



The Journal of Appellate Practice and Process

Volume 19
Issue 1 04/01/2018

Article 6


2018

Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!

James C. Martin

Susan M. Freeman

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>

 Part of the Courts Commons, and the Litigation Commons

Recommended Citation

James C. Martin and Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. APP. PRAC. & PROCESS 89 (2018).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol19/iss1/6>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS DEVELOPMENTS

WITHER ORAL ARGUMENT?
THE AMERICAN ACADEMY OF APPELLATE LAWYERS
SAYS LET'S RESURRECT IT!

James C. Martin and Susan M. Freeman*

Oral argument is one of the most written-about, discussed, and debated aspects of the appellate process. Among lawyers, judges, and legal commentators there are disparate views on its value. Some contend oral argument occupies attention and time that is disproportionate to its value to the decision-making process. This viewpoint is often driven by observations that briefs are far more important to shaping the ultimate decision and that oral argument only rarely changes the outcome.

The American Academy of Appellate Lawyers, a nationwide group of experienced appellate advocates, has, for many years, analyzed issues related to oral argument among its membership and with judges and academics. The Academy puts great value on oral argument, particularly from a systemic perspective. Oral argument is, after all, the only time where a party and its advocate can interact with the decision-maker. It is a time when the court's views on the issues are on display for

* Mr. Martin and Ms. Freeman are, respectively, the chair of the American Academy of Appellate Lawyers Oral Argument Initiative and the Immediate Past President of the American Academy of Appellate Lawyers.

the public and for clients, and counsel has the opportunity to address potential misconceptions or overlooked facts. In that manner, oral argument is the most tangible manifestation of the critical role that appellate courts play in the resolution of public and private disputes traversing our legal system.

Because of its strongly held beliefs, the Academy became concerned about the apparent and verifiable decline in the number of cases, particularly in the federal system, that are listed for oral argument, as well as the shrinking time allotted to those cases listed. These discussions started anecdotally. But eventually they resulted in the Academy's undertaking an initiative to see if steps could be taken to help increase the frequency and usefulness of oral arguments or, at the very least, re-invigorate the appellate courts concerning oral argument's intrinsic and extrinsic value.

The process began with a task force that looked closely at oral argument practices in the various federal circuits. In tandem with that effort, a statistical analysis was undertaken to try to make a meaningful evaluation of the frequency of arguments in the various circuits and develop some appreciation for the types of cases being argued. After gathering this foundational information, the task force, with input and insights gained from the Academy's membership, produced a report outlining the Academy's views on steps that might be taken to improve on the frequency and quality of oral argument in the intermediate federal courts of appeals. The formal report of the task force's efforts and analysis is attached to this article as Appendix I.

The report was prepared with the realizations that its statistical underpinnings were not perfect, that the frequency of argument varied widely within circuits, and that arriving at a consensus on how to address frequency and quality issues also could be the proverbial fool's errand. From the Academy's perspective, however, the report could at least provide a means to start a dialogue that would draw in stakeholders and provoke a serious discussion on the need to confront the consequences of the decline in oral arguments. The Academy likewise believed the report could be a useful framework for channeling the discussion towards achieving some positive results.

The Academy transmitted the report to the chief judges on each federal circuit with a proposal for in-person discussions on

its contents. As noted, these discussions were intended to start a dialogue between the courts and advocates on the benefits of oral argument and ways to preserve and enhance its role in our system of appellate justice. Those discussions are largely complete and this paper captures some initial observations that follow from the Academy's efforts.

The ensuing commentary is broken into three basic parts: (1) an analysis of the Academy's task force report and its recommendations; (2) some high level discussion points that arose from the Academy's circuit meetings; and (3) some concluding thoughts about what might be done to preserve and enhance the role of oral argument going forward.

I. THE TASK FORCE REPORT

From the Academy's perspective, the benefits of oral argument are profound. Among other things, it: (i) improves the accuracy and quality of appellate decisions and the decision-making process itself; (ii) provides the parties with a public manifestation that they have had their day in court; (iii) performs a critical civics function showing appellate courts' role in upholding the rule of law; and (iv) teaches lawyers how appellate judges decide cases.

Given these benefits, the statistical information the task force analyzed and evaluated was troubling. The Academy extracted classes of cases in which oral argument is unlikely to be helpful, e.g., cases with self-represented parties. In the remaining cases—those where argument might be appropriate—the percentage argued is below 50 percent in the majority of circuits, hovers at 50 percent in a few, and exceeds 50 percent in only two.

Measured against the language of Federal Rule of Civil Procedure 34(b), which starts with the proviso that "oral argument must be allowed in every case" subject to exceptions, one might expect oral argument to be the rule. When the statistics are considered, however, it is the exception, leading to the conclusion that oral argument in many circuits "will not be allowed" unless the court believes it will be helpful. The Academy believes this institutionalized rebuttable presumption against argument needs to change. Nor does change seem

insurmountable. Two circuits, the D.C. Circuit and the Seventh Circuit, hold argument in a significant number of cases and appear to treat oral argument as the norm. If the remaining circuits reached numbers in the 60 to 70 percent range, the systemic effect would be enormous, and Rule 34's argument allowance proviso would become a reality.

To get the discussions moving, the Academy's report offered some specific recommendations for the courts to consider. To that end, the report posited:

- Establishing pro bono or other programs that would provide opportunities for oral argument in pro se cases;
- Putting more stock in the parties' requests for oral argument and having these requests be made after briefing and focus on specific issues;
- Issuing more focus letters where the court gives advance notice to counsel on the issues it is concerned about;
- Developing a question and answer approach that directly gets counsel to the issues the court cares about that are likely to impact a resolution;
- Making greater use of technology to enhance outreach and account for geographic challenges; and
- Creating training programs for advocates that focus on how to deliver work product, written and oral, that is useful for appellate courts.

The Academy viewed these as modest but achievable steps. These recommendations then formed the backdrop for the initiative's next phase: direct discussions with the courts.

II. THE ORAL ARGUMENT INITIATIVE

The Academy recognized that simply making a handful of abstract recommendations in a report would not be impactful. Rather, any serious attempt to increase the frequency of oral arguments needed to involve direct discussions with the courts. Those discussions would provide a means to identify, probe and try to address why arguments are not held more frequently. So, following its publication, the Academy circulated its report, by letter from its president, to each circuit judge in the federal intermediate courts of appeals. A copy of that letter is attached as Appendix II. Academy Fellows and appellate practitioners, who practiced frequently in the respective circuits, followed up. In the end, discussions were held with eight circuits, including the Federal Circuit. The results of the discussions were reported to the task force by the Fellows who attended and some generalized observations on these face-to-face discussions follow.

