

Appellate Oral Argument: Creating the Presentation, Weighing the Precedential Impact, Preparing for Rebuttal

THURSDAY, MAY 20, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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American Academy of Appellate Lawyers

Remote Video Argument: Suggestions for Arguing Counsel

American Academy of Appellate Lawyers

Task Force on Remote Oral Argument

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

A. 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.

B. Projecting the Professional Advocate Through a New Medium.

The goal of an advocate arguing remotely on video is to develop a presence that is as effective as, what you would have in court—a confident participant in an educated conversation. Video conditions differ from courtroom conditions, but with proper planning some of the best of both can be achieved.

Throughout this section we recommend testing your equipment and setup in advance, including observing how you will look and sound to other participants. We also recommend viewing a recording of the argument afterward so you can see if changes should be made for next time. Some courts make downloadable videos available, although the lifetime of the archive varies. Others preserve only audio or post only by live streaming. If this is your court, determine whether a participant can record the argument from the communication app, and if one needs permission to do so.

B.1. Physical Space and Presence.

Whether you are delivering your argument at home, in an office, or in a studio space designed for video presentations, make the space comfortable for you given the needs of the medium. Consider both physical comfort and the mental comfort of knowing things are squared away. If the space is new to you, spend enough time in it beforehand to become comfortable in it. And, as with other aspects of this process, test in advance to allow you to see yourself as the judges will see you during the argument.

Avoid bare rooms; they produce echoes and can make your voice sound tinny to the judges. Furniture, draperies/curtains, and bookshelves will absorb echoes, but they must not present visual clutter.

Set up the space to preclude interruption by family, pets, colleagues, staff, and delivery personnel. Strict rules should govern family members (and colleagues, for that matter) who are in the home or office suite with you. If you are at home and have noisy pets, be sure someone is assigned to keep them quiet or distant.

Locate sources of ambient sound in the space you will use. Examples include plumbing fixtures, playrooms, windows with noise from outside, kitchens, bathrooms, busy streets, nearby construction projects, and a neighbor's penchant for powered yard work in the middle of the day. If you cannot avoid these outside sounds during argument, locate away from them. That may mean not using a home office for an argument even if you are used to working there.

Your visual background may be actual or virtual.

A virtual background is produced by the medium as a complete substitute for everything except the participant's head shot. Approaches to virtual backgrounds vary from mandatory to optional to forbidden. Courts that require virtual backgrounds often supply them. If selecting your own, make it appropriately professional—the classic bookcase, the back of a courtroom, or some neutral and non-distracting setting. Test! Test! Test!

If you can set up a neutral and professional real-life background, we recommend against using a virtual background unless the court requires it. Virtual backgrounds can generate distracting visual effects, such as making parts of you disappear when you move. An incorrect software-background combination can cause a crash. But if you cannot create an appropriately professional actual background, invest the time and resources to achieve a reliable and proper virtual background. Test! Test! Test!

In considering an actual background, make sure the scene behind you looks professional (like a bookcase), or at least neutral. Also, test in advance just what the camera will show (as opposed to what you see), which will depend on where you place it. A room at home or an office with some simple decorations can work, as long as the decorations are tasteful and unobtrusive.

Ultimately, though, the background should be just that, and should not distract from the presentation. A video argument is not an occasion to display diplomas, awards, or your superb taste in art, or to treat viewers to a cluttered desk, or a memorabilia-strewn den. Judges who can normally focus on arguing lawyers in a courtroom tell us they sometimes cannot avoid looking at distracting background objects when watching an advocate's small window on their screen. Do not let the camera display a ceiling fan—especially if it is on.

B.2. Lighting.

Principal lighting must come from in front of you, generally behind or at the camera. Otherwise your face will be in shadow—in extreme cases, unrecognizable. Although the light from a window will work if you are properly positioned, it may be harsh, and weather may make it inconsistent. If ambient light is not enough or not well positioned, consider ring lighting or a softbox, ideally with adjustable brightness and color temperature. If you wear glasses when you argue, be sure to position the light source so that it will not create distracting reflections.

