FOCUS ON THE CRUCIAL ISSUE

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I remember seeing as a lawyer a framed statement made by Abraham Lincoln: "Time is a lawyer's stock in trade."[1] Now, as an appellate judge, I observe that time may be both a friend and an enemy. Time is a friend if it is ample enough for us to give deep and thorough consideration to the issues that come before our court. Time is an enemy, however, when the crunch of heavy caseloads—or even the sheer number of issues presented by a single case—makes it difficult for us to give proper treatment to all of the matters raised by the parties. Perhaps nowhere is this phenomenon more apparent, and the need for a focused use of time more acute, than in oral argument.[2]

I have always been of the view that, in most cases, there should be time allotted to oral argument.[3] Oral argument can certainly be very helpful in a judge's decision-making process.[4] But based on my experience as an appellate judge, with over

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1. "A lawyer's time and advice are his stock in trade" is attributed to Abraham Lincoln. OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 257 (Fred Shapiro, ed., 1993).

2. The relatively short time allowed for oral argument requires that argument be carefully crafted to fit the time allotted. *See* John Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976). In other words, quite often the breadth of counsel's discussion must be limited in favor of depth.

3. In fact, the revision to rule 34 that was effective on December 1, 1998, reemphasizes the importance of oral argument in the appellate process. The revised language provides, "(2) Standards. Oral argument *must* be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary . . . ." FED. R. APP. P. 34(a)(2).

4. *See* Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986); Myron H. Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A. J. 1136 (Sept. 1981), updated in 1996 under the title *How to Win on Appeal: The New Ten Commandments of Oral Argument*, TRIAL, July 1996, at 68.

thirty years invested in examining briefs and hearing the oral arguments in over 5,000 cases, it is my opinion that the great majority of cases turn on a single issue. At most, perhaps two or three core questions are crucial. Yet almost invariably, the petitioner will raise a number of additional issues for the court to review and decide. Few of these fringe issues ever produce a reversal, and most of the time they should be considered secondary to the heartwood of the case.[5]

It seems to me that the appellate process would be improved if both attorneys and judges were required to focus on the one or two most important issues. Then, at the very least, the parties would be assured that the most important matters receive adequate attention from the court. Moreover, the court would be free to focus on the most vital questions, leaving lesser problems to a more cursory review. But by what process or method are we best able to define what questions are, in fact, the most important?

Early in my judicial career, the late Judge Irving Goldberg, United States Circuit Judge for the Fifth Circuit, and I often exchanged views about how to most effectively use our time on and off the bench. We concluded that all parties involved would benefit if we, as judges, could agree on the most important issue in the case and then direct the attorneys to argue that particular point.[6] To improve oral argument, we both resolved to try to get

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5. The Honorable Robert H. Jackson advised appellate advocates that

> [o]ne of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951).

6. Indeed, occasionally the Supreme Court utilizes the certiorari process to direct the parties to focus on an issue of particular concern. For example, in *Wright v. West*, 502 U.S. 1021 (1991), the Court directed the parties as follows:

> In addition to the questions presented by the petition, the parties are requested to brief and argue the following question: In determining whether to grant a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state

the lawyers to focus on what we thought would be the most important issue and thereby streamline our process of decision making.

We thought that we could implement this plan by discussing the issues with the other judges in advance of oral argument. The goal would be to reach agreement among the judges as to what we ought to suggest that the lawyers argue. Unfortunately, my experience with this technique was not a very good one. For whatever reason, the judges on the panel could seldom agree, at least at the beginning of oral argument, about what would be the most important point.[7] Judge Goldberg never told me of his experience, but I imagine that it might have been similar.

On the other hand, in the 1970s, I sat with the Second Circuit, where, at that time, the judges exchanged views about the cases prior to oral argument. This early exchange of views left oral argument as an opportunity to fill in the areas where the judges might have some disagreement. The approach made me uncomfortable, however, because the judges seemed to make many substantive decisions without the benefit of oral argument. Only if the judges disagreed would oral argument have an impact on the decisional process.

Nevertheless, despite the outcome of my failed experiment and my misgivings about the process used in the Second Circuit, I am convinced there ought to be a procedure by which lawyers can inform the judges, and in turn judges can inform lawyers, about what one or two issues are really crucial to a decision.[8]

I propose that we try, at least on an experimental basis, an approach by which both the petitioner's and the respondent's lawyers would highlight the most important issue or issues, so as

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court's application of law to the specific facts of the petitioner's case or should it review the state court's determination de novo?

