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In Defense of Oral Argument

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IN DEFENSE OF ORAL ARGUMENT

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Recently, many critics have maintained that oral argument to an appellate tribunal adds little if anything to the ultimate result of a contested case.[1] There are even those who rate oral argument as a pure waste of time. I remain a modest dissenter on that point of view.

For a small but significant number of jurisdictions, the default provision is for *no oral argument* unless the parties affirmatively request it or the court explicitly orders it.[2] A number of courts deny the right to oral argument if it is determined that the appeal is frivolous, the dispositive issue has already been authoritatively decided, or, given the simple or routine nature of the case, settled principles of law will govern its disposition.[3] In these instances, the rationale for denying oral argument is that it would serve no useful purpose.

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* Justice, California Supreme Court.

1. *See, e.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 294 (NITA rev. ed. 1996) ("[W]hen I change my mind at oral argument, more often than not it is because the performance at argument did not meet the promise of the brief. My mind was changed because the argument did not properly defend the brief. The case was not won at oral argument; it was lost.") (Ruggero Aldisert is a Senior Judge of the United States Court of Appeals for the Third Circuit.).

In a 1984 ABA study, Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit wrote that "[o]ral argument is important to me because it is the only time that all of the members of the court and all of the lawyers are together to discuss the case." *See* Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 69. He also revealed, however, that out of 157 cases heard over a ten-month period, oral argument failed to change his mind in 131 of them. *Id.* at 68, 70.

2. *See, e.g.*, KAN. R. S. CT. 7.01(c)(4) (summary calendar cases); LA. UNIF. R. CTS. APP. 2-11.4; MICH. APP. R. 7.214(A); N.M. APP. P. 12-214(A); N.Y. R. CT. § 600.11(f)(3) (nonenumerated appeals); OKLA. S. CT. R. 1.9.

3. *See, e.g.*, ALA. R. APP. P. 34(a); ARK. R. S. CT. 5-1(a); ARIZ. R. CIV. APP. P. 18; CONN. R. APP. P. § 70-1; KAN. R. S. CT. 7.01(c); ME. R. CIV. P. 75C(f); ME. R. CRIM. P. 39D(f): MICH. APP. R. 7.214(E); MINN. R. CIV. APP. P. 134.01(d); MISS. R. APP. P. 34(a); UTAH R. APP. P. 29(a).

In almost all courts, the amount of time allocated for oral argument has diminished over the years. The shrinking time allotment for oral argument may be an indicator of some courts' view of the value of oral argument. As one state court appellate justice explained, "When I first went on the [Nebraska] Supreme Court in 1978, we allowed 30 minutes to a side for argument. We have now reduced that to 10 minutes a side, with some exceptions, and we have found that the quality of the argument has improved tremendously."[4]

For oral argument to be meaningful and useful, the lawyers and the judges have to prepare their respective roles with diligence and dignity. I recall a justice on the California Supreme Court some years ago who would interrupt counsel's oral presentation at the outset with this critique: "Is your argument in your brief? If so, there is no need to repeat it here. If it is not, why not?" The beleaguered counsel was then required to explain his technique rather than to devote his limited time to the substance of his contention. If the few minutes that courts can grant to oral argument are to be worth their while, all participants must understand the benefits and challenges that oral argument provides.

First, I believe oral argument to an appellate tribunal serves the public interest. Primarily it enables the client—a member of the public—to have his point of view presented out in the open to the reviewing court. He believes it is his right, and for that purpose he engages an attorney to make his voice heard. In addition, the argument and its subsequent reporting in the media enable members of the public to hear and understand the contentions of the conflicting litigants. Ordinary observers cannot be expected to seek out the respective briefs, unless, of course, they have a peculiar or potential financial interest in the result of the litigation. Nor must they be expected in every instance to merely wait months for the ultimate published opinion.

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4. Chief Justice William C. Hastings of the Nebraska Supreme Court, *quoted in* ALDISERT, *supra* note 1, at 303. For a different theory on the reasons for the diminution of oral argument time, see 16A CHARLES ALAN WRIGHT, ARNOLD R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3980 (West 1996) ("The unrestricted opportunity to argue orally before a court of appeals has become one of the victims of the ever-increasing caseloads of the circuits.").

Second, skillful interrogation of counsel from the bench may reveal how a proposed legislative or judicial rule will actually perform in day-to-day practice. This may often be accomplished by suggesting hypothetical circumstances or by asking counsel to offer such possibilities.

Third, not infrequently oral argument develops a new issue overlooked or not adequately briefed. This gives the court an opportunity to instruct counsel to prepare supplemental briefing during a specified period.

