

REMOTE ORAL ARGUMENTS IN
THE AGE OF CORONAVIRUS:
A BLIP ON THE SCREEN OR A PERMANENT FIXTURE?

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In March 2020, most oral arguments in state and federal appellate courts were as they always had been: in person. By mid-March, COVID-19 struck and courts were faced with the difficult decision of how to balance on one hand, the need for advocates to plead their cases and the public's right of access to the courts, and on the other, the health risks of in-person arguments. Some courts, the United States Supreme Court among them, chose to hear arguments by telephone conference only. Others opted for audio-video arguments using such platforms as Zoom or Microsoft Teams. Still other courts used a combination of audio-only and audio-visual arguments. For judges and lawyers alike, this was an unanticipated and occasionally unsettling experiment.

This article is the sequel to “May It Please the Court or Not: Appellate Judges’ Preferences and Pet Peeves About Oral Argument.”¹ The follow-up describes the approaches to remote oral arguments that have been taken by four appellate courts: the Supreme Court, the United States Court of Appeals for the First Circuit, and the Supreme Judicial Courts of Maine and Massachusetts. Telephone interviews were conducted

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1. Margaret D. McGaughey, *May It Please the Court—or Not: Appellate Judges’ Preferences and Pet Peeves About Oral Argument*, 20 J. APP. PRAC. & PROCESS 141 (2019).

with many of the same jurists who were interviewed for the first article. One of them is an Associate Justice of the Supreme Court.² Seven of the jurists sit on the First Circuit.³ Four are current or former justices of the highest courts of Maine⁴ and Massachusetts.⁵ Interviews were also conducted of five lawyers who were among the first to present remote arguments in their respective courts.⁶ The purpose of the interviews was to explore the reactions of judges and lawyers to remote arguments, to understand how their preparation and performance differed, to identify the costs and benefits of alternatives to in-person arguments, and to offer suggestions for how to avoid the pitfalls of remote presentations and, instead, make them as effective as possible.⁷

I. HOW VARIOUS COURTS HAVE ADAPTED

A. Supreme Court

In response to health concerns surrounding COVID-19, the Supreme Court established a model that

2. Associate Justice Stephen G. Breyer graciously contributed his thoughts. Telephone interview with Justice Stephen G. Breyer, Associate Justice, Supreme Court of the United States (Jul. 14, 2020) (on file with author).

3. Sincere thanks go to Chief Judge Jeffrey R. Howard and Judges David J. Barron, William J. Kayatta, Jr., Kermit V. Lipez, Bruce M. Selya, the late Juan R. Torruella, and former Chief Judge Sandra L. Lynch, who suggested this article.

4. Former Chief Justice Daniel E. Wathen, Acting Chief Justice Andrew M. Mead, and Associate Justice Catherine R. Connors of the Supreme Judicial Court of Maine provided valuable perspectives.

5. Only weeks before his September 14, 2020, death, Chief Justice Ralph D. Gants of the Supreme Judicial Court of Massachusetts kindly agreed to be interviewed.

6. Attorneys Randall Kromm, Julia Lipez, Lauren Zurier, and Scott Meisler were among the first lawyers to argue in the First Circuit. Nolan Reichl presented the first remote argument to Maine's Supreme Judicial Court. All of them were helpful in giving lawyers' reactions to remote arguments.

7. Rachel Cossar contributed useful practical suggestions for arguing remotely.

some other courts have followed.⁸ For its ten-case May 2020 term, the Court opted for telephone conferences, in part out of concern regarding the security of audio-visual platforms.⁹ The question was not the security of the exchanges between the Court and the lawyers because, for the first time, Supreme Court arguments were livestreamed. Rather, at issue was the prospect of hacking internal Court communications. There was also a fear that static or other external influences could disrupt the proceedings.

Each Justice was allotted a specific number of minutes to ask questions and was told in advance what that timing would be. Following the relatively new custom of allowing lawyers two minutes to argue without interruption,¹⁰ the Justices each used their allotted time to ask questions in order of seniority, with Chief Justice John G. Roberts going first. If time remained, or if one Justice had not used the permitted time, additional questions could be asked, again according to seniority. Lawyers who had reserved rebuttal time were then allowed a summation.

