

The Power of the Spoken Word: In Defense of Oral Argument

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INTRODUCTION

In an article published in the Iowa Law Review, n1 Professor Robert J. Martineau vigorously disputes the "conventional view" that oral argument plays an important, if not essential, role in the administration of justice through the appeals process. n2 He asserts that the societal costs of oral argument far outstrip its value. n3 Relying on this premise, Martineau advances a series of novel proposals, leading to the virtual elimination of oral argument as an integral part of the decisionmaking process in intermediate federal and state appellate courts. n4

After serving eighteen years on the federal appellate bench, I am delighted to accept the challenge to oral argument made by Professor Martineau, and to reject his thesis. In this Article, I will first address Martineau's premise that the value of oral argument is greatly overestimated. n5 I will then examine the various proposals advanced by Martineau relating to the administration of the appeals process without oral argument in most cases. n6 In the final part of the Article, I will discuss what I see as the future of oral argument. n7

I. ORAL ARGUMENT: A WORTHY TRADITION OR AN EXPENSIVE HABIT?

Martineau suggests that the tradition of oral argument has become no more than an expensive habit, and, like cigarettes, the habit should be [*36] kicked. In reaching this conclusion, Martineau rejects several justifications for oral argument advanced by proponents.

Martineau identifies two major reasons usually advanced by persons asserting the value of oral argument. First, proponents often contend that oral argument is necessary to provide the judiciary, the least democratic and most isolated branch of government, with some semblance of public visibility and accountability. n8 Second, and more commonly, advocates of the oral tradition assert that oral argument helps judges decide the merits of the appeal before them. n9 Martineau concludes that neither of these reasons constitute sufficient justification for requiring oral argument in virtually every case. n10

A basic flaw in Martineau's analysis is his proposition that the question before the court is whether oral argument is necessary on every issue in every case. The question inevitably leads to the conclusion sought so painstakingly by Martineau. Certainly, society's need and desire to see its judicial system operate in public does not absolutely require oral argument in each of the tens of thousands of appeals taken annually. n11 Moreover, there is no question that some of the appeals taken are frivolous, and do not require oral argument. n12

It cannot be concluded, however, that oral argument is of little value in most cases, simply because it is not necessary in every case. The question must be reframed. Instead of examining the necessity of oral argument in every case, it must be determined whether oral argument is helpful in a substantial number of appeals. On the latter issue, Martineau and I again part company.

In my opinion, oral argument is an essential component of the decisionmaking process, and plays an important role in assisting the appellate judge in reaching a decision. As I recently wrote in another article:

The argument can isolate and clarify the core issues. [Vague points, complex points, and points that were simply overlooked] may become evident during oral argument. Most significantly, oral argument provides the attorney with his or her only opportunity to face and speak directly to the judges about the case and the contentions made by counsel. n13

Chief Justice William Rehnquist stated, during a panel discussion on oral advocacy:

You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what [*37] you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process. n14

The ability to face the court directly provides the litigant with a better opportunity to inform the judges of the litigant's position and the impact that a particular decision will have on the individual parties; cold, printed words convey little in regard to the sense of urgency under which a party may be operating. As Martineau acknowledges, oral argument conveys "emotion" more effectively than does the written word. n15 Martineau deprecates this role of oral argument, stating that courts should make their decisions "on a principled basis, not on an emotional basis induced, in part, by

counsel's rhetoric." n16 Martineau correctly observes that judges want to avoid deciding cases based strictly on emotional responses. Judges ought not to isolate themselves, however, from realities that may be better communicated in face-to-face confrontations. n17

Oral argument also plays an important part in solidifying the collegial operation of an appellate court. Chief Justice Rehnquist explained:

Brief reading is a solitary occupation; it is very difficult to get much out of someone else's reading a brief for you -- it is something you must do yourself, and in a relatively quiet environment. . . . Oral argument, on the other hand, is an essentially collegial function. It is one of only two occasions on which the judges get together to consider the case. n18

Without oral argument, a judge is "isolated from all but a limited group of subordinates." n19 In the Eighth Circuit, where the locations of judges' chambers stretch from Fargo, North Dakota, to Little Rock, Arkansas, oral [*38] argument provides essentially the only time in which the judges meet and engage in collective decisionmaking.

