Speak Up! A Defense of Oral Argument

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There is nothing quite like the spoken word. In *Gorgias,* Plato said persuasion is the winning of souls through speech. Appellate law now places a strong emphasis on the written submissions. However, try as we might, our written submissions—even those regarded as well written—are no substitute for the spoken word.

Oregon recently joined a small but significant minority of jurisdictions in which the default provision in the intermediate appellate court is for no oral argument unless a party requests argument or the court explicitly orders it. ORAP 6.05 (effective January 1, 2011). For some, this rule has been seen as a landmark on the road to the potential elimination of oral argument.


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Due mostly to dwindling resources and crushing caseloads, courts around the nation have been forced to do more with less. Unfortunately, oral argument is often a target for cuts. This includes reducing the amount of time the parties have to present oral argument; making oral argument opt-in instead of opt-out; and in some circumstances, giving the court the discretion to determine when and in which cases oral argument will be heard. Oregon is no different. First, the time allotted to each party for argument was reduced, and more recently the rules were amended, making argument opt-in rather than opt-out. The next move, if we are to follow the path taken by some jurisdictions, is that oral argument will only be permitted when or if the court requests it. This would be unfortunate, and in my opinion, a mistake.

Oral argument was once the hallmark of appellate practice. In fact, the U.S. Supreme Court did not require any written submissions until 1821. Even then, the written submissions were not "briefs" as we think of them today because the briefs did not include arguments, and were generally only a couple pages in length. The Court did not require arguments in the briefs until 1884. Instead, the cases were decided on the oral presentations of the attorneys. Argument often lasted for hours, and in some instances, days. For instance, in *Gibbons v. Ogden,* the Supreme Court spent five days listening to oral argument.

Oral argument should never be eliminated, by rule or by judicial discretion. Although the focus nowadays is on the written submissions, oral argument should not be overlooked. Oral argument serves an important public interest by enabling the parties—members of the public—to present their views out in the open, in public, to a reviewing court. The arguments lend an element of transparency to a deliberative process thought of by many as secretive or invisible. Skillful questioning by the judicial panel during oral argument may reveal how legislative enactments or judicial rules will actually work in day-to-day practice. This revelation comes from the back-and-forth exchange between the court and the attorneys but not necessarily from the briefs. For the majority of the public, their understanding of a case comes not from reading an appellate brief; it comes from media coverage of the oral arguments.

The court and the parties can work out solutions to the case at oral argument in circumstances that would make it impossible to accomplish through the briefs. The *Roe v. Wade* trimester scheme is said to be the product of oral argument.

Oral argument also may significantly serve your client's interests. Most appellate judges will say that oral argument has served to change their minds on an issue or case. Even those who view oral argument as a waste of time and resources will reluctantly admit that argument has still changed their minds in at least a small percentage of cases. Oral argument gives the appellate judges a chance to seek answers to questions that may have arisen in their minds. Carefully crafted questions by one judge may convince a colleague who previously had reservations about reaching a specific conclusion. Often, the judges use argument to telegraph their concerns to other judges on the panel.

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This indirect judicial dialogue can only occur at oral argument; it cannot take place in the written memos.

Oral argument may be the only time when all the parties and the tribunal discuss the case together. Oral argument gives the parties the opportunity to focus the tribunal's attention on the issue in the case. It gives the court an opportunity to ask questions about issues that may not be discussed in the briefs, such as jurisdiction, preservation or waiver. Oral argument aids judicial deliberation because argument occupies the pivotal position between the review of the written memos and the final decision. Chief Justice John Roberts has described oral argument as the organizing point for the entire judicial process. Former Chief Justice William Rehnquist described the written memos as the pleadings, and oral argument as the trial.

Finally, oral argument gives the parties and the attorneys an opportunity to discuss the case, face-to-face, with the judges who will ultimately determine the outcome of the case. It allows the parties, through their attorneys, to tell the court in person why the court should rule in their favor. This can be important to the client. Oral argument may also serve to eliminate bad arguments. After all, how can an argument be subjected to a straight-face test when the author need not appear to face the tribunal?

There is nothing quite like the spoken word. Although the focus is now on the written submissions, oral argument should not be overlooked, for it serves important public interests, as well as those of the client. Oral argument should never be eliminated.