The College Bulletin

News for Members of the Texas Bar College · Fall 2015

Civility Matters

From the Chair

Chad Baruch

The son of a friend of mine recently posted a terrific picture on Facebook. While on vacation, his family happened to stay at the same resort where Vice President Joe Biden was staying. When the family ran into Biden and his dog one morning, the vice president was gracious enough to spend a few minutes with them and take pictures with their children. The children will treasure that photograph for the rest of their lives. But when my friend's son posted the photograph on Facebook, the very first comment posted in response was—all too predictably—an insulting remark about the vice president. The comment drove home to me the toxic environment in which our public discourse occurs. Indeed, recent studies show that the overwhelming majority of Americans view a decline in civility as a major problem in our society.

Responding to this lack of civility, the Texas Legislature recently enacted a civility oath for lawyers. Beginning this year, all newly admitted Texas attorneys must take the oath. I am all for civility among lawyers (and everyone else). But I do find myself wondering from where a group of politicians found the nerve to demand civility of our profession in light of the bad behavior modeled daily by their brethren.

As I write this column, the presidential campaign seems to have reached an all-time low in terms of discourse. Candidates insult one another personally (even in regards to physical appearance and personality traits), use demeaning language, and generally behave like indulged and ill-mannered children. And such bad behavior is hardly limited to members of the executive and legislative branches. Our own U.S. Supreme Court has joined the fray, with some justices writing opinions that openly ridicule their colleagues. One can only wonder what young lawyers—and watchful members of the public—must think about the notion of civility in the legal profession when they see the most revered and respected members of that profession treating professional colleagues with such disdain.

The prevalence of social media seems to feed this lack of civility. Social media requires that we make instant judgments on even the most complex issues. After all, we cannot share our brilliant opinions on social media without first forming them. And because most posts become stale in a matter of hours, we must form and post these opinions right away—without the benefit of contemplation, reflection, or even the facts. We write first and think later. And we will believe almost anything we read on social media, no matter how outlandish.

Social media also requires that we see even the most difficult issues in black-and-white terms. Is there some reason I cannot support both dedicated law enforcement officials and members of minority communities? Why, exactly, is that an "either/or" choice? Social media drives us to "pick a side" instead of seeking common ground.

Finally, social media also seems to bring out the worst in public discourse. Safely ensconced in their homes and offices, people

post things they would not dream of saying in personal conversation. Even worse, gutter-level discourse seems to be contagious. One person overheats, and a series of scathing remarks predictably follows.

We as lawyers have an important role in promoting civility both among our peers in the bar and the general public. Our profession often requires us to disagree with our colleagues and advocate opposing positions. Our ability to do so civilly and politely models behavior for younger lawyers, clients, and the public in general. The key to doing better is to remember that civility is a universal, non-situational ethic. We must remain civil toward those whose acts and opinions we find most objectionable. We as lawyers should embrace this special role and, oath or no oath, remain committed to the ideal of civil discourse. And we should be especially careful to model this behavior in social media, where it is seen by so many people.

The Supreme Court of Texas created the Texas Bar College to promote professionalism among Texas lawyers through continuing legal education. Our members believe passionately in the notion of lawyers who keep abreast of the most current developments in the law, and who treat others with respect and civility. As Chair of the College, I thank each and every one of you for your commitment to the finest ideals of our profession. ■

Welcome to the College's Newest Board Members

KENDA L. CULPEPPER graduated from Texas A&M University in 1989 and Southern Methodist University School of Law in 1992. She then joined the Dallas County District Attorney's Office where she was a prosecutor in both the misdemeanor and felony trial sections from 1992 to 1995. While there, she handled cases ranging from misdemeanor theft and DWI cases to felony drug cases, Aggravated Robbery, Murder and Attempted Capital Murder.

In December 1995, Kenda left the District Attorney's Office to go into private practice. Board Certified in Criminal Law by the Texas Board of Legal Specialization in 1999, she became a partner at the Dallas firm of Milner and Finn, and, in 2004, she and former Judge Jim Pruitt created the law firm of Culpepper & Pruitt, maintaining offices in both Dallas and Rockwall. She is licensed to practice in the State of Texas and the United States District Court, Northern District of Texas.

