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ORAL ARGUMENT REFORM IN UTAH'S APPELLATE COURTS:  
SEEKING TO REVITALIZE ORAL ARGUMENT  
THROUGH PROCEDURAL MODIFICATION

Clark Collings\*

*[I]t will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.<sup>1</sup>*

I. INTRODUCTION

The modern institution of appellate oral argument has unfortunately arrived at this “sorry day.” It has simultaneously been both devalued and tediously used as a formalized relic of the past. This dual depreciation stems from two polarized perspectives. One viewpoint is that oral argument is an antiquated and ineffective tradition that should be completely replaced with written appellate argument.<sup>2</sup> Supporters of this viewpoint cite the decreasing rate of oral argument in appellate courts<sup>3</sup> and the general judicial perception of its irrelevance as evidence of the institution’s imminent disappearance.<sup>4</sup> The opposing camp argues the reverse; it attempts to preserve the tradition by returning to a format where appellate argument is predominately oral—consistent with Great Britain and other common law countries.<sup>5</sup> This group claims that the value of oral argument rests in a judicial process that is visible and open to public scrutiny.<sup>6</sup> They further argue that this

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<sup>1</sup> John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 11 (1955) (emphasis added).

<sup>2</sup> See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 4 n.14 (1986).

<sup>3</sup> See ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.S-1 (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf> (reporting that nearly 75% of the cases decided in 2010 in the United States Courts of Appeals were decided without oral argument).

<sup>4</sup> See Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 454 (2002) (estimating that only 5 to 10% of the remaining cases that are orally argued change a judge’s mind).

<sup>5</sup> See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1162 (2004).

<sup>6</sup> Martineau, *supra* note 2, at 11.

policy goal cannot be achieved if judges are deciding cases by simply reading briefs behind closed doors.

Although both camps make compelling arguments, the solution to the debate does not lie within a counter-reform—a complete resurrection of oral argument in every appeal<sup>7</sup>—nor does it call for a complete extinction of the practice. Rather, the solution can be found somewhere in the middle. Instead of focusing solely on the preeminence of either oral or written argument, the courts should try to effectively marry the two approaches to achieve optimal appellate review and client advocacy. Appellate oral argument's current procedural format is stuffy and ineffective. What it is designed to accomplish is necessary, but the vehicle it uses to achieve its purpose is outdated. As a result, it is becoming extinct in today's fast-paced appellate world. Therefore, the primary purpose of this Note is to explore and prescribe several procedural reforms that are designed to revitalize the institution and restore its purpose in the national appellate court system.

This Note proposes that the Utah appellate court system implement the prescribed solutions as a preliminary test and set an example for the rest of the nation. Part II of this Note will address the general purpose of oral argument, outlining its benefits and the overall importance of the practice. Part III will emphasize the negative impact of current appellate procedures on the judicial process and the difficulties courts face when approaching oral argument. Part IV will delineate the Utah state appellate court structure and how the current appellate rules addressing oral argument are applied. Additionally, it will discuss the progression of the current procedural rules governing oral argument in Utah and will address the reasons why the Utah judicial system is an ideal laboratory to test these modifications. Part V will explore and propose solutions to the problems discussed in Parts III and IV. These solutions include a proposal to implement a tentative-opinion program, a proposal to redesign the current format of oral argument, and strategies to overcome confirmation bias among the judges. Lastly, Part VI will briefly summarize the arguments and solutions discussed throughout the Note.

## II. THE PURPOSE OF ORAL ARGUMENT

Appellate oral argument is valuable and irreplaceable. Its primary purpose is to achieve optimal client advocacy and judicial review.<sup>8</sup> All other benefits are by-products of the process. The ultimate goal of bringing counsel before a panel of judges is to give a litigant his day in court and to help that court arrive at a just decision for that litigant. Judge Albert Tate Jr. believed that oral argument's "purpose is to assist and enlighten the court and if possible to incline the court to

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<sup>7</sup> *Id.* at 4 n.13 ("One federal judge has gone so far as to advocate making all appeals discretionary in the courts of appeals so that oral argument can be held in every case.").

<sup>8</sup> Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 629 (1962) ("The job of an appellate argument is to win a particular case before a particular tribunal, for a particular client.").

give sympathetic consideration to the client's view."<sup>9</sup> Additionally, Justice Simeon R. Acoba Jr. described oral argument as a "dialogue among the members of the court and counsel, which . . . enlivens the written briefs, heightens [the court's] awareness of what is significant to the parties, and invigorates [its] analytical senses."<sup>10</sup> Oral argument goes hand in hand with written briefing. When oral argument takes place without written briefs, the court is left unprepared to discuss the issues. Likewise, written briefing without oral argument leaves the court with unanswered questions. Although there is no constitutional right to oral argument,<sup>11</sup> its notion straddles the line of due process and equity.<sup>12</sup> In addition to its primary purpose, oral argument produces a bounty of benefits that are vital to the judicial process. These beneficial by-products are useful in defending the continued need of oral argument in appellate review.<sup>13</sup>

Oral argument keeps the court's doors open to the public, and thereby judges are accountable to the public—not only for the decisions they make, but also for the reasoning they employ to arrive at a decision.<sup>14</sup> In 1999, Justice Stanley Mosk of the California Supreme Court published an article defending the importance of oral argument.<sup>15</sup> In his article he discusses the public good that is served as a result of hearing oral argument.<sup>16</sup> He states:

[Oral] argument and its subsequent reporting in the media enable members of the public to hear and understand the contentions of the conflicting litigants. Ordinary observers cannot be expected to seek out the respective briefs, unless, of course, they have a peculiar or potential financial interest in the result of the litigation. Nor must they be expected in every instance to merely wait months for the ultimate published opinion.<sup>17</sup>

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<sup>9</sup> Albert Tate Jr., *The Appellate Advocate and the Appellate Court*, 13 LA. B.J. 107, 112 (1965).

<sup>10</sup> *Blair v. Harris*, 45 P.3d 798, 808 (Haw. 2002) (Acoba, J., dissenting).

<sup>11</sup> *Perez-Llamas v. Utah Court of Appeals*, 2005 UT 18, ¶ 10, 110 P.3d 706 ("[O]ral argument is a tool for assisting the appellate court in its decision making process, not an independent due process right vested in the parties.").

