

Oral Argument - A New Constitutional Right?

John C. Pickels

Repository Citation

John C. Pickels, *Oral Argument - A New Constitutional Right?*, 37 La. L. Rev. (1977)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol37/iss5/18>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

ORAL ARGUMENT—A NEW CONSTITUTIONAL RIGHT?

After the trial court awarded plaintiff damages in a personal injury suit, the defendants appealed to a court of appeal panel of three judges who received briefs, heard oral argument, and agreed to modify the trial court judgment. The three judge panel could not, however, agree on the extent of the modification and ordered reargument before a panel of five judges as required by Article 5, Section 8(B) of the 1974 Louisiana Constitution.¹ The order for the reargument specified "briefs only,"² and both the plaintiff and the defendants complied. Three of the five judges agreed on the reduction of the trial court damages award. The Louisiana Supreme Court granted certiorari "primarily to determine"³ if the plaintiff had been denied any right to oral argument during the reargument required under Article 5, Section 8(B). Although the court *held* that plaintiff had waived his right, if any, to oral argument by not making timely objection to the order for briefs only,⁴ the opinion, in dicta,⁵ summarized the divergent views of the justices.⁶ Three members of the court stated that

1. Article 5, Section 8(B) of the Louisiana Constitution of 1974 provides: "A majority of the judges sitting in a case must concur to render judgment. However, when a judgment of a district court is to be modified or reversed and one judge dissents, the case shall be reargued before a panel of at least five judges prior to rendition of judgment, and a majority must concur to render judgment."

2. The order of the three judge panel provided as follows: "A majority of the judges on the panel which heard the case have concluded the judgment appealed from should be modified, however disagreement exists as to the extent of the modification. It is ordered that the above entitled and numbered case be reargued, on briefs only, before a panel of five judges of this court." *Quoted in Duffy v. Throwbridge*, 335 So. 2d 30, 32 (La. 1976).

3. *Id.*

4. Specifically, the court rescinded its grant of certiorari as improvident. *Id.* at 33.

5. "[W]e had hoped to make an authoritative interpretation of the requirements of Article 5, Section 8(B), with regard to the right, if any, of oral reargument in cases governed by that provision. We are unable to do so . . ." *Id.* at 32.

6. "However, for purposes of guidance until an authoritative interpretation is reached, we think it fair to summarize the court's views as follows: Three members of the court are of the opinion that the constitution envisages a right to oral argument on the reargument of the case, when such is required by Section 8(B). Three members of the court are of the opinion that the 'reargument' required by the section is only in the sense of permitting an opportunity for either (or both) written or oral argument, in the sense of permitting the party to provide for the court reasons for or against the matter at issue for purposes of persuading the appellate court [dictionary citations omitted, see note 25, *infra*]. The other member of the court is of the view that the 'reargument' required is to the same extent as the party was afforded at the time of the original hearing of the appeal." *Id.* at 32-33.

Article 5, Section 8(B) contemplates a right to oral argument on the reargument of the case.⁷ One justice declared that the right to oral argument on reargument arises only if oral argument was granted at the original three judge hearing.⁸ The remaining three justices were of the opinion that the reargument contemplated by the constitutional provision requires only an opportunity to present a case, by briefs and/or orally, but not a *right* to oral argument on the reargument.⁹ *Duffy v. Throwbridge*, 335 So. 2d 30 (La. 1976).

The Louisiana Supreme Court did not decide in the instant case whether or not Section 8(B) grants a right to *oral* argument on the automatic reargument contemplated by the provision. The views expressed by the members of the court indicate that the issue is still in some doubt. Since a future case may present the issue squarely to the court, an exploration of applicable law and policy considerations may assist in the determination of which view expressed should be adopted.¹⁰ This note presents a history of oral argument in Louisiana appellate practice prior to the 1973 Constitutional Convention, the probable intent of the drafters of Section 8(B), the practice of several other states, and some experience in the federal courts in the granting or denying of oral argument.

Although the United States Supreme Court encourages oral argument in its own rules,¹¹ it has *not* held that the United States Constitution grants a right to oral argument in all appellate proceedings. The latest expression from the Court is in *FCC v. WJR, The Goodwill Station, Inc.*:¹²

[D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. . . . [T]his Court has held in some situations that such argument is essential to a fair hearing, . . . in others that argument submitted in writing is sufficient.¹³

7. See *id.* at 34 (Summers, J., concurring & dissenting). See also note 25, *infra*.

8. See *id.* at 33 (Dennis, J., concurring & dissenting). See also note 25, *infra*.

9. *Id.* at 32-33.

