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WITHER ORAL ARGUMENT?
THE AMERICAN ACADEMY OF APPELLATE LAWYERS
SAYS LET'S RESURRECT IT!

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Oral argument is one of the most written-about, discussed, and debated aspects of the appellate process. Among lawyers, judges, and legal commentators there are disparate views on its value. Some contend oral argument occupies attention and time that is disproportionate to its value to the decision-making process. This viewpoint is often driven by observations that briefs are far more important to shaping the ultimate decision and that oral argument only rarely changes the outcome.

The American Academy of Appellate Lawyers, a nationwide group of experienced appellate advocates, has, for many years, analyzed issues related to oral argument among its membership and with judges and academics. The Academy puts great value on oral argument, particularly from a systemic perspective. Oral argument is, after all, the only time where a party and its advocate can interact with the decision-maker. It is a time when the court's views on the issues are on display for

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the public and for clients, and counsel has the opportunity to address potential misconceptions or overlooked facts. In that manner, oral argument is the most tangible manifestation of the critical role that appellate courts play in the resolution of public and private disputes traversing our legal system.

Because of its strongly held beliefs, the Academy became concerned about the apparent and verifiable decline in the number of cases, particularly in the federal system, that are listed for oral argument, as well as the shrinking time allotted to those cases listed. These discussions started anecdotally. But eventually they resulted in the Academy's undertaking an initiative to see if steps could be taken to help increase the frequency and usefulness of oral arguments or, at the very least, re-invigorate the appellate courts concerning oral argument's intrinsic and extrinsic value.

The process began with a task force that looked closely at oral argument practices in the various federal circuits. In tandem with that effort, a statistical analysis was undertaken to try to make a meaningful evaluation of the frequency of arguments in the various circuits and develop some appreciation for the types of cases being argued. After gathering this foundational information, the task force, with input and insights gained from the Academy's membership, produced a report outlining the Academy's views on steps that might be taken to improve on the frequency and quality of oral argument in the intermediate federal courts of appeals. The formal report of the task force's efforts and analysis is attached to this article as Appendix I.

The report was prepared with the realizations that its statistical underpinnings were not perfect, that the frequency of argument varied widely within circuits, and that arriving at a consensus on how to address frequency and quality issues also could be the proverbial fool's errand. From the Academy's perspective, however, the report could at least provide a means to start a dialogue that would draw in stakeholders and provoke a serious discussion on the need to confront the consequences of the decline in oral arguments. The Academy likewise believed the report could be a useful framework for channeling the discussion towards achieving some positive results.

The Academy transmitted the report to the chief judges on each federal circuit with a proposal for in-person discussions on

its contents. As noted, these discussions were intended to start a dialogue between the courts and advocates on the benefits of oral argument and ways to preserve and enhance its role in our system of appellate justice. Those discussions are largely complete and this paper captures some initial observations that follow from the Academy's efforts.

The ensuing commentary is broken into three basic parts: (1) an analysis of the Academy's task force report and its recommendations; (2) some high level discussion points that arose from the Academy's circuit meetings; and (3) some concluding thoughts about what might be done to preserve and enhance the role of oral argument going forward.

I. THE TASK FORCE REPORT

From the Academy's perspective, the benefits of oral argument are profound. Among other things, it: (i) improves the accuracy and quality of appellate decisions and the decision-making process itself; (ii) provides the parties with a public manifestation that they have had their day in court; (iii) performs a critical civics function showing appellate courts' role in upholding the rule of law; and (iv) teaches lawyers how appellate judges decide cases.

Given these benefits, the statistical information the task force analyzed and evaluated was troubling. The Academy extracted classes of cases in which oral argument is unlikely to be helpful, e.g., cases with self-represented parties. In the remaining cases—those where argument might be appropriate—the percentage argued is below 50 percent in the majority of circuits, hovers at 50 percent in a few, and exceeds 50 percent in only two.

