AMERICAN ACADEMY OF APPELLATE LAWYERS

December 29, 1999

Editor,
American Bar Association Journal
750 North Lake Shore Drive
Chicago IL 60611

To the Editor:

Your article in the October 1999 issue, "Advocates for a Mute Court," struck a responsive note with many lawyers who are concerned about the decreasing availability of oral argument in appellate courts. Senator Charles Grassley, a member of the Senate Judiciary Committee, suggested in a hearing last March that the Second Circuit could become more efficient if it followed a number of other circuits and cut back on oral argument.

The American Academy of Appellate Lawyers is a membership organization comprised of more than 220 attorneys who specialize in appellate advocacy. In response to Senator Grassley's suggestion, the Academy formed a committee, chaired by Mark Kravitz of New Haven Connecticut, to prepare a letter urging the Judiciary Committee not to take any steps that would result in the further curtailment of oral argument in the federal courts of appeals. That letter was reviewed by our membership and approved by our Board of Directors; it was sent to the Judiciary Committee and the judges of the Second Circuit on December 29, 1999. A copy of the letter, together with a bibliography on the topic, can be found on the Academy's website at www.amappacad.org.

The fate of oral argument, and of the cases whose outcome may hinge on it, is an important topic on which the ABA Journal should keeping writing.

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Dear Members of the Judiciary Committee:

I write on behalf of the American Academy of Appellate Lawyers, a non-profit organization formed in 1990 to advance the highest standards and practices of appellate advocacy. The Academy consists of 223 Fellows elected by their peers. The Fellows are present and former judges and justices, former law clerks, and prominent attorneys specializing in appellate practice in state and federal courts throughout the United States.

The Issue

I am writing in response to a suggestion in the Chairman's Report on the Appropriate Allocation of Judgeships in the United States Court of Appeals, Subcommittee on Administrative Oversight and the Courts, March 1999, that the United States Court of Appeals for the Second Circuit become more "efficient" by abandoning its practice of hearing oral argument in most cases and by adopting screening procedures designed to limit oral argument to only the "most important" cases.

While the Academy takes no position on the need for or advisability of further judgeships in the Second Circuit or in any other court, the Academy supports and applauds the Second Circuit's long-standing practice of holding oral argument in most non-*pro se* cases where the parties request it. We believe that the recommendation contained in the Chairman's Report almost certainly overstates the time that can be saved by limiting oral argument. More important, however, the proposal fails to take into account the significant institutional and public values of oral argument. Any potential increase in judicial efficiency that might result from eliminating oral argument would, therefore, be more than outweighed by the harm that sacrificing these other important values would inflict.

The Benefits of Oral Argument

Oral argument is important, and not just to lawyers; it also has great value for judges, litigants and the general public. Oral argument serves the following important values:

- Oral argument provides an occasion for judges to direct pinpoint questions to counsel about specific issues that may intrigue or puzzle them, and to test ideas. As Chief Justice Rehnquist has put it, "You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there

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at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process" (Transcription, *Jurists-in-Residence Program*; St. Louis University School of Law (Apr. 8, 1983), reported in Bright, "The Power of the Spoken Word: In Defense of Oral Argument," 72 Iowa Law Review 35, 36-37 (1986)). Indeed, oral argument may provide judges a way to resolve appeals without significant further judicial activity because it can instantly focus the appellate judges on the "key" to a case.

- Oral argument provides an occasion for bringing together in one location the three decision-makers on a particular case. This is especially important in circuits spanning large geographical areas, where appellate judges often work in cities far from one another and meet face-to-face only for argument calendars. Justice Ginsburg recently described the importance of having the judges consider the case in one another's presence, as follows: "[W]e use the oral argument not simply to put to counsel the questions that are disturbing us, but also those that may be disturbing our colleagues. There's a fair amount of cross conversation going on at the oral argument and it does train our minds on the case." (Judicial Conference, Second Judicial Circuit of the United States, 178 F.R.D. 210, 281 (1997)).

