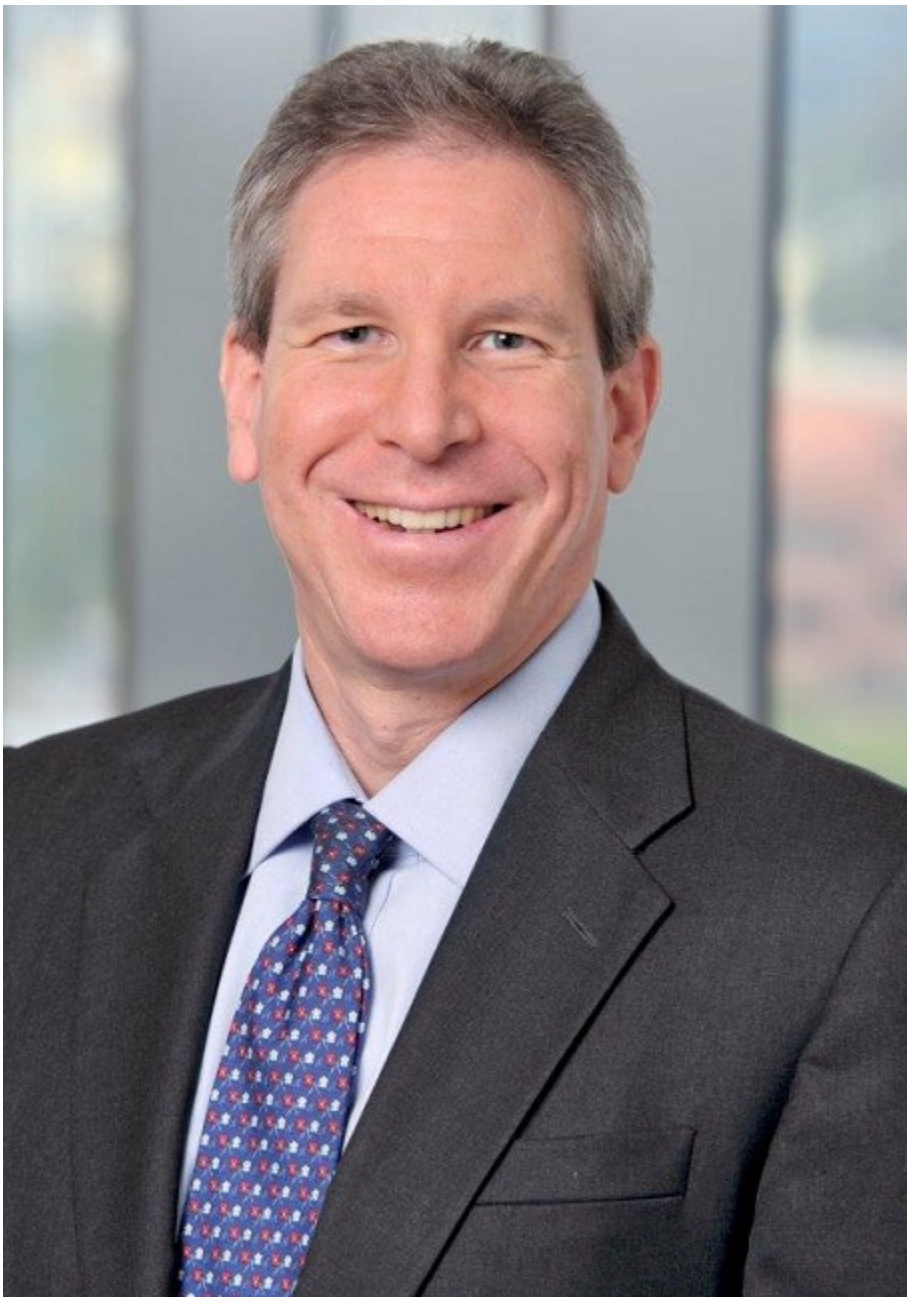
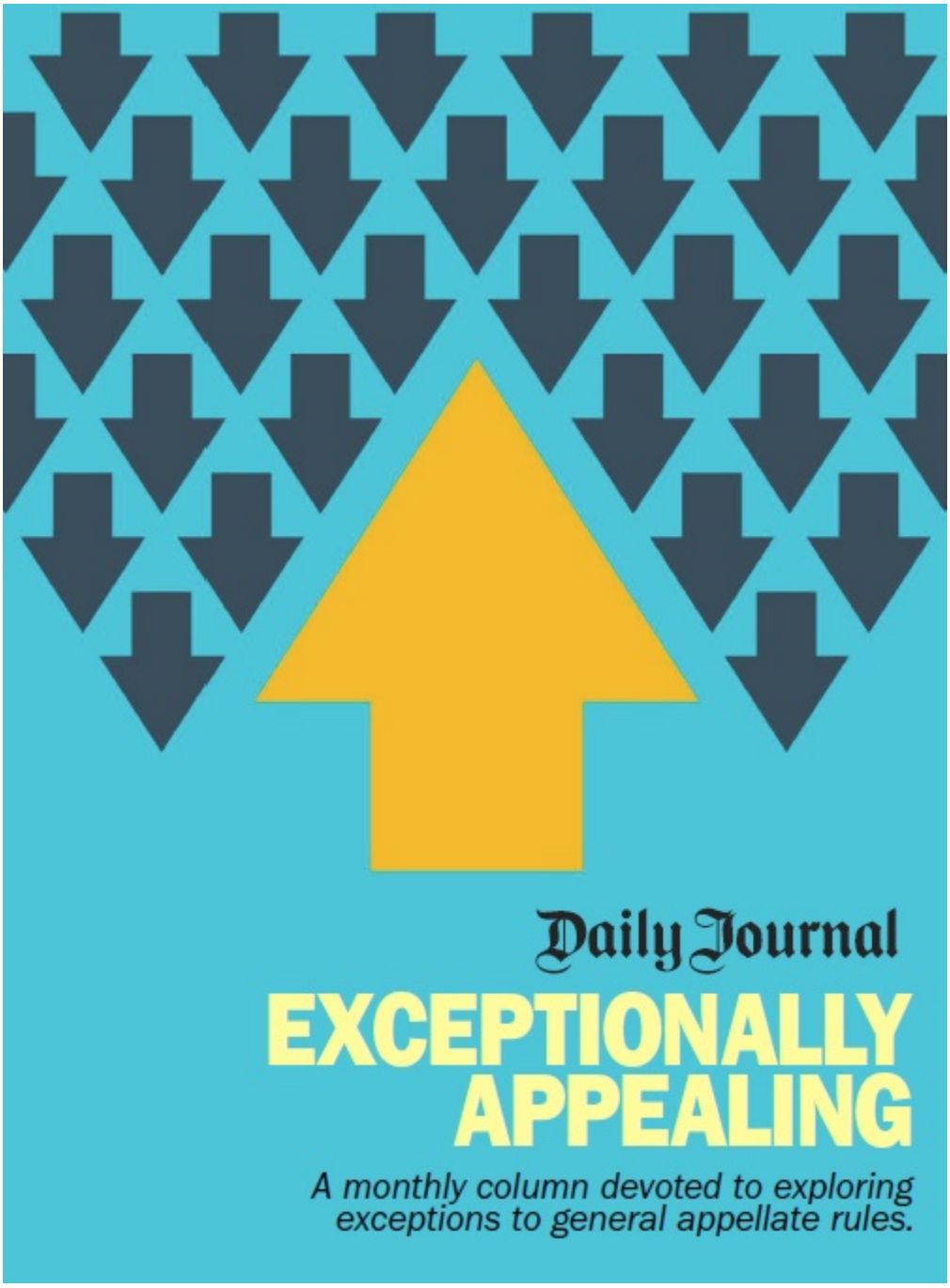
Riding the waive