Another essential function of oral argument is to raise the judge's confidence level in the correctness of the decision reached on the case in conference. The argument gives the court, with all the panel members participating, an opportunity to test ideas and to discuss problems about the case with counsel. The free interchange of ideas pursued at oral argument increases the court's ability to reach the right and just result.

According to Martineau, however, the value of oral argument in these cases is largely illusory. Although he agrees that an appellate court must clarify the issues, facts, and arguments of the parties before a just result can be reached in any given case, n20 he disputes the traditional view that oral argument is a desired avenue in which to clarify problems facing the court. n21 Martineau argues that the intermediate appellate courts would be better served by requesting the parties to submit supplemental briefs addressing the courts' questions. n22 He theorizes that oral arguments cannot communicate an idea more effectively than a carefully drafted brief "that can be studied as long as necessary." n23

Martineau asserts that his conclusion that oral argument is largely unnecessary in intermediate courts finds support from increasing numbers of judges. n24 An examination of the articles and statements on which Martineau relies reveals that this assertion rests on chimerical grounds. For example, Martineau relies heavily on comments made by Judge Ruggero J. Aldisert, now Chief Judge of the Third Circuit, that the appellate brief is far more important to the process of deciding an appeal than is oral argument: n25 "To judge [the] relative importance, consider this: Oral argument in a federal appellate court may take fifteen minutes, with most of the time devoted to answering questions from the bench; analyzing a brief consumes hours, if not days, for the judge and his staff." n26 Judge Aldisert stated that "[n]inety-five per cent of appellate cases are won or lost on the basis of written briefs." n27

Judge Aldisert's comments, however, do not negate the significance of oral argument as much as they emphasize the importance of the written brief in the decisional process. n28 I do not question the essential place that [*39] the brief holds in the appellate process. The briefs provide the court with its first look at the case, and it is to the brief that the judge will refer while preparing the opinion.

The central role of the brief, however, does not diminish the vital part that oral argument plays in the decisionmaking process. In my view, Martineau fundamentally errs in believing that brief writing and oral argument serve the same purposes and are interchangeable in our system of appellate review. To compare the role of oral argument to the role of brief writing is akin to comparing lemons to oranges. Both lemons and oranges are citrus fruits, both have pulp and juice, but both serve different purposes.

Oral argument acts as a supplement to the brief, not as a replacement. As Chief Justice Rehnquist explained in a recent article on oral advocacy, "the brief in an appellate court has about the same relation to oral argument as the pleadings in a case do to arguments before the trial judge or even a jury." n29 He compared oral argument and brief writing to the difference between a preview of a movie and the movie itself: "The 'preview' consists solely of scenes from the movie, but the preview selects the dramatic or interesting scenes that are apt to catch the interest of the viewer and make [the viewer] want to see the entire movie." n30

In my opinion, the most significant proof of the unique value of oral argument comes through the testimonials of those persons in the best position to judge -- the appellate judges. In a study of over two hundred statements made by appellate judges in various publications, presentations, and questionnaires, eighty percent of the judges said that oral arguments are very important to the resolution of cases. n31

I have previously conducted studies measuring the impact of oral argument on my decisionmaking process. In a study prepared by myself and Judge Richard S. Arnold, a colleague on the Eighth Circuit, we [*40] concluded that oral argument changed the tentative result that we had reached after reading the briefs in a substantial number of cases. n32 I later compared these results with figures provided to me by Judge George Fagg, a judge who studies the briefs

thoroughly and exhaustively, and found that Judge Fagg likewise changed his initial impression in a lesser but still significant number of cases. n33 These studies find additional support from results reached by other judges. Chief Justice Rehnquist, for example, has stated that oral argument may not cause a 180 degree shift in his tentative impression, but it has "at least chang[ed] some of my ideas . . . in a large minority of the cases that are argued -- somewhere between 25 percent and 50 percent." n34