<sup>12</sup> *See Blair*, 45 P.3d at 809 ("I believe the parties should be entitled to employ oral advocacy in their efforts to persuade us . . . ."); Stanley Mosk, *In Defense of Oral Argument*, 1 J. APP. PRAC. & PROCESS 25, 26 (1999) ("Primarily [oral argument] enables the client—a member of the public—to have his point of view presented out in the open to the reviewing court. He believes it is his right, and for that purpose he engages an attorney to make his voice heard.").

<sup>13</sup> *See Wolfson*, *supra* note 4, at 454 ("There are other substantial benefits to oral argument, aside from changing minds or making up minds. These other benefits more than make the case for oral arguments.").

<sup>14</sup> *See Mosk*, *supra* note 12, at 27.

<sup>15</sup> *See id.* at 25.

<sup>16</sup> *Id.* at 26.

<sup>17</sup> *Id.*

Additionally, oral argument contributes to sound public policy because it reminds the judges of the other players in the appeal and prevents them from becoming “too isolated.”<sup>18</sup> Oral argument also provides a type of scholarly think tank for counsel and the judges to predict unforeseen negative consequences of a particular decision by addressing hypotheticals.<sup>19</sup> Although the benefits cited above are not the principal purpose of oral argument, they show that in addition to client advocacy and appellate review, oral argument offers a diversity of benefits that would be lost if it were completely abandoned. Justice William J. Brennan summarized oral argument’s value when he concluded that “oral 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 . . . .”<sup>20</sup> As a result, courts must continue to strive to fulfill these purposes and retain these benefits by preserving an effective form of oral argument through procedural modification. Failure to do so has resulted in the weakened foundation of the institution, and opened the door for critics to call for its demise.

### III. WHEN PROCEDURE DILUTES PURPOSE

As the debate over the usefulness of oral argument continues, those who demand its abolishment cite several drawbacks as evidence of its uselessness. These criticisms, however, are only based in procedural weakness and do not strike at the core purpose of oral argument.<sup>21</sup> Therefore, the weaknesses these critics describe do not bolster their position that oral argument should be abolished; rather, they show that oral argument only requires procedural modifications to correct the problem. The following section discusses the most common weaknesses and shortcomings attributed to oral argument.

The two most popular criticisms of oral argument are (1) that it takes too long and (2) that the courts are too busy to expend judicial resources on such an activity. The critics state, “[O]ral argument, even when reduced to only ten or fifteen minutes per party, requires that judges and their staff travel to the court and sit through the [proceedings].”<sup>22</sup> These critics further complain, “Oral argument also requires the full attention of the judges and their staff to the cases being argued. The criticism is that the judges and staff are then left without opportunity to attend

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<sup>18</sup> Martineau, *supra* note 2, at 13.

<sup>19</sup> See Mosk, *supra* note 12, at 27 (“[S]killful interrogation of counsel from the bench may reveal how a proposed legislative or judicial rule will actually perform in day-to-day practice. This may often be accomplished by suggesting hypothetical circumstances or by asking counsel to offer such possibilities.”).

<sup>20</sup> HARVARD LAW SCH., OCCASIONAL PAMPHLET NO. 9, PROCEEDINGS IN HONOR OF MR. JUSTICE BRENNAN 22 (1967).

<sup>21</sup> See discussion *supra* Part II.

<sup>22</sup> Erick Rivero, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1517 (2006).

to any other matters during the course of an oral argument day.”<sup>23</sup> In connection with the complaint regarding lack of time, critics mention large caseloads as evidence of oral argument’s futility.<sup>24</sup>

Utah appellate courts have dealt with the lack-of-time issue by rigidly limiting time for oral argument. But the time limit creates problems of its own for attorneys. *Utah’s Practitioner’s Guide to Oral Argument* describes the need for haste in oral arguments by advising attorneys to be concise so as to not waste the limited time they are granted for oral argument.<sup>25</sup> It almost seems as if the court is rushing through the process in order to move on to other tasks. It is understandable that the panel is busy and has many cases to review, but it is less understandable that judges choose to be so formalistic as to shut their ears to a valid argument just because the time ended. Additionally, if oral argument is truly important, why is the panel so concerned with keeping to a rigid time allotment? Although engaging in oral argument does require more time, like any meaningful endeavor, the investor can expect a valuable return on his investment. Roscoe Pound reflected this same belief when he explained that “the rules limiting the time of argument . . . suggest [an] attitude toward oral argument as something in which the bar are to be indulged rather than as an effective aid to correct decision.”<sup>26</sup>

Oral argument is also criticized because the parties involved, the attorneys and the judges, are imperfect beings that make mistakes.<sup>27</sup> For example, parties often lose precious time during oral arguments because some judges have a propensity to bully counsel or lead their argument astray with tangential lines of questioning.<sup>28</sup> In some cases, judges focus on an unrelated issue or attempt to get

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<sup>23</sup> *Id.*

<sup>24</sup> See Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661 (2007).

<sup>25</sup> THE ADMIN. OFFICE OF THE COURTS, PRACTITIONER’S GUIDE TO ORAL ARGUMENT BEFORE THE UTAH COURT OF APPEALS 4 (2011), available at [http://www.utcourts.gov/courts/sup/forms/Practitioners\\_Guide\\_To\\_Oral\\_Argument.pdf](http://www.utcourts.gov/courts/sup/forms/Practitioners_Guide_To_Oral_Argument.pdf) (“[T]he allotted time for argument is consumed quickly, especially when numerous questions come from the Court. Counsel should be prepared to concisely present the strongest or most significant elements of the case. . . . The Court encourages counsel to submit the matter with time remaining if appropriate.”).

<sup>26</sup> ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 370 (1941).

<sup>27</sup> Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles?*, 49 U. MIAMI L. REV. 127, 127 (1994) (“[J]udges are not perfect, but only human . . . .”); Jon Newberry, *Nobody’s Perfect: For Lawyers Who Think They Must Always Be Invincible, Acknowledging an Error and Taking Corrective Action Go Hand in Hand*, A.B.A. J. Mar. 1996, at 70, 70 (1996) (“The best lawyers are not perfect, but they do handle their mistakes well.”).

