always Appealing: Would Releasing Draft Opinions Make Oral Argument Better?

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By Jon Collins

Unless you've been living under a rock, you are probably aware that someone leaked a preliminary opinion from Justice Samuel Alito in Dobbs v. Jackson Women's Health Org. Barring an unlikely last-minute change of heart, the opinion — conspicuously labeled and highlighted as a "1st Draft" — would unequivocally eliminate the right to an abortion, upending 50 years of constitutional law.

And yet despite the undeniable gravity of the opinion's substance, many prominent law professors, commentators, and journalists instead fixated over the impropriety of the leak itself. Conspiracy theories and opinion pieces sprouted faster than adolescent fan fiction; even SCOTUSblog, for example, immediately declared1 that the leak — rather than its result — amounted to "the gravest, most unforgivable sin."

Of course, SCOTUSblog's hyperbole aside, the leaked draft opinion was unquestionably a stark departure from the Court's usual norms. But is it possible that, in the right circumstances, releasing preliminary draft opinions might be a good thing?

Given the amount of ink spilled decrying the leaked Dobbs opinion, you might be surprised to learn that some appellate courts regularly issue "tentative" rulings long before the decision becomes final. In California, one division of the intermediate appellate court delivers a "tentative opinion" to counsel before oral argument — sometimes one to two months in advance.2 "Tentative opinions" can take many forms, ranging from full draft opinions, to short memoranda summarizing how the court intends to rule, to a simple list of questions directing counsel to the questions the court believes to be the most important.

Trial courts in California had adopted similar procedures in the 1980s, and the practice began in appellate courts in 1990 as a way to ensure compliance with the California Constitution's requirement that courts issue opinions no less than 90 days after the hearing date.3 But the main benefit of issuing tentative opinions is the efficiency and focus they bring to the appellate process, particularly oral argument.

Oral argument can sometimes be unhelpful for both advocates and Judges when they have different ideas about which issues are the most important and end up talking past each other. Many Judges express frustration when appellate counsel refuses to "cut to the chase" or insists on redirecting the argument to peripheral issues the court is less interested in. On the other hand, advocates can spend hours preparing for oral argument — incurring costs to their client — only to find the court isn't interested in the first three issues but is extremely focused on the fourth; or, even worse, to face a completely silent bench that has already made up its mind.

By providing insight into the court's reasoning for how it intends to resolve a case, tentative opinions allow appellate counsel to use oral argument as an opportunity to focus on the key issues that might sway the court to a different result or at least refine its decision. In California, many advocates and Judges have generally positive views of the practice; not only are advocates better prepared to make their final case to the court with a tentative opinion, but also "the decision to proceed with oral argument [is] easier" because it can "be discussed with clients in light of the cost."4

One judge praised tentative opinions by noting that "oral arguments have become shorter and focused on more important aspects of the case."5 Judges also believe the practice results in stronger and more accurate final opinions, as the tentative opinion alerts counsel to any legal or factual discrepancies that the court may have overlooked.6 In 2004, the California Supreme Court expressed its approval, declaring that "[w]e applaud innovations, such as the tentative opinion program," which is "designed to streamline the appellate process."7

Despite these benefits, tentative opinion procedures — or something similar — have not caught on elsewhere in the appellate world. Indeed, while appellate courts in New Mexico and Arizona have dabbled with similar practices,8 tentative opinions have not even managed to spread to the rest of California — most of the state's appellate divisions don't issue them.

Tentative opinions are certainly controversial. When an appellate judge in California first introduced the idea at a conference for other appellate judges, it was "as welcomed as a porcupine at a dog show."9 This might be due to the legitimate concerns about how tentative rulings might affect the appellate process.

For example, some critics argue that tentative opinions diminish the persuasive value of oral argument. Specifically, the fear is that appellate judges' opinions will be fixed and thus they will be more adversarial during oral argument — defending the tentative opinion and being "less receptive to arguments contrary to their tentative view than if they had authored nothing."10 Even if that isn't true — after all, nearly every appellate court already drafts pre-hearing or "bench" memoranda before oral argument, which often function as draft opinions — there may be a legitimate concern that tentative opinions diminish the court's appearance of fairness. When a court stands by its tentative opinion after the losing party endures a tough oral argument, it might give the impression that the court was biased against the losing party from the beginning.

Another consequence of tentative opinions is that they tend to reduce oral argument altogether. Of course, oral argument is available even in jurisdictions that issue tentative opinions, but more parties choose to waive it when they have the benefit of learning how the court intends to rule.11

To some, reducing oral argument is a benefit — it lowers litigation costs while simultaneously reducing the burden on courts. But most judges still find oral argument important; in one (admittedly old) survey, 80% of judges responded that oral argument is "very helpful" to resolving cases.12 And oral argument serves important functions beyond determining a result in legal disputes. If nothing else, oral argument can provide a "psychological benefit," especially for clients, by ritualizing the concept of due process and the opportunity to be heard.13 Oral argument also benefits the public by making the judicial process more transparent; without it, the public would have little opportunity to observe appellate court decision-making at all.

Another criticism of tentative opinions is that they require more work from judges, law clerks, and court staff before oral argument. In some ways, appellate courts do much of this work already — for example, by drafting internal memoranda analyzing each case to help the judges prepare for argument. But for tentative opinions to be useful, much of this work would need to be done

even earlier to provide the parties sufficient notice of the court's preliminary thinking. More importantly, a majority of the appellate panel would need to agree on a tentative opinion (or something similar) that is formally sent to the parties.

Many of these logistical concerns can be mitigated. For example, in New Mexico, the Court of Appeals issues one-to-two-page summaries of how the court intends to rule instead of full tentative opinions.14 Further, when the judges on a panel cannot agree on a tentative opinion, they draft a series of questions directing counsel toward the issues the panel members consider most important.15

In the end, it is hard to say what kind of impact a tentative opinion procedure would have on Washington courts, or if it is even feasible. Whether the potential benefits outweigh the costs requires a deeper analysis of Washington courts' logistical capabilities in addition to the important values underlying the appellate process. That discussion is beyond the scope of this article but is certainly worth having.

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1 https://twitter.com/SCOTUSblog/status/1521295411545260035

2 Alexander J. Konik, Tentative Rulings in California Trial Courts: A Natural Experiment, 47 Colum. J.L. & Soc. Probs. 325, 329 (2014).

3 Joshua Stein, Tentative Oral Opinions: Improving Oral Argument Without Spending a Dime, Journal of Appellate Practice and Process, Vol. 14, No. 1 (2013).

4 Stein, supra n.3 at 175.

5 Konik, supra n.2 at 334-35.

6 Id. at 336

7 People v. Pena, 32 Cal. 4th 389, 9 Cal.Rptr.3d 107, 83 P.2d 506, 516 (2004). However, the court criticized the specific wording of the notice sent to counsel along with the tentative opinion, which the court believed discouraged parties from requesting oral argument.

8 Konik, supra, n.2 at 328.

9 Stein, supra, n.3 at 162-63.

10 Konik, supra, n.2 at 336.

11 Id. at 334.

12 Stein, supra, n. at 176.

13 Id. at 176.

14 Konik, supra n.2 at 328.

15 Id.

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- Business of the Board (58)
- Dining Out (66)
- From The Desk of the Executive Director (66)
- From the Presiding Judge (64)
- General (1582)
- KCBA Classifieds (61)
- King County Law Library (65)
- Letters (1)
- President's Page (67)
- Profile (65)
- Volunteer of the Month (7)

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