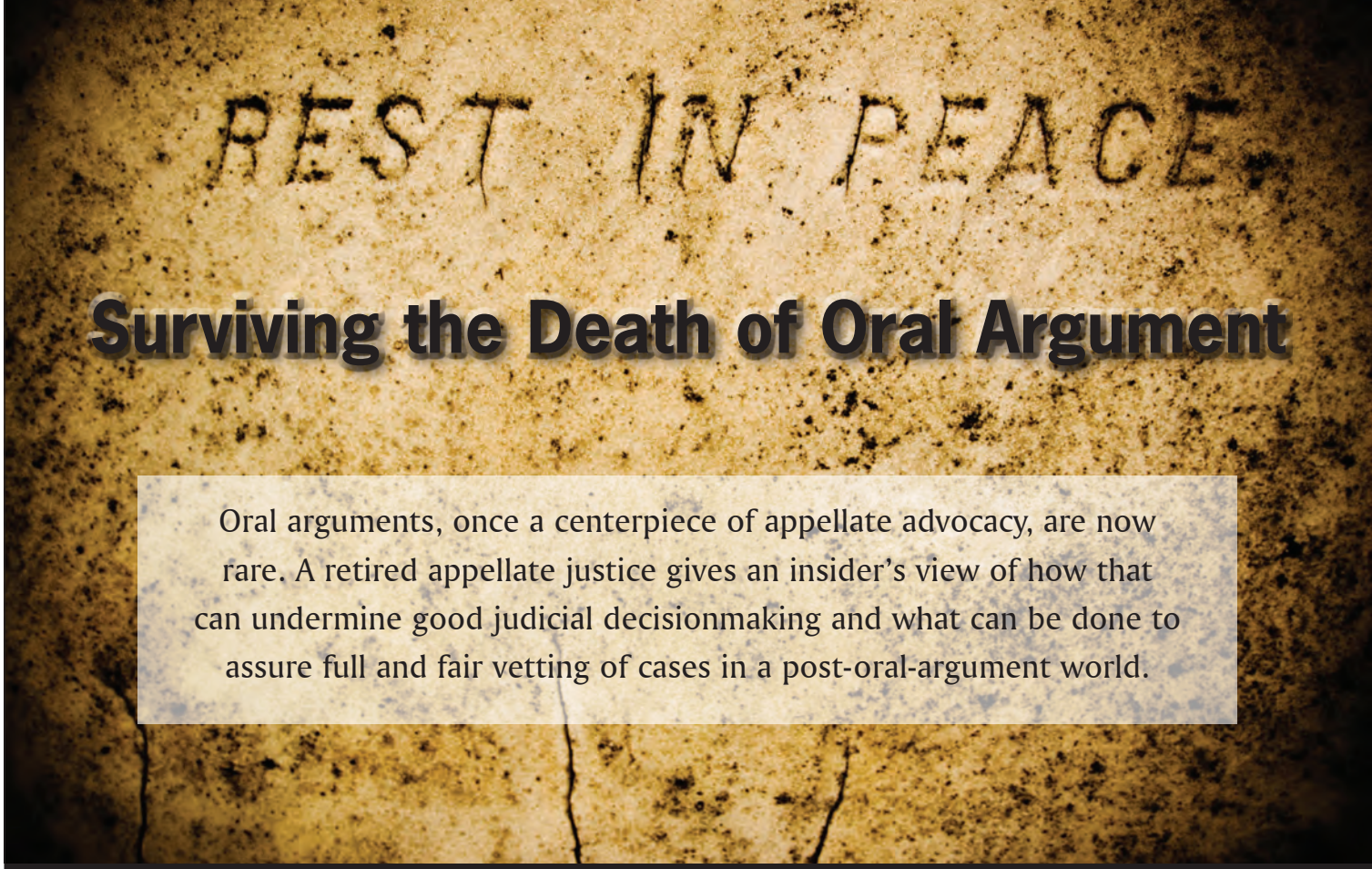

Surviving the Death of Oral Argument

Oral arguments, once a centerpiece of appellate advocacy, are now rare. A retired appellate justice gives an insider's view of how that can undermine good judicial decisionmaking and what can be done to assure full and fair vetting of cases in a post-oral-argument world.