Measured against the language of Federal Rule of Civil Procedure 34(b), which starts with the proviso that "oral argument must be allowed in every case" subject to exceptions, one might expect oral argument to be the rule. When the statistics are considered, however, it is the exception, leading to the conclusion that oral argument in many circuits "will not be allowed" unless the court believes it will be helpful. The Academy believes this institutionalized rebuttable presumption against argument needs to change. Nor does change seem

insurmountable. Two circuits, the D.C. Circuit and the Seventh Circuit, hold argument in a significant number of cases and appear to treat oral argument as the norm. If the remaining circuits reached numbers in the 60 to 70 percent range, the systemic effect would be enormous, and Rule 34's argument allowance proviso would become a reality.

To get the discussions moving, the Academy's report offered some specific recommendations for the courts to consider. To that end, the report posited:

- Establishing pro bono or other programs that would provide opportunities for oral argument in pro se cases;
- Putting more stock in the parties' requests for oral argument and having these requests be made after briefing and focus on specific issues;
- Issuing more focus letters where the court gives advance notice to counsel on the issues it is concerned about;
- Developing a question and answer approach that directly gets counsel to the issues the court cares about that are likely to impact a resolution;
- Making greater use of technology to enhance outreach and account for geographic challenges; and
- Creating training programs for advocates that focus on how to deliver work product, written and oral, that is useful for appellate courts.

The Academy viewed these as modest but achievable steps. These recommendations then formed the backdrop for the initiative's next phase: direct discussions with the courts.

II. THE ORAL ARGUMENT INITIATIVE

The Academy recognized that simply making a handful of abstract recommendations in a report would not be impactful. Rather, any serious attempt to increase the frequency of oral arguments needed to involve direct discussions with the courts. Those discussions would provide a means to identify, probe and try to address why arguments are not held more frequently. So, following its publication, the Academy circulated its report, by letter from its president, to each circuit judge in the federal intermediate courts of appeals. A copy of that letter is attached as Appendix II. Academy Fellows and appellate practitioners, who practiced frequently in the respective circuits, followed up. In the end, discussions were held with eight circuits, including the Federal Circuit. The results of the discussions were reported to the task force by the Fellows who attended and some generalized observations on these face-to-face discussions follow.

First, for those circuits where the percentage of arguments is low, the reasons given vary, but several recur. Among the most frequently cited are: (i) workload—oral argument takes time and it makes it more difficult to decide cases in a timely manner; (ii) lack of value—oral argument is unnecessary where the law is settled or no new or novel issues are presented; (iii) cost to the parties—oral argument is a significant expense particularly in those circuits that are larger geographically; (iv) lawyers are not requesting it—oral argument frequently is not requested in criminal and immigration cases; and (v) the unlikelihood that it will change the court's views—oral argument is not needed because briefing gives the court what it needs to decide a case.

Second, a loose consensus also emerged on why or how oral argument is an important part of the decision-making process. These included: (i) help in the court's reasoning process—oral argument can help refine perspectives on the result reached; (ii) performing an external systemic function—oral argument represents an important legitimizing factor in the role of the judiciary; (iii) some cases need to be heard—oral argument must be held in high profile or significant cases to meet private and public expectations; (iv) improvement in

briefing—oral argument provides a way for courts to hold lawyers accountable; and (v) educational function—oral argument enables the judges to learn more about the cases they have to decide.

Third, three of the Academy's specific proposals elicited a consensus endorsement. The discussions revealed that: (i) focus letters sent pre-argument help make oral argument more beneficial; (ii) pro bono programs work and providing argument opportunities in those cases has value; and (iii) mooting and video training makes sense and improves the quality of advocacy.

Fourth, and perhaps not surprising, there was widespread agreement that a well-presented argument enhances the decision-making process. From the courts' perspective, however, this requires properly prepared advocates who have an understanding of what the court needs to decide a case.

Fifth, in those circuits where oral argument is held most frequently, it is a part of the court's culture. The judges embrace it as a necessary and important part of the case resolution process. And, perhaps more fundamentally, they view the in-public engagement with colleagues and counsel as a welcome and impactful piece of their case resolution function.

