

Do's, Don'ts, and Other Observations from the Circuit Court

**Eastern District of Texas Bar Association
24th Annual Bench Bar Conference October 14, 2021**

HON. BILL BRYSON, COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HON. RAY CHEN, COURT OF APPEALS FOR THE FEDERAL CIRCUIT

HON. GREGG COSTA, COURT OF APPEALS FOR THE FIFTH CIRCUIT

HON. JAMES HO, COURT OF APPEALS FOR THE FIFTH CIRCUIT

Moderated by Tom Leatherbury, Vinson & Elkins LLP/Southern Methodist University Dedman
School of Law First Amendment Clinic

The panel will address best practices for handling specific issues encountered during briefing and oral argument, including those in the questions below.

WRITTEN SUBMISSIONS, INCLUDING BRIEFS

What do you expect of counsel (both appellant's and appellee's) in discussing the district judge's rulings?

Does this matter if you believe the district judge gets reversed infrequently or more frequently?

What advice do you have about how many issues the appellant should generally raise?

What impact does a weak argument have on stronger appellate arguments that the party has?

Anecdotally, we've heard that the number of cross-appeals is increasing. Is that your experience, and what advice would you give a lawyer considering filing a notice of cross-appeal?

What should counsel do if s/he finds a factual or legal error that makes a difference in the brief before oral argument?

Should counsel submit "new" (but really old) authority that s/he did not cite in the briefs?

ORAL ARGUMENT

What is your advice for handling hypothetical questions?

Are analogies used in argument effective or distracting or both?

Is there a good response when a judge goes outside the record to cite new facts?

How should counsel respond to a judge who is openly adverse to counsel's position?

Do you have any suggestions for warming up a "cold" bench?

When is it best to sit down early and yield time back to the Court?

How should counsel handle a lengthy question that cuts into argument time, especially in rebuttal?

When, if ever, is it acceptable to interrupt a judge's question?

How should counsel handle a question s/he doesn't know the answer to?

What do you think of the question – "What's your best case on issue x?"

What is your opinion of the proper use (if any) of oral argument exhibits/benchbook?

Have you seen any oral argument exhibits that are more helpful than others?

MOTIONS FOR REHEARING AND REHEARING EN BANC

What guidance can you give counsel deciding whether or not to move for rehearing and/or rehearing en banc?

What should counsel consider in moving for panel rehearing but not rehearing en banc and vice versa?

Do you look differently at motions for rehearing that raise primarily factual points as opposed to those that raise primarily legal points?