The Justices were not physically together for the arguments. Justice Stephen G. Breyer, for example, was in his home in Massachusetts. The late Justice Ruth Bader Ginsburg participated from her hospital bed.¹¹ In an effort to make sure the arguments proceed-

8. Press Release, Supreme Court of the United States, Press Release Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), https://supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20; Press Release, Supreme Court of the United States, Press Release Regarding October Oral Argument Session (Sep. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20.

9. Thomas Brewster, *Warning: Zoom Makes Encryption Keys in China (Sometimes)*, FORBES (Apr. 3, 2020), <https://www.forbes.com/sites/thomasbrewster/2020/04/03/warning-zoom-sends-encryption-keys-to-china-sometimes/#5d6aa1c43fd9>.

10. GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (2019), https://www.supremecourt.gov/casehand/Guide%20for%20Counsel%202019_rev10_3_19.pdf.

11. Ariane de Vogue & Veronica Stracqualursi, *Ruth Bader Ginsburg Participates in Supreme Court Arguments from Hospital*, CNN (May 6, 2020), <https://www.cnn.com/2020/05/06/politics/ruth-bader-ginsburg-supreme-court-coronavirus/index.html>.

ed smoothly, a member of the Court's IT staff monitored them remotely.

Justice Breyer said he did not find that the number of minutes given to him to pose questions was frustrating. Rather, he saw as a strong point of the Court's protocol that it required the Justices "to focus on our questions and to be succinct . . . and to listen carefully to what the responses were." The protocol, in combination with the audio-only format, "required considerable concentration, perhaps more than normal, and I think that was a good thing." Having a designated amount of time for questions also encouraged more participation by all members of the Court.¹² It seemed to Justice Breyer that for the lawyers, the protocol produced shorter, crisper, more succinct answers.

Justice Breyer also saw negatives in this format. His experience is that, done well, oral argument becomes a conversation. He pointed out that when Judge Learned Hand helped to design the courtroom in the Second Circuit, the bench was placed almost at eye level with the lawyers "to entice the lawyer into a conversation where they are both focusing on the legal problem and not just the client."¹³ A significant loss in the audio-only format was the absence of eye contact. In in-person arguments, looking at other members of the Court can help the Justices identify what is bothering one other, which can be productive during the argument itself, in conference, or both. The protocol also made it more difficult to follow up on another Justice's questions. For Justice Breyer, who has always enjoyed oral

12. Timothy R. Johnson et al., *COVID-19 and Supreme Court Oral Argument: The Curious Case of Justice Clarence Thomas*, 21 J. APP. PRAC. & PROCESS 113 (Winter 2021). Adam Liptak, *Were the Supreme Court's Oral Arguments a Success?*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/politics/supreme-court-phone-arguments-lyle-denniston.html?searchResultPosition=2> (noting that during the telephonic arguments, the characteristically taciturn Justice Clarence Thomas spoke in 100% of the cases).

13. See United States Court of Appeals for the Second Circuit, *Virtual Tour, Thurgood Marshall Courthouse*, <https://www.ca2.uscourts.gov/photos/slideshow.html#9> (last visited Oct. 8, 2020).

argument, one distinct negative in the remote format is that “there rarely is a light moment.”

Notwithstanding these negatives, Justice Breyer believed there will be no long-term impact on the administration of justice because oral argument is “a very small part of the entire proceeding.”¹⁴ Oral argument can help to shape the discussion, in part because the lawyers know the case more thoroughly than the Justices do. If the remote format results in increased focus by Justices and lawyers on each question and answer, the significance of oral argument could increase. The primary persuasion, however, takes place in the briefs and in the end, what matters is the way an opinion is written, which “will affect tens or hundreds of millions of people who are not in the courtroom.” Whether remote arguments will continue after COVID-19 abates may be a matter for the Court’s discussion.¹⁵

B. First Circuit

Although by March 2020 Boston had become a hotbed of COVID-19, the First Circuit was able to complete its March term without incident or illness. Lacking the tradition and the technology for online arguments, the court took on submission most of the cases that had been scheduled for argument in April and May in order to put the necessary changes in place. More complex cases that the judges thought needed oral argument were put over to a later term.