Martineau acknowledges that oral argument does in fact affect the decisionmaking process by expressing his conclusion that oral argument should be retained as part of the appellate-review process in those appellate courts with mandatory jurisdiction. n35 As Martineau states, these courts, with their discretionary review power, decide cases "that impact far beyond the litigants and the case itself." n36 Because of their role in deciding "important" cases, Martineau suggests that these courts should benefit from whatever value that oral argument might provide in their decisionmaking process. n37

Martineau apparently operates under the belief that the cases decided by appellate courts are, as a whole, of lesser importance, and therefore, have a lesser need for the benefit of oral argument. This conclusion ignores, of course, the fact that the "important" cases decided by the United States Supreme Court and by the state supreme courts usually pass through the scrutiny of the intermediate courts of appeals. Further, a great many "important" cases are never heard by the Supreme Court. Each year, the Supreme Court of the United States takes only a handful of appeals from each circuit. During this past term, the Court granted review in less than [*41] one percent of the total number of cases decided in the Eighth Circuit. n38

I therefore must express my deep conviction that oral argument plays a crucial role in the decisionmaking process of intermediate appellate courts, as well as in the Supreme Court and in the state supreme courts. I believe that Martineau's contentions to the contrary are, quite simply, without support in theory or practice. Nevertheless, I will address the proposals that Martineau advances on the basis of these contentions.

II. THE IMPACT OF ELIMINATING ORAL ARGUMENT

Relying on his conclusion that oral argument adds little value in exchange for its high cost in time and money, Martineau proposes that oral argument be dispensed with in most appeals before intermediate federal and state courts. n39 If the court wishes more information than that contained in the briefs, Martineau states, the court should address written questions to counsel instead of gaining the information through oral argument. n40 Further, in those instances in which an oral dialogue is necessary, Martineau suggests that it be conducted in a "round table" discussion, with the attorneys sitting on one side of the table, and the judges on the other. n41

Regardless of Martineau's protestations to the contrary, I simply do not believe that eliminating oral argument would save enough time and money to compensate for the loss of the benefits accompanying oral argument. Indeed, as noted by one commentator, "the missed opportunity [for the judges] to test and confirm a theory of the case may result in a longer decision time." n42 Some additional problems that would result from adopting Martineau's theory can be observed by examining the present procedures in the Eighth Circuit with regard to argued and nonargued cases.

In the Eighth Circuit, cases are initially screened by a senior staff attorney, who reviews the briefs and record and gives an initial recommendation as to whether and how much oral argument the appeal merits. n43 If the staff attorney recommends argument, the case is placed on the "argument calendar" as receiving an abbreviated ten-minute argument, the [*42] regular twenty-minute argument, or, when the issues are complex, a thirty-minute argument on each side. n44 The Eighth Circuit, however, is increasingly disposing of cases without oral argument. n45 Under Federal Rule of Appellate Procedure 34, a panel of three judges can unanimously agree, pursuant to a local rule, that oral argument is not necessary. At a minimum, the local rule must provide for oral argument in all cases except those in which (1) the appeal is frivolous, (2) the dispositive issue or set of issues has been recently authoritatively decided, or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. n46 The Eighth Circuit has adopted this standard in its local rule 10. n47

When a case appears to meet one or more of these requirements, the staff attorney may recommend that the appeal be decided without the benefit of oral argument. The staff attorney then refers the case to one of the Eighth Circuit's three-judge "screening" panels. n48 The panel n49 reviews the briefs and portions of the record to determine whether the appeal needs argument. If the presiding judge agrees with the staff attorney that the case does not merit argument, the judge, with the aid of the staff, prepares a proposed per curiam opinion, which is circulated to the other judges on the panel. If the other judges agree with the proposed disposition, the case is filed. If any judge disagrees with the disposition, the case is placed on the argument calendar.

