

ORAL ARGUMENT: DOES IT MATTER?

WARREN D. WOLFSON*

I read somewhere that when Daniel Webster and other lawyers argued *Gibbons v. Ogden*¹ before the United States Supreme Court they took five days to do it.² That was 1824. Obviously, things have changed. Judges don't give lawyers that much time any more. In fact, in many cases, we don't give them any time.

I detect among judges a growing disdain for oral arguments. We don't look forward to them as much as we used to. They often are seen as an extra and unnecessary step in the proceedings. Why is that? Why are we hearing fewer oral arguments for shorter times?

In my own court, the First District Illinois Appellate Court, the numbers of oral arguments have been going down steadily, while the numbers of cases we decide have been going up slightly. In 1995, our district heard 938 oral arguments. In 2000, we heard 695 oral arguments—243 fewer. About twenty-five percent of the cases we decide are orally argued these days. I believe our numbers are fairly typical in intermediate courts around the country.

What's going on? Is it because judges think arguments are unworthy of their time—too many no-brainer cases? Or are the briefs so good we just don't need any more argument? Or is it because we don't have many Daniel Websters any more? Appellate judges will tell you sitting up there and listening to lawyers read prepared talks or their briefs is not our idea of a great time.

I think mostly it comes down to numbers. Our job is to decide cases, and we have a lot of cases. Oral argument slows things up. We begin to fall behind. That's not good. People grumble. So we begin a culling-out process. We decide the easy and clear cases without argument. Appeals that ask us to overturn a trial judge's findings of fact usually don't require argument, whether the case is civil or criminal. The same is true for attempts to overturn jury verdicts on the evidence.

We tend to schedule argument on the cases that contain interesting or troublesome legal issues. We look for cases of first impression, or cases where the stakes are high—in dollars, in the validity of statutes, in human confinement. You would think this selection process would heighten the significance of oral argument for judges. Maybe it does, but I am not sure it works that way.

When I was asked to address this topic—the significance of oral argument—I decided to do some research. I found a lot of articles by judges and lawyers on how to make effective oral arguments, but there is very little on whether the arguments matter or why they should. We do have some anecdotal evidence, and I have heard that the plural of anecdote is data, but we don't even have much in the way of anecdote. Let me briefly review the literature for you, although

* Justice, State of Illinois Appellate Court. B.A., 1955, University of Illinois—Chicago; L.L.B., 1957, University of Illinois.

1. 22 U.S. 1 (1824).

2. See, e.g., William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999).

referring to it as “literature” might be excessive.

James Coleman, justice of the New Jersey Supreme Court, writes: “Many times a judge’s or justice’s pre-argument tentative position is changed based on the oral argument.”³ He didn’t say what he meant by “many times.” Judge Michael Kanne of the U.S. Court of Appeals for the Seventh Circuit believes oral arguments are important: “If it’s fifteen percent, that makes oral arguments worth doing and worth doing well.”⁴ Stanley Mosk, a California Supreme Court Justice, writes that he believes most appellate judges would agree that oral arguments performed effectively are of “crucial significance”—that they positively contribute to the decision-making process.⁵ He gives no percentages.

Compare Justice Mosk’s view with that of Ruggero Aldisert, Senior Judge of the U.S. Court of Appeals for the Third Circuit.⁶ He believes oral argument adds little to the ultimate result of a contested case. And, “[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. . . . [T]he case was not won at oral argument; it was lost.”⁷

Judge Richard Arnold of the U.S. Court of Appeals for the Eighth Circuit writes: “Oral 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.”⁸ Judge Arnold says that of 157 cases heard over a ten month period, oral argument failed to change his mind in 131 of them—twenty-six out of 157 is a 16.5 percent change of mind rate.⁹ Judge Joel Dubina of the U.S. Court of Appeals for the Eleventh Circuit writes that in many cases the helpfulness of oral argument is overrated, but that it can make a difference in a close case.¹⁰

I cannot end this survey of the literature without quoting from an article by a Texas lawyer, Brian Wice, who clerked for and then many times appeared before the Texas Court of Criminal Appeals: “[O]ral arguments are as useless today as the judges during my clerkship considered them Orals have become little more than a moot court exercise At the end of the day, you may have picked up points for style, but you have still lost your case.”¹¹ I have

3. James H. Coleman, Jr., *Oral Arguments: The Whats, Whys and Hows*, 7 N.J. LAW.: WKLY. NEWSPAPER 1747 (1998).

4. John Flynn Rooney, *Oral Argument Actually Can Actually Change Minds: Judge*, CHI. DAILY L. BULL., Nov. 18, 1994, at 1.

5. Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 29-30 (1999).

6. *Id.* at 25 n.1 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 294 (NITA rev. ed. 1996)).

7. *Id.*

8. *Id.* (citing Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 69).

9. *Id.*

10. *Id.* at 27 n.5 (citing Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, LITIG., Winter 1994, at 3, 4).

