CARLTON FIELDS

The Disappearing Oral Argument

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This article was originally published in Litigation, *a publication of the American Bar Association Litigation Section.* Once upon a time, there were no briefs filed on motions or appeals, only oral argument. Today, all too often, there is no oral argument for motions or appeals, only written briefs. Increasingly, courts are dispensing with oral argument, preferring the nonconfrontational determination of legal victory based just on written submissions. Oral argument, which requires the great skill that epitomizes being a lawyer, is being lost, going the way of the typewriter and the telephone landline. Why? The decline of oral argument is the fault of both lawyers and courts. The cost? A denial of justice and due process. True administration of justice comes from the verbal interchange between the lawyer/advocate and the judge/decider. Instead, when a court makes determinations on just the written word alone, the risk is the lawyer may not have adequately explained his or her position in the brief or the judge may not have understood the position in his or her reading of it. Oral argument allows those miscommunications to be corrected.

Scriveners, Not Trial Lawyers

With the growing scarcity of oral argument, and indeed trials, a new generation of litigators is maturing without ever having entered a courtroom. Just a crew of scriveners. Good scriveners to be sure, but not true trial lawyers. In the old English courts, barristers never submitted a written brief, relying instead on their oral skills. Not until 1843 did the U.S. Supreme Court allow briefs to be presented in lieu of oral argument. By 1849, the Supreme Court "limited" oral argument to just two hours, forcing written briefs as a necessity. By the 1970s and 1980s, with a dramatic increase in lawsuit filings, courts turned increasingly to relying solely on briefs because of their heavy caseload. By limiting themselves to briefs, courts were able to avoid the hours of preparation for oral argument when they needed to know the case as well as the advocate so the judges could ask percipient questions. The trend away from oral argument has progressed. A decade ago, in 2011, decisions based on oral argument in the 11th Circuit had declined to just 16 percent of the cases. The trend is even worse today. In the last tabulation in September 2020, in all of the federal circuits, only 19.3 percent of the cases decided had oral argument. Just 5,817 cases of the total of 32,796 cases decided on the merits actually had an oral argument. The Seventh Circuit had the highest percentage of oral argument, 37.2 percent; the lowest was the Fourth Circuit, deciding cases with

oral argument just 8.1 percent of the time, with the remaining 91.9 percent of the cases in that circuit decided only on the briefs. The statistics for all but one of the federal appel late circuits are on the back cover of this issue. Not only at the appellate level has this decline occurred. Trial courts – especially federal trial courts – are avoiding oral argument and deciding motions "on the papers." That results in courts taking motions under submission for months and sometimes a year or more. If there was oral argument, the judge would have to read the briefs and learn the issues before the hearing, which aids issuing a decision more quickly while the facts, law, and reasoning are fresh in the court's mind. (Whether they intend to or not, judges seem to enjoy torturing lawyers by waiting months and months and then issuing a written ruling late on a Friday night, making one lawyer pop the champagne and destining the loser for a rotten weekend.) A dramatic consequence of the disappearance of oral argument is the loss of one of the most important and difficult lawyering skills-– the ability to think on your feet, to act calmly and articulately when that inevitable curveball comes your way from a judge's probing questions. It is a skill not easily obtained and, unlike riding a bike, difficult to maintain without practice. Generations of lawyers are missing out on an opportunity to joust and spar through the spoken rather than the written word. Yes, some trial courts have initiated programs where they will provide oral argument for novice associates, but what about us old-timers? I still learn from every oral argument. And I learn from watching others argue orally. What to do and, more importantly, what not to do. I love to have my matter at the end of the calendar so I can size up my audience – the judge or judges. Those opportunities at best are diminishing and more often are just extinct. Those historical skills of being a lawyer – a sonorous voice and a calm demeanor when your insides are screaming "HELP" and you are fighting the desire to run from the courtroom – are needless talents these days. You just hide behind your computer and your written brief in the safe and secure confines of your office or home, where you can reflect on each argument with the luxury of time. Moreover, if you are the responding party, without oral argument you have no hope of the so important "last word." You get your opposition brief, but that is it. Your opponent gets to leave the last impression. Yes, oral argument is often constructed that way, especially on the appellate level; but in the relative rough-and-tumble of the trial court, either advocate can interject that final thought. In the old days of oral argument, trial courts welcomed the back-and-forth and back-and-forth. That way, each side is fully aired. Each position is fully explored. The decision is based on the entire scope of the issue, not the artificial territorial limit of opening, opposition, and reply. In briefs, the reply brief can often frame the result. Good luck getting leave for a sur-reply. One reason for the disappearing oral argument is the ever growing dockets. Deciding a case on the papers takes less judi cial time than oral argument. You just have to read the papers and weigh them. But oral argument takes as much of the judge's time as the lawyer's. The judge has to not only read the briefs but be able to discuss them and ask cogent questions on the cited cases and even the uncited authorities. It multiplies the demands on judges manyfold, demands that cannot be fobbed off on law clerks. Perhaps, with the overwhelming crush of increased caseloads, judges find eliminating oral argument one of the few ways to control their calendar and the demands on their time. The cost is tremendous on the parties and the system. Judges often complain that lawyers' oral argument only ends up being a boring oral reading of what is already in the written briefs and adds nothing to the

