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During the extraordinary times of the global COVID-19 pandemic, many ordinary aspects of life have been altered and changed. Stay-at-home orders and social distancing prevent day-to-day interactions. Like every other aspect of life, the practice of law has been affected by the pandemic as well, with attorneys dealing with the closure of law offices and the need to practice from home. The judicial system has been similarly impacted, and both trial and appellate courts have been faced with unprecedented circumstances. While research and writing have always constituted the heavy artillery of appellate work, and can be done remotely, one aspect of appellate practice that immediately ground to a halt was oral argument before the Superior Court of Pennsylvania.

Starting on March 12 of this year, the Supreme Court of Pennsylvania entered a series of administrative orders pertaining to the health crisis. On March 16, the court declared a general, statewide judicial emergency and, in order to safeguard the health and safety of court personnel, court users and members of the public, it directed the intermediate appellate courts to cancel oral arguments and submit the cases for merits consideration based upon the briefs. On March 18, the Supreme Court ordered all courts closed to the public

Up Close and *Personal*

Video Oral Arguments Before the Superior Court

By Mary Jane Bowes

and the intermediate appellate courts closed for all nonessential functions. However, the use of advanced communication technology to conduct court proceedings was specifically authorized and encouraged in all districts and courts, subject only to constitutional limitations. The high court entered an order announcing the cessation of the statewide judicial emergency after June 1, although appropriate health and safety measures remained in effect as determined by the individual courts.

During this time, the Pennsylvania Superior Court, as one of the busiest appellate courts in the country, continued its essential functions. Moving all operations remotely, the judges and staff read briefs, drafted memoranda and opinions, voted on cases and filed decisions. But missing from it all were the in-person oral arguments with counsel, the loss of which was lamented by both counsel and judges. In order to replace this critical interaction between judge and attorney, and encouraged by the Supreme Court directive, the Superior Court held its first video oral arguments on May 18, 20 and 22. Eighteen cases that had renewed their request for oral argument were heard over those three days. Concomitantly, the Supreme Court of Pennsylvania

hosted its first video arguments on May 19, 21 and 28. The Commonwealth Court also held a trial via Webex on April 28 and heard oral arguments in Harrisburg May 11 through 15, with some judges in person, and other judges and all counsel participating remotely. Since then, the appellate courts have continued to host remote proceedings and video arguments.

Several cases were initially heard by telephonic argument during the pandemic at the discretion of the panel. But with telephonic arguments, it is sometimes difficult to ascertain who is speaking. With video arguments, the attorneys and judges have the opportunity to see each other face-to-face and to engage in the valuable back-and-forth interaction that is the hallmark of vigorous oral arguments. With a panel of three judges, joined by counsel for appellant and appellee, it was easy to manage the oral arguments.

The video argument readily revealed the speaker. Spirited questioning took place, just as it does in the courtroom, with the advantage of not speaking into a large cavernous courtroom where voices sometimes get lost. The judges were trained beforehand so that they were equipped with the basic operations of the video plat-



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form. A cadre of experienced IT staff stood by to render assistance.

