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Oral Argument: An Endangered Species?



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As appellate lawyers, we treasure oral argument. It is our opportunity—our one and only opportunity—to speak directly to the judges and respond to their questions. As the late Chief Justice William H. Rehnquist once stated, “You could write hundreds of pages of briefs, and you are still never absolutely sure that the judge is focused on exactly what you want him to focus on.... [But] [r]ight there at the time of oral argument you know that you do have an opportunity to engage or get into the judge’s mental process.”¹

Many appellate judges say that they value oral argument because it helps them feel confident about the soundness of their decisions.² It is also an efficient opportunity, as a group, to address issues and resolve doubts.³ Former Illinois Appellate Court Justice Warren D. Wolfson commented in a law review article, “Orals help me focus my thinking and clarify the issues. I see more of what matters and does not matter. This leads to better writing and helps avoid mistakes.”⁴

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Does oral argument affect the outcome of appeals? Many judges say that it does. Even a judge comparatively indifferent to oral argument, Chief Judge Joel F. Dubina of the U.S. Court of Appeals for the Eleventh Circuit, calculated that his decision was changed “in no more than ten percent” of the cases.⁵ Retired Judge Paul Michel of the U.S. Court of Appeals for the Federal Circuit estimated that his decision was changed in 20 percent of the cases he heard.⁶ In a law review article, Judge Myron D. Bright, of the U.S. Court of Appeals for the Eighth Circuit, wrote that oral argument changed his perceptions in 31 percent of all the cases before him.⁷

If this were not enough to justify the time, effort and expense that are devoted to oral argument, there is also its effect on public perception. It is important for parties to know that judges (not only law clerks and judicial staff) pay attention to their cases.⁸ Oral argument “contributes to judicial accountability, enlarges the public visibility of appellate decision-making and safeguards against undue reliance on staff work.”⁹

Trend Toward Extinction in Federal Courts

Nonetheless, oral argument appears to be an endangered species. It survives at the U.S. Supreme Court and at some of the highest state courts. But in the intermediate appellate courts, which

have mandatory jurisdiction and decide the vast majority of appeals, oral argument is now “the exception rather than the rule.”¹⁰

In the federal circuit courts in 2010, according to government statistics, there was oral argument in only 26.4 percent of the cases that were decided on the merits.¹¹ At one extreme, the Fourth Circuit heard argument in only 382 of 2,966 cases that it decided on the merits (13.1 percent); the Third Circuit heard oral argument in 372 out of 2,526 cases (13.9 percent); and the Eleventh Circuit in 423 out of 2,943 cases (16.2 percent).¹² At the other extreme, the D.C. and Seventh circuits heard, respectively, 44.4 percent and 46.7 percent of the cases they decided on the merits.¹³

Even the U.S. Court of Appeals for the Second Circuit, which historically placed a high value on oral argument,¹⁴ is not immune to the trend. Since 2007, the Second Circuit has employed a screening process, and several classes of cases are decided without argument, including appeals from denials of asylum and “[a]ny other class of cases that the court identifies as appropriate.”¹⁵ Before 2007, the Second Circuit led the circuits in the percentage of appeals it decided on the merits after oral argument (a majority of its cases).¹⁶ In 2010, the Second Circuit still heard a higher absolute number of appeals than most other circuits, but of the total number of cases that it decided on the merits, only

37.7 percent were orally argued. (To add perspective, the Second Circuit decides a disproportionate number of administrative appeals.)¹⁷

The trend is toward further reductions.¹⁸ In addition, the courts have cut the time allotted to individual oral advocates.¹⁹

The Trend in State Courts

It is difficult to generalize about state appellate courts because states differ so much in their laws and practices,²⁰ but it is safe to say that oral argument occurs in an ever-smaller percentage of cases, and less time is allotted even when oral argument is granted.²¹ In a 2006 survey, courts in seven states reported that they decided most of their cases without oral argument. The Arkansas Court of Appeals heard oral argument in 33 out of 900 cases decided (3.7 percent). The New Mexico Court of Appeals heard oral argument in 39 cases out of 684 (under 6 percent). The Kentucky Court of Appeals heard 151 cases out of 1,274 (12 percent). In the same survey, New Jersey courts reported that they heard oral argument in 40 percent of their cases.²²