By June, the First Circuit began hearing oral arguments either of two ways: some audio-only and others audio-visual, using the platform Microsoft Teams

14. See Justice Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, BROOKINGS INST. 24 (Oct. 17, 2005), <https://www.brookings.edu/wp-content/uploads/2012/04/20051017Breyer.pdf> (“[T]he oral argument is only the tip of an iceberg. Most of what we do is done in writing, most of what we do is based on the briefs, and the oral argument sometimes is important, but it’s only a small part of the process.”).

15. In September 2020, the Supreme Court announced that it would continue to hold oral arguments by telephone for the start of the October 2020 term. October Oral Argument Session, *supra* note 8.

(Teams), which the Executive Offices of the United States Courts recommended. The choice of format was made by the panel hearing that day's cases. Judge Sandra L. Lynch,¹⁶ for example, had retreated to a vacation home where she had a malfunctioning iPad, no broadband internet, and remote access only by a hotspot that produced unreliable connections. She participated only in telephone conference arguments, one of which was heard en banc.

Although the First Circuit's IT and clerk staffs are lean in comparison to other courts, they undertook to train both judges and lawyers in the use of audio and audio-visual technology. Approximately a week before the first scheduled argument, the courtroom deputy held by telephone conference a general orientation session for all lawyers who would argue on a given day. This included a description of the protocol to be followed and directions for such details as muting the microphone when not arguing. The courtroom deputy also practiced the technology with the lawyers.

On argument day, the lawyers were told to connect thirty minutes before their scheduled time. After the lawyers were on the line, the judges announced that they had joined. The courtroom deputy then began the proceeding with a modified call similar to what the Supreme Court used for its remote arguments. Although the tradition is for the deputy to direct that "all rise" and then say, "draw near, give your attendance and you shall be heard," the phrases "all rise" and "draw near" were omitted.

The First Circuit's protocol for the audio-only arguments was modeled after the Supreme Court's. Judge William J. Kayatta¹⁷ and Judge David J. Barron¹⁸ re-

16. Telephone interview with Judge Sandra L. Lynch, Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 1, 2020) (on file with author).

17. Telephone interview with Judge William J. Kayatta, Circuit Judge, United States Court of Appeals for the First Circuit (Jun. 30, 2020) (on file with author).

18. Telephone interview with Judge David Barron, Circuit Judge, United States Court of Appeals for the First Circuit (Aug. 11, 2020) (on file with author).

ported that, knowing they would have only a fixed amount of time to ask questions, they tended to formulate them ahead of time. Although opening summations have not been the custom in the First Circuit, each lawyer was given a brief period to argue without interruption. The judges then divided the remaining time evenly among themselves and posed questions in order of seniority. Whichever judge was presiding orchestrated the transition from one judge to another, in part so that advocates who were unfamiliar with the judges' voices would know who they were addressing. The presiding judge also kept time, a function generally performed by the courtroom deputy.

A member of the First Circuit's IT staff monitored the arguments, as did the courtroom deputy. The arguments could be heard on YouTube with a thirty-second delay. For the first day's arguments, fifty-two people listened by YouTube.

The clerk's office provided similar pre-argument training to the lawyers who argued by Teams. Julia Lipez's¹⁹ Department of Justice computer could not interface with the First Circuit's Teams application, so she needed to argue from home, using her personal desktop computer. The courtroom deputy held a separate session with her and others who had similar problems to ensure that Teams worked on their devices.²⁰

During the Teams arguments, the judges each appeared individually on a screen. Only the arguing lawyer was visible on another screen and the audio of the non-arguing lawyer was muted. According to Chief Judge Jeffrey R. Howard,²¹ who presided over both audio-only and audio-visual arguments, the Teams arguments were generally less strictly orchestrated than the

19. Telephone interview of Julia Lipez, Assistant United States Attorney, United States Attorney's Office for the District of Maine (Jul. 3, 2020) (on file with author).

20. The First Circuit's IT staff and the courtroom deputy, Daniel Toomey, garnered high praise for their patience and help with the technology.

21. Telephone interview with Chief Judge Jeffrey R. Howard, Chief Judge, United States Court of Appeals for the First Circuit, (Jul. 2, 2020) (on file with author).

telephone conference presentations and resembled more closely an in-person argument. He and Judge Lynch agreed that in either the audio-only or the audio-visual format, there is more pressure on the presiding judge to be alert to technical difficulties, maintain control of the proceedings, and ensure that everyone has their say.

