

## THE IMPORTANCE OF EARNEST ORAL ARGUMENT<sup>1</sup>

There is no question that the written brief is the most important tool for convincing the appellate judge. Most judges decide most cases based on the briefs. Thus, excellent appellate advocates naturally work long and hard on their briefs and consciously devote time and effort toward improving their brief-writing skills.

In emphasizing the importance of good written briefs, some of us may be tempted to downplay oral argument. We may tend to put all our effort into the brief and treat oral argument as an afterthought.

But neglecting oral argument could be a deadly mistake. Substantial evidence shows that in a significant minority of cases, appellate judges change their minds based on oral argument. In those cases, oral argument will spell the difference between winning and losing.

In late 1998, I attended an appellate practice seminar in New Orleans. The faculty consisted mainly of appellate judges from both state and federal courts. At various points throughout the seminar, the floor was opened for questions, and various judges were asked whether oral argument had ever changed their minds about a case. Every single judge who responded to the question answered "yes."

But *how often* do appellate judges change their minds based on oral argument? More often than you may think.

In 1982 and 1983, two Eighth Circuit judges (Bright and Arnold) recorded their impressions of arguments that they heard. Judge Bright's records showed that oral argument changed his mind in 31% of all cases argued, and in 37% of those cases in which he thought that oral argument was necessary. Judge Arnold's records showed that oral argument changed his mind in 17% of all cases, and in 22% of cases in which he thought that oral argument was necessary. Bright & Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, 70 (Sept. 1984). Their Eighth Circuit comrade, Judge Fagg, tracked his reactions to oral argument during the au-

turn of 1984. The results: He changed his mind in 13% of all cases argued and in 21% of those cases in which he thought that oral argument was necessary. Bright, *Oral Argument: Why? How?*, 7 MINN. DEF. 9 (Summer 1986).

In April 1990, Judge Bright conducted a survey at the Seventh National Appellate Practice Institute, sponsored by the ABA's Appellate Judges Conference and National Institute in New Orleans. Lawyer participants were asked to brief and argue an issue in a civil-rights case before a panel of three faculty judges. The oral arguments were held on the last day of the conference, after the judges had already spent three days discussing the case at institute sessions, and after the judges had read ABA-drafted model briefs. Judge Bright then surveyed the judges to ask, among other things, how they would have decided the case and whether oral argument caused them to change their minds. The results: Of all judges who responded to Judge Bright's survey, 25% changed their minds after hearing oral argument. Bright, *Getting There: Do Philosophy and Oral Argument Influence Decisions?*, 77 A.B.A. J. 68, 72 (March 1991). This result is remarkable considering that the mind-changing occurred *after* the judges had already become thoroughly knowledgeable about the case during three days of institute activities.

Judge Michel of the Federal Circuit recently wrote that oral argument caused him to change his mind in "*only* about one of five cases..." or 20% (emphasis added). He found oral argument influential "far more than 20 percent of the time." Michel, *Effective Appellate Advocacy*, 24 LITIGATION 19, 21 (Summer 1998).

Chief Justice Rehnquist has been quoted as saying that oral argument, while not necessarily causing a 180-degree shift, "at least chang[ed] some of my ideas... in a large minority of cases that are argued—somewhere between 25 percent and 50 percent." Transcription, Jurists-in-Residence Program: St. Louis University School of Law (April 8, 1993).

Oral argument is more important in

courts that screen cases for oral argument. Selection of a case for oral argument means that the appellate judges themselves think that oral argument is important to help them decide the case. Fifth Circuit Judge Wiener once wrote:

[Y]our invitation [to oral argument] was issued for *our* benefit. You would not have been invited had we not anticipated that your participation in oral argument—more accurately oral *discussion*—would further crystallize the issues, enhance our understanding of the factual and legal details, subtleties and nuances of the case, and would answer any questions that remained unanswered after we read your briefs.

Wiener, *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 199-200 (1995) (emphasis in original).

Thus, it is not surprising that Judges Bright, Arnold, and Fagg found that their minds were more likely to be changed by oral argument in cases where they deemed oral argument necessary.

In many appellate courts, the decision conference is held shortly after oral argument. As Judge Michel put it, "We begin conference with your answers [at oral argument] ringing in our ears." Michel, *supra*, at 22. In most cases, the intermediate appellate court will be the last court to decide the merits of the case, because review by the United States Supreme Court or highest state appellate court is usually discretionary and difficult to obtain. Thus, oral argument in the intermediate appellate court not only may be decisive, but also will probably be your last chance to win or lose the case.

To sum up: In the majority of appellate cases, oral argument isn't decisive; the case is won or lost on the briefs. But in a significant minority of cases, oral argument is decisive. Probably somewhere between 10% and 35% of cases on appeal are won or lost on oral argument. Think about these statistics the next time that you are tempted to treat oral argument as an afterthought. Then use your newfound awareness as an opportunity to improve your oral-argument skills.

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<sup>1</sup> With apologies to Oscar Wilde.