First, for those circuits where the percentage of arguments is low, the reasons given vary, but several recur. Among the most frequently cited are: (i) workload—oral argument takes time and it makes it more difficult to decide cases in a timely manner; (ii) lack of value—oral argument is unnecessary where the law is settled or no new or novel issues are presented; (iii) cost to the parties—oral argument is a significant expense particularly in those circuits that are larger geographically; (iv) lawyers are not requesting it—oral argument frequently is not requested in criminal and immigration cases; and (v) the unlikelihood that it will change the court's views—oral argument is not needed because briefing gives the court what it needs to decide a case.

Second, a loose consensus also emerged on why or how oral argument is an important part of the decision-making process. These included: (i) help in the court's reasoning process—oral argument can help refine perspectives on the result reached; (ii) performing an external systemic function—oral argument represents an important legitimizing factor in the role of the judiciary; (iii) some cases need to be heard—oral argument must be held in high profile or significant cases to meet private and public expectations; (iv) improvement in

briefing—oral argument provides a way for courts to hold lawyers accountable; and (v) educational function—oral argument enables the judges to learn more about the cases they have to decide.

Third, three of the Academy’s specific proposals elicited a consensus endorsement. The discussions revealed that: (i) focus letters sent pre-argument help make oral argument more beneficial; (ii) pro bono programs work and providing argument opportunities in those cases has value; and (iii) mooting and video training makes sense and improves the quality of advocacy.

Fourth, and perhaps not surprising, there was widespread agreement that a well-presented argument enhances the decision-making process. From the courts’ perspective, however, this requires properly prepared advocates who have an understanding of what the court needs to decide a case.

Fifth, in those circuits where oral argument is held most frequently, it is a part of the court’s culture. The judges embrace it as a necessary and important part of the case resolution process. And, perhaps more fundamentally, they view the in-public engagement with colleagues and counsel as a welcome and impactful piece of their case resolution function.

III. CONCLUDING COMMENTARY ON THE FUTURE OF ORAL ARGUMENT

The Academy is not the only one to note the decline in oral argument when the statistics are applied to the circuits as a whole. Yet its report and initiative have revealed that there is no “one size fits all” when it comes to addressing this decline.

Lawyers, for their part, believe oral argument should be held more frequently because it is their only chance to be personally involved in the path to decision and provides an opportunity for their clients to see the level of investment the court has made in resolving their cases. Oral argument also puts the decision-making process on display, reinforcing the court’s role as a viable branch of government. By comparison, judges can be resistant to argument because the time in preparation in many cases outstrips the benefits to the decision-making process. Then, there are systemic tensions. The time involved in

preparing and holding argument impacts the time to decision for all cases, not just those that are argued.

Notwithstanding judicial concerns or misgivings, the Academy believes that frequency of oral argument in the majority of circuits needs to increase. This call for change recognizes that oral argument may not alter the ultimate decision in the vast majority of cases, and appreciates the considerable effort it takes for the judges to prepare. But the Academy's call takes dead aim at what it believes is a fundamental fallacy: that the value or importance of argument can or should be measured by its effect on the result reached. Simply put, whether argument changes the way a judge is leaning before it occurs is not the relevant point. Instead, the value of oral argument comes from holding it as part of the continuum to the ultimate decision. And, oral argument's benefits persist no matter how it affects the result in a particular case.

To begin with, for the public and parties, the systemic value of oral argument is considerable. Seeing cases heard reinforces the importance of the adjudicative function and visibly reinforces the court's active role in trying to ensure that a just result is reached. The public gains the confidence that judges are engaged on the issues presented and clients develop an appreciation that informed judges decide their disputes. By putting the court's misgivings, observations, and insights on display, argument provides valuable perspectives for clients and the public on how and why particular outcomes are reached.

Beyond its pivotal and visible systemic role, oral argument provides a unique avenue for lawyers to advocate for their clients and creates deeper connections to those who decide their cases. Oral advocacy skills are best developed by first-hand practice, where courts can communicate most effectively on what will help them decide a case. The interaction at oral argument builds respect for the work that goes into deciding cases and reveals that the judges have, in fact, familiarized themselves with the issues. Holding argument also legitimizes and cultivates the importance of the advocate's role in the appellate process, leading, in turn, to even greater respect for the courts.

Moving to the decision-making process itself, a well-presented oral argument adds value even when, on reflection, it

does not change a judge's initial views on how a case should be resolved. Oral argument can sharpen issues and reveal their nuances. It can increase awareness of implications of decisions on cases presenting different fact patterns. Argument can facilitate a dialogue among panel members on their concerns and provide a path to consensus result. On occasion, it can provide the inspiration to change the path to resolution or expand or contract a holding or supportive reasoning. Better decisions then follow with corresponding adjudicative benefits in the pending case and for those that will come later.

The Academy recognizes that its call for more frequent oral arguments is not a one way street. The judges candidly state, across the circuits, that the greatest benefits accrue when arguments are well-presented. Some level of assurance that prepared advocates will be appearing therefore could generate a corresponding increase in the number of arguments. The Academy accordingly is committed to making training opportunities more widely available and has started a program to accomplish that goal. It also is committed to working with, and its Fellows are working with, national, circuit, state and local bar associations to increase the number and frequency of continuing education programs aimed at appeals and to making those opportunities available when they can do the most good—when oral argument is at hand. Most recently, the Academy has teamed with the American College of Trial Lawyers in launching a nationwide clinical program to provide video training for appellate oral arguments.

The Academy will continue to pursue its informal dialogue with the circuit courts to help foster a cooperative relationship and look for other ways to make oral argument more efficient and beneficial. Pre-argument focus letters are just one example of how this might be accomplished. Enhanced continuing education opportunities with court participation is another. Wider availability of practice manuals that benefit from court input is still another. As with hands-on training exercises, these steps are all within reach, come at little cost and hold the promise of making oral argument much more productive.

In the end, the frequency of argument is at the court's disposal and any significant institutional change must come from within. The courts control their dockets and the manner in

which cases get decided. Those circuits that hold oral argument as part of their ingrained culture are able to maintain their workloads and the judges involved extol the value of the oral argument experience. Those circuits that hold argument less frequently should take steps internally to discuss the values furthered by oral argument and make an effort to change. The Academy is at the ready to join the effort. We welcome, invite and support an institutional change.

APPENDIX I

AMERICAN ACADEMY OF APPELLATE LAWYERS
ORAL ARGUMENT TASK FORCE REPORT

I. INTRODUCTION

The U.S. courts of appeal are allowing oral arguments in a smaller percentage of cases than in years past. This decline raises some profound systemic issues. Accordingly, a task force of the American Academy of Appellate Lawyers studied how our federal appellate courts are using and managing oral argument. This is the task force's initial report. It focuses on today's conditions in the U.S. courts of appeal. Based on the initial results, the Academy expects that improving oral argument will become one of its standing projects, with the thought to expand the project to state appellate courts and the hope that other appellate lawyer groups will become collaborators.