In November, 2008, she was honored to be elected as the Rockwall County Criminal District Attorney. She supervises twenty-seven employees, including 14 prosecutors.

She is the current state chair of the State Bar of Texas' Professionalism Committee and is a past chair of the Dallas Bar Association's Criminal Justice Section and Criminal Law Section. In 2013, she was one of two statewide lawyers to receive the prestigious "Certificate of Merit" awarded by the State Bar of Texas Board of Directors and past presidents to recognize a Texas lawyer's outstanding contributions to the legal profession. She is also honored to be a member of the William "Mac" Taylor American Inn of Court.

While in private practice, Kenda was a faculty member of the "Texas Trial College,"comprised of many of the state's top ranked trial lawyers. She has been a guest speaker for many associations on various legal topics and has spoken at well over 100 different events and CLE's over the last 8 years.

She is currently on the Legislative Coordinating Board of the North Texas Crime Commission and also on the Foundation Board and Training Committee for the Texas District and County Attorney's Association. She is honored to have been appointed to the Planning Committees for the State Bar Advanced Criminal Law Course and the Elected Prosecutor Conference as well as to a state-wide ad hoc committee dedicated to reviewing issues regarding eyewitness identification, *Brady*, and their relevance to recent exonerations.

Kenda has been named by *Texas Monthly* as a "Texas Super Lawyer", by *D Magazine* as one of the "Best Lawyers in Dallas, and by Forbes SkyRadio as one of "America's Most Influential Women".

HON. GEORGE C. HANKS, JR. received a Bachelor of Arts degree, summa cum laude, in 1986 from Louisiana State University. He received a Juris Doctor in 1989 from Harvard Law School and a Master of Laws degree in 2014 from Duke University Law School. He began his legal career by serving as a law clerk for Judge Sim Lake of the United States District Court for the Southern District of Texas, from 1989 to 1991. He served as an associate at the law firm of Fulbright & Jaworski, from 1991 to 1996,

and as a shareholder at the law firm of Wickliff & Hall, PC, from 1996 to 2000. From 2001 to 2002, he served as a District Judge for the 157th Civil District Court of Texas. From 2003 to 2010, he served as a Justice on the First Court of Appeals of Texas. From September 13, 2010 to April 22, 2015, he served as a United States Magistrate Judge in the Southern District of Texas. On January 7, 2015, he was nominated by President Obama to a seat vacated by Nancy F. Atlas. He was confirmed by the Senate on April 20, 2015, and received his commission on April 22, 2015 to become a United State District Judge for the Galveston and Victoria Divisions.

NATALIE COBB KOEHLER is a 1999 graduate of Texas A&M University and a 2002 graduate of South Texas College of Law. She is in her second term as the elected County Attorney of Bosque County.

In law school Natalie was a member of the South Texas Law Review where she received the Justice Charles Evans Hughes award. She also participated in the school's nationally recognized moot court program, winning the top speaker, top team, and best brief awards at the William B. Spong National Moot Court competition and first place team at the Texas Young Lawyers State Moot Court tournament. Prior to graduating, she was named the Outstanding Female Graduate for the Class of 2002. In 2012, she received the South Texas College of Law Alumni Impact Award, given to an alumnus who has made a significant impact in the profession and their own community.

Natalie served in 2011-12 as President of the 26,000 member Texas Young Lawyers Association (TYLA). In 2005, 2008 and 2009 she received the TYLA Presidents Award of Merit for outstanding contribution to the organization. She has also served as a Trustee of the Texas Bar Foundation and a director of the State Bar of Texas.

In 2010, 2011, 2012 and 2014, Natalie was named a Texas Super Lawyers Rising Star in Family Law by *Texas Monthly* magazine, an award given to only 2% of the state's lawyers. She is also a member of the Class of 2014 of the Texas Lyceum, a public policy group that identifies the next generation of top leadership in the State of Texas.

