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COVID-19, ZOOM, AND THE FUTURE OF APPELLATE ORAL ARGUMENT*

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When the COVID-19 pandemic descended upon us in early 2020, most courts scrambled to find ways to maintain continuity of operations while also protecting public safety for all who entered the courthouse. Appellate courts gradually gravitated toward video oral arguments on various platforms, with Zoom proving prevalent (and I'll use "Zoom" as a shorthand for these platforms). This radical restructuring of how we conduct oral arguments presents some questions worth pondering—chiefly, with oral argument declining across the country in recent years, can we reverse that decline, and if so, what might the future appellate landscape look like?

The pandemic essentially offers us the chance to reimagine appellate oral argument. In a post-pandemic landscape, I see a path to broadening the importance of oral argument, as well as expanding opportunities for lawyers (particularly junior lawyers) to partake of it. Zoom arguments will enable counsel to present arguments that clients might have vetoed previously for travel and costs reasons, particularly in courts with a broad geographic

With a backdrop of declining oral arguments in appellate courts nationwide, most courts experimented with "Zoom" arguments during the pandemic. This technological innovation can provide broader access to justice, transparency, and training opportunities, and appellate courts should consider how to benefit from this medium even after the pandemic.

reach. I do not mean to suggest that we should allow Zoom arguments to supplant in-person ones, but rather we should be open to the benefits that it can provide. This essay, in short, represents a defense of the continued significance of oral argument while recognizing that we can avail ourselves of new technologies (such as Zoom) to broaden the "appeal" of oral arguments and increase public access to them.

THE DECLINE OF ORAL ARGUMENTS

Years ago, when I served as a law clerk on the U.S. Court of Appeals for the Sixth Circuit, the court permitted every (counseled) party the opportunity for oral argument so long as counsel requested it. Fast-forward to today, and oral argument at the Sixth Circuit, much like most of its sister circuits, is essentially a rarity. And, indeed, in many appellate courts across the country, that same trend holds true.

So why has oral argument declined? Courts justify the decline in oral arguments for various reasons, but I highlight a few of them. First, courts typically cite the demands of their dockets as precluding frequent oral arguments. Time spent preparing for and participating in oral argument, so the reasoning goes, detracts from other matters at hand for a busy appellate judge, such as opinion writing. This is a fair critique—to a point. While time spent on the bench refereeing oral argument could certainly be allocated elsewhere, I'm less convinced that the time spent "preparing" for argument represents a lost cause. Judges should spend time on the case regardless of whether oral argument will occur, and I do not see the harm that comes from some more focused effort on particular cases. After all, if the case is open-and-shut, a judge is unlikely to burn the midnight oil preparing for it.

Second, the appellate judicial mindset has shifted a bit, and I suspect that many judges simply do not find oral argument as helpful as in generations past. A number of factors might explain this trend, but generally, I think it involves the wealth of information that we, as judges, now have at our fingertips before stepping to the bench for argument. In many courts, the practice of circulating bench memos among judges in advance of argument telegraphs how judges are inclined to rule. The caliber of contemporary law clerks and the level of preparation in advance, by clerk and judge alike, often leaves little to debate by the time that argument arrives in many cases.

Third, and tied into the two points above, judges are sensitive to the costs and delays attendant with oral argument. Hence, courts often think they are doing parties a favor by dispensing with argument. I have heard several appellate judges express the notion that argument in a particular case would just subject the clients to needless expense if we (the appellate panel) have already made up our minds. Having spent almost twenty years in private practice, with clients keeping a vigilant eye on billings, I can certainly appreciate that concern. While I am not insensitive to the costs of legal proceedings, I also recognize that a lawyer and client can make an educated choice about whether oral argument—or even pursuing an appeal, for that matter—is worth the cost. And we, as appellate courts, must ask ourselves hard questions, such as are we primarily granting argument in higher-profile cases, or are we allowing low-dollar (but potentially intriguing) cases to be argued as well?

One could offer myriad reasons for why oral argument is declining, and there is probably a kernel of truth to all of them. We can debate the reasons but not the effects: oral argument has declined for years, which raises questions about its future viability.