Founded in 1990, the Academy consists of approximately 300 experienced appellate lawyers, former judges, and academicians, representing all but two states. Central to the Academy's mission is the preservation and advancement of the administration of justice on appeal. The board of directors appointed the task force after members identified oral argument as a focus for the Academy's strategic efforts. The task force evaluated oral argument frequency and practices using both published data and interviews with federal appellate judges.

Based on its evaluation, the Academy specifically seeks dialogue at this time with the federal appellate courts about how to improve the quality and increase the frequency of oral argument. It is our hope that some circuits will establish pilot programs to implement some or all of the Academy's recommendations set forth in this report. The benefits for the administration of justice on appeal and appellate practice would be substantial.

II. THE DECLINE IN APPELLATE ORAL ARGUMENT

Federal Rule of Appellate Procedure 34(b) suggests oral argument is the norm. The rule provides: “[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agree that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.”

In practice, however, oral argument has become the exception. Annual reports from the Administrative Office of the U.S. Courts dating back to the late 1960s show a marked decline in both the percentage of argued cases and the time allotted for each argument. The data are not entirely comparable because of changes in recording and reporting practices, for the reasons explained in the addendum to this report. As further detailed in the addendum to this report, the frequency of oral argument in counseled cases varies from circuit to circuit. That said, there is no doubt that it is declining almost everywhere. Reducing the frequency of argument impairs both the quality of appellate justice and the connection between citizens and the rule of law. This report addresses the importance and value of oral argument and recommends strategies to increase both the efficacy and the frequency of oral argument.

III. THE IMPORTANCE AND VALUE OF APPELLATE ORAL ARGUMENT

Appellate oral argument is beneficial for many reasons, among them the following four:

- Oral argument improves the decision-making process by allowing the judges to consider the case collectively, to ask counsel questions, and to give counsel the opportunity to explain, face-to-face, the merits of his or her client’s position.

- Oral argument helps assure the litigants that they have received their “day in court,” reflecting the personal attention and investment of the panel hearing the argument.
- Oral argument provides systemic benefits, connecting citizens to the appellate courts and the process of appellate justice.
- Oral argument teaches lawyers how appellate judges approach case resolution, improving the quality of appellate advocacy in future cases, over the long term.

A. Oral Argument Improves the Decision-Making Process

American jurisprudence embraces three judge intermediate appellate courts primarily because collaborative review is more likely than unilateral review to produce correct decisions. A single judge’s reversal of another’s disposition may reflect only a difference of perspective or philosophy. In contrast, when three judges join in a reasoned opinion, the deliberative process is more likely to result in a decision that is free from error and improved in its reasoning and rationale.

Federal appellate judges report that oral argument changes their view about the outcome in approximately 10 to 20 percent of argued cases. Judges report that argument influences the rationale or the disposition of subordinate issues more often, but the percentage is difficult to estimate. Further, judges say they cannot identify in advance those cases in which they are likely to change their minds. Judges’ reports are exactly what the collaborative-review theory predicts.

When argument starts, a judge does not know if he or she misunderstood an important fact in the record or the text of a key statute or reasoning in an applicable precedent. At oral argument, either an advocate or a fellow jurist can help point the panel toward the correct reasoning and result. Moreover, in traditional internal court operations, the conference immediately following the oral argument presents the best opportunity for one judge to correct another’s misunderstanding.

Courts of appeals have evolved many ways to decide non-argued cases. Some of these threaten the efficacy of collaborative review. At least one circuit assigns drafting memorandum opinions in many *pro se* cases to staff attorneys. The staff attorney then circulates the draft to the panel, and defends the opinion to the panel. Judges and staff attorneys who participate in this process say that the defense session is at least as rigorous as oral argument in counseled cases. Much recommends that model in *pro se* cases, but staff attorneys should not substitute for appellate lawyers in counseled cases.

Another approach is to assign drafting memorandum opinions in non-argued cases to a lead judge. When the draft is prepared by that judge, it is circulated with the case file serially to the other two panelists. Discussion occurs only if the second or third panel member requests it. Even in the best of circumstances, circulating a draft risks forfeiting the value of collaborative review; in the worst, the value is obliterated.

Applying technology to judicial decision-making can further weaken the collaborative process. In theory, paper copies of the draft opinion and case file are unnecessary in the circulating-draft method of deciding non-argued cases. The lead chambers could send only an email with attachments, file paths, or hyperlinks. Courts' capacity for electronic circulation will grow even without designing court-specific software. More than circulating a physical file, electronic circulation may invite a moral peril: a judge engaged in other matters may sign off on a trusted colleague's draft without engaging with the case. And the third judge, unaware that the second judge did not engage, is at even greater risk to fail to engage after a draft has two votes.

Judges explain that the reduction in the number of oral arguments is based primarily on the premise that oral argument is time-consuming and not helpful. That is, many judges think they can be more efficient if they do not spend time preparing for and conducting oral argument. If output were the sole criterion to evaluate appellate court performance, the point would have persuasive force. But oral argument has never been justified by its efficiency. Rather, in an adversary model, oral argument provides the best foundation for securing collaborative review of each case. Further, courts can improve argument efficiency, just as lawyers can improve how they present cases.

The Academy's vision of oral argument is not of a Mount Rushmore panel enduring a long-winded speech, but of a hot bench posing critical questions and effectively engaging with counsel throughout. This sort of directed "Q&A" keeps arguments focused and makes them more productive.

Some judges express concern about the cost of oral argument to parties. The Academy understands this concern. But the Academy believes it may be overstated. In our experience, having decided to pursue the case to the appellate level (at least as to the appellant/petitioner), what the client wants is the best result (or at least a fair hearing), with the additional incremental expense of oral argument a relatively minor consideration.

B. Oral Argument Assures Litigants Their "Day in Court"

One English formulation of due process is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹ This is an elegant way of saying how important it is for each litigant to feel he or she got her day in court. The party who feels fairly treated tends to feel better about even an adverse result, and leaves the appellate system with a sense of dignity and respect for the rule of law.

The question, then, is how a party in an appeal is to gain a sense of being fairly treated. In trial courts, most of the action happens in a courtroom that, by constitutional law, must be open to the litigants and the public. But in appellate courts, a great deal happens behind closed doors. When a case is not argued, *all* of the action occurs in private, with only the result made public.

Oral argument cuts through this, and shows the parties that the judges are informed and engaged. It shines a light on the process. In this and other ways, oral argument confers credibility critical to the appellate judicial function.

C. Oral Argument Performs a Critical Civics Function

The Academy agrees with scholars and public figures, including Justice Sandra Day O'Connor, that civics education

1. R. v. Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, 259.

and knowledge have declined in recent years. The judicial branch is the least understood branch of government, with intermediate appellate courts the least understood among the judicial branch's sectors. The Academy believes ignorance of the judicial function threatens not just budgets, but also respect for the rule of law. Courts and lawyers cannot count on schools alone to imbue citizens with knowledge and respect for what we do.

