Do the RAPs Need to be Updated to Account for "Zoom Court?"

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Bar Bulletin Blog: General

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By Nichoals Bartels

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

Prior to the pandemic, the phrase "I have court tomorrow" carried with it the assumption that we would be donning our suits and heading down to the courthouse to go stand before a judge to appear in our cases. But because of the pandemic, fewer lawyers actually have to be in a courthouse to appear in a case. Unless your office is immediately adjacent to the courthouse, many lawyers are appearing via remote technology such as Zoom, Microsoft Teams, or Cisco's Webex these days.

In the beginning of the pandemic, courts, and just about everyone else, hastily transitioned to using Zoom and other remote technologies as the primary means to appear and to hold oral argument. Our Supreme Court quickly entered an emergency order that allowed Zoom1 to be used in lieu of in person appearances.2 Yet, as it would turn out, even with the pandemic in our rearview mirror, Zoom is here to stay.3

When the Supreme Court's orders expired last year, the Superior Court rules were quickly updated to reflect the recent ubiquity of Zoom court. The Board for Judicial Administration – Remote Proceedings Work Group, proposed changes to

thirty-three rules to recognize the use of Zoom and other remote technologies.4 However, all these rule changes were limited to the trial court rules, both superior courts and courts of limited jurisdiction.

Interestingly, the Rules of Appellate Procedure (RAPs) remain untouched.

Presently, the three divisions all have slightly different methods to deal with remote appearances at oral argument. In all cases, litigants receive a setting letter notifying the parties of the date that the court has set the case for oral argument. It is in this letter that the divisions outline their procedure for argument, be it via remote technology or in person.

In Division I, the setting letter strongly suggests that that the court has a preference for in person oral argument:

Division I will be conducting in-person hearings for all cases set for oral argument . . . In order to finalize the oral argument calendar it is imperative that you respond to this setting letter within three days of the date of this notice. If you are available to argue your case in-person, please respond by replying . . . and attaching the signed setting letter to the reply within three days of the date of this notice.

If you are unavailable to argue the case in-person, you must file a motion to continue within three days of the date of this notice. Cases that are stricken from the calendar will be reset at the convenience of the Court.5

Meanwhile, Divisions II and III appear to have less of an overt preference for in person proceedings.

In Division II, the setting letter contains a simple sentence requesting input from the parties:

Counsel/Parties must notify the court, within 5 days of the date of this letter, if they wish to present oral argument virtually rather than in person.6

Division III is unique in that the Court requests the parties to “meet and confer” and provide a joint response to the Court:

The Court requests the case participants meet and confer about whether you will be:

1) appearing in person at the courthouse,

2) appear remotely via Zoom,

3) or a hybrid approach with some participants appearing in person and others appearing remotely via Zoom.

A joint response is now due to be filed within 10 days…. If no response is filed by the due date, the court will set the oral argument for in person appearance. If the parties disagree regarding the hearing method to be used by the court, each party shall file an explanation (not to exceed 200 words) with the court within 10 days of this notice. 7

I believe the RAPs must be amended to align with the trial court rules that recognize the prevalence of Zoom and other remote technologies.

By creating a uniform rule that applies to all three divisions, the court would have a standard procedure that creates increased transparency of the court's process. There are no doubt benefits to letting each division manage their own argument setting, particularly given the different geographic and demographic makeup of each of the divisions. However, I believe that the current procedure of notifying parties of the oral argument procedures via setting letter hinders litigants, particularly those that do not regularly go before the Court of Appeals.

I would be in favor of adopting a process akin to the requirements of Division III's setting letter. This approach is favorable for two reasons. First, it strikes the proper balance between the court's preference for in-person argument, and the needs of the litigants. I believe that, barring some extenuating circumstance, in person appearance is preferable to appearing via Zoom. By appearing in person, you avoid the possibility of having technical issues that thwart your ability to make an effective argument, and you can save valuable argument time by being able to read the non-verbal communication of the court and the other party and respond accordingly. Plus, you get the added bonus of having in-person human interaction.

By requiring that the litigants "meet and confer,"8 the litigants are also placed in the proverbial driver's seat. Given that many litigants are now able to appear via Zoom, where appearing in person may have been a significant hardship, there is no doubt a significant increase in litigants' access to the Court of Appeals. Furthermore, by having a unform rule, parties that do not regularly go before the

Court of Appeals would have a prospective awareness of the process for argument, because it would be clear from the RAPs.

The second benefit of this hypothetical rule is that it provides an appropriate mechanism for how to resolve disagreements between the parties as to the format of the argument. The Division III approach, while keeping in person argument the default, allows for the parties to participate as they are able to — either both in person, both via Zoom, or one in person and one via zoom. Additionally, by meeting and conferring prior to argument, there is also no surprise when one party shows up for oral argument, only to find that the other party will be arguing via Zoom. If the parties do not agree, then the court can step in and require that the parties are in person.

While there are benefits to this rule there are also drawbacks. The first potential drawback is that a rule change of this kind arguably defies the age-old adage “if it ain’t broke, don’t fix it.” The Court of Appeals has been operating in its current state since the pandemic, seemingly without issue, so the “need” for a new rule is arguably lacking. Additionally, the three divisions all having their own procedure for setting argument, demonstrates the unique needs of each of the divisions and a uniform rule would cut against the individual autonomy of each of the divisions.

The second drawback is a logistical one that arises from the need to “meet and confer” on a tight timetable. While the meet and confer could be done via email, Zoom or telephone, that would still require some connection between the two sides, which may pose a challenge in some cases particularly in the rare case where a party does not have access to a phone or the internet. The meet and confer would also result in additional attorney time being devoted to the matter, and a simple email could potentially snowball into a larger dispute over the format of argument, the cost of which will likely be passed on to clients.

While I think that the RAPs are in need of an update, I am open to other opinions on the matter, such as if other practitioners have different ideas about how the Court of Appeals should handle the new age of Zoom arguments. I welcome any feedback or comments from other members of the Bar. I intend to propose a rule change in the next few months.

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1 “Zoom” has quickly turned into a proprietary eponym, to stand for the entire class of remote technologies, like “Kleenex” for facial tissue, or “Vaseline” for petroleum jelly. This article uses “Zoom” as a stand in for all remote video conferencing technologies.

2 In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, Amended order no. 25700-B-607 (March 20, 2020). This order was extended a handful of times as the pandemic wore on. All of the Supreme Court’s emergency orders can be found here: Washington Courts, COVID-19 Resources and Response, https://www.courts.wa.gov/newsinfo/index.cfm?fa=news info.COVID19Orders (last accessed March 11, 2025).

3 Zoom’s marketing materials rely heavily on this notion. Zoom, The Future of Courts – Hybrid and Virtual Courts, https://www.zoom.com/en/industry/government/resources/future-of-courts/?cms_guid= false&lang=en-US (last accessed Mar. 11, 2025)

4 Of those changes proposed, only one was rejected, the proposed change to GR 11.3. The proposed rule would have lowered the “good cause” requirement for remote interpreters such that “good cause for remote interpretation would only be required in criminal matters only, whether evidentiary or non-evidentiary. The Washington State Interpreter and Language Access Commission did not support this proposed change because the Supreme Court had already adopted a change to allow for remote interpretation.

5 Division I setting letter.

6 Division II setting letter.

7 Division III setting letter.

8 The phrase “meet and confer” is not found anywhere in the RAPs. The use of a meet and confer process would generally track with the informal conference of counsel as required by CR 26(i). There is rarely a formal face to face meeting in these conferences.