By Gino L. DiVito

The reduced number of oral arguments in Illinois Appellate Court proceedings is undeniable. When I served on the appellate court (from April 1989 through July 1997), it was common for each of the six divisions of the first district to schedule four cases each week for oral argument, the month of August excepted.

Now, the calendars published in the *Chicago Daily Law Bulletin* show that divisions of the first district typically schedule no oral arguments in a given week, or only one or two. Four oral arguments on a given day are uncommon.

Although information about the other districts is difficult to obtain, an informal polling of appellate attorneys indicates that at least in some districts there is a decrease in oral arguments, and in one district they rarely occur.

This article looks at how the decline of oral argument can lead to a decisionmaking culture under which judges are less prepared and engaged than judges and litigants have a right to expect – and proposes a remedy.

Some not-so-obvious benefits of oral argument

This trend away from oral arguments raises significant questions about how such cases are decided – not only by the judge who writes a decision[1] but also by the two others who make up the appellate panel.

Needless to say, every appellate lawyer wishes to know the process appellate judges use to decide cases. But there is an obvious difference between cases subject to oral argument and those that are not. Oral argument provides a window to the decision-making process that is unavailable when there is no public scrutiny. Oral arguments allow litigants, lawyers, and the merely curious to gauge the competence of the judges and the advocates, to draw some conclusions about the merits of each side of a case, and – based on what they see and hear – to speculate

1. The word "decision" is used throughout this article. It encompasses both an "opinion," which usually refers to a published decision, and an "order" issued under Supreme Court Rule 23, which is used in reference to a decision that has no precedential value and, at least until January 1, 2011, was unpublished.

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about the outcome.

Apart from the response to the appellate lawyer's concern about whether oral argument makes a difference (usually answered "rarely" or "sometimes"), the public nature of oral argument proceedings alone justifies their continuation. This, after all, is the only opportunity for the public to see the judges at work and to witness at least some of the process that leads to appellate decisions. A side benefit is that those in attendance are usually impressed by what they see.

More importantly, the public nature of the proceedings transforms them into an event, one for which not only lawyers but judges must prepare. It ensures that conscientious judges will read the briefs, that they will consider a law clerk's memorandum if one is prepared and shared in anticipation of the proceedings, and that they will review the relevant legal authority.

In an earnest effort to reach the right result, judges prepare for the event not only because it is a public manifestation of part of the decision-making process, but because it offers them a singular opportunity to engage lawyers who can share their knowledge concerning each case and its issues. The public proceedings thus promote judicial preparation, and they foster helpful dialogue between judges and attorneys, thus enhancing the likelihood of well reasoned and proper resolutions.

When oral argument is bypassed, however – when there is no public event – what assurance is there that judges are prepared and fully engaged?

Providing such assurance is tied to process. My personal experience with cases not subject to oral argument provides a stark contrast in methods, ultimately leading to the suggestions about process that prompt this article.

A blueprint for good decisionmaking

For my entire eight years on the appellate court I served in the first district's second division. That division had a proud history. A few of the judges who preceded me there were John Stamos, Robert Downing, and Edward Egan.

When I joined the division in April 1989, its other members were Michael Bilandic, Allen Hartman, and Anthony Scariano. Judges Hartman and Scariano served in the division for seven of the eight years I was there. When Judge Bilandic went to the supreme court, he was replaced first by Michel Coccia, and then by Carl McCormick, and finally by Anne Burke.

When I joined the division, I was introduced to two requirements that, I later learned, were not universally employed by other appellate districts or divisions. These requirements were imposed upon the "responsible" judge, the one randomly assigned to administer the case, i.e., to determine whether to hold oral argument and, if at least one other panel member agreed with that judge's reasoning and result, to write the decision.