Active in her community, Natalie serves on the Meridian Public Library Board of Directors and the Central Texas Youth Fair Board. She is also serving as a Texas A&M Aggies in Agriculture Mentor and is a member of the Ft. Worth Stock Show and Rodeo "Guns and Roses Committee". She has served as President of the Bosque County Republican Club, President of the Erath County Bar Association, Chairman of Bosque County Aggie Muster and was a member of the Houston Livestock Show and Rodeo Go Texan Committee.

In her spare time, Natalie enjoys traveling, cooking, helping her children show steers and heifers and volunteering at Camp John Marc, a camp for special needs children in Central Texas. She and her husband, Sean, are members of St. Olaf's Lutheran Church and live on the family ranch in Cranfills Gap, Texas. They have two children, Case and Carson.

CAREN LOCK is the Regional Vice President and Associate General Counsel of TIAA-CREF. She is the primary interface for the company on all legislative, executive, administrative, and regulatory matters in the southwest region. She also directs all legislative lobbying and regulatory advocacy in her states. At the company, Caren is active in gender and racial diversity initiatives. She was the former Corporate Co-Chair of the Women's Employee Resource Group. TIAA-CREF is a $523 billion full-service financial services group of companies that has dedicated itself to helping those in the academic, medical, cultural, and research fields for over 90 years.

Prior to joining TIAA-CREF, Caren was General Counsel with a consumer financial company in the Dallas/Fort Worth area. Before entering the corporate world, she also spent over a decade litigating complex business matters including copyright and trademark infringement, employment discrimination, shareholder and partnership disputes, aviation, and toxic tort.

Caren serves on the Board of the Dallas Women's Foundation and is a member of the Executive Committee. At the Dallas Women's Foundation, she chairs the Advocacy Committee. She is a member of The Dallas Assembly and former Board member of the Center for Nonprofit Management in Dallas where she currently serves on the Advisory Board. Caren is a member of the Founders Board of the University of North Texas School of Law. Previously, she has also served on the Boards of the Dallas Bar Association, State of Texas Asian Pacific Interest Section, and was President and former Board member of the Dallas Asian American Bar Association. From 2006 to 2013, Caren served on the Texas State Bar Grievance Panel and was Chair of her panel.

Caren is a frequent speaker on racial and gender diversity, nonprofit regulatory issues, legal ethics and grievances, generational dynamics, and community and political advocacy. She regularly presents at legal continuing education courses for the local and Texas bar organizations. In her spare time, she volunteers at the Cancer Support Community (formerly Gilda's Clubhouse) teaching yoga to cancer survivors and their families. Caren lives in Allen with her husband, Michael Bahar, and two sons. ■

United States Supreme Court UPDATE

By Matthew Kolodoski

As the United States Supreme Court hears an ever-shrinking number of cases, its decisions have less daily effect on most members of the Texas Bar College and Texas attorneys generally. Nevertheless, the Court has issued several recent decisions of profound legal importance and with potential application on the practices of Texas Bar College members. What follows is a brief statistical overview of the cases decided in the 2014-2015 Supreme Court term and a summary of a few of those decisions.

OVERVIEW

In the 2014-2015 term, the Court decided seventy-four cases.[1] Sixty-six of the cases had signed opinions after oral arguments, and eight of the cases had per curiam opinions. Of the cases decided by the Court, sixty-seven came from the circuit courts of appeal, five came from state courts, two came from district courts, and the Court had original jurisdiction in one case.

The Court affirmed the circuit courts of appeals in seventeen cases, state courts in three cases, and district courts in one case. Accordingly, the Court affirmed lower courts in twenty-eight percent of the cases and reversed in seventy-two percent of the cases. The Court decided thirty cases unanimously (41%), five cases with a vote of 8-1 (7%), nine cases with a vote of 7-2 (12%), eleven cases with a vote of 6-3 (15%), and nineteen cases with a vote of 5-4 (26%). Of the 5-4 cases, Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan formed the majority in eight of the nineteen cases, and Chief Justice Roberts along with Justices Scalia, Kennedy, Thomas, and Alito formed the majority in five of the nineteen cases. The remaining six 5-4 cases had varying majority groups; however, Chief Justice Roberts voted with the majority in five of the six remaining 5-4 cases.

