

Let's Revamp the Appellate Rules Too

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Now, how about the appellate rules? As the preceding articles in this issue explain, big changes intended to streamline litigation in district court have come to the Federal Rules of Civil Procedure. Most important, the new Rule 26 aims to ease the burden of discovery on parties and lawyers, making litigation faster and cheaper. In the same spirit, maybe it's time to take a closer look at appeals.

Appellate motions, briefs, and oral arguments are overly formal, redundant, and time-consuming, and there are obvious ways tweaking the rules and incorporating basic technologies could greatly simplify all three. The status quo is fine for lawyers and judges, who are well versed in current practice. But inefficient and unnecessary procedures add to the time needed to handle an appeal and so harm litigants by imposing unnecessary cost.

Before getting into specifics, it's worth stating my underlying (if head-bangingly obvious) premise up front: Legal procedures should be as easy and affordable as possible without compromising the quality of judicial decision-making. The first duty of courts is to the public—not judges or lawyers. Familiar ways of doing things may be comfortable or convenient for the bench and bar, but if they add cost while only marginally or occasionally improving the quality of appellate decisions, the basic interest of litigants in less expensive justice should prevail.

Some of my proposals may save clients only a few hundred or thousand dollars by eliminating an hour or two of billing here and there. Others could save much more. But what client wouldn't prefer to keep even small sums of money rather than spend them on lawyers? And even small amounts multiplied by thousands of appeals add up to untold millions in legal waste.

Let's start with motions. Appeals routinely feature motions for extensions of time to file briefs. These aren't difficult or complex, but it still might take a lawyer or her assistant an hour or two to locate an old one to use for form, recheck the applicable rules, seek consent from opposing counsel, decide which reasons to give, draft persuasively, proofread, and file. Why not replace it altogether with a 10-minute form email to the clerk and opposing counsel, at least for standard initial extensions? No chasing down your adversary—he simply has to object by responsive email within a certain time or is deemed to have consented. Alternatively, the electronic court filing system could lead users through a series of clicks to seek the extension, asking for a choice of predetermined reasons (“Conflicting obligations”), time requested (“30 days”), and so on. First extensions are routinely granted, so the process should be as quick and easy as possible. Some courts, like the Fifth Circuit, permit parties to seek certain agreed extensions by phone, which would be an equally good change.

Other run-of-the-mill motions could also be handled more efficiently by email or online forms, such as those seeking longer word limits or requests concerning argument. Courts could make the emails publicly available online, as motions are now.

The Burden of Redundancy

When it comes to briefs, there are several ways to simplify and shorten them so lawyers save time and clients save money. Here too, it might help to start with my underlying premise. I assume someone at the court of appeals—hopefully one or more judges, but at least a staff attorney or law clerk—will read or at least closely skim *the entire brief* before deciding the appeal.

Yes, state and federal courts of appeals are overburdened. “Whereas in 1950 [federal] circuit judges had to review an average of only 73 appeals, their modern counterparts must decide more than four times as many, with an average of 329 appeals per annum today.” Marin K. Levy, *Judging Justice on Appeal*, 123 *YALE L.J.* 2386, 2388 (May 2014). Some judges and scholars now speak of two appellate tracks—one for the more complex or important appeals, which receive close scrutiny from judges