III. CONCLUDING COMMENTARY ON THE FUTURE OF ORAL ARGUMENT

The Academy is not the only one to note the decline in oral argument when the statistics are applied to the circuits as a whole. Yet its report and initiative have revealed that there is no "one size fits all" when it comes to addressing this decline.

Lawyers, for their part, believe oral argument should be held more frequently because it is their only chance to be personally involved in the path to decision and provides an opportunity for their clients to see the level of investment the court has made in resolving their cases. Oral argument also puts the decision-making process on display, reinforcing the court's role as a viable branch of government. By comparison, judges can be resistant to argument because the time in preparation in many cases outstrips the benefits to the decision-making process. Then, there are systemic tensions. The time involved in

preparing and holding argument impacts the time to decision for all cases, not just those that are argued.

Notwithstanding judicial concerns or misgivings, the Academy believes that frequency of oral argument in the majority of circuits needs to increase. This call for change recognizes that oral argument may not alter the ultimate decision in the vast majority of cases, and appreciates the considerable effort it takes for the judges to prepare. But the Academy's call takes dead aim at what it believes is a fundamental fallacy: that the value or importance of argument can or should be measured by its effect on the result reached. Simply put, whether argument changes the way a judge is leaning before it occurs is not the relevant point. Instead, the value of oral argument comes from holding it as part of the continuum to the ultimate decision. And, oral argument's benefits persist no matter how it affects the result in a particular case.

To begin with, for the public and parties, the systemic value of oral argument is considerable. Seeing cases heard reinforces the importance of the adjudicative function and visibly reinforces the court's active role in trying to ensure that a just result is reached. The public gains the confidence that judges are engaged on the issues presented and clients develop an appreciation that informed judges decide their disputes. By putting the court's misgivings, observations, and insights on display, argument provides valuable perspectives for clients and the public on how and why particular outcomes are reached.

Beyond its pivotal and visible systemic role, oral argument provides a unique avenue for lawyers to advocate for their clients and creates deeper connections to those who decide their cases. Oral advocacy skills are best developed by first-hand practice, where courts can communicate most effectively on what will help them decide a case. The interaction at oral argument builds respect for the work that goes into deciding cases and reveals that the judges have, in fact, familiarized themselves with the issues. Holding argument also legitimizes and cultivates the importance of the advocate's role in the appellate process, leading, in turn, to even greater respect for the courts.

Moving to the decision-making process itself, a well-presented oral argument adds value even when, on reflection, it

does not change a judge's initial views on how a case should be resolved. Oral argument can sharpen issues and reveal their nuances. It can increase awareness of implications of decisions on cases presenting different fact patterns. Argument can facilitate a dialogue among panel members on their concerns and provide a path to consensus result. On occasion, it can provide the inspiration to change the path to resolution or expand or contract a holding or supportive reasoning. Better decisions then follow with corresponding adjudicative benefits in the pending case and for those that will come later.

The Academy recognizes that its call for more frequent oral arguments is not a one way street. The judges candidly state, across the circuits, that the greatest benefits accrue when arguments are well-presented. Some level of assurance that prepared advocates will be appearing therefore could generate a corresponding increase in the number of arguments. The Academy accordingly is committed to making training opportunities more widely available and has started a program to accomplish that goal. It also is committed to working with, and its Fellows are working with, national, circuit, state and local bar associations to increase the number and frequency of continuing education programs aimed at appeals and to making those opportunities available when they can do the most good—when oral argument is at hand. Most recently, the Academy has teamed with the American College of Trial Lawyers in launching a nationwide clinical program to provide video training for appellate oral arguments.

The Academy will continue to pursue its informal dialogue with the circuit courts to help foster a cooperative relationship and look for other ways to make oral argument more efficient and beneficial. Pre-argument focus letters are just one example of how this might be accomplished. Enhanced continuing education opportunities with court participation is another. Wider availability of practice manuals that benefit from court input is still another. As with hands-on training exercises, these steps are all within reach, come at little cost and hold the promise of making oral argument much more productive.