Fortunately for many of the readers of this article, the Appellate Division, First Department, still gives parties an opportunity to be heard in all “enumerated” appeals.²³ Thus, in the First Department, the parties—not the court—decide whether to be orally heard. In 2009, the rate of oral argument in the First Department was only 48 percent, suggesting that when oral argument is freely available, many parties choose to waive it.²⁴ However, we don’t know what percentage of the First Department’s decided cases are “non-enumerated.”²⁵

In the Second Department, which has an extremely high caseload, several issues will not be heard at all (for instance, the issue of “the legality, propriety or excessiveness of sentences” and some family law issues). In addition, the Second Department retains discretion to “deny oral argument of any cause.”²⁶ Nonetheless, in recent years, the court heard oral argument in 51 percent of its decided cases, on average.²⁷

The Third Department also declines to hear oral argument on some types of issues (for instance, the excessiveness of sentences) and in “any other case in which the court, in its discretion, determines that argument is not warranted.” In recent years, the Third Department heard oral argument in 41 percent of its cases, on average.²⁸

The Fourth Department declines to hear oral argument on some issues, as well as any case in which the court “determines that oral argument is not warranted.” In recent years, the court heard oral argument in 49 percent of its cases, on average.²⁹



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What are the causes of the decline, and what can be done?

The statistics do not tell us everything we would like to know. For instance, we do not know the proportion of cases in which the parties waived oral argument, nor do we know the proportion that involved pro se and/or incarcerated litigants. We also do not know what kinds of issues or parties tend to be screened out in the exercise of the courts’ discretion.

We do know that a valuable, time-tested part of our tradition is on a path to extinction in many jurisdictions. It is already true that in many cases, attorneys “have no idea” whether their briefs were read, or by whom.³⁰

In the intermediate appellate courts, which have mandatory jurisdiction and decide the vast majority of appeals, oral argument is now ‘the **exception** rather than the **rule**.’

What can be done to stop the trend of courts’ restricting or denying oral argument? The answer depends on the cause. It is widely accepted that the primary reason that courts have curtailed oral argument is increased caseloads.³¹ After 1960, there was an explosive rise in the number of federal appeals filed, which led the circuit courts to ration judicial time, “triage” cases, and severely curtail oral argument.³² (The number of appeals also increased in state courts, but varying “dramatically from state to state.”)³³

However, increased caseloads cannot be the whole story. Since 1960, the number of federal appellate judgeships also increased substantially—from 68 in 1960 to 179 today.³⁴ In addition,

technology has made chambers vastly more efficient since 1960 (think of e-mail, word processing, Lexis and Westlaw).³⁵ The drop in crime and laws restricting successive habeas petitions have led to fewer criminal and habeas corpus appeals.³⁶ Moreover, the number of federal appeals appears to have plateaued. In 2010, there were fewer new appeals filed than in 2001.³⁷

The second reason advanced for the curtailment of oral argument is more painful for lawyers to hear: It is that many judges feel that hearing oral argument is a waste of time, both because many appeals are meritless and because the quality of advocacy is low.³⁸

The quality of advocacy is something we can address. Our briefs need to show that we have arguments worth considering. We need to take seriously the faults in our briefs that judges most complain about—such as failure to engage seriously with the arguments raised by our adversaries, failure to address adverse authority, failure to acknowledge weaknesses, and lack of selectivity.³⁹

In addition, we need to approach oral argument with the reverence it deserves, preparing ourselves to converse with judges respectfully, to welcome their questions, and to have something to say that is not in our briefs. Unless we improve the quality of our written and oral advocacy, a valuable right may be lost.

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1. Quoted in Bright, “The Power of the Spoken Word: In Defense of Oral Argument,” 72 Iowa L. Rev. 35, 36-37 (1986). For a capsule history of the oral argument tradition, see Kravitz, “Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future,” 10 J. App. Prac. & Process 247 (2009).

2. See Bright, *supra* at 37-39 (reporting that in a study, “eighty percent of [appellate] judges said that oral arguments are very important to the resolution of cases”); Kravitz, *supra* at 269-71; Merling, “Advocacy at Its Best: the Views of Appellate Staff Attorneys,” 8 J. App. Prac. & Process 301, 313 (2006); Greene, “From the Bench—Oral Argument in the District Court,” 26 No. 3 Litig. 3 (2000); Michel, “Effective Appellate Advocacy,” 24 No. 4 Litig. 19, 23 (1998); Scalia & Garner, “Making Your Case” (2008) at 139.