The Court's docket was dominated by civil cases, with fifty-six cases (75%). The remainder of the docket consisted of eleven criminal cases (15%), seven habeas cases (9%), and one original case (1%).

FREEDOM OF SPEECH

Williams-Yulee v. Florida Bar

No. 13-1499
135 S. Ct. 1656 (2015)

The Court held that the First Amendment permits a state to prohibit judges and judicial candidates from personally soliciting campaign funds for judicial office. Florida is one of thirty-nine states where voters elect judges at the polls. The Florida Supreme Court adopted Canon 7C(1) of its Code of Judicial Conduct that provided judicial candidates "shall not personally solicit campaign funds . . . but may establish committees of responsible person" to raise money for election campaigns. Williams-Yulee mailed and posted online a letter soliciting financial contributions to her campaign for judicial office, and the Florida Bar disciplined her for violating Canon 7C(1). She challenged the canon on the grounds that the First Amendment protects a judicial candidate's right to personally solicit campaign funds in an election. The Florida Supreme Court upheld the disciplinary sanctions, concluding that Canon 7C(1) is narrowly tailed to serve the State's compelling interest.

[1] All statistics come from the *Stat Pack for October Term 2014* created by SCOTUSblog. Kendar Bhatia, *Stat Pack for October Term 2014*, SCOTUSblog (June 30, 2015), http://www.scotusblog.com/statistics/.

Walker v. Texas Division, Sons of Confederate Veterans, Inc.

No. 14-144
135 S. Ct. 2239 (2015)

The Court held that "specialty license plates issued pursuant to Texas's statutory scheme convey government speech." Because Texas "is not barred by Free Speech Clause from determining the content of what is says," Texas did not violate the First Amendment when it denied a request for a specialty license plate that displayed the Confederate flag. Justice Alito's dissent challenged that majority's characterization of the license plates as government speech, because Texas had approved over 350 specialty license plates.

Reed v. Town of Gilbert

No. 13-502
135 S. Ct. 2218

A unanimous Court in a majority opinion authored by Justice Thomas held that a town's sign code was a content-based regulation of speech that did not survive strict scrutiny. The town's code restricted the timing and placement of signs containing directions to public events, but categorized signs based on the message each sign conveyed and subjected each category to different restrictions. The Court found that the sign code was a "paradigmatic example of content-based discrimination" because it singles out specific subject matter for differential treatment, even though it does not target specific viewpoints within specific subject matter. Accordingly, the code was subject to strict scrutiny regardless of "the government's justifications or purposes for enacting" it. Because the town could not show that the sign was narrowly tailed to further any compelling government interest, it failed strict scrutiny.

MARRIAGE

Obergefell v. Hodges

No. 14-556
135 S. Ct. 2584 (2015)

The Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." The majority opinion, written by Justice Kennedy, began by noting that the concept of constitutional liberty is an evolving one and that the founders "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." Justice Kennedy then offered four reasons why marriage is deemed fundamental under the Due Process Clause and concluded that each reason applied to both same-sex couples as well as opposite-sex couples. Accordingly, the Court also held that states must recognize lawful same-sex marriages performed in other states.

ELECTION LAW

Alabama Legislative Black Caucus v. Alabama

No. 13-895
135 S. Ct. 1257 (2015)

The Court held that the district court erred in upholding the redistricting plan for state legislature boundaries when it used an "undifferentiated statewide analysis" instead of considering "racial gerrymandering with respect to the individual districts subject to the appellants' racial gerrymandering challenges." Furthermore, the district court erred in using the goal of equalizing population across all districts as a "factor among others to be weighed against the use of race to determine whether race 'predominates.'"

Arizona State Legislature v. Arizona Independent Redistricting Commission

No. 13-1314
135 S. Ct. 2652

The Court held that the Elections Clause of the Constitution permits Arizona to use an independent redistricting commission to draw the congressional and state legislative district maps of the state. Arizona's constitution was amended by popular referendum to create an independent redistricting commission. The Arizona legislature sued to challenge the commission's congressional district map. In upholding the redistricting map, the Court held the Arizona legislature had standing to bring the claim, because its allegation that the independent commission deprived the legislature of its authority over redistricting was a sufficient injury.

