Oral argument has lost its way

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Organizational practices sometimes outlast their rationales. There is a story, perhaps apocryphal, that when the British entered World War II, their weaponry included some Boer War-era artillery that they mounted on mobile units. A time-and-motion expert called in to improve the guns' firing rate was puzzled by a pause in certain soldiers' activity shortly before firing. An old colonel solved the mystery: The pause was part of the firing routine because the artillery had originally been drawn by horses which the soldiers had to hold, presumably to prevent flight.

Like the pause for holding the artillery horses, oral argument was once unquestionably necessary because briefs were exactly what their name implies: "a short abstract of the argument a lawyer would make orally." Anderson, "Changing Fashions in Advocacy: 100 Years of Brief-writing Advice," 11 J. App. Prac. & Process 1, 5 (2010). "Oral arguments would go on for hours - maybe even days - while briefs were for the most part only a few pages." *Id.* at p.5. In 1844, Daniel Webster and others presented *10 days* of oral argument to the U.S. Supreme Court in the 1844 case *Vidal v. Girards Executors*. Davis, "The Argument of an Appeal," 26 A.B.A.J. 895 (1940).

Because oral argument was the primary medium for communication between attorneys and appellate justices, the latter had relatively little information about the case prior to hearing the attorneys speak. Today, comprehensive pre-argument briefing provides the justices with far more written information than was formerly the case. Although oral argument (unlike the pause for horse-holding) might still be useful in at least some instances, it is no longer the primary way attorneys communicate with appellate justices.

During the 20th century, appellate courts made one sensible adjustment to this change by drastically shortening argument time. Unfortunately, most California appellate courts have failed to make a second logical modification in their procedures: routinely sharing their thoughts regarding the case with counsel before oral argument. Therefore, attorneys arguing in those courts generally lack knowledge of the court's concerns.

Such ignorance is suitable for graduate school oral examinations, whose object is to determine if the student has a broad range of knowledge regarding the applicable subject matter. However, oral argument is intended to assist the court in its decision-making process, not to test the attorney's knowledge of the case. An attorney who knows what issues the court considers important (and why) will be able to better prepare for argument by focusing more intensively on these issues. Of course, attorneys would still have to be ready for questions in secondary areas of interest, but they could focus their efforts on areas that they know are likely to be most productive. As a side benefit, oral argument preparation time would likely decrease, with concomitant client savings.

Remedying attorney ignorance of the court's concerns should not only change oral argument preparation, but should also alter the manner in which arguments are conducted. At present, appellants' attorneys in particular are faced with a Catch-22. On one hand, they know the court can disregard contentions advanced for the first time in

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A lawsuit filed Wednesday in the Southern District challenges the constitutionality of requiring paroled sex offenders to post signs on their doors announcing their status during Halloween trick-or-treating.

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After nearly a decade of lobbying, the U.S. Patent and Trademark Office officially launched a permanent California outpost Thursday that supporters hope will bolster jobs and educational opportunities in Silicon Valley.

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Google Inc. has defeated a lawsuit that alleged the Mountain View-based company infringed patents related to data transmission.

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Los Angeles County Superior Court participated in the statewide "Great Shakeout" one step further than required. Rather than simply "duck and cover," at least two courthouses were completely evacuated at 10:15 a.m., causing a 30-minute delay in business for most attorneys who stopped mid-hearing to walk down with court staff and re-enter. Some cheated, leaving early through the elevators, and one judge emailed his 11 a.m. schedule
Business

oral argument. On the other, when the justices take the bench, they often remind attorneys that the court has read the briefs and is familiar with the arguments. If new arguments cannot be made and the court knows the old ones, what can the appellant's counsel do other than to provide a précis of the arguments raised in the brief and hope for questions from the justices?

If the court's primary concerns are shared with counsel prior to argument, attorneys will no longer be "firing blind," which can result in unnecessarily detailed fact recitations or flights of rhetoric. Instead, counsel and the court can immediately engage in a dialogue that will likely be more useful to the court, as well as shorter and less tedious, than many oral arguments are currently. The court could facilitate this dialogue by changing the order of argument when the justices' concerns relate primarily to points made in the respondent's brief.

In the last few years, some appellate courts have attempted to communicate their thoughts to attorneys before argument by sending out "focus letters" prior to argument (at least in certain cases) or issuing tentative opinions on the day of argument. However, only District Four, Division Two issues full tentative opinions and circulates them to counsel before argument. According to material posted on the California Courts' website, that division believes argument has become "more focused and taken less time," and "more useful in assisting the court to reach a decision" following the adoption of this practice in 1990.

Focus letters that the attorneys receive before argument should have a similar, though perhaps not as pronounced, effect as the issuance and pre-argument circulation of full tentative opinions. The practice of issuing tentative opinions that counsel can only review on the morning of argument appears on its face to be less useful because counsel does not have the tentative to use in argument preparation. However, the efficacy of day-of-argument tentative opinions, as well as that of focus letters sent prior to argument, is an empirical question that will be answered over time.

If the quality of arguments is improving in California appellate courts that provide focus letters and/or day-of-argument tentative opinions, the justices should urge their colleagues to adopt similar systems. If argument quality does not improve, then perhaps these courts should adopt District Four, Division Two's practice of issuing full tentative opinions and circulating them to attorneys prior to the day of argument. Whatever method is adopted, however, California appellate courts need to maximize the usefulness of oral argument by communicating the court's concerns to attorneys before they begin their last attempt to persuade the court.

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