10. The editors of the Louisiana Bar Journal have commented on this "advisory opinion" and observed that "after this rather unusual opinion, showing a severely divided court, the bench and bar are perhaps even more in need of a definitive determination of the meaning of this provision." Note, "*Reargument*" in *Court of Appeal Under Article 5, Section 8(B) of 1974 Constitution—Advisory Opinion*, 24 LA. B.J. 237, 237-38 (1976).

11. U.S. Supreme Court Rules 44 & 45, 28 USCA, Rules.

12. 337 U.S. 265 (1949).

13. *Id.* at 275-76. See cases cited in that decision: *Morgan v. United States*, 298

No Louisiana Constitution has specifically addressed the question of whether or not a right to oral argument exists during any stage of the appellate process.¹⁴ However, the Louisiana Constitution of 1974 continues the past practice of authorizing the Louisiana Supreme Court to adopt administrative and procedural rules for all state courts.¹⁵ The legislation authorizing the supreme court to adopt procedural rules has specifically recognized the need, under some circumstances, for discretion in denying oral argument on appeal.¹⁶ The current Louisiana Supreme Court Rules deny oral argument in support of or in opposition to:

- a. An application for a rehearing.
- b. An application for a writ of review to the court of appeal.
- c. An application for a supervisory or remedial writ.¹⁷

At one time the rules denied oral argument completely "in any case coming before the court on a writ of review or under the court's supervisory jurisdiction."¹⁸

U.S. 468 (1936) (briefs sufficient); *Londoner v. Denver*, 210 U.S. 373 (1908) (oral argument essential).

14. See Louisiana Constitutions of 1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921, and 1974.

15. "The supreme court has general supervisory jurisdiction over all other courts. It may establish procedural and administrative rules not in conflict with law and may assign a sitting or retired judge to any court." LA. CONST. art. V, § 5(A).

16. LA. R.S. 13:72 (1950) provides: "The supreme court for a better administration of justice, may establish and enforce rules necessary to secure the regular and expeditious disposition of its business, and the preparation of proper and correct transcripts of appeal. To prevent the accumulation of cases on the docket, the supreme court, during the latter portion of the annual sessions, may hear and take under advisement such number of cases as the judges of the court may be able to examine during the vacation, and render opinions therein at the opening of the following session, and *may require such cases to be submitted on briefs.*" (Emphasis added).

17. *Louisiana Supreme Court Rules*, Rule VIII, § 4.

The Rules of the Supreme Court and the Uniform Rules—Courts of Appeal are set out and annotated at the end of Title 13 of the Revised Statutes. They are also found (annotated) in a special desk copy pamphlet entitled *West's Louisiana Statutes Annotated, Court Rules—State and Federal. Amendments to the Court Rules* appear in the *Southern Reporter (Louisiana Edition only)*.

18. Rule XI, Louisiana Supreme Court Rules, found with amendments to April 4, 1939, in 191 La. xxxvii at xlv. This rule was upheld unanimously and oral argument was denied in the complicated case of *State ex rel. Wogan v. Clements*, 194 La. 812, 195 So. 1 (1940), even though the respondent formally assented to relators' motion for oral argument "inasmuch as the questions of law involved in this case were of vital interest to the public." *Id.* at 816, 195 So. at 2 (1940). Thus, the Supreme Court of Louisiana refused to relax its own rule which denied oral argument in cases arriving under a writ of certiorari.

The power of the Louisiana Supreme Court to deny oral argument has seldom been questioned at all and never successfully. In a rare challenge, the State of Louisiana claimed a *right* to oral argument before the court in the landmark property case of *State v. Aucoin*.¹⁹ The supreme court had failed to reach any decision during the first presentation of the case, during which oral argument was heard. The court then adjourned for the summer. The State claimed a *right* to continue oral argument in the fall.²⁰ The court painstakingly traced the development of constitutional and statutory rights in this area and specifically held that the statute relied on by the State had become "inoperative and ineffective."²¹

It appears that prior to the 1973 Louisiana Constitutional Convention, although oral argument was routinely granted, there was no recognition of any *right* (constitutional, statutory, or court rule) to oral argument or oral reargument at any hearing or rehearing before any Louisiana appellate court.²²

In the instant case, the three "views" expressed by the supreme court²³ appear to be influenced predominantly by a literal reading of

19. 204 La. 301, 15 So. 2d 313 (1943). The Supreme Court of Louisiana adjourned without a decision on July 29, 1943, to reconvene on the first Monday of October, 1943. The decision on the merits is found at 206 La. 786, 20 So. 2d 136 (1944).

