

2018

Oral Argument: Transformation, Troubles, and Trends

Marshall L. Davidson III

Tennessee Workers' Compensation Appeals Board

Follow this and additional works at: <https://repository.belmont.edu/lawreview>



Part of the [Legal Writing and Research Commons](#)

Recommended Citation

Davidson, Marshall L. III (2018) "Oral Argument: Transformation, Troubles, and Trends," *Belmont Law Review*: Vol. 5 , Article 9.
Available at: <https://repository.belmont.edu/lawreview/vol5/iss1/9>

This Article is brought to you for free and open access by the College of Law at Belmont Digital Repository. It has been accepted for inclusion in Belmont Law Review by an authorized editor of Belmont Digital Repository. For more information, please contact repository@belmont.edu.

ORAL ARGUMENT: TRANSFORMATION, TROUBLES, AND TRENDS

JUDGE MARSHALL L. DAVIDSON, III*

“There is no place to hide when one stands at the lectern
before the judges; it truly is a lonely spot.”¹

INTRODUCTION.....	203
I. EVOLUTION OF ORAL ARGUMENT	204
II. DOES ORAL ARGUMENT REALLY MAKE A DIFFERENCE?	207
III. THE VALUE OF ORAL ARGUMENT	208
IV. DRAWBACKS OF ORAL ARGUMENT	210
V. EFFORTS AT REFORM	212
CONCLUSION.....	216

INTRODUCTION

Imagine arguing a case in the United States Supreme Court for *ten days*. It happened in 1844.² What about making an appellate argument for a mere twelve hours? Lawyers did just that in 1868.³ Or consider litigating a

* Judge Davidson is the Presiding Judge of the Tennessee Workers’ Compensation Appeals Board. He would like to thank the current and former Justices of the Tennessee Supreme Court for whom he previously worked for providing excellent examples of how to prepare for and conduct oral argument. He would also like to thank his fellow judges, David F. Hensley and Timothy W. Conner, for their willingness to try different approaches to oral argument with the aim of eliminating its inefficiencies while retaining its benefits. Finally, he would like to thank Elizabeth Vines, Matthew Keene, and Dana Jaskier for their helpful guidance and suggestions as this article was under construction.

1. Mark R. Kravitz, *Written and Oral Persuasion in the United States Court: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 265 (2009).

2. Edward T. Swaine, *Infrequently Asked Questions*, 17 J. APP. PRAC. & PROC. 271, 276 n.11 (2016).

3. *Id.* at 278 n.23.

case on appeal and briefs not being a required part of the process. At one time, that was the norm.⁴

Since first becoming engrained in our legal culture centuries ago, oral argument has undergone significant changes driven largely by increasing caseloads, technology, and innovation. These changes continue today, especially regarding the timing and availability of oral argument, even to the point that some lawyers and judges are questioning its worth. Others lament the severe restrictions many jurisdictions have imposed on oral argument. All the while, reforms are being suggested to preserve the best elements of oral argument while minimizing its inherent inefficiencies.

This article explores the dynamic transformation of oral argument from early in American history, its markedly changed significance relative to briefs, and where trends and innovative ideas, including some recently taking root in Tennessee, may take this enduring tradition in the future. To understand the transformation of oral argument and contemporary attitudes about it, one must be familiar with its origins and the crucial role it played in the decision-making process in England and in the formative years of the United States.

I. EVOLUTION OF ORAL ARGUMENT

Before the printing of briefs became a widely accessible practice, oral argument was the primary medium of advocacy on appeal. In fact, American courts, following the lead of those in England, largely dispensed with written submissions until the nineteenth century, making oral argument the sole method of presenting a case on appeal.⁵ Under England's oral argument tradition, both then and now, most information appellate judges consider, including the facts, law, and arguments of the parties, are presented to the judges in open court, after which the decision is typically announced from the bench, without a written opinion.⁶

As most lawyers and judges are well aware, the United States borrowed heavily from English legal traditions, including some aspects of appellate practice. In England, for example, the appellate process has always been speech-centered, as there are few briefs and no fixed time limits on oral argument.⁷ Thus, English appellate judges, who have no law clerks and who rarely write opinions, "must learn all they are going to learn about the case while the oral argument is in progress."⁸

4. Martin J. Siegel, *Let's Revamp the Appellate Rules Too*, 42 LITIGATION 30, 34 (2016).

5. Swaine, *supra* note 2, at 275 n.9.

6. ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 242 (1st ed. 1990); *See also* Delmar Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 134 (1979).