RELIGION

Holt v. Hobbs

No. 13-6827
135 S. Ct. 853 (2015)

The Court held that an Arkansas Department of Correction grooming policy that prohibited a Muslim inmate from growing a one-half inch beard in accordance with his religious beliefs violates the Religious Land Use and Institutionalized Persons Act of 2000. The Act prohibits state governments from imposing "a substantial burden on the religious exercise" of a prisoner unless the government shows that the burden "is the least restrictive means of furthering [a] compelling governmental interest." In rejecting the policy, the majority opinion authored by Justice Alito noted that the department's policy of controlling contraband could be satisfied in other ways. The Court further stated that "Petitioner's belief is by no means idiosyncratic," "[b]ut even if it were, the protection of [the Act] . . . is 'not limited to beliefs which are shared by all of the members of a religious sect.' " The Court reversed and remanded.

FEDERAL CIVIL RIGHTS STATUTES

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.

No. 14-86
135 S. Ct. 2028 (2015)

The Court held that a Muslim job applicant who was rejected for a retail store position because she wore a headscarf in violation of the store's policy against employees wearing "caps" while working, could maintain a Title VII claim against the retailer even though the applicant never specifically requested a religious accommodation to be allowed to wear her headscarf. The Court reversed and remanded.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.

No. 13-1371
135 S. Ct. 2507 (2015)

The Court held that disparate-impact claims are cognizable under the Fair Housing Act. The Act provides that is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Additionally, the Act provides that "[i]t shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of" the same attributes. Justice Kennedy, in writing for the majority, concluded that these provisions of the Act encompass not only claims of disparate treatment, but also claims of disparate impact, where a plaintiff "challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."

AFFORDABLE CARE ACT

King v. Burwell

No. 14-114
135 S. Ct. 2480 (2015)

The Court, in a majority opinion authored by Chief Justice Roberts, held that the tax credits provided in the Patient Protection and Affordable Care Act are available in states where the federal government, rather than the individual state, established the health insurance exchange required in the Act. The Court declined to defer to the IRS's interpretation of the Act and reviewed the Act without deference to the IRS's interpretation. The Court read the Act's words "in their context and with a view to their place in the overall statutory scheme" and concluded that the phrase "an Exchange established by the State" was ambiguous. The Court, however, determined that an interpretation of the text as limited to only state exchanges would be incompatible with the overall purpose and structure of the statute.

FOURTH AND FIFTH AMENDMENT

Heien v. North Carolina

No. 13-604
135 S. Ct. 530 (2014)

The Court held that a police officer's reasonable mistake of law (i.e., that two working brake lights are required on a car in North Carolina, when, in fact, only one is necessary) does not make a stop of a vehicle unreasonable under the Fourth Amendment. The Court noted in a majority opinion authored by Chief Justice Roberts that, "Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law." However, the Court clarified that a mistake of law had to be objectively reasonable, which the Court had "little difficulty" in determining regarding the officer's incorrect interpretation of the brake light law. Accordingly, a subsequent search was therefore valid and its fruits admissible.

Rodriguez v. United States

No. 13-9972
135 S. Ct. 1609 (2015)

The Court held that a police stop that exceeds the time necessary to handle the traffic violation, which was the basis for the initial stop, is an unreasonable seizure. Accordingly, prolonging a traffic stop to permit a dog to sniff the stopped car is not permitted, absent reasonable suspicion of criminal activity.

EIGHTH AMENDMENT

Glossip v. Gross

No. 14-7955
135 S. Ct. 2726

The Court held that death-row inmates who challenged Oklahoma's method of execution failed to establish a required element of a method-of-execution claim (i.e., the evidence did not establish that a demonstrated risk of severe pain from the drug was substantial when compared to known and available alternative methods of execution). The majority opinion, written by Justice Alito, reasoned that because capital punishment is constitutional, there must be a constitutional means of carrying it out. Further, the Court noted that the district court did not commit clear error in making its findings regarding the drugs used by Oklahoma, since numerous courts have reached the same conclusion, the State's expert provided persuasive testimony unrebutted by contrary scientific proof, and federal courts should not "embroil themselves in ongoing scientific controversies beyond their expertise."

