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Appellate Results Are Not Always Predictable Based on Interactions at Oral Argument

APPELLATE ANSWERS: It is what happens after oral argument—unseen by the litigants and lawyers—that determines how the case will be decided.

By Marie E. Lihotz and Marianne Espinosa | December 24, 2020



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How can it be that everything went “right” at oral argument and the decision came out “wrong”? In other words, the panel found your arguments unpersuasive.

Let’s assume you did everything right in your preparation and performance. The passage of time can alter one’s perception of the strength of the arguments advanced. So, as best you could, you looked over the record and briefs with fresh eyes. You plumbed through the facts and the law and were able to readily refute your adversary’s arguments. You updated research to make appropriate references to cases decided since the briefs were filed. When necessary, you yielded on points rather than advance losing arguments. You even cherry-picked your arguments, announcing to the court that, unless the panel had questions regarding the other points in your brief, you were limiting your argument to discrete issues. (Not only does that enhance your credibility as an advocate, it focuses the judges’ attention on your winning issues.)

You even practiced your pitch with someone unrelated to the case, perhaps even someone who is not a lawyer—like your grandmother. It is a quite a reality check to get input from civilians who are unencumbered by legal precedents. Their common sense is surprisingly enlightening as to how the court might rule. If, for example, your grandmother's reaction to your distillation of the case is "If that's the law, I hope you lose," consider a new approach.

No matter how many "friendly" questions the panel asks during oral argument, the practical consequences of a potential decision may switch on a nagging red light in the back of the judicial brain, signaling that a conventional application of law to facts may produce an injustice, whether of great or minimal magnitude. Judges strive to reach results that are fair and make sense, both to the litigants and in the larger context.

A significant explanation for the disconnect between your perception of oral argument and the decision rendered may result from the fact that you and the judges are at different stages of the journey to the ultimate result. For you, the work is done, the journey ended. Leaving the courtroom is like disembarking and finding your way to the luggage claim area and your car. But, for judges, oral argument is more like the point in the journey when you first settle into your seat on the airplane: you booked the flight, packed your bags, got to the airport on time and are now onboard, anticipating what lies ahead.

The amount of work a judge spends on a case before oral argument varies as much as the amount of planning different travelers do before a trip. All judges have a working familiarity with the issues and facts after review of the briefs and appellate record, the initial impressions of fellow panelists in "pinks," and, perhaps, a law clerk's bench memorandum. Beyond that, the amount of preparation prior to oral argument is decidedly personal. Like the tourist who books every dinner reservation before getting on the plane, some judges go quite deep, and are able to debate footnotes at oral argument. Others are like the tourist who reads Fodor's on the plane. Informed, but not steeped in details.

It is what happens after oral argument—unseen by the litigants and lawyers—that determines how the case will be decided. Whether the judges initially agree or disagree on the ultimate result, there is work to be done.

At the conference that follows argument, answers that once seemed obvious become less so when a single judge raises questions about something that arose during argument. Opinions may differ or change. Debates ensue. Sometimes, that exchange resolves differences. Sometimes, it does not. The dissenter may tackle an opinion with the avowed purpose of convincing the others the result should be different. Occasionally, that works. The process can be—take your pick—gratifying, contentious, enlightening, lively, frustrating; but it is easily the most memorable part of appellate work.

Another avenue to a result not necessarily predictable based upon the interactions during oral argument emerges when the judge assigned to write the opinion for the court becomes convinced that the agreed-upon result is wrong. The author of the opinion inevitably does a more extensive examination of the case than fellow panelists did prior to oral argument. Further review may reveal authority was misread, facts possibly overlooked, or a pertinent factor not considered or given appropriate weight in the initial analysis. A shift in direction can also occur if the judge feels stuck. Taking the controlling law and the facts as known, the presumed analysis just does not flow. It is said that, when the analysis is sound and the result is correct, the opinion writes itself. If not, it is best to take a step back and reconsider.

Although it may offer little solace, judges are human and do change their minds. Evolving thought leads to increasing certainty, even when the ultimate decision differs from the initial impression. As Alexander Pope observed: "Some praise at morning what they blame at night, But always think the last opinion right."

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