Commentary: It's Time to Re-think Oral Argument

Martin J. Siegel Contact All Articles
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Today's appellate oral arguments are the miniaturized descendants of much heftier beasts. Yet as the time devoted to oral argument and even its basic reason for being have changed, its archaic format hasn't. Some experimenting may now be in order.

Oral presentations were once the cake and not just the icing of appeals.

The British appellate system had no briefing at all but relied exclusively on extended oral argument, which carried over to America, wrote University of Cincinnati College of Law professor Robert J. Martineau in "The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom" in the October 1986 issue of the *Iowa Law Review* .

When Daniel Webster handled the famous Dartmouth College case in 1818, oral argument lasted three days, according to former 11th U.S. Circuit Court of Appeals Chief Judge Joseph Hatchett and Robert J. Telfer III in "The Importance of Appellate Oral Argument" in the fall 2003 issue of the *Stetson Law Review* .

The U.S. Supreme Court did not require written briefs until 1821, and even then they were just a few pages with no argument — a component not required until 1884, noted former U.S. Supreme Court Chief Justice William H. Rehnquist in a winter 1999 article in *The Journal of Appellate Practice and Process* , "From Webster to Word-Processing: the Ascendance of the Appellate Brief." Rehnquist wrote that, as late as 1925, briefs were not circulated to the justices until very shortly before argument, so the lawyers' oral presentations supplied the first impressions of the case.

Because oral arguments originally were designed to introduce the appeal and cover it in detail, the format lent itself to lawyers giving speeches. Attorneys stood in the well of the court at some distance from the judges, who listened quietly until they heard enough to ask questions.

Oral argument has now shrunk to a few minutes, and briefs have replaced orations as the main vehicle for imparting information about the case. What judges want now from oral arguments are answers. Hatchett and Telfer quoted former U.S. Supreme Court Justice Byron White's view that he and his fellow justices "treat lawyers as a resource rather than as orators who should be heard out according to their own desires."

Given the modern purpose of appellate argument, lawyers often are urged to be conversational.

Judge Jacques L. Wiener Jr. of the 5th U.S. Circuit Court of Appeals advised practitioners in his November 1995 article, "Ruminations From the Bench: Brief Writing and Oral Argument in the Fifth Circuit" in the *Tulane Law Review* that, by the time of argument, the court of appeals "is quite familiar with the case, so treat oral argument as a 'discussion.' "

Hatchett and Telfer counseled in their article, "A great way to approach an oral argument is to think of it as the preliminary conference for deciding the case." Later, they continued, "[A]n advocate at oral argument should attempt to engage in a conversation with the judges and be prepared to answer questions that the judge may have."

Table Talk

Although the purpose of argument has changed, the old format hasn't. Yet it's hard to have much of a conversation with someone who is several feet away and peering downward while a small yellow light signals imminent muzzling. Martineau proposed in his article that an updated format may be better suited to what oral argument has become.

He suggested lawyers and judges share a conference table with case materials spread out before them. They could review testimony or exhibits together in close quarters, facilitating communication and solving the age-old problem of how to use demonstrative materials during appellate argument. Lawyers could take turns addressing the same question, ensuring issues aren't lost in the shuffle or covered only by one side. The more relaxed setting could also put

attorneys, especially those who don't often appear in appellate courts, at greater ease, improving their advocacy.

The judges could supply counsel with their initial questions in advance, so they arrive better prepared to address what's on the judges' minds. More planned, thoughtful answers should enhance the overall discussion and give counsel the best shot at changing a judge's mind if she is leaning one way or the other after reading the briefs. The quality of appellate decisions should improve accordingly. Some appellate courts in California and Arizona provide tentative decisions to lawyers before argument for this reason.

Coming full circle, this less-formal procedure would bring the American legal system back into line with the mother country, where appellate courts now conduct sessions akin to what Martineau proposed. Some appeals might be ill-suited to a change in format. In cases of unusual importance, a traditional argument does more than give judges a chance to obtain answers to questions raised by the briefs; it also helps air issues of public interest, teaches people about the work of the courts and lets parties make their cases to a wider audience.

But a more conversational format may work better for intermediate appellate courts and more conventional cases. For this class of appeals, which encompasses most of the docket, some Texas courts might consider experimenting with a revamped format tailored to the current reality of oral argument. Perhaps a pilot project, used in cases where the parties consent, could help determine whether the model lawyers know so well could use a long overdue tune-up.

Martin J. Siegel handles complex civil appeals and trial court briefing and argument with the Law Offices of Martin J. Siegel in Houston. His e-mail address is martin@siegelfirm.com.