

THE FUTURE (IF ANY) OF ORAL ARGUMENT

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CHAPTER 8

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THE FUTURE (IF ANY) OF ORAL ARGUMENT

“*ἀόριον ἀδιον ασω . . .*”¹

I. ARE YOU TALKING TO ME?²

Hot? Cold? Tepid? Every oral argument seems different, even before the same court. How can you prepare, when you can't be sure what will be coming your way? And does this “guessing game” detract from the value of oral argument to the court? It certainly adds to the anxiety of the lawyers and increases the cost to the clients. In short, is there a better way to do things? Before answering that question, we need to know what purposes oral argument has served, currently serves, and might serve in the future.

But to know where you're going, it's good to know where you are. And to know where you are, it's often helpful to know where you've been. Therefore, this paper begins by briefly discussing the good, old days of oral argument. It then examines present experiences (nightmares?) of oral argument. It concludes with speculation, some of it perhaps informed, about the future of oral argument—if any.

II. BEEN THERE, DONE THAT: THE GOLDEN AGE OF ORAL ARGUMENT

A. Before the Fall

Once upon a time, in the Seventeenth Century, it was considered scandalous to write a brief on appeal.³ Briefs submitted by a party to the court were considered *ex parte* communications. Only oral argument in the presence of opposing counsel was allowed. Typically, these oral arguments might continue for several days. Counsel and the court frequently read from law books during the argument, recalling other authorities from memory. When the argument concluded, the judges would remain on the bench while whispering among themselves for a minute or two, before announcing the decision and explaining the court's reasoning—again citing authorities from memory and reading from cases and statutes.

B. *Felix culpa* and the Ten Commandments

When briefs finally were accepted, o happy day!, they were more of a written preview of the parties' anticipated oral remarks.⁴ Oral argument still would last several days, but it was followed by judicial deliberations and a written opinion explaining the decision.⁵

Eventually, briefs became more substantial, and oral argument evolved into a 30-60 minute presentation by counsel to the court, occasionally with questions from the court.⁶ This time constriction led to the need for a method of presenting oral argument. Thus, the

Ten Commandments or oral argument were handed down in 1940 by the renowned John W. Davis:⁷

1. “Change places with the Court.”
2. “State first the nature of the case and briefly its prior history.”
3. “State the facts.”
4. “State the applicable rules of law on which you rely.”
5. “Always go for the jugular vein!”
6. “Rejoice when the court asks questions.”
7. “Read sparingly and only from necessity.”
8. “Avoid personalities.”
9. “Know your record from cover to cover.”
10. “Sit down.”⁸

C. After the Deluge

“A hard rain's a-gonna fall.”⁹

Oral argument began changing dramatically with the enormous increase in case filings that occurred during the 1980s. Although more cases began being filed in the 1970s, it took a few years for the inertia of the legal system to recognize and implement the necessary changes. These began with the restriction of time. When I began practicing law in 1979, the typical oral argument allowed 30 minutes for each side, and an additional 15 minutes for the appellant's rebuttal. Probably 99% of the cases received oral argument.

As a result of these changes, the Ten Commandments have become hopelessly outdated. Davis assumes, even expects, largely cold courts. Today we more often encounter hot courts. A modern advocate following Davis's advice would usually have a disastrous argument. Consider the following¹⁰:

First, Davis recommends changing places with the court. Davis presumably meant only in your imagination. If you try walking toward the bench today, a marshal will probably stop you one way or the other. Few oral advocates are at their best when wounded. An opening shout of “Don't tase me, bro”¹¹ is yet to be preferred over the traditional “May it please, the Court.”

Davis most likely meant that you should try to imagine what the court would want to know in order to decide the case. In Davis's time, of course, there were fewer cases and fewer judges. Thus, like all great advice, it's much easier to say than to do. For starters, you would need to know your judges' habits as well as what they have done regarding your specific case. Do they ordinarily read the briefs themselves, or work from a law clerk's memorandum? Were they watching for the latest updates on Joran van der Sloot and didn't get around to reading your particular brief? Are they usually interested more in the facts or in the law? Do they care about policy arguments and equities, or do they simply decide cases based on precedent? Are they

procedural specialists? Could they fairly be called “waiver-happy”? Are they experts or novices in your substantive area of the law? Have they ever had a personal or professional experience that will be triggered in their memory by your case? Unless you know the answer to all these questions, then the judge you imagine may bear little relation to the one actually sitting in a black robe on the bench that day.