7. Karlen, *supra* note 6, at 134.

8. *Id.* at 133.

While English traditions greatly impacted the development of the legal system in the United States, it did not take long for the American system to diverge on a major element of the appellate decision-making process: oral argument. In contemporary America, appellate judges have the benefit of briefing and are not expected to rule from the bench immediately upon the conclusion of oral argument. Given that most decisions by English appellate courts are delivered orally when the attorneys finish speaking, it has been suggested that English judges pay more attention during oral argument than their American counterparts.⁹ While most appellate judges in this country would probably beg to differ, it is true that English legal norms have always favored oral presentations over written ones, a practice that has changed little for centuries. While that was also true at one time in the United States, our legal culture today is much to the contrary, now favoring written submissions over oral ones. Early on, however, when our courts became separate from those in England, and continuing through their formative years, the American appellate process was, like the English process, primarily oral.¹⁰

As strange as it may seem to modern lawyers and judges, our appellate courts, like those in England, initially did not impose time limits on a party's argument on appeal. Consequently, arguments could, and did, go on for hours and even days, just as they do in England today. However, the practice of unbridled oral argument eventually created problems for American courts, including the United States Supreme Court, because "advocates, whether good or bad, had the Court at their mercy."¹¹ In fact, lawyers would continue to speak "over the audible clatter of forks and knives" as justices ate meals, careful to remain within earshot of counsel.¹²

But, in the nineteenth century, the mood among American courts began to change. Amid increasing caseloads, longer terms of court, and little staff assistance, appellate arguments had reached a point that judges began publicly complaining that presentations by lawyers were "excessively prolix and tedious."¹³ Expressing frustration with the protracted nature of oral arguments early on, Chief Justice John Marshall, who presided over the United States Supreme Court for more than three decades, reportedly commented that "the acme of judicial distinction" was "the ability to look a lawyer straight in the eye for two hours and not hear a damned word he says."¹⁴

It was not until the mid-nineteenth century that appellate courts began clamping down in significant ways on counsels' monologues. The Supreme Court, for example, limited oral argument to two hours per side in

9. *Id.* at 136-37, 151.

10. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 10 (1986).

11. Swaine, *supra* note 2, at 276.

12. *Id.* at 276-77.

13. *Id.* at 276 n.15.

14. *Id.* (quoting Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time*, 1985 SUP. CT. HISTORICAL SOC'Y YEARBOOK 22, 25).

1849.¹⁵ When that was deemed too long in 1911, the time was cut to ninety minutes per side; then the rule was changed to one hour and, eventually, to thirty minutes, the current standard, which has stood for nearly fifty years.¹⁶

Not surprisingly, other appellate courts fell in line, including those in Tennessee. For example, nearly four decades ago, the time allotted for oral argument in the Tennessee Supreme Court was limited to thirty minutes per side, which is still the rule today.¹⁷ The prior practice was to allow one hour per side, and the parties were not required to request oral argument as they are now. Instead, it was automatically scheduled as a routine part of the appellate process.¹⁸ The time periods in the state's other appellate courts are even shorter. The Tennessee Court of Criminal Appeals allows twenty minutes per side,¹⁹ and the Tennessee Court of Appeals permits fifteen minutes per side.²⁰ Similarly, arguments in the Sixth Circuit, when allowed at all, are fifteen minutes per side, the standard in most federal courts.²¹

In terms of allotted time, the evolution of oral argument has been a stark one, ranging initially from an unlimited time to argue to merely a few minutes in many courts. This has raised concerns that, in some appellate courts, oral argument has all but disappeared. The Nebraska Supreme Court illustrates just how far the pendulum has swung in this direction, allowing only ten minutes per side.²²

In response to this unrelenting march toward increased brevity, some commentators have cautioned that, notwithstanding its important role in the decision-making process, oral argument is being "sacrificed on the altar of efficiency."²³ While this may be true in some courts, there is no question that, as the time allowed for oral argument has gradually decreased, courts' emphasis on briefing has gradually increased. In fact, the "roles of briefing and [oral] argument [have] flipped; instead of filing long briefs, lawyers gave long speeches in the well of the courtroom."²⁴ Not anymore.

