

AMERICAN ACADEMY OF APPELLATE LAWYERS
TASK FORCE ON REMOTE ORAL ARGUMENT
RECOMMENDATIONS FOR COURTS
HEARING ORAL ARGUMENT REMOTELY

INTRODUCTION

The COVID-19 pandemic poses extraordinary challenges for the nation's appellate courts and the lawyers who practice in them. The American Academy of Appellate Lawyers, composed of 350 Fellows who practice in every state and all federal appellate courts, is exceptionally concerned about the pandemic's consequences for appellate practice and justice. In both state and federal courts, the sudden move to audio or video oral arguments has made a universal and dramatic change, one that Fellows of the Academy have experienced firsthand.

To address issues related to remote argument, the Academy appointed a task force to collect experiences, procedures, and practices, to share what it learns, and to recommend good practices to bench and bar. This, the first phase of the task force's work, focuses on remote argument procedures and formats. The Academy's Board of Directors has adopted this report.

Before setting out our specific recommendations, certain principles inform our thinking and recommendations.

First, as stated in the Academy's 2017 Task Force Report and Initiative on Oral Argument,¹ the Academy is committed to the notion that oral argument is, and should remain, an important part of the appellate process. We know as practitioners that it contributes to the delivery of justice in appellate courts.

Second, we firmly believe that in-person oral arguments are superior to any form of remote argument. Fellows' experiences with fully remote and hybrid arguments, both before and during the pandemic, bear out the common-sense notion that personal communication is more effective than electronic communication. Personal contact fosters the richest and most nuanced exchange of views, even in simple appeals. And remote argument may impair the transition from the advocacy phase to the conference, risking

¹ https://www.appellateacademy.org/publications/oral_argument_initiative.pdf; 19 J. Appel.Prac.&Proc. 89 (2018).

diminution of the collaborative process that distinguishes appellate from trial decision-making. Applying these principles, we intend our recommendations to help courts make remote arguments, as much as possible, like in-person arguments.

But we also recognize that one size does not fit all—not all courts, not all counsel, and not all cases. Appellate courts, even in nominally unified systems, have unique rules, practices, procedures, geographic configurations, and available resources. Some of our recommendations may not be practical for all appellate courts. But we hope they will give courts ideas for how to improve remote argument.

While we believe that in-person arguments are the ideal, a remote argument is better than no argument. Offering remote argument will remain critical for some time; even when most judges and staff may safely be present in the courtroom, there will be counsel (and clients) for whom the risk is too great. And even after the threat dissipates, the continued availability of a remote option may make argument practical where it might not otherwise be. Current conditions are laboratories, where lawyers and judges can experiment with good practices so that they can become best practices. But what we learn by participating in this time- and budget-limited response to the pandemic should not become an automatic or self-justifying way of doing things when it is no longer necessary.

The recommendations we set out below are intended to serve some basic principles:

- That remote oral argument be used instead of submitting on the briefs cases that would have been argued to a panel before COVID-19;
- That remote argument be as much like in-person argument as possible; and
- That clients and the public have at least as much access to remote oral arguments as they have access to in-person arguments.

James R. Layton, Chair
Charles Becker
Charles A. Bird
Joel D. Bertocchi

Michael B. King
Robin Meadow
Catherine W. Smith

RECOMMENDATIONS OF
THE AMERICAN ACADEMY OF APPELLATE LAWYERS
FOR COURTS HEARING ORAL ARGUMENT REMOTELY

1. Technology choices

Each court must choose between video and audio-only arguments. But whether the argument will show judges and counsel on a screen is not the only technology question.

a. Video v. audio-only

Dozens of Academy fellows have now argued remotely. Many have argued both video and audio-only. Fellows have expressed a very strong preference for video arguments. If a court has the ability to elect a remote video platform, the Fellows of the Academy urge it to do so.

Audio-only technology is an option that some appellate courts have employed for several decades. It is the experience of our Fellows that telephonic oral argument before a panel of judges suffers from several deficiencies. While telephonic argument works reasonably well when only one decision-maker is involved, it presents unique problems for argument to an appellate panel. The “cues” that visual interaction brings to an argument are lost when argument is conducted over the phone. And the problem of talking over, or cross-talk, becomes acute. That may prompt use of “rules of transition” from question to argument that make for a stilted flow and use valuable time.

b. Sound

Adequate sound quality for all participants and listeners is preeminent. The court must ensure that all active participants are fully understandable to all other participants—that they have sufficient volume and clarity for all listeners. That does not require the most expensive or sophisticated equipment. But courts should be willing to pay what is required to ensure all can hear.

