed response.
- Avoid stream of consciousness presentations.
- Answer the court's question; do not say you will get back to it later.
- Respond to the major points that your opponent makes, but do not let your opponent dictate your argument--try your case.
- Similarly, address the court, not opposing counsel.
- Respectful disagreement with the judge explaining the reasons is acceptable.
- Speak with conviction and confidence.
    - Avoid saying "I think"; "I believe"; or "I submit."
- Use a conversational tone and speak in short sentences.
- When the court speaks—stop talking!
- Succinctly state the relief you are seeking.

II. Oral Advocacy in the Appellate Court

A. Different audience and circumstance; different approach.

1. Lessons from U. S. Supreme Court lore.

In Supreme Court lore there are two mutually exclusive tales that perfectly describe proper preparation and expectations regarding appellate oral argument in general. The first is that when Chief Justice John Roberts was in private practice, he *never* received an unanticipated question in oral argument.

The second is that when he was on the Court, Justice John Paul Stevens asked a question that no one anticipated in every significant argument. All the Chief Justice's 26 arguments came during Justice Stevens's tenure on the bench, so something has to give.

Despite the direct conflict, the tales elucidate important truths about oral argument—great advocacy is the result of diligent preparation, and you must retain flexibility to answer questions you do not anticipate. Chief Justice Roberts had a reputation for dogged preparation even back when he was in private practice. He was known to spend hours anticipating questions, preparing flash cards with questions and answers, shuffling them to prepare to shift gears mid-argument, and engaging in challenging moot courts. That preparation showed in his advocacy.

B. Suggestions for effective preparation.

1. Guide-posts: the opinion below and the briefs.

In preparing for oral argument, please remember the strategy that went into briefing the case. Keep notes for oral argument prep as you prepare a brief. Start your preparation by reading the opinion below and the briefs that were filed. While reading those documents, create a new document of anticipated questions and strategies and themes that jump out at you in the process. Then incorporate your thoughts from the briefing process.

2. Three types of knowledge necessary for oral argument.

As you continue preparation, remember the three types of knowledge that are needed for successful oral argument:

Knowledge of the record. To be successful in oral argument, an advocate must, of course, know the record. It is important to provide the tribunal with a credible source for any questions that come up with respect to the underlying facts of the case and the procedure.

Knowledge of the direct law. It is also important to know the directly applicable law. In preparation, become familiar with the cited cases, the facts underlying those cases, relevant other cases that may come up, and the law underlying those issues from a first principles perspective.

Knowledge of the indirect law. Developing the indirect law is the trickiest part of oral-argument prep, and it is also the area from which you

are most likely to receive an unanticipated question. For good reason, appellate courts are steadfastly concerned with how the opinion they write will affect future litigants, and how it will be quoted back to them in related contexts. That is why you often will hear the question: “How would you have me write that into an opinion?” or “What is your limiting principle?”

Having an understanding of the adjacent law and the various contexts your case may affect helps mightily in this context, both in anticipating questions, and in one’s ability to answer the unanticipated question.

3. Practice, practice, practice.

Dale Carnegie once said: “There are always three speeches for every one you actually gave: the one you practiced, the one you gave, and the one you wish you gave.” To help ensure that the argument you wish you gave actually was the augment you did give, focus ever more on preparation and practice.

Once comfortable with the record, arguments, and direct and indirect law, consider putting together flashcards with questions on one side and answers on the other. Work through them repeatedly and shuffle them.

Consider moot arguments if for no other reason than to allow you to walk into the argument believing you have anticipated every question, but even if not, having knowledge of your principled argument will allow you to answer the unanticipated question.

III. Similarities Between Trial and Appellate Oral Advocacy

Notwithstanding the different circumstances that exist between trial court and appellate court settings, several similarities exist for effective oral advocacy in those venues:

- In any venue or setting, the most important thing you can do for your client is have credibility with the court. Without credibility, you will be merely speaking to the walls.
- Credibility starts with a serious and respectful attitude when making the argument—your attire, demeanor, deference to the court, respect for opposing counsel, conviction of your position, and body language, which conveys sincerity.
- The primary purpose is to help the court with its decision both by educating and persuading the court, most often in your answers to the court's questions.
- Effective oral argument at all levels requires organizing your thoughts in advance and anticipating the court's questions.
- Answer the court's questions—and answer them directly, accurately, and concisely.
- At both levels, you should see what is happening as a transcript rolling through your mind.
- Oral arguments must always be much more focused, and much simpler, than the detailed presentation in the written motions, briefs, etc.

- Confidence is critical wherever and to whomever you present the arguments on your client's behalf.

IV. Differences Between Trial and Appellate Oral Advocacy

Understandably, several differences exist between advocating before a trial court and an appellate court.

A. Your audience.

The most obvious difference is your audience.

- At the **appellate level** your audience is a panel of three judges at the intermediate appellate level, and a group of judges numbering between five and nine, depending on the jurisdiction of the highest court.
- Appellate judges have at least one briefing attorney, and most likely have additional staff attorneys and others who draft pre-argument memoranda summarizing the issues, the law, and the parties' arguments.
- Appellate judges frequently have the task of persuading their colleagues on how the issues should be decided and the opinion should be written.
- At the **trial level**, there is one trial judge. But sometimes the audience includes jurors when the court permits the argument while the jury is seated.
- Unless you are in a federal district court, most trial judges do not have a briefing or staff attorney, or clerks to assist

with the legal issues. So they prepare on their own, assuming time permits. Thus, they are even more dependent on the integrity and accuracy of the oral advocate.

B. Time constraints on judges and advocates.

- Notwithstanding having a very full case load, **appellate judges** have time to develop a preliminary opinion on how they may rule on the legal issues and prepare questions to counsel to clarify the gray areas.
- Appellate advocates do not have much time to make their arguments. Most courts permit 20 to 30 minutes for each advocate to present argument—*and* answer questions. Most appellate courts are very strict with the time limits.
- Usually only one advocate—the appellant or petitioner—can rebut the arguments of the other party.
- At the **trial level**, the judge usually has considerably less time to prepare for an oral presentation than do appellate judges. Trial judges have many other types of responsibilities, including hearing numerous other cases in one day.
- Arguments given during a trial can be shorter than appellate oral arguments, particularly if the jury is either in the jury box or waiting to be seated.

- Many trial court arguments become necessary upon an unexpected event during trial, such as when the court needs a legal explanation in support of or in opposition to an objection to the admissibility of evidence. There often is literally no time to prepare.
- Sometimes during trial, the trial judge requests the parties to prepare a bench brief and provide it to the judge first thing in the morning. Therefore, you may be working through the evening and night to draft the brief and also to prepare for the oral argument, which may be given at any time the next day, with little or no notice, and with only a few minutes in which to give it.

V. Conclusion

Oral presentations before trial and appellate courts play a critical role in the representation of your client. It exists primarily to assist busy judge(s) in making the correct legal decision. Because the time to present argument is limited at all levels, a serious attitude, preparation, and practice are paramount. These lead to the equally important qualities of an accurate, honest, concise, and helpful argument.

A summary of an effective oral argument by the late Chief Justice of the United States Supreme Court, William H. Rehnquist, encapsulates much of the foregoing discussion, and equally applies to oral advocacy in trial and appellate courts:

[She] will realize that there is an element of drama in oral argument. . . . But she also realizes that her spoken lines have substantive legal meaning. . . . She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. . . . She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of *fin de siècle ennui* (French idiom meaning boredom).