Second, Davis says to begin with the nature of the case and its procedural history. In the old days of cold courts and leisurely arguments, that might have worked. There’s the apocryphal story of Chief Justice Hughes stopping an advocate at the Supreme Court to ask how he had arrived at the court, meaning the procedural history of the case. Missing the point or perhaps just flustered, the advocate supposedly replied, “By the Baltimore & Ohio Railroad, your Honor.”

Today, detailing the nature of the case and its procedural history is a waste of time, unless your appeal turns on a particular procedural issue. If the court has any familiarity with the case at all, it will at least have skimmed the first page of your brief to know whether you are representing the defendant in a criminal necrophilia case rather than *Macrophard* in a civil antitrust case. And unless jurisdiction is disputed, one can safely omit telling the court whether you are appealing from a final judgment rather than an interlocutory order.

Third, Davis commands next stating the facts. This sounds promising, for the facts are the heart of most cases. Often the law is settled, and the primary question is which line of cases should be applied to a particular set of facts. Further, most appellate courts know a lot of law in a lot of areas. What they don’t know so well are the facts in your particular case.

Nevertheless, if you begin with much factual information today, most appellate courts will cut you off by noting that they have read the briefs and are familiar with the facts. Appellate courts sit primarily to decide questions of law. Those questions are informed by the facts, but a detailed factual summary at the outset will cause the court to believe you are making a jury argument. The better practice today is to frame the legal issue quickly and then to weave the facts into your argument. This is especially true with a cold court, for until the court is given a legal framework to contextualize the facts, it cannot comprehend them.

Fourth, Davis suggests stating the applicable rules of law upon which you rely. Again, Davis apparently presupposes a cold court that has not read enough of the briefs to know which are the key cases or statutes at issue. He seems to expect that he will be allowed to speak for several minutes without interruption. (Nice work if you can get it.) Merely stating abstract rules at the outset will leave the court wondering about the context. You also will probably invite a dispute about

which line of “applicable rules” should control. Before you know what has hit you, the court will have taken over the argument, leaving you only to respond to its questions with “yes” or “no” answers and debating arcane distinctions among holdings, judicial dicta, obiter dicta, and maybe even dik-diks. You then may never get to the facts that may be the heart of the appeal, which may be why Davis urged one to talk about the facts before turning to the law.

Fifth, Davis advises appellate advocates to strike at the jugular vein. Of all his Commandments, this one is probably the most long-lived (and the one that appellate vampires are most likely to be comfortable with). This is a good Commandment, even more essential today than in Davis’s time. By the “jugular vein,” Davis means the key point on which the appeal should turn. This requires you to frame the legal issue precisely, explicitly state your conclusion and the premises leading to that conclusion, and argue the law or facts (including procedural rules such as the standard of review) supporting those premises. Finally, you can add policy reasons to bolster the legal principles and equities to bolster their application to the facts.

And this is where you can briefly work in the nature of the case and main procedural history when you frame the legal issue at the beginning of your argument.

Davis’s advice to go for the jugular counsels you to focus on what will affect the decision of the appeal. In today’s era of short oral arguments and hot courts, his Fifth Commandment (not to be confused with the Fifth Amendment) should always be obeyed.

Nevertheless, what happens if you have inadvertently aimed at the wrong vein? In other words, what happens when what you consider the dispositive issue differs from the one the court views as dispositive? This can easily happen if you are unable to follow Davis’s First Commandment about correctly changing places with the court. If you guess wrong about what the court thinks is dispositive, you might consider yielding the remainder of your time and slinking back to your office or some other “bar.”

Sixth, Davis encourages one to rejoice when the court asks questions. This is because Davis so often faced cold courts. A question showed him that the court might have interest in a particular point, or at least had been listening to his argument. Today, we still occasionally face a cold court, but if anything, today’s courts are sizzling. Accordingly, my reaction to the court’s questions depends on the question being asked. If the court is eviscerating my opponent’s entrails with a question, then I do sometimes secretly rejoice. But when the judicial laser is performing a nonconsensual lobotomy on me, rejoicing is not usually the first thing that comes to mind. Instead, I instantly start grinding my teeth, feeling sheer panic, looking for the savior of

a red light, and hearing a recurring voice in my head asking just why it was I decided to become a lawyer rather than a brick mason.¹²

Answering the court's questions truly is essential to winning the case, provided they are in fact relevant, open-minded questions. Most are, but some are not. Most questions sincerely seek information about the record, whether a particular precedent is factually distinguishable, or what might be the practical result of the rule under consideration. But a few questions seem to be designed to prove the judge is smarter than the advocate, to see how quickly the advocate will wilt under the onslaught, or even to embarrass another judge on the panel. And then there are the devil's advocate questions sometimes to test a theory, but at other times seemingly to encourage the parties to settle before the court has to write a complex opinion. While in his day Davis may have rejoiced, today I more often inwardly cry.

