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Many lawyers consider oral argument to be the climax of the appellate process, yet in some (exceptional) cases, oral argument is simply missed. Wait! What?

BENJAMIN G. SHATZ

Partner, Manatt, Phelps & Phillips LLP

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EXCEPTIONALLY APPEALING

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Proposition: Oral argument is the climax of the appellate process. Paper pushing and brief writing are essential, but hardly exhilarating. And while receiving a decision (these days it's "you've got mail!") is a momentous denouement, it simply doesn't qualify as the exciting part of the process -- no matter how momentarily thrilling for the winner. No, the

game's truly afoot in the moment of truth, when the lawyers get to stare the robed oracles in the eye, face to face, and sing from the heart at oral argument.

Conventional wisdom, of course, is that advocates (especially appellants) should never pass up the opportunity to appear in the flesh, stand proudly on their hind legs, whip out their silver tongues and quick wits, and finally act like real lawyers for the world to see. (These days, it may be more like sitting in an unused bedroom, dressed for success from the waist up, and hoping the Wi-Fi doesn't freeze mid-sentence.) Setting aside the debatable efficacy of oral argument, it remains a key component of any appeal. In federal appeals, where oral arguments is by invitation-only, when the court declines to convene a hearing, the lawyers are (or should be) disappointed. In short, it is an event not to be missed.

And yet, in exceptional (perhaps bizarre) cases, that's exactly what happens: Oral argument is simply missed. Wait! What? Does that really happen? Yep.

Exhibit A. Earlier this year, in *Cotto v. City of New York*, 17-2845 (2d Cir.), the 2nd U.S. Circuit Court of Appeals set an oral argument for March 2. Appellant's counsel telephoned the court clerk to confirm his appearance. On the appointed date, appellee's counsel appeared, but appellant's counsel failed to show. An order to show cause issued, threatening sanctions in the form of reimbursement for the time appellee's counsel spent preparing for and appearing for argument. In its May 19 order, the court was gracious in accepting counsel's representation that his failure to appear was "not intentional or malicious." Nonetheless the court imposed restitutionary sanctions, noting that "attorneys are required to keep track of their professional obligations" and that "I forgot" is "not an acceptable excuse." (Cue "You Can Be a Millionaire" from Steve Martin's classic album Comedy Is Not Pretty (Polygram 1979); *see* Weiss, "'I forgot' isn't acceptable excuse for missing oral arguments, 2nd Circuit tells lawyer" (ABA J. May 20, 2020).)

Well, sure, you're thinking that the Big Appeal is teeming with lawyers, and some are bound to make crazy mistakes. But this wouldn't happen in California, right? Think again. Better yet, read *In re Aguilar*, 34 Cal. 4th 386 (2004). That citation is to a California Supreme Court OSC re contempt against two attorneys for the "willful neglect of the duty to appear for oral argument" before the Supreme Court. Yeah, that's California's highest court. And they were counsel for the petitioning parties. Flabbergasting. Imagine a lawyer going to the trouble of petitioning for review, catching lightening by winning review, briefing the merits, returning an oral argument rsvp, but then blowing off the Supreme Court oral argument.

In imposing sanctions, the Supreme Court explained: "Presentation of oral argument on appeal is an important responsibility for an attorney in any case, not only in light of the duty owed to the client but also because of the attorney's professional obligations to the appellate court. As a general rule, this court does not permit parties to waive oral argument in cases before this court, and we, like all other courts, rely upon the

presentation of oral argument by well-prepared attorneys to assist us in reaching an appropriate resolution of the often difficult questions presented in the cases before us."

Aguilar is definitely an exceptional case, worth reading for the gory details (and for the interesting partial dissenting opinion). And yet it's not as unique as one might hope. Various cases mention in passing the unexpected absence of lawyers from appellate argument. *E.g.*, *Spanos v. Dreyer, Babich, Buccola & Callaham, LLP* (C077235, June 27, 2016) 2016 WL 3583364, n.1 (noting that appellant's counsel failed to appear at oral argument); *Berdan v. Firmac, Inc.* (A140339, May 22, 2015) 2015 WL2454068; *Perez v. Breen* (July 17, 2006, B185281) 2006 WL 1977103; *In re Crooks*, 51 Cal. 3d 1090, n.2 (1990).