<sup>28</sup> See Mosk, *supra* note 12, at 26 (providing an example of a California judge who always interrupted lawyers at the beginning of their oral argument with certain questions that inevitably distracted the lawyers from the substance of their arguments).

the attorney to commit to unfavorable assertions about the case.<sup>29</sup> Justice Mosk recalls a justice on the California Supreme Court “who would interrupt counsel’s oral presentation at the outset with this critique: ‘Is your argument in your brief? If so, there is no need to repeat it here. If it is not, why not?’”<sup>30</sup> Justice Mosk continued: “The beleaguered counsel was then required to explain his technique rather than to devote his limited time to the substance of his contention.”<sup>31</sup> This behavior is counterproductive. It wastes the lawyer’s, and most importantly, the client’s valuable time. Furthermore, lawyers often spend months preparing for oral argument only to be interrupted in the middle of their introduction by an unexpected line of questions from a judge.<sup>32</sup>

In connection with the judge’s shortcomings, another prevalent criticism and drawback to today’s oral argument procedure is the panel’s own confirmation bias.<sup>33</sup> According to Professor Alafair Burke, “[C]onfirmation bias is the tendency of people, when they are testing the validity of a theory, to favor information that confirms the theory over disconfirming information.”<sup>34</sup> For example, an appellate judge may formulate a theory of the case and an inevitable decision as a result of reading the briefs in preparation for oral argument. At oral argument, under the confirmation bias theory, that particular judge may be prone to only ask questions or look for arguments that support, rather than disconfirm, her view of the case.<sup>35</sup> Essentially, judges are not allowing oral argument to add anything to the discussion because they have already made up their minds. A variety of judges have confirmed this theory. Judge Ruggero J. Aldisert, appellate judge on the United States Court of Appeals for the Third Circuit believes:

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<sup>29</sup> Mark Hummels, *Distributing Draft Decisions Before Oral Argument on Appeal: Should the Court Tip Its Tentative Hand? The Case for Dissemination*, 46 ARIZ. L. REV. 317, 317–19 (2004); see also Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, LITIG., Spring 1989, at 33, 36 (warning that appellate judges may engage in extended debates with counsel over issues that are not central to the case and that advocates must seek to avoid “becoming bogged down in intellectually stimulating digressions while precious argument time ticks away”).

<sup>30</sup> Mosk, *supra* note 12, at 26.

<sup>31</sup> *Id.*

<sup>32</sup> See Wolfson, *supra* note 4, at 455.

<sup>33</sup> Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516 (2007) [hereinafter Burke, *Neutralizing Cognitive Bias*]. Other culprits responsible for a judge’s inability to change his mind in oral argument could include selective information processing, belief perseverance, and the avoidance of cognitive dissonance; however, a discussion of these cognitive psychology studies is beyond the scope of this Note. See generally Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 *passim* (2006) (discussing alternative possibilities to cognitive biases).

<sup>34</sup> Burke, *Neutralizing Cognitive Bias*, *supra* note 33, at 516 n.17 (citing PETER C. WASON & PHILIP N. JOHNSON-LAIRD, *PSYCHOLOGY OF REASONING: STRUCTURE & CONTENT* (1972)).

<sup>35</sup> *Cf. id.* at 516–17 (applying the cognitive strategies to prosecutors rather than judges).

[W]hen I change . . . my mind at oral argument, more often than not it is because the performance at argument did not meet the promise of the brief. My mind was changed because the argument did not properly defend the brief. The case was not won at oral argument; it was lost.<sup>36</sup>

Additionally, a ten-month observation of Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit found that oral arguments failed to change his mind in 131 out of 157 cases.<sup>37</sup> Moreover, attorneys are beginning to see the futility in arguing a case that is already decided in the minds of the judges. One attorney's sentiment reflected a general sense of discouragement when he said that "most lawyers can count on the fingers of one hand the number of times oral argument actually seemed to make a difference."<sup>38</sup> If judges do not find oral argument useful and have firmly decided the case before hearing argument, why continue the course? The solution, however, does not lay in abolishing oral argument, but instead it must be found in removing the judge's biases.

As mentioned above, attorneys are not without their fair share of the blame. They have been accused of wasting argument time with poorly prepared presentations. In some cases, attorneys seem uninterested, read verbatim from their briefs, and repeat themselves constantly.<sup>39</sup> Furthermore, counsel has been accused of mis-citing cases, arguing "weak, silly, or frivolous issues—which shouldn't be in the briefs in the first place,"<sup>40</sup> and sidestepping questions put forth by the bench.<sup>41</sup> It is difficult for a court to reach an equitable decision in the appellate-review process when counsel is not fulfilling its end of the deal.

Given all of its human shortcomings, there is still value in oral argument. New oral argument procedures are designed to free up the court's docket and allow frivolous appeals to be disposed of quickly and efficiently. The courts, having devoted time and resources to make their dockets lighter and the process more streamlined, have unfortunately all but abandoned the usefulness of appropriate oral argument. Only meaningful procedural reform can return this lost value to the court and allow oral argument to flourish again.

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<sup>36</sup> RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 294 (1996).

<sup>37</sup> Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 68, 68–70.

<sup>38</sup> Robert E. Shapiro, *Advance Sheet*, LITIG., Summer 2001, at 59.

<sup>39</sup> Wolfson, *supra* note 4, at 454.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 455.



## IV. UTAH: WHERE PROCEDURE CAN EMBRACE PURPOSE

*A. The Utah Experiment*

Utah offers the fertile legal landscape necessary to reform the broken oral argument system. First, the Utah appellate court system carries a relatively smaller caseload than most states with a similar population size.<sup>42</sup> In 2008, the total number of appeals filed in both the Utah Supreme Court and the Utah Court of Appeals hovered close to 1,450.<sup>43</sup> Kansas, West Virginia, and Nevada—states with roughly the same or smaller population size—had almost twice as many appeals filed in their respective states in 2008.<sup>44</sup> As a result, the Utah state appellate system is not overwhelmed by heavy caseloads like those states that use their workload as justification for cutting back on oral argument. Second, Utah is fundamentally open to allowing oral argument in its appeals. Neither the Utah Supreme Court nor the Utah Court of Appeals requires litigants to formally request oral argument. Thus both courts are structurally open to hearing oral argument on every appeal. Furthermore, as of 2004, the Utah Supreme Court was one of only three state supreme courts to automatically schedule oral argument in all cases.<sup>45</sup> Accordingly, Utah is well positioned to experiment with a procedural reform that will assist its efforts to improve oral argument in its appellate courts.

*B. Utah State Appellate Court Structure and the Application of Rule 29*

To better understand both the potential effects of and the need for implementing procedural modifications in the Utah appellate system, it is useful to understand how the system is structured. Additionally, it is important to know how Utah's appellate procedure rules relating to oral argument are applied in its appellate courts.

