Post-argument briefs: a small burden with great benefits

Erwin Chemerinsky *is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.*

The U.S. Supreme Court should institute a new procedure in all cases: allow lawyers to file a short brief after the oral argument in which they have the opportunity to address questions raised at the oral argument more fully and with more reflection than possible while at the lectern. In fact, all courts of appeals should do this. The briefs could be limited to five pages so they would not put a burden on the judges.

Arguing a case in the Supreme Court is an exhilarating, but also a frustrating experience because there are so many questions and so little time to answer them. Often a lawyer will get a sentence or two out in response to a question and then get a question from a different justice about something else. In an argument in 2005, I received a question from Justice John Paul Stevens. Before I could answer, Justice Anthony Kennedy changed the hypothetical and then Chief Justice William Rehnquist added something to that. I said one sentence in response to the Rehnquist question before Justice Antonin Scalia asked me a question about something else. I kept trying to go back to the unanswered questions from Stevens and Kennedy, but it was very difficult to find the time between questions to do so.

In a more recent argument, in December 2013, I was asked three questions in a row by different justices before I could answer any of them. At one point, I was asked a question by Justice Stephen Breyer and had a three-sentence response prepared. I said the first sentence and then was asked a different question by another justice. I never did get to give the other two sentences to my answer. These are typical experiences for Supreme Court advocates.

My sense is that federal court of appeals judges have more respect for each other's questions and generally allow more of an answer before interrupting. Also, except in en banc arguments, there are three rather than eight questioners as there are in the Supreme Court (Justice Clarence Thomas virtually never asks questions at oral argument). But in federal courts of appeals, and for that matter in state appellate courts as well, there frequently is not the chance to explain an answer before the next question.

More importantly, no matter how much a lawyer prepares, there can be unexpected questions. In both the Supreme Court and other appellate courts, the judges are well prepared and ask difficult questions, often seeing the case differently from the way the lower courts or the lawyers perceived it. There are frequently tough follow-up questions.

There is an old adage that there are three oral arguments for an attorney: the one that was planned, the one that was given, and the one that the lawyer wishes had been delivered.

Tuesday, January 14, 2014

Law Practice
State Bar may begin auditing lawyers' client trust accounts
State Bar leaders largely supported the idea of conducting random audits of lawyers' and law firms' client trust accounts. If approved, initial audits likely would be "probing questionnaires," bar CEO Joseph L. Dunn said.

U.S. Supreme Court
Recess appointments, labor board rulings at stake in high court case
The U.S. Supreme Court's ruling could reverse hundreds of labor board decisions and rules, including precedent-changing rulings affecting union organizing drives and collective bargaining rules.

Appellate Practice
Post-argument briefs: a small burden with great benefits
There is an old adage that there are three oral arguments for an attorney: the one that was planned, the one that was given, and the one that the lawyer wishes had been delivered. By **Erwin Chemerinsky**

Litigation
MGA files $1B state court case against Mattel
The Bratz manufacturer filed a trade secret theft action against the competing toymaker in Los Angeles County Superior Court several weeks after a judge barred the case from moving forward in a federal court.

Corporate
Dealmakers
A roundup of recent merger and acquisition and financing activity and the lawyers involved.

Government
Expiration of tax credit could knock wind out of state's renewable energy projects
The loss of the credit, some experts say, could lead to a "black hole" in wind energy projects in the next several years.

Law Practice
National appellate bar group inducts Reed Smith partner as head
James C. Martin, who this month became president of the American Academy of Appellate

I am sure that everyone who has argued in a court of appeals has had the experience after the argument of wishing to have answered a question differently. Sometimes the differences are minor and would not matter at all. But sometimes, after even short reflection, the response would be quite different. Oral arguments exist because courts and lawyers believe that they can matter; it is the chance for the judges to ask the questions that most trouble them in the case and it is the opportunity for the lawyers to address them.

Supreme Court justices and appellate judges would benefit from more thoughtful and complete answers. The immediate answer at the lectern sometimes isn't the best answer and frequently isn't adequately explained because of the time constraints. In the Supreme Court, each side gets 30 minutes. But in federal courts of appeals, it is not unusual for each side to get 10 or 15 minutes.

There is an easy solution: allow each side to file a short post-argument brief. It should be limited in length. Even a five-page brief from each side would serve the purpose and would not unduly burden the court.

In the federal court of appeals, sometimes judges will ask for additional briefing of an issue. That is far more rare in the Supreme Court. Also, Federal Rule of Appellate Procedure 28(j) allows for supplemental briefs when "pertinent and significant authorities come to a party's attention after the party's brief has been filed - or after oral argument but before decision." These briefs are filed by letter and are to be no more than 350 words. Sometimes lawyers use these - and I confess I have done this - to try and address a question from oral argument that was not fully answered. But that is not a proper use of a 28(j) letter brief.

My proposal is simple: in all cases, allow the lawyers to file a short brief, and it can be in letter form, after the oral arguments. They can be due within 48 hours of the oral argument so that they do not delay the decision-making. Each side should get one brief and they should be filed simultaneously; there should not be reply briefs. I can see no argument against this except for the additional work for the courts in having to process the briefs and the judges having to read them. In the world of electronic filing, the former is a nonexistent concern, and the latter is a small burden.

Permitting the lawyers to provide more complete answers to the most important questions, and with the benefit of some reflection, only can help the decision-making process. There is an old adage that there are three oral arguments for an attorney: the one that was planned, the one that was given, and the one that the lawyer wishes had been delivered. That certainly so often has been my experience. Lawyers should have the chance, in short written briefs to give the latter and to explain their position to courts of appeals after the oral argument.

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Previous **Next**

Lawyers, wants to use his new role to support the wider recognition of certified appellate specialization and an increased focus on oral argument.

Litigation

Judges, juries to decide definition of "natural" in food labeling cases

The Food and Drug Administration last week denied requests from two California federal judges to provide more guidance about whether a bioengineered or genetically modified ingredient could qualify as "natural."

Corporate

Wilson Sonsini, Orrick handle $3.2B sale of Nest Labs to Google

Orrick, Herrington & Sutcliffe LLP represented Nest Labs Inc. in the Palo Alto-based startup's sale to Google Inc. Google received counsel from Wilson Sonsini Goodrich & Rosati PC in the deal announced Monday.

Law Practice

Government antitrust lawyer jumps to private practice

A DOJ trial attorney who recently handled a marquee price-fixing case involving electronic liquid-crystal displays will join the Palo Alto office of Wilmer Cutler Pickering Hale & Dorr LLP, the firm announced Monday.

Litigation

New trial motions against Toyota denied

The jury's decision in the first unintended acceleration case against Toyota Motor Corp. to go to trial in California state court will stand, according to a judge's ruling Friday.

Judge formally denies retrial in singer's wrongful death suit

A Los Angeles County Superior Court judge stuck with her tentative ruling and denied a new trial in the wrongful death lawsuit filed by Michael Jackson's family.

Law Practice

Hopkins & Carley names incoming managing partner

Jeffrey E. Essner was elected to a three-year term, replacing William S. Klein, who held the post for 15 years.

Corporate

TCW Group names associate GC

Kevin L. Finch, whose first day was Monday, joins from Freeman, Freeman & Smiley LLP, where he was a partner in the firm's corporate practice group.

Labor/Employment

NLRB case has far-reaching implications