Imposing severe limitations on the time allotted for oral argument has resulted in much of the persuasive load being placed on the parties' briefs, something that would have been foreign to lawyers and judges in our nation's past. In fact, briefs were not even required in many courts, such as

15. Swaine, *supra* note 2, at 277; *See also* Martineau, *supra* note 10, at 10.

16. Swaine, *supra* note 2, at 277; *See also* Martineau, *supra* note 10, at 10.

17. Tenn. R. App. P. 35(c).

18. John L. Sobieski, Jr., *The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure*, 46 TENN. L. REV. 1, 87-88 n.482 (1978).

19. Tenn. Ct. Crim. App. R. 14.

20. Tenn. R. App. P. 35(c). Though the default rule under Tennessee Rule of Appellate Procedure 35(c) is to allow thirty minutes of argument per side, that rule grants the appellate courts discretion to modify the time allowance. It is current practice of the Court to allow fifteen minutes of argument per side.

21. Sixth Cir. R. 34(f)(1).

22. Neb. Ct. R. App. P. § 2-111(E)(1).

23. Kravitz, *supra* note 1, at 268.

24. Siegel, *supra* note 4, at 34.

the United States Supreme Court, until 1821; and it was not until decades later that content requirements for briefs were imposed.²⁵

Not only did limiting the time for oral argument elevate the importance of briefs, it also altered the way in which oral argument itself was conducted. In particular, the expectation was cast upon lawyers that they would be prepared to address questions from the bench instead of delivering lengthy speeches, and judges began asking questions with increasing frequency. Thus, “[m]ore written submissions, and less air time, naturally affected oral argument’s character.”²⁶

This new dynamic of conducting business on appeal eventually led some judges to wonder whether questioning from the bench had become excessive and unwieldy, leaving lawyers feeling as though they were “bystanders in their own cases.”²⁷ For example, Justice Clarence Thomas, who rarely asks questions from the bench, believes “there are far too many questions” and that it is difficult to “learn a whole lot when there are fifty questions in an hour.”²⁸ His colleagues generally agree. According to Justice Samuel Alito, “if you wait until the end of the sentence, you will never get a question in.”²⁹

Fortunately, Tennessee’s appellate courts, probably like most other courts, have not reached this point. While appellate judges in Tennessee are not shy about asking questions, they tend not to dominate the limited time allotted the parties to make their points. Most practitioners would probably agree this is a good thing.

II. DOES ORAL ARGUMENT REALLY MAKE A DIFFERENCE?

Although oral argument serves a variety of important functions, some of which are markedly distinct from the briefs, a common question among practitioners is whether it can make any difference in the outcome. The answer is, it depends.

It should come as no surprise that judges who prepare for oral argument—and most do—have a lean one way or the other going into oral argument. The ensuing exchange with the lawyers typically solidifies that initial impression into a more hardened view of the case, which is then shared with the judges’ colleagues during discussions soon after the argument concludes. To be sure, however, instances abound where oral argument causes a judge to re-evaluate his or her initial impression or, sometimes, change their view of the case altogether. Even if oral argument does not result

25. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEG. HIST. 482, 486-89 (1994).

26. Swaine, *supra* note 2, at 278.

27. *Id.* at 280 n.34.

28. *Id.* at 280 n.35.

29. *Id.* at 280 n.34.

in a changed vote, it can certainly make for a more informed and focused opinion.

The prospect that oral argument can make a difference in the outcome, or at least place the case in a different light, prompts an interesting question: under what circumstances, if any, should a party waive oral argument, assuming oral argument is an option in the first place? While this question does not lend itself to a clear answer in every instance, there are at least two ways of approaching the issue. The first recognizes that, in some appeals, oral presentations by the lawyers, in addition to the briefs, may be of little value to the judges in deciding the case or are of such minimal value as to not warrant the investment of time and expense for the parties or for the court. Also, if the case does not involve an unsettled point of law or developing area of the law, is not factually or legally complex, presents nothing novel, and otherwise lends itself to a fairly predictable outcome, it may not be worth the risk of possibly converting a winning case into a losing one, a risk inherent in oral argument.