Currently Utah has two appellate courts, the Utah Supreme Court and the Utah Court of Appeals. The Utah Supreme Court is the state's only "court of last resort," and it is responsible for all appeals relating to civil cases, capital and first-degree felony cases, and all proceedings relating to the Judicial Conduct Commission, attorney discipline, and constitutional questions.<sup>46</sup> The Utah Supreme Court, consisting of five justices who serve ten-year terms, also has jurisdiction

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<sup>42</sup> See R. LAFOUNTAIN, ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 2 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (showing that Kansas had 2,742 incoming cases in its appellate courts, West Virginia had 2,411, and Nevada had 2,248).

<sup>45</sup> See DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 151–54 tbl.26 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf>.

<sup>46</sup> THE ADMIN. OFFICE OF THE COURTS, UTAH'S APPELLATE COURTS (2007), available at [http://www.utcourts.gov/knowcts/docs/Appellate\\_Court\\_Brochure.pdf](http://www.utcourts.gov/knowcts/docs/Appellate_Court_Brochure.pdf).

over the Utah Court of Appeals.<sup>47</sup> The Utah Court of Appeals was created in 1987 and consists of seven judges who serve six-year terms.<sup>48</sup> It is responsible for all district court criminal appeals (excluding capital and first-degree felony cases), domestic relationship appeals, and all juvenile court appeals.<sup>49</sup> It also hears any other cases transferred to it from the Utah Supreme Court.<sup>50</sup>

Rule 29 of the Utah Rules of Appellate Procedure governs oral argument for both the Utah Supreme Court and the Utah Court of Appeals.<sup>51</sup> Subsection (a) of Rule 29 allows oral argument in all cases without a formal request, but it also gives the courts the ability to deny oral argument in frivolous appeals, appeals where a dispositive issue has been “recently authoritatively decided,” and in appeals where “the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.”<sup>52</sup> Most recently, the Utah Court of Appeals has used this discretion and denied oral argument in several cases.<sup>53</sup> Subsection (c) outlines the “order of oral argument.”<sup>54</sup> This subsection reflects the rigid procedure present in most appellate courts today.<sup>55</sup> Lastly, subsection (f) gives litigants the option to waive argument and receive a decision on the submitted briefs.

Rule 29 has recently been amended to address the courts’ presumption of oral argument.<sup>56</sup> The Advisory Committee Notes explain, “[T]he former practice was to presume that argument was waived unless requested. The amendments change the practice to presume that argument is requested unless expressly waived. The rule incorporates the oral argument priority classification formerly found in the administrative orders of the Supreme Court.”<sup>57</sup> This is one reason why Utah is a particularly ideal location for procedural reform. Unlike other jurisdictions that are introducing rules that limit oral argument, Utah is expanding the right to oral argument, thus reflecting the State’s willingness for further reform.

Even though Utah has amended Rule 29 to allow more oral arguments, its procedural structure, like most appellate courts, is antiquated and seems to engage in the process for traditional reasons. The appellate process in the Utah Supreme Court and Utah Court of Appeals starts with the appellant filing a notice of appeal

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> UTAH R. APP. P. 29.

<sup>52</sup> *Id.* 29(a)(1)–(3).

<sup>53</sup> *See, e.g.,* Salt Lake City v. Hughes, 2011 UT App 128, ¶ 1 n.2, 253 P.3d 1118.

<sup>54</sup> UTAH R. APP. P. 29(c).

<sup>55</sup> *Id.* (“The appellant shall argue first and the appellee shall respond. The appellant may reply to the appellee’s argument if appellant reserved part of appellant’s time for this purpose. Such argument in reply shall be limited to answering points made by appellee in appellee’s oral argument.”).

<sup>56</sup> UTAH R. APP. P. 29 advisory committee note.

<sup>57</sup> *Id.*

with the court no later than thirty days after the trial court's judgment.<sup>58</sup> From there, the parties file briefs and the trial court record is sent to the appellate court.<sup>59</sup> Once the appellate court has these documents in its possession, oral argument is heard, and thereafter the court issues an opinion to the lower court and to the parties involved.<sup>60</sup> The mechanics of the oral argument format in the Utah appellate courts are very similar to other courts across the country. It is formalistic and fairly brief. The Utah Supreme Court hears cases on the first Tuesday, Wednesday, and Thursday of every month, excluding January, July, and August.<sup>61</sup> It allows each party twenty minutes to address the court, totaling forty minutes per session.<sup>62</sup> The Utah Court of Appeals hears arguments in the Matheson Courthouse, usually in the last two weeks of every month, excluding July and December.<sup>63</sup> This court usually hears two to three arguments a day.<sup>64</sup> It also encourages counsel to be well prepared for "the presentation and judicial dialogue that constitute oral argument."<sup>65</sup> The court allows each party fifteen minutes to address the court, totaling thirty minutes per session.<sup>66</sup> In both the Utah Supreme Court and Court of Appeals these time requirements are strictly followed and kept by a timer on counsel's podium.<sup>67</sup> Similarly, the remaining procedures are followed in both courts. As is the tradition with all appellate courts, the appellant argues first and is allowed to allocate a portion of his time for rebuttal.<sup>68</sup> Thereafter the appellee argues, and then the appellant engages in his rebuttal.<sup>69</sup> If time concludes as counsel is explaining a legal theory or argument, he must stop immediately.<sup>70</sup> The Utah State Judiciary has even stated, "[T]he allotted time for argument is consumed quickly, especially when numerous questions come from the Court. Counsel should be prepared to concisely present the strongest or most significant elements of the case. . . . The Court encourages counsel to submit the matter with time remaining if appropriate."<sup>71</sup> The Utah rules openly accept the value of oral argument, but simultaneously undercut that value by limiting its use in the execution of the rule.

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<sup>58</sup> UTAH R. APP. P. 4(a).

<sup>59</sup> THE ADMIN. OFFICE OF THE COURTS, *supra* note 46; UTAH R. APP. P. 12(b).

<sup>60</sup> See THE ADMIN. OFFICE OF THE COURTS, *supra* note 46.

<sup>61</sup> THE ADMIN. OFFICE OF THE COURTS, PRACTITIONER'S GUIDE TO ORAL ARGUMENT BEFORE THE UTAH SUPREME COURT 1 (2011).

