

May It Please the Court, or Not: Obtaining Oral Argument after *Palombi*

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This article will examine case law in light of the decision in *Palombi v. Palombi*, and provide practice tips on how to best position your case to obtain oral argument.

You Must Ask for It

Under Rule 1:6-2(c), a “...movant’s request for oral argument *shall* be made either in the moving papers or reply; a respondent’s request for oral argument *shall* be made in the answering papers.” (Emphasis added). Under Rule 1:6-2(d), “[e]xcept as provided in R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs.” The import of these rules is clear: If you want oral argument, you must ask for it.

If It is Not a Substantive or a Non-Routine Discovery Motion, Forget It

Oral argument for motions in the civil part is “... granted as of right” unless it “... involves pretrial discovery or is directly addressed to the calendar...”¹ Unfortunately, family part motions are not afforded the same assurance. Even if you ask for oral argument in a family action, there is no guarantee the request will be granted. The rules of court give courts more discretion to grant or deny oral argument in the family part. Even “substantive and non-routine” motions may be adjudicated on the papers in the family part because of one simple word in the rule: “ordinarily.”²

“Motions in family actions shall be governed by R. 1:6-2(b) except that, in exercising its discretion as to the mode and scheduling of the disposition of motions, the court shall *ordinarily* grant requests for oral argument on substantive and non-routine discovery motions and *ordinarily* deny requests for oral argument on calendar and routine discovery motions.”³ The question then is what are “substantive” motions or “non-routine discovery motions,” and how does the court go about deciding

when to grant oral argument and when to determine a case on the papers?

The distinction between a matter or issue that is substantive and a matter or issue that is procedural has long been established in the New Jersey court system. The Supreme Court of New Jersey identifies the distinction as follows:

In [*Winberry v. Salisbury*, 5 N.J. 240 (1950)], we distinguished between substantive and procedural laws by their primary effects on the parties. Substantive law defines the parties’ rights and duties, whereas procedural law regulates the means through which these rights and duties are enforced. *Winberry*, *supra*, 5 N.J. at 247-48. In other words, “[i]f it is but one step in the ladder to final determination and can effectively aid a court function, it is procedural in nature and within the Supreme Court’s power of rule promulgation.” *Suchit v. Baxt*, 176 N.J. Super. 407, 427 (Law Div. 1980).⁴

This distinction was again set forth in a 2007 unpublished Appellate Division case seeking to determine whether an arbitrator’s failure to explain his basis for a treble damage award in a consumer protection matter was appropriate. There, the Court applied the difference between substantive and procedural law by explaining, “[t]he mandate that an arbitrator explain a treble damage award does not affect the winning party’s substantive right to receive the award; it simply describes the procedure by which the award is to be made.”⁵

While *Palombi* has been widely utilized by family part judges since the Appellate Division’s decision in 2010, it certainly was not the first case allowing a family part judge to deny oral argument in his or her discretion.⁶ The rules of court have been continuously amended to address issues that arise within the court system, including the specific desire to expedite matters

within the family court.⁷ Specifically, Rule 1:6-2(b) permits a trial court judge to determine the “mode and manner of disposition of motions and whether they will be orally argued or not.”⁸ This court rule was interpreted to “give the trial judge the option of dispensing with oral argument...when no evidence beyond the motion papers themselves and whatever else is already in the record is necessary to a decision.”⁹ The purpose of the rule was simply to permit trial court judges to avoid “unnecessary or unproductive advocacy.”¹⁰ The court in *Mackowski* interpreted Rule 5:5-4 to mean that oral argument should normally be granted in matters when “significant substantive issues are raised and argument is requested.”¹¹

The Appellate Division has identified specific family part issues that are presumed to be substantive and would ordinarily require oral argument. A non-exhaustive list of these issues includes child custody,¹² parenting time,¹³ alimony,¹⁴ emancipation,¹⁵ and modification of child support.¹⁶ While these issues are ordinarily considered to be substantive, the attorney or *pro se* litigant filing the motion must be clear in his or her arguments and aware that the trial court judge continues to have discretion to deny oral argument, despite the existence of a substantive issue. Further, attorneys or litigants should be aware that the existence of disputed material facts does not alone give rise to a substantive issue.

Beware the Procedural Deficiency Pitfalls

While *Palombi* permits trial court judges to deny oral argument based on the lack of a substantive issue, that is not the only basis for doing so. If a motion is procedurally deficient, the trial court judge may deny oral argument outright, despite the existence of a potential substantive issue or a dispute regarding the facts.¹⁷ There are a number of court rules that require certain procedural steps to be taken within the initial filing of a motion. First, as outlined in Rule 1:6-2(d), a party must request oral argument in his or her moving papers.¹⁸ This request, however, may be conditioned on the requirement that opposition be filed before the moving party's request for oral argument can be triggered.¹⁹ Regardless, as referenced above, if a moving party fails to make this request in his or her moving papers, the court may deem the omission as consent to having the matter heard on the papers.