ENTER COVID-19 AND ZOOM

The COVID-19 pandemic ushered in dramatic changes in our legal system as courts struggled to remain open without jeopardizing public health and safety. For appellate courts, our primary interaction with lawyers and the public occurs during oral argument. As states across the country shut down during the early stages of the pandemic, many courts suspended oral argument for at least a while, but as we began to realize that COVID-19 was not going away anytime soon, courts began considering

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various alternatives: telephonic argument, video/Zoom arguments, and socially distanced arguments with masks. While none of these measures proved perfect, Zoom arguments emerged as the consensus choice in federal and state appellate courts. That evolution thus raises a question—how has that worked so far?

Early in the pandemic, I circulated a survey to several federal and state appellate judges and lawyers across the country. While this was not a methodologically sound survey with an appropriate sample, it was designed to gather an impressionistic sense from judges and lawyers as to the efficacy of this new medium of Zoom arguments as all of this unfolded in real time.

With the caveat that just about everyone said that they preferred in-person arguments, appellate judges and lawyers seemed to embrace this new technology with somewhat surprising enthusiasm. Part of the reason for that is that many viewed telephonic arguments as inadequate, and thus not a viable option. But appellate judges found the Zoom technology relatively easy to use and a reasonably adequate substitute for in-person oral arguments. One state supreme court justice remarked, "The video oral arguments have worked well. I'm looking forward to returning to live oral arguments, but I think there may be a place for video oral arguments in the future." A justice from a different state echoed the point: "Zoom has been fantastic."

One state intermediate appellate judge appreciated the increased public access to the proceedings: "the public, other attorneys or out of town attorneys can easily view [the arguments] whereas before the audience was far less." A state supreme court justice from a more rural state echoed the point: "My state is quite large geographically, so it might be a good option for lawyers who have to travel."

On the other side of the lectern, appellate practitioners found the technology reasonably user friendly, and they applauded efforts of bar associations and courts to provide assistance and training to appellate lawyers. Some lawyers appreciated certain "luxuries" allowed by the new format, such as having case files, relevant precedents, and exhibits at the ready on their desk when they typically could not lug all of those materials to the podium. And certainly, despite all efforts to maintain formality, a reduced formality necessarily comes with Zoom, which might be comforting, particularly to more junior lawyers. Technology-related concerns, however, remained top-of-mind for lawyers, as even the most technologically savvy of us cannot guard against everything that could go awry in a Zoom argument—as one lawyer reported, the fire alarm in his building went off during the middle of argument.

While Zoom certainly has its converts, some respondents to the survey questioned the efficacy of Zoom and debated the ongoing role of the platform. Many voiced concern that Zoom arguments are not necessarily a practical solution in many corners of our country without reliable Internet access. And this problem is not confined simply to lawyers, as many courts permit *pro se* litigants to present oral arguments. How can we ensure that *pro se* litigants have adequate access to technology sufficient to present a Zoom oral argument?

Respondents also disagreed on whether Zoom facilitated public and media access to oral argument. Some courts, including many state supreme courts, already provided streaming video access to oral arguments pre-pandemic. Other courts collected audio recordings of oral arguments on their websites. While some appellate judges see a virtue in Zoom as increasing access to argument, such an increase only happens if the courts permit streaming viewing and provide a reliable archive of the arguments (perhaps using YouTube as a repository).

The "jury," as it were, remains out on Zoom, but we are becoming accustomed to the medium and beginning to see how it might play a continuing role for appellate courts.

A DEFENSE OF THE MODERN ORAL ARGUMENT

As we ponder the future of oral argument, it is helpful to remember some of its virtues. The lay public often misunderstands appellate courts because they seem shrouded in mystery. Oral argument puts the decision-making process on display, providing clients and the public alike with a glimpse into that process that (hopefully) cultivates a sense that judges are prepared and care about the cases. Sitting in our ivory towers and never letting the public see our work process firsthand would inevitably erode trust and confidence in the judiciary. The more we chip away at that right and experience, the more we remove that connection and render the lawyers less vested in the appellate process.

