

THE ONCE AND FUTURE ORAL ARGUMENT

By Hon. David M. Gunn & Nicholas M. Bruno¹

Oral argument can be useful to the Court. It is certainly useful to the parties who can see the deliberative process play out and thereby feel more confidence in the result of the appeal (whether they win or lose). But does it work as well as it could? Can we come up with ways to improve the process?

Over the decades, the Texas system's approach to oral argument has changed significantly. Before the current appellate rules, the state practice liberally granted argument. Over time, the number of oral arguments dropped as the demands on the intermediate courts' dockets increased. During the pandemic, arguments in at least some courts

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dropped even lower, but now the number is climbing again. This paper will examine some of those oral argument trends through the decades. It will then discuss some suggestions (and a current pilot program in the Texas appellate courts) that aim to increase the usefulness of oral argument.

I. Prior state practice/liberality toward oral argument.

Oral argument practices have evolved over the years. Two changes in particular stand out as impacting practitioners:

- courts formerly treated argument as a right, but now they allow it only as a matter of discretion (indeed, now there is only roughly a 25% chance of obtaining argument even when argument is requested), and
- courts allow much less time for argument than they once did.

Start with what we know about nineteenth century practice. We know from reading the nineteenth century appellate rules that oral argument in the Supreme Court of Texas lasted two hours per side, plus half an hour for rebuttal. *See* Hans W. Baade, *Chapters in the History of the Supreme Court of Texas: Reconstruction & "Redemption" (1866-1882)*, 40 ST. MARY'S L.J. 17, 87 (2008). From what we can tell, oral argument appeared freely available as well. Upon the passing of an attorney who was born in 1860, a surviving friend said: "He told me once that he always argued his cases orally in the appellate courts, even though, as it often happened in the old days, that the court would not decide the case for three or four years and the oral argument had been forgotten." William A. Vinson, *Memorial on John Charles Harris*, 11 TEX. L. REV. (SUPP.) 84, 85 (1933).

This state of affairs continued into the twentieth century. *See, e.g.,* Robert W. Stayton, *Functional Indications in Reported Opinions* (pt. 2), 14 TEX. L. REV. 164, 179 (1936) (explaining that when discretionary review was granted, the cause would be submitted, and "oral argument upon it was available"). But the court might dispense with argument if the respondent failed to ask for it. *See Elec. Express & Baggage Co. v. Ablon*, 218 S.W. 1030, 1030 (Tex. 1920) ("An answer which does not reserve the right of oral argument in this court having been filed, under our rule 5 (159 S. W. x) we proceed, without unnecessary delay, to decide the case."); *see also Martin v. R.R. Comm'n*, 106 S.W.2d 653, 653 (Tex. 1937) ("[T]he defendants in error have filed in this court an answer to the application for the writ of error, and in

such answer have not expressly reserved the right to be heard in open court. Such a record gives this court the right, at its discretion, to grant the writ of error and to proceed to final disposition of the case This we now do.”).

During the second era of the Commission of Appeals (1918–45), one of the commissioners, Judge Leon Sonfield, gave a 1920 speech called “*The Commission of Appeals*,” in which he stated: “I would not submit an important case without an oral argument, if I could possibly be there to make it.” Procs. of the 39th Ann. Session of the Tex. Bar Ass’n 22 (1920) (transcript available at https://www.google.com/books/edition/Proceedings_of_the_Joint_Sessions_of_the/r8DAQAAIAAJ?hl=en&gbpv=1&pg=PA22&printsec=frontcover). “But along with that, I would say that I would rarely take the full time that is allotted in which to present a case.” *Id.*

Another commissioner, Judge James McLendon of Austin, spoke at the Texas Bar Association’s 1922 meeting, in remarks entitled “*The Delights of Oral Argument*.” He stated: “In something over three hundred cases that have been submitted to my section of the Commission, I think there have been something like two hundred and fifty in which the cases were argued orally.” Procs. of the 41st Ann. Session of the Tex. Bar Ass’n 217–18 (1922) (available at https://www.google.com/books/edition/Proceedings_of_the_Annual_Session_of_the/mMcDAQAAIAAJ?hl=en&gbpv=1&pg=PA217&printsec=frontcover). He added: “[W]e encourage oral argument and we want you to come to us and present your case orally; we want to hear what you have to say and we want to get both sides given at the same time.” *Id.* at 218.

Thus, practitioners apparently had a chance to say as much as they wanted to say during argument. One practitioner said that from his experience, “the chief qualification of an appellate judge” was the ability to listen to a lawyer speak “for two hours during an oral argument and never hear a word.” *Procs. of the 42d Meeting of the Tex. Bar Ass’n*, 1 TEX. L. REV. (SUPP.) 129 (1923).