- The exchange of views among counsel and judges that occurs during oral argument can provide judges with a measure of confidence in their decision making that is not provided by written briefs alone. As Justice White has described the value of oral argument, "All of us on the bench [are] working on the case, trying to decide it ... [The lawyers] think we are there just to learn about the case. Well, we are learning, but we are trying to decide it, too. [I]t is then that all of us . . . are working on the case together, having read the briefs and anticipating that [we] will have to vote very soon and attempting to clarify [our] own thinking and perhaps that of [our] colleagues. Consequently, we treat lawyers as resources rather than orators . . ." (White, "The Work of the Supreme Court: A Nuts and Bolts Description," Oct. 1982 N.Y. State Bar J. 346, 383).

- Oral argument can convey to appellate judges far more effectively than any written brief can, the human consequences of their decisions.

- Oral argument is an opportunity for lawyers to clarify their arguments, to examine issues from a different perspective, to change the emphasis of their presentations, and to provide precisely the record or case citation needed so that the court will recognize how to conclude the appeal expeditiously. Appellate opinions frequently comment on counsel's concessions or clarifications at oral argument (see, for example, *Cedar Rapids Comm. School Dist. V. Garrett F.*, 119 S.Ct. 992, 998 & nn.7 & 8 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169, 118 S.Ct. 1925, 1932 (1998); *Gilbert v. Homar*, 520 U.S. 924, 933-936, 117 S.Ct. 1807 (1997)).

- There is a spontaneity in the direct, "real time" face-to-face communication that occurs at oral argument that cannot be achieved in written briefs, nor even in electronically mediated discussion. That spontaneity has a way of unlocking more wisdom than reams of structured

briefing. As a result, cases often turn out quite different after oral argument than the judges may have supposed before argument.

- Oral argument provides a focus point for settlement. When a definite date is set for consideration of an appeal, parties and counsel are more likely to concentrate on a case, confront the strengths and weaknesses of their positions, and weigh the odds realistically.

- Oral argument demonstrates to the parties that their case was decided as the result of a deliberative process. The ability to look the decision-maker in the eye is a hallmark of American jurisprudence, and legitimates the result.

- More generally, oral argument – the only public aspect of the appellate process – is an avenue for citizen contact with the appellate courts. Without oral argument, appellate judges would be cloistered from all but a limited number of subordinates. As Judge Bright wrote in the article cited above, "Oral argument is necessary to provide the judiciary, the least democratic and most isolated branch of government, with some semblance of public visibility and accountability." (Bright, at p. 36). Increasing the visibility of the appellate courts, therefore, has a value independent of the effect of argument on any specific case.

Perhaps most important, while appellate judges sometimes despair of the quality of oral argument, their comments on and off the bench stress its importance. In fact, many published and unpublished appellate opinions discuss procedural issues in terms of whether a party received "the benefits of oral argument" or "the benefits of written briefing and oral argument" (see, for example, *United States v. Jacobs*, 167 F.3d 792, 795 (3rd Cir. 1999); *Hamm v. Canal Insurance Co.*, 1999 U.S. App. LEXIS 7631 (4th Cir. 1999); *Ruiz v. Johnson*,178 F.3d 385, 390 (5th Cir. 1999); *Dodd v. Darden*, 1999 U.S. App. LEXIS 11405 (6th Cir. 1999); *United States v. Shugart*,176 F.3d 1373, 1374 (11th Cir. 1999)).

We also attach a selected bibliography of recent articles to illustrate the views of a large number of judges and former judges, as well as appellate practitioners and law professors, concerning the role and importance of oral argument. The observations of two D.C. Circuit Judges are typical of the comments found in these articles. To them, oral argument:

"makes or breaks about a quarter of the court's cases . . . Judges go straight from oral argument to conference, where they cast their votes. This means that lawyers at argument are poised to have a decisive impact on the deliberations.

"' . . . Sometimes it will actually affect the decision, and in many instances it will certainly affect the way we deliberate and the way in which we write.

" . . . 'I certainly know of cases – and very important cases – where the panel went into the courtroom leaning one way and came out the other.'"

(Sturgess, "They Don't Like What They Hear," Legal Times, December 24, 1990, p. 1 (quoting Judges Laurence Silberman and Harry Edwards)). Chief Judge Richard Posner, commenting specifically on proposals to curtail oral argument, summed up the value of oral argument to judges in this way: "Although the average quality of oral argument in federal courts (including the Supreme Court) is not high, the value of oral argument to judges is very high." (Posner, The Federal Courts Challenge and Reform, pp. 160-161 (Harvard University Press, 1996).

