Should Judges Consider Costs To The Parties In Deciding Whether Oral Argument Of An Appeal Is Worthwhile?

By Howard J. Bashman

Late last month, the *National Law Journal* published what may the most recent of a recurring series of articles decrying the decline in the number of oral arguments occurring in federal appellate courts. This particular article focused on the issue from the perspective of appellate advocacy, asking where the next generation of appellate lawyers can turn to obtain courtroom experience.

Our local federal appellate court, the Philadelphia-based U.S. Court of Appeals for the Third Circuit, certainly bears its share of responsibility for the overall decline of oral arguments in federal appellate courts. Yet in Pennsylvania, at least, there remains one intermediate appellate court that is willing to entertain oral argument of any appeal in which counsel timely requests it. That appellate court is the Superior Court of Pennsylvania. Thus, in Pennsylvania, the answer to where the next generation of appellate advocates can get their courtroom experience is arguing cases before the Pa. Superior Court.

As someone who tries to pay close attention to the reasons that federal appellate judges are offering for the decline in the percentage and raw number of cases being argued in the U.S. Courts of Appeals, one explanation in particular has struck me as particularly disconcerting -- namely, that the judges are declining to request oral argument of some cases because the perceived costs of oral argument to the parties appears to outweigh its likely benefit to the judges.

To be sure, recent amendments to the discovery provisions of the Federal Rules of Civil Procedure demonstrate that we now exist in an era where cost–benefit considerations can play a determinative role in the judicial management of litigation. Whereas once a plaintiff seeking to pursue a relatively insignificant claim could attempt to inflict enormously expensive discovery obligations on a defendant in the hope of extracting a settlement regardless of the merits of the plaintiff's claim, now federal district and magistrate judges have the ability to ensure that the discovery obligations being inflicted on a defendant bear some reasonable relationship to what's at stake in a given case.

Yet the *in terrorem* effect of a lawsuit that could impose huge discovery costs on a party would seem to be of a far greater magnitude than the *in terrorem* effect of an appeal that may or may not encompass the need to present appellate oral argument. I have spent the past 27 years working on appeals in private practice, the first 13 at larger law firms and the past 14 as a solo practitioner. I cannot think of a single case in which the cost of preparing for and presenting oral argument ended up being anywhere near as large as the cost of briefing the appeal.

To begin with, there are certain types of cases in which having appellate oral argument would not cost the client anything more in counsel fees. Some appeals are handled on a flat rate basis, where the agreed upon fee covers all work needed until a three-judge appellate court panel issues its ruling in the appeal. This flat rate approach is particularly prevalent when a defendant-appellant in a criminal case hires private counsel for an appeal. And this same flat rate approach is becoming more and more

common among sophisticated corporate clients and those smaller corporate and individual clients who want to control at the outset their exposure to legal fees at the appellate stage of litigation.

In flat fee cases, it does not cost the client anything more for an appellate court to request oral argument, and thus appellate judges would be making a mistake in denying oral argument simply to avoid inflicting additional cost on a litigant under some cost-benefit analysis. Whether a case is being handled on a flat fee basis is not something that appellate judges will know, demonstrating how faulty any perceived cost-benefit analysis of oral argument from the parties' perspective often can be.

At this point, no doubt many readers are thinking that, in flat fee cases where the court does not request oral argument on appeal, the attorneys benefit, because they will end up earning more money per hour worked. Although that surely is correct, responsible attorneys will care the most about achieving the best possible result on their clients' behalf, and will also have calculated the flat fee with the possibility of oral argument occurring. As a result, courts have no reason to feel sorry for attorneys handling an appeal on a flat fee basis when requesting oral argument, nor for good reason is maximizing attorney profits a reason that I have ever heard an appellate judge give for declining to request oral argument of an appeal.

By the time an appeal reaches the oral argument stage, the greatest expense associated with any appeal -- the briefing of the appeal -- will already have been incurred. Even in an appeal that is being handled by an attorney or law firm on an hourly rate basis, I have never heard a client say that the added cost of presenting

appellate oral argument in a case in which the judges desire oral argument makes it financially impossible to proceed with the case and therefore, instead, whatever settlement amount the opposing party is demanding must be paid to dispose of the case.

Whether the oral argument of a given appeal would benefit the judges assigned to decide a particular case is something that federal appellate judges surely are accustomed to determining, but in making that evaluation those judges should exclude from their consideration the matter of perceived cost to the parties. For one thing, the oral argument may have no cost to a party in terms of additional attorneys' fees if the case is being handled on a flat fee basis or by government or other counsel who is paid a salary for performing his or her work. And equally as important, by the time the case has reached the oral argument stage, the vast bulk of the cost to obtain a ruling on appeal has already been incurred. As a result, the comparatively slight additional expense to get it right by answering whatever questions the judges may have far outweighs the possibility that the far greater costs to bring the case to the precipice of decision will have been squandered because the judges didn't think that some relatively small additional expense was merited to answer their inquiries.

Federal appellate judges simply are not well-equipped to accurately consider the costs to litigants of requesting oral argument on appeal, and therefore those judges should not weigh that factor in deciding whether or not to request oral argument of any given appeal.

•

Howard J. Bashman operates his own appellate litigation boutique in Willow Grove, Pa. and can be reached by telephone at (215) 830-1458 and via email at hjb@hjbashman.com. You can access his appellate Web log at http://howappealing.abovethelaw.com/ and via Twitter @howappealing.