20. 204 La. at 302, 15 So. 2d at 313. Since the court had failed to reach a decision during the term in which the case was first argued, the State of Louisiana based its claim on Section 1912 of the Revised Statutes of 1870 (reported in Dart's Louisiana Statutes, Vol. 1, sec. 1417 (1932 or 1936)), which reads as follows: "Whenever the Supreme Court of this State shall, for any cause, fail to render a decision in any case pending before that court at the term during which such case was argued, it shall be lawful for either party in such case to have said case fixed for reargument, orally, or by brief at the next succeeding term of said court; Provided: The motion for such reargument be filed with the clerk on or before the first day of such succeeding term."

21. *Id.* at 309, 15 So. 2d at 315. The court did not discuss whether the statute (Section 1912 (1870)) would have *required* oral argument if it had still been in effect. However, the court recognized the importance of additional oral argument in the case. Therefore, "exercising the discretion vested in the Court in such matters," the court reassigned the case for further oral argument. *Id.* at 309-10, 15 So. 2d at 316.

22. *E.g.*, Louisiana Uniform Rules—Courts of Appeal. Rule X, § 5 provides: "The Court, in its discretion and at any time after a cause has been submitted, may order that the case be resubmitted, with or without oral argument, to the court sitting en banc."

Rule XI, § 4 provides: "When a rehearing is granted the case . . . may be argued orally . . . or, in the discretion of the court, the case may be ordered submitted on briefs. . . ."

23. See note 6, *supra*.

Section 8(B)²⁴—especially the word “reargued.”²⁵ A literal reading of the provision reasonably supports each of the three interpretations. An analysis of the probable intent of the drafters of Section 8(B) might provide a method of determining which view is the best reasoned.

The testimony during the 1973 Louisiana Constitutional Convention clearly indicates that the delegates intended a new constitutional right in Article 5, Section 8(B),²⁶ but they certainly did *not* discuss or in any way allude to a right to *oral* argument during the reargument they provided in Section 8(B).²⁷ This new right to automatic reargument was totally opposed by Delegate (Justice) Tate because it was “the sort of intra-court regulation that should not in my opinion be in a constitution.”²⁸ The convention delegates were concerned with the size of the court of appeal panel to be allowed to reverse a trial court judge’s finding of fact, not the procedure before the panel.²⁹ The “reargument” granted by Section 8(B) was probably intended to be a “rehearing” before a larger panel.³⁰ However, since the word “reargument”³¹ was used and not the word “rehearing,” a literal reading allows a construction of Section 8(B) that envisages a new right to *oral* argument on the reargument before the larger panel.³²

24. See note 1, *supra*.

25. The single authority cited in support of all three views expressed by the members of the court is as follows: “(see 4 Words & Phrases, verbo “argue” and “argument”, p. 16 (1969); Black’s Law Dictionary, verbo “argument”, p. 137 (4th ed. 1951); Webster’s Third New International Dictionary, verbo “argue” and “argument”, pp. 116-17 (1961); The American Heritage Dictionary, verbo “argue”, p. 70 (1969).” 335 So. 2d at 32. The Court stated that the three views were presented to afford “guidance” to appellate practice in Louisiana “until an authoritative interpretation is reached.” *Id.* Since the issue was not reached, the division of the court, brevity of the opinions, and the lack of authoritative citation should be considered before reliance is placed on the views expressed. The interpretation of this constitutional provision to include a right to oral argument is *res nova* and certainly not settled by the dicta contained in the instant case.

26. See generally STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS Aug. 16, 1973 at 36-69 [hereinafter cited as PROCEEDINGS].

27. Note, 36 LA. L. REV. 844 (1976), discusses in great detail the law/fact distinction that is necessary for a proper interpretation of the automatic right to another hearing (reargument) before a five judge panel granted by Article 5, Section 8(B). The note provides a complete analysis of why Section 8(B) was drafted.