The first requirement was that a law clerk of the responsible judge had to write a memorandum with three goals: to summarize the facts and issues in the case; to independently analyze statutes, prior decisions, and other authority relevant to the issues (whether cited by the parties or not); and to recommend an appropriate disposition.

The second requirement was that a case not subject to oral argument be treated the same as a case scheduled for argument. That meant that the responsible judge was required to set it, without public disclosure, for consideration on the same day that other cases were set for oral argument.

As a result, the briefs for that case were circulated along with the briefs of the cases scheduled for argument at least a week (usually three) before the oral argument. Also, the clerk's memorandum for the case was to be shared with each member of the panel.[2]

Because of these requirements, our procedure for addressing argued and nonargued cases was identical. We therefore had adequate time to review the briefs and the clerk's memorandum, and on oral argument day we were prepared to discuss appropriate outcomes during the impression conference that followed the proceedings.

Denying oral argument creates a situation where an authoring judge might not have the full participation of colleagues who, if they were totally engaged, could deter an inappropriate decision.

As a result, when a draft of a decision was later circulated, each of us was familiar with the facts, the issues, the clerk's analysis, and our preliminary sense of the appropriate decision. We were therefore able to address our colleague's circulated draft decision effectively and expeditiously.

The temptation to cut corners

Compare that procedure to the one employed by my division during my last year on the court.

In 1996, the supreme court realigned the divisions within the first district.[3] I remained in the second division, but without my former colleagues. As the elected presiding justice of

2. This article is not intended to address the debate concerning the advisability of appellate judges sharing pre-oral memoranda of law clerks. Nevertheless, I strongly favor such sharing. I do so because my experience is that even those appellate judges who do not share memoranda involve their law clerks in their cases before scheduled arguments, and most of those judges obtain memoranda from them. Why then conceal the benefit of the analysis they have received? Why conceal the information that influences their decision-making?

I favor such sharing also because, in important cases or where issues were complex, it was reassuring when a law clerk who had done independent research and analysis agreed with my initial impression concerning the proper result; or when I had the benefit of the clerk clarifying for me issues or analyses that were unclear in the briefs; or when the memorandum provided me the means to conclude that the clerk had reached the wrong result.

For me, the possibility of the law clerk reaching the wrong result was a major benefit of sharing memoranda. The responsible judge might not have realized that the clerk's analysis was faulty or that the clerk had relied on inappropriate authority. But, when that occurred, I knew that the faulty analysis or the improper reliance would likely influence the judge. That gave me an advantage that I would not have had without that knowledge. I could do independent research or have one of my clerks do so. I could, and did, through questioning at oral argument, elicit responses from counsel that might lead the judge to recognize that the clerk's analysis was faulty. And, in the impression conference, with full knowledge of what may have been influencing the judge, I could address the problem directly. Indeed, because we were all on the same footing, it would even enable that judge or the other judge on the panel to convince me that the clerk got it right and that I was wrong. And when I was the one sharing my clerk's memoranda, my colleagues were able to use them in similar fashion. In short, we stood on equal ground – something very useful in dealing with judges who were giants, but even more helpful in dealing with those who were mere mortals.

3. That realignment, along with the annual rotation of judges from one division to another that has occurred since, has ended the significance of division identity.

the newly constituted division, I tried mightily to convince my new colleagues to follow the procedures to which I was accustomed: the advance circulation of briefs, the setting and discussion of cases not subject to argument along with those that we were to hear on oral argument day, and the sharing of the memorandum of the responsible judge's clerk. My colleagues soundly rejected my recommendations.

The result was that there was no distribution of briefs or memoranda before oral argument day or anytime before a draft of a decision was circulated. Thus, when one of my colleagues and I received the circulated draft decision of the authoring judge, we knew nothing at all about the case.

Because the briefs had not previously been made available and because there had been no discussion about it, our first knowledge of the case was the circulated decision and the briefs that accompanied it. Only the draft decision and the relevant briefs were circulated. There was no need for a clerk's memorandum, because the circulated decision was deemed to have made such a memorandum superfluous.