Certain requests for relief must also be accompanied by particular exhibits, which, if excluded from a submis-

sion, may render the entire submission procedurally deficient, and a basis to deny oral argument.

Rule 5:5-4(a) provides:

When a motion is brought for enforcement or modification of a prior order or judgment, a copy of the order or judgment sought to be enforced or modified shall be appended to the pleading filed in support of the motion. When a motion or cross-motion is brought for the entry or modification of an order or judgment for alimony or child support based on changed circumstances, the pleading filed in support of the motion shall have appended to it a copy of the prior case information statement or statements filed before entry of the order or judgment sought to be modified and a copy of a current case information statement.²⁰

In the *Palombi* matter, the parties' mutual failure to adhere to the rules of court was ultimately fatal to their respective positions, despite the fact that substantive issues regarding child support and alimony were raised by the parties.²¹ While the court ordinarily hears oral argument on issues in which substantive issues are raised, the party's failure to append the appropriate proofs to their moving papers was fatal. Oral argument would have been insufficient to cure these defects. Oral argument is intended to be a forum in which the parties further argue their respective positions and perhaps answer any questions that linger in the judge's mind after reviewing the parties' papers. Oral argument is not intended to be an opportunity for parties to cure the deficiencies in their motions or present facts not of record, judicially noticeable or stipulated.²²

Another procedural deficiency that may lead to the denial of oral argument is a party's failure to adequately support his or her request for reconsideration of a prior order. When filing a motion for reconsideration, the court rules require the party abide by Rule 5:5-4(a) in providing the prior order, but also that the party plead with specificity the aspects of the order the party believes the court has overlooked or erred in making its prior decision.²³ If either of these prongs is not adequately met, the trial court may procedurally deny the motion, despite the fact that substantive issues might exist.

Palombi specifically addressed the issue of reconsideration motions by stating:

...Michael's failure to satisfy the threshold requirement of demonstrating that the court acted in an arbitrary, capricious, or unreasonable manner in his motion papers was not a defect that could be cured at oral argument. Accordingly, the court was not required to engage in the reconsideration process and oral argument would amount to no more than unnecessary and unproductive advocacy.²⁴

While the *Palombi* matter is instructive regarding the Judiciary's discretion to dispense with oral argument, it is perhaps more helpful to family law attorneys to ensure they do not fall victim to the procedural pitfalls that will result in the denial of their oral argument requests.

Practice Points Following *Palombi*

While the *Palombi* matter may often be regarded by attorneys as a tool by which the Judiciary arbitrarily denies oral argument, the legislative intent of the rules behind the case law is judicial economy and efficiency. Attorneys who raise a substantive issue in motion practice must present their matter in a manner that will provide the court with no option but to hear the matter outright. In order to do so, remember the following practice points:

1. Always request oral argument in the moving papers or opposing papers, pursuant to Rule 1:6-2(c) and (d).
2. Oral argument is ordinarily only granted for substantive and non-routine motions, pursuant to Rule 5:5-4(a).

3. A motion that presents a substantive issue but is procedurally deficient may be denied oral argument.
4. Be aware of the rules of court as they apply to procedural issues. Specifically, always attach the prior order(s) you seek to modify, as well as the prior and current case information statement for those motions seeking a modification of a support obligation, pursuant to Rule 5:5-4(a).
5. Plead motions for reconsideration with specificity and be sure to attach all necessary prior orders, pursuant to Rule 4:49-2 and Rule 5:5-4(a).
6. Remember that factual disputes do not necessarily give rise to a substantive issue, and include all appropriate proofs to adequately present your matter to the judge.
7. Submit all necessary proofs to the judge with the initial motion, and do not rely upon your appearance at oral argument to furnish additional documents or facts to the judge. ■

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Endnotes

1. N.J. Court Rules, R. 1:6-2(d) (2015).
2. N.J. Court Rules, R. 5:5-4(a) (2015).
3. *Id.* (emphasis added).
4. *Ferreira v. Rancocas Orthopedic Assocs.*, 178 N.J. 144, 162 (2003) (Zazzali, J., concurring in part and dissenting in part).
5. *Preferred Warranties, Inc. v. Fialkowski*, 2007 WL 4270361 (N.J. Super. Ct. App. Div. Dec. 7, 2007).
6. *Palombi v. Palombi*, 414 N.J. Super. 274 (App. Div. 2010).
7. *Fusco v. Fusco*, 186 N.J. Super. 321, 328 (App. Div. 1982).
8. N.J. Court Rules, R. 1:6-2(b) (2015).
9. *Fusco, supra*, at 328.
10. *Id.*
11. *Mackowski v. Mackowski*, 414 N.J. Super. 274, 285 (App. Div. 1998).
12. *Fusco, supra*, 186 N.J. Super. at 684-85; *see also Brower v. Brower*, 2013 WL 656315 (N.J. Super. Ct. App. Div. Feb. 25, 2013).