The theory behind Rule 34 and its Eighth Circuit counterpart is to save the time and expense of holding unnecessary oral arguments. As explained by Chief Judge Godbold of the Eleventh Circuit:

In a simple case in which the result is clear and no close or significant issues of law are involved, transporting counsel to the place of holding court and paying them for attendance is a waste of societal assets in a world where there are other priorities. . . . Perhaps most important of all, the appellate court's function and [*43] value are demeaned by requiring it to carry out acts merely ceremonial, while pretending the facade is real. n50

The procedure of permitting nonargument cases has some regrettable drawbacks, however. Unlike a case which has received oral argument, for example, no collegial conference between the judges accompanies the disposition of the nonargument case. Moreover, nonargument cases are pre-assigned to the lead judge. In contrast, no assignment is made in argument cases until the conference has discussed each crucial issue and has cast the vote to affirm or reverse. In nonargument cases, consequently, the resulting opinion is essentially the product of one judge and that judge's staff. Moreover, and most significantly for Martineau's theory, it is my experience that nonargued cases almost invariably result in an affirmance of the district court's decision. n51 This trend is reflected in statistics from other circuits, leading one commentator to conclude that "an inverse proportion has arisen between the reversal rate and the growth in the non-argument calendar." n52 I have repeatedly urged counsel for appellants to request oral argument. n53 To waive oral argument is to bypass an important opportunity to influence and even to change the tentative views that the judges hold after reading the briefs.

To some extent, of course, it is difficult to compare what the method of handling nonargument cases under Martineau's theory would be in comparison to the manner in which they are handled now. Currently, aside from pro se appeals, only single issue and noncomplex cases are slotted for nonargument disposition in the Eighth Circuit. n54 I believe that some of the characteristics existing under the present nonargument system would continue under Martineau's revised system, however. Under Martineau's theory, which would require changing Federal Rule of Appellate Procedure 34(a), counsel would lose the opportunity to personally plead the case and give highlight to the important issues. The decisions made, in my judgment, would be more like one-judge opinions than those made after oral argument and a decisional conference. Martineau posits that oral argument is not needed in most cases because, after the judges read the briefs, they can request counsel to [*44] address the court's remaining questions in supplemental briefs. n55 According to Martineau, the court should schedule oral argument, to be held in a "round table" format, only when the supplemental briefs fail to respond adequately to the issues. n56 Martineau contends that the court would both speed up the process and permit counsel time to prepare an adequate response by seeking written answers before scheduling oral argument. n57

I agree with Martineau that posing written questions to counsel before oral argument is appropriate under certain circumstances. n58 Unfortunately, under most circumstances, presenting counsel with different written questions from each judge prior to oral argument may cause, rather than reduce, time delays. For a period of about one year, when presiding at Eighth Circuit panel sessions, I attempted to implement a procedure similar to that suggested by Martineau. Immediately prior to oral argument, I and the other judges would confer and attempt to delineate issues which we believed should be addressed in oral argument. n59 We would then inform counsel that the chosen issues concerned the court. However, prior to hearing oral argument with its clarifying force, the judges were rarely able to agree on which issues controlled the appeal. From that experiment, I concluded that it would be best to allow counsel to set his or her own agenda at oral argument.

Furthermore, Martineau's proposal has the great disadvantage of limiting the court's ability to ask follow-up questions after receiving the response. One question may lead to another. Under the procedure advanced by Martineau, the court would either be forced to issue another list of questions to counsel, schedule oral argument, or leave the questions unanswered.

Finally, Martineau's theory makes no provision to compensate for oral argument's great, and largely unappreciated, benefit of providing a recognizable culmination to the decisionmaking process. Oral argument provides a time when the judges gather in one place to receive answers to all of their remaining questions. The judges know that, soon after the argument, they will be called upon to vote on the result of the case. Oral argument thus serves as a precise and important step in decisionmaking.

At the decisional conference following argument, the voices of counsel [*45] will often continue to be discussed by the judges. Although the judges, upon further review of the briefs and records, may later change their minds, the odds are that the decision to reverse or affirm made at conference will be the ultimate disposition of the case. Martineau's approach offers only a bureaucratic decisional process to replace the dynamism of decisions influenced by the recent oral input of the lawyers.

III. SUGGESTIONS FOR THE FUTURE OF ORAL ARGUMENT

I agree with Professor Martineau in two respects. First, I agree that the "crisis of volume" is reaching enormous dimensions. n60 Second, I agree that not all appeals merit oral argument. I do not believe, however, that the solution is to eliminate oral argument in intermediate appellate courts in all but the most complex cases.