In the end, the frequency of argument is at the court's disposal and any significant institutional change must come from within. The courts control their dockets and the manner in

which cases get decided. Those circuits that hold oral argument as part of their ingrained culture are able to maintain their workloads and the judges involved extol the value of the oral argument experience. Those circuits that hold argument less frequently should take steps internally to discuss the values furthered by oral argument and make an effort to change. The Academy is at the ready to join the effort. We welcome, invite and support an institutional change.

APPENDIX I

AMERICAN ACADEMY OF APPELLATE LAWYERS
ORAL ARGUMENT TASK FORCE REPORT

I. INTRODUCTION

The U.S. courts of appeal are allowing oral arguments in a smaller percentage of cases than in years past. This decline raises some profound systemic issues. Accordingly, a task force of the American Academy of Appellate Lawyers studied how our federal appellate courts are using and managing oral argument. This is the task force's initial report. It focuses on today's conditions in the U.S. courts of appeal. Based on the initial results, the Academy expects that improving oral argument will become one of its standing projects, with the thought to expand the project to state appellate courts and the hope that other appellate lawyer groups will become collaborators.

Founded in 1990, the Academy consists of approximately 300 experienced appellate lawyers, former judges, and academicians, representing all but two states. Central to the Academy's mission is the preservation and advancement of the administration of justice on appeal. The board of directors appointed the task force after members identified oral argument as a focus for the Academy's strategic efforts. The task force evaluated oral argument frequency and practices using both published data and interviews with federal appellate judges.

Based on its evaluation, the Academy specifically seeks dialogue at this time with the federal appellate courts about how to improve the quality and increase the frequency of oral argument. It is our hope that some circuits will establish pilot programs to implement some or all of the Academy's recommendations set forth in this report. The benefits for the administration of justice on appeal and appellate practice would be substantial.

II. THE DECLINE IN APPELLATE ORAL ARGUMENT

Federal Rule of Appellate Procedure 34(b) suggests oral argument is the norm. The rule provides: “[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agree 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.”

In practice, however, oral argument has become the exception. Annual reports from the Administrative Office of the U.S. Courts dating back to the late 1960s show a marked decline in both the percentage of argued cases and the time allotted for each argument. The data are not entirely comparable because of changes in recording and reporting practices, for the reasons explained in the addendum to this report. As further detailed in the addendum to this report, the frequency of oral argument in counseled cases varies from circuit to circuit. That said, there is no doubt that it is declining almost everywhere. Reducing the frequency of argument impairs both the quality of appellate justice and the connection between citizens and the rule of law. This report addresses the importance and value of oral argument and recommends strategies to increase both the efficacy and the frequency of oral argument.

III. THE IMPORTANCE AND VALUE OF APPELLATE ORAL ARGUMENT

Appellate oral argument is beneficial for many reasons, among them the following four:

- Oral argument improves the decision-making process by allowing the judges to consider the case collectively, to ask counsel questions, and to give counsel the opportunity to explain, face-to-face, the merits of his or her client’s position.

- Oral argument helps assure the litigants that they have received their “day in court,” reflecting the personal attention and investment of the panel hearing the argument.
- Oral argument provides systemic benefits, connecting citizens to the appellate courts and the process of appellate justice.
- Oral argument teaches lawyers how appellate judges approach case resolution, improving the quality of appellate advocacy in future cases, over the long term.

A. Oral Argument Improves the Decision-Making Process

American jurisprudence embraces three judge intermediate appellate courts primarily because collaborative review is more likely than unilateral review to produce correct decisions. A single judge’s reversal of another’s disposition may reflect only a difference of perspective or philosophy. In contrast, when three judges join in a reasoned opinion, the deliberative process is more likely to result in a decision that is free from error and improved in its reasoning and rationale.

Federal appellate judges report that oral argument changes their view about the outcome in approximately 10 to 20 percent of argued cases. Judges report that argument influences the rationale or the disposition of subordinate issues more often, but the percentage is difficult to estimate. Further, judges say they cannot identify in advance those cases in which they are likely to change their minds. Judges’ reports are exactly what the collaborative-review theory predicts.