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A Judge Comments

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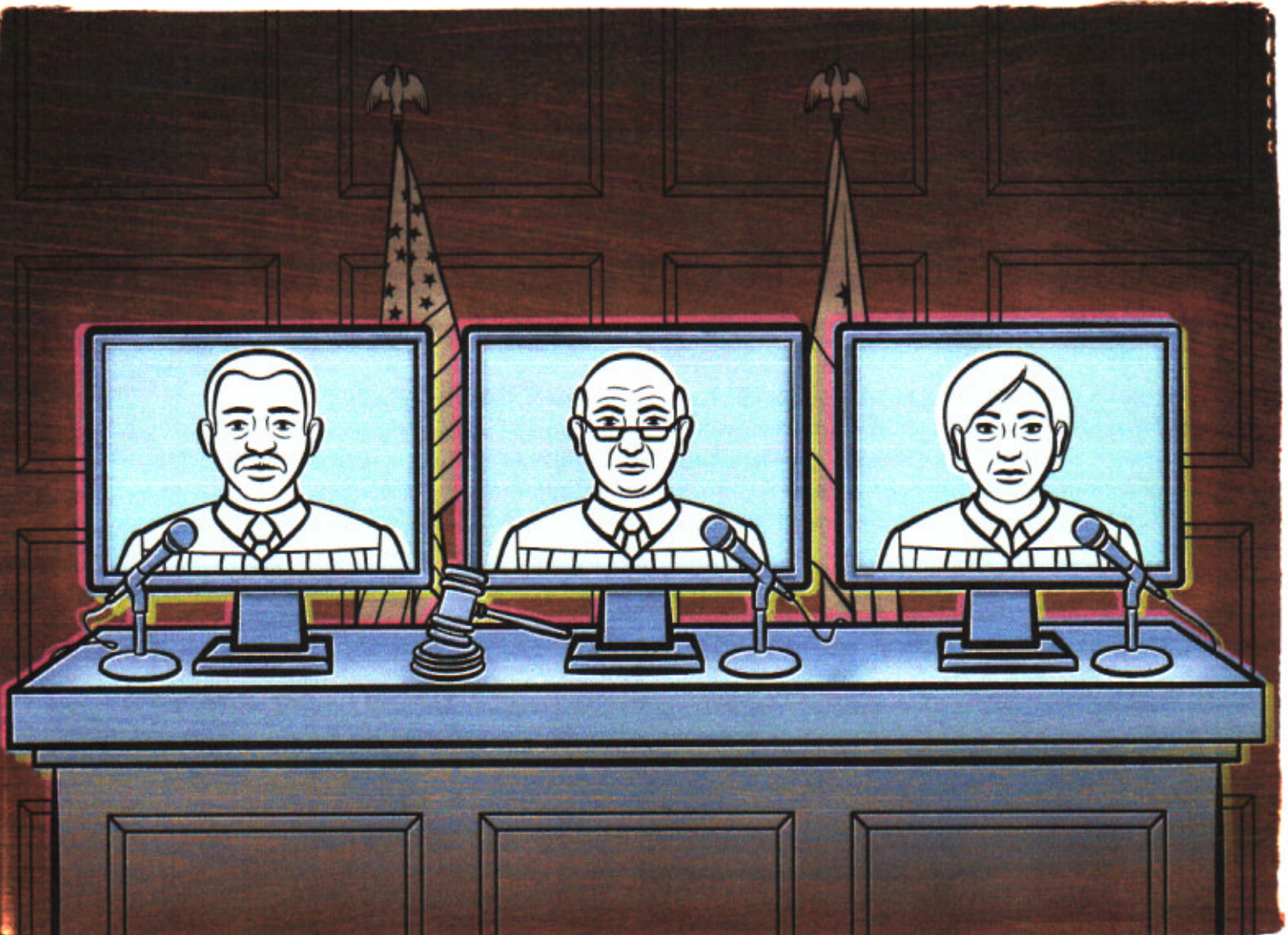
When is the last time you wrote an appellate brief and deliberately omitted any mention of the dispositive fact or point of law that wins your case, just so you could spring it out at oral argument?

I suspect never.

One of the dirty little secrets of appellate practice is that oral argument rarely changes anything, and that’s not because we appellate judges are geniuses who have mastered all human knowledge. Rather, it’s because we’ve read your briefs, in which you’ve told us in writing, often ad nauseam, what the law and the facts are, what your position is, and why.

If you’ve done your job of presenting a well-researched, cogent

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and staff as before, and one for more routine cases, which are screened and diverted by staff attorneys or law clerks for quicker determinations without argument. *See id.* Still, at every state and federal court of appeals, *someone* is presumably reviewing the whole brief before the case is decided.

If that's the case, why do federal and state appellate rules require briefs to have so many repetitive sections? Two of these stand out: the summary of argument and the statement of issues presented for review. *See, e.g.,* FED. R. APP. P. 28(a). By the time the reader of an appellate brief reaches the summary of argument, he will have seen at least one and likely two other condensed versions of the same legal points. The first of these is the table of contents, which lays them out in headings usually drafted as positive statements encapsulating the party's positions. Second, most briefs in complicated cases also feature introductions previewing the main arguments. Surely, we can live without a third summary right before the reader takes in the arguments themselves. It's usually destined to be forgotten anyway, once the arguments have been read.