Seventh, Davis admonishes one not to read from a prepared text. This is good advice—as is to brush one's teeth (though not during the argument). Nothing is more boring, and less persuasive, than an advocate reading from a canned text. It suggests a lack of confidence in oneself, or even in one's case. It also suggests that someone else may have written the text for a “big name” simply to read and that the big name didn't even take the time to learn the text by heart.

Moreover, because today's appellate courts usually ask lots of questions, trying to read from a text runs the additional risk of automatically responding with what's written on the page even if it has no relation to what was asked by the court. That's a recipe for losing a case, as well as for public humiliation—very possibly in front of your client, or even posted on the Internet.

The Eighth Commandment counsels against personal attacks. This, too, is excellent advice. (If only all judges would abide by it, but then Davis handed down his Commandments only for advocates.) It's been reported, for instance, that Judge Learned Hand yes, *the* Learned Hand, was one of the greatest judicial pitchers of all time. When dissatisfied with a brief or oral argument, Hand was known to throw the briefs at the offending advocate, who once happened to be the future Justice John Marshall Harlan Jr. (And you think Senior Judge _____ is bad! At least he hurls only verbal abuse at counsel.)

Furthermore, Davis himself had enormous trouble practicing what he preached. It's reported that he once struck opposing counsel, hurled an inkwell at another, chased one man down the street with a buggy whip, and engaged in a protracted, unseemly ethical fight against another leader of the bar. That's what it was like to practice law in the good old days before the

Standards for Appellate Conduct made everything so professional—and so boring.

Davis's Ninth Commandment, like the Ninth Amendment, seems often to be neglected. Yet it is sound advice to know the record from cover to cover. That probably was not too hard when trials lasted two or three days. But most trials today last much, much longer than trials in Davis's era. Trials of three or even nine months are not unheard of. Tens of thousands of exhibits are sometimes introduced into evidence. Although a huge trial record must be mastered, unless one is blessed with a photographic memory it will be difficult to know such a record from cover to cover. One usually must focus on the parts of the record relevant to the issues on appeal, hoping that the court will allow a post-submission letter to fill in the answer to an unanticipated question on an irrelevant topic.

A problem can arise, however, because what should have been anticipated or what is irrelevant often lies in the eye of the beholder. To be absolutely safe, therefore, you must both memorize and have instant recall of every single detail in the record, as well as every word in all the briefs and in all the authorities cited in the briefs. When you find clients willing to pay for that process, please let me know so I can add them to my holiday-card list.

Davis's Tenth Commandment is undoubtedly his best: When one has said what needs to be said, sit down and shut up. Should I say more?¹³

III. BE HERE NOW¹⁴: ORAL ARGUMENT IN 2010

As the caseload crunch continued, courts began restricting the right to argue orally. Now, only a small percentage of cases receive oral argument.¹⁵ We're faced with what might be called “The Incredible Shrinking Oral Argument.”¹⁶

Perhaps we've become victims of our own success. Appellate practice as a specialty has expanded logarithmically since the mid-1980s. Presumably this has led to better oral arguments. It has surely led to better briefs. With better briefs, oral argument may be less important in helping the court reach the right result. Current courts of appeals also are more prepared before oral argument because they have more staff. As a result, they are less likely to be unduly influenced by the overstated oratory of a trial lawyer. As was once said, “Generally speaking, the worse the court, the greater the importance of advocacy.”¹⁷

Plenty of books and articles describe how to prepare for oral argument. Plenty of books and articles discuss the content of oral argument, and plenty of books and articles suggest how to handle different types of questions.¹⁸ But no book or article can fully describe how to handle the infinity of factors affecting a real oral argument.

A. “What, Me Worry?”¹⁹

Let’s take an example taken from the real world. (The advocate’s name is being withheld to save me embarrassment.) Suppose you represent a contractor who performed work, but the owner refused to pay him. A jury found no substantial performance. On appeal, the contractor contends that his substantial performance was established as a matter of law. As attorney for the appellant contractor, you build your argument with formal logic:

- A contractor who substantially performs can recover the contract price less the cost of completion;
- This contractor substantially performed as a matter of law;
- Therefore, the judgment should be reversed and rendered to award the contractor the contract price less the cost of completion.