I think the one solution to the current problem is to refine our screening process in order to better identify those cases in which argument would serve little or no purpose. Another solution would be to reduce the number of frivolous appeals in the intermediate courts. Some of the responsibility for this solution would rest with the bar. First and foremost, attorneys should try to make realistic evaluations as to the merits of the appeals. Moreover, appellate courts should attempt to discourage frivolous appeals by imposing sanctions against parties pursuing appeals that are clearly and unquestionably without merit. n61

I believe that another viable alternative is for appellate courts to limit issuance of formal opinions to those cases of general interest and precedential value. In those cases not meeting these criteria, the court would issue a summary disposition after examining the briefs and record, and hearing oral argument. This procedure would be akin to that now followed in the Second Circuit, where the court hears at least abbreviated [*46] oral argument in virtually every case.

n62 Many of the cases receive summary disposition with the presiding judge of the panel writing orders on those cases that do not require detailed written opinions. n63 Interestingly, the Second Circuit maintains one of the best records for early disposition of cases among the courts of appeals. n64

To a certain extent, the Eighth Circuit may already be moving in this direction. For the past several years, this circuit has decided approximately one-third of its cases without oral argument. During the eighteen-month period from January 1, 1985 to June 30, 1986, however, eighty-five percent of the cases were screened for oral argument, and only fifteen percent were screened for nonargument submission. n65 Much of the reason for this shift can be attributed to the use of limited ten-minute arguments in cases of lesser complexity, rather than the standard twenty-minute argument. During this same period, the number of unpublished orders and per curiam opinions has increased dramatically. n66

I believe that the direction in which the court is moving -- more oral arguments and less formal opinions -- is better than the direction suggested by Martineau -- less oral arguments and more formal opinions. Although, in the ideal situation, judges should always write opinions explaining the reasons for the decision, these days of burgeoning caseloads do not permit such a luxury. I, for one, would prefer, in those cases in which no important precedent is involved, to summarily dispose of the appeal after oral argument, when I am reasonably satisfied of the result to be reached, rather than writing an extensive opinion. The saving of time for the judge in the former circumstance can be substantial.

CONCLUSION

As Martineau stresses in his article, oral argument is expensive, both in the time and money that it requires. The problem is especially acute in a circuit as geographically spread as the Eighth Circuit, where travel alone is costly. With the advancement of technology, someday we might be able to reduce these costs by conducting arguments and conferences through an electronic medium that can reproduce both voice and image. Until then, it is my view that, if the case justifies an appeal, it justifies an oral argument.

FOOTNOTES:

* United States Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit. I wish to acknowledge the valuable editorial assistance in the preparation of this article by my former law clerk, Laurie A. Vasichek, J.D., University of Minnesota School of Law, 1985, who is now an associate with Dorsey & Whitney, in Minneapolis, Minnesota

n1 Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986).

n2 For a selection of articles supporting the traditional view of the importance of oral argument, see generally Bright, *The Changing Nature of the Federal Appeals Process in the 1970's*, 65 F.R.D. 496 (1974); Bright, *Oral Argument: Why? How?*, 7 MINN. DEF. 9 (Summer 1986) [hereinafter *Oral Argument*]; Bright & Arnold, *Oral Argument? It May Be Crucial!* 70 A.B.A. J. Sept. 1984, at 68 [hereinafter *Bright & Arnold*]; Cutler, *Appellate Cases: The Value of Oral Argument*, 44 A.B.A. J. 831 (1958); Engel, *Oral Advocacy at the Appellate Level*, 12 U. TOL. L. REV. 463 (1981); Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 CORNELL L.Q. 6 (1955); Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801 (1951) reprinted in 37 CORNELL L.Q. 1 (1951);

Rehnquist, *Oral Advocacy*, 27 S. TEX. L.J. 289 (1986); Rossman, *Appellate Court Advocacy: The Importance of Oral Argument*, 45 A.B.A. J. 675 (1959).

n3 See Martineau, *supra* note 1, at 20-28.

n4 *Id.* at 28-32.

n5 See *infra* text accompanying notes 8-37.

n6 See *infra* text accompanying notes 38-59.