Oral argument provides courts a forum for citizens to engage with the appellate process. Intermediate appellate courts use all the following strategies, and more, to teach civics by showing people what courts do: free website access to the dockets for cases of popular interest; live streaming arguments in *en banc* cases and cases of popular interest; making recordings of arguments available free on their website; "riding circuit" so that citizens can see the court in action without having to travel to its primary seat; hearing arguments at law schools and other locations of easy access to people already interested in the appellate process, as well as on college campuses or at public buildings compatible with class study by high school students. In some state courts, arguments of great public note are made available to the community and even are broadcast on network or cable television. Just as parties should see justice done in their cases, so the public should see justice being done in appellate courts generally.

The confidential aspect of deciding appeals conflicts with popular demands for transparency in the political branches. But oral arguments and reasoned opinions ensure that justice manifestly and undoubtedly is seen to be done. Without changing their internal processes, appellate courts can display oral argument as an essential feature of the judicial process—and display it proudly. Further, increasing the frequency of oral argument allows lawyers and public observers to better advocate for, and defend, the appellate system in a public forum, including when it comes to court funding. Litigants and citizens who have seen the intermediate appellate system work can better vouch for its place in our system. Shutting people out, by comparison, can lead to misperceptions and disaffection.

D. Oral Argument Provides a Critical Teaching Function

Oral argument teaches lawyers how to practice appellate law. An active appellate panel teaches lawyers how judges approach cases. This is a function simply of the panel doing its business: asking about the issues the judges have identified as most important to the disposition of the case and about the elements of the record and the law most relevant to those issues. Even listening to argument in cases in which the lawyer has not been involved helps lawyers understand what is important to judges.

If judges want better work product from lawyers, judges need to show lawyers how they can produce better work. The best investment is giving feedback; oral argument is one of the few permissible windows through which lawyers can observe how appellate judges judge.

In summary, denying oral argument may appear to provide an immediate benefit by making judicial time more efficient, yet it ultimately threatens the appellate decision-making process, the litigants' confidence in that process, public confidence in the rule of law, and the quality of appellate legal services. We encourage courts not only to set more cases for oral argument, but to do so in ways that intentionally serve and benefit from the interests in preserving collaborative review, promoting engagement with appellate courts, seeing justice done, and educating appellate advocates. Some specific recommendations follow.

IV. RECOMMENDATIONS TO IMPROVE THE QUALITY AND INCREASE THE FREQUENCY OF ORAL ARGUMENT

Many steps can be taken among the stakeholders to improve the quality and increase the frequency of appellate oral argument. Here are some, set forth in quasi-chronological order (in terms of the life of an appeal).

A. Establish Pro Bono Programs and Other Opportunities for Oral Argument

Appellate courts should implement programs to assign *pro bono* lawyers to brief and argue appropriately screened cases either as counsel for pro se litigants or as an *amicus*. Some appellate courts have these programs today.² These programs thrive on effective screening so that the pro bono lawyer has a legitimate argument to brief and the court has a significant issue to decide. The programs enable financially eligible clients to have effective appellate representation. They deliver high-quality briefs to the merits panel. In these basics, the programs benefit litigants with worthy cases, appellate courts, and society as a whole.

The icing on the cake is a promise that the court will grant oral argument in pro bono program appeals.³ The oral argument promise is an important incentive for junior lawyers (and their firms) to take pro bono cases. Allowing argument provides all the benefits we have discussed, in addition to those specific to the pro bono program. We recommend that every court of appeals adopt a pro bono program with an argument promise similar to that of the Ninth Circuit.

In addition, even aside from such pro bono programs, both the bench and the bar should consider how less experienced lawyers can get more opportunities for oral argument (for example, in cases in which oral argument would not otherwise be granted). Some states that certify appellate lawyers require a minimum number of oral arguments; carving out arguments for junior lawyers will enable them to more readily meet those requirements and promote appellate specialization. This, too, will provide a quality enhancement.

2. See, e.g., 9TH CIR. GEN. ORDER 3.7 (Apr. 3, 2018) (providing that “[i]f an appeal has been selected for inclusion in the court’s *Pro Bono* Representation Project and pro bono counsel has been appointed, the panel shall not submit the case on the briefs, but shall hear oral argument unless pro bono counsel withdraws or consents in writing to submission on the briefs”).

3. See, e.g., *id.*

B. Consider Parties' Requests for Oral Argument

In those circuits that don't hold oral argument in most counseled civil cases (and these are most of the circuits), courts should be receptive to the litigants' requests to argue cases. These requests should be made after the close of briefing and should identify the specific aspects of the appeal for which argument would be helpful. Today, in most courts, requests for oral argument are made early in the appeal process and are often pro forma: *e.g.*, "this case is complex and involves novel issues of great importance." Our recommendation focuses both counsel and the court on the case as briefed.

C. Issue More Focus Letters

Some appellate courts issue orders or letters in appropriate cases, specifying which issues counsel should be prepared to argue orally. This procedure is positive and productive: it ensures that the issues of greatest concern to the court will be addressed, and it reduces counsel's investment in preparing for other issues. We encourage more use of focus letters, particularly where the court is allowing only brief argument times. Further, panels should always give notice when a judge intends to introduce issues that were not briefed or that the parties treated summarily, as sometimes occurs with respect to issues involving subject matter or appellate jurisdiction.

D. Develop a Hot-Court Oral Argument Culture

Courts should develop a hot-but-courteous oral argument culture. A judge should challenge a lawyer to respond to the primary reasons the judge thinks the lawyer should lose an issue. A judge can also focus the lawyer on concerns about the scope and impact of a particular resolution. In a hot-court culture, the court can set argument time case-by-case, based on the complexity of issues. Courts should allow at least 10 minutes per side in the simplest cases, with increasing levels for increasing complexity. A "hot" argument not only will most benefit the court, but also will best serve the goals set forth above.

E. Use Technology to a Fuller Extent

The Academy recommends that all circuits develop easy docket access, live streaming, downloadable recordings, and outreach programs. Each circuit should have a committee of judges, with appropriate staff support, to implement well-established civics functions and to generate and execute new programs appropriate to the circuit's geography and operations.

Another technology-related recommendation is that courts conduct some arguments by video-conference, especially when judges' chambers and lawyers' offices are located far from the argument venue. The dynamics of a teleconference are inferior to personal appearance, but argument via video is better than no argument at all. Video-conferencing also makes oral argument more affordable for parties of modest means and in smaller cases.

F. Thoughts on the Role of Appellate Lawyers

We are well aware that for some appellate judges, the problem with oral argument is the poor quality of the lawyers' work. We know that appellate courts could be more efficient if they received a better average quality of advocacy in both briefs and oral argument.

It's not as if inexperienced lawyers don't have opportunities to get training in appellate advocacy. At the national level, commercial providers, the Council of Appellate Lawyers in the ABA Judicial Division, DRI—the Voice of the Defense Bar, and others have produced excellent programs. Some circuits have bar associations that produce regional programs; some local bar associations also sponsor excellent programs. States that have certified appellate specialization produce and certify training and education.