Obviously, the appeal will turn on whether the contractor substantially performed as a matter of law.

To prepare for the argument, you collect authorities describing what the law considers substantial completion. You also marshal all the evidence, within the limitations of the standard of review, to which that law will apply. You plan to remind the court of the policy reasons supporting the common-law doctrine of substantial completion. You even slip into your planned presentation a few comments about the equities favoring the contractor, such as the defendant owner’s having represented to the government that the project was actually complete so that the defendant could get paid from taxpayer funds.

Having prepared thoroughly, you feel guardedly optimistic. The flashpoint should really turn on whether the court believes you can meet the rigorous standard of review.

When you begin your argument, however, you are greeted with a seemingly off-the-wall question about whether it’s fair for someone to breach a contract and expect to be paid. You then get a question from another judge implying that the contractor overcharged the owner, so that the owner had every right not to pay him, regardless of substantial performance. When you duck to the equities, you are quickly cut off by the comment that what the owner and the government do is between them and has no relevance to the contractor’s claim against the owner.

As you can see, what you project does not always match what happens. (“Stuff” happens; it’s the same “stuff” that sometimes hits the fan.) You are likely to have been surprised and thrown off balance. As a result, you did not notice the body language of the first questioner, which might have revealed she was playing

devil’s advocate. She knew from conference that the second judge (whose background was primarily in criminal law) was skeptical of your contention, so she wanted to give you a chance to remind him of the underpinnings behind the doctrine of substantial completion. Rather than take that opportunity to wax eloquently about Anglo-Saxon jurisprudence, the march of progress, and the importance of builders to society from Noah’s Ark to the present, you are offended and brush off the question with a quick reply as if it is irrelevant.

Even worse, your projected view of reality caused you to overreact to the second judge’s adverse questions. Since they don’t match what you think he should be asking you, your body language signals defensiveness. That will cause an observant judge to think that he has discovered a weak spot in your argument, or perhaps that your credibility is slipping. And, because you can’t believe what you are hearing is really happening, you are not able to put yourself inside the judge’s perspective. Thus, your answers to his questions are likely to be curt, condescending, and unconvincing.

Before you know it, your fifteen minutes is gone and so was your guarded optimism. When you return to your office and call the client, all you can report about the oral argument is that “It could have gone better.”

B. 21st Century Schizoid Man²⁰

As the song says, “Nothing he’s got he really needs.”²¹ That’s often how I feel at oral argument. What I have I often don’t need, and what I don’t have is precisely what I need (for instance, a factually and legally sound position).

This has left me to ruminate on my feelings toward oral argument after 31 years of arguing. I find that I both love it and hate it.²² “[L]et me count the ways”.²³

1. I Love Oral Argument

- It’s intellectually stimulating.
- It’s a great billing opportunity.
- I get to match wits with very bright judges.
- It can be fun.
- The preparation forces me to condense the case into its essentials.
- I enjoy the analysis and synthesis.
- The questioning makes me feel fully alive.
- I feel like a primitive hunter, hunting for the winning argument.²⁴
- I have an excuse to focus on only one matter for a substantial period of time.
- Almost all judges are pleasant and sincere.
- It teaches humility.

2. I Hate Oral Argument

- Preparation can be tedious.
- Clients don't usually want to pay for all the time it takes to prepare.
- It's too much work for the 15 minutes of fun.
- Often, the judges already have their minds largely made up.
- The fun can quickly turn into disaster.
- I dislike the necessary rote memorization.
- It's nerve-wracking.
- Sometimes the questioning reminds me of what I hated about law school—the Socratic Method.
- It activates latent competitiveness with opposing counsel.
- I get bored by not having other things to work on for variety.
- A few judges are rude—extremely rude.
- It can utterly destroy self-esteem.

To lessen the schizophrenia,²⁵ are there new commandments for the modern age?

C. Ten “Suggestions” and Four Agreements

For modern advocates, instead of Ten Commandments I propose Ten Suggestions for oral argument:

1. Answer the court's questions directly and truthfully.
2. Focus on the dispositive point on which the case should turn.
3. Know the record completely.
4. Be aware of the applicable standard of review.
5. Address the problems in your case, both factual and legal.
6. Concede as much as you can and still prevail.
7. Know the controlling authorities and trends in the law that might affect your case.
8. Don't accuse opposing counsel of misconduct.
9. Don't diss the trial judge or even the jury.
10. Be explicit about the relief you want.