By the 1950s, argument time in the Supreme Court of Texas was only about 25% of what it had been in the nineteenth century. *See* Clyde E. Smith, *Appellate Procedure and Method of Review of Causes in the Supreme Court of Texas*, 1 S. TEX. L.J. 121, 125 (1954) (“In oral argument before the Supreme Court, each party is allowed thirty minutes with an additional 15 minutes for the petitioner to use in rebuttal.”). Justice Greenhill offered some advice to lawyers about how to spend the opening part of those 30 minutes:

It is helpful to the court to get as much of the situation before it as possible right at the first. I would suggest that in the first few minutes these questions be answered:

- (1) what kind or type of case is it?
- (2) was it tried to a jury or to the court?
- (3) what did the trial court hold?
- (4) what did the Court of Civil Appeals hold?
- (5) what are the controlling points in the case?

Then give a discussion of the facts.

Joe Greenhill, *Presentation of a Case to the Supreme Court of Texas*, 38 TEX. L. REV. 538, 546 (1960).

Justice Greenhill was trying to encourage attorneys to get to the point quickly, but the notion of quickness is relative. One might reasonably question whether his suggestion would burn up too much of the opening today, where the supreme court allows only 20 minutes in total for each side.

To appreciate the situation in Texas as of 1962, consider this description by Dallas attorney Royal Brin, who became one of the state's first full-time civil appellate specialists:

Rule 423 sets forth the right to oral, written or printed argument on the party of any party who has filed briefs. . . . Rule 426 deals with the time allowed for oral argument. It states that not more than two counsel on a side may be heard without special leave of Court; that each side may be allowed one hour with an additional twenty minute for the appellant in conclusion, with discretion in the Court to allow additional time if the magnitude or importance of the case or the difficulty of the legal issues should require.

Royal H. Brin, Jr., *Oral Argument in the Courts of Civil Appeals* (pt. 1), 25 TEX. B.J. 271, 271 (1962). Now fast forward to the mid-1980s. Oral argument was still considered a matter of right:

When a case is properly prepared for submission, any party who has filed briefs in accordance with the rules prescribed therefor and who has made a timely request for oral argument under (f) hereof may, upon the call of the case for submission, submit an oral argument to the court.

TEX. R. CIV. P. 423(a) (1985, repealed 1986).

But the time allotted had started to shrink. As explained in the 1985 version of an annual survey article about civil procedure, the supreme court amended the rules to fix the time at 30 minutes per side in the courts of appeals:

With respect to oral argument in the court of appeals, rule 423 now specifies a uniform time limit. Formerly, the time limits depended upon the local rules of each court of appeals. Under amended rule 423, each side is allowed thirty minutes in argument, with fifteen more minutes for rebuttal by the appellant; in cases involving difficult questions, the time limit may be extended, provided application is made before argument begins.

Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, *Texas Civil Procedure*, 39 SW. L.J. 419, 458 (1985). The same time limits—30 minutes to open, and 15 minutes for rebuttal—applied in the supreme court, under old Texas Rule of Civil Procedure 498. *See* TEX. R. CIV. P. 498 (1984, repealed 1986).

The following year, Figari's annual survey article addressed Rule 423 in its final vintage, that is, in the vintage before the 1986 rules of appellate procedure arrived and supplanted all the provisions that had once governed appeals. The 1986 Figari article stated:

Although the rules governing appellate procedure sustained no major changes during the survey period, the supreme court did make several note-worthy revisions. An appellate party desiring oral argument in the court of appeals must now file a specific request for oral argument at the time he files his brief in the case. Rule 423 previously permitted any party filing a brief to submit an oral or written argument when the court called the case for submission. Under the amended rule, written arguments are apparently no longer permitted, and failure to make a specific request for argument constitutes a waiver of oral argument. If a party waives his right to argument under

rule 423, the court of appeals may nevertheless direct that party to appear and submit argument upon submission of the case. The court may also advance submission of the case without argument if, in its discretion, argument would not materially aid the court in determining the issues presented in the appeal. Finally, while former rule 423 allowed the court to extend the time for argument in cases involving difficult questions, the amended rule now also permits the court to exercise its discretion in shortening the time permitted for oral argument.

Ernest E. Figari, Jr., Thomas A. Graves & A. Erin Dwyer, *Texas Civil Procedure*, 40 Sw. L.J. 491, 527 (1986).

So to get oral argument in the court of appeals, all you had to do was ask for it on the cover of the brief and show up when the time came. Take the Houston courts of the late 1980s. Each court would get roughly 1100 cases per year, and each would grant argument freely. If counsel requested argument, counsel would probably get it.

