"Request for Oral Argument Denied:"

The Death of Oral Argument in Alabama's Appellate Courts

By J. Mark White

If your work as a lawyer includes any type of appellate practice, ask yourself: When was the last time an Alabama appellate court granted your request for oral argument? A simple comparison of the total number of cases filed in the appellate courts with the number of cases in which the request for oral argument was granted reveals a significant gap. Ask your colleagues when they last argued before the appellate courts and the answer will reveal the same. I propose that the lack of oral argument in Alabama's appellate courts is denying our clients the full benefit of our judicial system, especially the appellate system.

During the last six years, an average of 2,100 cases were filed each term in the Supreme Court of Alabama.[1] However, during this same period, the average number of oral arguments were only 25 each year.[2] During this entire six-year period, the Alabama Court of Civil Appeals granted oral argument in only 12 cases, and there were two consecutive years where no oral argument was held.[3] Over the last seven years, the Alabama Court of Criminal Appeals has averaged only 22 oral arguments annually.[4] I strongly suspect that if death penalty cases were excluded, the average yearly number of cases in which the request for argument was granted in both the Alabama Supreme Court and the Court of Criminal Appeals would hover in the single digits.

When compared with appellate court activity in other jurisdictions, Alabama's numbers are drastically low. In 2006, appellate courts in both Louisiana and New Hampshire heard oral argument in 39 percent of the cases docketed for appeal.[5] The District of Columbia Court of Appeals heard oral argument in 31 percent of its cases.[6] Historically, approximately 98 percent of the cases before the Supreme Court of Kansas and approximately 60 percent of the cases before the Kansas Court of Appeals were allowed oral argument.[7] For the 2007 October term, the Supreme Court of the United

States set aside 28 days for oral argument and as of December 31, 2007, has already scheduled oral argument in 50 cases.[8]

Considering the total number of appellate cases that were argued in Alabama over the last six years, an Alabama litigant might be more likely to be struck by lightning than to have appellate oral argument granted. The declining trend in oral argument suggests that the appellate courts of Alabama are abandoning, or have in fact already abandoned, the practice of oral argument. As lawyers in Alabama, we should be asking the appellate courts why oral argument has declined so significantly and how is this affecting Alabama's judicial system. In a state where our appellate judges[9] are selected by popular vote, Alabama citizens are entitled to the answers to these questions.

Justice William J. Brennan observed:

> [O]ral argument is the absolutely indispensable ingredient of appellate advocacy . . . . [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument . . . . Often my idea of how a case shapes up is changed by oral argument . . . . Oral argument with us is a Socratic dialogue between Justices and counsel.[10]

Justice Antonin Scalia asserts that he uses oral argument "[t]o give counsel his or her best shot at meeting my major difficulty with that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'"[11] Oral argument allows judges to probe the depth of counsel's arguments and positions, to test counsel's conviction and belief in his own assertions, and to satisfy the judge's own intellectual curiosity.[12] Oral argument provides the opportunity for the appellate judges to listen to the questions posed by their colleagues and gain insight as to how their brethren on the bench are thinking.[13] The mere preparation for oral argument can stimulate the members of the bench to fully explore the theoretical and practical consequences of a case's outcome. Conscientious preparation can instill a greater appreciation of the issues involved and the interests at stake. Scholars suggest that some appellate court members use information tactically mined during oral arguments to build consensus for majority opinions.[14]

Oral argument is also an opportunity for counsel to defend her theory of the case and engage the bench in a conversation about key legal and factual issues. Perhaps most importantly for the practitioner, recent studies have shown that a good oral argument can significantly increase the chances of winning on appeal.[15] As Judge Joel Dubina of the Eleventh Circuit Court of Appeals has noted, "I have seen cases where good oral argument compensated for a poor brief and saved the day for that litigant. I have also seen effective oral argument preserve the winning of a deserving case."[16]

As the third governmental branch of American democracy, the judiciary has a tremendous affect on the populace. But its role, while highly publicized, is arguably the least *public*. Oral arguments, which in Alabama are open to the public, are virtually the only time when a citizen can come into contact with an appellate judge while that judge is doing her job. "The Court's authority–possessed of neither the purse nor the sword–ultimately rests on sustained public confidence in its moral sanction."[17] The importance of appellate oral argument cannot be overestimated in its role of conveying a semblance of visibility and accountability[18] to an institution that can otherwise be perceived as closed to the very people who elect the members of its bodies.[19] Oral argument can and does provide and preserve the appearance of justice.[20]