1. One First Circuit Judge's Remote Experience with the Ninth Circuit

Before the virus hit, First Circuit Senior Judge Kermit V. Lipez²² had agreed to sit by designation with the Ninth Circuit. As he pointed out, the Ninth Circuit is much larger geographically and in the number of judges than the First Circuit. The Ninth Circuit's IT staff is also more numerous, and they were already familiar with remote platforms. Even before the pandemic, the Ninth Circuit had been holding remote oral arguments, for example, when the court sat in more than one location on a given date or illness or some personal issue prevented a judge from joining a panel. The Ninth Circuit's audio-visual platform is not Teams but Zoom.²³

When it became apparent that Judge Lipez's participation would be remote, a Ninth Circuit staff member contacted him to explain that court's system and protocol. At the time, Judge Lipez had closed his chambers in Portland, Maine, and was working from home in a guest bedroom, surrounded by briefs and documents piled high on a double bed. Concerned about the background against which he would appear remotely, Judge Lipez opted for a virtual background of plain wooden planks. During an orientation session, the Ninth Circuit IT staff member said of the background, "all you need is antlers." Taking this as polite suggestion to choose

22. Telephone interview with Judge Kermit V. Lipez, Senior Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 1, 2020) (on file with author).

23. An informal survey of the Appellate Chiefs in United States Attorney's offices across the country reflected a general preference for Zoom.

something else, Judge Lipez obtained from the First Circuit staff a substitute virtual background of the en banc courtroom in Boston.

Judge Lipez was slated to participate from his home in Maine with Ninth Circuit Senior Judge Randy Smith, who was physically in his chambers in Pocatello, Idaho, and Circuit Judge Johnnie Rawlinson, who planned to participate from her chambers in Las Vegas, Nevada. Two days before the arguments, however, violent protests required closing the Las Vegas courthouse, so Judge Rawlinson joined from a study in her home. During one argument, Judge Rawlinson's internet connection failed, and her image suddenly disappeared from the video screen. Judge Smith tried to signal the arguing lawyer to stop but suspended the argument briefly while the IT staff attempted to reconnect Judge Rawlinson. Because they were unable to do so, Judge Rawlinson completed her participation by an audio-only connection and Judge Smith assumed Judge Rawlinson's role as the presiding judge.

2. The Judges' Reactions

The First Circuit judges' reactions to the audio-only and audio-visual arguments varied. The differences may be explained in part by divergent views regarding the utility of oral argument generally. The late Judge Juan R. Torruella,²⁴ for example, believed that too many cases are granted oral argument even when they are held in person.

Chief Judge Howard observed that, on the whole, the lawyers seemed more comfortable with remote formats than some of the judges, likely because lawyers have become accustomed to communicating by conference call, Zoom, or Teams. Judge Lynch, who presided over several audio-only arguments, concluded that the

24. Telephone interview with Judge Juan R. Torruella, Circuit Judge, United States Court of Appeals for the First Circuit (Jun. 30, 2020) (on file with author). Judge Torruella passed away on October 26, 2020, as this article was being finalized for publication.

telephone format worked well, and the Supreme Court's protocol produced arguments that were more orderly than in-person presentations, had greater participation by the judges, and possibly produced better opinions. Judge Barron found that the structure helped to avoid distractions and kept him on track. Judge Torruella, by contrast, was frustrated by his inability to pursue issues when they naturally arose during the argument.

Judge Lynch acknowledged that following the Supreme Court protocol "lock step" was somewhat unsatisfying for the judges, but says that as time passed, the audio-only arguments became more natural. She, for example, ceded time to other judges she sensed had more questions than she did. The judges became bolder about stopping lawyers who did not answer questions and intervening in the dialogue between a lawyer and another judge. Judge Barron commented that the Teams format created a somewhat surprising sense of intimacy, perhaps because the screens of the three members of the panel and the arguing lawyer were all the same size. Being able to see the full face of the other judges on the video screen also made it easier for the judges to interject because on the bench, they sit beside each other and have only sideways views.