When argument starts, a judge does not know if he or she misunderstood an important fact in the record or the text of a key statute or reasoning in an applicable precedent. At oral argument, either an advocate or a fellow jurist can help point the panel toward the correct reasoning and result. Moreover, in traditional internal court operations, the conference immediately following the oral argument presents the best opportunity for one judge to correct another’s misunderstanding.

Courts of appeals have evolved many ways to decide non-argued cases. Some of these threaten the efficacy of collaborative review. At least one circuit assigns drafting memorandum opinions in many *pro se* cases to staff attorneys. The staff attorney then circulates the draft to the panel, and defends the opinion to the panel. Judges and staff attorneys who participate in this process say that the defense session is at least as rigorous as oral argument in counseled cases. Much recommends that model in *pro se* cases, but staff attorneys should not substitute for appellate lawyers in counseled cases.

Another approach is to assign drafting memorandum opinions in non-argued cases to a lead judge. When the draft is prepared by that judge, it is circulated with the case file serially to the other two panelists. Discussion occurs only if the second or third panel member requests it. Even in the best of circumstances, circulating a draft risks forfeiting the value of collaborative review; in the worst, the value is obliterated.

Applying technology to judicial decision-making can further weaken the collaborative process. In theory, paper copies of the draft opinion and case file are unnecessary in the circulating-draft method of deciding non-argued cases. The lead chambers could send only an email with attachments, file paths, or hyperlinks. Courts' capacity for electronic circulation will grow even without designing court-specific software. More than circulating a physical file, electronic circulation may invite a moral peril: a judge engaged in other matters may sign off on a trusted colleague's draft without engaging with the case. And the third judge, unaware that the second judge did not engage, is at even greater risk to fail to engage after a draft has two votes.

Judges explain that the reduction in the number of oral arguments is based primarily on the premise that oral argument is time-consuming and not helpful. That is, many judges think they can be more efficient if they do not spend time preparing for and conducting oral argument. If output were the sole criterion to evaluate appellate court performance, the point would have persuasive force. But oral argument has never been justified by its efficiency. Rather, in an adversary model, oral argument provides the best foundation for securing collaborative review of each case. Further, courts can improve argument efficiency, just as lawyers can improve how they present cases.

The Academy's vision of oral argument is not of a Mount Rushmore panel enduring a long-winded speech, but of a hot bench posing critical questions and effectively engaging with counsel throughout. This sort of directed "Q&A" keeps arguments focused and makes them more productive.

Some judges express concern about the cost of oral argument to parties. The Academy understands this concern. But the Academy believes it may be overstated. In our experience, having decided to pursue the case to the appellate level (at least as to the appellant/petitioner), what the client wants is the best result (or at least a fair hearing), with the additional incremental expense of oral argument a relatively minor consideration.

B. Oral Argument Assures Litigants Their "Day in Court"

One English formulation of due process is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹ This is an elegant way of saying how important it is for each litigant to feel he or she got her day in court. The party who feels fairly treated tends to feel better about even an adverse result, and leaves the appellate system with a sense of dignity and respect for the rule of law.

The question, then, is how a party in an appeal is to gain a sense of being fairly treated. In trial courts, most of the action happens in a courtroom that, by constitutional law, must be open to the litigants and the public. But in appellate courts, a great deal happens behind closed doors. When a case is not argued, *all* of the action occurs in private, with only the result made public.

Oral argument cuts through this, and shows the parties that the judges are informed and engaged. It shines a light on the process. In this and other ways, oral argument confers credibility critical to the appellate judicial function.

C. Oral Argument Performs a Critical Civics Function

The Academy agrees with scholars and public figures, including Justice Sandra Day O'Connor, that civics education

1. *R. v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259.

and knowledge have declined in recent years. The judicial branch is the least understood branch of government, with intermediate appellate courts the least understood among the judicial branch's sectors. The Academy believes ignorance of the judicial function threatens not just budgets, but also respect for the rule of law. Courts and lawyers cannot count on schools alone to imbue citizens with knowledge and respect for what we do.