Consistent denial of oral argument can, at a very minimum, create the perception that the courts are not interested in hearing what the parties and their counsel have to say. When the entire appellate decision-making process is conducted behind closed doors on the basis of written submissions alone, the people, the bar *and the courts* lose the humanizing "face" that oral argument provides. Oral argument gives both counsel and litigants the opportunity to experience and participate to some degree in the workings of the appellate court. Oral argument provides great institutional value to the appellate courts as the rule of law depends upon the peoples' belief in the institution of law and their acceptance of the judicial decisions.[21] As Justice Scalia noted, "[w]ise observers have long understood that the appearance of justice is as important as its reality."[22] Truly, "justice must satisfy the appearance of justice."[22] The impact that oral argument has on the perception of the parties as to the legitimacy of our legal system is compelling.[24]

While there may always be debate over the merits of appellate oral argument,[25] time and again prominent jurists have emphasized its value. In a recent lecture on oral advocacy delivered at Cornell University, retired Justice Sandra Day O'Connor made the following observation:

> Oral argument, now, is very different than it was in the early days of the court . . . . But one thing hasn't changed since the days when Chief Justice (John) Marshall favored (William) Pinkley with high praise. As Chief Justice Marshall recognized, a justice's best work requires the clear-headed guidance of a brilliant oral advocate . . . .[26]

Justice O'Connor's words are not merely lip-service to an old, outmoded tradition. Arguments should be valued by judges for the clarity and fresh perspectives they may provide to a case. Justice O'Connor has also noted that Chief Justice John Roberts has called oral argument "[a] time, at least for me, when ideas that have been percolating for some time begin to crystallize."[27]

Oral argument provides a court with the opportunity to engage in a structured dialogue with those who should be the most knowledgeable source of the facts and legal issues regarding a particular

…a good oral argument can significantly increase the chances of winning on appeal.

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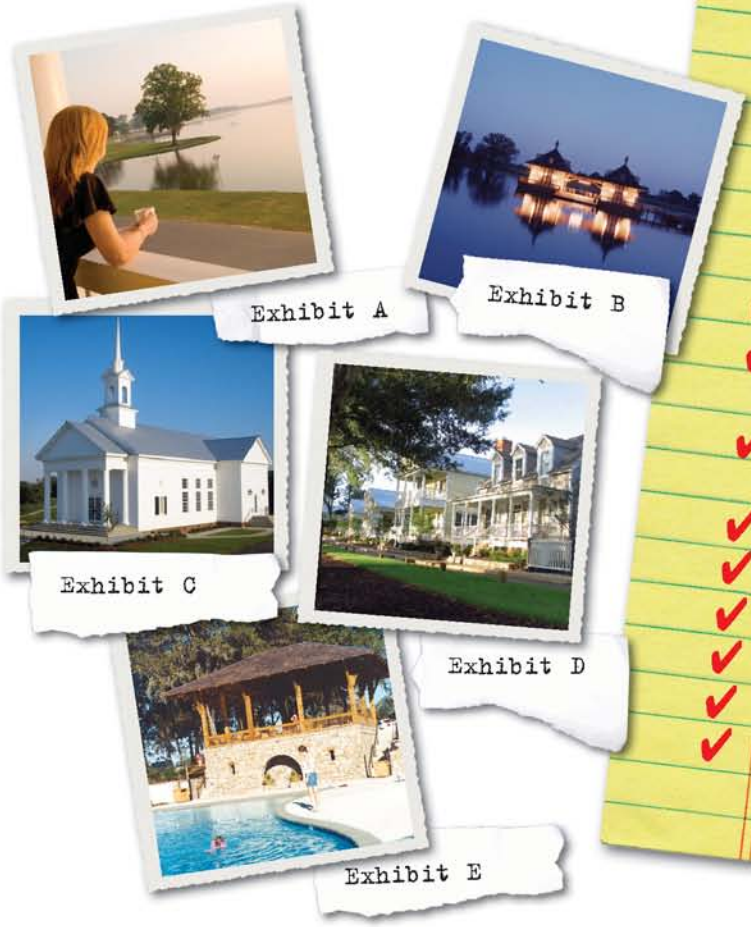