But there is a critical problem: one-time appellate advocates usually do not prepare themselves for the possibility of an appeal. Many of them get no help from the training system in delivering work product useful to appellate courts. We are working on concepts, like short, just-in-time video courses that can teach the basics at the time one-time users most need training. That work is outside the scope of this report, but it is

part of the dialogue we hope to open with the courts of appeals about improving oral advocacy.

V. CONCLUSION

The Academy looks forward to discussions with the appellate courts, and to input from the courts on the Academy's recommendations for improving the quality and increasing the frequency of oral argument. As noted at the outset of this report, we stand ready and eager to work with the courts of appeal to develop pilot programs to begin to implement some or all of the recommendations set forth in this report.

SELECTED BIBLIOGRAPHY

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 (1982)

Ruggero J. Aldisert, *A Judge's Advice: 50 Years on the Bench* 167–225 (2011)

American Academy of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. App. Prac. & Process 1 (2006) (includes selected bibliography)

Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35 (1986)

David R. Cleveland and Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. App. Prac. & Process 119 (2012)

Mary J. Deits & Lora E. Keenan, *Getting to Know Us: Judicial Outreach in Oregon*, 6 J. App. Prac. & Process 237 (2004)

Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639 (2003)

Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1 (2007)

John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal*, 41 Cornell L.Q. 6 (1955)

Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 Stetson L. Rev. 139 (2003)

Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. App. Prac. & Process 141 (2006)

Laural Hooper, Dean Miletich, and Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals* 18–32 (2d ed. 2011)

Bert I. Huang, *Lightened Scrutiny*, 124 Harv. L. Rev. 1109 (2011)

Daniel Kahneman, *Thinking, Fast and Slow* (2011)

Marin K. Levy, *Judging Justice on Appeal*, 123 Yale L. J. 2386 (2014)

Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 Geo. Wash. L. Rev. 401 (2013)

Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel*, 61 UCLA L. Rev. 1246 (2014)

Roger J. Miner, *Professional Responsibility in Appellate Practice: A View from the Bench*, 19 Pace L. Rev. 323 (1999)

Brett G. Scharffs, *The Character of Legal Reasoning*, 61 Wash. & Lee L. Rev. 733 (2004)

Michael A. Wolff, *From the Mouth of a Fish: An Appellate Judge Reflects on Oral Argument*, 45 St. Louis U. L.J. 1097 (2001)

MORRISON REVISION 7/17/15
THE NUMBERS

As a result of our study, we concluded that doing further breakdowns of existing data, rather than trying to make more refined efforts at comparisons with prior years, is a more fruitful way to examine the problem and look for solutions that would improve the situation for the courts, the parties, and their advocates. Moreover, there are areas where further breakdowns of data would enable courts to refine their consideration of what changes might be made in deciding which cases should be granted oral argument and how argument might be made more useful for the court and the parties.

We began our examination of the frequency of oral argument with the publicly available Table B-1 issued by the AO as of September 30th of each year, which includes data from all circuits except the Federal Circuit. We used the Table that ended on September 30, 2014. It reported that there were 6,646 appeals terminated after oral argument out of a total of 55,216 terminations, which would mean that only 12% of the cases received oral argument. But digging deeper into the numbers, with a significant assist from staff at the D.C. Circuit who answered many of our questions, we concluded that 12% is not a fair number. Therefore, we examined the data in greater detail in order to make further refinements with the goal of eliminating cases in which there was likely to be little reasonable basis for having oral argument and thus to focus on cases in which reasonable people could differ on whether to grant oral argument. This examination also led us to seek and obtain from the Federal Judicial Center additional data on Pro Se and Immigration (BIA) appeals that are not included in the public tables. Our study also revealed that there are substantial differences in the rates of oral argument across the circuits, both overall and within specific case categories, and so we decided to break down our refined data by circuits to reflect those differences. Before turning to the four Tables that are appended to the end of this report, we offer an explanation about the categories of cases on Table B-1 and why we made certain exclusions in the attached Tables.

A. “Procedural” Terminations and “Merits” Terminations

Case terminations are divided into procedural and merits terminations, with the former comprising about one third of all terminations in 2014. In the procedural category, about 72% were terminated by staff, for reasons such as voluntary dismissals, settlement, failure to file a brief, and other instances in which no judge was involved. Plainly, those cases are not candidates for oral argument.

There were also 4935 procedural terminations decided by “Judge,” which could mean a single judge or a panel, but either way the termination was for some procedural reason, probably with an opposition. Those reasons could include an untimely notice of appeal, or filing in the wrong court, but could also include terminations for lack of standing, etc.

There are two ways that a procedural termination could arise: by motion or after full briefing and perhaps argument. Under Federal Appellate Rule 27(d)(2), motions and responses are limited to 20 pages each, whereas full briefing allows 14,000 words (about 60 pages, depending on formatting). In addition, Rule 27(e) excludes oral argument on motions “unless the court orders otherwise.” Many appellees seek to short-circuit the full briefing process (thereby saving time and money) and thus file motions for summary affirmance, which could be on a procedural ground, or on the merits.

A motion might also be brought on a ground such as non-compliance with the Antiterrorism and Effective Death Penalty Act of 1996, which sets limits on bringing some habeas corpus cases, and where non-compliance could be considered either procedural or on the merits. We have inquired, and have been advised, that the AO does not have statistics that break out whether a termination—either procedural or merits—was based on a motion, with shorter page limits and probably no oral argument, or after full briefing, in which case oral argument may or may not have been given.

In trying to determine an appropriate “denominator” against which to compare the actual number of oral arguments, we had to decide whether to include Procedural Terminations (Judge), knowing that some cases in that category will have received oral argument. Similarly, we also know that some

merits terminations will be based on motions that did not receive oral argument. Although we have no way of knowing how many there are in each category, we do know that the motions terminations fall into both categories and will partially offset each other. Based on our experience, and our preference to understate the problem of reduced oral argument in cases of doubt, we decided to take out all procedural terminations in calculating our denominator.

Our examination also led us to suggest that the AO begin requiring the circuit courts to include on all terminations whether they were pursuant to a motion or after full briefing. That determination can be made very simply and requires no judgment at all. Indeed, the AO might also consider abandoning the procedural/merits line because it does require judgment and does not seem responsive to any particular need for data in the effective and fair administration of the federal courts of appeals. Changing the judge category to motions would also enable us and others to further refine the base of cases fully briefed against which the number of oral arguments could be assessed.

B. Consolidated Cases

The next category of adjustments relates to consolidated cases, of which there were 2737 among the merits terminations in 2014 (7%), which is equal to about 41% of the total number of oral arguments nationwide (6646). Within consolidations, there are several kinds of cases: criminal cases with several defendants (about 30% of all consolidations are in direct criminal appeals); administrative agency appeals direct to the courts of appeals (about 10%), which may involve multiple parties with some, but not total overlap of issues, including both claims that an agency rule went too far and did not go far enough; and private civil cases (about 35%), in which there could be cross-appeals or cases with more than one plaintiff or defendant, with an indeterminable degree of overlap in the issues.

