

Always Appealing: What Color is Your Mask?

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AUGUST 2020 BAR BULLETIN

By Catherine Wright Smith



A sartorial guide to appellate argument in plague times.

This is the first of a planned series of columns by its members that will address current issues in appellate practice and recent appellate cases.

The members of our 5-lawyer firm usually make 30 or more merits arguments a year in the appellate courts of this state. Although the days leading up to an argument are a time of intense work — strategy sessions with colleagues, and lots of solo time spent in short term memorization of the relevant record and statutory and case law — I have never thought much about the “aesthetics” of appellate argument before a panel of judges. On the day of the argument itself, I just roll out of bed, decide which of the five “argument outfits” currently in rotation to put on (based mostly on the weather and the type of case) and call it good. I’ve never thought that much about my appearance except to avoid anything like dangly earrings or flashy nail polish that might have the effect of focusing attention on the messenger rather than the message I am trying to convey to the panel members on behalf of my client.

As did everything else, that all changed when the pandemic hit. By March, arguments were cancelled, or postponed, in all the state’s appellate courts. And when they started up again, they were very different — and very different in each of the intermediate appellate courts, sitting in Seattle, Tacoma, and Spokane, and at the Temple of Justice in Olympia.

As it happened, my first oral argument in the Covid era was before the state Supreme Court. The Court began holding arguments via zoom in May, and by the time I was up to bat in June they had it down: the Court's bailiff and IT specialist were incredibly helpful and patient in vetting counsels' remote argument arrangements and making sure the process went as smoothly as possible. The "Brady Bunch" format necessary to make 9 Justices visible to arguing counsel took a little getting used to, but I was pleasantly surprised (and hopeful) that, although no substitute for live argument, the format allowed for the sort of dialog and exchange with members of the Court that to me is the real reason for "live" argument.

What was really different, though, was the amount of time I found myself putting into my physical appearance in preparation for my zoom-argument debut. That black and white tweed ensemble that I always thought of as my "best" argument suit somehow read as psychedelic purple on the camera we'd jury-rigged in our (deserted) office. That navy blue "second best" dress somehow made me look as though I had no shoulders when viewed only from the chest up. Why did I look so washed out and pale in our lonely, fluorescent-lit conference room? And my hair!

Well, let's not talk about my hair, four months into lockdown.....

In the end, I settled on a 30-year-old jacket — long out of the argument outfit "rotation" as an outdated relic of the days of big shoulder pads, but just right in the zoom era. And a little lipstick made me feel presentable.

My 89-year-old father, watching the argument streaming on TVW from his home in Oklahoma, assured me he liked my "tousled" hair. But it remains surprising to me how much thought I had ended up giving to the aesthetics of argument now that the way it occurred had changed so dramatically.

And the changes continue. In July, our "local" intermediate appellate court here in Seattle, Division One, began holding live, in-person arguments. Gone are water pitchers and post-argument handshakes with opposing counsel; plexiglass, masks, and disinfectant are the order of the day. Once again, court staff have been incredibly helpful and patient in helping counsel navigate the "new normal." Here's my partner Howard, masked up and ready for his first in-person argument:



This is a vast improvement over what had become his usual attire for remote appearances. Here's Howard, who is President of the American Academy of Appellate Lawyers this year, getting ready to introduce a remote panel on election law appeals the AAAL put on for its members this summer:



You can tell it is a formal occasion because Howard is wearing khaki shorts, rather than his usual madras.

My partner Valerie has also had her first in-person argument in Division One — and her experience once again reflects how we must think of things differently now. Valerie wore a black dress, and a black mask — the “go to” for serious lawyers these days.



But Valerie also has black hair. Although her appearance “read” fine in person, on reviewing the argument on TVW we realized that only her eyes were visible, in a sea of black — she appeared to be wearing the video equivalent of a burqa:

We have gotten Valerie a gray mask, for next time.

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