Try to eliminate all light sources behind you and minimize those to the side. They create distracting shadows and even block out part of your intended image. This is so even if you use a virtual background; back-lighting in particular may make your image ghost whenever you move, even a little. Avoid having a window in the background, as it will backlight you and make your actual appearance hard to see. Check that overhead lighting does not appear on the screen—and look at how it affects the image of your head and hair. Experiment with the lighting, and have someone observe (or better, record) how you will look to viewers, including the judges.

B.3. Personal Presence.

Dress as you usually would for a court appearance, but avoid black, bright colors, stripes, or anything busy. Video will magnify anything like that. Dress professionally down to the shoes—not just because the camera might slip and catch your bare feet, but also because doing so will contribute to the necessary feeling of formality.

The new medium and its technology present an unprecedented choice: to sit or to stand. Most lawyers who argue infrequently in appellate courts are sitting for video arguments because the performance studio is easier to arrange. But ease is only one factor for an appellate lawyer who expects to argue regularly. Courts may develop rules, customs, and expectations on the topic, and advocates may need the ability to present in both postures. Already, the advocate should determine if a particular court has a preference and review argument recordings to get a sense of local practice.

Each mode has advantages and disadvantages.

- **Standing** is more formal. Some advocates thrive on the dignity of standing before the court; some feel more authoritative. Such internal preferences affect performance and are important. We are told that lawyers representing government agencies frequently stand. This probably reflects traditional inter-branch respect and a sense that standing projects more authority. Some say the standing video advocate projects more persuasively because of different tonal quality resulting from better diaphragm breathing. If the camera and court rules allow zooming out so the lectern and upper body of the advocate can be seen, standing approximates one's appearance in court. Is this good? In virtual argument, the judges almost always appear in intimate face shots, separated from counsel electronically rather than

by the well. Zooming out is a choice by the advocate to maintain formality when the judges do not do so. This might be contrary to the feel of the event driven by the technology itself. But if a court appears in an *en banc* setting, the feel may be consistent. And standing can complicate adapting to what you can or must do when not arguing, discussed immediately below. For example, one advocate reported sitting at a table facing a second camera, but that strategy required on-site tech support.

Standing requires a lectern wide enough to hold everything you want in your easy view. And it requires careful consideration of where to place the camera—and perhaps even more important, where to place the microphone. A mic located at a distance from the standing position can present problems with volume, ambient noise, and echoes. You may need a mic that is not built into the laptop or camera.

- **Sitting** is more conversational. Advocates intimidated by walnut-and-marble formality may thrive when arguing from a desk or conference table. Others risk becoming sedate or monotonous. Sitting paces socially with judges who sit individually at home or in an office and appear through head-and-shoulders shots. It implies head-and-shoulders-only camera coverage for the advocate, a condition that some courts require. For both advocates and judges, this feels more intimate and revealing than personal appearances. There are few logistical issues unique to sitting for argument, although universal issues like camera placement have different solutions depending on whether the advocate sits or stands.

Whether you sit or stand, maintain traditional upright posture. Resist the temptation to rest body parts on a lectern or table. Do not eat or drink, although a sip of water from a small cup before or after arguing is appropriate, as it would be in court. Keep your head reasonably stable in all dimensions.

What will be your presence when you are not arguing? Will your image continue to appear on everyone's screen? Do you have the option to go dark? Will you be muted, or allowed to mute yourself? The court's choices in managing the medium have profound implications for what counsel can and must not do.

Muting seems universal. Sometimes the court imposes the muting; otherwise, counsel has the option inherent in all common apps. If you have the option, mute yourself. It's elementary self-protection.

If you can go dark, do it if you have remaining argument. When dark and mute you can converse, exchange notes, and prepare for your next turn speaking in a much more relaxed way than when you argue in court. Pay careful attention to the proceedings so you can be ready instantly when your image is restored.

If you are always on-screen, or choose not to go dark after arguing, traditional schooling in forbidden activities applies. No slouching, leaning, facial gestures, hand gestures, or audible utterances. As at counsel table, you may quietly take notes to prepare for any remaining argument. If you allow others to pass you notes at all, develop a means of doing so that does not cause you to lean, jerk your head, or obviously take your attention off the proceedings. Traditional schooling in forbidden activities applies even more than before.

