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ORAL ARGUMENT AND EXPEDITING APPEALS: A COMPATIBLE COMBINATION

Joy A. Chapper*

A recent trend in appellate court practice and procedure has been the curtailment and, in some cases, elimination of oral argument.¹ Where parties once were given extensive, if not unlimited, time for argument, it is now common for oral argument to be provided only upon request after the court has invited waiver, and limited to ten to fifteen minutes per side.

The reduction in opportunity for oral argument, an action generally taken in response to increasing caseloads, has disquieted some observers of the appellate process.² At a time when judges are assisted by increased numbers of law clerks and central staff attorneys, the elimination of argument removes the one occasion at which appellate judges can be seen at work and thus lessens assurances that cases are actually receiving the direct attention of the judges themselves. In addition, it is thought to affect judicial review by depriving counsel and the court of a focus on central issues that oral argument provides more effectively than written briefs.³

As a time-saver for judges, the reduction of oral argument has limited returns, at least where the judges' chambers are located in the same courthouse. The elimination of argument calendars frees some time for the judges; although most of the time they would spend preparing

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1. The curtailment of oral argument has been most visible in the federal courts. Presently, only the Second Circuit Court of Appeals routinely provides for oral argument. *See generally* J. HOWARD, *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* (1981). State appellate courts vary widely in their use of oral argument. In some courts, argument is a matter of right and is provided for in every case. In other jurisdictions, argument may be provided by right, but the court frequently seeks waiver of that right. Finally, some courts only provide for argument when it is requested by a judge. *See generally* S. WASBY, *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* (1979).

2. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 16-18 (1976) [hereinafter cited as CARRINGTON]; Schroeder, *Judicial Administration and Invisible Justice*, 11 U. MICH. J.L. REF. 322, 327-29 (1978).

3. *See* Wasby, *Oral Argument in the Ninth Circuit: The View from Bench and Bar*, 11 GOLDEN GATE L. REV. 21, 43-44, 50-51 (1981).

for argument would presumably be spent on the case in any event. All told, the impact of eliminating oral argument on court time has been thought minor,⁴ and its potential for reducing delay limited.⁵ The primary delay reduction from the elimination of argument would be the removal of a scheduling bottleneck that an oral argument calendar can create.⁶

Because significant reductions in delay are unlikely to flow from the elimination of argument, some commentators have been prompted to examine more closely the requirements of the appellate process itself.⁷ If it is redundant to present an appeal through both written briefs and oral argument, then it seems possible, for some cases at least,⁸ to curtail sharply the written presentations and to place increased reliance on oral argument. Reducing briefs, unlike reducing argument, could achieve considerable savings in time and effort for attorneys as well as judges. Under this approach, the parties' written presentations would be reduced to very short documents and the time allowed for filing greatly compressed. In return for the limitations on briefing, the case would promptly be set for oral argument. The argument session itself would have no fixed time limits. It would be a less formal proceeding, in which counsel presented their arguments and the court actively explored the merits of the case with them. The objective would be to provide an adequate examination of the issues by the court so that by the time the session was concluded the case could be promptly decided, either by oral decision at the close of argument or by written decision shortly thereafter.

This alternative approach has not been extensively applied.⁹ A simulation conducted in Arizona in the mid-1970's emphasized oral argument and oral decisions.¹⁰ This experience led to two other projects, one a short-lived "appeal without briefs" program in the Court of

4. See STANDARDS RELATING TO APPELLATE COURTS 57 (1977) [hereinafter cited as ABA STANDARDS].

5. M. OSTHUS & R. SHAPIRO, CONGESTION AND DELAY IN STATE APPELLATE COURTS 21 (1974).

6. A recent study has found that "artificial limitations on the number of arguments heard per court session" is the single most important factor affecting the amount of time spent from the close of briefing to oral argument. J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY 61 (1981).

7. See generally CARRINGTON, *supra* note 2; Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Hufstедler & Hufstедler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971); Hufstедler, *Appellate Court Reform — A Second Look*, 4 PAC. L.J. 724 (1973).