The other way of looking at the question is perhaps more in line with conventional wisdom, i.e., if a case is worth appealing, it is worth arguing. The premise of this view is that oral argument calls to the attention of every member of the appellate panel the essential contentions of the parties and gives the judges and lawyers an opportunity to discuss the case, usually right before the judges decide it, a function distinct from the briefs. Also, while the risk of an unexpected turn at oral argument is unavoidable, that risk is outweighed by other considerations, not the least of which is that an oral exchange is the parties' sole opportunity to address the judges' concerns about their positions.

In most courts, whether to orally argue a case on appeal is largely a choice for the parties and, for any number of reasons, a party may elect to forego oral argument. However, the most prudent course is to pursue oral argument if the case involves an issue of first impression, an unsettled point of law, an emerging area of the law, or one in a state of flux. In addition, oral argument should be requested if the case is difficult factually, difficult legally, or if the outcome is arguably close. Otherwise, the exercise may not be worth the time and expense for either the parties or for the court, assuming the issues are thoroughly and completely treated in the briefs.

Regardless of which view has more merit, most appellate judges would probably agree that oral argument, when performed effectively, can impact the result in close cases.

III. THE VALUE OF ORAL ARGUMENT

Although the manner of conducting oral argument has undergone significant change in terms of its duration and availability, as has its importance relative to briefing, its essential purpose remains the same. Reduced to its essence, oral argument provides an opportunity for the

litigants and judges to have a focused discussion about potentially outcome-determinative issues. This opportunity for exchange is important for two broad reasons. First, oral argument is the *only* opportunity in the appellate process for discussion between the parties and the judges. Second, oral argument provides the parties with a captive audience and essentially forces the judges to focus, discuss, and consider the case as nothing else does, typically right before the case is decided.

By contrast, briefs serve as the parties' opportunity to present a coherent, logical, and complete analysis of the issues, unencumbered by interruptions from the bench and the unpredictable course of oral argument. Briefing enables issue development in a way that simply cannot be accomplished in the limited time permitted for oral argument. Briefs, if thorough and well-written, can also narrow the range of topics for discussion at oral argument, essentially setting the stage for what is to come.

Oral argument is different. Unlike the brief, oral argument can be used to clarify the record, refine the substance of claims, and examine the logic of arguments. It can also be useful in exploring the practical impact of possible outcomes, a change in the law, or the adoption of a particular rule or approach.

Similarly, oral argument is uniquely situated to isolate the few considerations, or perhaps the sole consideration, truly pivotal to the decision. As explained by one judge, the "spontaneity in the face-to-face conversation at a good oral argument that cannot be achieved in the [briefs] . . . has a way of unlocking more insight about the issues . . . than volumes of briefs." While briefs are the superior way of delivering voluminous or detailed information, "nuance is more likely to emerge in the live exchange" between the lawyers and the judges.³⁰ Put simply, oral argument can provide a perspective on the case that briefs cannot.

In addition, oral argument is useful in holding the parties accountable for the contentions asserted in their briefs. In other words, oral argument can serve as "the anvil on which a solid position is hammered out and confirmed—or shattered entirely by repeated blows."³¹ As every appellate judge knows, lawyers are more apt to make unreasonable or extreme arguments or claims in their briefs than they are in-person before multiple, well-prepared judges. An oral exchange can determine whether the parties' arguments hang "together under fire . . . or fall apart entirely" as "hidden defects, gaps in reasoning, or unanticipated consequences" are exposed.³² Briefs cannot perform this valuable function.

Also, oral argument serves an important public interest by giving litigants—members of the public—their day in court, in an open forum, which they and others can observe. Thus, even if a party does not prevail,

30. *Id.* at 267.

31. Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 532 (1984).

32. *Id.*

they leave the process feeling as though they have been heard, which is no small matter. Oral argument provides a sense of participation that increases respect and confidence in the process and in the court's decision.