We recommend that judges and arguing counsel:

- try to use land lines and computers only with fast and stable connections;

- where possible, select a quality mic; and
- carefully select and prepare the space they will use. (Small spaces with hard walls may produce echoes.)

c. *Public access*

Oral argument is the sole point in the appellate process where clients and the public observe, in person and contemporaneously, the work being done. Thus procedures should be available for passive participants and nonparticipants—*e.g.* non-arguing counsel and clients—to observe. While the manner for observing may differ with various technology choices, courts should be no less “open” when argument proceeds remotely than when argument is in a public courtroom.

The technology chosen should ensure that listeners do not disrupt the argument. Thus the court must have a method of muting all those listening to an audio call and watching a video call. Listeners cannot be allowed to place a call on hold or otherwise create interruptions by music-on-hold or error messages. But each court should ensure real-time public access to the argument

d. *Technology help*

Before and during the argument, the court should have a technology support person readily available to judges and arguing counsel. The court should identify to judges and counsel contact information for the court employees who will be responsible for pre-argument coordination and training, and for managing the technology during argument.

Court staff should follow up with arguing counsel after the argument to ask about the experience and to solicit suggestions for improvements.

2. Preparation

In traditional in-person argument, court staff prepares the facility. But for remote argument, responsibility for physical preparation is shared with judges and arguing counsel. Before the argument, each participant must be fully prepared to proceed using the chosen technology. Judges need the help of court staff—and so do arguing counsel.

a. Judges

Judges should choose a location from which to participate—a room in their home, in chambers, or another location. The room should have sound-absorbing features (curtains, bookshelves, etc.) to reduce echo and ambient noise.

Each judicial officer should test their setup with at least as many concurrent remote listeners, including the other judicial officers, as will be active during the actual argument. Judges should test their setup with other remote listeners to ensure adequate volume and clarity. The setup should be re-tested whenever there is any change in a judicial officer’s equipment or environmental setup.

b. Arguing counsel

Oral argument is hard enough in its traditional form. Arguing remotely presents new concerns. So procedures must be fully and carefully explained well in advance to all participants and implemented with adequate preparation and support.

Each arguing counsel should receive a detailed description of the process, to include:

- Identification of and download instructions for any required software, and detailed instructions for access the audio or videoconference system;
- Instructions for watching or listening that counsel can forward to passive participants;
- A description of the process by the argument will be conducted—including how counsel will know how much time remains.

To ensure counsel’s preparation, the court should offer—and for now, perhaps require—a practice session in which each arguing counsel appears in the location and using the equipment that they will use for the actual argument. Counsel should not have to worry about not understanding how the system works, or not meeting the connectivity requirements on the day of argument. And the court should not have to wonder if it will be surprised by what it hears (or does not hear) and sees.

Finally, the court should have all counsel connect shortly before each calendar not just to check in as they do in person in the courthouse, but to ensure, again, that each counsel is set up properly.

c. Public

The Court should make easily available to the public the method by which interested persons can watch or listen to the argument. This can be done for arguments generally on the court's website. But the information should also appear on the posted docket that includes the particular argument.

3. Argument

No remote oral argument method will be exactly like an oral argument where all are present in the courtroom. We recommend that courts take steps to make the remote argument flow as well as possible.

a. The speaker

The court should have a method of identifying the speaker. For argument on video, have the name of each judge and arguing counsel appear with their image. For audio-only arguments, judges speaking should identify themselves or be identified by the presiding judicial officer.

b. Questioning

The court should consider techniques to avoid cross-talk that interferes with the court and counsel hearing everything said. That means articulating with special care and speaking with adequate volume. Because of lags in transmission, judges should exercise patience with counsel when it comes to cross-talk.

If the court decides to use a systematic method for judges' questions, such as taking turns, the court should inform arguing counsel at the outset of the argument—or better, in advance.

If the court decides to allow arguing counsel a certain period before the first question, the court should include that in the information provided to arguing counsel before argument.

c. *Video*

Certain concerns are particular to video argument.

As to the screen presentation, the panel members and arguing counsel should all be visible during the oral argument. The court should be able to mute non-arguing counsel and other passive participants.

As to the appearance of the court, judges should wear robes. No special background is necessary for the court, but the court should be mindful that virtual backgrounds may be distracting if they distort the image of the judge or counsel. The background used by the judges (and counsel) should be neutral and simple—and it should be the same as the background and location used for the practice session.

If the court's practice permits the display of exhibits, transcripts, or other record materials, and illustrative exhibits, the court should provide instructions—and require that the arguing counsel use the technology to show the item during the practice session.