8. There appears to be a consensus that oral argument is not necessary for all appeals. See ABA STANDARDS, *supra* note 4, at 58; CARRINGTON, *supra* note 2, at 21-24.

9. See CARRINGTON, *supra* note 2, at 27-28; Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Hufstедler & Hufstедler, *Improving the California Appellate Pyramid*, 46 L.A. B. BULL. 275 (1971); Hufstедler, *Appellate Court Reform — A Second Look*, 4 PAC. L.J. 724 (1973).

10. See generally E. JACOBSEN & M. SCHROEDER, REDUCING THE TIME AND COST OF THE AP-

Appeals for the Ninth Circuit,¹¹ and the other, an accelerated docket program in the Colorado Court of Appeals that limits and compresses briefing but does not emphasize oral argument.¹² In addition, there has been at least one experiment with increased oral argument that was not tied to a limitation on briefing.¹³

In February 1981, the California Court of Appeal Third Appellate District in Sacramento implemented an expedited appeal procedure for civil cases emphasizing oral argument and decreasing the importance of written briefs. Although the experience in this one site is far from definitive, it does provide the first concrete evidence on key issues concerning the acceptability and feasibility of this type of procedure. The questions that must be asked in evaluating this experimental procedure concern which cases can be appropriately handled in this fashion; just how sharply written briefs can be limited; and the impact this procedure will have on the quality of appellate review.

The purpose of this Article is to explore these issues in light of Sacramento's experience with the expedited appeal procedure. The data presented here are drawn from an evaluation of the first twelve months of the procedure's operation.¹⁴ This evaluation was based on court records of the more than one hundred cases that followed the expedited procedure to completion, in-person interviews with members of the court and court staff, and telephone interviews with participating attorneys. Part I briefly sets out the new procedure and the context in which this procedure was introduced and integrated. Part II discusses the conclusions that can be drawn from this experience with respect to the scope of a program of this nature, its most feasible features, and its quantitative and qualitative impact on the appellate process. Finally, Part III examines attorneys' reactions to the program.

I. THE SACRAMENTO PROCEDURES

The California Court of Appeal Third Appellate District is one of

PELLATE PROCESS: ARIZONA APPELLATE PROJECT REPORT (1976) [hereinafter cited as JACOBSEN & SHROEDER].

11. For a description of this program, see Chapper, *Appellate Courts Develop Special Tracks to Fight Delay*, 20 JUDGES' J., Spring 1981, at 50, 56.

12. See CBA Judiciary Section's *Proposed Expedited Appeal Process*, 6 COLO. LAW. 1133 (1977); D. Enoch, transcribed comments (Dec. 2, 1980), reprinted in APPELLATE JUSTICE IMPROVEMENT PROJECT COLLECTED PAPERS (M. Hudson ed. 1981).

13. This experiment took place in the California First District Court of Appeal in San Francisco in 1978-79. See Chapper, *supra* note 11, at 55.

14. See generally J. Chapper & R. Hanson, *Expedited Procedure for Appellate Courts: Evidence from California's Third District Court Appeal* (Mar. 1983) (unpublished manuscript) (on file with the *Journal of Law Reform*).

The remainder of this Article is based on data from the Sacramento study. Rather than cite

the five districts of the state's intermediate appellate court. The District's annual filings include approximately six hundred civil appeals. Its seven judges sit in three-member panels. An expedited appeal procedure retaining oral argument appeared appropriate for the court for several reasons in light of its existing practices and the court's own interests and objectives.

First, the court was looking for ways to enhance its ability to keep abreast of its increasing caseload, but without cutting back on its practice of hearing oral argument in a large majority of civil appeals. On the other hand, the court was not interested in extending oral argument to the fifteen to twenty percent of civil appeals that it determined after briefing did not need oral argument.

