


always Appealing: Video Remote Argument - Best Practices

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Over the summer, I had the pleasure of joining several of my appellate colleagues across the country, all Fellows of the American Academy of Appellate Lawyers, on a task force that drafted a set of proposed “best practices” for remote video argument. This article is devoted to some of those recommendations, slightly edited for this publication.

Introduction

The opportunity to be heard is a bedrock principle of due process, and oral argument of appeals is one of the most important ways that we honor and achieve — and publicly demonstrate that we achieve — that fundamental goal. But disruption has been the word of this century, and it eventually shakes even well-established foundations.

The judicial system’s low tolerance for change once modulated disruption. No more. Coping with a dangerous disease spread by human breath disrupts every in-person communication traditional in appellate decision-making. COVID-19 forced oral arguments to go virtual in a matter of days.

We publish this paper to share what our members have learned after half a year of presenting and observing remote video arguments in state and federal courts from coast to coast. We recognize that events will overtake some of our suggestions. But it is time to consolidate early experiences coping with and exploiting the disruption to oral advocacy caused by COVID-19.

We begin with these hard truths:

1. Treating remote video argument as in-person argument with a camera risks ineffectiveness and embarrassment. Video argument interposes both a camera and an app between advocate and court, creating a new medium.

2. Whether you have actually argued an appeal remotely yet or not, you have likely gained new experience with video conferencing otherwise over the last six months, conferring with colleagues, opponents, clients or even family members and friends. You should not assume that arguing an appeal remotely will be just like that.

While this paper will provide some advice that would be of help in any video conference context, it is primarily directed at effective remote appellate advocacy, not effective video conferencing. They are not the same thing.

3. Don't expect to wait it out. Courts will continue to protect judges and staff — and hopefully counsel, clients and the public — from COVID-19 until the threat is trivial. Some will push faster than others back into courtrooms — often with judges, counsel, staff and (if permitted at all) spectators masked and distanced. Others, however, will continue to rely on remote argument for some time.

And even as the COVID-19 threat ebbs, courts and lawyers will have become more accustomed to video argument and some will likely prefer it in many situations. So it's not going away. Financially and attitudinally, appellate lawyers should treat video argument as a long-term and evolving condition. That means they should devote both the time and resources to present video argument effectively. The bench and bar owe themselves and the public concerted effort to deliver effective appellate justice that incorporates video argument and its technology.

Practice in the New Medium

You may confront the new electronic medium for video appellate argument because a court schedules you to argue by video or because as an appellate lawyer you choose to face the changes now, before a court requires you to. If you are preparing for a one-off experience, or you have a

one-court appellate practice, this paper still speaks to you.

But you can narrow many of your plans and choices to fit the particular court. We recommend you carefully study the court's published information and instructions about video argument before proceeding.

If you have an appellate practice in multiple courts — even multiple branches of a state's intermediate appellate court — we recommend reviewing the Academy's Recommendations for Courts Hearing Oral Argument Remotely.¹ It will provide more generalized perspective on variations in judicial practice for remote video arguments.

To do one argument, the bare minimum you need to know consists of:

- What hardware and software do I need to connect reliably with the argument from beginning to end?
- What will the judges see on the screen when I am arguing?
- What is the presiding judge's practice regarding the structure of argument? Some courts give short uninterrupted time before the first question. Others have judges take turns questioning counsel. Many are following the traditional format.
- What will be my situation when I am not arguing? Will I continue to appear on the judges' screens the same size as opposing, arguing counsel? Can I control whether I am on camera? Whether I am muted?
- Will my client and others be allowed to watch and listen? If so, how so?

When you focus on a particular court, review its rules and practices again carefully, consider the parts of this paper important to you, and prepare a list of questions to be posed to the clerk of the court.

Most courts are very helpful. Do not assume that you need not ask questions simply because you or a colleague argued before the same court recently. The nuances of courts' use of video argument are evolving quickly.

Basic Technology

The goal in acquiring and managing video argument technology is to make it infallible, seamless and invisible. That the medium resists achieving the goal is all the more reason to strive for it.

If you have access to a video production facility — studio, lab or professionally developed conference room — use it. Some of the advice in this section will not pertain to you, but much in the other sections will.