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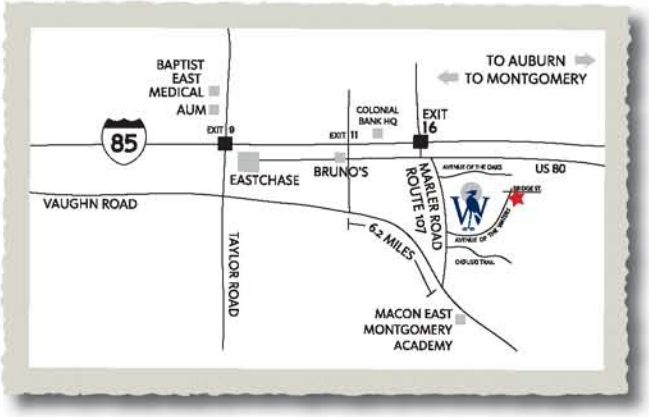

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case–appellate counsel. Through their questions, judges can use this time to explore the potential results and consequences a particular decision may have. Issues discovered during oral argument can be returned to counsel for further briefing, thereby allowing a more complete development of the issues and the impact a particular outcome will have, not on only the appellate litigants, but on society as a whole.[28]

The appellate court may test the boundaries of a party's position through questions about hypothetical situations, or it may attempt to force concessions. This back-and-forth method of communication is unique to the process of appellate review in at least two respects. First and foremost, oral argument is often the only opportunity for the court to meet face-to-face with counsel prior to rendering a decision. Second, it also provides one of the few times that the members of a court will meet together as a group to address a particular case. Supreme Court Justice Byron R. White has characterized oral argument as a time when "all of the Justices are working on the case together, having read the briefs and anticipating that they will have to vote very soon, and attempting to clarify their own thinking and perhaps that of their colleagues."[29]

Important as this dialogue is for an appellate court, it also provides an advocate with his best and probably only chance to address those issues over which the judges seem to be most troubled. Oral argument gives counsel the opportunities to attempt to assuage any doubt and direct the bench toward the dispositive issues and facts of the case. In this way, the court's questions become not only a test but a tool for the advocate to use in tailoring an argument that creates a greater likelihood of a favorable ruling on appeal.[30]

Judge Myron H. Bright of the Eighth Circuit Court of Appeals is a staunch supporter of appellate oral argument and has written several articles on the topic. In his 1986 article, *"The Power of the Spoken Word: In Defense of Oral Argument*," Judge Bright outlines his views on the critical importance of appellate oral advocacy for both judges and lawyers.[31] Judge Bright notes that, in addition to providing a public face for the appellate courts and a dialogue between judges and lawyers, oral argument "[p]rovides 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 . . . ."[32] Additionally, Judge Bright observes that oral argument is much more effective at communicating emotion than a written brief. Although appellate decisions should not be made on the basis of emotion, Judge Bright advises that "judges ought not to isolate themselves . . . from realities that may be better communicated in face-to-face confrontations."[33]

An attorney who is sure of her case and confident in her abilities should relish the opportunity to argue before the very judges who will ultimately decide the issues.[34] While oral argument can never replace the written brief, it serves the crucial role of providing one more opportunity to influence the court's opinion.[35] From the practical perspective of

