

always Appealing: Video Remote Argument: Best Practices Part II

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(First of Two Parts)

Last year, as noted in our December column, I served on a task force that drafted a set of proposed “best practices” for remote video argument, with several appellate colleagues across the country, all Fellows of the American Academy of Appellate Lawyers.

When I reported on our work a few months ago, I had hoped events would conspire to not have to follow up with a second column on video remote argument. Alas, no — it looks like we will be presenting remotely for at least a few more months. So, this column is devoted to some more of our task force’s “nuts and bolts” recommendations, slightly edited for this publication.

A. 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. We are fortunate in Washington in having the archives of tvw.org to facilitate that review.

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. 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 headshot. Approaches to virtual backgrounds vary from mandatory to optional to forbidden. Here in Washington, they are generally optional (although some formats do not accommodate virtual backgrounds). Make your background 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 that 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 or 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.

“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

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