Do you, Exceptional Lawyer, have the confidence to know when to waive oral argument?



BENJAMIN G. SHATZ
Manatt, Phelps & Phillips, LLP

Benjamin is a certified specialist in appellate law who co-chairs the Appellate Practice Group at Manatt in the firm's Los Angeles office.



Shutterstock

EXCEPTIONALLY APPEALING

The Exceptional Lawyer quests on safari through the jungles of California's statutes and rules governing appellate practice for the elusive "unless," "except," "but not," and similar quarry that nourishes his raison d'etre. But the Exceptional Lawyer cannot live by

statutory quirks and quicksands alone. Other exceptional species are equally deserving of exploration outside the traditional taxonomized collections. A prime specimen is the familiar "unwritten rule of practice." And just like officially codified rules, even these unwritten rules have exceptions.

Perhaps the most revered unwritten rule of appellate practice is: "Never waive oral argument." Appellate literature is literally littered with articles vociferously exhorting lawyers to never, ever, ever allow an opportunity for oral argument to escape. The reasons for this are well understood, if not obvious. After all, oral argument is what lawyers, especially appellate lawyers, are supposed to do: stand up on their hind legs and argue against opposing counsel in court. Letting any opportunity to press the client's case before the decision makers is deemed foolhardy. Relying on the briefing alone to win fails to recognize that the judges might not have read or completely appreciated the briefing and record. Oral argument is the lawyer's chance to look the decision maker in the eye and present your case one more time directly to the heart. Oral argument, moreover, is a fundamental stage of advocacy that (in theory) promotes respect for the justice system, and the public, especially clients, expect it.

But a heretical, curmudgeonly contrary view, reasons as follows: Oral argument is a waste of time. Often no questions are asked, and no wisdom is imparted in either direction, i.e., to or from the bench. Preparing for argument is time consuming and expensive. The process is an often inept and inefficient. Lawyers forcing themselves onto courts who would prefer not to have to listen to them is an exercise in futility, if not rudeness. Appeals are really won at the briefing stage, and a few minutes of oral argument will not make any difference in the outcome. Courts, especially California appellate courts, already have drafted written decisions before oral argument anyway. These facts are not secrets, and appellate judges are nearly uniform in admitting that argument only rarely affects the pre-prepared decision and only very rarely changes a result.