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 4; THE ADMIN. OFFICE OF THE COURTS, *supra* note 25, at 4.

<sup>68</sup> See THE ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 3; THE ADMIN. OFFICE OF THE COURTS, *supra* note 25, at 3.

<sup>69</sup> See THE ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 4; THE ADMIN. OFFICE OF THE COURTS, *supra* note 25, at 3-4.

<sup>70</sup> THE ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 4; THE ADMIN. OFFICE OF THE COURTS, *supra* note 25, at 4.

<sup>71</sup> THE ADMIN. OFFICE OF THE COURTS, *supra* note 61, at 4.

## V. PROPOSAL FOR PROCEDURAL REFORM

The failures described above strengthen the argument that the solution is modification, not abolishment.<sup>72</sup> This section proposes several procedural strategies that can remedy the problems described in Part III. These proposals can either be taken as a whole or taken piecemeal; regardless, they will have a positive effect on the overall quality of oral argument in Utah and the national appellate system.

### A. *Tentative Opinions Issued Before Oral Argument*

An effective way to curb tangential lines of questioning from aggressive judges, to better prepare the litigants, and to narrow the focus of discussion in oral argument is for the court to circulate a tentative opinion among all the parties before argument takes place. A draft decision or tentative-opinion program is not new to state appellate practice or even to the justice system in general. Although it has not yet been used in the Utah appellate system or on the federal appellate level, it has been implemented in both the Arizona Court of Appeals and the California Court of Appeals with great success.<sup>73</sup> Furthermore, prior to its implementation in these state appellate courts, many state trial courts and administrative courts had employed this process to improve the quality of counsel's arguments.<sup>74</sup> In essence, a tentative-opinion program is a type of reverse briefing whereby the court reveals where it stands prior to oral argument.

#### 1. *The Arizona Model*

In 1982, the Arizona Court of Appeals, Division Two, was the first appellate system in the country to implement the tentative-draft distribution procedure.<sup>75</sup> Under the Arizona model, once oral argument is scheduled for an appeal, the process takes the following four-step procedure. First, after the panel of judges has read the parties' briefs, an assigned judge prepares a draft opinion asserting his own decision of the case.<sup>76</sup> The author of this tentative opinion is not revealed to

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<sup>72</sup> See discussion *supra* Part III.

<sup>73</sup> See Hummels, *supra* note 29, at 329–38.

<sup>74</sup> *Id.* at 320 (citing *People v. Hayes*, 802 P.2d 376, 419 (Cal. 1990)); Philip M. Saeta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, JUDGES J., Fall 1981, at 20, 21; see also PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 53 (1976) (“Trial courts were early modern pioneers of disseminating draft decisions. The Los Angeles Superior Court began issuing tentative rulings before oral argument in its law and motion and discovery courts in the mid-1960s. Administrative tribunals also have long benefited from the use of recommended or tentative decisions.”).

<sup>75</sup> Hummels, *supra* note 29, at 320.

<sup>76</sup> *Id.* at 330.

the parties.<sup>77</sup> Second, the assigned judge then circulates the draft opinion among the other judges on the panel with an opportunity to informally discuss the case and come to a tentative meeting of the minds.<sup>78</sup> This informal discussion, however, does not constitute an official vote and thus the draft decision is still the initial view of the author.<sup>79</sup> Third, the court notifies the parties of the scheduled date and time for oral argument and that a draft opinion is available.<sup>80</sup> Fourth, after receiving this notice, litigants have ten days to alert the court that they do not want the tentative opinion distributed.<sup>81</sup> Finally, if all parties agree to the dissemination of the opinion, the draft is distributed to the parties for use in preparation for oral argument seven to ten days prior to the scheduled date of oral argument.<sup>82</sup>

The beauty of the Arizona draft opinion procedure is that it is informal and “not followed rigidly in all cases.”<sup>83</sup> This allows the judges some flexibility and to adapt to the changing needs of each case.<sup>84</sup> For example, sometimes a judge assigned to draft an opinion is unable to finish before the assigned oral argument date. In such a case, the court can continue without draft distribution or it can reschedule the oral argument to allow for the completion of the draft.<sup>85</sup> This loose approach to the procedure gives the court the ability, in the event of a full docket, to dispense with the draft distribution and to continue on with the scheduled cases. When procedure becomes more important than the goal it aims to achieve, the court system finds itself engaging in counterproductive behavior. The Arizona approach solves that problem.

Moreover, the Arizona draft opinion procedure allows the attorneys involved in the appeal to know what issues are important to the panel. It also helps them tailor their presentation to resolve any concerns the judges might have. Additionally, the draft opinion permits the attorneys to clarify any erroneous assumptions the panel might have in regard to their case.<sup>86</sup> As noted above, the Arizona draft opinion distribution procedure has been successful and welcomed by judges and attorneys. In 1987, the court initiated an informal study to measure the overall reception and effectiveness of the process.<sup>87</sup> The study found that the draft opinion procedure

- 1) made oral argument more useful for both counsel and the court by ensuring that judges were better prepared for argument and by focusing the attention of judges and advocates on the significant issues in the case;

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 331.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 350.

<sup>87</sup> *Id.* at 332.

2) gave counsel an opportunity to clarify perceived errors of fact or law in the draft, at a time when the court was viewed to be more responsive to such suggestions than it would be during a motion for reconsideration after a decision; and 3) served to keep the judges and their staff “on track” with their caseload by establishing an “artificial deadline” for draft rulings before argument, and by enabling panels of judges to move quickly to a final opinion or memorandum immediately following oral argument.<sup>88</sup>

Accordingly, the benefits and flexibility that the Arizona model provides can help Utah reshape its approach to oral argument and help make it relevant again.

## 2. *The California Model*

The California model also provides a unique approach to oral argument procedure, and if coupled with some of the pieces of the Arizona model, it could offer a more polished approach that will improve oral arguments. In 1990, about a decade after Arizona initiated its draft opinion procedure, the California Court of Appeal, Fourth Appellate District, Division Two, followed suit.<sup>89</sup> The idea arose out of a need to improve oral argument and make it more useful to the parties involved.<sup>90</sup> The challenge in California was that, like Utah, parties are granted oral argument by right, and thus the court hears oral argument in almost all cases.<sup>91</sup> The court needed to take a different approach to handle the amount of arguments it was hearing. The court enacted a model similar in some respects to Arizona’s model, but the California model interjects new procedures to remedy specific problems within its jurisdiction.

