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Abolish Oral Argument?

By Myron Moskovitz

Stanley Mosk once told me, "Oral argument is a waste of time." I didn't buy it, because I didn't want to buy it: I'm an appellate lawyer who enjoys the banter of oral argument. But as a justice of the state Supreme Court and a former state Attorney General, he knew what was going on *behind* the courtroom. Now, I believe he might have been right.

Let's set the scene as the advocate sees it. You represent the appellant, and you appear for oral argument before our state Supreme Court or one of our appellate courts. You look up at the black robes, and you assume that the justices have come to the hearing with open minds. Since you already put in your brief what you thought were your best arguments, you begin a boiled-down version of a selected couple of your most special zingers. But soon after, the justices interrupt with questions. Nothing wrong with that. A dynamic intellectual dialogue might help the court reach the most just decision, which would seem to be the main goal of oral argument.

But you get a queasy feeling: the questions are not genuine inquiries, but rhetorical - even hostile. You might even feel ambushed by questions that raise issues your opponent never raised in his brief. (Later, when you get the opinion, you see that the decision turned on that issue!) None of your answers seem to satisfy the justices.

An experienced appellate litigator watching this performance has seen it before, and can easily predict how the court will decide the case. Usually only one side gets hammered this way. Generally it's the appellant's advocate, but occasionally the respondent's lawyer gets nailed. The non-hammered attorney might get a few questions, but the imbalance is obvious. By the tone, content, number, and target of their questions, the justices reveal who won the appeal. As Justice Mosk knew, that decision was made *well before* oral argument. The oral argument had no effect on the outcome, no matter how poised and apparently persuasive the losing attorney argued.

This is not the case in all American appellate courts and it wasn't always the case in California's courts. Years ago, when I clerked for a justice of the state Supreme Court, we prepared a "calendar memorandum" before oral argument - presenting the arguments on both sides, often without a recommendation for disposition. Since the justices hadn't fully made up their minds, oral argument mattered more.

That all changed when our courts began complying with the "90-day rule." Article 6, Section 19, of the California Constitution requires judges to issue opinions within 90 days after the lawyers "submit" the case for decision, which usually occurs at the very end of oral argument. Rather than get squeezed by the 90-day clock, our appellate courts now front-load their cases: they draft the opinion *before* the case is "submitted" (i.e., before oral argument even begins.)

So let's revisit the scene described above. As the advocate argues, she notices the justices reading down at some papers on the table. She thinks it's the briefs or part of the record.

It's actually the draft opinion, all ready to be filed and sent out. Once in a while, something said at oral argument will induce the court to change a bit of language in the opinion. But the result? Hardly ever. Thus, the whole purpose of oral argument - to help the justices reach the most just result - is lost.

Well, maybe not the *whole* purpose. Oral argument also gives the court a chance to "show the flag," to emerge from their chambers to allow the public to see the pretty faces of those who decide cases. A worthy goal, to be

sure, but is this the best way to do it?

Lawyers spend a lot of time preparing for oral argument. They re-read the record, the briefs, and the cases. They try to anticipate questions, and they might even practice in moot courts. All this takes many billable hours - paid by their clients. Then the lawyers (often with clients) come to the podium believing that this investment matters, that they have a chance to persuade the court.

But they don't, and the pretense of real substance where there is in fact little substance is troubling - at least to me. Can't the justices show their public face by speaking at bar association lunches and high school assemblies? That's much cheaper than oral argument.

While oral argument is not useless, its benefits are too small to be worth the time justices spend on it, the lawyers' amount of preparation, and especially the damage to clients' pocketbooks. Perhaps Justice Mosk was right: let's just abolish it.

But wait a minute. Abolish *all* oral argument? What about oral argument in our trial courts? That, my friends, is a different kettle of fish.

Most of our trial courts issue tentative opinions before oral argument. That gives the lawyers a chance to use oral argument to address the exact points the court cares about. No need to guess. No need to go through all the arguments in your briefs. Just focus on what counts - and you know what counts because the judge just told you what counts. Simple, straight-forward, fair and transparent, the way we hope all government institutions operate.

Such focused oral argument might actually change the judge's mind and reach the most just result, which is the main purpose of any argument, oral or written. And if you fail to change the judge's mind, at least you had a fair shot. If the tentative opinion convinces you that there aren't very good arguments against it - just save your client's money by waiving oral argument and living with the loss.

The California Constitution requires our appellate courts to permit oral argument, so they go through the motions - while hiding the ball. Wouldn't it be nice if the justices would just show the draft opinion to you, like our trial courts do?

Occasionally before oral argument, the Court will send counsel a short "focus letter." Sometimes this really does give fair warning of the precise issue on which the decision (already written) will turn. But sometimes it is opaque or abstract, leaving the advocate scratching her head trying to figure out how it affects the outcome. But even a good focus letter fails to give the *context* of the question. This is what the lawyer needs in order to answer the question in a way best suited to help the client.

Why not give the lawyers the draft opinion? Maybe justices fear that this will increase the number of requests for oral argument. It is not clear to me why this would be a bad thing. The court might actually gain something from an oral argument that focuses on the issues the justices themselves deem important. Trial courts do, and I'm aware of no studies showing that their practice of issuing tentative decisions increases the number of requests for oral argument.

Do justices believe that lawyers will not have anything useful to say about their draft opinions? Or are they concerned that lawyers will have too much to say, are they wary of criticism? Are they afraid of looking indecisive or stupid if they change the opinion after showing the tentative? (I sure hope not.) Perhaps the answer is simple, blind inertia: "We've always done things this way..."

California has six Courts of Appeal, some with several "divisions" (panels of three justices). Only one division issues tentative decisions before oral argument - Division 2 of the 4th District Court of Appeal in Riverside. On its Web site, the justices report that without tentative decisions, "oral argument is often a dry, meaningless ritual in which counsel merely review the arguments set forth in their briefs...."

Further, "[T]he justices of this court have found oral argument more useful in assisting the court to reach a decision. The justices do not sense that their deliberations are any less objective than before the tentative opinion program began. Counsel almost unanimously praise the program. Issuance of the tentative opinion before oral argument has significantly reduced the time spent on oral argument in two ways. First, argument has

become more focused and taken less time as counsel can concentrate on the issues found significant by the court. Second, counsel often decide to waive oral argument once they see the court's tentative opinion. Thus, the program has increased both the quality and efficiency of the court resulting in a savings to taxpayers." (See www.courtinfo.ca.gov/courts/courtssofar/4thDistrictDiv2/programs.htm#tentative.)

Our Supreme Court has declared: "If oral argument is to be more than an empty ritual, it must provide the litigants with an opportunity to persuade those who will actually decide an appeal." *Moles v Regents of Univ. of Cal.* (1982) 32 Cal.3d 867, 872.

Today, oral argument in most of California's appellate courts is indeed an "empty ritual." If our appellate courts will not share their draft opinions with advocates before oral argument, we might as well follow Justice Mosk's advice: save courts, counsel, and clients a lot of time and money by abolishing oral argument.

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