Even these suggestions won't work every time, since each oral argument seems to have its own vibe. You truly need to be “in the moment” to have a chance at handling the hot courts one usually sees today.²⁶

More general and encompassing advice is simple to say, but not always easy to practice. It's from the *Four Agreements*:²⁷

1. Be impeccable with your word.
2. Don't take anything personally.

3. Don't make assumptions.
4. Always do your best.

Applied to oral argument, the first agreement is essentially don't lie and don't say ugly things about the parties, opposing counsel, or other courts (and particularly not about the court you're in).

The second agreement means not to take the bait when opposing counsel or the judge is ugly to you. It also means not to lose your cool, even if the argument seems to be going badly. You will always respond better if calm. And don't fail to recognize that a judge could simply be playing devil's advocate or throwing you a softball. Nor should you expect that a personal relationship with the judges will necessarily carry the day for you or your opponent. Finally, don't take a loss personally: you neither make the facts nor the law; you just present them to the decision-makers.

The third agreement means to prepare, prepare, prepare. Don't assume you'll win. Don't assume the court will ask questions, but don't assume it won't. Don't assume the court will have read the briefs. Don't assume the court knows as much about this area of the law as you do, but don't assume that it doesn't. Don't assume that your supposedly controlling case will not be distinguished away. Don't assume that the court will consider legislative history. Don't assume that the court will follow its announced schedule of arguments, the time limits, or even the customary order of argument. In short, prepare for the worst, but hope for the best.

The fourth agreement is your duty. You must represent your client zealously within the bounds of the law. You should do your best also for the court. Having done so, however, you should let go of the argument once it is done. You will lose some cases. And the secret is that some cases really should be lost.

D. Much Ado About Nothing?²⁸

The question then arises whether oral argument has any real value in deciding the case. Starkly put, are appellate lawyers simply scam artists, or in today's phrase, “spin doctors”? Are we trying to sell snake oil? After all, the record says what it says. The statutes say what they say, and the cases do likewise. Aside from teeing up the issues, what can appellate lawyers do to make the result different from what it should be under an objective reading of the law and facts? We can win cases that should be won, and we can lose cases that should be lost. But can we—as so many of our clients wish—win a case that really should be lost?²⁹

If there were an objective outcome in every case, the answer would be, and should be, “no.” But subjectivity runs high, and everyone knows that different panels of a court will come out differently on similar issues a lot of the time. Appellate advocates can assist the court by teeing up plausible issues, pointing

the court to the relevant law, and laying out the material facts. Appellate advocates assist their clients by doing the same, plus being selective about how they characterize the law and facts. It's a question of emphasis. And oral argument is uniquely suited to reveal when the emphasis is appropriate and when it has been overdone.

In short, oral argument is useful for try to focus the court on what the advocate thinks is important and to protect the court from making inadvertent mistakes, especially with regard to the policy implications of its rulings. Beyond that, it has little real value, other than the structural due-process value of a ritual.³⁰

IV. BE THERE THEN: THE FUTURE OF ORAL "DISCUSSION"

Why do we still call it oral *argument*? How often do advocates really get to "argue" to the court, the way a trial lawyer argues to a jury?³¹ Isn't it usually more of an oral examination, similar to defending a doctoral dissertation? (Calling it an oral examination, however, might confuse the public about whether one is practicing law or practicing dentistry.)

The appellate judges I have contacted generally share the same opinion about oral argument: In a complex case with good appellate lawyers, it can be helpful. (Note their use of the word *can*, meaning "possibly.") The primary function of oral argument today is to make sure the court has not missed the right analysis, overlooked a key fact or case, or ignored a practical effect of the decision. It's similar to a final inspection or punch list.

With good advocates, some judges are more inclined to sit back and listen, confident they'll hear what they need to hear. But when they have specific questions, they also are more likely to ask them, expecting that they'll receive good answers. (With weaker advocates, they will tend to rely more on the briefs and internal staff.) But it's a relative thing. Some judges are more extroverted than others. Those usually will ask more questions than less outgoing colleagues. And some judges will concentrate their questions on the cases for which they expect to be the authoring judge. There is no solid rule.