And finally, oral argument provides an important forum for an interchange of ideas between counsel and the judges, and between the judges themselves. The members of the court are given the opportunity to probe, to seek answers to questions that may have arisen in their minds. A justice may challenge his own temporarily formed opinion about the case by probing questions pro and con on the position he may have in mind. And, on perhaps rare occasions, attorney responses to questions from the bench may alter a previous tentatively reached conclusion.[5] Further, appropriately designed questions by one justice may convince a doubtful colleague who had previously indicated reservations to reach a preferred conclusion. Senior Judge Frank Coffin, of the First Circuit Court of Appeals, expresses the interaction between judges during oral argument well:

> By their questions and comments to counsel, judges telegraph their concerns and preferences to other judges. Oral argument is really the first stage of the conferencing among the judges. How often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye.[6]

A healthy interchange between counsel and the judges is encouraged only if questions from the bench are relevant and

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5. *See* Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, LITIGATION, Winter 1994, at 3, 4 ("[I]n many cases, the helpfulness of oral argument is overrated. It can, however, make the difference in a close case. . . . I have seen cases where good oral argument compensated for a poor brief and saved the day for that litigant. I have also seen effective oral argument preserve the winning of a deserving case.") (Judge Dubina sits on the United States Court of Appeals for the Eleventh Circuit.).

6. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 132-33 (1994).

stated briefly to allow counsel adequate time to reply. I have observed instances in which a lengthy query from the bench to counsel was made in his five-minute rebuttal time. Not only could he not adequately respond, but also his planned rebuttal had to be abandoned at the expiration of his brief five minutes.

Attorneys who adequately prepare and anticipate the questions that will likely come from the bench have a distinct advantage. But it is seldom possible to consistently out-guess the bench. Justice Jackson put his experience this way:

> I used to say that, as Solicitor-General, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.[7]

On occasion there is the problem of injection of humor in the course of oral argument. It may be by a justice, in which event the polite response of counsel could be crucial. If it is by an attorney he should be confident of his judicial audience. I have a favorite example of good-natured humor, not offensive to the parties or their presentation, or decisive on any issue. It involved the former Chief Justice of California, Malcolm Lucas, who had a wry sense of humor.

A small community in California passed a local ordinance prohibiting fortune telling within its city limits. A fortuneteller named Fatima Stevens brought a lawsuit seeking an injunction against enforcement of the ordinance. Obviously there were serious First Amendment problems with the ordinance, which was a total prohibition—not a regulation or a licensing—of the activity. However, the fortuneteller lost in the courts below, and our Supreme Court granted a hearing.

As counsel for the fortuneteller rose for oral argument to present her case, Chief Justice Lucas said, "Counsel, you have us at a disadvantage."

The attorney was perplexed. "Why, Your Honor?"

"Well," said the Chief Justice, "hasn't your client told you how this case will ultimately turn out?"

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7. Justice Robert Jackson, *quoted in Resolutions In Memoriam Mr. Justice Jackson*, 99 L. ED. 1311, 1318 (1955).

I could not have conceived of an appropriate response to that judicial hand grenade. But this attorney was up to the challenge. "No, Your Honor," he replied. "You must remember I did not consult my client for advice. She consulted me."

Touché. All in good taste, lightening any tension and yet not interfering with consideration of the serious aspects of the case. Incidentally the fortuneteller ultimately prevailed unanimously.[8]

Of course, for oral argument to be an effective tool, it must be adequately undertaken.[9] It has been said counsel should not attempt a two-foot leap over a ten-foot ditch. The rules of professional conduct do, after all, require attorneys to exhibit "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[10]

A poorly presented oral argument may not only damage a client's case, it may negatively affect the client's view of an attorney's performance. Indeed, I have recently heard of attorneys being sued by their former clients for allegedly incompetent oral argument. Although some allegations of poor performance may be based on concessions unadvisedly made by counsel, the greater number will be grounded in counsel's apparent lack of preparation, and on occasion, on counsel's inadequate responses to questions from the bench. While there is still no convincing authority on charges of attorney negligence based on inadequate or improper oral argument, there will likely be cases on this subject in the future. Whether such incompetent representation rises to the level of negligence may well become a factual question for a jury.

Although recently critics of oral argument have been numerous and outspoken, I believe most appellate judges would agree that oral argument performed effectively is of crucial significance. Careful and thoughtful preparation and participation—by both the attorneys and the appellate judges—

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8. *See* Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 703 P.2d 1119 (Cal. 1985).

9. At least one commentator has argued that parties should always hire appellate specialists to handle their appeals. *See* Dennis J.C. Owens, *New Counsel on Appeal?*, LITIGATION, Spring 1989, at 1.

10. MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.1 (1996).

will ensure that oral argument continues to positively contribute to the decision-making process.