In a home or business office without professionally developed video facilities, power your video argument system with a desktop or laptop, not a tablet or smart phone.

Hardwire everything you can. First, this applies to the computer, even if you need to run unsightly cable from the router to the unit. Hardwire peripherals, too. Do not trust wireless devices; their batteries may fail, and they may be subject to radio frequency interference.

If you cannot hardwire the computer, locate your home studio in an area of high signal strength and reliability. Speed test the computer. If it is not up to the minimum necessary for the apps for video argument, upgrade the system.

Download and use any app used by the court for connection. Do not rely on a web version. If your electric service is subject to outages, consider getting an uninterruptible power supply (UPS).

Practice using the video argument technology in business and personal communication. When appropriate, ask for others' feedback on how you appear through the medium.

Rehearsal

The video-argument era introduces a new subject into rehearsals for oral argument. Of course we still rehearse substance through moot courts and similar means. We now also have to rehearse technical aspects of oral argument to ensure we can access the courtroom environment and maximize our effectiveness within the video medium. Practicing the technical side of argument has emerged as a vital aspect of case preparation.

As discussed above, anyone preparing for a video argument must consider where to set up and what equipment to use — and there are no single right answers to these questions. But whether you set up in your home or office, whether you use a laptop alone or a professional studio — no matter what you decide — you must build and practice your system well before argument.

A location may seem perfect in theory. An equipment plan may seem good in theory. But not until you build your system and practice with it will you know how well your approach works. The day of oral argument is not the day to discover your lighting is weak, or your background is ill-suited, or you don't understand how the microphone works.

Setting yourself up in your performance space, do a moot court connected with other participants by the same technology as the court's — or the closest you can come. Everyone appears remotely and questions you remotely. Do the moot long enough before argument so you can refine your technical plan as needed.

Wear the clothes you plan to wear for argument. Proceed as you ordinarily would manage a moot court. But seek critique not just on your substantive argument, but also on your appearance and physical presence as perceived through the video medium.

Authorize participants to critique everything in your presentation. This may be difficult for subordinates who are not used to telling experienced colleagues that their hand gestures are distracting. But that is exactly what one must learn to be effective in the new medium. Observers should be free to comment on technology, like the height of the camera and the impression made by the lighting.

This is the time for the advocate to learn that their glasses reflect into the camera. Is the image size appealing? How is the advocate's virtual eye contact? Provoke and welcome discussion. Only through practice with honest feedback will you be able to assess and sharpen your presentation in the video medium.

Just as you would scout a court pre-pandemic, watch remote oral arguments in the court that you will appear before. If possible, watch arguments featuring the judges before whom you will argue. A judge with whom you are familiar in a live setting may have a different personality in a video setting.

Different judges within the same court may have different philosophies about how to preside over an oral argument. Watching arguments may provide helpful insight into the court's technical approach to video argument. Bring those insights into your moot court or related preparation.

If you are arguing remotely in a particular appellate court for the first time — or for the first time recently, since court technology evolves quickly — take advantage of any opportunity offered by the court to practice using its technology. If you are not offered or required to participate by the court, consider asking for a technology practice session.

If the court requires a virtual background, be sure you understand those requirements exactly. Consult with the clerk's office as needed. Then practice your argument with the virtual background. Learn whether particular movements or postures result in visual distractions like partial disappearance and ghosting.

Learn the contact information for the person in the clerk's office who can help with a technology emergency that materially impairs or prevents your participation.

Learn how the court will perform time-keeping during the oral argument. Will time be shown on the screen? Do you have to keep it yourself? Determine whether you want any parallel time system visible to you during argument — for example, a watch sitting on your laptop in a spot not visible to the camera. If so, practice not being caught looking at a clock.

It was a real pleasure sitting on this task force, and I thank its chair Jim Layton (Missouri), Chip Becker (Pennsylvania), Charlie Bird and Robin Meadow (California), Joel Bertocchi (Illinois), and especially Seattle Fellow Mike King, for the opportunity to serve with them. In a future column, I plan to share the task force's report on the "nuts and bolts" of projecting as an advocate through the new medium, presenting argument, and including clients and others in the remote process.

"Always Appealing" is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

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1 <https://www.appellateacademy.org/publications/AAAL-Remote-Task%20ForceCourt-Recs.pdf>