The judges with whom I spoke also strongly believe a due-process component to oral argument should prevent its entirely vanishing. They sincerely believe that it is valuable for litigants and judges to have to face each other—in some percentage of cases—to keep the system real and to ensure some level of confidence in the system. As one judge mentioned to me, it also reduces the *perception* of one-judge decision-making.³² Further, we can all attest to the value of collective thinking—up to a point.³³ A question by one judge may trigger another entire line of thought in another judge and change the analysis

completely. And there may even be some primitive value to watching body language and subconsciously sensing smells to know when an advocate is on weak or strong ground. Thus, oral argument probably "shall not perish from the earth."³⁴

That oral argument will change dramatically is almost certain. In fact, it continues to change before our eyes.

One of the first changes has been to broadcast oral arguments over the Internet, as the Texas Supreme Court does. This saves on travel expenses for other interested lawyers and sometimes for clients. It also creates a new resource of "beauty pageants," since prospective clients can view lawyers in action. Unfortunately, a lawyer arguing a tough case may be at a disadvantage over a lawyer sailing through a sure winner. "Success breeds success."³⁵

Another change already occurring in some jurisdictions is to have at least one judge participating via a monitor from another city. The future could actually see the advocates in their respective cities and the judges in theirs, all participating in an oral argument via televised hookups.³⁶ (I predict that the Fifth and Ninth Circuits may be the last courts to adopt that change, given the pleasure many derive from travel to New Orleans and San Francisco.)

Another change has been the occasional, attempted use of PowerPoints during oral argument. To date, most judges have not found this helpful. A PowerPoint suggests the advocate is in charge of the dialogue, which is not the way most judges view oral argument. I was present as opposing counsel at what was perhaps the first attempt to use a PowerPoint before the Texas Supreme Court. It was, in my view, a disaster. The judges quickly took control of the discussion, insisting that counsel flip back to other screens and then challenging counsel about omissions in the discussion of the evidence. While possibly useful as a substitute for a blowup of a chart or contractual language, PowerPoints are probably not a good idea for trying to make your arguments. And bench exhibits are usually preferable anyway.

Another change already underway stems from the increase in filing of CD-ROM briefs with hyperlinks. I participated in an oral argument involving a CD-ROM hyperlinked to the record and the authorities. During the argument, it became apparent which judge would be writing the opinion, since that judge had her laptop running while on the bench and asked 28 questions during 40 minutes of argument. She also obviously referred to the links when questioning whether counsels' paraphrases were precisely accurate. As this practice becomes more common, the need for precision in answers will only increase. Perhaps, if we are fortunate, the temptation to misstate the record and the authorities also will diminish.

The use of CD-ROM and electronic briefs is already changing how some advocates prepare of oral argument, at least with regard to the transportation of materials. Fewer advocates haul a litigation bag (or two) filled with paper copies of the record, all the briefs, and a binder of authorities. More advocates now simply take a laptop with the CD-ROM. My current practice usually is to load .pdf copies onto my Amazon Kindle DX, carefully bookmark them for quick reference, and take only that and a few notes to court.

The courts' use of the Internet raises the interesting question of judicial notice from search engines. While the propriety or impropriety of that is outside the scope of this paper, counsel may in the future be confronted with more questions at oral argument concerning "facts" not in the appellate record. A recent Second Circuit opinion stretched this point.³⁷ And many have related stories about Chief Justice Rehnquist's penchant for asking questions (wasting counsel's time?) about trivia and geographical details that were not in the record (and not germane to the issues at hand).³⁸

Another possibility is that oral argument may become more structured as courts focus on its limited substantive value. This could take many forms. One has been tried in parts of California and Arizona, where draft opinions are circulated *before* the argument, so that counsel have a chance to argue directly to where the court is going.³⁹ Of course, it is hard to get a panel to change its mind, especially when the opinion has already issued, but many courts today already have draft opinions on the bench—only the advocate is unaware of what it says.

Another would be to issue questions in advance of oral argument that the court wants counsel to focus on. Judge Alvin Rubin of the Fifth Circuit was an active proponent of this method. Most judges I have spoken with over the years believe this is impracticable in light of their preparation schedules. And they want the flexibility to think of something new as they hear the argument and other judges' questions.

The Supreme Court of Texas used to grant writs of error on specific points to give counsel a clue as to what the court was most interested in, but has since discontinued that practice. My opinion about the reason for this change is that too many cases were decided on other issues, opening the court up to some embarrassment and also misleading the advocates who had prepared for the argument.

