ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

LOS ANGELES

SUMMER/FALL 2018

## SOME THOUGHTS ABOUT ORAL ARGUMENT IN THE CALIFORNIA COURT OF APPEAL

*David M. Axelrad*

It used to be that appellate advocacy consisted entirely of oral argument, and the greatest appellate lawyers were the greatest orators, such as Daniel Webster. (See, e.g., Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief* (1999) 1 J. App. Prac. & Process 1, 1-2; Waxman, *In the Shadow of Daniel Webster: Arguing Appeals in the Twenty-First Century* (2001) 3 J. App. Prac. & Process 521, 523.) There were no written briefs, and the argument itself would at times continue for days. For example, in the United States Bank case, *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316 [4 L.Ed. 579], six of the most prominent lawyers in the country at the time, including Webster, argued for nine days. (1 Warren, THE SUPREME COURT IN UNITED STATES HISTORY (1926) p. 507.)

After 1821, when the United States Supreme Court began to require printed briefs, dependence on written briefs grew, and oral argument was curtailed. (Former U.S. Supreme Ct. Rules, rule XXX, 19 U.S. (6 Wheat.) § v (1821) (repealed 1943); *see Hall*, OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES (2005) p. 108; Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States* (1994) 38 Am. J. Legal Hist. 482, 482-483.) State appellate courts followed a similar trajectory. (Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future* (2009) 10 J. App. Prac. & Process 247, 253-254 (Kravitz); see Ehrenberg, *Embracing the Writing-Centered Legal Process* (2004) 89 Iowa L.Rev. 1159, 1183.) Today, by the author's calculation, only 14 states give parties to an appeal a right to oral argument. In all other states and in the federal system, the appellate courts have authority to dispense with oral argument in cases where the court concludes that argument would not assist the decision-making process.

Nonetheless, oral argument continues to play an important role. It allows the public to see justice in action, helping to ensure confidence in the judiciary and the judicial process. (Kravitz, *supra*, at pp. 263-264, 267.) It is the one opportunity for a face-to-face dialogue, a chance to respond to the judges' concerns, clarify facts or issues, answer questions that may be troubling the court, and explore the legal and policy implications of a particular holding. (Kravitz, *supra*, at pp. 264-266.)

California allows oral argument as a matter of right in all direct appeals. (Cal. Rules of Court, rule 8.256; *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 871-872; *People v. Brigham* (1979) 25 Cal.3d 283, 285-289.) But the state Constitution does not confer the right, although the Supreme Court has said that it is "'implicit'" for appeals. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1256 [holding there is no right to oral argument before issuance of a peremptory writ in the first instance; "Nothing in the history of (article VI, sections 2 and 3 of the California Constitution) indicates that their drafters intended or believed that there should be or is a constitutional right to oral argument in all causes decided by an appellate court on the merits"].) "Where, as in the

present case [review of a State Bar disciplinary decision], governing decisions, statutes, and rules do not contemplate oral argument, the constitutional provision does not confer such a right independently." (*In re Rose* (2000) 22 Cal.4th 430, 455.)

The current rule allows "[e]ach side . . . 30 minutes for argument," "[u]nless the court provides otherwise by local rule or order." (Cal. Rules of Court, rule 8.256(c), (c)(2).) While many Courts of Appeal give the parties discretion to argue for the full 30 minutes, some Courts of Appeal have taken advantage of the flexibility available under the rules to impose limitations.

For example, the Third Appellate District, in its local rule 3, provides: "Each side is allowed 15 minutes for oral argument, . . . [¶] Any request for additional time for oral argument must be made by written application submitted to the court within 10 calendar days of the date of the order setting oral argument. The application must be served contemporaneously on all other parties and must specify the amount of time requested and the issues to which additional oral argument will be addressed. When an application is granted, the time allotted to the other side or sides will be similarly enlarged." (Ct. App., Third Dist., Local Rules, rule 3, Time for Oral Argument.) The Fourth Appellate District, Division One has a similar rule. (See Ct. App., Fourth Dist., Div. One, Misc. Order No. 061218.)

I believe the effectiveness and value of oral argument in California's Courts of Appeal can be improved if the courts take advantage of the opportunity provided by the existing Rules of Court to limit or expand oral argument in certain cases. The rules are sufficiently flexible to allow the Court of Appeal to account for the fact that some cases deserve more discussion at oral argument than others. There are many cases in which a short argument, no more than a few minutes, gives the parties a full opportunity to present their case and respond to the court's questions. Conversely, there are cases that should be allotted more than 30 minutes per side because of the complexity of the issues or the number of parties. Adjusting oral argument to meet the needs of the case is an important case management tool.

I also believe the effectiveness of oral argument increases when the court gives the parties a preview of its thinking, by issuing a "focus letter" identifying the issues of concern, or a tentative opinion, before oral argument. The Court of Appeal in Riverside, California (Fourth District, Division Two) issues tentative opinions in every case 30 days before oral argument. These are full opinions that lack the names of the participating justices but include record citations that are usually removed in final opinions. Recently other Courts of Appeal have begun to experiment by sending "focus letters" prior to argument directing the parties' attention to issues of concern, or by providing very short summaries of the court's tentative decision before argument begins. Those experiments should also continue and, hopefully, expand.

Finally, I disagree with those who claim that oral argument never affects the outcome of an appeal. While the justices may have already written a draft opinion before they take the bench, justices and their staff are human. Mistakes or misunderstandings can surface at oral argument. Even if only infrequently, an oral argument can and does change minds about the proper outcome of an appeal.

We will never return to the days of oral argument when appellate advocates would command the court's attention for days at a time. But oral argument still serves a valuable function in the appellate process, and both bench and bar should strive to improve it.

***David M. Axelrad*** *is a partner at Horvitz & Levy LLP in Burbank.*