Oral argument also leads to enhanced decision making. I recall numerous examples during my time on the bench where oral argument might not have changed the ultimate result, but it certainly impacted how we approached the opinion. Oral argument can enrich our understanding of cases, which directly impacts how we write opinions, and thus the evolution of case law. Cases and record cites often emerge at argument in sharper relief, enabling us to consider those points anew in light of the argument. And argument can, and does, sometimes sway results.

Nor should anyone overlook the value of conference in the overall calculus of the worth of oral argument. Particularly in courts with jurisdiction over numerous counties or states, oral argument may be one of the rare occasions when the judges gather together in person, sometimes even breaking bread afterwards. In a world where many judges communicate regularly through email, the debate back and forth is helpful not only in resolving a particular case, but also in building collegiality between colleagues.

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HOW WE INTEGRATE ZOOM

Zoom has the potential to broaden public access and understanding of appellate courts, and even to help improve oral arguments. We therefore should embrace this medium for at least limited use post-pandemic.

Zoom, if properly used, can become a powerful tool to both increase access to justice and to enable courts to modernize. Zoom has already lifted the veil on how appellate courts function. The federal D.C. Circuit reported that around 90,000 people logged in to "attend" two high-profile arguments during the pandemic, and a Michigan Court of Claims hearing garnered 50,000 viewers. This renewed interest in the appellate process by the general public has convinced some that the pandemic actually *increased* court transparency.

And it can continue to do so. We should be flexible and allow for Zoom arguments, post-pandemic, in situations where the parties request it, particularly when the argument would necessitate travel or other expenses that could be avoided. Zoom argument has also shown us that people actually pay attention to livestreamed arguments. Many courts now appreciate what several state supreme courts at the vanguard of this movement have known for a long time: livestream arguments are a valuable resource for lawyers and clients, as well as a transparency tool in this modern age.

As we consider how technological innovations can enhance oral argument, we must also place a renewed focus on oral argument to ensure its long-term vitality. First, we must help cultivate the next generation of appellate lawyers. Right now, it is exceedingly difficult for junior lawyers to obtain meaningful oral argument experience. How can one excel without practice?

So how do we do that? A couple of thoughts come to mind. Appellate courts that restrict oral argument should consider granting it—even if it would otherwise be denied—if a junior lawyer is going to argue. Hand in hand with that, bar associations should focus on appellate mentoring, such as organizing moots for lawyers undertaking their first arguments. Relatedly, courts should consider creating some type of pro bono appointment program that would help provide argument at-bats for aspiring appellate lawyers. One of the chronic problems in the legal profession is matching underprivileged clients with junior advocates who desperately need the experience and are willing to work pro bono.

Now consider how we could overlay Zoom on such efforts—pro bono lawyers without funding might not be able to afford to travel to an oral argument, and Zoom could solve that problem by obviating the need for travel expenses. This creates a win-win-win: junior lawyers get great experience, appellate courts receive better advocacy, and the otherwise *pro se* party secures counsel.

In conjunction with this point, appellate courts should also revisit their court-appointed lists. In most courts, these representations do not pay much, but adding Zoom as an option for oral argument may make these appeals more affordable to counsel (particularly junior lawyers who might not otherwise be on the appointment list). Mandating training for these appointed lawyers, and allowing them to attend remotely, can help expand, diversify, and improve the panel. And we must acknowledge the reality that some arguments may just be better suited for Zoom (for a host of reasons), and perhaps we should evaluate rule changes to allow for that.

Finally, appellate judges need to play an active role in helping educate lawyers about oral arguments and technological changes. During the pandemic, I have seen firsthand a number of appellate judges stepping up in seminars to help educate the bar about Zoom oral arguments, and we must continue that work. If we want better oral arguments, we must be invested in the process.

The bottom line is that appellate courts and appellate lawyers are at a moment where we must reevaluate oral argument and think critically about it (the ABA and others are already undertaking such efforts). Zoom might be the lightning rod to help spark that discussion, and if we want this tradition of oral argument to endure, as I suspect most would readily acknowledge, then we need to be open to some changes and to taking a leadership role to implement them.