Advocates who move around or talk with their hands may find ways to do so behind a lectern, but the medium or court rules may make this impossible. This is only one instance of how a reasonable in-person style may be incompatible with the new medium.

B.4. The Camera.

The camera and its demands cause the most profound changes from personal argument to video argument. The camera is merciless; it picks up everything in its range, unlike the judicial eye, which is often blind to minor distractions in the courtroom.

Laptop cameras provide adequate performance, if positioned properly. But if your resources permit it, one upgrade to consider is a stand-alone webcam or even a good-quality digital camera. A separate camera should come with a high-quality lens and better resolution that make you look more natural and present, and thus more professional and authoritative. Do *not* use a wide-angle fisheye type camera designed to capture a whole conference room. If you're using a conference-room camera, set it up to zoom to your head and shoulders and don't use its wide-angle setting.

But more important than camera quality is camera placement: This is so for several reasons. Of course, the camera must be set up so you are facing it. Vertically, it should be positioned so that the top of your head appears near the top of the frame. And take care to determine what distance from you provides the best view of you, so you do not look too close or too far away to the judges.

The camera's lens should be parallel with your eyes and, ideally, perpendicular to the ground—this presents the most natural view and sees you straight on. If the

camera is not perpendicular to the ground, the parallax distortion in the background will look unprofessional and distracting. A camera shooting from a lower angle will see up your nose and into your mouth, and may put your face in shadow; this is a particular problem with using a laptop webcam if it is resting on a desk and you are looking down at it, as is the normal laptop operating position. If you use a laptop camera, try to set the laptop on some kind of stand (books or boxes work) so the screen, and thus the camera, is at or just above your eye level.

In placing the camera, consider its relationship to the screen on which you will watch the judges and other participants. Unlike a movie or entertainment video, screens for remote video argument display pictures of all participants in their simultaneous separate activities. When you look at a judge's face on the screen, you're *not* looking at the judge because you're *not* looking at the camera. The greater the distance from camera to screen, the more your eyes will track off contact when you mean for them to track into contact. Please see part D, where we discuss in detail eye contact during argument. A logistical advantage of using a laptop is that the camera is usually centered at the top of the screen on which you view the proceedings, but everything from webcams to full studios can be set up to produce the same result.

And again—test! Test! Test! Whatever approach or equipment you use—and whenever you change your setup—have a colleague stand in for you while you watch on another screen, or better yet record yourself using the setup.

B.5. Microphone and Audio.

Although a custom mic setup is ideal, laptop mics seem to work reasonably well. But if your resources permit it, use a hard-wired peripheral mic tuned for human voice communication. See Part B.3 about the need for a separate mic for standing argument. Whatever your preference, test it *in the environment you will use* to be sure you're satisfied with the sound quality.

What about listening tools? Most lawyers report satisfaction with laptop speakers. Lawyers with hearing impairment should take extra care to adopt a satisfactory system. We do not recommend headsets or earbuds as a standard approach. The visual distraction for the judges probably overcomes the convenience of better incoming sound quality. Wisdom lies in having an enhanced listening device ready to plug into a USB port if a judge speaks softly or the court's system is adjusted low. In scouting the court, counsel should try to discover whether it has a history of sound projection issues.

Know how to mute and unmute with your equipment quickly, and learn the court's protocol—some courts do the muting themselves when you are not arguing, while others will require you to do it.

Avoid having two connections open—a computer and any telephone—because this can cause piercing feedback and make you unintelligible. If you must be connected in two modes, practice the connection and learn how to avoid feedback, which may be accomplished by keeping your video connection muted throughout.

Remember that, like the camera, the mic is merciless. It can pick up coughs, sneezes, heavy breathing, typing, shuffling papers, chewing, and even swallowing. Be muted when not presenting argument.

B.6. The Screen.

The screen on which you see the court is the second-most important change wrought by the new medium. While the camera is unobtrusive during argument, the screen is literally in your face.

Set up the screen so you face it; see part B4 regarding camera placement relative to the screen (and placement of both relative to you).