Admittedly, some judges like the summary of argument. Justices Thomas and Alito have called it the most useful part of Supreme Court briefs, though Justice Scalia wonders why it exists:

Why would I read the summary if I'm going to read the brief? Can you tell me why I should read it? Should I feel guilty about not reading it?... Maybe it's there for those judges who don't intend to read the brief.

Transcripts of Interviews with Supreme Court Justices, SCRIBES J. LEGAL WRITING 74 (Bryan A. Garner ed., 2010), <http://legaltimes.typepad.com/files/garner-transcripts-1.pdf>. But as with all things that impose cost on litigants, the question shouldn't be, "do some judges like it?" It should be, "can we reasonably do without it?"

Lots of appellate lawyers think so, for whatever that's worth. Opposing a proposal to reduce the word limit in federal appellate briefs, the Council of Appellate Lawyers, part of the Appellate Judges Conference of the ABA's Judicial Division, suggested that the advisory committee instead "consider eliminating the requirement of a summary of argument or otherwise altering the structure of briefs to try to improve their quality and lessen the occurrence of repetition." Council of Appellate Lawyers, *Comments on Proposed Amendments to the Federal Rules of Appellate Procedure Before the Advisory Committee on Appellate Rules* (Feb. 13, 2015), [http://howappealing.abovethelaw.com/ABA_CAL_final_comments_re_proposed_FRAP_amendments\(with_member_comments\)_4833-2898-5890_v.pdf](http://howappealing.abovethelaw.com/ABA_CAL_final_comments_re_proposed_FRAP_amendments(with_member_comments)_4833-2898-5890_v.pdf).

Issue statements are also redundant. The best issue statements embody subtle advocacy, and lawyers and commentators strenuously debate how best to write them. But as with the

summary of argument, the information and advocacy that issue statements contain appear in several other parts of the brief: the table of contents, the introduction, and the argument. And like the summary, issue statements are mostly forgotten by the time the reader finishes the brief.

True, issue statements play a different and vital role in petitions and briefs to supreme courts. In that forum, issue statements specifically describe what the party wants the court to address and may also limit what will be decided. They can make or break whether the court decides to hear the case. But intermediate appellate courts take all comers, and by the end of the brief in that court—really by the end of the table of contents—judges will know what the issues are. If counsel hasn't managed to convey them by the end of the brief, ordering him to do so in the form of issue statements won't make much difference.

Proof that judges can get along just fine without summaries of the argument or issue statements is found in the appellate rules of several states that omit them. Appellate courts in California, Michigan, New Jersey, New York, North Carolina, Ohio, and other states don't require a summary of argument. *See* CAL. R. CT. 8.204(a); MICH. CT. R. 7.212; N.J. R. APP. PRAC. 2:6-2(a); 22 N.Y. CT. APP. R. 500.13(a); N.C. R. APP. P. 28(b); OHIO R. APP. P. 16(A). Some states do without the statement of issues. *See, e.g.,* CAL. R. CT. 8.204(a); FLA. R. APP. P. 9.210; N.J. R. APP. PRAC. 2:6-2(a).

Then there is the jurisdictional statement required of appellants' briefs in federal and many state appellate courts. *See, e.g.,* FED. R. APP. P. 28(a)(4). Because most appeals don't feature weird or knotty jurisdictional problems, there is no reason to include this in every appellant's brief, particularly when district and appellate courts generally perform their own jurisdictional review. As one judge has written, "we will examine our jurisdiction *sua sponte* at any and every stage of the proceedings—after briefing and even on occasion after argument." Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 191 (Nov. 1995). In many courts, staff attorneys screen the appeal for jurisdiction early on, and appellants have to file forms at the outset of the appeal explaining the basis for jurisdiction. *See, e.g.,* LAURAL HOOPER, DEAN MILETICH & ANGELIA LEVY, *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS* 15–17 (Fed. Judicial Ctr., 2d ed. 2011). In the unusual case where jurisdiction is questionable, the court can always solicit arguments on the subject from the parties.