As a group and individually, therefore, our appellate experiences convince us that whatever small amount of time might be saved by eliminating or limiting oral argument in the manner suggested in the Chairman's Report would not be sufficient to compensate for the important institutional benefits that would be lost. Indeed, as federal courts increasingly use summary dispositions and orders to improve their efficiency, oral argument may become the *only* way for the parties and the public to be assured that their cases and arguments were considered and decided by Article III judges.

In this respect, oral argument in the appellate courts is similar to debate in the Senate. Though senatorial debate has never been deemed the most "efficient" way to pass laws, it is nonetheless rightly considered to be critical to public accountability and to the operation of our democratic government. Oral argument in our federal appellate courts is also too important and too effective to sacrifice in the name of increased efficiency.

The Academy appreciates your willingness to consider our views on this issue of critical importance to the future of our federal appellate courts. If the Academy can provide the Committee with any further information or be of assistance in any way, please do not hesitate to call upon us.

Sincerely yours,

Alan B. Morrison, President

cc: Judges of the Second Circuit
Encl. Bibliography

SELECTED BIBLIOGRAPHY ON ORAL ARGUMENT

Books

Joe S. Cecil and Donna Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals (The Federal Judicial Center, 1987).

Frank M. Coffin, On Appeal – Courts, Lawyering, Judging (W.W.Norton & Co., 1994).

Michael R. Fontham, Written and Oral Advocacy (John Wiley & Sons, 1985).

Robert J. Martineau, Appellate Justice in England and the United States: A Comparative Analysis (William S. Hein & Co.,Inc, 1990).

S. O'Malley and A. Layton, European Civil Practice (Sweet & Maxwell, 1989).

Charles Platto, Civil Appeal Procedures Worldwide (IBA, 1992).

Richard A. Posner, The Federal Courts – Challenge and Reform (Harvard University Press, 1996), Chapter 6.

The Instruments of Appellate Advocacy, 4th ed. University of Texas Law School Foundation (1987).

Law Journal Articles

Myron H. Bright, "The Power of the Spoken Word: In Defense of Oral Argument", 72 Iowa Law Review 35 (1986).

Nicholas M. Cripe, "Effective Appellate Argument," 70 ABA Journal 56-59 (December 1984).

John W. Davis, "The Argument of An Appeal," 26 A.B.A. Journal 895 (1940)

Albert J. Engel, "Oral Advocacy at the Appellate Level," 12 University of Toledo Law Review, 463 473 (Spring 1981).

Robert Martineau, "The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom", 72 Iowa Law Review 1 (1986).

Stanley Mosk, "In Defense of Oral Argument," The Journal of Appellate Practice and Process, Vol. 1, No. 1, 25 (1999).

Linda K. Neuman, "Oral Advocacy: In Step With The Times?", 34 South Dakota Law Review 236 (1989).

Thomas R. Newman, "Oral Argument," 188 New York Law Journal, 1 (October 21, 1982).

E. Barrett Prettyman, "The Supreme Court's Use of Hypothetical Questions At Oral Argument," 33 Catholic Uni. Law Review 555 (1984)

William H. Rehnquist, "From Webster to Word-Processing: The Ascendance of the Appellate Brief, "The Journal of Appellate Practice and Process, Vol. 1, No. 1, 1 (1999).

William H. Rehnquist, "Oral Advocacy: A Disappearing Art", 35 Mercer Law Review 1015 (1984).

William H. Rehnquist, "Oral Advocacy", 27 S. Texas Law Review 289 (1986).

Gary L. Sasso, "Appellate Oral Argument," 20 Litigation 27 (Summer 1994).

Stephen M. Shapiro, "Oral Argument in the Supreme Court of the United States", 33 Catholic Uni. Law Review 529 (1984).

Stephen M. Shapiro, "Questions, Answers or Prepared Remarks," 15 Litigation 33 (Spring 1989).

White, "The Work of the Supreme Court: A Nuts and Bolts Description," Oct. 1982 N.Y. State Bar J. 346.