

Oral Arguments by Videoconference: Avoiding Common Pitfalls

by Graham K. Bryant

As most attorneys have learned since the COVID-19 pandemic began, a wide variety of videoconferencing platforms are available with each one having unique features and quirks. No single platform has become standard for judicial use. Instead, courts across the Commonwealth have adopted a variety of video technologies as they adapt to pandemic procedures.¹

For instance, the Supreme Court of Virginia held its first videoconference merits session in June using the Polycom platform, while the Court of Appeals of Virginia has instead opted to use Microsoft Teams for its writ arguments and panel hearings. Zoom, generally considered the leading videoconferencing platform, is widely used in Virginia's federal courts. Despite Zoom's ubiquity, it is unlikely that Virginia's appellate courts will begin using it due to lingering security concerns,² particularly considering the Texas Supreme Court's recent two-month struggle to regain control of its administrative systems after a ransomware attack.³

Attorneys can expect to face this mixed bag of videoconference platforms for some time to come. The Court of Appeals recently indicated that it will hold oral arguments remotely "through at least December 31, 2020,"⁴ and with the pandemic showing few signs of abating, other Virginia courts are likely to follow. With videoconference arguments here to stay — at least for the foreseeable future — this column provides practical suggestions for taming technology and avoiding common pitfalls.

1. Become Familiar with the Software

The day of argument is not the time to learn how a new videoconference platform works. Download whatever application the court will be using well in advance of your argument date,

then make an account if necessary and familiarize yourself with the software's features and controls. Each platform functions differently, so don't assume familiarity with one will translate to another. Likewise, a given platform will look and operate differently depending on whether it is accessed on a PC or mobile device. The best practice is to avoid using mobile devices like tablets or phones for videoconference arguments unless absolutely necessary.

The most useful resource for ensuring that your device is ready for argument is the court's clerk's office. Most clerks' offices offer resources for attorneys preparing for videoconference arguments,⁵ including scheduling test videoconferences. The value of a test meeting cannot be overstated because it will be the only opportunity prior to the argument itself to connect your device to the court's system. In doing so, you may uncover connectivity issues, like interference from your local firewall, which would go undiscovered in test calls within your organization.

2. Prepare Your Virtual Lectern

Another advantage of a test meeting is that it provides an opportunity to familiarize yourself with the argument screen layout. Be sure to know the locations of the judge or judges, opposing counsel, and the timer so you can plan accordingly. For example, both the Supreme Court and Court of Appeals provide an on-screen timer. In the Supreme Court, a camera shares the display on a physical courtroom timer. This means the timer occupies an ordinary video box situated under the boxes for the Justices and opposing counsel, with arguing counsel centered in a larger box. The Court of Appeals, however, uses a software timer shared using the videoconference

platform's screen-sharing feature. As a result, the timer will dominate the screen unless counsel manually changes the view.

Ensure that your off-screen argument space is prepared as well. If you use multiple monitors, make sure you know on which screen the videoconference will display. Use soft lighting to illuminate your face, and position yourself so that the camera shows your head and shoulders. Take care in selecting a background because windows will cause your face to be shaded and busy backgrounds are distracting. Finally, treat your virtual lectern as you would the real thing. Avoid the temptation to have lots of materials at your computer just because you think the court cannot see them — everyone will hear the rustling if you shuffle through them.

3. Minimize Disruptions

Technical problems are nearly unavoidable in the videoconference argument environment but taking a few precautions can do much to minimize them. Connect using a wired connection if possible and avoid competing bandwidth uses, such as large downloads, during your argument. Also silence



Graham K. Bryant is an associate at Byrne Legal Group where he concentrates his practice on appellate advocacy while contributing to the firm's defense of healthcare providers. Graham previously served as a law clerk to both of Virginia's appellate courts. He is a member of the Virginia State Bar's Special Committee on Technology and the Future Practice of Law and a graduate of William & Mary Law School, where he presently serves as an Adjunct Professor of Law.

Technology and the Future Practice of Law

any other devices to avoid distracting notification noises. Consider using wired headphones and a high-quality external microphone rather than your computer's defaults to improve sound quality while reducing the risk of feedback screeches.

Following videoconference etiquette can also do much to avoid disruption. If you are not the only argument on the docket, treat joining the videoconference as you would walking into a courtroom during another hearing by minimizing your presence. You can accomplish this by muting your microphone and turning off your video *before* joining, not immediately afterward — having a new box with someone's face appear for a few seconds before disappearing is distracting for attorneys and judges alike. Remain muted unless you are actively arguing.

4. Respond to Your Audience

The biggest advantage of videoconference arguments over more traditional telephone arguments is that you can see

your audience — the court — and it can see you. Traditional advice stresses the importance of eye contact for persuasive oral argument.⁶ But making and leveraging eye contact is complicated by the videoconference environment, in which the only way to make “eye contact” is to look directly into the camera lens. It is tempting to look at the box displaying a judge's video when arguing or responding to a question, but doing so makes you appear to be looking away. Innocently looking at these boxes rather than the camera can easily be mistaken for reading from an on-screen script or notes, so take care in directing your attention.