Requirements that parties discuss the standard of review are also unnecessary. *See, e.g.,* FED. R. APP. P. 28(a)(8)(B). In the vast majority of cases, the standard is obvious and the judges are already more familiar with it than counsel. Yet clients are charged as lawyers obligatorily research and write up the latest and greatest statement of how to review summary judgments. The less experienced or knowledgeable the lawyer, the higher

the cost. As with jurisdictional statements, this should be limited to special requests of specific parties in the rare cases in which the standard of review is uncertain.

In reality, all that judges need to decide appeals are (1) a discussion of relevant facts, (2) a brief sketch of the procedural history bearing on the appeal, (3) legal argument, and (4) a request for specific relief. Litigants should not be required to pay for much more than this, at least in most cases in the intermediate appellate courts. Drafting and proofreading unnecessary parts of briefs cost clients thousands of dollars, depending on rates and how many lawyers get involved. They also lengthen the brief, though judges constantly admonish lawyers to shorten them.

At least one state has successfully shorn the appellate brief of its redundancies. In Georgia, an appellant's brief need only contain a statement of the procedural history and facts, a list of the errors in the lower court, and argument (including the standard of review). See GA. CT. APP. R. 25(a). The appellee's brief is purely facts and argument. See *id.* Yet the quality of Georgia's appellate decisions is presumably no lower than anywhere else.

Courts reluctant to order major changes to appellate briefs might at least consider giving parties the option. In Minnesota, parties can file an "informal brief," if the court agrees, containing only "a concise statement of the party's arguments on appeal." MINN. R. CIV. APP. P. 128.01(a). Minnesota appellate courts "will likely authorize informal briefs if both parties agree. . . . An informal brief will usually resemble a well written memorandum of law submitted to the trial court. It may also take the form of a letter to the court." DIANE B. BRATVOLD & PAULA D. VRAA, 5A MINNESOTA PRACTICE: METHODS OF PRACTICE § 1.79 (4th ed. 2015). New Jersey also lets parties file letter briefs of fewer than 20 pages in lieu of standard briefs. See N.J. APP. R. 2:6-2(b). These are limited to a table of contents, a procedural history, a statement of facts, and argument. See *id.*

Oral Argument

Oral argument might be the facet of appeals most ripe for reform. Like most appellate practitioners, I love oral argument. Compared with the drier, lonelier spade-work of research and brief-writing, oral argument offers the temporary high of performance—what trial lawyers get from a closing. Matching wits with adversaries and well-prepared judges in grand, high-ceilinged spaces is great fun. Throw in lodging and dining in New Orleans—many of my cases are in the Fifth Circuit—and the experience is even better. Still, flying to a different state for 20 minutes of trying to answer questions sprung by surprise strikes me as a grossly inefficient way to help judges complete their analysis of an appeal.

Thinking about oral argument can benefit from a bit of history because we didn't end up with our current version by design.

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brief, then what you say in oral argument is almost always a rehash of what you've written. If we judges didn't have a crushing backlog, or if we had unlimited time, it wouldn't be such a big deal to travel to San Francisco, New Orleans, or wherever, and spend several hours a week in open court listening to oral renditions of the very same things we just got finished reading.

John Henry Wigmore famously said that the rules of relevancy are an accommodation to the shortness of human life. I think the same can be said of submitting most appeals on the briefs. In my experience, the cost of oral arguments in terms of judicial and lawyer time, money, and decisional delay usually outweighs the benefits. Time spent listening to a reiteration of what we've already read is time not spent on other cases.

Like everything involving the law, there are a few exceptions. Some lawyers don't write well. They need oral argument to articulate what they can't seem to convey in writing. Some cases are unusually complex or confusing, and the judges simply don't understand the story, or the argument, or how a byzantine statute works. In such cases, argument can de-muddy the waters.

Sometimes the judges spot something or think they've spotted something (a fact, a precedent, a theory) that hasn't already been answered by the briefing. Martin Siegel's idea of emailing questions to counsel—a modern variation on court orders directing the filing of supplemental "letter briefs"—is an excellent one. As he points out, some courts already do that.

