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The Silence of Oral Argument

There was a time, in the federal system, when in-person motion practice with oral argument was very active. Unfortunately, such now seems to be, in many of the federal districts, a distant, albeit fond, memory of the past. Is it time to revisit the need for oral argument?

The Vanishing Trial, a 2004 publication of the American College of Trial Lawyers, discussed the difficulties and expenses of bringing a case to trial with the inevitable result that fewer cases are now litigated, especially in the federal system, to conclusion as compared to decades ago. It begins with the oral presentation of motions to the court.

One may inquire as to the interrelationship between motion practice and trials. Attending oral argument in the federal arena before an Article III judge can be somewhat intimidating. A lawyer's initial venture into the federal system (as compared to that which one may experience in state court) is eye opening, nerve wracking and possibly knee knocking. The formality/solemnity of the occasion, the accoutrements in the courtroom, and the sheer number of experienced federal practitioners coalesce to create an air of austerity—as it should be. The practitioner's appearances in federal court during motion practice inevitably should make one comfortable in those surroundings. Once comfortable, the argument should flow easily and become more cogent. Once a certain level of relaxation is obtained, additional appearances are not to be feared, but looked upon with a degree of anticipation, at least for the practitioners. Trials become not an ordeal, but a search for truth. How is this comfort level attained? This comfort level is learned not through in-office practice, but only via in-court personal experience, the most basic of which is oral argument.

Motion practice is a learning experience. One learns from watching those who precede one's own argument. One learns from the elder statesmen of the bar. One should learn to emulate the good traits of predecessor attorneys while discarding those habits best used elsewhere. It is a learning experience that has no end. Younger lawyers learn from old. Older lawyers should learn from those their junior.

Oral argument, in days gone by, served as a meeting place for federal litigators. It was not unusual when appearing before one judge to encounter several opponents in other cases. Today's litigation seems to focus on speed. Other than the initial deposition, the main attorney litigants may not physically meet with each other until the pretrial conference. The chance encounters in federal court on "motion day" inevitably lead to meetings in the hall or lunch conferences. Problems that could not be resolved over the phone or through an exchange of correspondences were eliminated, or at least minimized, in these face-to-face encounters. The result: less "meter" motions in the future, resolution of pretrial matters, possibly settlement and if not a "cleaner," more expeditious trial.

The role of the court in oral argument is most important. Active judges seem to enjoy the "give and take." Judges, although the final decision maker, also play an important role as instructor, the penultimate courtroom professor. Judges by their questions and comments instruct lawyers, in particular, the younger lawyers, as to a court's particular and unique likes and dislikes. The lawyers learn to "think on their feet." A judge's courtroom comments are never lightly discarded. "What did the court mean by that?" The court focuses on issues that are of concern to the court, thus allowing the attorney to readily explain that which would be difficult to articulate on paper. Once the lawyer becomes comfortable in the federal court surroundings, understands the nuances of the particular judge, and is able to verbally clarify issues, the more that lawyer is prepared for an actual trial.

In the past decade or so, occasions for oral argument have greatly diminished. Some courts disfavor it completely; others require the filing of a specific motion and order before selectively granting argument. Courtrooms that were once full on motion day are now sparsely populated. During a recent oral argument the judge on another floor sent his clerks to observe—presumably a novelty (one could here substitute "travesty") to which those clerks had not been previously exposed. The final result is that which the Oracle could have predicted: fewer trials, less experienced lawyers. One of the explanations mentioned in *The Vanishing Trial* for fewer trials is that attorneys are less experienced.

Viewed from the eyes of the court, judges have indicated that in their opinion oral argument was not helpful in that many who stood before the podium simply read their memoranda or otherwise repeated that which had been filed. Others failed to appear entirely. Still others, lacking verbal skills or due to "nerves," could not expand upon that which they had

written. The courts complained that such was tantamount to a waste of time in that the court was not enlightened by the verbal presentation of the barrister.

One response is that judges can deftly move those appearing before the court away from a line-by-line recitation of filed memoranda. Incisive questioning should cause the oralist to abandon the prepared text to concentrate on court-raised issues. As judges control all aspects of trial, so too the same applies to arguments during motion practice.

Increasing oral arguments on motions will invariably lead to greater attorney comfort and confidence. The trials should follow. **TFL**

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I especially thank Fern Bomchill, our incoming 84th President, and Bob DeSousa, our President-Elect, for their unwavering support, both professional and personal, throughout this active year. The Association is in good hands.

Finally, I thank all of you for affording me the opportunity to serve as your 83rd National President and to be a part of the FBA's championship team! I am sure you will join me in anticipating a bright future for our Association.