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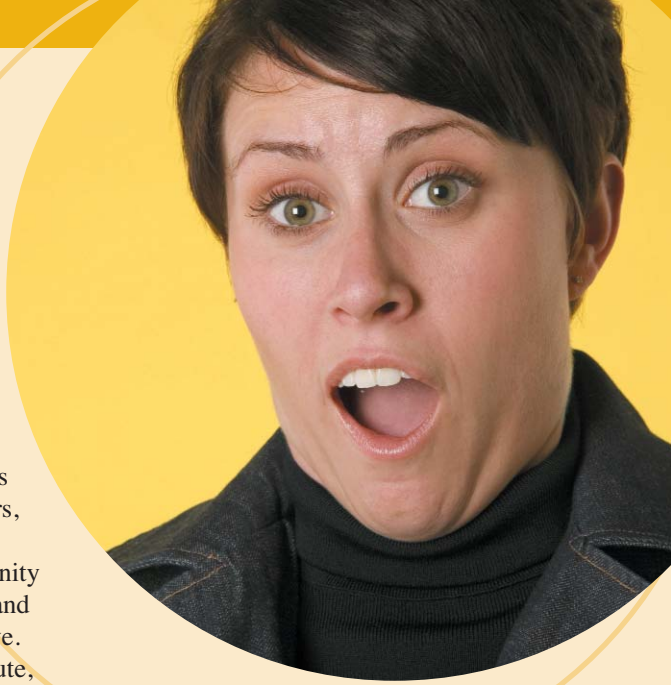

an advocate, appellate oral argument simply *works*.[36] Judge Bright also conducted a study on the efficacy of oral arguments in his court. Using his notes from oral arguments, as well as those of colleagues Judge Richard S. Arnold and Judge George G. Fagg of the Eighth Circuit Court of Appeals, Judge Bright concluded that oral argument changed his tentative opinion in 31 percent of all cases argued. The opinions of Judge Arnold and Judge Fagg were likewise influenced in 17 percent and 13 percent respectively of all cases argued.[37]

Further bolstering Judge Bright's conclusions are those of a recent study using Justice Harry Blackmun's grading of oral arguments.[38] Legal scholars studied Justice Blackmun's grading presented in a random sample of 539 cases decided between 1970 and 1994, and concluded that the quality of oral argument correlated highly with a justice's final vote on the merits. This was true even after consideration of each justice's ideological inclination.[39] These concrete results should inspire any advocate to treat oral argument as a valuable weapon in his arsenal. Basically, a good oral argument gives an advocate a better chance of winning on appeal. However, the advocate must first be given the opportunity to make that argument.

In light of these facts and considerations, the declining trend of oral argument at the appellate level in Alabama is a cause for concern for all–judges, attorneys and the citizens of Alabama. The loss of a very critical part of our system of justice can only diminish the public's confidence in our court system. The blame for this substantial loss must be placed directly at the feet of those lawyers and judges who do nothing to mitigate the infrequency of oral argument. As Justice John M. Harlan noted:

> [T]he job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.[40]

Without a change of course by the Alabama appellate courts, everyone stands to lose. The appellate courts lose a valuable opportunity to gain information and maintain their collegial function, and possibly even their authority and credibility with the public. Members of the bar lose the opportunity to interact with the court and to provide a full and fair presentation of the arguments of their clients.[41] The public at large loses a component of its voice in the courts, as well as its only opportunity to see this branch of democracy in action.

Does Alabama have an elected judicial system that is open for public review and subject to legal debate, or do we have an elected judicial system that is closed out of fear of public skepticism, a system where legal debate would simply interfere with pre-determined conclusions? These questions must be addressed and answered by lawyers, judges and legal scholars, as well as by voters seeking to preserve what we know to be the best system of justice in the world.

The bottom line is that we live in a society that is becoming increasingly skeptical and distrustful of its elected leaders and of government, including the courts, individually and as institutions. Oral argument opens the courtroom to the litigants and the public and, by so doing, sheds light on the appellate decision-making process and thereby encourages respect for the rule of law. By this means, all of us–the litigants, their counsel, the bar, the individual judges, and the court as an institution–win. ▲▼▲

Endnotes

1. Statistics obtained from Alabama Clerks of Court.
2. *Id.*
3. *Id.*
4. *Id.*
5. Statistics obtained from the National Center for State Courts.
6. *Id.*
7. *Id.*
8. *www.supremecourtus.gov/oral_arguments/argument_calendars.html* (last visited December 27, 2007).
9. Although "judge" is the term used to describe members of Alabama's courts of civil and criminal appeals, and the term "justice" describes a member of Alabama's Supreme Court, for simplicity I use the term "judges" in this article to cover both appellate judges and justices.
10. Robert L. Stern, et al., Supreme Court Practice: For Practice in the Supreme Court of the United States 671 (2002) (quoting Harvard Law School Occasional Pamphlet No. 9, 22-23 (1967)).
11. Hon. Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139, 142 (2003) (quoting Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, 15 LITIG. 33, 33 (spring 1989) (in turn citing *This Honorable Court* (WETA television broadcast 1988))).
12. Interestingly, recent research suggests that "by keeping track of the number of questions each Justice asks, and by evaluating the relative content of those questions, one can actually predict before the argument is over which way each Justice will vote." Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 272 (2004).