Oral argument provides courts a forum for citizens to engage with the appellate process. Intermediate appellate courts use all the following strategies, and more, to teach civics by showing people what courts do: free website access to the dockets for cases of popular interest; live streaming arguments in *en banc* cases and cases of popular interest; making recordings of arguments available free on their website; "riding circuit" so that citizens can see the court in action without having to travel to its primary seat; hearing arguments at law schools and other locations of easy access to people already interested in the appellate process, as well as on college campuses or at public buildings compatible with class study by high school students. In some state courts, arguments of great public note are made available to the community and even are broadcast on network or cable television. Just as parties should see justice done in their cases, so the public should see justice being done in appellate courts generally.

The confidential aspect of deciding appeals conflicts with popular demands for transparency in the political branches. But oral arguments and reasoned opinions ensure that justice manifestly and undoubtedly is seen to be done. Without changing their internal processes, appellate courts can display oral argument as an essential feature of the judicial process—and display it proudly. Further, increasing the frequency of oral argument allows lawyers and public observers to better advocate for, and defend, the appellate system in a public forum, including when it comes to court funding. Litigants and citizens who have seen the intermediate appellate system work can better vouch for its place in our system. Shutting people out, by comparison, can lead to misperceptions and disaffection.

D. Oral Argument Provides a Critical Teaching Function

Oral argument teaches lawyers how to practice appellate law. An active appellate panel teaches lawyers how judges approach cases. This is a function simply of the panel doing its business: asking about the issues the judges have identified as most important to the disposition of the case and about the elements of the record and the law most relevant to those issues. Even listening to argument in cases in which the lawyer has not been involved helps lawyers understand what is important to judges.

If judges want better work product from lawyers, judges need to show lawyers how they can produce better work. The best investment is giving feedback; oral argument is one of the few permissible windows through which lawyers can observe how appellate judges judge.

In summary, denying oral argument may appear to provide an immediate benefit by making judicial time more efficient, yet it ultimately threatens the appellate decision-making process, the litigants' confidence in that process, public confidence in the rule of law, and the quality of appellate legal services. We encourage courts not only to set more cases for oral argument, but to do so in ways that intentionally serve and benefit from the interests in preserving collaborative review, promoting engagement with appellate courts, seeing justice done, and educating appellate advocates. Some specific recommendations follow.

IV. RECOMMENDATIONS TO IMPROVE THE QUALITY AND INCREASE THE FREQUENCY OF ORAL ARGUMENT

Many steps can be taken among the stakeholders to improve the quality and increase the frequency of appellate oral argument. Here are some, set forth in quasi-chronological order (in terms of the life of an appeal).

*A. Establish Pro Bono Programs and Other Opportunities
for Oral Argument*

Appellate courts should implement programs to assign *pro bono* lawyers to brief and argue appropriately screened cases either as counsel for pro se litigants or as an *amicus*. Some appellate courts have these programs today.² These programs thrive on effective screening so that the pro bono lawyer has a legitimate argument to brief and the court has a significant issue to decide. The programs enable financially eligible clients to have effective appellate representation. They deliver high-quality briefs to the merits panel. In these basics, the programs benefit litigants with worthy cases, appellate courts, and society as a whole.

The icing on the cake is a promise that the court will grant oral argument in pro bono program appeals.³ The oral argument promise is an important incentive for junior lawyers (and their firms) to take pro bono cases. Allowing argument provides all the benefits we have discussed, in addition to those specific to the pro bono program. We recommend that every court of appeals adopt a pro bono program with an argument promise similar to that of the Ninth Circuit.

In addition, even aside from such pro bono programs, both the bench and the bar should consider how less experienced lawyers can get more opportunities for oral argument (for example, in cases in which oral argument would not otherwise be granted). Some states that certify appellate lawyers require a minimum number of oral arguments; carving out arguments for junior lawyers will enable them to more readily meet those requirements and promote appellate specialization. This, too, will provide a quality enhancement.