One consequence of this procedure was that we had no insight into what may have influenced the authoring judge and, perhaps, what analysis or recommendation that judge might have rejected or ignored. I frequently wondered whether a draft decision was the work solely of a judge or of a law clerk, or one mandated by the judge despite a law clerk's contrary advice, or one in which judge and clerk exercised independent judgment and were in total agreement.

A more significant consequence of this procedure was that because appellate judges customarily give priority to the work of their colleagues, my fellow judges and I dutifully put other work aside to attend to the circulated decision. We had to read the briefs and the draft decision and, when the decision failed to supply adequate analysis, review relevant authority. For conscientious judges, this is not a simple process.

The easy alternative would have been to determine the correctness of the decision based solely on the opinion itself. But using that option would have meant ignoring the advocates' arguments and granting too much power to a single judge – without knowing what influenced that judge and how he or she reached the decision.

My personal experience demonstrates that in cases where there is no oral argument, a process must be implemented that removes any temptation to cut corners.

No conscientious judge would do that. No conscientious judge would reach a decision, or concur in one, without knowing and considering the arguments that support or refute it.

Nevertheless, the temptation to concur without reading the briefs was great. Because I was the presiding justice of the division, I was always the first judge on the panel to receive a circulated decision. That gave me extra responsibility, because my concurrence meant that the circulated decision almost certainly would be issued in the form in which it left my chambers.

Time was valuable, both mine and my colleagues. After all, saving time was one of the reasons for not having oral argument. But hours had to be spent reviewing a draft decision and briefs and authorities and in proofing and editing the work of colleagues. All the while my own work was waiting.

The pressure to cut corners was unmistakable. Although I never took shortcuts, I often wondered whether my colleagues – in my division or in other districts or divisions – did. I wonder to this day.

Removing the need to act in haste

My personal experience demonstrates that in cases where there is no oral argument, a process must be implemented that removes any temptation to cut corners. Appellate judges must adopt procedures that enable them to review briefs on whatever schedule they regularly employ and that give them an opportunity to discuss with each other the right result for the right reason.

Each member of a panel must be placed on equal footing with the authoring judge – before a draft decision is circulated. The remedy, in short, is to remove the need to act in haste.

What litigants, lawyers, and the public want from the appellate court is that every judge on every panel is fully engaged and doing what is necessary to reach a proper decision. The denial of oral argument creates a situation where an authoring judge might not have the full participation of colleagues who, if they were totally engaged, could deter an inappropriate decision while enhancing the likelihood of a well reasoned and proper decision.

Appellate judges must ensure that the denial of oral argument does not also lead to less than a full and fair consideration of all issues. I know from experience that time demands may lead to behavior inconsistent with the interests of justice.

I know, too, that living without oral argument is acceptable (for both appellate judges and litigants) if judges use procedures similar to those my colleagues and I employed during my first seven years on the appellate court – procedures under which judges receive and review briefs and are fully engaged in reaching an appropriate result *before* a draft decision is circulated.[4] ■

4. It should be noted that, in addition to those cases that are initially administered by the "responsible" judge, there is another category of cases that are not subject to oral arguments: those that are initially handled by the research staff of the appellate court. Those cases, usually with a single discrete issue or two, and often involving issues previously decided by a reviewing court, are selected by the director of the research staff and thus removed from early administration by one of the judges. They then are assigned to the law clerks who comprise the research staff. For each case, a clerk authors a draft Rule 23 order and sends it and the relevant briefs to the responsible judge, who then administers it like other cases, i.e., the judge determines whether bypassing oral argument is appropriate and, after reviewing the briefs and relevant authority, whether the decision is proper. If so, after appropriate edits and rewriting, the decision and the briefs are circulated to the other members of the panel.

This article does not recommend alteration of the process used in such cases. Because they usually lack complexity and because the decision and the briefs in these cases are generally short and can be addressed in a relatively short time, the process recommended in this article for other cases that are not subject to oral argument (i.e., those not handled by the research staff) is unnecessary.