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13. As Senior Judge Frank Coffin of the First Circuit Court of Appeals noted, "[h]ow often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was more, much more to the case than met my eye." Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25, 27 (winter 1999) (internal citation omitted).
14. *See, e.g.,* Timothy R. Johnson, Oral Arguments and Decision Making on the United States Supreme Court (2004); Timothy R. Johnson, et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 Am. Pol. Sci. Rev. 99 (2006).
15. Johnson, *The Influence of Oral Arguments on the U.S. Supreme Court*, *supra* note 14.
16. Joel F. Dubina, *From the Bench: Effective Oral Advocacy*, 20 Litig. 3, 3-4 (winter 1994).
17. *Bush v. Vera*, 517 U.S. 952, 1048 n.2 (1996) (quoting *Baker v. Carr,* 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting)).
18. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 Iowa L. Rev. 35, 36 (1986).
19. Addressing the significance of a downward trend in the percentage of appellate oral arguments heard in her home state, former Texas appellate Justice Susan Larsen made the following observations:

    > [J]udges serve the people. They are not direct representatives as are legislators, but it is their job to decide disputes among real people, not just theorize with briefs and transcripts and law books and computer research. Listening to the representatives of those people, even for fifty minutes, focuses the minds of the judges on the dispute. It gives the entire panel, not just the single judge writing the opinion, a period of time to contemplate that case alone; asking questions, mulling through logical consequences, and doing their job. It promotes discussion amongst the judges, highlights their differing outlooks, enhances critical thinking and results in better law. More than that, oral argument is the only opportunity the public has to observe the decision-making process at work; every other aspect of appellate opinion-making is secret.

    Susan Larsen, *Wanna Talk? No, Not Really*, The Texas Blue, Jan. 15, 2007, *www.thetexasblue.com/ wanna-talk-no-not-really* (last visited Jan. 2, 2008).
20. In his dissent in *Kleindienst v. Mandel,* 408 U.S. 753, 776 n.2 (1972), Justice Marshall observed:

    > [T]he availability to us of briefs and exhibits does not supplant the essential place of oral argument in this Court's work. Lengthy citations for this proposition, which the majority apparently concedes, are unnecessary. I simply note that in a letter to Henrik Lorenz, accepting an invitation to lecture at the University of Leiden and to discuss "the radiation problem," Albert Einstein observed that "(i)n these unfinished things, people understand one another with difficulty unless talking face to face."
21. In *Payne v. Tennessee,* the concurrence noted Justice Marshall's explanation:

    > that '"[t]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself."' *Flood v. Kuhn,* 407 U.S. 258, 293, n. 4, 92 S. Ct. 2099, 2117, n. 4, 32 L. Ed. 2d 728 (1972) (dissenting opinion) (quoting Szanton, *Stare Decisis; A Dissenting View*, 10 Hastings L.J. 394, 397 (1959)) (internal quotation marks omitted).

    501 U.S. 808, 834 (1991).
22. *J.E.B. v. Alabama ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).
23. *Levine v. United States,* 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)).
24. Justice Simeon R. Acoba, Jr., 11 Hawaii Bar Journal 4, 9-10 (May 2007).
25. An indication of the importance of oral argument is the fact that beginning in October 2006, the United States Supreme Court has made transcripts of oral arguments available free to the public at its Web site, *www.supremecourtus.gov,* on the same day that the argument is heard by the Court.