PATENT

Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.

No. 13-854
135 S. Ct. 831 (2015)

The Court held that the resolution of subsidiary factual issues in construing a patent claim by a district court should be reviewed under Federal Rule of Civil Procedure 52(a)(6) for clear error, not *de novo*. "[W]hen the district court reviews only evidence intrinsic to the patent . . ., the judge's determination will amount solely to a determination of law, and the Court of Appeals will review that construction *de novo*." When "the district court will need to look beyond the patent's intrinsic evidence and to consult extrinsic evidence . . . . In cases where those subsidiary facts are in dispute, courts will need to make subsidiary factual findings about that extrinsic evidence. These are the 'evidentiary underpinnings' of claim construction . . . and this subsidiary factfinding must be reviewed for clear error on appeal." The Court vacated and remanded.

Employment Law Service Project

by Patsy Yung Micale

The Texas Bar College is committed to promoting professionalism through education in its community service projects. For the second consecutive year, Texas Bar College co-sponsored a Continuing Education Unit (CEU) for the members of the Galveston County Mutual Assistance Partnership (GC-MAP), a non-profit organization that connects, strengthens and supports non-profit agencies in the Galveston Bay Area. This year's CEU was held on July 16, 2015, simultaneously with the Texas Bar College's Summer School CLE program at Moody Gardens in Galveston. **Emily Harbison**, an Associate with Baker & McKenzie LLP, gave an extremely informative and interactive presentation on "Employment Law: Sexual Harrassment," which was well-received by the attendees.

Emily Harbison

The College plans and implements community service projects annually. Please contact us at (800) 204-2222, ext. 1819 if you have ideas to share and/or would like to participate in future community service projects. We look forward to hearing from our members!

Basic Tips for Improving Oral Argument in Appellate Courts

By Chad Baruch

Few aspects of legal practice are as misunderstood as appellate oral argument. Sadly, most appellate arguments just aren't very good. Many lawyers spend little time preparing for oral argument while others seem to misunderstand its purpose. This short article provides a series of basic tips on preparing for oral argument in the appellate courts.

Know the courtroom etiquette.

Each appellate court, even among the Texas intermediate courts, has its own way of doing things. Judges appreciate lawyers who take the time to become familiar with the court's individual practices and etiquette. Before arguing in a particular court for the first time, talk to other lawyers experienced in practicing before that court. If yours is not the first case of the day, consider arriving early and listening to earlier arguments (or even arriving a day early to do so). Not only will this give you a greater familiarity with the court's way of doing business, it may also provide you some insight into the tendencies and attitudes of the judges.

Adopt a conversational tone.

At its best, oral argument is a high-level discussion of the most challenging issues in the case. Use a respectful but conversational tone when addressing the court. One of the worst things a lawyer can do is adopt a "professorial" tone during oral argument—judges do not enjoy receiving lectures. But most of them do enjoy engaging in detailed and thorough discussions of the law.

Handle nervousness.

Appellate judges know that even the most experienced oral advocates sometimes get nervous during oral argument. This is natural. Most of the time, this nervousness disappears after the opening minutes of the argument. The possibility of opening nervousness makes a well-scripted and rehearsed introduction vitally important.

Have a well-rehearsed introduction.

In almost every oral argument, you can count on being allowed to get out your first few sentences before receiving any questions from the panel. In complicated cases, where the judges have numerous questions, this may be your only uninterrupted time. Practice your introduction until you know it cold. Never start with a dull recitation of the facts—the judges have read the briefs and understand the basic facts of the case. Instead, begin with whatever information you deem most important to convey to the court before being diverted to other matters. These first few sentences offer you an opportunity to get straight to the heart of your case and explain to the court why your client should win.

Answer questions directly.

