Strategic, Persuasive Requests

# Maximizing Your Chances for Oral Argument

**By Eric J. Magnuson and Michael A. Kolcun**

Appellate attorneys must be prepared to answer the one question that clients will inevitably ask, "*Will we get oral argument?*" The short answer is, "Maybe, if you ask nicely."

In most instances, both parties to an appeal have significant reasons to seek oral argument. For the appellant, even the most minimally involved client will have lived through a loss in the district court, as well as the arduous process of drafting two complex appellate briefs. The appellant will be eager for the opportunity to have their story persuasively communicated to a distinguished panel of appellate judges. Former Minnesota Supreme Court Justice John Simonett was once asked if the appellant should ever waive oral argument. After reflecting on the question for a moment, he responded, "It's a lot like proposing marriage—I suppose you could do it just in writing."

On the other hand, oral argument is the appellee's only chance to respond to the reply brief. Suffering a reversal will sting even more if the appellee declined to pursue the opportunity to speak directly to the court.

The fact remains, however, that oral argument is, in some courts, going the way of the carrier pigeon. Federal circuit courts throughout the country are deciding cases without entertaining argument, and at staggering rates. While the reality remains that the opportunity for oral argument is dramatically decreasing, appellate lawyers can maximize their chances by strategically and persuasively drafting a request for argument to both engage and persuade the behind-the-scene decision makers.

## The Cold, Hard Facts

When was the last time that you or your one of your contemporaries argued before a federal appellate court? The answer is, more often than not, a number of years. Oral argument is increasingly becoming an endangered species, and in fact, federal appellate courts do not even recognize the right to oral argument in every case. *See, e.g. Toquero v. INS*, 956 F.2d 193 (9th Cir. 1992) (oral argument not necessary to satisfy due process); *NLRB v. Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers*, 476 F.2d 275 (3d Cir. 1973) (denial of oral argument under local rules neither violates due process nor Fed. R. App. P. 34). The Supreme Court has even weighed in, reasoning that "[c]ertainly the Constitution does not require oral argument in all cases…." *FCC v. WJR, Goodwill Station, Inc.*, 337 U.S. 265, 276 (1949).

Aside from the Supreme Court, oral argument is declining in the vast majority of federal jurisdictions. According to government statistics, the federal circuit courts of appeal decided cases on the merits after oral argument in just 18 percent of all cases. *See* Table B-1, *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending June 30, 2015*. Oral argument is remarkably far less likely in the Fourth and Third Circuits, which decided cases after argument in just 8 percent and 10 percent of all cases, respectively. *Id.* Even the most engaged bench, the Seventh Circuit, decided cases after argument just over a third of the time. *Id.*

Compare this to just five years ago, when the federal circuits decided cases on the merits after oral argument in 26 percent of all cases. *See* Table B-1, *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending December 31, 2010*. And 10 years ago, that figure was near 30 percent. *See* Table B-1, *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending December 31, 2005*.

As the federal circuits continue to shy away from entertaining oral argument, strict adherence to the rules and local procedures—in addition to persuasion, of course—becomes all the more important to an appellate attorney who wishes to engage an appellate panel in the courtroom.

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## Rules and Select Procedures Governing the Request for Oral Argument

Rule 34(a)(2) of the Federal Rules of Appellate Procedure provides:

> Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Despite the seeming mandate of the rule to provide oral argument in all cases, the federal circuits have freely applied these exceptions, finding the vast majority of cases fall into one of the enumerated categories. And different circuits have also adopted unique approaches to determine whether to permit oral argument in a given case. For example, the Second Circuit declines to hear argument in certain immigration matters, and the Eleventh Circuit considers additional factors such as judicial resources, control of the docket, minimizing the unnecessary expenditure of government funds, and lessening delay in decisions. *See* 2d Cir. L.R. 34.2; 11th Cir. R. 34-3.

Many of the federal circuits have a screening process to determine whether to grant oral argument. This screening is often completed by an assigned panel of judges, as is the case in the Tenth, Third, and Fourth Circuits. Other circuits utilize staff attorneys and clerks to assist with prescreening cases for argument, such as the Fifth, Eighth, Eleventh, and D.C. Circuits.

As for the request itself, many of the circuit courts permit the request for oral argument to be detailed within a party's brief, should oral argument be sought at all. The Fifth and Eleventh Circuits go one step further by imposing a duty on the parties to include a statement in their principal brief pertaining to whether they deem oral argument appropriate. *See* 5th Cir. R. 28.2.3; 11th Cir. R. 28-1. The Eighth Circuit requires the very first page of every appellant's brief to contain a summary of the case and request for oral argument. *See* 8th Cir. R. 28A. The Second Circuit, which uses an oral argument statement form requiring the parties to append, among other things, a statement of the nature of the action and a list of the number of issues proposed to be raised on appeal. *See* 2d Cir. L.R. 34.1.

As this variety in local procedures implies, the decision by various courts about whether oral argument will be entertained is highly discretionary. Counsel should be mindful of the court that they seek to address, speaking to its philosophy toward oral argument when the request is made. Appellate attorneys should draft the oral argument request not only within the confines of Fed. R. App. P. 34, but also keeping the individual circuit's rules, internal procedures, and intended audience in mind.

## Maximize Your Chances

Barring a fundamental change to the operating procedures and customs of the federal circuits, there are still a number of steps that an appellate attorney can take to maximize the chances of obtaining oral argument. In circuits where oral argument may be requested within the body of a brief—and especially those in which the request does not count against page or word limitations, such as the First and Eighth Circuits—counsel should take care to draft a compelling reason why a case merits in-person advocacy before a circuit court.

While appellate attorneys should stay within the general confines of the rules and local procedures, adherence to boilerplate should be avoided. There is no reason why the quality of advocacy should deteriorate from the level devoted to drafting the principal briefs when the time comes to request oral argument. The request for oral argument should be just as persuasive and punchy, although care should be taken to avoid an overly argumentative request.

Appellate attorneys seeking oral argument must convince the court that their arguments are worth considering in person. One way to construct a standout request is to consider the Fed. R. App. P. 34 factors in reverse. If applicable, counsel should explain that recent case law, a question of first impression, or novel issues are implicated in the appeal, and detail why argument would be beneficial to the panel and the circuit's jurisprudence overall.

Counsel should also take care to elaborate how many issues are presented, as well as the level of their complexity. Explain if ambiguity exists in the applicable rule or leading case because of inconsistency in panels, or across the circuits. Of particular guidance is the Internal Operating Procedures of the Third Circuit, which explain certain circumstances that determine whether its judges find oral argument necessary, such as matters of important public interest or if clarification is needed with respect to an important legal, factual, or procedural point. *See* 3d Cir. I.O.P. 2.4.2.

Should a particular circuit's procedures preclude an opportunity to submit a detailed, persuasive request—or worse, if the request is rubberstamped with a denial—a motion could be submitted under Fed. R. App. P. 34 with these considerations in mind. *See, e.g.,* David G. Knibb, *Federal Court of Appeals Manual* §§33:14-15 (6th ed. 2013).

## Conclusion

The goal of obtaining oral argument can be achieved by capturing a court's attention through persuasive writing. Even if oral argument is denied, the request itself is the first chance that an appellate litigator has to persuade the court to decide the appeal in your favor. Due care to this oft-neglected step in an appeal is essential to obtain the ideal: coveted facetime before a panel of federal appellate judges who will see a case in a more complete and realistic light when confronted by a live advocate.

As the Sixth Circuit explains in its local procedures, the purpose of oral argument is to emphasize and clarify the argument presented in the briefs. The request for oral argument should do just that. FD