Perhaps the most interesting potential would not be dependent upon technological advances, but would be aided by them. Specifically, it would involve the transformation of oral argument into a continuing dialogue between the court and counsel as the opinion is being drafted. Can we imagine oral argument turning into a process more like an open-book examination,

either preceding or followed in some instances by an actual or video appearance in court? In discussing this concept with many judges, many say that they prepare no earlier than the weekend before the argument, particularly if they are not expecting to be the authoring judge. Thus, a more focused oral argument or set of questions is not likely to happen until courts are able to get a better handle on their huge dockets.

Many judges are willing to entertain post-submission briefs. A change could involve the court's initiating post-submission filings by sending letters or e-mails requesting succinct answers to specific questions. For example, "The Court asks counsel to respond within five days concerning whether *Otis v. Redding* is controlling. The responses are limited to 500 words." Or, as another example, "The Court asks counsel to respond at what page of the record the objection to the admission of the testimony about the cat's meow was preserved. Please respond within five days and limit responses to 10 words. Have a nice day ☺."⁴⁰

The beauty of this approach is that it would give counsel the chance to provide their best answer to the Court. No longer would oral argument depend on which counsel had the best memory, had guessed the right issue to concentrate preparation on, or had the best ability to respond under stress. Instead, *mirabile dictu*, the Court could receive the best information available to decide the case.

Some judges cautioned me that different judges have different philosophies about the role of appellate advocates. Some want all the information they can gather from the advocates and consider that anything the Court can do to help the advocates provide that information benefits the Court. But others prefer the mystery of the "black box." (Or is the more apt analogy to the Wizard of Oz behind the curtain?⁴¹) Those judges don't like to share information with counsel, resulting in the surprise—or shock effect—when the opinion one day magically appears.⁴²

Another problem (benefit?) is that it might cause more cases to settle before an opinion is written. Some judges think that would be great; others don't. I tend to think settlements always are good, especially if I've already earned most of my fee and have a real chance of losing on the merits.

More than one extremely talented and well-regarded judge commented that the problem, if any, is that the judges receive too much written information from the advocates. These judges favored closure, and also recognized the value of oral over written communication because of the opportunities for follow-up. But these judges were opposed to continuing the dialogue after the argument, since at some point the case belongs to the court, not the litigants. They did, however, see the occasional value in a post-submission

brief focused on an issue that unexpectedly arose during oral argument. But they would not welcome more than that.

V. WHITHER THOU GOEST, CRETIN?⁴³

Change is inevitable. Knowing exactly how things will change is impossible. But perhaps this paper can stimulate thinking about which changes to seek and which to avoid. If so, then it may have been worthwhile. I invite you to initiate or join in a discussion with your local appellate justices about how to improve oral argument.

¹ “I shall sing a sweeter song tomorrow.” Samuel Taylor Coleridge, Preface to “Kubla Khan,” in *Christabel, Kubla Khan, and the Pains of Sleep* (1834 ed.). Coleridge goes on, however, to note “but the to-morrow is yet to come.” *Id.*

² *Taxi Driver* (Columbia Pictures 1976).

³ *Smith v. Crokew & Wright*, Reports of Cases in the Court of the Star Chamber and High Commission, 1631-32, at 39 (Camden Society 1886).

⁴ S. Ct. R. VIII, 1 Wheat xvi (1795).

⁵ See Randall T. Bell, “To Write a Brief . . .,” in *Appellate Advocacy* 109-10 (ABA 1981); David C. Frederick, *Supreme Court and Appellate Advocacy* 15-16 (2003).

⁶ David C. Frederick, *Supreme Court and Appellate Advocacy* 17-26 (2003).

⁷ John W. Davis, “The Ten Commandments of Oral Argument,” 26 A.B.A. J. 895 (1940); see generally William H. Harbaugh, *Lawyer’s Lawyer: The Life of John W. Davis* 401-04 (1973).

⁸ *Id.*

⁹ Bob Dylan, “A Hard Rain’s a-Gonna Fall,” on *The Freewheelin’ Bob Dylan* (1962).

¹⁰ A modified version of this section was originally published in Roger D. Townsend, “Oral Argument on Appeal: Go Forth and Sin, Sin, Sin,” *The Appellate Advocate* 20 (State Bar of Texas, Fall 2009).

¹¹ Comment by Andrew Meyer, as viewed on *Gainesville Sun*, <http://www.youtube.com/watch?v=6bVa6jn4rpE> (Sept. 17, 2007).