Judge Bruce M. Selya, who participated in both audio-only and audio-visual presentations, thought that using the Supreme Court's telephone format changed the character of the arguments and diminished that experience for him because "one of the hallmarks of oral argument . . . is a very free-flowing exchange among the judges."²⁵ A negative effect of confining judges to a certain number of minutes was that the allotted time "belonged exclusively to that judge" and the others were reluctant to interject or ask follow-up questions. In addition, the rank order and strict time allotments tended to force the judges to stick to one issue, even though he or she might have questions regarding more

25. Telephone interview with Judge Bruce M. Selya, Senior Circuit Judge, United States Court of Appeals for the First Circuit (Jul. 30, 2020) (on file with author).

than one subject. Having listened to the Supreme Court's audio-only arguments, Judge Selya concluded that they lacked the flavor of in-person presentations.

Although Chief Judge Howard thought the lawyers generally acquitted themselves well, for Judge Lynch, the quality of advocacy varied. The consensus of the judges was that good lawyers tended to be good, no matter what the format. Even in the telephone conference format, which allows no one to see anyone else, the good lawyers successfully struck a conversational tone. The others, Judge Lynch thought, "were pretty much the way they always are." Judge Selya agreed that just as in in-person presentations, "the lawyers who would attempt to be responsive were attempting to be responsive and the lawyers who preferred to be evasive preferred to be evasive." Even though the images on the video screens were small, they gave advocates some opportunity to establish eye contact with the judges, which is an essential ingredient of an effective in-person argument. Judge Barron commented that for lawyers, a certain degree of stage fright may be diminished by the remote formats because there is no audience in the gallery.

The First Circuit judges who used both formats generally agreed that the audio-visual arguments produced a more natural, easier give-and-take. According to Scott Meiser,²⁶ who has also argued in the Ninth Circuit, that court so significantly prefers the audio-visual format that it has directed government attorneys to use it exclusively. Judge Kayatta, who terms himself "bullish" about the effect of oral argument on the public's perception of courts, agreed that the audio-visual format is preferable to audio-only. Nevertheless, he remained uncomfortable that litigants may think that because their case was not argued in person, they have lost to "the judge behind the green curtain." Judge Barron shared the concern about public access to courts.

26. Telephone interview of Scott Meisler, Attorney, United States Department of Justice (Jul. 30, 2020) (on file with author).

3. *Lawyers' Reactions*

The lawyers who argued in the First Circuit by conference call found the experience more orderly, but also more stilted and less spontaneous than in-person presentations. Lawyers and judges alike tried to avoid interrupting or talking over each other. It was harder to hear when a judge started talking. Lacking eye contact, it was difficult to sense how the judges were responding. Pauses were longer and more disconcerting than in person. Lauren Zurier,²⁷ who generally represents the appellee and thus most often is in a reactive position, found it harder to pivot from one argument to another and more difficult to turn the argument into a conversation. She also did not feel the same rush of adrenalin that for her is part of the argument experience.

However, an advantage of the audio-only format was that the advocates could have at hand more documents than they would customarily take to the podium. Although Zurier generally puts a brief outline in a binder, knowing that the judges could not see her, she organized documents in stacks across the desk where she sat to argue. Meisler took advantage of the judges' inability to see to use the search function on his laptop to find the answer to a question concerning a somewhat obscure fact.

Randall Kromm²⁸ presented the first Teams argument before the First Circuit. The size of the judges' screens made it harder for him to make eye contact, so Kromm tried to focus on the judges' tones of voice instead. Having presented approximately 100 First Circuit arguments, he found it more difficult than usual to interpret the reaction of judges who were silent during the argument. However, he was somewhat more relaxed

27. Telephone interview of Lauren Zurier, Assistant United States Attorney, United States Attorney's Office for the District of Rhode Island (Jun. 30, 2020) (on file with author).

28. Telephone interview of Randall Kromm, Assistant United States Attorney, United States Attorney's Office for the District of Massachusetts (Jun. 30, 2020) (on file with author).

knowing that he did not have a gallery full of people sitting behind him. Julia Lipez thought that looking directly at the camera, as she was advised to do, was somewhat counterintuitive because in an in-person argument, her natural inclination is to focus on whatever judge is questioning her. In contrast to Kromm, she thought the equal size of the images of judges and lawyers created a more intimate, somewhat more informal atmosphere than an in-person presentation.