Even so, sometimes in appellate adjudication, as in life, it is more productive and efficient to have a face-to-face dialogue than an email exchange. On those occasions, oral argument does indeed serve a useful purpose. But those occasions are the exception, not the rule.

Everyone going to the emergency room deserves to be carefully triaged. Still, the guy having a stroke rightfully gets more time than the guy who hit his thumb with a hammer. The same principle should apply to the scheduling of oral argument. Every appellate case should be evaluated for whether the briefs adequately address the issues presented. If so, we can read and, if necessary, reread them; we don't need them read to us. If an unusual situation is presented, then the case should be set for argument.

One last thought: If you've written a good brief, one that's better than the other side's, give serious consideration to affirmatively waiving oral argument even if the court doesn't submit the case on its own. If you're already ahead on paper, all oral argument can do is give the other side a chance to make up for lost ground. Remember, you have the right to remain silent. ■

It evolved accidentally into a miniaturized facsimile of what was originally something very different. The roles of briefing and argument were once flipped; instead of filing long briefs, lawyers gave long speeches in the well of the courtroom introducing the case to the judges and canvassing the whole appeal. Daniel Webster's argument in the famous Dartmouth College case in 1818 lasted three days. The Supreme Court didn't require briefs until 1821, and originally they lacked legal argument—a component not required until 1884. See William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 2–3 (Winter 1999).

But as caseloads rose, oral argument time shrank and then disappeared altogether in most cases. Its purpose changed too, from slow-paced presentations of the whole case to narrow, truncated exchanges serving the court's need for more information about points not fully clarified in the briefs. Now oral argument is often called “a conversation between the Court and counsel,” as Justice Ginsburg put it, “giv[ing] counsel an opportunity to face the decision-makers, to try to answer the questions that trouble the judges.” *Transcripts of Interviews with Supreme Court Justices, supra*, at 136. Ninth Circuit Judge Pregerson similarly advises lawyers: “Your primary job at oral argument is to answer the judges’ questions carefully.” Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 440 (1986).

As a mechanism for answering questions from decision-makers in another location, however, no one would dream up oral argument as it exists today. Courts have simply plodded ahead with the old format, shaving minutes off here and there and limiting the cases in which it is offered, though the underlying reason for it has changed.

Suppose you read something, or two competing versions of something, and want more information from the authors. You probably wouldn't ask them to spend lots of time guessing what you might ask, allocate days or weeks to review their materials in preparation, then fly to a different location so you could sit several feet away on a raised platform and ambush them with previously withheld questions. Instead, what most of us would probably do in that situation, assuming some access to the authors, is email.

Appellate courts could email too. That is, when some larger importance or lack of clarity in an appeal triggers a court's need to ask questions—the situation that now gives rise to argument—the questions could simply be emailed to counsel. Rules could mandate answers by email within a prescribed period in, say, 150 words, or whatever the question demands. If necessary, lawyers could also respond to the other side's answers and judges could pose follow-ups.

This would save clients a lot of money. By contrast, lawyers now prepare in the dark and have to be ready for everything. “[A]s a lawyer, you've got to be prepared to answer a thousand questions. You might get eighty, you might get a hundred, but you've got to be prepared to answer more than a thousand.”

Transcripts of Interviews with Supreme Court Justices, supra, at 7 (Interview with Chief Justice Roberts). We pore through trial court records, reread briefs and relevant cases, rack our brains for possible questions, arrange mock arguments with colleagues, and so on. The process takes days or weeks, the meter running all the while. Then comes overnight travel much of the time, imposing more fees and expenses. When judges travel to attend argument, we all pay. Reviewing materials to respond to emailed questions from the court and crafting short answers would take far less time and cost less money.

As a mechanism for answering questions from decision makers, no one would dream up oral argument as it exists today.

In addition to saving money, questioning by email might yield better answers and thus be more beneficial to the court. If the goal of oral argument is to provide the most useful, accurate information to the judges, subjecting lawyers to what is essentially a timed memorization test based on cramming and guesswork seems like a dubious method. Rare is the perfectly prepared, beautifully phrased response with the best supporting detail. More commonly, lawyers give halfway off-the-cuff answers that, in the heat of the moment, might omit key facts or precedent. As Justice and former Solicitor General Robert Jackson famously put it:

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 I actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803 (1951) (quoted in Mark 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 (2004)). With the pressure off, an emailed response might come closer to Justice Jackson's third version.