Likewise, the ceremonial or stately aspects of the occasion provide some measure of public visibility and accountability of the courts. One reason the English courts have not jettisoned their heavy emphasis on oral argument is the belief that "justice must be seen in order to be done."³³ Put another way, "there is great value in allowing litigants and the public to see judges facing lawyers and one another grappling with the issues in the cases before them. Otherwise, briefs go in one end of the opinion factory . . . and opinions come out the other end, without any chance for the public or the parties to understand who really decided the case."³⁴ In a system of decision-making dependent upon public confidence and acceptance of the results of its processes, there exists a keen societal or institutional interest in open court processes. But for oral argument, citizens would have no real contact with appellate judges. Public trust and institutional legitimacy are critically important, and oral argument fosters those goals.

Oral argument may also help avoid a problem commonly experienced by appellate judges – becoming too isolated. By having direct personal contact with the parties, or more precisely their attorneys, judges cannot help but be reminded that their decision will have a direct impact on real people.³⁵ Oral argument allows appellate judges to avoid becoming mere processors of paper, removed from human interaction with those their decisions will touch.

Finally, while the brief is a party's first opportunity to influence a court's thinking about its decision, oral argument is the last such opportunity. Both vehicles of persuasion improve the decision-making process, but only one, oral argument, is interactive. For lawyers, this can be simultaneously welcoming and unnerving. Oral argument gives the parties a chance to clarify and hone their arguments but, at the same time, the lawyers "have no choice but to respond to the court's questions about aspects of the case that they might have purposefully ignored in their briefs."³⁶

IV. DRAWBACKS OF ORAL ARGUMENT

For all the positive elements associated with oral argument, there are, like many facets of the law and legal processes, downsides. First, there is a belief among some appellate judges, particularly those with high caseloads, that oral argument is "inefficient and consumes too much court time, without attendant benefit."³⁷ As explained by one appellate judge, the "cost of oral

33. Kravitz, *supra* note 1, at 263.

34. *Id.*

35. Martineau, *supra* note 10, at 13.

36. Kravitz, *supra* note 1, at 265.

37. *Id.* at 255.

arguments in terms of judicial and lawyer time, money, and decisional delay usually outweighs the benefits.”³⁸ Most judges would probably agree with this view if the time is spent merely listening to a recitation of what was said in the briefs. Likewise, some appellate lawyers believe oral argument is not worth the time and expense, at least in routine cases, though “matching wits with adversaries and well-prepared judges in grand, high-ceiling spaces is great fun.”³⁹

Second, a plausible argument can be made that a careful reading of the briefs and the record gives the judges a sufficient basis to decide most cases, making oral argument unnecessary. While this is certainly true in many cases, perhaps a majority of them, it is also true that a good oral argument can shed light on pivotal aspects of the case in ways the briefs cannot. But the point that many cases on appeal are not so difficult that oral argument is indispensable is a point with which most appellate judges would probably agree.

Third, if the briefs are of little help to the judges due to lack of skill or effort by counsel, and thus, “even after careful scrutiny confusion remains over the facts, issues, or contentions of the parties, it is doubtful whether a fifteen or twenty minute oral argument will do much to clarify matters.”⁴⁰ A lawyer who cannot write an adequate brief is not likely to do much to enlighten the judges at oral argument. As explained by one commentator, “the idea that an attorney can respond better orally to an unanticipated question, under the pressures of a personal appearance in a public courtroom, relying exclusively on memory, than in a written brief over which the attorney has had [weeks] to prepare, with full access to the record and to the texts of relevant cases, simply defies the realities of the situation.”⁴¹ Most appellate judges would likely agree with this too.

Fourth, oral argument has become so brief, about fifteen or twenty minutes in most courts, if not less, that parties can do little more than merely summarize a few key points, which are already discussed in greater detail in the briefs, especially when they are peppered with questions from the bench. “It simply flies in the face of common sense that the transitory, spontaneous, and soon forgotten oral statement can communicate an idea better than a carefully prepared brief that can be studied as long as necessary.”⁴²

Fifth, due to the scheduling and logistical processes of preparing the cases and getting everyone together in one room, oral argument slows a final resolution to the parties’ dispute, often by many months. If the case could be decided right after the completion of briefing, the parties would have an answer sooner rather than later, enabling them and the court to move on.

