

RESOLUTION 03-05-06

DIGEST

Rules of Court: Tentative Rulings Before Oral Argument On Appeal

Amends Rules of Court, rule 23, to require the Courts of Appeal to issue a written tentative decision before oral argument is heard.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Rules of Court, rule 23, to require the Courts of Appeal to issue a written tentative decision before oral argument is heard. This resolution should be approved in principle because it will provide litigants with an opportunity to prepare for oral argument on the specific issues that concern the Court for a more focused and meaningful argument.

Most appellate courts in this state currently have written bench memos prepared for the justices to use for oral argument on any appeal. However, the litigants are not privy to the bench memo and therefore have no advance guidance about what issue(s) concern the court prior to oral argument. By providing the parties and counsel with advance notice of the issues that concern the court in the appeal, this resolution will assist the litigants in focusing the argument on the issues important to the court. It will also assist in ensuring the issues are fully explored prior to the issuance of an opinion. At the same time, the tentative bench memo could not be used for any purpose other than preparing for oral argument by providing that it shall not be cited or used in any subsequent proceeding in the appeal or in any other case.

This resolution proposes a sensible way to promote more effective and meaningful use of appellate oral arguments, while allowing each court of appeal to determine what to include in its tentative ruling.

SECTION/COMMITTEE REPORT

COMMITTEE ON APPELLATE COURTS

DISAPPROVE

The Committee supports the proposal's intended goal of making oral argument more meaningful. But while there are good reasons to believe that the proposal will achieve that purpose, by informing counsel of the court's concerns before oral argument, there are also good reasons to believe it may have the contrary result. There is a concern, for example, that once a panel makes its tentative opinion available to the parties, it may be more difficult than ever to effect a change through oral argument.

In addition, the proposal assumes that the panel has made a tentative opinion. On some occasions, however, a panel may not have a tentative opinion because there are questions that need to be addressed at oral argument. It should, therefore, remain with the individual Courts of Appeal to determine whether issuing tentative decisions before oral argument would be helpful.

Accordingly, the Committee does not support the proposed amendment to rule 23. The Committee does, however, support the practice of advising appellate counsel by letter of the Court of Appeal's concerns prior to oral argument, which is already used by some Courts of Appeals.

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the Judicial Council amend California Rules of Court, Rule 23, to read as follows:

1 Rule 23

2 (a)(1) Each Court of Appeal and division must hold a session at least once each
3 quarter.

4 (2) A Court of Appeal may hold sessions at places in its district other than the court's
5 permanent location.

6 (3) Subject to approval by the Chair of the Judicial Council, a Court of Appeal may
7 hold a session in another district to hear a cause transferred to it from that district.

8 (b) The Court of Appeal clerk must send a notice of the time and place of oral
9 argument to all parties at least 20 days before the argument date. The presiding justice may
10 shorten the notice period for good cause; in that event, the clerk must immediately notify the
11 parties by telephone or other expeditious method.

12 (c) Prior to oral argument, the Court of Appeal shall prepare a tentative decision on
13 the issues of the case involved in the appeal. Prior to oral argument, the Court of Appeal
14 clerk shall either seasonably send by mail or email, or make available to the parties no later
15 than 24 hours before oral argument, a copy of the Court of Appeal's tentative opinion in the
16 case. This tentative opinion shall not be used for any purpose other than notify the parties of
17 the Court of Appeal's preliminary impressions of the issues and resolution, to allow
18 comments and argument addressing the proposed decision(s) by the parties at the oral
19 hearing. Following oral argument, the tentative opinion, its content, drafting, accuracy
20 and/or completeness shall not be cited or referred to in any subsequent proceeding in the
21 appeal, or in any other case; a violation of this rule shall be considered unprofessional
22 conduct.

23 (ed) Unless the court provides otherwise by local rule or order:

24 (1) The appellant, petitioner, or moving party has the right to open and close. If
25 there are two or more such parties, the court must set the sequence of argument.
26 (2) Each side is allowed 30 minutes for argument. If multiple parties are represented
27 by separate counsel, or if an amicus curiae—on written request—is granted permission to
28 argue, the court may apportion or expand the time.
29 (3) Only one counsel may argue for each separately represented party.
30 ~~(d)~~(1) A cause is submitted when the court has heard oral argument or approved its
31 waiver and the time has expired to file all briefs and papers, including any supplemental
32 brief permitted by the court.
33 (2) If the Supreme Court transfers a cause to the Court of Appeal and supplemental
34 briefs may be filed under rule 13(b), the cause is submitted when the last such brief is or
35 could be timely filed. The Court of Appeal may order the cause submitted at an earlier time
36 if the parties so stipulate.
37 ~~(e)~~(1) Except as provided in (2), the court may vacate submission only by an order
38 stating its reasons and setting a timetable for resubmission.
39 (2) If a cause is submitted under ~~(d)~~(2), an order setting oral argument vacates
40 submission, and the cause is resubmitted when the court has heard oral argument or
41 approved its waiver.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: There is no practice or requirement for the Court of Appeal to provide its preliminary thoughts or tentative decision concerning the issues on appeal prior to oral argument. At the time of oral argument, most courts have a bench memorandum reflecting the justices' leanings on the issue. These often serve as the core for the formal opinion(s) and decision which ultimately issues in the case.