3. See Hellman, “The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice,” 8 J. App. Prac. & Process 141, 183 (2006); Epstein, “Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument,” 39 J. Legal Stud. 433, 435 (2010); Binford, “Seeking Best Practices Among Intermediate Courts of Appeal: A Nascent Journey,” 9 J. App. Prac. & Process 37, 73-75 (2007).

4. Wolfson, “Caught in the Middle: The Role of State Inter-

mediate Appellate Courts,” 35 *Ind. L. Rev.* 451, 454 (2002).

5. Dubina, “How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit,” 29 *Cumb. L. Rev.* 1, *8 (1998-1999).

6. Michel, *supra* at 21. See also Hughey, “Effective Appellate Advocacy before the Federal Circuit: A Former Law Clerk’s Perspective,” 11 *J. App. Prac. & Process*, 402, 426-27 (2010); Wolfson, *supra* at 453 (reporting on a survey of state appellate judges).

7. Bright, *supra* at 38, fn 32-33. Judge Bright also noted that Eighth Circuit Judge George C. Fagg reported that oral argument changed his perceptions in 13 percent of the cases. See also judges quoted in Hellman, *supra*, at 182.

8. Hellman, *supra*, at 183-84. See Mosk, “In Defense of Oral Argument,” 1 *J. App. Prac. & Process* 25, 26 (1999); Bright, *supra* at 35.

9. Standards Relating to Appellate Courts, ¶3.35 (A.B.A. Commission of Standards of Judicial Administration 1977), cited in Marvell, “State Appellate Court Responses to Caseload Growth,” 72 *Judicature* 282, 290 (1989).

10. Wright & Miller, *Fed. Prac. & Proc. Juris.* §3980 (2011). See also Markey, “On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand,” 33 *S.D. L. Rev.* 371, 376-77 (1988); Baker, “Applied Freakonomics: Explaining the Crisis of Volume,” 8 *J. App. Prac. & Process* 101, 111-12 (2006).

11. See www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx (Admin. Off. of the U.S. Cts., “Annual Report of the Director: Judicial Business of the United States Courts,” U.S. Govt. Printing Off. 2010).

12. *Id.*

13. *Id.*

14. See Kravitz, “Developments in the Second Circuit: 1998-1999,” 32 *Conn. L. Rev.* 949, 1025 (2000) (“the Second Circuit is unique in its approach”); Lindquist, “Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts,” 41 *U. Rich. L. Rev.* 659, 680 (2007); Oakley, “The Screening of Appeals: the Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties,” 1991 *B.Y.U.L. Rev.* 859, 864 (1991) (remarking on the Second Circuit’s “null” model of screening and “norm favoring oral argument” except for pro se incarcerated litigants and where a hearing was waived with the approval of the presiding judge).

15. Local Rules 34.1(b) and 34.2.

16. In 1997, 64.9 percent of the Second Circuit’s cases decided on the merits were orally argued; in 2000, 60.1 percent; in 2001, 52.8 percent; in 2004, 58 percent; and in 2005, 54.5 percent. See www.uscourts.gov/Statistics/JudicialBusiness.aspx.

17. The Second Circuit decided 1,246 appeals after oral argument. The only circuit with comparable numbers was the Ninth (1,870 cases orally argued). See www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx; (statistics for the year ending March 31, 2010).

18. In 1997, 40 percent of all federal appeals decided on the merits received an oral hearing; in 1999, 37 percent; in

2001, 32 percent; in 2005, 30 percent; and so on. See www.uscourts.gov/Statistics/JudicialBusiness.aspx; and see the graphs in Lindquist, *supra* at 671-72.

19. When oral arguments are heard, the typical federal appeals court allots from 10 to 15 minutes to a side. Duvall, *supra* at 122; Dubina, *supra* at 7; Wright & Miller, *supra* (the default is “from 10 to 20 minutes” in most circuits).

20. For instance, in Alaska, “oral argument will be held if it is timely requested” by any party (Rules of Appellate Procedure §505), while in Indiana it is entirely within the court’s discretion whether to grant it (Rules of Appellate Procedure §52, 53).