Second, the court was interested in reducing the overall appeal time for civil cases. Although its median disposition time of fourteen months for all appeals in 1980 compared favorably to many other courts, the court believed that there was considerable room for further reduction, particularly with respect to briefing, which consumed the largest single block of time from notice of appeal to disposition. A procedure compressing the briefing schedule offered the opportunity to reduce overall elapsed time by several months.

Finally, the court was willing to undertake a program that did not threaten to reduce the amount of time that the judges would be required to devote to an individual case. The court was primarily concerned that the new procedure achieve time reductions without increasing the amount of time required to be spent on a case.

To expedite courtroom procedures, the Sacramento court adopted several new rules. Opening briefs were limited to ten pages double-spaced, not including the statement of facts. No reply brief was permitted. Appellant's brief was due within twenty days from the date of the scheduling order placing the appeal within the expedited procedure. Respondent's brief was due within twenty days of the filing deadline for appellant's brief. Oral argument was set for approximately thirty days after the close of briefing. The time allotted to each side for argument was not limited in advance; the expectation was that the session would continue as long as necessary to permit a full exploration of the issues by the court. The court's goal was to file its opinion within ten days after oral argument.

The court used its existing settlement conference procedure as the mechanism for identifying cases. With this procedure, civil appeals come in for a judge-conducted conference after the record is filed. After

every reference to this data (a task that would entail multiple footnotes on every line), the Chapter and Hanson unpublished report is cited only once. *See id.* The reader is advised that support for statements in the ensuing text that are not otherwise footnoted can be found in the unpublished report.

an unsuccessful conference or at the conclusion of unsuccessful negotiations, the conference judge explains the expedited alternative to counsel and further explores the case's suitability. Because the court lacks rule-making authority to require cases to follow the expedited procedure, participation is dependent upon the consent of the parties. Once the parties stipulate to the use of the expedited procedure, a scheduling order is entered.

II. THE SACRAMENTO COURT'S EXPERIENCE WITH EXPEDITED APPEAL PROCEDURES

A. *Scope*

A threshold question concerns the scope of an expedited procedure — which cases can appropriately be handled in this fashion, and how frequently these appropriate cases occur in a given court.

The expedited procedure was designed for a specific category of case: relatively straightforward appeals presenting a limited number of issues that were governed by established principles of law. These cases, it was thought, did not need an elaborate process but could be fully presented, considered, and decided with short briefs and informal arguments within a compressed time frame.

The court's experience with case-by-case screening indicates that expedited procedures can be used for a much broader range of cases than originally anticipated. Virtually all types of cases were represented; almost a third of the cases had been disposed of by trial; close to half of the cases had testimonial transcripts, and half of these exceeded fifty pages.

Looking beyond this diversity, most of the expedited cases appeared to share one basic characteristic. They were typically one or two issue cases that were neither factually nor legally complex. Even where there may have been a trial, the issue or issues on appeal generally did not depend on a review of the full record. The expedited cases, however, were not the "easiest" cases coming to the court. At the time the expedited procedure went into effect, approximately fifteen percent of civil appeals were resolved without oral argument. The court was concerned that these "routine disposition appeals" — identified after briefing — would be the only ones earmarked for expedited treatment. This does not appear to have been the case. Although the number of civil appeals in which the court requested waiver of argument showed a slight decline, suggesting that some may have been handled under the expedited procedure, the total number of cases identified as suitable for the program far exceeded the number of cases in which the court might have invited waiver of argument.

There were indications, however, that the more complex civil cases

entered the program in significant numbers. Approximately fifty percent of non-settled civil appeals were considered suitable for the expedited procedure. Because the court continued to request waiver in fifteen to twenty percent of these non-settled appeals, only about one-third of the civil appeals coming to the Third District were considered too complicated or complex to be handled under the court's new procedure.¹⁵

Another indication of the complexity of expedited cases was the high number of opinions certified for publication. Under California Rules of Court, a decision of the Court of Appeal is published only if the court certifies that it establishes a new rule, alters an existing rule, discusses a legal issue of continuing public interest, or criticizes existing law.¹⁶ The Third District has generally published less than twenty percent of its opinions in civil cases. The publication rate for expedited appeals was thirty percent.