Often a lawyer might reconsider that desire when a submission date loomed, perhaps because the other side's brief turned out not to be so threatening, or perhaps because counsel's own position started to feel a bit vulnerable. The clerk's office would call the attorneys about a day before argument to see whether counsel planned to show up and argue. Sometimes they did; sometimes they didn't. From the perspective of the court, there often seemed to be a correlation between the strength of the legal positions and the desire for argument. In criminal cases, for example, the appellant's lawyer might opt to dispense with argument if the case felt like a long shot, while opting to show up if the case felt promising; in turn the State might skip the argument as a way of projecting confidence and sending the message, "*Nothing to see here . . . These aren't the droids you are looking for.*" But the bottom line is that everyone largely assumed that argument could be had if it was wanted. Hence, with 30 minutes per side, and with the possibility of several cases on the day's docket, an oral argument session might go all morning or all afternoon.

And of course, the court could go longer than normal for a bigger case. For example, in the *Jack Ruby* case, studded with celebrated lawyers like Sam Houston Clinton and William Kunstler, not to mention California's Melvin Belli, the Court of Criminal Appeals expanded the time allowed to an hour and a half per side, with a 30-minute rebuttal:

The above entitled and numbered cause on appeal before this Court is set for submission on brief and oral argument for 9:30 A.M. on Friday, June 24, 1966.

Prior to said submission appellant will designate in writing the attorneys authorized to represent him in this court and said counsel will designate which of them will use the time allowed for oral argument. A similar list of counsel who will argue for the state shall be filed.

Pursuant to Rule VII of the Rules of this Court the time allowed for oral argument is extended to one hour and thirty minutes opening and thirty minutes rejoinder.

Rubenstein v. State, 407 S.W.2d 793, 801–02 (Tex. Crim. App. 1966) (Woodley, J., concurring).

In today's world of soundbites and 140-character postings, a 30-minute rebuttal would feel like cruel and unusual punishment, if not to the advocate, at least to the court.

Trends in the Fifth Circuit were moving in the same direction as the ones in Texas—shorter times and denial of oral argument in more cases—as chronicled by Judge John C. Godbold:

Times change. Courts are continually re-examining their procedures and habits with cold and critical eyes. Judges are less and less willing to accept an answer that we do something, and do it in a particular way, because that is what the institution has always done. . . .

Appellate practice is also changing. Bench and bar are learning to get to the bare bones of disputes with less concern for the fat. The discursive or repetitious brief and the hyperbolic argument are no longer welcome. . . .

A written brief may be the only shot that counsel gets at the appellate court. The Fifth Circuit, for example, has moved reluctantly to deciding without oral argument appeals which are frivolous or simple or in which the court concludes oral argument will not be helpful. . . .

The Fifth Circuit, of necessity, now schedules the majority of its oral argument cases for twenty minutes to the side. I have a word of encouragement to the lawyers who think twenty minutes is too short. The advocate with the

maximum time of thirty minutes tends to use it uneconomically. He is likely to be less direct in getting to the point and to dwell too long on nonessentials. Counsel with twenty minutes knows that he is stripped to the bare bones and has no throwaway time. Properly used, a twenty-minute presentation will be as helpful to the court as a less taut thirty-minute argument.

John C. Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 801, 816 (1977).

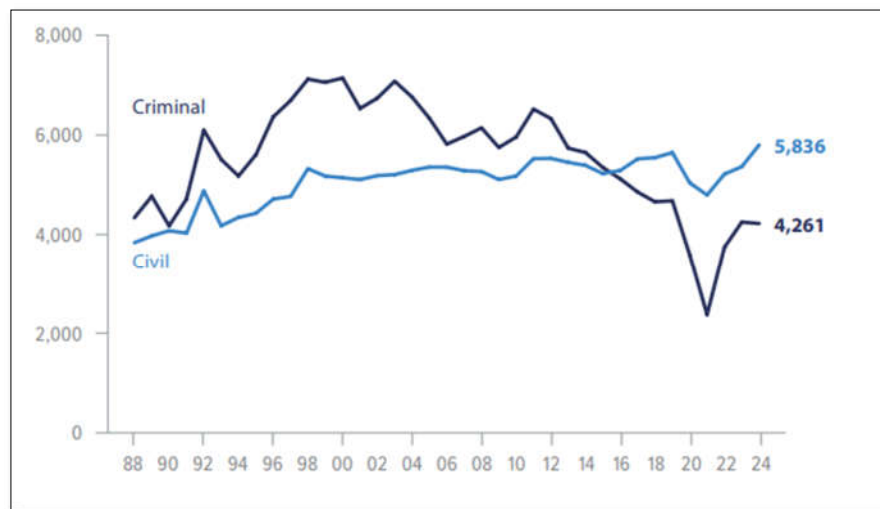
At least one appellate practitioner who thought 20 minutes inadequate was the legendary Jim Kronzer. He went to a CLE where Judge Godbold gave a presentation about this downward trend in argument time. When it came time for questions from the audience, Kronzer asked him: “Thank you for the talk, Judge Godbold. But if you are right that oral argument times need to be reduced, how is it that your speech to explain why lasted more than 20 minutes?” Kronzer’s question did not elicit the judge’s unmitigated favor.