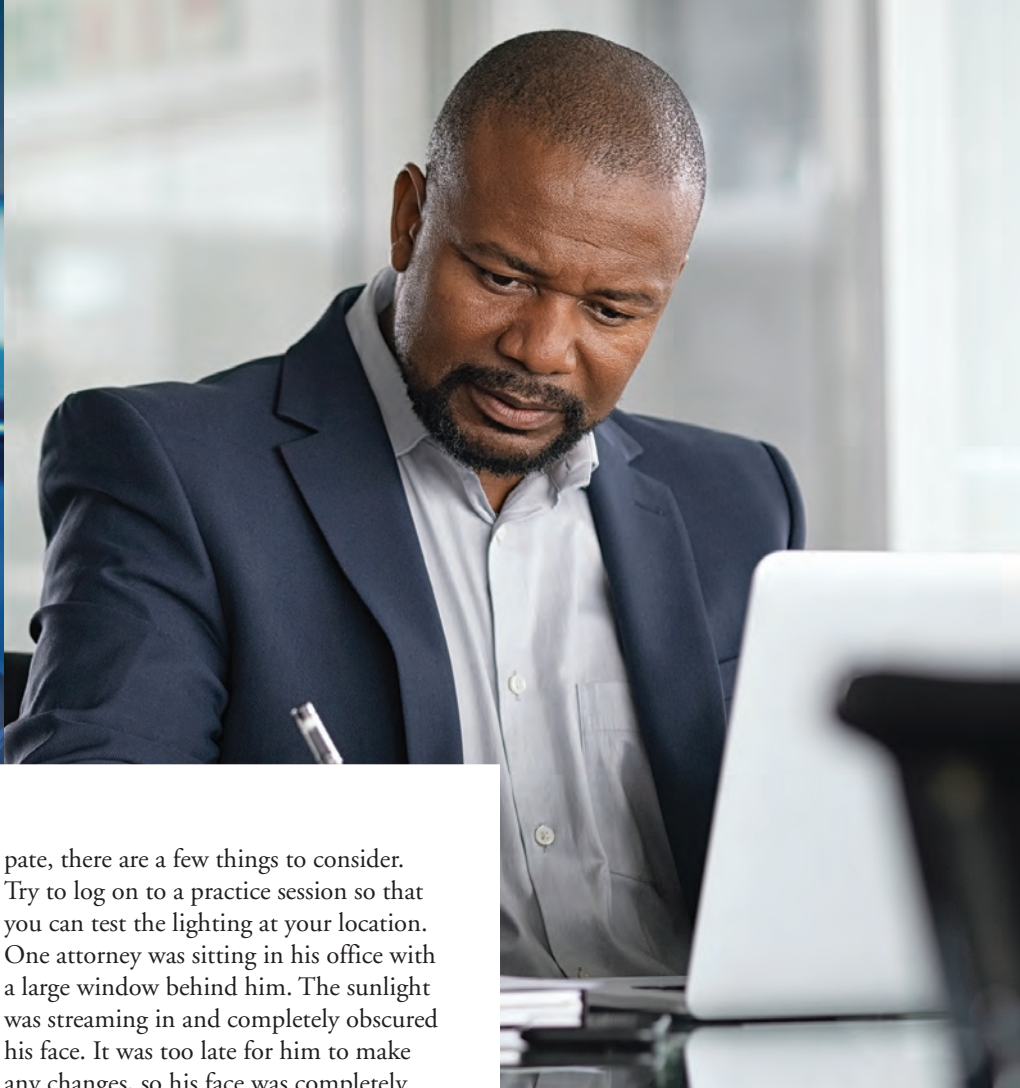
Each argument was scheduled for a specific time, so there was no waiting for hours on end until one's case was called. Attorneys were provided with detailed instructions as to how to participate. In addition, information was posted on the Superior Court website concerning remote argument procedures. A cushion of time was built into the schedule between each argument to allow for technical difficulties, which were surprisingly few. Notice as to the dates and times of the cases were published on the Superior Court webpage and on its calendar. A hyperlink with public logon information was listed there as well in order to fulfill the state constitutional requirement that "All courts shall remain open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay," Pa. Const. Art. 1, § 11. The oral arguments were livestreamed on YouTube so that public access was assured. That way, clients, friends, colleagues and proud mothers and fathers of advocates could watch. A call-in number was also provided for those without access to a computer.

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there are certain practices and preparations that can enhance the overall quality of the video presentation. The following tips and recommendations may benefit advocates in any future remote oral arguments.

First and foremost, it is prudent to ensure that counsel have the technical know-how to participate in the video arguments. While the whole world was "Zoom-ing" with friends and family during the quarantine, that platform is only one of many available for virtual meetings. The Pennsylvania appellate courts utilized Cisco's Webex, which differs in its usability and operation from other applications. Since Webex was not as commonly employed as Zoom, the Superior Court offered practice sessions for counsel from 8 to 9 a.m. on the mornings of the arguments. Attorneys had an opportunity to check in with the legal systems staff of the court to confirm that they had the technical capacity to participate in the Webex event. Several attorneys took advantage of the technical assistance offered by the court. In fact, the Unified Judicial System has a webpage devoted to Webex assistance and support, which can be found at <https://pacourts.webex.com/>.

Court staff members remained available during the actual argument sessions in the event that a technical glitch occurred. It was comforting to have an experienced



staffer calmly walk the attorney through his or her difficulties with being seen or heard during the remote argument. Several times, the judges themselves sought to provide assistance to the attorneys as some struggled with the technology. Since it was the first time for both counsel and judges to participate in video proceedings, patience and understanding were the order of the day for all involved.

The two critical functions that must be mastered on any video platform are operating the camera and the audio features. Both can be turned on and off, and the ability to do so is critical to a successful argument. One attorney could not manage to activate his camera despite coaching from the IT staff and the judges. When asked if there was anyone around who might lend assistance, he commented that he had directed his children to not interrupt his argument. Upon the advice of the court, he called one of his children into the room, who quickly solved his problem and turned on his camera. Never underestimate the ready assistance of digitally-expert youths!