Id. at 1021.

7. It is not clear why judges assigned to a panel would be unable to agree on which issues warrant argument, since local rules routinely provide that panels may determine that oral argument is not warranted at all. *See, e.g.*, 4TH CIR. R. 34(a).

8. The Third Circuit has in fact adopted a process by which the court may advise counsel of the issues a panel is particularly interested in hearing argued. *See* 3D CIR. R. 34.1(c). Apparently, however, it is rarely used. In addition, the Fifth and Sixth Circuits have adopted local rules requiring counsel to direct the court's attention to issues warranting oral argument. *See* 5TH CIR. R. 28.2.4; 6TH CIR. R. 9(d).

to focus the judge's attention on those particular matters, without waiving the client's rights as to any other issues. With that preliminary input, the judges would be better able to determine the most important issues in the case, which counsel might then address at oral argument. I suggest a pilot program to be undertaken by one of the circuits.

The pilot program could provide that rule 28(a)(5) of the Federal Rules of Appellate Procedure[9] be modified to provide for (1) a statement of the issues presented for review, with a notation to the court of the one or two most important issues and (2) a statement of the issues that counsel is prepared to argue during the time allotted at oral argument. A similar rule would, of course, apply to the respondent's brief, through a parallel change to rule 28(b).[10]

Again, this procedure would require appellate lawyers to focus on what points of law each side believes to be paramount and dispositive. While no rights would be waived, the lawyers would thus give the judges some notice of what the lawyers thought to be most important in the case. Once the court has had an opportunity to review the briefs, and within a few days of oral argument, the judges could suggest the issue or issues that should be argued without limiting the options available to litigants and their representatives. This procedure could be handled by an amendment to rule 34(c) of the Federal Rules of Appellate Procedure.[11] Rule 34(c) in the pilot program might read:

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9. Rule 28(a)(5) currently provides: "(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated: . . . (5) a statement of the issues presented for review." FED. R. APP. P. 28(a)(5) (amended effective Dec. 1, 1998).

10. Rule 28(b) would be amended to permit the appellee's counsel to designate additional issues warranting oral argument. The rule currently provides:

> (b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:
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> (1) the jurisdictional statement;
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> (2) the statement of the issues;
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> (3) the statement of the case;
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> (4) the statement of the facts; and
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> (5) the statement of the standard of review.

FED. R. APP. P. 28(b) (amended effective Dec. 1, 1998).

11. Rule 34(c) currently reads, "Order and Content of Argument. The appellant opens

> *Order and content of argument.* The appellant opens and concludes the argument. Counsel must not read at length from briefs, records or authorities. *The court may suggest issues of greatest concern. The parties should be prepared to discuss such issue or issues fully on oral argument.*

In sum, this process would enable lawyers to suggest to the court issues each believes to be crucial to the case and would require judges to advise the lawyers prior to oral argument what they think are the issues that need discussion in oral argument.[12] By means of such an enhanced focus, the appellate process would do more to ensure that what the lawyers and judges feel to be most important will not be overlooked but will, instead, be given appropriate and adequate time and consideration. Some may argue that when crucial issues are highlighted, other secondary issues will not command as much of the judges' personal attention. In the long run, however, I suspect that when judges are given the opportunity, as a result of the lawyers' selection and their review of the briefs, to address those issues that truly matter, time will be better spent and justice better served.

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and concludes the argument. Counsel must not read at length from briefs, records, or authorities." FED. R. APP. P. 34(c) (amended effective Dec. 1, 1998).

12. Rule 34 of the Federal Rules of Appellate Procedure was amended, effective December 1, 1998, to include a provision permitting parties, and further allowing local circuits to *require* parties, to submit to the court "a statement explaining why oral argument should, or need not, be permitted." FED. R. APP. P. 34(a)(1) (amended effective Dec. 1, 1998). In permitting the circuits by local rule to require a party to provide a statement setting forth reasons why oral argument should or should not be granted, the revision of Rule 34 may prove a step in the right direction. Implementation of this procedure will provide a vehicle for counsel to focus the court's attention on the issue or issues most likely requiring additional discussion in oral argument.