deliberation. Judges also report that too many lawyers are inept, come to court ill prepared, and have not read their own briefs, much less the cases cited in them or in their opposition's papers. The latter failure requires greater discipline in admitting lawyers to the bar. But the former problem is due in part to the judges themselves. As lawyers, we put our best stuff in our brief. It may be the only shot we have. First impressions are important. We carefully draft our written argument. In oral argument, unless we are respond ing to the reply brief (if we are the opposing party) or to a judge's question, we really don't have much to add. So we repeat what is already in the written brief because that is the best we have. A key to effective argument is having a prepared judge – a judge who has read the pleadings, who has tough questions for both sides, and who engages in a dialogue with the advocates to search for the right result. It requires the judge to spend the same time preparing for the hearing as the lawyer needs. And the lawyer usually only has one case to prepare for that day; a judge may have over a dozen. Because of the caseload perhaps, too often judges sit stony-faced during oral argument, ask no questions, and then either take the case under submission to issue a written opinion prepared by one of their law clerks or read into the record the law clerk's bench memo to announce their decision. Judges' lack of preparation rarely allows them to have their minds changed in oral argument. Some important tools besides mere judicial preparation are written tentative rulings and questions the court issues before the argument date to the oncoming advocates. Tentative rulings, be they written or oral, let the advocate know what the judge is thinking. The lawyer can then prepare to deal with those issues and craft an oral argument that may be far, far different from the written brief. Some courts issue written tentatives a day or two before oral argument. That is preferable for the advocates, compared with announcing an oral tentative at the commencement of the hearing, because the lawyers can better prepare. Another tool is written questions in which the court sets out the issues it views as key for determining the case. These may be far different than the issues either litigant saw as framing the motion or appeal. Again, getting those in advance of the hearing date by a day or two allows for better preparation, rather than scrambling on your feet. The amazing thing about deliberations of either motions or appeals is that all too often the decider views the facts and the law differently than either side. That can be the result of the advocates not adequately communicating or the decider/judge not understanding the facts or legal issues presented. Oral argument is fundamentally necessary to change those mistakes by either the lawyer or the judge. It allows a dialogue and interchange where the deficiency on either side of the bench has an opportunity to be corrected. By forgoing oral argument, both courts and advocates are forgoing an essential part of due process necessary to reach a just result. So many of us were educated on the Socratic method, the asking of questions that forced us to think and analyze. That is part of the essence of oral argument. It is time both courts and lawyers turn back to the genesis of our profession and revive the greatest arena of all – the debate in the courtroom.

Authored By

Mark A. Neubauer

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