After ascertaining that the attorney has the technical capabilities to log on and participate in the remote argument, counsel should decide on the location for his or her argument. Many of the attorneys argued from home, others from their law offices. Regardless of where you decide to partici-

pate, there are a few things to consider. Try to log on to a practice session so that you can test the lighting at your location. One attorney was sitting in his office with a large window behind him. The sunlight was streaming in and completely obscured his face. It was too late for him to make any changes, so his face was completely shrouded in darkness during his argument. Those savvy in virtual meetings recommend a bright light immediately behind your camera to appropriately illuminate your face. Countless YouTube tutorials exist to provide expert advice on how to best maximize a video appearance.

Another attorney disabled her camera during opposing counsel's argument. Fearful that she had been accidentally disconnected, the court stopped the argument to inquire as to whether she was still on the video call. She thought it would be less distracting to turn off her camera, but it distracted the court enough to stop and inquire as to whether she was present. And, of course, we can never get away from interruptions in the form of telephone calls, except this time it was a landline in the attorney's office. He kept picking up and replacing the receiver, but the persistent caller kept calling back. Best to silence the landline as well as the cellphones.

Several attorneys stood during their argument, attempting to replicate the formality

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of being in a courtroom. They also remained standing during opposing counsel's argument as well. This lent itself to a stilted experience, with counsel looking stiffly at the camera during opposing counsel's argument. That is unnecessary. After all, in the courtroom, you sit while the other attorney argues. Another attorney walked around his office reviewing his notes while opposing counsel argued. Even in a video argument, you should comport yourself with the same measure of respect for the other attorney as in the courtroom, bearing in mind that everything that you do can be seen by the judges and opposing counsel.

Whether sitting in a young daughter's purple bedroom or at the dining room table, the advocate should be comfortable and in close range to the camera and the speaker. Ensure that the audio is loud enough; if possible, use the computer audio and not a telephone speaker. Just like in the courtroom, the judges should not have to strain to see you or hear you. Always keep your speaker on mute until it is your turn to speak; that eliminates any background noise and interference with the person speaking. One attorney used a split screen so that he could see his notes on the video screen and not have to glance down while arguing.

Up close and personal to the judges in a way that traditional oral argument does not permit, video argument allows you the opportunity to speak directly to the judges about the case in an atmosphere where the judges' entire attention is on you. There are no interruptions from the court crier trying

to order lunch, no folks wandering in and out of the courtroom, no security issues being handled in the aisle, no attorneys restless or working (or sleeping) in the back rows. Just you and opposing counsel and the three judges are on the screen. This is your chance to lean in to the ear of the court about the wrong inflicted on your client or to assure the appellate judges of the utterly correct decision reached by the esteemed trial judge below.

Certain aspects of oral advocacy never change: the need to be prepared, to know the record cold, to convey the heart of your case and to clearly assert the alleged trial court error. Yet the formality inherent in the courtroom argument yields to a more personal experience when arguing via video. In a very real way, the video argument is a more intimate experience than advocating in an ornate courtroom, standing at a podium and looking up at the judges sitting on the other side of the high, intimidating bench. Instead, the videos of the individual judges are all the same size as the videos of the attorneys. One attorney said it democratized the argument and, in a sense, he was right. All of those participating, judges and attorneys alike, are playing their respective parts in the expansive sea of justice that winds its way through the appellate courts like a ship seeking its harbor.

Someday soon, the world will return to its proper order. Courts will reopen and attorneys will again fill the courtrooms for motions, trials and appellate arguments. Will we need video arguments in the future? That remains to be seen. But dur-

ing the pandemic, they kept all the participants safe from exposure to the coronavirus, obviated the need for travel, provided a ready platform for zealous oral advocacy and enabled attorneys and judges alike to perform the very best part of appellate practice — "face-to-face" oral argument. ☞

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Mary Jane Bowes has served as a judge of the Superior Court of Pennsylvania for over 19 years, and has been a zealous advocate for increased transparency and public access of its decisions. She was appointed by the Supreme Court of Pennsylvania to its Appellate Courts Procedural Rules Committee in 2016, and is past chair of the Superior Court IOP Committee and the Appellate Advocacy Committee of the PBA. Judge Bowes lectures widely throughout the commonwealth on appellate practice issues for state and local bar associations, and has served on several video oral argument panels with the Superior Court. The above article solely reflects the views of the author. Photo of Judge Bowes courtesy of the author.

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