38. Hon. Barry G. Silverman, *Sua Sponte: A Judge’s Comments*, 42 LITIGATION 31, 33 (2016).

39. Siegel, *supra* note 4, at 33.

40. Martineau, *supra* note 10, at 13.

41. *Id.* at 14-15.

42. *Id.* at 14.

Sixth, because oral argument slows the appellate process, its elimination in all but truly worthy cases would increase court efficiency and productivity. More cases could be decided faster, helping to reduce backlogs where they exist, and prevent backlogs where they do not.

Few would seriously contend that these criticisms justify the elimination of oral argument in every case or that oral argument is never helpful in the decision-making process. However, the chorus of voices questioning the wisdom of conducting oral argument in every case has grown loud. To be sure, the benefit of oral argument in routine cases to be decided based on settled principles may well not be cost-effective, for either the courts or for the parties.

But routine or not, oral argument does make it possible for the judges to converse with counsel about their impressions and ideas, something that is impossible to do based on written submissions alone. Finding the right balance is the struggle courts face.

V. EFFORTS AT REFORM

To ensure oral argument continues to play a key role in the appellate process, proposals for change have come from courts and legal scholars alike. These proposals, premised on the notion that oral argument must be restructured to remain feasible, revolve around using it in only certain types of cases and in ways different from conventional practices.

Selecting cases worthy of oral argument: In many jurisdictions, such as Tennessee, parties need only request oral argument to receive it. In fact, when the modern approach to oral argument was fashioned in the 1970s, Tennessee expressly rejected a proposal that would have given courts the option of dispensing with oral argument notwithstanding a party's request for it.⁴³

This is not the case, however, for Tennessee's newest appellate tribunal, the Workers' Compensation Appeals Board. In that body, which was created in 2014 to hear appeals of workers' compensation cases, no oral argument occurs unless a majority of the judges agree to place the case on an oral argument docket, either upon their own motion or upon motion of a party.⁴⁴ If a party files a motion requesting oral argument, the motion must explain "with specificity the reason(s) the decision making process would be aided by oral argument."⁴⁵ Other jurisdictions, such as some federal courts and courts in Wisconsin, have similar requirements.⁴⁶

43. John L. Sobieski, Jr., *The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure*, 45 TENN. L. REV. 161, 251 n.501 (1978).

44. Tenn. Comp. R. & Regs. 0800-02-22-.04(1).

45. *Id.*

46. Martineau, *supra* note 10, at 29 n.175.

Thus, the Tennessee Workers' Compensation Appeals Board selects the cases it will hear orally, effectively creating two tracks—one for more complex or legally significant cases, and one for routine cases. This break from the tradition of conducting oral argument whenever requested by the parties is driven by three objectives: to best allocate the Appeals Board's limited time and resources, to reduce litigation costs incurred by the parties, and to decide simple cases without delay. The idea is to avoid the inefficiencies inherent in oral argument while preserving and maximizing its benefits.

The Appeals Board's approach of screening cases and identifying those worthy of oral argument is not unique to the Appeals Board. Legal scholars have advocated screening cases for decades, and courts have taken note.⁴⁷ The federal courts of appeal, for example, may dispense with oral argument if a panel of screening judges determines the appeal is frivolous, the "dispositive issue or issues have been authoritatively decided," or if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument."⁴⁸ This screening process has reduced the number of cases argued in some federal courts by eighty percent.⁴⁹

Thus, the trend, especially in the federal courts, is to decide more cases based solely on the briefs. Those cases that do make it to oral argument share common characteristics, including "the presence of counsel, novel issues, complex issues, extensive records, and numerous parties."⁵⁰ Cases selected for argument in the Tennessee Workers' Compensation Appeals Board generally include these same characteristics.

Providing questions to the parties in advance: Another interesting development is alerting the parties in advance of oral argument to areas of concern to the judges by including specific questions that may be asked at oral argument in a pre-argument notice. The idea is that, by instructing the parties to be ready to address specific topics or questions, the attorneys have a chance to reflect on the questions beforehand. This, in turn, promotes a more complete understanding of the case by the judges.⁵¹

Proponents of pre-argument notice assert that it reduces needless surprise by impromptu questioning and permits research and reflection and consultation with other lawyers, making for more informed and insightful answers, ultimately leading to better decisions.⁵² As stated by one commentator, while "last minute unveiling [of questions] adds drama, and offers a greater test of counsel," questions "need not necessarily be sprung

47. *Id.*

48. Fed. R. App. P. 34(a)(2).

49. Swaine, *supra* note 2, at 280-81.

50. *Id.* at 282 n.42.