Always answer questions directly. Almost every list of "bad practices" based on input from appellate judges focuses on answering questions. Appellate judges don't like when lawyers evade questions, and they don't like when lawyers give longwinded answers to questions. If a question can be answered simply "yes" or "no," then answer it that way. If you feel the need to explain your answer, do so only after answering directly. And, of course, never tell a judge that the question is irrelevant (even if it is!). Answer the question directly, then explain why you feel the issue is not necessary to the court's decision.

Be flexible.

If you came to oral argument prepared to spend all of your time discussing Point A, yet the court immediately begins hammering you with questions about Point B, you can safely assume your time is better spent addressing Point B.

Never fudge.

If you don't know the answer to a question, say so immediately. Nothing during oral argument is as dangerous as "fudging" an answer to a judge's question.

Anticipate and rebut counter arguments.

Having read the briefs, the judges know the parties' basic arguments. Instead of merely repeating the arguments from your brief, address the other side's responsive arguments and explain why they lack merit. This also has a strategic purpose. Many lawyers who do not regularly argue appellate cases prepare only to make the basic points raised in their brief. If they stand up to speak with you having already acknowledged and rebutted those points, these lawyers may be caught flat-footed.

Don't address every issue.

Don't feel the need to address every issue or argument in the case. Instead, focus on the issues or arguments likely to trouble the court.

Be cautious about using humor, and avoid jury argument.

More often than not, attempts at humor fall flat in the appellate courts. Similarly, appellate justices do not appreciate flowery language more appropriate for juries, fits of righteous indignation, or attacks on opposing counsel. Avoid all of these.

Know your record.

A good oral advocate has total mastery of the trial court record. If you anticipate being questioned about particular portions of the record, make a notation so that you can respond by directing the court to the record cite. By the time of oral argument, you should know the record better than anyone.

Anticipate questions—and have ready answers.

In the weeks leading up to oral argument, compile a list of the ten questions most likely to be asked of you during oral argument. Rehearse simple and direct answers to each question.

Consider a moot argument.

As with anything else, oral argment improves with practice. If at all possible, consider conducting a moot argument with other lawyers serving as the appellate justices.

Be right—and in the right.

In one of the greatest lines from any film related to law (from the film *Absence of Malice*), a judge played by Wilford Brimley memorably says: "It ain't legal. And worse than that, by God, it ain't right." Judges are people too. And they often are concerned with the effects of their decisions. Remember to explain why your client is not just right, but is in the right.

Use the one-sentence method.

In preparing for oral argument, I always try to prepare a single sentence by which I could explain my client's core position to any of my children. You should be able to tell the court in one plain and simple sentence why your client should win the case.

Update your authorities.

In the days leading up to oral argument, verify that your important authorities remain valid. Always update your research to discovery any new cases relevant to the appeal.

Think before speaking.

Feel free to take a moment to think before you speak. Lawyers often make the mistake of rushing to answer a question before stopping to think about what they intend to say. Judges understand that lawyers are human. They will not be offended by the idea that you might wish to take a moment to think about a question before answering it.

Admit mistakes.

If you make a mistake, say so. For example, if you hastily answered a question incorrectly, tell the court you made a mistake and your answer should have been X.

Hammer your own weakest point.

Most of the time, if you know part of your argument is exceptionally weak, the court does too. You can bet that is almost certainly where the judges will begin their questioning. In preparing for oral argument, spend as much time focusing on your weaknesses as your strengths.

End powerfully.

Just as it is important to start with a strong introduction, try to end with a powerful summary of your client's entitlement to victory. Prepare a one-sentence conclusion, and be sure to save yourself enough time to use it. ■

Summer Snapshots

FROM LEFT: Jay Jackson (left) accepts the 2015 Franklin Jones, Jr. Award for Best CLE Article; Claude Ducloux (left) presents Chad Baruch with the Gene Cavin Award; Rachel Jones (left) accepts the Steve Condos Most CLE Hours Award.

Great CLE Articles from TexasBarCLE's Online Library

FREE access to these and many more is included with your College membership. Check 'em out!