Like it or not, however, the same shifts have taken root in Texas. By the time Texas adopted the 1997 appellate rules, the courts had abandoned the notion that argument was a matter of right. *See, e.g., Polasek v. State*, 16 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2000, pet. ref’d) (“The fallacy of appellant’s arguments is its assumption that the determination of whether to hear oral argument is objective. It is not. A majority of the panel or *en banc* court determines whether it thinks oral argument would be helpful. Notice is given to the parties accordingly. A party may persist and request reconsideration of the decision to deny oral argument, but ultimately a majority of the panel will decide whether it thinks oral argument would be helpful. On the other hand, even if there is no request for oral argument, or an outright waiver, the court may decide oral argument would be helpful and may order the parties to appear to present it. The purpose of oral argument is to help the court. Therefore, it must be the court that decides what it thinks would be helpful. At any point in the process, the court can always stop and hold oral arguments, if a majority of the court thinks it would be helpful.”). With the new century upon us, lawyers could no longer promise their clients an oral argument, and the time allotted for argument would now be shortened to 20 minutes—or even 15 in some venues—depending on the customs of the particular court.

II. After a drop during the pandemic, the number of oral arguments has been increasing.

After dropping during the pandemic, the number of oral arguments has been increasing. To put that increase into perspective, it is helpful to recount the busy dockets facing our intermediate appellate courts.

The latest statistics from the Office of Court Administration note that, with well over 5,800 appeals filed in fiscal year 2024, civil appeals are now at the “highest level of filings on record.” TEX. OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 75 (FY 2024), <https://www.txcourts.gov/media/1461502/ar-statistical-fy24.pdf>:



Every indication suggests that the number of appeals filed in fiscal year 2025 was even higher. See TEX. OFF. OF CT. ADMIN., ANNUAL STATISTICAL SUPPLEMENT (FY 2025), <https://www.txcourts.gov/media/1461515/coa-activitydetail2025.xlsx> (last visited Aug. 14, 2026).

And every indication is that oral arguments, likewise, have been increasing since the pandemic. OCA did not previously publish the precise numbers of oral arguments that each intermediate court of appeals holds every year, so data on the issue was scarce. The Houston appellate courts, however, had shown a marked drop in the number of oral arguments from 2015 to 2023. See Nicholas Bruno, *Oral Argument Statistics in the Houston Courts of Appeals*, APPELLATE LAWYER, Apr. 2024, at 1, 2, <https://www.hba.org/docDownload/2356044>.

The data collected by OCA demonstrates that the number of arguments have substantially increased in the Houston appellate

courts. The preliminary data² from fiscal year 2025 indicates that the First Court of Appeals granted 50 oral arguments (nearly matching its pre-pandemic levels), while the Fourteenth Court granted 63 (also in line with that Court’s pre-pandemic levels). Other courts also hold a high number of oral arguments, with the Dallas Court holding the largest number of arguments (158).

Fiscal year 2025 was the first year OCA collected oral argument data from the intermediate appellate courts. The intermediate courts granted 500 oral arguments across the state. No trends can be deduced from this data yet, but the range of numbers of arguments is noteworthy:

Court	Oral Arguments	Civil Oral Arguments
1st/Houston	50	46
2nd/Fort Worth	26	18
3rd/Austin	18	16
4th/San Antonio	20	12
5th/Dallas	158	96
6th/Texarkana	20	4
7th/Amarillo	35	16
8th/El Paso	16	14
9th/Beaumont	10	7
10th/Waco	9	2
11th/Eastland	16	13
12th/Tyler	16	16
13th/Corpus Christi	16	11
14th/Houston	63	46
15th/Statewide	27	27
Statewide	500	344

But not every litigant wants argument. Indeed, most do not. According to OCA, “[i]n cases submitted during FY 25, at least one party requested oral argument in 22 percent of cases.”

And even when a litigant wants argument, argument is still rare. Oral argument was granted in “approximately one-quarter of the 1,921 cases in which it was requested.”

² The data from the Office of Court Administration was graciously provided to the authors of this paper on a preliminary basis in early July 2026.