2. See, e.g., 9TH CIR. GEN. ORDER 3.7 (Apr. 3, 2018) (providing that “[i]f an appeal has been selected for inclusion in the court’s *Pro Bono* Representation Project and pro bono counsel has been appointed, the panel shall not submit the case on the briefs, but shall hear oral argument unless pro bono counsel withdraws or consents in writing to submission on the briefs”).

3. See, e.g., *id.*

B. Consider Parties' Requests for Oral Argument

In those circuits that don't hold oral argument in most counseled civil cases (and these are most of the circuits), courts should be receptive to the litigants' requests to argue cases. These requests should be made after the close of briefing and should identify the specific aspects of the appeal for which argument would be helpful. Today, in most courts, requests for oral argument are made early in the appeal process and are often pro forma: *e.g.*, "this case is complex and involves novel issues of great importance." Our recommendation focuses both counsel and the court on the case as briefed.

C. Issue More Focus Letters

Some appellate courts issue orders or letters in appropriate cases, specifying which issues counsel should be prepared to argue orally. This procedure is positive and productive: it ensures that the issues of greatest concern to the court will be addressed, and it reduces counsel's investment in preparing for other issues. We encourage more use of focus letters, particularly where the court is allowing only brief argument times. Further, panels should always give notice when a judge intends to introduce issues that were not briefed or that the parties treated summarily, as sometimes occurs with respect to issues involving subject matter or appellate jurisdiction.

D. Develop a Hot-Court Oral Argument Culture

Courts should develop a hot-but-courteous oral argument culture. A judge should challenge a lawyer to respond to the primary reasons the judge thinks the lawyer should lose an issue. A judge can also focus the lawyer on concerns about the scope and impact of a particular resolution. In a hot-court culture, the court can set argument time case-by-case, based on the complexity of issues. Courts should allow at least 10 minutes per side in the simplest cases, with increasing levels for increasing complexity. A "hot" argument not only will most benefit the court, but also will best serve the goals set forth above.

E. Use Technology to a Fuller Extent

The Academy recommends that all circuits develop easy docket access, live streaming, downloadable recordings, and outreach programs. Each circuit should have a committee of judges, with appropriate staff support, to implement well-established civics functions and to generate and execute new programs appropriate to the circuit's geography and operations.

Another technology-related recommendation is that courts conduct some arguments by video-conference, especially when judges' chambers and lawyers' offices are located far from the argument venue. The dynamics of a teleconference are inferior to personal appearance, but argument via video is better than no argument at all. Video-conferencing also makes oral argument more affordable for parties of modest means and in smaller cases.

F. Thoughts on the Role of Appellate Lawyers

We are well aware that for some appellate judges, the problem with oral argument is the poor quality of the lawyers' work. We know that appellate courts could be more efficient if they received a better average quality of advocacy in both briefs and oral argument.

It's not as if inexperienced lawyers don't have opportunities to get training in appellate advocacy. At the national level, commercial providers, the Council of Appellate Lawyers in the ABA Judicial Division, DRI—the Voice of the Defense Bar, and others have produced excellent programs. Some circuits have bar associations that produce regional programs; some local bar associations also sponsor excellent programs. States that have certified appellate specialization produce and certify training and education.

But there is a critical problem: one-time appellate advocates usually do not prepare themselves for the possibility of an appeal. Many of them get no help from the training system in delivering work product useful to appellate courts. We are working on concepts, like short, just-in-time video courses that can teach the basics at the time one-time users most need training. That work is outside the scope of this report, but it is

part of the dialogue we hope to open with the courts of appeals about improving oral advocacy.

V. CONCLUSION

The Academy looks forward to discussions with the appellate courts, and to input from the courts on the Academy's recommendations for improving the quality and increasing the frequency of oral argument. As noted at the outset of this report, we stand ready and eager to work with the courts of appeal to develop pilot programs to begin to implement some or all of the recommendations set forth in this report.

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