Some benefits of oral argument probably wouldn't be well served by email exchanges. Stanley Mosk, a former justice of the California Supreme Court, promoted oral argument in part because it gave litigants their day in court in an open forum they could observe and provided "members of the public [the opportunity] to hear and understand the contentions of the conflicting litigants." Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 26 (Winter 1999). "Visibility of judges at oral argument reinforces judicial legitimacy" by giving parties and the public a window into the decision-making process. Hummels, *supra*, at 328.

Still, emailed questions and answers could be made public, as briefs are. With today's technology, people wouldn't be any less likely to access email exchanges on PACER than they would be to log on to a court's website and listen to an argument. That said, an exceptional public interest might justify the cost of traditional argument in unusual cases. And arguments in supreme courts are different animals. They perform a valuable civic function for which emailed questions and answers probably wouldn't suffice. But most appeals in the intermediate appellate courts are already decided without argument, and the vast majority of arguments that do occur in those courts interest only the parties involved in the case.

Another objection might be that argument is fluid, questions may not occur to judges unless unexpectedly prompted by another question or answer, and this sort of free-for-all can't be duplicated in emails. Considering that judges could respond to counsel's answers to their and other panel members' emailed questions with additional questions when necessary, however, the loss of spontaneity inherent in an emailed version of argument may not be great. Alternatively, the court could follow up on any emails with an argument by videoconference, as described below.

This brings me to a second suggestion. In cases where emails seem insufficient—or if judges want to continue real-time oral presentations—courts should at least provide some or all questions in advance or focus the parties' attention on specific issues they want addressed at argument. Like emailed questions and answers, this would eliminate the inefficiency and expense of having to re-master the entire record and legal landscape for a brief argument that will, inevitably, examine only some small but previously unknown part of it.

Some appellate courts in California and Arizona effectively do this by issuing tentative decisions to the parties a week or more before argument. See Hummels, *supra*, at 330–34. Lawyers and judges who use this practice seem to like it. Oral argument is more focused and therefore more illuminating to the court because counsel know the decisive issues in advance. See *id.* at 332, 341. Arizona judges reported that "[t]he focus comes two

ways: 1) by narrowing the scope of argument through the draft's indication of the issues, arguments, and cases that appeal to the draft's author, and 2) by allowing for a focused critique of the draft's analysis, made possible by the analytical jump-start the draft provides." *Id.* at 341. In California, the practice has also led to fewer arguments overall because lawyers can better analyze whether they have a realistic chance at persuading the court. See *id.* at 335.

Some courts accomplish much the same goal though "focus orders" issued before argument, asking counsel to concentrate their presentations on one or more specific questions or issues. These have been used occasionally in Florida, and one appellate practitioner there writes:

Lawyers who know in advance the panel's specific areas of concern or interest are able to prepare for oral argument much more effectively and efficiently. The argument itself is more relevant to the court and more likely to forestall any perceived (or real) problems with the court's analysis that might otherwise have to be addressed in the rehearing process.

Susan L. Kelsey, *Improving Appellate Oral Arguments Through Tentative Opinions and Focus Orders*, 88 FLA. B. J. 28, 30 (Dec. 2014).

Videoconferencing

One way or the other—by providing specific questions, a draft opinion, or a focus order—the court should let counsel into the unfolding deliberative process before argument. The court might also rethink the way it hears from them. Lawyers and judges are used to seeing each other in person, but in an age when hundreds of millions of people use Skype, Facetime, and other videophone services in personal and professional communication, courts might consider ending the wasteful practice of flying lawyers to a different city for 20-minute interviews.

There is no reason today why judges can't conduct arguments with lawyers sitting at their desks and speaking into computers while facing the judges' images on-screen. Some state and federal appellate courts permit argument by videoconference at the court's discretion. See 3D CIR. R. 34.1(e); 6TH CIR. R. 34(g)(3); CAL. R. CT. 8.885(b). But it is far from the norm anywhere, and counsel may hesitate to request it, even when they can, for fear of experimenting with a seldom-used mechanism or losing a perceived advantage with the court.