Exhibit B. Consider that the Federal Rules of Appellate Procedure (effective in 1968) contain a "nonappearance" rule addressing AWOL appellate lawyers. Current FRAP 34(e) provides that "If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise." Apparently the idea of a no-show was deemed such a likely possibility that a rule was created to address it. *See* Strubbe, "A Lawyer's Guide to the Federal Rules of Appellate Procedure," 3:2 J. Marshall J. of Prac. & Proc. 260, 338 (1970) (noting "In practice it very seldom happens that any party fails to appear for oral argument."). And this is in an appellate system where there is no right to oral argument, so lawyers who receive argument should be particularly keen to appear. Further, because many states model their appellate procedures on the federal rules, many states have adopted this rule verbatim (e.g., a random sampling includes Alabama, Florida, Hawaii, Mississippi, Massachusetts, Nevada, Ohio, the Carolinas, and Utah). Some have added the threat of sanctions to their rules.

But sunny California looks to the bright side. We do not expect lawyers to miss oral argument, and thus do not deign to credit that outrageous contingency with a rule. Our appellate rules assume that counsel will do their jobs and appear at the appointed time and place. *See* Cal. Rules of Court 8.256, 8.524, 8.638, 8.885, 8.929. An unexcused failure to appear for an appellate argument is, naturally, viewed as a "most serious and flagrant breach of [] professional duty." *Herron v. State Bar*, 24 Cal. 2d 53, 62 (1944). Case law also clarifies that our appellate courts may consider the failure to appear at argument to be a forfeiture of the right to appeal. *See Weiss v. Citrus Heights, LLC* (D058614, Aug. 3, 2012) 2012 WL 3139772, n.2 (citing *Jordan v. County of Los Angeles*, 267 Cal. App. 2d 794, 798 (1968)).

Of course, we know what life and traffic is like. Sometimes lawyers simply can't make it to court for extraordinary reasons. This is why oral argument rsvp forms typically ask for a lawyer's phone number. Sometimes a nonappearance is justified. But more often than not, human error causes the gaffe.

Urban legends abound. In one, a case is called for oral argument (in the 5th District, in Fresno), and respondent's counsel states his appearance. But appellant's counsel is nowhere to be seen. The presiding justice has the clerk call appellant's counsel's office in Los Angeles. Appellant's counsel is connected on the phone and is told that it's time to argue the appeal. Apparently there was confusion about whether the argument was going forward, and appellant's counsel essentially ends up arguing it on the fly. Far from ideal.

Another classic story is the one about the L.A. lawyer who flies up to San Francisco to argue an appeal in the California Supreme Court. He arrives at a dark courthouse. The Supremes happened to be sitting in L.A. Oops! But the absent lawyer won the case anyway. So that makes it an exception to Woody Allen's maxim that 80% of success is just showing up.

One cutesy variation on the theme is sending a sacrificial lamb. One recent example is *Davis v. TWC Dealer Group, Inc.*, 41 Cal. App. 5th 662 (2019). In Davis, a new controlling Supreme Court opinion issued after briefing. The court sent a letter to counsel advising appellant's counsel to be prepare to address the new case, address why they had failed to raise the new case, and also to address a questionable use of ellipsis in the opening brief (omitting key language from the arbitration provision at issue). The letter signaled that appellant's counsel was headed for a tough and problematic oral argument. The solution? Easy: Send a young associate instead! Rather than any of the lawyers who had appeared on the appellate briefing and papers in the trial court, an associate was dispatched for the hearing. Unfortunately, the associate apparently had little familiarity with the case and was not able to effectively address the court's concerns. Id. at 677. Mercifully, no sanctions were imposed. But the cautionary tale is clear.

Readers of this column undoubtedly have their own strange-but-true tales of AWOL advocates. Such war stories are exceptionally appealing.