One major divergence from the Arizona plan is that California requires a vote by all judges on the panel of its draft opinions, whereas Arizona only requires an informal conference.<sup>92</sup> As a result of the vote, the draft becomes a “tentative opinion” rather than a “draft opinion.”<sup>93</sup> Another difference in the California approach is the notice given to parties in regard to the tentative opinion. After the judges have voted on the tentative opinion, it is mailed to the parties with an “oral argument waiver notice” usually one to two months prior to the scheduled oral argument.<sup>94</sup>

Like the Arizona model, the California model has been well received and has been effective in accomplishing its purposes. According to Justice Thomas E. Hollenhorst, one of the justices responsible for fashioning the California model, the tentative-opinion program made oral argument more useful to the court and to

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 333.

<sup>90</sup> *Id.* at 333–34.

<sup>91</sup> *Id.* at 334 n.135.

<sup>92</sup> *Id.* at 334.

<sup>93</sup> *Id.* at 334–35.

<sup>94</sup> *Id.* at 334.

counsel.<sup>95</sup> In regard to counsel's response to the program, Justice Hollenhorst said, "In both civil and criminal matters, counsel almost always reported great benefit in planning their strategy for oral argument and deciding which issues to concede and which to pursue."<sup>96</sup> The most dramatic effect the California model has had on oral argument is the way counsel's presentations now play before the judges. Traditionally, counsel sparred with one another, attacking each other's arguments from the briefs. Conversely, under the tentative-opinion program, an early winner and loser have already been determined, and thus "[c]ounsel no longer argue against each other but become proponents or opponents of the tentative decision draft."<sup>97</sup> This paradigm shift has resulted in more lively debates during oral argument, and "[w]here counsel raise[s] legitimate concerns about the contents of the tentative opinion, the court, rather than becoming embroiled in a defense of it, defers to the opposing counsel to respond to the concerns."<sup>98</sup> Accordingly, the issues are crystalized for all the parties and a productive forum is created, rather than a formalistic setting where little is accomplished.

Lastly, in 2004, the California Supreme Court issued an opinion discussing whether the tentative-opinion program in Division Two violated the parties' right "to oral argument on appeal in California."<sup>99</sup> The court held that the practice was permissible but warned against the use of the waiver sheet, concerned that it could discourage litigants from pursuing oral argument.<sup>100</sup> Overall, the court was pleased with the program, stating, "We applaud innovations, such as the tentative opinion program adopted by the Court of Appeal here, that are initiated to maintain the quality and integrity of the judicial process in spite of [courts' increasing caseloads and financial constraints]."<sup>101</sup> The tentative-opinion program is still only used in division two and has yet to spread to other divisions within the fourth district.

### 3. *Tentative Opinion Proposal for Utah*

The Utah appellate court system and its oral argument procedure would benefit greatly from implementing a tentative-opinion program. The proposed program should reflect the basic structure of the Arizona model with some of the alterations of the California model. Additionally, new provisions should be included to expand on the successes that California and Arizona have experienced.

The proposed Utah model should operate under a three-step process. First, after briefs have been submitted and oral argument has been requested in either the Utah Court of Appeals or the Utah Supreme Court, a judge on the assigned panel hearing the argument will be randomly selected to write a draft decision. Second,

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<sup>95</sup> Thomas E. Hollenhorst, *Tentative Opinions: An Analysis of Their Benefit in the Appellate Court of California*, 36 SANTA CLARA L. REV. 1, 17 (1995).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 20.

<sup>98</sup> *Id.* at 20–21.

<sup>99</sup> Hummels, *supra* note 29, at 337.

<sup>100</sup> *Id.*

<sup>101</sup> *People v. Pena*, 83 P.3d 506, 516 (Cal. 2004).

as in the California model, after the completion of the draft, the other judges on the panel will review the draft, contribute feedback, and vote as to whether it reflects the mind of the court. If all the judges agree, the draft decision will then become a tentative opinion. Although it may take longer to draft and to vote on, the tentative opinion provides counsel a better prospective of where the entire panel of judges stand in regard to the case.<sup>102</sup> Under Arizona's draft-decision model, counsel may be misled to believe that the entire panel is in conformity with the draft and may address arguments only pertinent to one judge, thus causing oral argument to be lopsided and ineffective. Moreover, when counsel is aware of the entire panel's position, it may reconsider a certain approach or abandon seeking oral argument altogether.<sup>103</sup> Thus, dedicating time early in the process to produce a tentative opinion better prepares the judges and counsel for oral argument, and as a result it lays a foundation for oral argument to be more efficient and effective. Finally, using a tentative-opinion approach over a draft opinion may save time in that it may help reduce the number of frivolous and unwarranted oral arguments that continue forward. In a sense, it is better to spend a dime now to save a dollar later. Third, after the completion of the panel's vote, the litigants are notified by e-mail of the date and time scheduled for oral argument and that a tentative opinion is available for distribution pending acceptance by both parties. Both the appellant and appellee will then have ten days to opt out of the program. If neither party sends correspondence within the ten days, the panel will disseminate the tentative opinion—ideally between fourteen and twenty-one days prior to oral argument.

The above proposal assumes that each member of the panel of judges will agree on the preliminary draft decision and that the three-step process can be accomplished in a reasonable time—avoiding a backlog in the court's calendar. In the event that problems occur, the proposed Utah model will default to the flexible approach adopted by Arizona.<sup>104</sup> The court can either postpone oral argument or dispense entirely with the tentative opinion.<sup>105</sup> What the Utah model will do differently, however, is that it will still require some kind of communication from the panel to the litigants prior to oral argument. This communication could be the draft opinion with disclaimers that it only contains one judge's opinion. It could also be a type of interrogatory, addressing questions that the judges may ask in oral argument.<sup>106</sup> The purpose of this portion of the proposal is to eliminate the element of surprise during oral argument and to give counsel some direction while preparing. Time and disagreement among judges are not the only potential drawbacks to the proposed Utah model; however, additional drawbacks will likely be overcome by including flexible and simple procedural additions.

Another popular criticism of the tentative-opinion program among reluctant courts is the "judges' concern with opening their internal 'work product' to public

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<sup>102</sup> Hollenhurst, *supra* note 95, at 14.

<sup>103</sup> *Id.* at 14–15.