The roar of conventional wisdom responds: Tentative views can indeed change. Anecdotes abound about brilliant appellate arguments assuredly resulting in victories and saving sinking (or deceased) cases. As counsel, you really can not know if your case is one of those exceptional instances where oral argument actually could alter a decision in a material, even outcome-determinative, way. So allowing the possibility to make a difference slip away is a disservice to your client, the court, and -- indeed -- to the very cause of justice! (Thunderous applause.) Any lawyer who, through negligence, waives oral argument should be pilloried; and any "lawyer" who intentionally forgoes an oral argument is either lazy or craven, and probably both. (Cue approbational harrumphs.)

Ad hominem aside, these are perfectly reasonable points. Truly, the conventional position is undoubtedly the safest and soundest. But you didn't come here for that. Readers of the Exceptional Lawyer want to delve deeper to at least consider exceptions to even the most orthodox of dogmas.

To begin, the lawyer's goal for oral argument is to help win the case. But what if the case is already won? Division Two of the 4th District Court of Appeal in Riverside typically issues tentative decisions, allowing counsel to see the court's full reasoning. Sometimes the cover letter to these decisions indicates that oral argument is still welcome, but in other cases the cover letter is worded differently to indicate that the court is pretty sure it's got it right, and no further assistance from counsel seems necessary. (Of course, California litigants on appeal always have the right to insist on oral argument, and the courts may not discourage the exercise of that right. *See People v. Pena*, 32 Cal. 4th 389 (2004). If that tentative decision is spot-on, unassailably correct, couldn't that justify a waiver? Many lawyers believe so, as evidenced by the many arguments waived after tentative decisions (estimated to range between 65 and 80 percent of cases facing tentatives, especially in criminal cases, and with very few rehearing petitions). Are all these lawyers making a terrible mistake? Isn't the winning lawyer reasonable in taking the tentative win as is? And for the losing side, isn't part of being a good counselor at law exercising sound judgment in recognizing when the jig is up and the time has come to throw in the towel?

Even if one were to hold fast to the position that appellants should never waive oral argument, does this necessarily hold true for respondents as well? If an appellant waives argument, it would seem to send an odd message for the respondent to nonetheless insist on a hearing. Anecdotes abound in which the appellant turns tail at the prospect of oral argument (either with or without having seen an adverse tentative), and the respondent then "gambles" in following suit and waiving as well. Statistically, though, that's not much of a risk, as respondents are far more likely to prevail on the whole anyway. The right call, it would seem, comes down to knowing the case and being able to accurately and intelligently handicap the outcome without any significant margin of error.

Here's a hypothetical for dyed-in-the-wool argument-takers: Assume an appellant, acting in pro per, has filed plainly hopeless briefing, and then waives argument. Even without a written tentative in respondent's favor, would you still grab the pitchforks against a respondent's lawyer who chooses to follow suit and waive? In instances where one side (usually the appellant) has so obviously self-destructed or is pursuing an appeal so devoid of any reasonable probability of success, isn't waiving argument at least a reasonable option to seriously consider?

Justice Cardozo famously estimated that 90 percent of appeals "could not, with semblance of reason, be decided in any way but one," i.e., the law and its application meant that most appeals were "predestined" to be affirmed. See Benjamin N. Cardozo, "The Nature of the Judicial Process," Lecture IV (Adherence to Precedent) 164 (Yale Univ. Press 1921); Benjamin N. Cardozo, "The Growth of the Law" 60 (Yale Univ. Press 1924). Intermediate appellate courts hear predominantly mundane matters, and in many court systems -- our federal courts, for example -- most appeals are decided without oral argument. (Here's an exception to ponder: Although Federal Rule of Appellate Procedure 34(a)(2) begins with "Oral argument must be allowed in every case," it continues

"unless" the panel "unanimously agrees that oral argument is unnecessary." As a result, the exception has become the rule, and most cases do not receive argument.)

Despite all the noble sentiments about engaging in the public display of justice, and all the very strong reasons why appearing for argument -- even if just to "answer any questions" -- is probably the wiser course of action (particularly for appellants) almost all of the time, lawyers should not ignore certain hard realities. Given the costs of preparing for oral argument, the odds of success, and a clear-headed analysis of the merits, can't it sometimes be acceptable to waive oral argument?

When you have confidence in your case, confidence in your briefing, confidence in your court, confidence in the system, and confidence that the other side is headed nowhere but down, down, down, destined to crash and burn, why insist on a front row seat to witness the catastrophe? Exceptional cases may warrant exceptional strategies. When conditions are just right, do you have the confidence to ride the waive?