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Oral Arguments or Theatrical Performances?

Author: Gideon Kanner

There are things in life that people just don't like to mess with, like the human vermiform appendix, for example. It performs no significant physiological function, and is said to be a vestigial organ that has lost its original function. Still, no one wants to undergo an appendectomy just to get rid of it. It's sort of like that with oral argument in the appellate courts these days. Maybe in the past, when courts were "cold" when judges did not read the briefs before taking the bench, oral advocacy may have been decisive. Now, with "hot" judges, who have read the briefs and are prepped by clerk-written pre-argument bench memos, it's another story.

Oral arguments may be interesting and at times informative, but as experienced participants in the process agree, they do not affect the outcome of cases, though they may affect a court's reasoning. The incidence of cases in which an appellate court changes the intended outcome after hearing oral arguments, is measured in events per lifetime. In my own case, after spending some 40 years or so as an appellate lawyer, I can think of only one, maybe two, cases in which the outcome was determined in oral argument.

Nonetheless, as all newspaper readers know, oral arguments before the U.S. Supreme Court are treated as a big deal, and the "first Monday in October" can at times assume some the attributes of a Circus Maximus. Case in point: Justice Sonia Sotomayor's recent maiden voyage - you should pardon the expression - as participant in oral arguments before the U.S. Supreme Court. According to the *Los Angeles Times* (David G. Savage, *Sotomayor Takes Vocal Role on Her First Day*, Oct. 6, 2009), in the course of one hour, she asked 36 questions of the hapless lawyers trying to argue their case. And that wasn't

Newsletter Editors

Michael Berger
Partner
mmberger@manatt.com
310.312.4185

Benjamin Shatz
Counsel
bshatz@manatt.com
310.312.4383

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all. Justice Antonin Scalia, no slouch in the question-asking department himself, asked 30 questions during the same time. Which, with all due respect to their Lordships, is a case of overdosing on questions. Big time.

After reading this bit of news, I scurried to my calculator, which revealed that if you take the total number of minutes in an hour and divide it by the number questions asked during that time, that comes to a question every 54 seconds. This assumes that none of the other justices asked any questions. Not even Justice Ruth Bader Ginsburg or Justice Stephen G. Breyer. Though, as the late Frederick Bernays Wiener counseled in his treatise, "Rejoice when they ask questions. At least it shows that you haven't rendered them comatose," this is way too much of a good thing. Not exactly an atmosphere that is conducive to a lawyer's structuring and presenting a coherent, organized oral argument.

Having labored in the appellate vineyards for some 40 years and having thus acquired the requisite experience (along with the inevitable professional scar tissue) I submit that what went on here, whatever it was, was not an appellate oral argument, but more of a theatrical performance for the benefit of the press.

You could say that, in spite of its growing prominence in the news, oral argument before the U.S. Supreme Court is losing its appeal. Why? Because there, as in other appellate courts, cases are decided on the briefs, not on the basis of lawyers' forensic performances. No matter how smart they may be, the Justices are incapable of reducing the complexities of a case worthy of Supreme Court review to a few questions, and in the end they have to base their decision on the contents of the briefs and their clerks' memos. Nor are the lawyers capable of providing proper answers in a matter of seconds. The issues before the High Court are often sophisticated, and do not lend themselves to being dealt with by ad hoc responses to whatever may have popped into their Lordships' minds during oral argument. Add to that the fact that the Justices can be something less than models of *politesse* when it comes to interrupting, not just the lawyers' train of thought, but each other, and jumping from topic to topic with no rhyme or reason and the overall performance may be more in the nature of a doctrinal goulash than a respectful conversation between court and counsel trying to address a difficult issue of law.

Then there is the matter of varying degrees of judicial preparation. Thus, in *Agins v. City of Tiburon*, I stepped up to the plate and began arguing, only to have one of their Lordships ask: "Where is the complaint?" I knew then and there that it was not going to be one of my better days. That's how one acquires that professional scar tissue. On the other hand, sometimes, the Justices' understanding of a case can be superlative. I'll never forget the time when, in *City of Monterey v. Del Monte Dunes*, Justice Anthony M. Kennedy informed the unfortunate city lawyer that he (Kennedy) had read the transcript of jury arguments (which was not designated as part of the record) and thus knew that the lawyer was now arguing contrary to what he had told the jury. Ouch! At other times the degree of judicial preparation and understanding may fall short of so lofty a standard.

This implies no disrespect. After all, judges decide all sorts of cases and are therefore generalists who may not be at home in all areas of the law. In the normal course of events, they may know all about the niceties and vagaries of search and seizure and abortion law,

but not necessarily the law of variances.

So does all that mean that I am opposed to oral argument? Heavens, no. Oral argument, like other solemn ceremonies, has an important purpose. It serves the vital function of putting a visible human face on the institutions that dispense justice to the citizenry. It may not be decisive of individual case outcomes, but it regularly serves as a way of correcting judicial misapprehensions about the content of the record, and subtleties of the pertinent law, thus improving the judicial end product. These are valuable things to lawyers, litigants and to society at large, that can enhance both the litigation process as well as its outcomes. But even so, what happens before the Justices these days can be a bit much, and its prominent treatment by the press misinforms the citizens as to the workings of the important institution that is the Supreme Court of the United States.

A little self-restraint may be in order, not only on the part of the press but also on the part of the Justices. Lawyers who argue these cases have often lived with them for years and know more about them than the Justices. So assuming a modicum of skilled appellate advocacy on their part, letting the lawyers have a little more leeway in oral argument, without being constantly interrupted and hectored from the bench by folks who, truth to tell, may or may not fully understand the subtleties of the controversy at hand, is not a bad idea. If a case is important enough to take up the Supreme Court's limited time and resources, it should be important enough to be heard properly.

Gideon Kanner is professor emeritus at the Loyola Law School, and of counsel to Manatt, Phelps & Phillips. He is past president of the California Academy of Appellate Lawyers.

For additional information on this issue, contact:

Gideon Kanner An experienced appellate attorney and eminent domain expert, Mr. Kanner has been a practicing appellate lawyer in eminent domain and inverse condemnation for forty years. Mr. Kanner has been counsel for property owners in numerous precedent-setting cases before the California Supreme Court and has appeared as counsel for parties and amici curiae in a number of inverse condemnation cases in the United States Supreme Court.