<sup>104</sup> Hummels, *supra* note 29, at 330–31.

<sup>105</sup> *Id.*

<sup>106</sup> Martineau, *supra* note 2, at 31.



inspection.”<sup>107</sup> This hesitation can be overcome by scheduling an opportunity for counsel to read the tentative opinion in camera. Under this approach, courts would require attorneys to review draft opinions in the judge’s chambers under a specified time limit. If these courts are still uncomfortable with such transparency, at the very least, the court can still engage in a process of distributing questionnaires prior to oral argument in an effort to refine issues at the hearing.

A related criticism is the potential reluctance to change the draft opinion once it has been formulated, much like cognitive bias or “front loading.” Judge Hollenhorst addressed this issue by explaining “that the same arguments about the court becoming locked into a position in a tentative decision can also be made after the use of traditional oral argument and release of an opinion which for some reason has been shown to be erroneous.”<sup>108</sup> Furthermore, as explained above, the judges are also prone to this weakness after their initial reading of the briefs or during their preparation for oral argument. Thus, concluding that tentative opinions are tainted because of a judge’s unwillingness to change his mind is unfounded because judges are prone to do this with or without an established tentative-opinion program in place. A solution to this judicial shortcoming will be addressed in the next section.

Consequently, a tentative-decision program gives direction to oral argument by inviting the attorneys to point out flaws in the tentative opinions. These opinions are described as “targets,” at which the parties are encouraged to take careful aim.<sup>109</sup> The tentative-opinion process keeps judges conscientious of their work and provides transparency to the public. The procedural development of a tentative-opinion program in Utah will refine the judge’s line of questioning and better prepare counsel for the process of presenting the client’s case to the court. As a result, oral argument will improve, and more equitable decisions will be reached.

### *B. Restructuring the Procedural Format of Oral Argument*

In addition to providing an indication of what the court will likely discuss at oral argument, a wholesale procedural format change will further help revitalize the judicial process. Implementing a conference model, rather than the rigid model currently in place, will make the conversation between the judges and counsel less formal and more productive. Judges actually prefer the conference model, and it brings a greater sense of organization to the conversation between the advocate and the panel. Former Deputy Solicitor General Stephen M. Shapiro believes “most appellate courts [and] the Justices of the Supreme Court view . . . [oral] argument, not as an occasion for speeches or a game of 20 questions, but rather as an initial conference convened to decide the case.”<sup>110</sup> He also asserts that “Counsel is invited

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<sup>107</sup> Hummels, *supra* note 29, at 320.

<sup>108</sup> Hollenhorst, *supra* note 95, at 28; *see also* discussion *infra* Part IV.B.

<sup>109</sup> Hummels, *supra* note 29, at 339.

<sup>110</sup> Shapiro, *supra* note 29, at 34.

into the conference for two purposes: to serve as a resource, providing information needed to clarify the thinking of the Justices; and to bring an organizing theme, emphasis, and a note of drama needed to marshal the information in a meaningful way.”<sup>111</sup>

Instead of following an arcane format of judges sitting in elevated benches, the Utah appellate courts should implement a format similar to that used at congressional committee hearings.<sup>112</sup> Under this format, all the parties, including the panel of judges, will sit at level tables facing one another. While seated, attorneys will each receive two to five uninterrupted minutes to summarize their position. Thereafter, each judge will have at least ten minutes to question each attorney.<sup>113</sup> If additional time is required for either counsel or the panel, an extension should be granted liberally.<sup>114</sup> During this questioning process, counsel can address one another, and a conversation will take place among all the parties—rather than a rushed and interrupted show of oratory skill. At the end of the question-and-answer period, the parties will be dismissed and the oral argument will be officially over.<sup>115</sup>

Another common law rule that can be implemented allows for a more open discussion at oral argument by giving the parties the option to address new arguments not addressed in their briefs. According to *Yee v. City of Escondido*,<sup>116</sup> “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”<sup>117</sup> Implementing this rule will make oral argument less dependent on the written briefs and more open to a fluid conversation of the legal issues. Justice Mosk, discussing this notion, stated, “[N]ot infrequently oral argument develops a new issue overlooked or not adequately briefed. This gives the court an opportunity to instruct counsel to prepare supplemental briefing during a specified period.”<sup>118</sup> As a result, no stone will be left unturned, and oral argument will be better equipped to help the court render a just decision. This format will completely change the atmosphere at oral argument. Judges will no longer be able to interrupt counsel with frivolous questions, and attorneys will be required to

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<sup>111</sup> *Id.*

<sup>112</sup> See generally H.R. DOC. NO. 111-157, cl. 2(j), at 563–64 (2011) (describing the procedural format of a congressional committee hearing).

<sup>113</sup> *Cf. id.*

<sup>114</sup> See 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3980 (4th ed. 2008).

<sup>115</sup> This type of argument format is not new to the appellate world. Recently, the New Hampshire Supreme Court implemented a similar format after extensive testing in a lower division. See NEW HAMPSHIRE SUPREME COURT 3JX ORAL ARGUMENT LIST (OCT. 29, 2010), available at [http://www.courts.state.nh.us/supreme/orals/3jx\\_oct\\_28\\_2010.pdf](http://www.courts.state.nh.us/supreme/orals/3jx_oct_28_2010.pdf). Furthermore, Professor Martineau proposed a similar format change in 1986. See Martineau, *supra* note 2, at 30–32.

<sup>116</sup> 503 U.S. 519 (1992).

<sup>117</sup> *Id.* at 534.

<sup>118</sup> Mosk, *supra* note 12, at 27.

come prepared to discuss the pertinent merits of the appeal. An actual conversation will occur between the panel and the attorneys, and the court will engage in a thorough analysis of the law.

*C. Judicial “Debiasing Strategies”*<sup>119</sup>

One procedural modification that will free the judges from confirmation bias and contribute to a more useful oral argument discussion is the application of a cognitive filter test to the appellate review process. This solution solves a key criticism of the tentative-decision program. As described above, confirmation bias is the cognitive process of only favoring information that supports a particular theory or belief, rather than accepting information that may disconfirm that previously held belief.<sup>120</sup> This cognitive limitation may affect a judge’s ability to objectively use information received at oral argument in deciding the appeal. Professor Alafair Burke proposed a test that assists criminal prosecutors in removing their confirmation bias, and as a result decreases the number of wrongful convictions.<sup>121</sup> This same test can be applied to judges as they embark in the appellate review process, especially as they approach oral argument.