11. Brian W. Wice, *An Invitation to Persuade? We Decline*, 15 TEX. LAW. 32 (1999).

heard that representing criminal defendants in Texas leads to that kind of cynicism.

It should come as no surprise to you that I concluded the literature on the subject of oral argument and its significance isn't very helpful. I could not come to Indianapolis empty handed. So, I decided to do my own scientific survey. Well, a survey, anyway, something like Captain Ahab going fishing.

I met with sixteen judges of the Illinois Appellate Court, First District—which covers all of Cook County. My court. There are twenty-four judges in the First District. So, I had a good numerical sample. So far, so good. The problem was: how do I frame the questions to ask these judges? I came up with two questions for my survey. Whether the answers I received are of any value is still under consideration.

The first question was: Considering all the cases where you have heard oral arguments, in what percentage of those cases did the oral argument *affect* your decision concerning the outcome of the case? I was asking only about “affect”—not about whether the judge's view prevailed. And, I did not ask the judges to distinguish among arguments that changed their minds, that helped make up their minds, and those that affirmed a view already held. All I wanted in that first question was affect—admittedly not a precise term, but one we should recognize when we see it.

The answers to the first question ranged from 100 percent to zero percent. This tells you very little about the affect of oral argument, but quite a bit about our judges. Six of the responses were fifty percent or more. Four of them were between twenty percent and forty percent. And six of them were between zero and fifteen percent.

The answers to the second question might be more useful, or at least more interesting. The second question: In what percentage of those cases—cases where your decision was somehow affected—did the oral argument cause you to change your mind about the way an issue in the case should be decided? Obviously, the second question was slightly loaded. It made assumptions. It assumed the judge had at least read the briefs before argument and had formed an impression, if not a conclusion, about the outcome—a fairly safe assumption in our court, I am happy to report.

The answers to question number two ranged from zero percent by one judge to twenty percent by two judges. In all, ten judges said they changed their minds in five percent or fewer of the cases where oral argument had some affect. Two of them said ten percent. One was at 12.5 percent. One at fifteen percent. And then two at twenty percent. All this in the numerical universe defined by the presence of affect.

I am not a good enough statistician to tell you with any precision what all of this means, if anything. I believe the judges seriously addressed the two questions. If you take the answers at face value, it is safe to reach some conclusions—at least as far as our court is concerned.

There is a good chance oral argument will have an affect on judges, especially where cases set for argument have at least one interesting issue to begin with. How much affect? Not much, if you are concerned about a judge's change of mind. Perhaps a good amount if you are asking whether there is any

point to oral argument in the first place. It seems to have an analytical or thought-affirming impact. From the discussion that followed my survey, I can tell you our judges like oral argument. They would not do away with it. They regret they cannot do it more often.

For what it's worth, I will give you my view of the value of oral argument. My best estimate is that oral argument does affect the outcome at times. That is, it changes or makes up minds in about five to ten percent of the cases where we hear argument. That estimate might be generous. If the change of mind percentage is so small, is argument worth the time and trouble? I am convinced it is. We do not know which five or ten percent of the cases will change judicial minds. These include the lightning bolt arguments, the ones that make you say: "I never thought of that." Or, "Now I see." Or a simple: "Ahah!"

There are other substantial benefits to oral argument, aside from changing minds or making up minds. These other benefits more than make the case for oral arguments. Orals help me focus my thinking and clarify the issues. I see more of what matters and does not matter. This leads to better writing and helps avoid mistakes. Orals help me test my impressions and whatever conclusions I have reached. What did I miss? What should I have considered and did not? Was I about to do something stupid? Orals help me see the impact of what I have in mind. What worlds will tumble? How much damage would I do?

I should observe at this point that the benefits I see presuppose lawyers are prepared and reasonably intelligent. That is, they are ready to respond thoughtfully to questions of fact and law. Nothing kills the desire to hear oral argument more than lifeless lawyers who parrot mediocre briefs. It seems to be a law of nature that bad briefs lead to bad oral arguments.

Orals help me persuade my colleagues by asking questions I know the answers to—the beginning of a conference. They also give lawyers a chance to lose a case they might have won, not so much by arguing badly, but by not arguing at all an issue I was fond of. Orals give me a chance to ask about issues not raised in the briefs—such as jurisdiction or waiver. Orals provide an escape valve for lawyers and litigants. This is their chance to be heard and to provide an educational experience for everyone involved in the case. The proceeding is more public, less secretive. Finally, and of great importance, oral arguments get me into a courtroom, where I can see, hear, and talk to real people. I have a good time at oral argument. I like asking questions and getting answers. It energizes me. It provides an occasion to have lunch with colleagues.

If oral argument is to be meaningful, lawyers and judges have to strike a bargain—one that by necessity must remain unspoken. Lawyers must make and keep certain promises. First, they must not be boring. That means they must not read to us, repeat themselves, or simply repeat the words of the brief. And they must sound like they care. Dozing judges do not make a receptive audience.

