Appellate Law

The Tragedy of the (Oral Argument) Commons at the Pa. Superior Court

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Oral argument can be one of the most exhilarating aspects of the appellate process. At an appellate oral argument, you can observe firsthand that the judges have understood and agree with the arguments you have asserted in your written briefs. And you can address directly whatever questions the actual appellate decision makers have about the case and anything that may be troubling them about your client's position on appeal.

Although appellate judges have repeatedly stated that oral argument changes their minds about the outcome in only a very small percentage of all cases, an appellate oral argument gives the advocates a final opportunity to influence the outcome in a face-to-face discussion with the judges who will actually be deciding the appeal. For this reason — because an appellate advocate should not relinquish any opportunity to advance his or her client's case — I have consistently recommended that lawyers request oral argument on appeal in courts that leave it up to the lawyers to decide whether a case will be orally argued or decided solely on the briefs.

Nevertheless, it is also important to recognize that the time of appellate judges is a finite, scarce and valuable resource. The more time that an appellate judge spends on the bench hearing oral argument, preparing to hear oral argument, and commuting to and from the oral argument location — which may be many hours away from the judge's chambers — the less time the judge will have to decide cases on the merits, draft opinions, and review and comment on the draft opinions of his or her colleagues.

The Superior Court of Pennsylvania — which has a hard-earned reputation as one of the busiest appellate courts in the nation in terms of its overall judicial workload — is the only state or federal appellate court in Pennsylvania that continues to allow the lawyers in a case to decide whether an appeal will be orally argued or decided on the briefs without oral argument. Unsurprisingly, a consequence of that policy is that the Superior Court hears oral argument in a very large number of appeals.

The Pennsylvania Superior Court's Web page containing that court's oral argument calendar reveals that most of that court's active judges are scheduled to hear oral arguments at six-to-eight two-day oral argument sessions throughout 2010. And the typical oral argument session consists of 45 to 55 cases listed for oral argument. Thus, in 2010, a typical Pa. Superior Court judge may hear oral arguments in about 300 cases.

Furthermore, even a two-day oral argument session may cause a judge to be absent from his or her chambers for up to four days if he or she must commute halfway across the state, or even farther, to attend the oral argument. In the final analysis, participating in oral arguments may cause the average Superior Court judge to be absent from his or her chambers for nearly one month out of every year.

Allowing the attorneys in a given case to decide whether an appeal will or will not be orally argued fails to sufficiently value and safeguard the limited precious time of appellate judges. The Superior Court should therefore instead implement the procedures that the 3rd U.S. Circuit Court of Appeals has long used to decide whether an appeal will be orally argued. The 3rd Circuit's system leaves it up to the judges, rather than the lawyers, to decide whether a given appeal will be orally argued.

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Many weeks in advance of a given oral argument session, the 3rd Circuit's Clerk's Office distributes the briefs for the cases assigned to that session to the three-judge panel that will decide those cases. The judges then review those briefs, and if any one of the three judges wishes to hear oral argument in any case, that case will be scheduled for oral argument. Thus, it only takes one judge on the three-judge panel to list a case for oral argument, meaning that a case will not receive oral argument only if none of the judges on the panel desires it.

Of course, different 3rd Circuit judges have differing views on the usefulness of oral argument. For example, when the late, great Judge Edward R. Becker was on the panel, you knew that a larger percentage of the cases were likely to be selected for oral argument, because he really enjoyed its give-and-take and it helped him better understand the cases and reach a well-informed decision.

The 3rd Circuit's criteria for deciding what cases should be orally argued is relatively straightforward. If a case raises important issues of first impression, it is likely to be orally argued. If the judges are, based on the briefs, of the view that the trial court's decision should be reversed, the case is more likely to be orally argued. If the judges have questions about the case or the briefs fail to provide an adequate understanding of the facts or the issues on appeal, the case is more likely to be orally argued. And sometimes even the identity of the lawyers may make a case more likely to be orally argued.

One reason for the state Superior Court's current approach to selecting cases for oral argument, whereby the selection process is left up to the lawyers, is a concern that it would take that court's judges as much time and effort to decide which cases should be orally argued as it currently takes simply to endure six-to-eight marathon two-day oral argument sessions each year. I respectfully believe that concern is unfounded.

To their great credit, state Superior Court judges are usually very well-prepared at oral argument, indicating that they devote a meaningful amount of time to learning about each case in advance of each oral argument session. I am certain that the amount of time each judge takes to prepare for the oral argument of a case exceeds the amount of time it would take to decide whether that case is deserving of oral argument. And because fewer cases will ultimately be selected for oral argument when it is the judges who are deciding which cases should be argued, a significant overall time savings will result.

The Superior Court is no stranger to the practice of appellate triage, whereby cases are handled differently depending on their perceived significance. The use of nonprecedential rulings, which can be prepared more rapidly than published opinions, is one such time-saving approach. Having that court's judges decide which cases should be orally argued would be another efficient way to ensure that lawyers are not wasting judges' time on the bench when those judges could instead be engaged in the most important aspect of their job, which is actually deciding cases. •

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