51. *Id.* at 288.

52. *Id.* at 305-11.

like pop quizzes.”⁵³ Indeed, “questions sprung by surprise strikes [some] as a grossly inefficient way to help judges” think through a case because lawyers have to “prepare in the dark and have to be prepared for everything.”⁵⁴ One commentator goes so far as to argue that, in its present form, “oral argument, rather than being an excellent means of communication, is in fact a highly unreliable one” for these very reasons.⁵⁵

In those courts using pre-argument questions, the questions typically focus on jurisdiction, standing, mootness, and similar threshold issues, but also on particular cases and statutes not adequately covered in the briefs.⁵⁶ The Tennessee Supreme Court occasionally avails itself of this practice, and the Tennessee Workers’ Compensation Appeals Board has a rule specifically contemplating pre-argument questions.⁵⁷ This rule implicitly recognizes that “if a question deserves a considered answer, as opposed to the best spontaneous answer, it is better tendered beforehand.”⁵⁸ Moreover, obtaining specific information from the parties ahead of oral argument, in addition to or in lieu of providing pre-argument notice of questions or areas of concern, may speed up the decision-making process, narrow areas of focus at oral argument, or even make oral argument unnecessary in some cases.

Some courts, namely intermediate appellate courts in Arizona and California, have taken the idea of advance notice a step further by issuing tentative decisions to the parties in advance of oral argument, which may be changed entirely after the argument is held.⁵⁹ This idea has not gained widespread acceptance. Indeed, when discussed among appellate judges, the proposal is about as “welcomed as a porcupine at a dog show.”⁶⁰ Yet, the practice of pre-argument circulation of tentative rulings has been embraced by judges and lawyers who have tried it because the oral argument itself tends to be “more focused and therefore more illuminating to the court because counsel know the decisive issues in advance,” plus the judges seem more prepared.⁶¹ Also, some parties, after seeing the tentative decision, settle.⁶² Downsides of pre-argument distribution of a tentative decision include the judges becoming locked-in to a particular position, along with the parties possibly feeling as though they were misled if the final decision differs from

53. *Id.* at 294.

54. Siegel, *supra* note 4, at 34.

55. Martineau, *supra* note 10, at 22.

56. Swaine, *supra* note 2, at 290-91.

57. Tenn. Workers’ Comp. App. Bd. Prac. & Pro. § 6.9.

58. Swaine, *supra* note 2, at 305.

59. Mark Hummels, *Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip its Tentative Hand? The Case for Dissemination*, 46 ARIZ. L. REV. 317, 319, 329 (2004).

60. *Id.* at 319.

61. Siegel, *supra* note 4, at 35; *see also* Hummels, *supra* note 59, at 332.

62. Hummels, *supra* note 59, at 332.

the draft decision, notwithstanding clear instructions that the decision was tentative and could be changed.⁶³

Whether or not a tentative decision is floated to the parties before oral argument, providing questions ahead of time does, the argument goes, “eliminate the inefficiency and expense of having to re-master the entire record and legal landscape for a brief argument that will, inevitably, examine only some small . . . part of it.”⁶⁴

Methods of scheduling and conducting oral argument: Another break from tradition, at least in Tennessee, is the willingness of the Workers’ Compensation Appeals Board to consider conducting oral argument telephonically or by video, in addition to conducting in-person oral argument.⁶⁵ These alternative options for conducting oral argument recognize a fact of modern life, i.e., millions of people use technology to see and interact with one another daily, both personally and professionally. While some courts avail themselves of these options, oral argument by teleconference or video is not the norm in most jurisdictions.⁶⁶

In addition, the Tennessee Workers’ Compensation Appeals Board is experimenting with how to best schedule oral arguments. Specifically, the Appeals Board has been attempting to accommodate the lawyers’ schedules, to the extent possible, by asking them to declare their availability for a range of possible dates for a docket before it is set. This seems to reduce the number of motions to continue and the need to shuffle cases around at the last minute. In addition, lawyers appreciate the courtesy of being able to offer input before being informed when and where they must appear. Time will tell whether this practice remains feasible but, so far, it is working.