28. PROCEEDINGS, Aug. 16, 1973 at 59.

29. *Id.* at 36-69 *passim*. See also note 27, *supra*.

30. *Id.* Delegate Pugh specifically equated “rehearing” and “reargument.” *Id.* at 66.

31. See the dictionary authorities cited at note 25, *supra*.

32. The single justice completing the majority “view” of the court in the

The rules of practice before other states' appellate courts offer collateral support for either general construction of the provision.³³ In some states the appellate courts have total discretion to hear or deny oral argument in any case at any time.³⁴ Other states recognize a right to oral argument.³⁵ Of special interest is the right to oral argument recognized in California, as it arose from an interpretation of the word "argument" in a provision of that state's constitution.³⁶

instant case would allow the *right* only if oral argument was "afforded" on original hearing. 335 So. 2d at 33 (La. 1976). Whether that justice assumed appellate court discretion in the original grant of oral argument was unexplained.

Such a right to oral reargument would be the only right to oral argument in Louisiana appellate practice. The court would then be in the difficult position of justifying the situation in which parties would have no right to oral argument on original hearing but should the appellate court reverse the lower court with one judge dissenting, a constitutional right to oral reargument would come to life. (Assuming, of course, that oral argument was previously granted.)

33. Although three views were expressed by the members of the court, these can be grouped into two general constructions of Section 8(B). The first construction is that the provision envisages a right to *oral* argument. This construction is the "view" of the majority. The second construction is that the provision does not contemplate such a right. The position of the "swing" justice (that the right is perfected only if oral argument was granted on original hearing) is not lost in such a grouping.

34. *E.g.*, Florida Appellate Rule 3.10(e) which provides: "In its discretion the Court may require oral argument in any case even though the same has not been requested, may limit the time thereof, or may dispense with oral argument in any case even though request for oral argument has been made." *Accord*, *Damora v. Givotovsky*, 301 So. 2d 37 (Fla. App. 1974), *cert. dismissed*, 324 So. 2d 80 (Fla. 1975); and Indiana Appellate Rule 10(A) which provides: "oral argument will not be granted except at the court's discretion." *Accord*, *State ex rel. Mass. Transp. Auth. v. Indiana Review Bd.*, 251 Ind. 607, 254 N.E.2d 1 (1969).

35. *E.g.*, Tenn. Acts of 1911, Chapter 25 (5 TCA 27-115 (1955)), provides: "the appellate courts of this state are forbidden to reverse any case tried or triable by jury in the lower courts, and to dismiss the same upon the merits without giving the parties an opportunity to be heard through their counsel by oral argument. . . ." *Construed*, *West Constr. Co. v. White*, 130 Tenn. 520, 172 S.W. 301 (1914); and California Rules on Appeal, Rule 22(1) provides: "Counsel for each party shall be allowed 30 minutes for oral argument." Rule 28(f) provides: "When a hearing is granted, the cause shall be placed on the calendar for oral argument, unless oral argument is waived." *See also* CAL. PENAL CODE §§ 1253-54 (1943).

36. Cal. Const. art. VI, § 2 (1879), (similar words are found in the current Constitution adopted in 1966), provides in part: "The concurrence of four justices present at the *argument* shall be necessary to pronounce a judgment in bank" (Emphasis added). This provision, although adopted in 1879, was not construed until *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 122 P.2d 257 (1942), which interpreted it as envisaging a constitutional right to oral argument. California immediately adopted court practice rules consistent with this interpretation. *See*

In federal practice, both the Third and Fifth Circuits have dealt specifically with oral argument. The Fifth Circuit added Local Rule 18 on December 24, 1968, establishing a summary calendar and discretion to deny oral argument.³⁷ The experience of nearly two years of extensive litigation involving Rule 18 as well as detailed statistical data covering approximately eighteen months were presented in *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York*³⁸ in order to "adequately inform the Bench, the Bar, litigants, scholars and that vast body of people now naturally concerned in good judicial administration about this remarkable judicial tool."³⁹ The Third Circuit granted itself discretion to hear or deny oral argument in Local Rule 12(6)(b).⁴⁰ The argument that the denial of oral argument under these rules offends the due process requirements of the fifth amendment to the United States Constitution has been rejected in both the Third⁴¹ and Fifth⁴² Circuits. The United States Supreme Court has declined to grant any of the many requests to review the Fifth Circuit's summary calendar procedure.⁴³