Again, we were faced with a binary choice: to take out all cases reported terminated by consolidation or leave them in. We decided to take them out, not just because the numbers were very large, but because the circuits differed widely in the impact

of including them and measuring oral arguments in that category of cases. Thus, on the one extreme was the D.C. Circuit, in which there were more than 35% more terminations by consolidation of administrative appeals than there were oral arguments of agency appeals. Most circuits had the reverse: several times the number of oral arguments as consolidation terminations, with one circuit (10th) where the ratio of oral arguments to consolidations was more than 10 to 1. We recognized that a consolidation of a massive EPA rulemaking appeal, for example, is not the same as an immigration appeal or a routine NLRB unfair labor practice ruling. We nonetheless concluded that leaving in all consolidated cases would create the opposite error, by understating the percentage of cases in which oral argument was a realistic possibility of being provided.

C. Prisoner Petitions

There are two categories of cases in which there are a large, but indeterminable number in which one side (almost always the plaintiff/petitioner) is not represented by counsel. These are U.S. Prisoner Petitions and Private Prisoner Petitions, where the term “Private” refers to prisoners held by state and local, not U.S., authorities. These cases include habeas corpus proceedings and their federal equivalent under 28 U.S.C. § 2255, where the petitioner is seeking release from prison or other substantive reduction or change of sentence. In some number of these cases, the prisoner is represented by counsel, but we decided not to seek to break down prisoner petitions by pro se or counseled cases but instead decided to break out pro se cases on a separate table. Some of these cases receive oral argument, but only if the prisoner is represented by counsel. Some present important issues of law, while others are fairly routine. Another significant group within these categories are complaints about prison conditions, which include class actions seeking injunctive relief, as well as individual claims seeking damages from prison guards or doctors for violations of the prisoner’s constitutional rights. Many, perhaps most, of these cases are filed pro se, and there is a wide range regarding the difficulty and/or importance of the issues presented.

Again, we had to decide whether to include these cases as part of our denominator. After excluding procedural terminations and consolidations, there were 3485 cases in the US prisoner category and 6368 in the Private group. Of those 163 and 465 received oral argument, or about 5 and 7%, respectively, which is hardly surprising given the large number of these cases brought pro se. As a result, we decided to have a separate table that shows the impact of eliminating all pro se cases.

D. Agency Appeals, Including Immigration Appeals

The category of Agency Appeals includes only those cases that come directly from an administrative agency (and the Tax Court) and do not go through the district court. For some agencies, there is direct review in the courts of appeals for all of their cases involving their substantive laws (NLRB and FCC are two examples); others, such as FDA, have only limited direct review, with most of its cases going to district court first. In addition, all Title VII and FOIA cases against all agencies go to district court, where they are treated on appeal as US cases.

The Tables that are publicly available do not have breakdowns by agency for Agency Appeals, but we obtained a breakdown from the Judicial Conference for the largest category of such appeals: immigration cases coming from the Board of Immigration Appeals. In 2014, BIA appeals represented 68% of all direct agency cases after excluding consolidated cases and more than 10% of all terminations in all categories of cases. Of the 2374 BIA cases terminated on the merits, 372 (16%) had oral argument, with a wide variation among the circuits as to the percentage of BIA cases that had oral argument.

The largest numbers of immigration cases are in the Second (417) and Ninth (1503) Circuits, which are considerable reductions from 2012 (1582 and 2860). There are significant numbers of BIA cases in all of the other circuits, except the D.C. Circuit, which had none in 2014. In every other circuit except the Tenth, there were more BIA cases than those from all other agencies combined. Two points on oral argument in BIA cases in the Second and Ninth Circuits bear noting. In the Second Circuit, under Local Rule 34.2, the court maintains a non-

argument calendar for immigration cases claiming asylum or seeking to withhold removal. In the Ninth Circuit, although oral argument is also limited, the court appoints counsel in prescreened cases, including immigration cases, “presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument.”⁴

In the end, we decided to leave BIA cases in the basic tables, but to do a separate table showing, among agency appeals, the relative percentages of BIA and other agency appeal cases that received oral argument.

E. U.S. Civil, Other Private Civil, and Bankruptcy

Three categories—Other U.S. Civil, Other Private Civil, and Bankruptcy—do not have any apparent needs for adjustments beyond eliminating procedural terminations and those based on consolidations, which apply to every category of cases. By way of background, the first category is for those cases in which the United States, a federal agency, or a federal official is either a plaintiff or a defendant, the case was initially brought in a district court, and the appeal is from a judgment of that court. The second is comprised of all other non-bankruptcy civil appeals from district court judgments. They are mainly federal question and diversity cases, and both extend to a wide range of subjects. Although labeled “private civil,” it also includes suits by and against states, municipalities, and their officers and employees. Third is the relatively small group of bankruptcy cases. The United States or one of its agencies is a party to many such cases (especially those that are appealed), but the presence of the US does not take the case out of this category.

F. Original Proceedings

The final category of cases is Original Proceedings, which is comprised mainly of writs of mandamus or prohibition, most of which are filed by pro se parties. In 2014, there were 5145

4. U.S. CT. OF APP. FOR THE NINTH CIR., PRO BONO PROGRAM 1 (Jan. 11, 2012), available at <http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf>.

terminations in this category of which only 35 received oral argument (0.7% after eliminating consolidations). All of the circuits had a significant number of those proceedings, but no circuit had an overwhelming number. No circuit had more than nine oral arguments among these cases, and several had none. For these reasons, this category will be excluded from our basic denominator.

G. Description and Highlights of Attached Tables

Table I includes only percentages and not numbers of terminations. It is divided into circuits and type of case (eliminating only the Original category). It also eliminates procedural terminations and cases that were consolidated. The overall average percentages of oral arguments run from the mid-teens (3rd, 4th, 6th & 11th), to a group in the low 30s (1st, 2nd & 10th), with the 7th & DC Circuits at 45 and 55%, respectively. A similar pattern followed for direct criminal appeals, whereas for US prisoner petitions, DC stood out at 35%, although it had only 52 after consolidations. Private (state) prisoner cases were also rarely argued, except in the 1st Circuit (31%, out of 41 cases). Civil appeals in US, private, and bankruptcy cases were more often given oral argument, and there were fewer wide-spread differences among the circuits in these categories (although no circuit had a higher percentage in any of these categories than the 7th). Finally, on agency appeals, the 7th and DC Circuits heard 72% (after consolidation), followed by the 10th at 38%, the 5th & 7th at 23 & 24%, with four in the teens and four in single digits.