Second, they must not argue weak, silly, or frivolous issues—which shouldn't be in the briefs in the first place. These are issues that will dilute the strength of serious matters. In the same vein, inconsistent positions deter judges from paying serious attention.

Third, needless to say, lawyers must be intimately familiar with the record and the cases they cite. Honesty and sincerity are imperative. If a lawyer

miscites authority or misrepresents the record, all is lost.

Fourth, lawyers must listen carefully and respond to our questions—whether they are asked of appellant or appellee. These questions signal the issues we care about. If the lawyer says, “I’ll get to that,” or “But that’s not this case,” or if he or she dances around the point, the lawyer’s chances are dismal. This is true not because the lawyer has failed to recognize the brilliance of the question, but because we assume he or she cannot provide a good answer. True, sometimes we overreact to a lawyer’s lack of enthusiasm for our questions, but so it goes.

I can’t overestimate the value of questions. They are the lawyer’s opportunity to persuade. Plato said “persuasion is the winning of souls through speech.”¹² For the purpose of these remarks, I have assumed, without deciding, that judges have souls and that lawyers have the power of speech. How do lawyers win our souls? Maybe by telling us how we might change lives when we decide the case—change them for the better or the worse. Maybe the questions that must be asked and answered by lawyers are: Why is this case worth being appealed? Why does the result matter?

This takes me to the fifth and final promise lawyers must make and keep. Give us reasons why we should rule in a certain way. Not just because a similar case points in that direction, but because it would be right and good and a proud moment in the law. In short, the lawyer must look beyond the confines of the case and gaze into the future, taking us with him or her.

I am sure there are appellate judges who would add other provisions to the lawyers’ part of the compact, but these are the ones I find most important. (I have not mentioned the sense of loss I feel when I observe that oral and written eloquence rarely occurs.)

I said this was to be a compact between lawyers and judges. Appellate judges, too, must make and keep promises. These are mutual obligations. We, too, are obligated to prepare. We have to read the briefs and not just pretend we have read them. Our court always begins by telling lawyers: “We have read the briefs, so don’t waste your valuable time by reciting the facts.”

In forty-four years of practice I never have heard an appellate judge say to a lawyer: “We have not read the briefs, so give us the facts, and do it slow.” Either the judges are doing their jobs or they have no sense of shame.

Beyond the briefs, one or more of us has to know the record, the relevant parts of it anyway. And, we have to have read the cited cases and important cases that are not cited. If we don’t do that, lawyers may as well speak in an obscure foreign language.

Our questions must be clear and serious—not asked to show how clever or humorous we can be. And we should give the lawyers a chance to answer the questions we ask. Sometimes we don’t. Asking questions to embarrass or ridicule is an abuse of our power. When I hear a judge begin a question with, “Do you mean to say . . .?” or “Are you telling us . . .?” I know there is a bully in the schoolyard.

One reason why it is so difficult to place a value on oral argument is that

12. PLATO, GORGIAS 453 (Terence Irwin trans., Oxford Univ. Press 1979).

judges are so different. We don't know the judge's state of mind when he or she takes the bench. Is the judge's mind made up? Tentatively made up? Completely open and noncommittal? Or not a clue? Oral argument can't work successfully when it digs in a dry well. Surely, it must be something more than an opportunity for us to read all the letters that have been piling up.

At last, a sum-up to the question before me: Do oral arguments matter?

They matter in the close cases. They aid the decision-making process. They bring a solemnity to the occasion. They begin a thoughtful exchange of ideas among judges. These are reasons enough to value oral argument highly. Short of that, there always is what may be, in the long run, the best reason—they get us out of the office.

I don't think we can talk about oral argument as some isolated issue. The question of significance is serious, and should be taken seriously. But it must be placed in the context of who we are and why we do what we do.

I believe I have learned a few things in the past twenty-six or so years on the bench, and what I have learned is what makes me look forward to oral arguments—every time. I have learned that we still can talk about ideals and principles without being embarrassed—even after all this time. We still can value personal liberty above power and expediency. We still understand that we have safeguards to enforce, and we enforce them because we know there are men and women whose appetites for power or property might exceed their moral wisdom.

We still understand hard-won rights can be lost simply by taking them for granted. We are reminded every day that we function in a public place where truth is truth and lies are lies, where people who act must be held accountable, and where the State is held to certain standards.

We don't need more laws and higher penalties. We need vigilance. And we need to hear about these matters, and talk about them, and think about them. Oral arguments and the conferences that follow them make great proving grounds.

Make no mistake—we have a love affair going here. We love our profession. We love what we do. The affair will endure and prevail so long as we bring to it loyalty, fidelity, and sincerity; so long as we approach it with the passion and consideration a lasting affair requires.