In Zoom, a common video application used by many courts, the app appears to choose where on each participant's screen to display the thumbnail pictures of other participants. Future upgrades might allow for resizing and relocating. Other video applications, such as WebEx, BlueJeans, and Microsoft Teams, might allow this directly or in connection with browser settings or a local app. In the current state of technology, probably the safest approach is to use a full-screen gallery view showing all participants. Speaker view is less desirable because it can be flipped away from the speaker to another participant by ambient or accidental noise.

The advocate must learn to deal with multiple issues raised by the ability to see oneself. Whether driven by ego, anxiety, or something else, there's a tendency to stare at our own images when we see them on the screen. Just as you need to practice looking into the camera, you need to practice *not* looking at yourself. Some courts omit your image from your own screen after a pre-argument check to be sure everyone else can see you.

The screen in the face makes it hard for advocates to be “in the zone.” Only practice with the medium is likely to reinstate the peaceful mental state conducive to transcendent oral arguments.

C. 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 before which you will appear. 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.

D. Presenting Argument.

Before connecting into the court's remote argument system, close all apps except those used for the argument. Disable all audible or popup notifications. Make sure your computer is plugged in. Assure your connection is correct. Have standing by whatever communication device you need for emergency contact with the court—but make sure it cannot generate an audible signal. Assure the silence of all other nearby technology.

Best practice is to make a checklist, like a pilot's preflight, of everything you have prepared for your performance studio. Do not hesitate to have a copilot take you through the preflight.

As oral advocates, we know that building and maintaining a sense of connection with the court is central to defending or advancing our client's viewpoint. Long experience has taught most of us how to do that during in-person argument. Video

argument presents additional considerations regarding how to converse and connect with judges.

Most of us develop strategies to encourage judicial participation. We instinctively watch judges for cues they might want to speak. The new medium makes picking up cues more difficult, makes a few judges more reticent, and embeds a time lag that can cause people to speak over one another. This imposes a higher burden of watchfulness on appellate counsel. When speakover occurs, apologize and ask a judge to repeat what you did not hear. So far, most judges seem reasonably kind in dealing with this aspect of the medium.

Just as advocates have a more difficult time picking up cues from facial expressions and body language, advocates' nonverbal communication is harder for judges to read. We are at the beginning of understanding how nonverbal communication works in the new medium. And some effects cannot be controlled; for example, a judge who watches an all-participants view will pick up less from the advocate than will a judge who watches a speaker view—the larger image dramatizes eye movement.

No other nonverbal tool is as important as eye contact in personal human communication. One reason remote video argument qualifies as a new medium is its simulacrum of eye contact. Here are the most important changes to which counsel must adapt.

- Looking directly into the camera makes direct eye contact with all participants simultaneously. This is a stressful and difficult posture to maintain. It can give the impression of staring, although the opposite is true—when looking at the camera, you are not looking at another participant.
- You cannot turn to face a judge who speaks to you. The judge's image on your screen is not a camera conveying information back to the judge. Rather, the most personal contact you can make with the judge is to look directly at the camera.
- Counsel who want to assure a judge they are paying attention to a question or comment must do so verbally. They incur the same risks as speaking a judge's name in traditional argument, e.g., butchering the name or using the wrong name.
- Many advocates sweep their eyes across the bench to include all judges in the discussion, particularly when more than three judges are sitting.

This can be a very natural and welcoming gesture. There is no equivalent in remote video argument. While the advocate needs to monitor all judges, the ocular process of doing so is a shifting around that offers no intuitive comfort to the viewer.

- The video argument medium differs from television and streaming media. Professionals in those media speak to an invisible audience that gives no real-time feedback. They anticipate a display in which they are the center of attention, rather than projection on a screen of thumbnails. Generally they work in an environment with a prompter that helps them center their eyes on the camera. Theirs is a much easier adaptation than ours, although we can learn from them.

Like a media professional, the advocate's goal should be to create a comfortable illusion of eye contact. This begins with locating the camera so the advocate can look at it easily. It includes managing the screen so the advocate rarely is distracted to look far from the camera and never needs to shift rapidly around pictures on the screen. The advocate must find a personal right proportion of the time to look directly into the camera, with some time for eye relief.