Table II takes out all 9610 prisoner cases (US & private/state) from the cases terminated on the merits on Table I (29,212). It shows the actual numbers of cases (same basis as Table I), prisoner cases, and non-prisoner cases. Direct criminal appeals, which usually have counsel, are not treated as prisoner cases for this Table. The right column shows the percentage of orally argued cases by circuit when prisoner cases are removed. The increase in percentage of oral arguments is less than 10% (*i.e.*, $14-21 = 7\%$) for every circuit except the 7th (increase from 45 to 65%) and the 10th (increase from 30 to 41%).

Table III starts with the basic cases & percentages in Table I and shows the number and percentages of oral arguments for pro se and then counseled cases on the merits, after consolidations and original cases are removed. If the appellee is the only pro se, the cases are counted as counseled cases. The contrast in orally argued cases is quite dramatic: overall = 23%; pro se = 3%; and counseled cases = 40%. Of the circuits, five had less than 1% of their pro se cases argued, seven had between 3 & 6% argued, and DC led the pack with just 10%. For counseled cases, three had 25% (3rd, 4th, and 11th), eight between 31 & 51%, and DC and the 7th on top at 77 & 86%, respectively.

Last, Table IV shows the impact of immigration (BIA) appeals on the percentage of oral arguments among agency appeals only (merits cases, after eliminating consolidations). First, BIA cases are more than twice the number of other agency appeals, although they are not all as complex and many agency rulemaking challenges are often filed in the DC Circuit (which had no BIA cases in 2014). Second, while overall there were fewer oral arguments in BIA than in non BIA cases (16 vs 22%), the disparity was much less that for pro se vs counseled cases (Table III). Third, at the top of BIA argued cases was the 7th with 77% of its BIA cases argued (and only 57% of its other agency appeals), followed by the 9th tied with the 8th (at 19%), even though the 9th decided 1026 BIA cases on the merits. Fourth, for non-BIA appeals, three circuits had appreciably higher percentages (DC/72, 10th/62 & 7th/57), with three circuits below 10% (1st, 2nd & 3rd), four in the teens (4th, 6th, 9th & 8th), and the others between 22 & 36%.

TABLE I
PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON THE MERITS
U.S. COURTS OF APPEALS 2014
BY CIRCUIT & BY CASE CATEGORY*

	All	Criminal	US Prison	US Civil	Private Prison	Private Civil	Bank	Agency
All	23	22	5	38	7	46	51	18
DC	55	65	35	53	0	47	50	72
1 st	32	29	4	34	31	57	44	4
2 nd	32	37	5	51	9	55	56	9
3 rd	12	12	5	19	4	23	39	9
4 th	11	12	2	24	2	26	38	16
5 th	22	14	7	56	5	54	75	23
6 th	18	14	6	21	7	39	50	7
7 th	45	60	5	61	13	68	75	72
8 th	22	18	6	34	7	50	37	24
9 th	24	30	5	49	10	53	47	16
10 th	30	41	2	26	7	43	59	38
11 th	14	12	3	17	5	35	35	15

*Source: Administrative Office, Table B-1 for 12 months ending September 20, 2014. This table does not include cases from the Federal Circuit, and it excludes procedural terminations, consolidated cases, and cases in the original proceedings category.

TABLE II
PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON THE MERITS
U.S. COURTS OF APPEALS 2014
BY CIRCUIT & BY CASE CATEGORY*

	Cases Table I	Oral % Table I	Prisoner Cases	Cases Minus Prisoners	Oral Non- Prisoners	Oral % Non- Prisoners
All	29212	23	9610	19602	5983	31
DC	426	55	51	375	219	58
1 st	770	32	125	645	227	35
2 nd	2522	32	458	2064	780	38
3 rd	1782	12	581	1201	206	17
4 th	3081	11	1276	1805	315	17
5 th	3645	22	985	2660	749	28
6 th	2720	22	950	1770	413	23
7 th	1506	45	526	980	633	65
8 th	1881	22	717	1164	363	31
9 th	6439	24	2406	4033	1306	32
10 th	1303	30	358	945	383	41
11 th	3137	14	1227	1910	393	21

*Prisoner cases include both U.S. and Private (state) prisoners. They are excluded from the total cases and their oral arguments are also excluded.

TABLE III
PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON THE MERITS
U.S. COURTS OF APPEALS 2014
BY CIRCUIT WITH PRO SE ADJUSTMENT*

	Cases Table I	% Oral Table I	Pro Se Cases	% Oral Pro Se Cases	Counseled Cases	% Oral Counseled Cases
All	29212	23	13790	3	15422	40
DC	426	55	138	10	288	77
1 st	770	32	234	0.8	534	46
2 nd	2522	32	1016	6	1506	50
3 rd	1782	12	538	0.2	944	25
4 th	3081	11	1731	0.2	1350	25
5 th	3645	22	1904	5	1741	41
6 th	2720	22	1303	3	1417	31
7 th	1506	45	744	3	762	86
8 th	1881	22	901	3	980	39
9 th	6439	24	3065	6	3374	40
10 th	1303	30	534	0.6	769	51
11 th	3137	14	1380	0.5	1757	25

*Pro se cases include only cases with no counseled party and pro se is appellant; if pro se is appellee, case is treated as counseled case. Pro se cases obtained by special FJC report 7/15/15.

TABLE IV
PERCENTAGE OF ORAL ARGUMENTS
IN AGENCY CASES DECIDED ON THE MERITS
U.S. COURTS OF APPEALS 2014 BY CIRCUIT
WITH AND WITHOUT IMMIGRATION (BIA) ADJUSTMENT*

	Agency Cases Table I	Agency % Oral Table I	BIA Cases	% Oral BIA Cases	Non BIA Cases	% Oral Non-BIA Cases
All	3514	18	2374	16	1140	22
DC	100	72	0	0	100	72
1 st	92	4	79	4	16	6
2 nd	552	9	417	10	135	8
3 rd	195	9	120	8	75	9
4 th	167	16	110	16	57	18
5 th	202	23	140	19	62	33
6 th	257	7	190	4	67	15
7 th	81	72	60	77	21	57
8 th	92	24	64	19	28	36
9 th	1503	16	1026	19	477	11
10 th	112	38	49	6	63	62
11 th	158	15	119	13	39	18

*Agency cases from Table B-1, after excluding procedural and consolidated terminations. BIA case information obtained by special FJC report 7/15/15.

APPENDIX II

February 12, 2016

Chief Judge Sandra Lea Lynch
United States Court of Appeals for the First Circuit
United States Courthouse; Suite 8710
One Courthouse Way
Boston, MA 02210

Dear Chief Judge Lynch:

As you may be aware, the American Academy of Appellate Lawyers, founded in 1990, is an invitation-only professional association dedicated to the enhancement of appellate practice and the administration of appellate justice. The Academy today consists of approximately 300 experienced appellate lawyers, former judges, and academicians, from virtually every state in the nation.