21. Marvel, *supra* at 288-90 (in states with available statistics in 1984, 60 percent of appeals were orally argued—down from 75 percent a decade earlier—and 50 percent had reduced time limits). See also Hummels, “Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination,” 46 *Ariz. L. Rev.* 317, 321 fn 26 (2004); Hellman, *supra* at 182; Binford, *supra* at 79-80.

22. Binford, *id.*

23. N.Y.C.R.R. §600.11(f)(1)-(3).

24. See the Annual Report 2009, New York State Unified Court System at 15, at www.nycourts.gov/reports/annual/index.shtml. In the five years from 2005 through 2009, the rate of oral argument in the First Department averaged 45 percent.

25. Siegel, *New York Practice* 5th ed. (2011) §540, states that “most” enumerated appeals are orally argued.

26. N.Y.C.R.R. §670.20(a)-(d). www.nycourts.gov/reports/annual/index.shtml (2005-2009).

26. N.Y.C.R.R. §800.10(a)(5), (b)-(c).

27. See www.nycourts.gov/reports/annual/index.shtml (2005 through 2009).

28. N.Y.C.R.R. §800.10(a)(5), (b)-(c). And see www.nycourts.gov/reports/annual/index.shtml (2005-2009).

29. N.Y.C.R.R. §1000.11(a)-(c). And see www.nycourts.gov/reports/annual/index.shtml (2005-2009).

30. Comment quoted in Hellman, *supra* at 181. See also Markey, *supra* at 376-77; Baker, *supra* at 111-112. And see Oakley, *supra* at 859 (noting that in most federal appellate courts, a “centrally-organized, parajudicially-supervised group of staff attorneys” is relied on to screen cases); Carrington, “A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts,” 9 *J. App. Prac. & Process* 231, 234, 241 (2007) (“many, many appeals are decided by memoranda written by staff attorneys subject to nominal oversight”).

31. Wright & Miller, *supra*. And see Tobias, “Suggestions for Studying the Federal Appellate System,” 49 *Fla. L. Rev.* 189, 209 (1997).

32. Baker, *supra* at 109-110; Oakley, *supra* at 871-72, 873-74 (citing the “crisis of volume”); Martineau, “Appellate Justice in England and the United States” (William S. Hein & Co. 1990) at 155-57 (“overwhelming” growth led to “increased use of staff”); Lindquist, *supra* at 661-62.

33. Baker, *supra* at 104 fn 7; Martineau, *supra* at 156.

34. See www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx.

35. Baker, *supra* at 105, 108-109.

36. Judicial Business of the United States, Annual Report of the Director (2010) at 12 (“[c]riminal appeals dropped 7 percent”).

37. www.uscourts.gov/Statistics/JudicialBusiness.aspx. And see Hellman, *supra* at 178-81 (noting that by 2004, there was no longer a “sense of crisis” about caseloads).

38. See, e.g., Carrington, *supra* at 241 (“I frequently heard...that the infrequency of oral argument is insignificant because so many of the lawyers...are simply not worth listening to”); Mosk, *supra* at 25; Baker, “Proposed Intramural Reforms: What the U.S. Courts of Appeal Might Do to Help Themselves,” 25 *St. Mary’s L.J.* 1321, 1351 (1994) (“The prevailing perception of the docket crisis is that a large number of appeals are frivolous or hopeless”); Hellman, *supra* at 183 (“most oral argument is not well done”); Martineau, “The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom,” 72 *Iowa L. Rev.* 1, 33 (1986) (describing oral argument as “little more than a waste of time”).

39. See, e.g., Cole, “An Interview with Steve Shapiro,” 23 *No. 2 Litig.* 19, 26 (1997) (“The court wants briefs that respond to the difficulties in the case as opposed to briefs that treat the other side’s submissions as being utterly frivolous and which fail to come to grips with the real difficulties.... Two such briefs are like ships passing in the night”); Ginsburg, “Remarks on Appellate Advocacy,” 50 *S.C.L. Rev.* 567, 568 (1999) (“Above all, [a first-rate brief] is selective. It resists making every possible argument.”); Posner, “Convincing a Federal Court of Appeals,” 25 *No. 2 Litigation* 3 (1999); Hughey, *supra* at 405-424.

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