n7 See *infra* text accompanying notes 60-67.

n8 See Martineau, *supra* note 1, at 11-13.

n9 *Id.* at 13-17. Martineau also examines the importance of oral argument to the litigant desiring to persuade the court to reach a favorable disposition. See *id.* at 17-20.

n10 See Martineau, *supra* note 1, at 11-17.

n11 In 1985 alone, a total of 33,880 appeals were docketed in the 12 United States courts of appeals. During the same year, the courts reached disposition on 32,626 appeals. FEDERAL JUDICIAL WORKLOAD STATISTICS 3 (1985). These figures, of course, do not measure the numbers of appeals brought in state appellate courts.

n12 See *infra* text accompanying notes 45-50.

n13 *Oral Argument*, *supra* note 2, at 10.

n14 *Transcription, Jurists-in-Residence Program; St. Louis University School of Law (Apr. 8, 1983)* [hereinafter *Jurists-in-Residence Program*] (discussion on oral argument held between Chief Justice Rehnquist and myself).

n15 Martineau, *supra* note 1, at 15.

n16 *Id.* at 16.

n17 In an article discussing oral argument in the Second Circuit, Judge Irving R. Kaufman also stressed the power of oral argument:

[Oral argument] enables counsel to add the stress and verbal emphasis that cannot be easily communicated on the cold page of the printed brief. The oral argument is counsel's opportunity to persuade, to turn the heads of the judges a little, to leave them with the working hypothesis that his client deserves to win.

Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171 (1977).

n18 Rehnquist, *supra* note 2, at 299-300.

n19 Engel, *supra* note 2, at 472 (quoting P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 17 (1976)). Another commentator described the isolation under which federal appellate judges work as follows:

The work of a federal appellate judge can be lonely and frustrating. The hours are long and the salaries are certainly not commensurate with the responsibility. The process of research and writing incident to deciding cases is necessarily quite monastic. The appellate judge's function calls for many more scholarly research skills than those which a trial judge must develop in refereeing courtroom battles. The court's proper concern is not so much with litigants, but with questions of law and policy which will govern future cases. The scholarship necessary to make reasoned decisions takes place in a private atmosphere, quite remote from the public eye.

Corrigan, *Effective Appellate Advocacy in Criminal Cases in the United States Court of Appeals for the Sixth Circuit*, 12

U. TOL. L. REV. 495, 498 (1981) (footnotes omitted).

n20 See Martineau, *supra* note 1, at 16.

n21 *Id.*

n22 See *id.* at 28-29.

n23 See *id.* at 15.

n24 See *id.* at 22.

n25 See *id.*

n26 Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence -- A View from the Jaundiced Eye of One Appellate Judge*, 11 *CAP. U.L. REV.* 445, 455-56 n.25 (1982).

n27 *Id.* at 456.

n28 The same is true for the other sources cited by Martineau. Interestingly enough, each contains statements supporting the role of oral argument. Martineau, for example, cites Rubin & Ganuchau, *Appellate Delay and Cost -- An Ancient and Common Disease: Is it Intractable?*, 42 *MD. L. REV.* 752 (1983), Martineau, *supra* note 1, at 3 n.7, wherein Judge Alvin B. Rubin of the Fifth Circuit and Gilbert Ganuchau, the Clerk of Court for the Fifth Circuit, stated that the disposition of cases without oral argument results in a substantial savings in time and money. See Rubin & Ganuchau, *supra*, at 761-62. They went on to outline, however, the significant disadvantages that result from bypassing oral argument:

The most important is that counsel is deprived of the opportunity to face the decisionmakers and to attempt to persuade them. The opportunity for oral argument is traditional, but more than the elimination of custom is involved. Oral argument gives the suitors and their counsel a higher degree of assurance that they have had a fair opportunity to present their case and to put the issues before the judges who make the decision. The give-and-take of questioning helps minimize the suspicion that the judge did not understand the case or that he delegated the decision to a clerk.