This Resolution: Requires the appeals court to have a written bench memorandum/tentative decision for the hearing. This will allow a focused and meaningful oral argument, fostering a correct and just decision on the appeal.

The Problem: Currently, appellate counsel only can guess from questions the court asks at the time of oral argument, if any, the court's sense of the issues. This limits the value of oral argument: to address and correct faulty thinking or misunderstandings, or fortify the merits of preliminary impressions concerning the issues. Notwithstanding the briefing, counsel's statutory right to oral argument, in an effort to convince the appellate tribunal to reach a correct decision on often complex questions, is essentially done in total ignorance of the court's presuppositions, predilections or leanings in resolving the appeal—depriving the parties this valuable opportunity to vet and persuade on the issues, and correct faulty thinking or erroneous beliefs. Even at the trial level, tentatives routinely are disclosed to counsel even though the trial court's judgment is subject to appellate supervision. With the appeals court remaining cryptic on its preliminary

impressions, its decision can go awry without meaningful opportunity to prevent or correct an erroneous or unfair disposition at oral argument. For all intent and purposes, once the court of appeals issues its opinion, it's unlikely then it can be coaxed to change its decision on rarely granted petitions for rehearing. It is also all but certain that no oversight relief will occur with the Supreme Court, even where the appeals court's decision is unjust or wrong, unless the petition meets the narrow requisites for review and an already over-burdened Supreme Court is willing to take the matter on review. Not uncommonly the appellate court will decide on an analysis neither side envisioned. This is particularly true when the issue is politicized, a party unsympathetic, or the court seems determined to harshly dispose of the appeal in an unpublished decision based on personal notions of what should be the outcome. Since appellate justices frequently rely on a bench memoranda drafted by staff attorneys, who researched the issues and summarizes the positions to the court, oral argument is a critical tool and the perfect time to correct misapprehensions or faulty thinking, or to illuminate solid analyses, for a thoughtful, fair and just result. Allowing appellate counsel a meaningful opportunity to orally address the pivotal issues underscoring the court's analysis not only fosters justice at this important end game in the litigation process, but leaves even in the losing party a sense that all cogent points were fully heard and considered.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution requires the court of appeal to issue tentative rulings prior to oral argument. In the resolution's statement of reasons, the author notes that a bench memorandum is circulated before oral argument, "which often serves as the core for the formal opinion(s) and decision which ultimately issues in the case." The statement fails to recognize the circulated bench memorandum is drafted by only one of the justices, and typically does not reflect the thinking of the other two. Both the disposition and reasoning contained in the circulated bench memorandum often change dramatically after a joint review by the justices. Accordingly, issuing a true "tentative decision" will require more effort than simply providing a copy of the bench memorandum to counsel.

Requiring all three justices on a panel to meet in conference and prepare a tentative decision before oral argument would not only delay oral argument in that specific case, but would negatively impact the court's time in general, potentially lengthening the time required to resolve

all appeals. Moreover, such a procedure may naturally result in the justices being less open to change at oral argument. Although the current fluidity of oral argument has the drawbacks noted in the statement of reasons, it has the benefit of allowing the parties to argue their cases before the court in the manner they view as most persuasive. The justices are not shy about asking questions about the issues which concern them most. Nonetheless, if the justices truly miss the point, a petition for rehearing is an acceptable means of addressing the issue. That the majority of such petitions are denied should not be taken as evidence they are not carefully considered.

Tentative decisions are optional in superior court, and no compelling reason dictates they be mandatory in the court of appeal.

SAN DIEGO COUNTY BAR ASSOCIATION

In the Fourth Appellate District, the proposed rule would change process, not just disclosure practice. Fourth Appellate District panels generally do not confer before argument except in writ cases. This is true even in Division Two (Riverside-San Bernardino), which is the only court in the state that provides its bench memorandum to counsel before argument. Ironically, Division Two bench memoranda are commonly called tentative decisions, despite the fact they usually don't have the requisite two votes when released. Sometimes the "tentative" turns out to be a dissent. This resolution would force the courts in the Fourth Appellate District to confer before argument, which does more to make oral argument meaningless than does the nondisclosure practice of courts that conference and vote before argument. Forcing the Fourth Appellate District to adopt the inferior northern model is not desirable.