B. Program Features

The specific time schedules and page limits adopted by the Sacramento court were based upon the judgment that they would prove to be workable parameters for presenting and deciding non-complex civil appeals. The results support that initial judgment. Counsel met the twenty-day deadlines for filing briefs. The briefs themselves fell within the required page limits.¹⁷ Cases were set for argument roughly thirty days after the close of briefing. The only time projection that was not consistently met was the ten-day target for the filing of the court's opinion following oral argument. This shortcoming was largely attributed to the increased rate of publication.

It is not clear whether these time schedules could be reduced still further. Some commentators have suggested limiting written submissions to a listing of the authorities relied upon,¹⁸ or even eliminating written submissions entirely, with the parties relying on trial briefs.¹⁹ The question remains, however, whether the benefits expected to be derived from such alternative procedures would justify their implemen-

15. It was not clear whether the voluntary nature of the program would affect the volume of cases that ultimately followed the new procedure. As it turned out, in virtually all cases found suitable for expedited handling, counsel availed themselves of the option. Although there may have been concern over the voluntary nature of invitations from the court, interviews with the attorneys did not indicate a real or perceived coercion by the settlement conference judge.

16. CAL. R. CT. 976(b).

17. Briefs averaged about 10 pages including the statement of facts. The average for a set of comparable cases decided by the court in the year prior to the introduction of the expedited procedures was 22 pages.

18. See CARRINGTON, *supra* 2, at 18.

19. The Arizona simulation was based upon the Hufstедler proposal. See *supra* note 7; JACOBSEN & SCHROEDER, *supra* note 10, at 3.

tation. At a minimum it is unlikely that a sizable portion of a court's civil appeals could be appropriately addressed with such limited written submission.²⁰ On the other hand, a limit of ten pages for briefs was found to be acceptable for close to half of the Sacramento court's civil appeals.

C. Impact on the Appellate Process

The expedited procedure was expected to reduce appeal time while retaining the opportunity for oral argument. Expedited cases from the first year of the new program showed a dramatic reduction in elapsed time from the start of briefing to disposition. The expedited cases were concluded on an average of ninety-nine days from the start of briefing as opposed to the 232-day average for comparable cases handled in the year prior to the implementation of the new procedure. The overall time spent from notice of appeal to disposition was reduced from almost fourteen months to just over eight.²¹

Although the judicial investment of time on expedited cases was not determined on a case-by-case basis, the Sacramento judges do not believe that the expedited procedure had any effect on the total time they spent on each case. Short briefs, for example, did not necessarily take less time to read and evaluate than long ones. The flexible argument sessions did not produce a significant increase in time spent per case.

The expedited procedure does, however, appear to have had some effect on the quality of judicial review. One of the benefits of the procedure, according to members of the court, is that it produced greater clarity in the presentation of issues. For cases in which only one or two issues were involved, the ten-page brief limit forced counsel to be focused and concise. More important, the judges suggested that the shortened procedure may be operating as an incentive to counsel to reduce the number of issues presented. Rather than contesting all issues raised by the lower court proceeding, counsel — according to the judges — are focusing only on the central issues in an effort to “qualify” the case for expedited handling. The result is that fewer tangential issues are coming before the court; consequently, the judges are free to devote greater time and concentration to those issues presented.²²

20. Using expedited cases from the first year as a rough guide, fewer than 15% of the individual briefs filed were five pages or less.

21. The first year's non-expedited cases are still being monitored to determine whether the time reductions for expedited cases were achieved to the detriment of non-expedited cases. Aggregate elapsed time data provided by the court suggest that the expedited program did not have that effect.

22. This voluntary reduction in issues may also contribute to the high percentage of appeals that are considered suitable for expedited handling.