*1. Professor Burke’s Prosecutorial Debiasing Strategies*

The core component of Professor Burke’s proposal is to enact noninvasive reform that neither requires cumbersome implementation nor carries with it bags of controversy.<sup>122</sup> Her proposal is nimble and puts the responsibility of implementation on the prosecutors.<sup>123</sup> This intuitive approach may be the best way to initiate reform; however, it requires the judges, individually or collectively as a panel, to implement the following four debiasing strategies.<sup>124</sup>

The first strategy Professor Burke proposes is a simple plan of education.<sup>125</sup> Evidence shows that learning about the dangers of confirmation bias contributes to mitigating its harmful effects.<sup>126</sup> This can be accomplished relatively easily by requiring periodic training.<sup>127</sup> Evidence also suggests, however, that education alone cannot overcome confirmation bias, and therefore it must be united with other strategies.<sup>128</sup>

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<sup>119</sup> Professor Alafair Burke coined this term. Burke, *Neutralizing Cognitive Bias*, *supra* note 33, at 520.

<sup>120</sup> *Id.* at 516 n.17.

<sup>121</sup> *Id.* at 520.

<sup>122</sup> *Id.* at 522.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 520.

<sup>125</sup> *Id.* at 522.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 522–23.

<sup>128</sup> *Id.* at 523.

Second, Professor Burke proposes an individual devil's advocate system where prosecutors are "forced to articulate arguments that contradict their existing beliefs."<sup>129</sup> Research reveals that "induced counterargument" combined with exposure to opposing viewpoints help to remove confirmation bias.<sup>130</sup>

The third debiasing strategy revolves around internal reviews. Since relying solely on oneself to see a different perspective might fail due to a lack of effort or an overwhelmingly strong confirmation bias, Professor Burke suggests using others who are less invested in a particular outcome to help in the decision making process.<sup>131</sup> This process is basically a form of the devil's advocate strategy, but instead of being one's own devil's advocate, another noninvested individual provides a "fresh look."<sup>132</sup> This conversation can take place formally or informally depending on the importance of the case.<sup>133</sup> In either alternative, this form of confirmation debiasing confronts individuals holding the bias and forces them to reconsider their stance. Through this internal review, another layer of redundancy is inserted to assist the prosecutor in his effort to remove the bias.

The last proposed strategy revolves around a system of "external transparency."<sup>134</sup> This strategy interjects the last line of defense against confirmation bias. Where education is susceptible to lack of attention, and devil's advocate exercises with an uninvolved individual are prone to groupthink, this strategy of opening up to others' scrutiny will force individuals with confirmation bias to rethink their position. Professor Burke suggests that external transparency can consist of advisory "fresh look" committees, which are operated by civilians "permitting outsiders such as judges, civil practitioners, and defense attorneys to review their discretionary conduct."<sup>135</sup> Although this may be the most controversial layer in the defense against confirmation bias, the proposal is up to the prosecutors to decide and implement, which allows them to choose an external check that is reasonable to their circumstances.

## 2. *Judicial Debiasing Strategies for the Utah Appellate System*

Although Professor Burke created her proposal with criminal prosecutors in mind, the principles are applicable to judges engaged in appellate review. Before the substantive applicability is discussed, it is important to note that Professor Burke's notion of nimble reform is procedurally applicable as well. These strategies can quickly be initiated if the judges themselves take the responsibility to implement them, thereby avoiding cumbersome and controversial steps that would involve the state legislature. Concerning Professor Burke's first education strategy,

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<sup>129</sup> *Id.* at 524.

<sup>130</sup> *Id.* at 523 ("Social scientists have found that both induced counterargument and exposure to opposing views can reverse the effects of cognitive bias.").

<sup>131</sup> *Id.* at 525.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 526.

<sup>134</sup> *Id.* at 527.

<sup>135</sup> *Id.*

judges could schedule a monthly or quarterly training seminar where the effects of confirmation bias are discussed. This should be easy to implement because most state bar requirements already call for some kind of continuing education course. This confirmation bias training could be incorporated into that schedule.

The devil's advocate strategy is already informally in place in most appellate courts. The process of oral argument itself is a forum for judges to confront opposing viewpoints. This process is not sufficient, however,<sup>136</sup> and additional lines of defense should be built. One possible strategy, related to Professor Burke's second recommendation, is to require the judge to argue more heavily and ask questions against his previously held viewpoint during oral argument. Regarding the tentative-opinion program, the court could require an alternate judge to write a tentative dissenting memorandum opinion in an effort to present the panel with a different outlook on the case. The court could invite judges that are not assigned to the case to provide feedback that would take place in either formal or informal meetings. Additionally, the revised format for oral argument proposed above would lend itself to a more open discussion among the judges and the attorneys, and in turn, it would be a more effective type of devil's advocacy than the original format.

Finally, the court could implement external transparencies in an effort to eliminate confirmation bias. The tentative-opinion program offers a viable strategy in this category. By allowing counsel to see the court's tentative opinions, the judges are forced to explain their positions using facts, and when combined with the other strategies above, they will be more aware of their propensity to allow confirmation bias to influence their decision. At the other extreme, the court could organize a panel of local practitioners to review a judge's suspected confirmation biases by comparing tentative opinions with discussions at oral argument and the ultimate decision in the case. These committees would be completely advisory, much like the committees used in Professor Burke's example, and would be used in situations where the court itself institutes the committee by invitation. Applying any of the above strategies will breed a culture that is aware of the dangers of confirmation bias and is able to remove that bias from judicial decisions. Consequently, oral argument will become more useful and relevant for everyone involved.

## VI. CONCLUSION

Accordingly, the current institution of oral argument in the national and Utah appellate court systems must be revitalized to save a legal practice that has positively contributed to the development of the law. The purposes served by oral argument—client advocacy and equitable appellate review—cannot be lost merely because the procedure is outdated. By implementing a tentative-opinion program, oral argument will be more focused and meaningful. By reformatting the procedural logistics of oral argument, the parties will be uninhibited in their

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<sup>136</sup> See discussion *supra* Part III.

approach to the conversation. Finally, by employing judicial debiasing strategies, the judges will be aware of their confirmation bias propensities and, as a result, will arrive at better decisions. The Utah appellate process will be reinvigorated and will avoid the “sorry day” when oral argument becomes meaningless.