Again, that number varies by Court. The Dallas Court granted argument 56% of the time it was requested; other intermediate courts' grant rate percentage was in the teens:

Court	Argument Requested	Granted	Granted %
1st/Houston	221	50	23%
2nd/Fort Worth	207	26	13%
3rd/Austin	150	18	12%
4th/San Antonio	56	20	36%
5th/Dallas	281	158	56%
6th/Texarkana	78	20	26%
7th/Amarillo	115	35	30%
8th/El Paso	85	16	19%
9th/Beaumont	69	10	14%
10th/Waco	60	9	15%
11th/Eastland	41	16	39%
12th/Tyler	65	16	25%
13th/Corpus Christi	111	16	14%
14th/Houston	318	63	20%
15th/Statewide	64	27	42%
Statewide	1,921	500	26%

III. How can oral argument be more useful to the Court?

There is no one “right” way for oral argument to occur. The main objective should be to facilitate open communication between the justices deciding the case and the advocates before the court.

A. Some general observations.

In his 1987 book entitled *The Supreme Court: How It Was, How It Is*, Chief Justice William Rehnquist devoted Chapter 12 to oral argument. There he describes several species of oral advocates:

- The lector: “[H]e does just what his name implies: He reads his argument . . . Questions from the judges, instead of being used as an opportunity to advance one’s own arguments by response, are looked upon as an interruption in the advocate’s delivery of his ‘speech,’ and the lawyer after answering the question returns to the printed page at exactly where he left off; returns, one often feels, with the phrase ‘as I was saying’ implied if not expressed.”

- The debating champion: “[H]e is so full of his subject, and so desirous of demonstrating this to others, that he doesn’t listen carefully to questions.”
- Casey Jones: “He is a good oral advocate, but falls short of being a top-notch oral advocate because he forgets about the limitations of those he is trying to convince. The reason I call him Casey Jones is because he is like an engineer on a nonstop train—he will not stop to pick up passengers along the way.”
- The spellbinder: “The spellbinder has a good voice, and a good deal of that undefinable something called ‘presence’ which enables him to talk *with* the Court rather than talk *to* the Court He is the other side of the coin from Casey Jones, who won’t let up on legal analysis long enough to give the judges a mental breathing spell A florid peroration, exhorting the Court either to save the Bill of Rights from the government or to save the government from the Bill of Rights, simply does not work very well in our Court.”
- “These are but a few of the varied species of oral advocates that have come before our Court in my time. If we were to combine the best in all of them, we would of course have the All American oral advocate. If the essential element of the case turns on how the statute is worded, she will pause and slowly read the crucial sentence or paragraph. She will realize that there is an element of drama in an oral argument, a drama in which for half an hour she is the protagonist. . . . She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions.”

Oral argument in the U.S. Supreme Court will necessarily differ from argument in a Texas intermediate court, where the case might involve multiple parties, multiple issues, and complicated factual disputes about the sufficiency of the evidence. Even so, there are lessons in the Rehnquist discussion. As it indicates, a conversation between counsel and the court entails a back and forth, so the advocate should not expect to control it, but the advocate should at least come in with a plan. The need for a plan is especially acute for the advocate who goes first. If you go first, you presumably lost in the court below and bear the burden of explaining why the status quo needs to change. This means that you should work hard on what to say in those first few sentences.

This point certainly fits with the old saying, “You only get one chance to make a good first impression,” but it goes further than that. The stakes go far beyond merely coming across as credible and knowledgeable. The oral advocate is now in the sales business. Since you typically don’t know how long you will get to go before the first question, spend time working on the tip of the spear. Sharpen it. Polish it. Practice your opening over and over until you can deliver those vital few sentences without looking down at your notes. Maintain eye contact with the panel during that first moment. Maybe the panel will let you get through an entire minute or two of argument, but you cannot count on that in most of today’s forums. Instead, you may only get out one to three sentences before the questioning starts. Ask yourself, “If I can only utter three sentences, what should those sentences say?” Then practice those sentences until you can deliver them without looking down.

Craft the opening as though it will be the last thing the judges hear. Here is how the Government opened its argument in a criminal case in *Ratzlaf v. United States*, 510 U.S. 135 (1994): “We start with the elementary principle that ignorance of the law is no excuse. And we, like 10 of the 11 courts of appeals that have considered the question presented in this case, believe that that principle, considered together with the standard tools of statutory interpretation, show that it is our theory of the case and not petitioners’ that is the correct one.” Transcript of Oral Argument at 20–21, 510 U.S. 135 (1994) (No. 92-1196).

Notice that the first sentence can stand on its own as a framing for the argument: “We start with the elementary principle that ignorance of the law is no excuse.” *Id.* at 20. That one sentence could act as the spear tip. The second sentence adds more material. As things turned out, the Government attorney in *Ratzlaf* ended up getting through six sentences before the questioning started, but since there is normally no way to know in advance how far the court will let you go, it behooves you to think hard about what you want to accomplish in those first remarks. Build those remarks in a way that will sum up the case and help you make the sale. Build them in a way that you can internalize, so that you can speak while keeping eye contact and not have to look at your notes.