Id. at 762. The authors also acknowledged that oral argument "helps the court write a better opinion for it affords an opportunity to ask questions about the issue and the record and to explore matters not adequately presented in the briefs." *Id.*

Statements outlining the benefits of oral argument can be found in other sources relied on by Martineau. See Martineau, *supra* note 1, at 4 n.14, citing Holmes, *In Support of Appellate Briefing*, 58 *OHIO ST. B.A. REP.* 1016, 1020 (1985) (oral argument helps courts receive answers to troublesome questions, allows counsel to focus on central issues, and can change judge's mind on case's disposition); Leavitt, *The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures*, 4 *PAC. L.J.* 1, 20 (1973) ("On every issue for which a judge has questions, the courtroom should be opened for possible spoken answers.").

n29 Rehnquist, *supra* note 2, at 298.

n30 *Id.* at 299; see also Kaufman, *supra* note 17, at 171 ("An oral argument is as different from a brief as a love song is from a novel. It is an opportunity to go straight to the heart!").

n31 MARVELL, *APPELLATE COURTS AND LAWYERS* 75 & n.7 (1978).

n32 Judge Arnold and I kept records of our impressions of the arguments we heard between September 1982 and June 1983. For each case we noted whether we believed that oral argument had been necessary and whether it had changed our tentative opinions. My records revealed that oral arguments changed my perceptions in 31% of all cases argued, and in 37% of those cases in which I deemed that oral argument had been necessary. Judge Arnold's records indicate that he changed his tentative disposition in 17% of all cases, and in 22% of the cases in which he determined oral

argument was necessary. See Bright & Arnold, *supra* note 2, at 70.

n33 Judge Fagg recorded his reactions to oral arguments during September, October, and December sessions in 1984. Judge Fagg's tabulations reveal that oral argument changed his mind in 13% of all cases argued, and in 21% of those cases in which he believed oral argument had been necessary. See Oral Argument, *supra* note 2, at 9.

n34 Jurist-In-Residence Program, *supra* note 14, at 18; see also Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 254 (1975) (quoting Supreme Court Justice William Brennan at Third Circuit Judicial Conference in 1972: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument.").

n35 Martineau, *supra* note 1, at 5 n.15.

n36 *Id.*

n37 See *id.*

n38 For the period between July 1, 1985, and June 30, 1986, the Supreme Court granted review in 12 cases. During the same period, the Eighth Circuit disposed of 1,976 cases. These figures, and other figures relating to the Eighth Circuit, were compiled by Robert St. Vrain, Clerk of Court for the Eighth Circuit Court of Appeals.

n39 Martineau, *supra* note 1, at 21.

n40 *Id.* at 29.

N41 *Id.* at 30.

n42 See Baker, A Compendium of Proposals to Reform the United States Courts of Appeals, 37 U. FLA. L. REV. 225, 245 (1985); see also Carrington, Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 558 (1969) (elimination of oral argument deprives judge of important opportunity to test and confirm opinion, potentially increasing decision time).

n43 See 8TH CIR. R. 10(a); see also Heaney, The Appeals Process in the Eighth Circuit, 78 F.R.D. 261, 262-63 (address delivered before 1977 Eighth Circuit Judicial Conference); Ubell, Report on Central Staff Attorneys' Offices in the United States Courts of Appeals, 87 F.R.D. 253, 290-93 (1980).

n44 See 8TH CIR. R. 10(b). The panel hearing the argument can modify these initial allotments of time.

n45 See *infra* text accompanying notes 65-67.

n46 See FED. R. APP. P. 34(a).

n47 See 8TH CIR. R. 10(c).

n48 The Eighth Circuit's Manual of Internal Operating Procedures describes the "screening panel" as follows:

All active judges of this Court, except the chief judge, sit on the nonargument panels. Occasionally, senior judges and specially assigned district judges also serve. At any given time there are at least two such panels in operation. Judges are assigned to the panels on a periodically rotating system.

The major function of the nonargument panels is to decide cases screened and classified for nonargument submission, pro se cases, and 8th Cir. R. 12 motions by the parties to dismiss for lack of jurisdiction. Cases dismissed, affirmed or, in rare instances, reversed, on the Court's own motion at the early stages of the appeal may also be decided by the nonargument panels.

INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
§ I(C)(2), at 3.

n49 Judges on the panel are selected on a rotation basis. *Id.*

n50 Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A. J. 863, 865 (1980), quoted in Baker, *supra* note 42, at 244.

n51 The high affirmance rate reflects an informal policy of some judges on the Eighth Circuit not to reverse a case without oral argument. Moreover, the frivolous appeals and other cases likely to produce an affirmance find their way to the list of cases decided without argument.

n52 Baker, *supra* note 42, at 245.

n53 See Oral Argument, *supra* note 2, at 17-18; Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A. J. 1136 (1981).

n54 One commentator contends, at least by implication, that some courts are deciding relatively complex cases without oral argument. This commentator noted that, in recent years, between 40% and 50% of the appeals decided by the courts of appeals are decided without oral argument. See Baker, *supra* note 42, at 244. The percentage for the Eighth Circuit is much lower: only one-third of the appeals decided by this court in the past several years were done so without the benefit of oral argument.

n55 Martineau, *supra* note 1, at 29.

n56 See *id.* at 30.

n57 See *id.* at 29.

n58 For example, the court may want supplemental briefs addressing issues that arose subsequent to filing of the parties' main briefs, such as a new Supreme Court case which may affect the disposition of the appeal. It is not unusual for an Eighth Circuit panel to request supplemental briefs when all the judges agree to do so. These briefs are sometimes requested before and sometimes requested after oral argument.

n59 The idea for having "preargument conferences" came from a suggestion given me by Judge Irving Goldberg of the Fifth Circuit Court of Appeals.

When sitting as a visiting judge with the Second Circuit in October 1980, I observed and participated in a preargument procedure in which the panel exchanged preliminary written views about the issues in the appeal. After this exchange, the judges' questions focused on the areas of disagreement or uncertainty that had surfaced in the exchange of views by members of the panel. This procedure also served as a preargument "flushing out" of difficult legal issues in the case.

n60 Statistics regarding the increase in the number of cases docketed in the United States courts of appeals are to some extent, misleading because they do not make provision for the increase in the number of judges sitting on the courts. The figures are no less astounding when the increase in the number of judges is considered, however, as a recent study shows:

Year	Appeals	Per 3-Judge Panel
1940	3,446	124
1950	2,830	131
1960	3,895	172
1970	11,662	361
1980	23,200	527
1984	30,000+	700+

Baker, *supra* note 42, at 235. For a dated examination of caseload problems facing state appellate courts, see generally, M. OSTHUS & R. SHAPIRO, *CONGESTION AND DELAY IN STATE APPELLATE COURTS* (1974).

n61 See Baker, *supra* note 42, at 271-73 (describing sanctions that courts could impose for bringing frivolous appeals); FED. R. APP. P. 38 (authorizing award of damages and costs to appellee responding to frivolous appeals); 8TH CIR. R. 16(e) (assessing costs of frivolous petitions for rehearing); 8TH CIR. R. 17 (c) ("On its own motion the court may grant an allowance of reasonable attorney's fees to a prevailing party in appropriate cases."); see also *Uekert v. Commissioner*, 721 F.2d 248, 250 (8th Cir. 1983).

n62 Kaufman, *supra* note 17, at 171; see generally J. HOWARD, *COURTS OF APPEALS ON THE FEDERAL JUDICIAL SYSTEM* (1981).

n63 I served as a visiting judge with the Second Circuit in October 1980, and personally observed the efficiency, speed, and excellence of this method of appeals disposition.

n64 In 1984 (July 1, 1983, to June 30, 1984), for example, the median time for an appeal to be in the "pipeline" -- from filing the record to disposition -- was in excess of eight months. The median time in the Second Circuit was 6.6 months. FEDERAL COURT MANAGEMENT STATISTICS FOR 1984, at 13, 15 (1984).

n65 See Bright & Arnold, *supra* note 2, at 70.

N66 In the Eighth Circuit, unpublished opinions and orders have no precedential effect. During fiscal 1985, the Eighth Circuit issued 769 published opinions and 419 unpublished orders and opinions. In contrast, the court issued 654 published opinions in fiscal 1986, but 711 unpublished orders and dispositions.