¹² Afterwards, the answer quickly returns: I get to work indoors, the pay is better, and it’s much easier work even if not so socially useful.

¹³ A rhetorical question that I would appreciate your not responding to, especially during my presentation.

¹⁴ Ram Dass, *Be Here Now* (1971); see also George Harrison, “Be Here Now,” on *Living in the Material World* (1973).

¹⁵ Susan Larsen, “Wanna Talk? No, Not Really” *Texas Blue*, Jan. 15, 2007, <http://www.thetexasblue.com/wanna-talk-no-not-really>.

¹⁶ Cf. *The Incredible Shrinking Man* (Universal International Pictures 1957) (dealing with diminishing human beings rather than court hearings).

¹⁷ Anon., *English Justice* 151 (1932), quoted in Bryan A. Garner, *The Winning Oral Argument* 6 (2007).

¹⁸ E.g., Herbert Monte Levy, *How to Handle an Appeal* (4th ed. 2008); Antonin Scalia & Bryan A. Garner, *Making Your Case* (2008); Bryan A. Garner, *The Winning Oral Argument* 6 (2007); Frederick Bernays Wiener, *Effective Appellate Advocacy* (rev. ed. 2004); David C. Frederick, *Supreme Court and Appellate Advocacy* (2003); Ruggero J. Aldisert, *Winning on Appeal* (2d ed. 2003); John W. Cooley, *Callaghan’s Appellate Advocacy Manual* (1989).

¹⁹ Alfred E. Neuman, *Mad* #24 (July 1955).

²⁰ King Crimson, “21st Century Schizoid Man,” on *In the Court of the Crimson King* (1969).

²¹ *Id.*

²² Compare Johnny Winter, “I Love Everybody,” on *Second Winter* (1969) (apparently happy) with Johnny Winter, “I Hate Everybody,” on *Second Winter* (1969) (apparently not so happy).

²³ Elizabeth Barrett Browning, *Sonnets from the Portuguese* XLIII (1850).

²⁴ See generally Robert Bly, *Iron John* (1990).

²⁵ See generally Wayne Shorter, “Schizophrenia,” on *Schizophrenia* (Blue Note Records 1967).

²⁶ See generally Thich Nhat Hanh, *Present Moment Wonderful Moment* (2006); see also Eckhart Tolle, *The Power of Now* (2004).

²⁷ Don Miguel Ruiz, *The Four Agreements* (1997).

²⁸ William Shakespeare, *Much Ado About Nothing* (1600).

²⁹ But see Gerry Spence, *How to Argue and Win Every Time* (1995).

³⁰ See generally Laurence Tribe, “Structural Due Process,” 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

³¹ Ruggero J. Aldisert, *Winning on Appeal* § 24.6.1, at 367 (2d ed. 2003).

³² With regard to the reality, this respected judge said “if a judge is not going to take the job seriously, then having oral argument or not will make no difference.”

³³ See Irving L. Janis, *Crucial Decisions* (1989) (discussing perils of “groupthink”).

³⁴ Abraham Lincoln, *Gettysburg Address* (1863); see generally Garry Wills, *Lincoln at Gettysburg* (1993).

³⁵ Although the Internet attributes this as a supposedly famous quotation from Mia Hamm, the soccer star, I’ve heard it all my life—particularly from my grandfather. So, if anyone deserves credit for this bromide, I’m giving it to W.O. Baxter as told to the author on multiple occasions from 1954-1995. Sorry, Mia.

³⁶ Maybe I'm just getting old, but a "hookup" via television doesn't sound nearly so interesting as a personal encounter—in any sense of the word.

³⁷ *U.S. v. Bari*, 599 F.3d 176 (2d Cir. 2010).

³⁸ David C. Frederick, *Supreme Court and Appellate Advocacy* 112-15 (2003).

³⁹ Mark Hummels, "Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination," 46 *Ariz. L. Rev.* 317, 319-20 (2004).

⁴⁰ The court could also consider advising counsel to inform counsel's malpractice carrier in lieu of filing a response.

⁴¹ L. Frank Baum, *The Wizard of Oz* (1900).

⁴² *Cf.* Naomi Klein, *The Shock Doctrine* (2008) (dealing with other types of shocks and their effects).

⁴³ Woody Allen, "The Metterling Lists," in *Getting Even* at 7 (1978); *see also* Wooden Wand, *Whither Thou Goest, Cretin* (2010).

