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ORAL ARGUMENT — LET IT BE

by

THE HONORABLE THOMAS J. MOYER*

IN ANY DISCUSSION concerning the need to change the existing rules of appellate practice, oral argument is perhaps the most vulnerable element. While the elimination of a right to oral argument could reduce the time some cases pend in the court, the right to oral argument provided by Appellate Rule 21 should not be eliminated. Oral argument is important to the disposition of an appeal for the following reasons:

1. Oral argument provides the attorney with an opportunity to discuss the case with the judges who will be deciding it.
2. Oral argument gives the judges the opportunity to question the attorneys about points in the briefs that the judges may have misapprehended or do not completely understand. It is not uncommon for one or more judges to say after oral argument that their inclinations to a decision in the case following a reading of the briefs had changed after oral argument.
3. Oral argument provides the attorneys with an opportunity to emphasize the points he or she believes the court should give closest attention.

The value of oral argument is largely dependent upon whether the judges have read the briefs prior to oral argument. It is highly preferable that judges have read the briefs, and are conversant with the facts and the legal issues in the case when oral argument is being presented. Oral argument is virtually a total waste of time if counsel is required to use oral argument time to recite the facts of the case and present all of the legal issues.

I am aware of proposals to give the court discretion to decide in what cases oral argument will be allowed, with certain types of cases exempted from the court's discretion. Such proposals carry two liabilities: such discretion is subject to the same kind of abuse that produced Appellate Rule 12(A); and the types of cases suggested for the exemption are precisely the types of cases in which oral argument produces little if any assistance to the decision-making process. For instance, when counsel argues in a felony case that the verdict of the jury is against the manifest weight of the evidence, the time expended for that oral argument is usually not warranted. Rather, it is often the difficult civil case in which the colloquy between judges and counsel enlightens the judges. If the primary purpose of the judicial process is to resolve disputes between parties based upon the facts giving rise to the dispute and the law that relates to the

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dispute, any proposal to remove, or give to the courts the discretion to remove, an element of that process that enables the judges and the parties' representatives to "discuss" the case should be carefully scrutinized. The reasons given for changing the current process do not persuade me that such changes will produce a better decision.

Assuming oral argument is an exercise that should be preserved, it should be emphasized that it is only helpful in the disposition of a case if counsel follows at least the following guidelines:

1. If the court is a "hot court," meaning the judges have read the briefs before oral argument, a statement of the facts in oral argument should emphasize only those facts counsel feels are critically important to the appeal.
2. Oral argument should be presented from notes which are neither committed to memory nor may be read as a speech. There are few people who can commit an oral argument to memory or read it word for word from a text and effectively answer the court's questions.
3. Always respond to a judge's question with a direct answer. If a case cited by a judge is not favorable to your client, say so, and do your best to distinguish it. If it is a Supreme Court case, it is usually fruitless to urge an intermediate appellate court to not follow the case.

   Too often counsel act as if questions by the court are designed to trap them or make them look unknowledgeable. Most questions posed by the judges are designed to assist the inquiring judge to test his or her understanding of the facts, counsel's argument or the judge's understanding of the case and the law relative thereto. Many times a "hostile" question is actually an attempt by the judge to be certain he or she has considered all the arguments against the judge's dispositional inclination. Counsel should look upon questions by the court as an opportunity to explain, perhaps in a different way than previously, counsel's position in the case.
4. It should be too obvious to require emphasis, but appellate counsel must be totally familiar with the facts of the case and the law that applied to it. Too often counsel will respond to a question by the court with the following statement, "I don't know the answer to the question because I was not trial counsel." That answer is unsatisfactory and signals the court that appellate counsel is not familiar with the transcript. If the court is expected to read the transcript, as we do, certainly the counsel who are urging the court to adopt their position in a case should have read and be familiar with the transcript. Counsel should also follow the letter of Appellate Rule 21(H) which requires the filing of additional authorities prior to oral argument.

The art of communication is critical to the disposition of most appeals.

Communication is enhanced when it is composed of more than one discipline. The privilege given appellate counsel by Appellate Rule 21 to augment written briefs with an oral argument to the judges, whose understanding of the case is necessary to a fair and just decision, is a privilege that should be preserved under the Ohio Rules of Appellate Procedure.