The essential value of oral argument is the ability to respond directly to the court's questions about your case, but some judges are more hesitant to interrupt with questions during remote arguments. A judge's body language can signal that a question is forthcoming, but these subtle signals can be lost in a videoconference argument with coun-

sel focused on the camera. There are thus dangers in either looking only at the screen or only at the camera, so the best approach appears to be addressing argument toward the camera while periodically scanning the screen for signs of questions. Complement this scanning process by using effective pauses. In addition to being a valuable rhetorical technique, pauses also give the court a chance to ask questions. **Even with these precautions, however, the anecdotal evidence to date indicates videoconference benches tend to have fewer questions than live benches, so prepare accordingly.**

Videoconference arguments remain a technological novelty for counsel and courts alike, but they will likely remain a regular part of our judicial system long after COVID-19 is gone. Developing best practices for them now is a prudent way to adapt to the future practice of law. ☺

Endnotes

- 1 See In re: Order Declaring a Judicial Emergency in Response to Covid-19 Emergency (Mar. 16, 2020), http://www.courts.state.va.us/news/items/covid/2020_0317_supreme_court_of_virginia.pdf (encouraging courts to adopt remote-hearing technology consistent with law in response to COVID-19).
- 2 Although Zoom has substantially remedied cybersecurity flaws discovered shortly after the pandemic began, some conservative IT departments remain wary of the platform. See Rae Hodge, *Zoom Security Issues: Zoom Buys Security Company, Aims for End-To-End*

- Encryption*, CNET (May 8, 2020), <https://www.cnet.com/news/zoom-security-issues-zoom-buys-security-company-aims-for-end-to-end-encryption/>; see also *Remote Appearances*, Chesterfield Cty. Cts., <https://www.chesterfield.gov/4931/Remote-Appearances> (indicating that the Supreme Court of Virginia has authorized use of Polycom and WebEx, but not Zoom, Skype, or FaceTime for remote hearings).
- 3 Angela Morris, *Texas Appellate Courts Almost Back Online After Ransomware Attack*, Tex. Law. (July 10, 2020), [\[sansomware-attack/\]\(https://www.law.com/texaslawyer/2020/07/10/texas-appellate-courts-almost-back-online-after-ransomware-attack/\).

 - 4 In re: Third Order Concerning Court Operations under the Public Health Emergency Created by the Outbreak of Coronavirus Disease 2019 \(COVID-19\) \(Aug. 31, 2020\), \[http://www.vacourts.gov/news/items/covid/2020_0831_cav_operations_order_third.pdf\]\(http://www.vacourts.gov/news/items/covid/2020_0831_cav_operations_order_third.pdf\).
 - 5 See, e.g., *Videoconferencing Tips for Counsel*, 4th Cir. Ct. Appeals, \[https://www.ca4.uscourts.gov/docs/pdfs/VideoconferencingTips-forCounsel.pdf?sfvrsn=488fb909_2\]\(https://www.ca4.uscourts.gov/docs/pdfs/VideoconferencingTips-forCounsel.pdf?sfvrsn=488fb909_2\).
 - 6 Antonin Scalia & Brian A. Garner, *Making Your Case: The Art of Persuading Judges* 178–78 \(2008\).](https://www.law.com/texaslawyer/2020/07/10/texas-appellate-courts-almost-back-online-after-ran-</div><div data-bbox=)

Law Libraries *continued from page 44*

Endnotes

- 1 Supreme Court of Virginia, In Re: Declaring a Judicial Emergency in Response to COVID-19 Emergency (2020), http://www.courts.state.va.us/news/items/covid/2020_0317_supreme_court_of_virginia.pdf.
- 2 *The Guide to Law Online*, maintained by the Law Library of Congress, links to thousands of these freely-available resources, <https://www.loc.gov/law/help/guide.php>.
- 3 Monica Anderson and Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Center (2019),

- <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>.
- 4 *Organisation for Economic Co-operation and Development, Understanding the Digital Divide* (2001), <http://www.oecd.org/internet/ieconomy/1888451.pdf>.
 - 5 AALL, *Law Libraries and Access to Justice: A Report of the American Association of Law Libraries Special Committee on Access to Justice* (2014), <https://www.aallnet.org/wp-content/uploads/2018/01/AccessToJusticeSpecialCommittee2014LawLibrariesAndAccessToJustice.pdf>.
 - 6 Emily A. Vogels, Andrew Perrin, Lee Rain-

- ie, and Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, Pew Research Center (2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.
- 7 Geraldine Cepeda, *Reopening Our Libraries: The Guam Law Library*, LISP/SR Blog (Aug. 13, 2020), <https://lispr.wordpress.com/2020/08/13/reopening-our-libraries-the-guam-law-library/>
 - 8 The views expressed herein are solely those of the author and do not reflect the opinion of the Law Library of Congress or the Library of Congress. ☺