

always Appealing: Once Again Glad to Be Last on the Calendar

Posted on: Jul 1, 2023

Bar Bulletin Blog: [General](#)



On the last day of May 2023, I had the great pleasure of sitting through an entire merits oral argument calendar in Division One. Why was the experience so gratifying? In part because, as Judge Mann announced in calling the calendar (at 9:30 a.m. sharp!), it was the first time in over three years the Court had heard multiple cases on an oral argument calendar. Judge Mann noted that the last time he had presided over a calendar, in Spring 2020, it was to announce that “for the duration,” arguments would be conducted in a manner that, at that time, had yet to be determined. Of course, “the duration” lasted far longer than we ever imagined, but Division One’s ingenuity in keeping the courts open was up to the challenge.

I have always enjoyed sitting through merits oral argument calendars — especially Division One, which is usually a “hot” bench that, having preconferenced, can be counted on to ask probing questions that go to the “meat” of an appeal. It is fun listening to the other cases — trying to divine what the issues are,1 privately “grading” the advocates, sussing out which judge on the panel might have a particular case assignment. Most fun of all can be imagining what my response would have been to what appears to be a particularly confounding question — an exercise undoubtedly made easier for me, sitting in the gallery, because my speculative answer is usually unfettered by any knowledge of the difficult facts or pesky precedent that might cause arguing counsel to falter.

So it was really great to be back, cheek-to-jowl with a passel of nervous advocates waiting for their turn at the podium — no temperature checks under a tent outside the locked doors to One Union Square; no swabbing of the podium by a gloved-and-masked clerk; no “pope-mobile”-type plexiglass surrounding the presiding judge. No

no lonely courtrooms, with only arguing counsel allowed in court and no opportunity to debrief with clients and colleagues in the lobby after the adrenaline rush of a really good conversation with the judges.

Our firm began this “Always Appealing” feature three years ago with a column entitled “What Color Is Your Mask?” It was intended as a sartorial guide to oral argument during the pandemic, based on our vast weeks of experience at the time. We speculated how long as advocates we would have to go without haircuts, or whether we would ever have to wear trousers (or skirts) to court again. We’ve all learned a lot since then. Our courts found a number of ways to “skin the covid cat,” and the movement to remote argument (through a plethora of platforms) and the Washington Courts’ foresight in providing access to court proceedings through tw.org, are good things that came out of the pandemic. But more than other appellate courts, Division One remained committed to safe “live” argument whenever possible. For that I remain grateful. But it’s also good to be last on the calendar again!

Catherine W. Smith is a principal in Smith Goodfriend. She founded the Washington Appellate Lawyers Association and is a Past President of the American Academy of Appellate Lawyers. She can be reached at cate@washingtonappeals.com.

1 There always seems to be at least one “mystery issue” in each case. Was there really a Henderson issue in that summary judgment on appeal in the first case? (I think not.) What was the significance of the hair dryer in the insurance coverage case argued second?

2 It was disturbing to realize just how much I rely on lip-reading to “hear” the judges’ questions, and on facial expressions to “see” if I had answered them.

3 Oral arguments are stressful under the best of circumstances. I once sat as a “judge” on a moot court with Charlie Wiggins (when we were partners, before he went on the bench), in which he asked a question that appeared to cause the student advocate to faint. But I never felt like I was going to keel over until I wore a particularly effective mask, which left me breathless, during an argument in 2021.