Appellate attorney and future federal judge John G. Roberts managed to get out seven sentences when starting his oral argument in the U.S. Supreme Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002):

Thank you, Mr. Chief Justice, may it please the Court:

In 1974, when it enacted the Family Educational Rights and Privacy Act, Congress conditioned Federal funding for educational institutions on the institution not having a policy or practice of releasing student records without consent. Congress did not phrase this condition in terms of individual rights. It did not, for example, follow the model of Title IX, enacted 2 years earlier and also dealing with educational institutions, and say something like, no student at a school receiving Federal funds shall have his records released without his consent. Instead, Congress proceeded more indirectly. It said that no funds shall be made available to any institution having a policy or practice of releasing student records without consent.

The statute is directed to the Secretary of Education. He's the one who makes federal funds available, not to the institution receiving the funds, and certainly not to the individual student.

Transcript of Oral Argument at 3–4, 536 U.S. 273 (2002) (No. 01-679).

The questioning broke out at this point, but the message had been delivered. The Court's opinion in the case began in a way similar to attorney Roberts's opening.

The bottom-side party faces a different set of challenges in deciding how to open. If your side prevailed in the court below, you will get the appellate luxury of sitting back and watching everything unfold at oral argument as the judges explore issues with the other side, but this also means that you cannot design—or at least cannot count on sticking to—as much of a blueprint for what to cover when. And even if you draft an intricate outline, you might need to scrap the whole thing if the argument goes off in a direction that you did not foresee.

With argument time now being so limited, the whole endeavor of oral argument differs from its counterpart in prior generations. When Royal Brin published his 1962 article, he described an appellate system that would let him open an argument more or less how he wanted and at considerable length:

The opening argument should begin with a short statement of the nature of the case, followed by a clear and simple exposition of the facts. Do not go into great detail, but do

give the important and pertinent facts necessary to present a clear picture of what the case is all about.

Brin, 25 TEX. B.J. at 272.

Brin's next comment about practice in 1962 may leave you startled: "In most Courts of Civil Appeals, the judges will not have read the briefs and the record before oral argument, and in at least one it has been the custom of the Chief Justice to so announce at the beginning of each session for the guidance of the attorneys waiting to argue." *Id.* "Therefore the approach generally should be that of giving the Court its first introduction to the case and seeking to make the first impression a favorable one." *Id.* "After the general factual presentation comes the statement of the points of error and the legal arguments in support of those points. Here the first step is to make clear to the Court exactly what your legal contentions are before going on to attempt to convince the Court that such contentions are valid." Royal H. Brin, Jr., *Oral Argument in the Courts of Civil Appeals* (pt. 2), 25 TEX. B.J. 326, 326 (1962). "It is quite likely that at some stage of the argument, there will be questions from the Court. This should be anticipated and should not disconcert the lawyer who is properly prepared." *Id.*

Brin's view agreed with the view of Justice Norvell, who commented that "the oral argument usually serves as an introduction to the case." James R. Norvell, *The Case on Appeal*, 1 S. TEX. L.J. 229, 232 (1954). Justice Norvell thus offered advice on how counsel should start the argument:

Newspaper writers employ a lead to attract the attention of their readers.

It generally consists of one paragraph and, as a rule, answers the questions of who, what, when, where and why. The first paragraph of an appellate court opinion is not dissimilar to the newspaper lead and the opening words of the argument should follow a like pattern. The initial statement should disclose:

1. The general nature of the case, that is, whether it is a suit for injunction, an action for damages, or some other form of proceeding.
2. Whether the case was tried to a jury or to the court, and if a non-jury case, whether or not findings of fact and conclusions of law were requested and filed

3. The nature of the judgment rendered; that is, for the plaintiff or defendant, or upon the jury verdict or notwithstanding the verdict.

Id. at 234. The premise of this advice is that the judges will not have done much workup and thus will be looking to the oral argument for help in getting oriented.

Today's practice looks nothing like that. If you get oral argument in a Texas court of appeals, you can rest assured that the judges have read the briefs. Practices may vary about which person or persons inside the court will dive deepest into the record, as today's courts have staff lawyers to help master the record, but you will not need to educate the court on what your case is about. You should jump straight to the sales pitch.

B. Rebuttal.

What about rebuttal? You may find it difficult to believe, but rebuttal has a way of being the least significant part of the argument. In a detective story by Agatha Christie or Arthur Conan Doyle, the ending furnishes the most dramatic and memorable part of the exercise. Appeals do not work that way. The reality is that by the time of rebuttal, your audience might well be mentally ready to close out the session and move on to the day's next task.