In 2013, the Academy identified the decline in the frequency of appellate oral argument as an issue of great and growing concern. We appointed a Task Force to study the issue. The Task Force evaluated oral argument frequency and practices, using both published data and interviews with federal appellate judges. After extensive internal discussion, in October 2015, the Academy released the Task Force's Report, with five specific recommendations, along with an Addendum that closely examines the numbers. (A copy of the Report and Addendum is attached. These documents also appear on the Academy's website, <http://www.appellateacademy.org/>.)

To further these important objectives, the Academy has established Circuit-based committees to partner with the appropriate bar groups in each Circuit and commence dialogue with the Circuit judges and, as appropriate, Court staff on the Task Force's recommendations. A member of the First Circuit's committee will be contacting you in the near future to discuss next steps.

On behalf of the Academy, I thank you in advance for your consideration of and, I hope, support for this important project.

Respectfully,

Nancy Winkelman President

Enclosure

A WORD OF INTRODUCTION: *U.S. SUPREME COURT BRIEF WRITING STYLE GUIDE*

Dan Schweitzer*

Should appearances matter? In principle, no. We should not judge a book by its cover or a person by his or her physical attractiveness. Likewise, one supposes, a judge should not assess a brief differently depending on whether it is written in Courier (ugly) or New Century Schoolbook (lovely). So what can be less useful than a guide to appellate brief writing that is, at bottom, about appearances?

Yet my *U.S. Supreme Court Brief Writing Style Guide* is about little else. It provides no advice on the types of legal arguments that are effective in the Supreme Court. And it provides only occasional advice on how to write a convincing appellate brief. Most of the *Style Guide* is instead devoted to matters such as how properly to cite a Supreme Court case (cite only the official U.S. Reporter) and how the Opinions Below section should read. Why did I bother?

The answer, of course, is that appearances do matter. A job applicant should not show up for an interview wearing a t-shirt and ripped jeans. A male attorney appearing in court ought to wear a tie. When we bungle how we present ourselves, we are judged harshly—and for good reason. Sloppy, inappropriate attire is a sign. It tells us that the person is too green to know what’s appropriate and didn’t care enough to find out.

Legal briefs are judged—to an extent—the same way. Judge Wald noted in these pages almost 20 years ago that “you cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the

*Director and Chief Counsel, NAAG Center for Supreme Court Advocacy. Readers can reach Mr. Schweitzer at dschweitzer@naag.org or 202.326.6010.

judge go back to square one in evaluating the counsel.”¹ I wrote the *Style Guide* to address a related flaw in too many Supreme Court briefs I had read: the failure to abide by the Court’s unwritten rules and customs.

At bottom, it’s about establishing credibility. A court is more likely to accept your characterization of the facts and your explanation of the law if you have earned its trust. Time and again, judges and experienced practitioners have told me that nothing is more important for an advocate than establishing credibility with the court. That is especially true for repeat players—such as the group of attorneys with whom I work, members of state attorney general offices.

So how do you establish and maintain credibility? To loosely paraphrase Chief Justice Roberts, the way to earn trust is to act trustworthy.² That means being scrupulously honest and accurate; not misstating the facts or the law; not exaggerating or omitting key matters; treating the court, opposing counsel, and court personnel with courtesy; and communicating with the court—in writing and orally—in a temperate, reasoned tone.³

It also means avoiding typos, using proper citation form, and doing the other myriad small things that make a brief look just right. Justice Scalia explained why judges care about that:

There’s a maxim in evidence law or criminal law or whatever: *falsus in uno, falsus in omnibus*. If you show that a witness lied about one thing, the jury can assume that he lied about everything. False in one, false in all. It’s the same thing about sloppiness. If you see somebody who has written a sloppy brief, I’m inclined to think this person is a sloppy thinker. It is rare that a person thinks clearly, precisely, carefully and does not write that way. And contrariwise, it’s rare that someone who is careful and precise in his thought is sloppy in his writing. So it hurts

1. Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 22 (1999).

2. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1 v. Jefferson Cnty. Bd. of Educ.*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

3. See Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy*, 44 LITIGATION 12, 13–14 (2018).

you. It really hurts you to have ungrammatical, sloppy briefs.⁴

It also hurts you to write a brief that fails to conform to the Court's unwritten rules and customs. To return to an earlier example, in most courts the proper way to cite *Roe v. Wade* is *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). In the Supreme Court, the proper citation form is *Roe v. Wade*, 410 U.S. 113 (1973). If your Supreme Court brief uses the former citation, every Justice and law clerk who reads the brief will immediately react negatively. Every one of them will think, "This person doesn't know how we do things up here." Worse, every one of them will think, "This person didn't have the good sense to go on the web and look at how the Solicitor General's office or other regular practitioners here write their briefs."

Will the Court deny your cert petition simply because it used the wrong citation form for Supreme Court decisions? Of course not. But it puts you behind the eight ball. It's one knock against your credibility. And there are a hundred other similar ways you can lose credibility points that the *Style Guide* walks through.

Instead of having a Statement of the Case that describes both the factual and procedural backgrounds (usually in that order), you might without the *Style Guide*'s advice follow many lower courts' practice of having a Statement of the Case (describing its procedural history) followed by a Statement of the Facts. You might italicize the codes and reporters in statutory and case citations—as they do in New Jersey state courts, but not the U.S. Supreme Court. You might cite the decision under review by citing the federal reporter rather than the cert petition appendix. There are even ways to mess up the cover page. (If I see another lawyer put his or her state bar number on it, I'll scream.) But of course you won't make these greenhorn mistakes if you adopt the Supreme Court style outlined in the *Style Guide*.

After more than two decades working on Supreme Court cases as Supreme Court Counsel for the National Association of

4. Bryan Garner, *Justice Antonin Scalia*, 13 SCRIBES J. LEG. WRITING 51, 71 (2010) (transcribing Mr. Garner's interview of Justice Scalia).

Attorneys General, it seemed time to put this all down on paper. It began as a list of pet peeves. (For goodness sake, don't write your Questions Presented in all caps!) With time, it became a comprehensive walk through the different sections of Supreme Court briefs. All the while, its focus remained on style, not substance.

Earning credibility can be difficult. No one *wants* to acknowledge that a recent precedent supports the other side's position. Our fingers resist typing the bad but relevant fact that makes our client look less appealing. Adhering to a court's brief writing customs and practices is—or ought to be—the *easy* way to gain credibility.

Newcomers to Supreme Court practice already start at a disadvantage. A modern Supreme Court bar has emerged, whose members possess “years of advocacy experience before the Court, settled expertise in the workings of the Court, and in-depth knowledge of the concerns and predilections of the individual Justices.”⁵ They have also built up a large store of credibility with the Court.

The first-timer must earn the Court's trust and respect one page at a time, one brief at a time. Mostly, she will do so by writing well-organized, cogently reasoned, even-toned documents. But she will also do so by making each sentence and each page look the right way. That means no typos, no grammatical errors, and adopting the Supreme Court's distinctive style customs. I hope the *Style Guide* helps appellate attorneys accomplish that task.



5. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1525 (2008); see also John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68 (2005).