Witkin, *New California Rules on Appeal*, 17 S. CAL. L. REV. 232, 243-44 (1944). Cf. *People v. Brown*, 55 Cal. 2d 64, 357 P.2d 1072, 9 Cal. Rptr. 816 (1960). The court also found in *Metropolitan* that denying oral argument on petitions or motions did not offend the constitutional intent. It is interesting to note that California has a long history of granting trial court judges complete discretion in hearing oral argument. See, e.g., *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 P. 635, 636 (1894), where the court stated: "We have no doubt that the court, in the exercise of its discretion, had the right to decline to hear oral argument." Cf. *Rieger v. Rich*, 163 Cal. App. 2d 651, 329 P.2d 770 (1958) (criminal cases heard by judge without jury); *Larsen v. Blue and White Cab Co.*, 24 Cal. App. 576, 75 P.2d 612 (1938) (civil case). The current trial court practice in criminal case requires some closing but it may be limited, CAL. PENAL CODE § 1093 (1951). This conforms to current United States Supreme Court rulings requiring some closing argument of counsel at the end of a criminal case whether argued before a jury or judge alone. E.g., *Herring v. New York*, 422 U.S. 853 (1975).

37. 28 USCA, Rules, U.S. Court of Appeals, 5th Circuit, Rule 18(a) provides: "Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar." Extensive citations are provided defining cases of "such character" in 28 USCA, Rules.

38. 431 F.2d 409 (5th Cir. 1970).

39. *Id.* at 410, n.6.

40. "Whether there will be oral argument is decided by the Court, whether requested or not." 28 USCA, Rules.

41. E.g., *NLRB v. Local 42*, 476 F.2d 275 (3d Cir. 1973). Another argument, that the Federal Rules of Procedure (Rule 34, 28 USCA, Rules) required oral argument, was also rejected.

42. E.g., *George W. Bennett Bryson & Co., Ltd. v. Norton Lilly Co., Inc.*, 502 F.2d 1045 (5th Cir. 1974).

43. E.g., *NLRB v. Buffalo Cab Co.*, 458 F.2d 499 (5th Cir.), *cert. denied*, 409

The Louisiana Constitution should be construed by the same rules of interpretation as are other laws.⁴⁴ Certainly the words of Article 5, Section 8(B) must be given their ordinary meaning,⁴⁵ but the purpose, spirit, and intent of the provision should prevail over a literal reading.⁴⁶ Although a literal reading of Section 8(B) supports each of the three views expressed by the court in the instant case, it is clear that the drafters never intended this provision to affect the practice before an appellate panel concerning *oral* argument. The past policy of this state has been to allow appellate courts the discretion to hear or deny oral argument. It appears that there is no compelling authority and little persuasive reason to change this historically protected discretion. Indeed, the weight of experience of other courts and the ever increasing case load of the appellate courts provides good reason to continue the previous practice.

It is hoped that the Louisiana Supreme Court will reject future demands of any *right* to oral argument at any appellate proceeding, be it original hearing, reargument prior to judgment, or rehearing after decision. The court should retain the discretion historically granted to it by Louisiana Constitutions to control the administrative and procedural rules of Louisiana courts, including the limiting or denying of oral argument at any stage of the appellate process.

John C. Pickels

U.S. 949 (1972); *United States v. Middleton*, 458 F.2d 482 (5th Cir.), *cert. denied*, 409 U.S. 863 (1972); *Kimmons v. Wainwright*, 450 F.2d 335 (5th Cir.), *cert. denied*, 405 U.S. 1043 (1971).

44. *E.g.*, *Barnett v. Denelle*, 289 So. 2d 129 (La. 1974); *Roberts v. City of Baton Rouge*, 236 La. 521, 108 So. 2d 111 (1959); *Nicholson v. Thompson*, 5 Rob. 367 (La. 1843).

45. *See* LA. CIV. CODE art. 14; *e.g.*, *State v. American Sugar-Refining Co.*, 51 La. Ann. 562, 25 So. 447 (1898), *aff'd*, 179 U.S. 89 (1900).

46. *See* LA. CIV. CODE art. 18; *e.g.*, *Barnett v. Denelle*, 289 So. 2d 129 (La. 1974); *State v. Joseph*, 143 La. 428, 78 So. 663 (1918).