Lawyers customarily save five minutes for rebuttal, but in today's world, you should consider shortening that to three. The opening typically has more impact on the judges, so you are likely to be better off trying to score points during that phase. By the time of rebuttal, everybody in the courtroom knows that the clock is ticking, and they can physically feel that it's time to return their tray tables to the full, upright, and locked position. The judges have heard both sides already and may have asked you everything that matters to them when you were speaking the first time.

So is saving five minutes invariably a bad idea? No. It's totally up to you. Just be advised that every extra minute of rebuttal is a minute where the odds of making an impact go down. But what if you are concerned that the appellee will misrepresent the record? That can happen, but when it does, judges sometimes catch it themselves. Even if it does happen, and even if the judges do not catch it, anything egregious can be addressed in 20 or 30 seconds. Likewise, if you relied heavily on *McGillicuddy* in your opening and the appellee flatly refused

to respond to it, you can make that point on rebuttal without needing a full five minutes.

When people think of Puccini's opera *Turandot*, they think of *Nessun Dorma* in the final act. It is the aria that raises the rafters. Your rebuttal will never be *Nessun Dorma*. Nor does it need to. Rebuttal can be perfectly effective if it consists merely of weighing in on questions that were asked earlier in the session—e.g., “Judge Smith, you asked about where to find X in the record. Here is the citation for that. Judge Jones, you asked about Y. The Fifth Circuit wrote about that in the so-and-so case. Mr. Chief Justice, you asked about Z. Here is the answer....” Of course, in the uncommon case where you are using a different lawyer for rebuttal, that change in presentation can alter the experience and make a full five minutes feel less burdensome. Five minutes for a different speaker won't feel as stale as five minutes for the lawyer who did the opening. But that is not the norm. So consider shortening your allotment of rebuttal time. If the court is still interested in the case when that light turns red, the court can extend the time. Let the court be the one to keep the music playing.

For a reminder about the foibles of human communication, remember the fellow who started his rebuttal by saying, “I have four points to make” but got questioned so heavily during his first two points that the time ran out before he got to the other two. He saw that his time had expired, so he closed his notes and headed off to counsel table, only to hear a judge ask about the pair of unreached points, “Hang on, counsel, real quickly, what's three and four?” Puzzled, the lawyer looked up and said, “What's three and four? Seven.”

C. One U.S. Supreme Court procedure.

One method adopted by the U.S. Supreme Court since the pandemic has received some attention. Under one version of the procedure, each advocate will have a two-minute period to make an argument uninterrupted by any questions from the Court. After that two-minute window, the justices can begin asking questions of the advocate. See Clare Cushman & Jim Duff, *Oral Argument: Significant Changes in Format*, SUPREME COURT HISTORICAL SOCIETY (Oct. 10, 2021), <https://supremecourthistory.org/scotus-scoops/oral-argument-significant-changes-in-format/>.

Whether this procedure will continue is an open question. Chief Justice Roberts recently suggested that this procedure results in oral argument taking “a little too long” and suggested the Supreme Court may “look at it [the oral argument format] over the summer.” Suzanne

Monyak & Jordan Fischer, *Roberts Hints at Changes to ‘Too Long’ Supreme Court Arguments*, BLOOMBERG LAW (May 6, 2026), <https://news.bloomberglaw.com/us-law-week/roberts-eyes-changes-to-too-long-supreme-court-arguments>.

D. The First Court of Appeals Pilot Program.

The First Court of Appeals has been experimenting with a pilot program that is similar to the U.S. Supreme Court’s current oral argument procedure. For cases to be argued before one of the three panels (a panel that sat in March-April-May 2026), the court included the following language in its written notice of submission, promising a two-minute “no fly zone” for the oral advocates:

Pilot Program: Each side will be allowed to open with two minutes of uninterrupted time. Counsel may use the full two minutes, or only a part of it, or none of it. The purpose is to allow counsel a chance to prepare an “elevator pitch” that highlights whatever points counsel deems worthy of attention. (Rebuttal will not have any guarantee of uninterrupted time.)

The language underwent slight alterations for argument in front of a different panel (sitting June-July-August 2026), but the substance remained the same. As far as we are aware, no other Texas appellate court has ever guaranteed any uninterrupted argument time to the oral advocates. The time for a two-minute rule in Texas has come.

We know from the federal experience that such a device can work; the U.S. Supreme Court has used it in recent years, and the Fifth Circuit uses something comparable for *en banc* arguments. Nobody is clamoring for the two-minute rule’s abolition. Nor is anybody saying, “I sure wish judges would interrupt more often.” To the contrary, we have all seen appellate counsel stride to the podium, start by saying that the judgment should be reversed for three reasons, and then get interrupted before reaching reason number three. Some of that impatience in the questioning has to be blamed on counsel’s inability to get the tip of the spear out quickly and clearly, but we have all seen well-designed openings get disrupted by questioning that likely could have waited.