In particular, argument by videoconference or email would save the client money in cases when, frankly, the whole exercise ends up being a waste of time. Many courts grant argument after review by a screening panel or individual judge, but this is no guarantee the different judges assigned to decide the appeal will actually have questions or be especially interested in the

case. Most lawyers have had the experience of showing up to argue, only to find the judges pretty well decided. They leave shaking their heads and wondering why the ritual occurred at all. Judges themselves repeatedly say that argument rarely determines the outcome; for example, Third Circuit Judge Ruggero Aldisert estimated that argument affected his decision in no more than 10 percent of cases. Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 *CAP. U. L. REV.* 445, 456 (1982).

Some judges use oral argument less to gather necessary information and more to test theories and persuade colleagues. Other arguments end up in time-consuming blind alleys or off on tangents that might satisfy judges' curiosity but pretty obviously don't matter much to the case at hand. Former D.C. Circuit Judge Patricia Wald acknowledged the "seduce and abandon" technique of some judges who keep counsel skewered on some peripheral line of argument, which when the opinion comes down turns out to have had no relevance at all." Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 *J. APP. PRAC. & PROCESS* 7, 18 (1999).

After all, that one week a month in court is the only recreation an appellate judge gets from the paperwork and she will likely act up, play devil's advocate, lead you down primrose paths and pounce at the dead end. Later in conference she will say she was having some fun, testing the waters, seeing how far you would actually go on a point.

Id.

This is all well and good; judges are entitled to their fun. They'll naturally try to influence one another when brought together on a panel, and no lawyer expects every question to be decisive. The goal isn't to force judges to self-censor or to circumscribe argument—it's to conduct it in a way that serves the same purposes but minimizes expense to the people paying for it.

Finally, if oral argument is held with everyone in a room together, rethinking how counsel and judges interact may also yield benefits. Although oral argument is supposed to be a "dialogue among equals," as Chief Justice Roberts posited, *Transcripts of Interviews with Supreme Court Justices*, *supra*, at 7, that vision may be hindered by the current setup. It's hard to have much of an equal conversation with someone who's sitting on an elevated platform looking down on you while a small yellow light signals your imminent muzzling.

Thirty years ago, one law professor proposed a less formal arrangement: Lawyers and judges could gather at a conference table with the case materials, reviewing the record or legal authority as needed. See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 *IOWA L. REV.* 1, 31–32 (1986). Instead of giving sequential presentations

covering several different aspects of the case, counsel could take turns addressing the same question from the judges at the same time, which should improve clarity. See *id.* This configuration could help lawyers supply the additional information judges want in a more relaxed, conversational setting that better fits the current function of argument without unnecessary theatrics and digressions. It could also put lawyers who don't often appear in appellate courts, which is a considerable number of those who now give oral arguments, at greater ease, improving their advocacy.

When judges travel to attend argument, we all pay.

Some might question whether this kind of argument would weaken the judges' authority, but Martineau points out that, ironically, it would more closely mirror current English procedure, "which is not so much a formal presentation by the attorneys to the judges as it is a combination argument-discussion-decision-opinion conference." *Id.* at 32. "Of course, no one contends that the English procedure is too informal or reduces the respect for the English appellate court. Furthermore, American experience with pretrial conferences held in judges' chambers suggests that the status of the judge remains unaffected as well." *Id.*

One intermediate appellate court in Wisconsin experimented with roundtable and other formats in the 1990s. A former judge on that court I spoke with, Gordon Myse, believes that placing lawyers and judges at the same table better fostered a conversational atmosphere, though a few lawyers responded inappropriately to the loosened reins. He concluded that a hybrid format—where judges remained on the bench but dispensed with time limits and posed the same question to both sides before moving on—promoted the deepest plumbing of the issues and the freest flowing exchange.

Just as with litigation in the district court, the appellate process needs regular scrutiny to make sure litigants aren't saddled with unnecessary costs. It bears remembering that they and the wider public are the courts' first constituents, not judges and lawyers used to things as they are. Streamlining briefs and motions, revamping argument, and making use of well-established technologies can save parties money on fees and expenses without threatening the judicial end product. We should begin experimenting with changes to make sure federal and state appeals are as cost-effective and user-friendly as possible. ■