Expand oral argument and constrict briefing: One idea aimed at helping preserve oral argument in the face of caseload and other pressures is to provide for lengthy oral arguments and either impose severe page restrictions on briefs or eliminate them completely.⁶⁷ The premise of this proposal is that oral argument should be available in most every case where it is requested, for the reasons discussed above. Adopting this proposal would make the American system much like the English system. However, the idea has gained little traction in the courts and is unlikely to do so any time soon given that courts have come to rely so heavily on briefs.

Eliminate written opinions in certain cases: Another proposal for preserving oral argument is to eliminate written opinions and, instead, issue

63. *Id.* at 335.

64. Siegel, *supra* note 4, at 35.

65. Tenn. Comp. R. & Regs. 0800-02-22-.04(1) (2016).

66. *See, e.g.*, Sixth Cir. Fed. R. App. P. 34(g)(3).

67. Martineau, *supra* 10, at 25.

oral decisions from the bench.⁶⁸ This too would resemble the practice in England and speed up the decision-making process which, the argument goes, is good for the parties and courts alike. Alternatively, the oral decision could be followed by a short order affirming the lower court's decision. A reversal would require a written opinion. These ideas are not just theories. Courts have in fact experimented with them.⁶⁹

Critics of these proposals ascribe to the view that judges' learning about cases through oral presentations, as opposed to written ones, is inherently inefficient.⁷⁰ They also point out that doing away with written opinions in favor of oral decisions would be counterproductive given the value of having written decisions that explain the court's reasoning to the parties, to the lower court judges, and to those who will occupy the bench in the future.⁷¹ Moreover, written opinions are more apt than oral ones to force judges to "to think through the decision, to detail the crucial facts, and to show the relationship between those facts, the relevant law, and the result."⁷² In addition, a written opinion is the best way for the parties to actually see why they won or why they lost. Finally, a written opinion "guides the development of the law [by] telling the legal community and the public what the law is and where it may be going."⁷³

For these reasons and others, it is unlikely oral opinions will replace written ones any time soon. Even critics of the way oral argument is currently structured assert that oral presentations should be retained if the alternative means forgoing written decisions.⁷⁴

CONCLUSION

If recent times have demonstrated anything about our nation's appellate process, it is that oral argument is not immune from scrutiny and change. Nor should it be. When a particular practice on appeal no longer serves the interests of the courts and the litigants, it should be modified or abandoned. No one would seriously contend otherwise. To be sure, however, oral argument provides "an unparalleled opportunity for litigants, through counsel, to face those who will decide their fate, for lawyers to make certain that their arguments are understood, and for judges to understand the facts, legal arguments, and human dimensions of the case to be decided."⁷⁵

68. *Id.* at 25-26.

69. *Id.* at 26.

70. *Id.*

71. *Id.* at 27.

72. *Id.*

73. *Id.*

74. *Id.* at 32.

75. David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 148 (2012).

It is true that oral argument, since its earliest days, has changed dramatically in terms of its duration, availability, and significance relative to briefs. It is also true that oral argument is changing in other ways as courts experiment with innovative options for selecting the cases to be heard, scheduling and logistics, and conducting the argument itself. These changes have essentially been forced upon the courts by burgeoning caseloads, but are also made possible by technology and the willingness of judges to adapt and try new ways of doing old things. Still, the imposition of severe restrictions on the timing and availability of oral argument have been adopted with reluctance and, according to many, is “highly regrettable.”⁷⁶

But the consistent thread is that, in most jurisdictions, oral argument continues to play an important role in the appellate process, even with limitations that did not exist until fairly recently. Judges are keenly aware that their rulings will make tangible, lasting impacts on the lives of the parties, and most judges are driven by a desire to not only reach a fair result that comports with legal requirements and common sense, but to ensure that the law is as clear and sensible as possible. Oral argument, if done right with prepared lawyers and prepared judges, and done with the right cases, helps achieve those objectives.

76. Martineau, *supra* note 10, at 4.

