

Law Practice, Appellate Practice

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**Remotely interesting**

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## **EXCEPTIONALLY APPEALING**

You don't need this column to tell you that the past couple months have been exceedingly exceptional. February had 29 days, March had 30 days, and April felt like an eternity. The world as we know it is convulsing with hard changes. The legal profession has been far from immune: Law schools, if functioning, are teaching online; the bar exam is likely to be delayed and law students may be provisionally licensed. Major law firms have eliminated summer programs, furloughed staff, reduced attorney compensation, and taken other painful measures. Many courts have effectively shut down, reducing services to essential matters only.

Appellate practice too is facing difficult change. A slowdown in litigation means fewer cases in the pipeline. Meanwhile appellate work that normally creeps at a snail's speed has decelerated to glacial movement, as emergency orders inject further delay -- at least from a client's perspective. Regular appellate practitioners are not fazed by having to wait eons for appellate records, briefs, arguments, or decisions. Lengthening the timeline by several months evokes only a yawn. Emergency orders are exceptional, however. Recently we've seen the California Supreme Court extend by 30 days matters with deadlines between March 20 and April 20. Similarly, the six Court of Appeal districts each extended deadlines between mid-March and May 18 through various orders. The Supreme Court also finally got around to implementing full e-filing.

Beyond mere time-shifting the paper-shuffling, the biggest change has been to oral argument. The U.S. Supreme Court has finally been pushed to adopt newfangled technology, like telephones. The California Supreme Court slid comfortably into BlueJeans for video arguments. Other courts around the country are using Zoom, Skype and various other platforms. But many appellate oral arguments in federal court were canceled (since oral argument is a privilege there, not a right) and many others were postponed. Arguments that did occur, and future arguments, of course, were and are being done remotely. So let's explore this development.

For years many appellate courts provided the option of appearing telephonically. Appellate pros saw this as a sucker's bet. Any minor cost-savings in not having to travel to court were more than lost by the blunted persuasiveness of remote advocacy. Oral argument being the one and only opportunity for the key players to be in the same room at the same time focused on the case, wise attorneys knew better than to phone it in. A live, in person, performance is always a better method of communicating than a technological one.

But now, remote arguing isn't just a bad option to reject out of hand, it's the only game in town. The recent exponential uptick in telephonic and video arguments has produced all manner of glitches, technical and otherwise, resulting in a cornucopia of humor: "Press 1 to appear before the Supreme Court"; "Can you hear me now, Mr. Chief Justice?" "Please hold for a question from Justice Thomas." By now we've all heard about (or seen clips of) the dancing daughter, the shirtless lawyer, and "undercover" attorneys (making appearances from bed). One judge, returning to the fray after being momentarily dropped from the call, apologized for missing part

of counsel's argument, and was told, "that's ok, you didn't really miss anything!" Advocates and judges fumbling with mute buttons -- "Why aren't you answering my questions, counsel?! Oh, my microphone is off" -- and camera shots of middle-aged lawyer bellies, arguably add to the levity.

But there's really nothing funny about a struggling justice system, irate judges, frustrated clients, flummoxed lawyers, or hearings interrupted by incessant dog barking, or worse, members of the public on the line heckling counsel. Clients paying hourly rates are not amused. The next hot frontier in appellate advocacy, therefore, will be exploring how to maximize the effectiveness of appearing remotely. Much of the conventional wisdom for a good oral argument IRL (for those over 30, that means "in real life") requires only slight updating to apply equally to our modern virtual arguments. But there are also new considerations to address.

**Know the tech.** Just as a good oral argument in person requires being comfortable in the courtroom, advocates must be completely comfortable with the technology being used - - *before* the argument starts. So practice with the phone or video system to gain familiarity, comfort, and mastery. There's no time for on-the-job learning at argument. If the tech-system highlights the noisiest participant, turn off your mic when it's not your time to speak. Otherwise you could force your way into the spotlight merely by shuffling papers on your desk during the other side's turn. (Some suggest putting a towel on your desk to muffle the sound of moving computers, binders, or flipping pages.) Don't allow other electronic sounds -- *You've Got Mail!* -- to interrupt either. Keep your devices fully charged or plugged in. Being booted from an argument by a dead battery is bad form.

Nor do you want any static or other connection interference. If the internet is your route to argument, then use a direct-wired connection instead of Wi-Fi. If using the phone, then use a landline instead of a mobile (assuming the connection is clearer and less prone to interference). Oral argument has always been about making the clearest possible connection with the bench.

Similarly, effective lawyers know that being on time is being late. If possible, call or log on to your argument long before the starting time. If this allows you to hear earlier arguments, all the better. If it means you're on hold, then so be it. And on the topic of being on hold, never put the court on hold. We've had enough "funny" stories about unwittingly injecting elevator music into arguments.

**On your (bare) feet, counsel.** Arguing remotely provides possible advantages. Rather than confined to a smallish lectern, you may have the luxury of a larger workspace. Of course, having the record, briefs, and caselaw all spread out may not really be all that helpful. But it might be. You also may have the option of arguing while seated. Many advocates will probably feel more comfortable standing; that's a personal preference. If the goal is to replicate an in-court argument, standing is the way to go. Dressing for court is also essential, of course. Whether you really need shoes and socks is another question.

**Control the setting.** When we were lucky enough to get to go to court, we didn't have to worry about finding a nice quiet room. Appellate courtrooms are designed with dignity, acoustics, and proper lighting in mind (at least in theory). But now it's your job to create the backdrop. Your

spare bedroom (or closet -- yes, really) probably can't compete. Finding a solitary space, away from pets, kids, lawnmowers, and the rest of domestic life is a crucial challenge that must be met. **No cutesy virtual backdrops, please.** And whatever's really behind you must not be distracting. Lighting is important too: a window behind turns you into a shadow, and in front may not work either.

Calling a lifeline. At the lectern you're typically alone, and even having a partner at counsel-table is of little use. Electronic arguments offer the possibility of having someone send helpful texts or emails during the argument. This may seem like a great idea. It probably isn't. Just as driving while intoxicated is a grave danger, arguing while heeding "helpful" kibbitzing is more likely to be a detracting distraction. An advocate's attention should be fully focused on the panel.

**Speak (even more) concisely.** Good presentations are always carefully planned. Oral argument is the time to say as much as possible in as few words as possible. Virtual presentations makes this even more important: Consider what needs to be said and say it in short, succinct, direct sentences. Speak more slowly than you think is natural and pause after each sentence. Give the court space to interject. A slow, deliberate pace is important because virtual appearances run a high risk of too many people speaking over each other simultaneously -- and then engaging in an Alphonse and Gaston routine to get things back on track. This benefits no one and burns valuable time.

**The Biggie.** The biggest reason telephonic appearances are unsatisfying and ineffective is that communication is best done in person, with nonverbal body language, facial expressions, and gestures conveying vast amounts of meaning. Even with video, much of this is lost. Conversations are simply better face-to-face. With virtual arguments, judges may be less willing to engage with questioning, and counsel may be more tempted to read. These inclinations must be overcome by both sides for argument to retain its value.

**Not The End.** For better or worse, we stand at the dawn of a new age. The innovations and experiments being tried now may last a long time. And those that are improvements -- like more e-filing, no paper copies -- should remain in place going forward. Truly these are exceptional times. Hey, you got two Exceptionally Appealing columns in a single month, so things can't be all bad. The old normal is good too: Next month's column will be in its usual First Tuesday of the Month slot -- and it won't mention the virus. Stay safe and avoid those who aren't (aka Covid-iots).