We are still learning how medium-effects like camera placement and eye tracking affect delivering effective remote argument. Imposing camera, app, and screen exists in every video communication. With more video connecting in our lives, people may become more tolerant of disruptions of natural human connection—or the opposite may happen. For now, we recommend looking at the camera as much as possible, at least when you're speaking. Because this is unnatural, it takes practice.

Long before you are called to argue, you will have established whether the court will see you in a head-and-shoulders shot or a lectern shot. If the former, and you are a person who naturally uses hand gestures or moves around a lectern, you have some relearning to do. For example, movements of shoulders that result from off-camera gestures can be distracting. And be sure to keep your hands out of the camera's view. If you are appearing in a lectern shot, know the sweep of the camera so you can keep your gestures within it.

Notes present a challenge. Many advocates bring notes to the lectern and use them during in-person oral argument. But every time one looks at notes, eye contact is broken. The camera dramatizes the shift; looking down or to the side at notes breaks any illusion of eye contact in the new medium. Can makeshift devices hold a few critical notes as a media professional might use a teleprompter? Some have

placed post-it notes as far around their computer screen to reduce the distance of eye travel to notes. Will a technology develop for using notes during Zoom-type video conferences? Some advocates have resolved to eliminate notes entirely to maintain steady eye contact with the court at all times.

We recommend against using screen sharing to present demonstratives to the court. Many appellate courts either forbid or barely tolerate demonstratives during in-court argument. Electronic screen sharing adds multiple opportunities for failure and confusion. Of course, some cases may involve a critically important demonstrative, for example, a map of disputed property. If so, contact the clerk substantially before argument to work out plan so the judges can see the demonstrative as you discuss it.

In conclusion, if in-person argument involves the theatrical use of our bodies from the waist up, video argument distills the physicality of oral argument largely to our faces. We must be conscious and careful about how our faces move, and what emotions they convey. We must appreciate that remote argument is not just in-person argument through a different medium. The medium itself emphasizes different aspects of the argument experience, requiring us to learn different skills.

E. Clients and Others.

Court rules might allow or prohibit silent, invisible, third-party presence in arguing counsel's studio. A prohibition ends that matter.

In-room presence of non-arguing counsel is a matter of teamwork and collegiality. If other advocates are members of Click & Clack's notorious Payne-Diaz family, this may be the chance to exclude them. If they are present, they must follow the same rules as clients.

If clients may not be present, counsel should find other means of client access. Understand all methods of client access to the argument, real time and recorded, so you can provide the client the fullest range of options for attending the argument, or reviewing the argument after-the-fact.

Explain the new process to the client. If the client is savvy about traditional courtroom argument, highlight contrasting aspects of remote video to minimize any shock effect. If the client is familiar with video conference technology, use that familiarity as a bridge to explain similarities and differences of video argument. If appropriate, invite your client to your moot court so they can see in advance the technology you will use to argue in their behalf.

Clients may extrapolate from the similarities between video conferences and video argument that they can be in the same space with you as you present your argument. There are dangers: e.g., leaning into the camera view, *sotto voce* comments picked up on the microphone, and engagement with you that causes distracting movement on screen. We recommend discouraging presence in your studio.

If the client insists and the court rules allow presence in your studio, explain and enforce these guidelines.

- During your argument, note-passing by any means is forbidden. Besides distracting you, it causes you to move in inexplicable ways and impairs your presence and authority before the court.
- If the advocate has a remaining chance to speak, communications between attorney and client depend on whether the attorney can go black. If so, free flow is acceptable. If not, courtroom rules apply. The process must not cause the advocate to make movements distracting to the court.
- It is dangerous to set up communication by email or text while counsel is not arguing but is on camera. Using the same computer being used to connect with the argument involves a range of risks including providing the communication to all participants and interfering with counsel's connection or viewing-screen management. Using a second electronic device risks producing sound feedback or other noise heard by everyone else, including the judges.

Post-argument debriefing of the client may be enhanced by the availability of a court's preserved record of the virtual proceeding.

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