As for how well the two-minute rule is actually working in the First Court, the early impressions look encouraging. You will have to ask the oral advocates for their views, but the process has certainly made it easier for the panel members to get a full handle on how counsel wants to pitch the case. It has also forced the judges to focus and to

become more active listeners for the first 120 seconds. Here's hoping that the practice spreads throughout the appellate courts in Texas.

To be sure, we have all seen cases where counsel mishandles the opening. Watch some video recordings of oral arguments in the Texas Supreme Court, and you will see opening after opening where those first few sentences of argument time lard up the case with conclusory sermonizing. If you are in a court with no guarantee against interruptions, get some points on the board immediately before trying to launch into the details. So if you want to give three reasons for reversing the judgment, try to shrink wrap your three points into a short formula, *e.g.*, “The appellee’s claims are untimely, unproven, and inconsistent with your decision in *McGillicuddy*.” Do not try to spend one minute on introducing reasons #1, another minute on reason #2, and a third minute on reason #3, all in the belief that after those three minutes of supplying the court with a handful of headnotes, you will then circle back to your first point and unpack a full exposition. That plan will fare as well as a cake in the rain.

IV. How do opinions refer to oral argument?

Some writers have begun observing how some appellate courts reference oral arguments in their opinions—and these observations should guide a practitioner’s preparation for argument. For example, one author recently examined how the Federal Circuit’s opinions reference statements at oral argument and noted that previously, “Federal Circuit judges almost never quoted oral argument in their precedential opinions” but now “more than 40% of [that court’s] precedential opinions include a direct reference to oral argument.” Dennis Crouch, *Locked In at the Lectern: How the Federal Circuit Uses Oral Argument*, PATENTLYO (June 30, 2026), <https://patentlyo.com/patent/2026/06/locked-in-at-the-lectern-how-the-federal-circuit-uses-oral-argument.html>.

An advocate getting cited in an opinion was not usually a good sign for the lawyer: “48% of the oral argument citations could be classified as a ‘concession’—counsel admitting against interest, narrowing scope, or agreeing with the court’s adverse framing.” *Id.* In other words, “the lectern has become the place where judges narrow the positions.” *Id.* The author concluded that “[t]he bottom line here is that old adage about oral arguments being the place where you lose the case appears to have some merit.” *Id.*

But that was not universally the case. Oral argument was an opportunity for the “parties to directly address issues that they may

have glossed over in the briefs.” *Id.* An inability to respond to such questions was, as one would expect, something that did not escape a judge’s observation; the Federal Circuit “is increasingly using its own real-time observation of how counsel hedged, conceded, or pivoted as a substantive part of its record.” *Id.*

This paper does not attempt to replicate a statistical study on the Texas intermediate courts. But a Westlaw search of Texas opinions over the last year returned approximately 70 opinions that referenced oral argument for some substantive reason. We will not quote the individual cases for obvious reasons, but it suffices to say that most references fall into some recognizable patterns:

- The opinion references a concession made by the attorney during argument.
- The opinion notes if the attorney had no answer to a question posed by the Court (or, relatedly, if the attorney had no authority to support a legal position).
- In recounting the facts material to the analysis, the Court references the attorney’s framing of the record in oral argument.
- The opinion sets out the attorney’s view of the decision tree.
- The opinions also indicated when argument helped the Court better understand nuances in a party’s position.

Of course, oral argument aids the Court in ways that may not be directly expressed in an opinion. But an appellate advocate preparing for oral argument would be well-served to consider these categories. What concessions the Court may ask the advocate to make? What are the facts material to the analysis? What does the decision tree look like? And an advocate may very well consider filing post-argument briefing to answer questions to which the advocate was unable to give an answer during argument.

* * *

As communication practices and oral argument customs continue to evolve, some things remain the same, such as the overarching goals of our legal system, and the way lawyers and judges labor together to pursue those goals. Supreme Court Justice Smedley made this point 75 years ago, in words that have not lost their force:

We are blessed in Texas with an able Bar and the value of the help they give to the Court in the presentation of their cases is incalculable. Without that help, or that kind of help, service on the Court would be to a great extent dreary drudgery. The members of the Bar should realize that they have a great part in the development of our law by the judicial process and that the opinions as appearing in the books are the result of the combined work of the judges and the lawyers who have participated in the cases. Justice Holmes referred to “the judges’ half of our common work,” and added that “the law is made by the Bar even more than by the bench.” Whether we serve at the Bar or on the bench, we are all of the same noble profession—we are first of all lawyers. And we are fortunate to have the opportunity to work together in the building of the majestic temple of justice.

Graham B. Smedley, *Trial Tactics in the Supreme Court of Texas*, 14 DALLAS B. SPEAKS 134, 144 (1951).