In explaining the disproportionately high percentage of cases argued orally in the Second Circuit Court of Appeals, one commentator noted:

> The Second Circuit might justify its preference in two ways. First, the court may view universal oral argument as a decision-enhancing mechanism. Even in cases that appear straightforward on the briefs, oral argument may alter the way the panel views the case. In some small body of cases, it may even result in a change in the direction or the terms of the court's ultimate decision. Alternatively, the court may view universal oral argument as a perception-enhancing mechanism. That is, even if the court feels that the oral argument provides no actual benefit in terms of the decisions it reaches, it may still prefer them because it is a low-cost way to attain the valuable benefit of an improved perception of fairness by litigants. This would be true if litigants view oral argument as an important symbol that the court is taking its case seriously and considering it carefully. In either case, the rule is in place precisely because the court expects that it will have some effect on outcome or perception of outcome. There is a final possibility that is independent of any such anticipated effect. The court may think that the time and resources necessary to identify cases that would be candidates for decisions without oral argument exceeds the savings in time and resources that are gained by deciding them in that manner. Given the relative ease of issuing an order to dispose of a case without oral argument, however, this explanation seems quite unlikely.

Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 B.Y.U. L. Rev. 55, 73 n.65 (2007).

26. Tim Ashmore, *O'Connor Stresses Role of Oral Advocacy*, Ithaca Journal, Oct. 24, 2007, *www.theithacajournal.com/apps/pbcs.dll/article?AID=/20071024/NEWS01/710240334/1002* (last visited Jan. 2, 2008).
27. *Id.*
28. Mosk, *supra* note 13.
29. Hatchett, *supra* note 11, at 142.
30. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 17-20 (1986).
31. Bright, *supra* note 18.
32. *Id.* at 37.
33. *Id.*
34. "[T]he parties stipulated to submit their controversy upon briefs. Whether decision to forego oral argument springs from supreme confidence in his case by each litigant or denotes complete lack of it, we are unable to determine . . . ." *Jacobson v. Coon,* 165 F.2d 565, 566 (6th Cir. 1948).
35. As Tom Johnson noted in his judicial profile of Hon. R. Lanier Anderson III of the Eleventh Circuit Court of Appeals:

> Judge Anderson is a firm believer in the importance of oral argument. Although he spends hours reading the briefings of cases in advance of his monthly sittings, he actively engages the litigants from the bench, testing the strength of their arguments. The oral argument may not always change or even sway a result, but it often aids the judges in reaching the just and proper result under the law.

Tom Johnson, *Judicial Profile: Hon. R. Lanier Anderson III U.S. Circuit Judge, Eleventh Circuit Court of Appeals*, 54 Fed. Law. 32, 33 (August 2007).

36. *See Cent. Distribs. of Beer, Inc. v. Conn,* 5 F.3d 181, 185 (6th Cir. 1993) (Wellford, J., dissenting):

> The importance of oral argument is emphasized by the fact that, in a majority of cases, the decision is ultimately reached in accordance with the impression that the judges have as they leave the bench. While it is quite true that the impression after oral argument derives from the reading of the briefs as well as from the argument, it is also true that the impression from reading the briefs may be changed or modified by the oral argument. Although the oral argument and brief complement each other, each serves a different purpose. The oral argument should be something in the nature of a tour de force designed to persuade the judges that fair play and precedent support the position of the advocate.

37. Bright, *supra* note 18, at 39 n.32, 40 n.33.
38. Johnson, *The Influence of Oral Arguments on the U.S. Supreme Court*, *supra* note 14.
39. *Id.* at 109.
40. John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L.Q. 6, 7 (1955).
41. *See Greene v. B.F. Goodrich Avionics Sys., Inc.,* 409 F.3d 784, 792 n. 7 (6th Cir. 2005):

> This case presents an important example of how the value of oral argument cannot be understated. Oral argument allowed us to further delve into issues of concern that were not adequately addressed by the parties in their briefs. "The intangible value of oral argument is, to my mind, considerable . . . . [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel . . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs." William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1021 (1984).

J. Mark White is a graduate of Auburn University and Cumberland School of Law of Samford University. He served on the Board of Bar Commissioners for the Alabama State Bar from 1995 to 2004. White has served on numerous boards and committees, including as chair of the Alabama Supreme Court Committee on Judicial Canons & Ethics and as chair of the Alabama Supreme Court Judicial Campaign Oversight Committee (1998, 1999). He was a member of the state bar's Task Force on Bench and Bar Relations from 1989 to 1990. He is also a member of Alabama State Bar Committee on Judicial Reform. White currently is the president-elect of the Alabama State Bar and will assume the office of president for the 2008-09 term in July of this year.

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