The court maximized the impact of this new incentive to limit the number of issues argued by placing expedited cases on special argument calendars. Each calendar consisted of not more than six expedited appeals; conversely, regular calendars — set each month for non-expedited appeals — had eight to twelve cases. With fewer cases on a day's calendar and fewer issues per case, the judges had more time to prepare for argument and thus were better positioned to question counsel. Both judges and staff attorneys observing the argument sessions noted a higher level of exchange between the court and the attorneys in expedited cases, and more questioning and probing by the judges. The limited number of issues per case also helped counsel's presentation, by decreasing the likelihood that preparation time would be wasted on tangential issues. This qualitative change in oral argument sessions, however, did not involve a significant increase in the time actually consumed. The median time for argument in the expedited cases was under thirty minutes — less than the time allotted for argument on the non-expedited calendar, although probably more than the time consumed by argument in a non-expedited case.

III. ATTORNEY PERSPECTIVES

The Sacramento program has provided the first opportunity to evaluate attorneys' reactions to an expedited procedure. Structured telephone interviews were conducted with 165 of the 212 attorneys involved in cases following the expedited procedures in the first twelve months. These interviews disclosed an overwhelmingly positive response to the new procedure. Virtually all of the attorneys were satisfied with their experiences and favored its continuation.

The reasons underlying this response suggest that the attractiveness of the program did not lie in any of its qualitative dimensions. The attorneys were satisfied that the restrictions placed on briefing did not hamper their ability to present their cases to the court. Both appellants and respondents generally believed that their briefs achieved several important objectives — providing notice to the opponent of the issues being raised, orienting the judges to the issues, and providing a framework for argument.

The limited briefs were seen, however, as a source of significant time savings. A majority of the attorneys reported spending less time in brief preparation than they would have spent under the traditional procedure; only one of the 165 interviewed indicated spending more time. This response clearly indicates that a short brief takes less time to write than a lengthy one.

Contrary to what might have been expected, the reduction in time and effort did not create a qualitative shift in the nature of the briefs.

It was believed that reduced page limits might make the briefs less formal or result in less discussion of the facts. Yet, only one-third of the attorneys reported that the limits on briefing had any such effect.

Surprisingly, the attorneys did not believe the new procedure changed the nature of their preparation for oral argument, or changed oral argument itself, in any significant respect. The limitations placed on the briefs did not result in an increase in the amount of time spent preparing for oral argument or in changes in the type of preparation. Significantly, there was a considerable range of opinion on the role of argument in the expedited cases, suggesting that the limitations on briefing were not accompanied by a decrease in the perceived importance of briefs relative to oral argument. Although an overwhelming majority of the attorneys (79%) viewed the argument as merely complementing the briefs, and a sizable majority (62%) saw the argument as providing an opportunity for the court to examine the issues being presented, only a bare majority (52%) believed that the argument session was helpful to the court in reaching its decision. Thus, it appears that the brief would have to be restricted far more severely to enhance the importance of oral argument to attorneys.

The single most striking aspect of the interviews was that the attorneys were interested, first and foremost, in speedy case resolution. Indeed, reduced appeal time was identified as the primary advantage of the new procedure. The program was acceptable to the attorneys because significant time reductions were achieved without impairing their ability to prepare and present their cases. In their opinion, the revised procedure was qualitatively equivalent to the standard procedure. All things being equal, these attorneys opted for speed.

CONCLUSION

The experience of the California Third District Court of Appeal demonstrates that it is possible to have an expedited appeal procedure that reduces the elapsed time from notice of appeal to disposition by close to fifty percent while still preserving the opportunity for oral argument. It cannot be said, however, that oral argument was the causal mechanism for the expedition. It is clear, nonetheless, that briefs can be reduced — in length and in the time permitted for filing — without impairing counsel's ability to prepare and present their positions to the court. Finally, where oral argument is retained, the issues presented may be better understood.

For other courts, particularly courts hearing large numbers of appeals of right, the Sacramento approach offers not only a fast-track model to reduce appeal time, but also an alternative to curtailing counsel's opportunity for oral argument. The transferability of this

approach to other courts will depend to a considerable extent on the degree to which other courts wish to emphasize this feature in designing new procedures.