For young lawyers to seasoned partners, don't miss
What Trial Lawyers Can Learn from Supreme Court Opinions
presented by Clyde J. "Jay" Jackson III and Brian S. Humphrey II
http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=AR&lID=174018

Appreciate John Mayer (not the soulful crooner but equally engaging) as he shares
The 10 Commandments of Ethical Collections
http://www.texasbarcle.com/cle/OLViewArticle.asp?a=172274&t=PDF&e=13790&p=1

Can we serve in dual capacity as guardians and lawyers? Yes, WE CAN!
Attorneys Serving as Fiduciaries & Guardians: Compensation and Fee Issues
by Gus G. Tamborello
http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=AR&lID=177397

Before your next trial, understand why
Getting the Charge Right and Charge Error Preservation
(by Hon. David E. Keltner, Jay Jackson, and Thomas. C. Wright) is critical to the success of your case.
http://www.texasbarcle.com/Materials/Events/13950/175193.pdf

A Short Course on Enforcing Property Awards
by Joan F. Jenkins and Erin R. Christopher will take you from drafting an airtight enforceable property provision all the way to a contempt hearing for violations.
http://www.texasbarcle.com/Materials/Events/13944/173488.pdf

THE ENDOWMENT FUND FOR PROFESSIONALISM has been established by the College to underwrite projects and services that contribute to higher standards of educaiton and performance among lawyers. For example, some proceeds for the fund will be used to establish free access for all College members to the State Bar of Texas' Online Library, which provides immediate, word-searchable access to more than 20,000 CLE articles written by experienced members of the bar. Many lawyers find that beginning their research in the Online Library gets them the practical information and analysis they need more quickly and more thoroughly.

Membership in the Fund is by invitation of the Texas Bar College. After five continuous years of College membership, a lawyer becomes eligible to join the Fund. Levels of membership vary according to the lawyer's financial commitment Choose your membership level:

Endowment Fund Scholar
The Scholar commits to at least a $1,000 contribution which may be paid out at $200 per year.

Honored Endowment Fund Scholar
The Scholar has reached the $1,000 contribution level.

Sustaining Endowment Fund Scholar
The Honored Scholar continues to make annual contributions of at least $200 per year.

Friends of the Endowment Fund for Professionalism
Non-qualifying Texas Bar College members or non-College members may contribute to the Fund.

Members of the Fund and Friends of the Endowment Fund will be acknowledged by the College. Remember, the Fund will achieve its goals with your commitment. Consider joining the Fund today!

The Endowment Fund for Professionalism

Texas Bar College P. O. Box 12487 Austin, Texas 78711-2487

As a member of the Texas Bar College for five consecutive years, I hereby accept my invitation to join The Endowment Fund for Professionalism. Enclosed is my **tax-deductible** contribution of $1,000 to fulfill my commitment as an Honored Endowment Fund Scholar or my minimum initial contribution of $200 as an Endowment Fund Scholar (exact amount indicated below). I recognize that my gift supports professionalism of lawyers through education and contributes to the betterment of the legal profession in Texas.

Please make my **tax-deductible** contribution in ❑ honor of or ❑ memory of _____.

Amount of contribution: ❑ $1,000 ❑ $200 ❑ Other $_____

Payment by enclosed ❑ check payable to The Endowment Fund for Professionalism of the Texas Bar College.

Please charge my credit card ❑ $1,000 ❑ $200 now, and annually $200 for the next four years ❑ Other $_____

Credit Card No. _____ ❑ American Express ❑ Visa ❑ MasterCard ❑ Discover

Signature Authorizing Payment_____ Date_____
If paying by credit card, you may fax this form to 512-463-1498 or scan and email it to mgaston@texasbar.com, or you may pay online at **www.texasbarcollegeshop.com/Endowment-Fund_c9.htm**.

Member Name:_____ Bar Card Number: __ __ __ __ __ __ __ __

Firm:_____ Email:_____

Address:_____City/State_____ Zip_____

Office Phone: (_____)_____ Office Fax: (_____)_____

College Members who wish to contribute or pledge less than $1,000 or who have not achieved five consecutive years of College membership and non-College members may make tax deductible contributions and become a Friend of the Endowment Fund for Professionalism by completing and returning this form.