Timing presented challenges for the lawyers. Instead of the light system that is traditional in courtrooms, the presiding judge kept track of the time limits and the courtroom deputy announced when advocates had five minutes remaining. Kromm, who relies on body language as a sign that the judges have no further questions, found the cues harder to read and wound up ending with five minutes to spare. Nevertheless, Kromm was pleasantly surprised by the experience and thought the quality of the argument did not suffer because of the format.

In addition to his audio-only argument in the First Circuit, Meisler had argued by audio-visual means in a number of other circuits. He agreed that even with the audio-visual format, it was harder to assess whether the judges were engaged in his argument and when to stop talking. What helped him was beginning his presentation with an explanation of which issues he planned to cover so that the judges could re-direct him if they chose. The telephone conference argument was somewhat easier for Meisler because he is accustomed to conversations on the telephone. However, either format does make it difficult for an advocate to decide whether to shift to a different point as opposed to waiting for the judges to respond.

C. Maine Supreme Judicial Court

Even before COVID-19, Maine's Supreme Judicial Court had been livestreaming its oral arguments. In

April 2020, the Law Court²⁹ began having remote arguments, all of them by Zoom. Nolan Reichl,³⁰ who presented the first remote argument, participated in advance in what amounted to a chambers conference in which the lawyers and justices discussed some of the logistical details of the process. Although an initial suggestion for keeping time was to have a clock counting backwards on one screen, the lawyers thought that would be too ominous and distracting. Instead, it was agreed there would be a screen that the court clerk would monitor to change the colors from white (uninterrupted time) to green (questioning) to yellow (one minute remaining) and finally red (stop). The lawyers were also given a virtual background depicting a view of the lectern from the bench.

Several days before the arguments, the clerk contacted the lawyers to install Zoom if necessary, teach the lawyers how to use it, and ascertain their level of comfort with the technology.³¹ On the day of argument, the lawyers signed in fifteen minutes ahead of time to do a sound check of their microphones with the clerk. The judges then signed on individually. One minute before the scheduled time, the clerk allowed the lawyers to join and counted down to start the audio but continued to monitor the session. The Law Court did not adopt the United States Supreme Court's protocol. Instead, the court followed its traditional argument format in which the Chief Justice welcomed the lawyers and gave a lawyer who reserved time three minutes in which to argue without interruption before the justices began asking questions.

29. When sitting as an appellate court, Maine's Supreme Judicial Court is known as the Law Court. *Supreme Court*, STATE OF MAINE JUDICIAL BRANCH, https://www.courts.maine.gov/maine_courts/supreme/ (last visited Oct. 8, 2020).

30. Telephone interview of Nolan Reichl, Partner, Pierce Atwood, LLP (Jul. 8, 2020) (on file with author).

31. The Supreme Judicial Court's clerk, Matt Pollack, appears to have been indispensable to the functioning of that court's remote arguments.

1. Justices' Reactions

Acting Chief Justice Andrew M. Mead³² was “pleasantly surprised” that the technology generally worked well. The lawyer in one argument had trouble with the Zoom settings, but after the clerk telephoned him and walked him through the process, there were no further glitches. To Chief Justice Mead, the audio-video arguments seemed more orderly than in-person arguments. Unless they were speaking, the Justices muted their microphones, which their fellow jurists could see. Name plates on the screens and the illumination of the screen of a justice asking a question allowed the lawyers to know which jurist they were addressing. Chief Justice Mead had generally been somewhat reluctant to interject himself into a colloquy between another justice and a lawyer, but the act of unmuting a microphone by a colleague who intended to enter the conversation made it easier for the justices to interrupt each other politely. Chief Justice Mead’s take on the lawyers was that because they were so accustomed to speaking from a podium in a courtroom, they were a bit more tentative and cautious when arguing remotely.

Justice Catherine R. Connors³³ found it helpful to see a screen stating “protected time” as opposed to the customary light on the clerk’s desk below the bench. For her, body language, on which she relied heavily as a practitioner, was almost entirely missing. As Chief Justice Mead explained, “everyone is bolted down,” so it was more difficult to read subtle cues such as a judge sitting back to signal the end of an exchange with a lawyer.

Former Chief Justice Daniel E. Wathen³⁴ left the bench before remote arguments came into common use

32. Telephone interview with Chief Justice Andrew M. Mead, Acting Chief Justice, Supreme Court of Maine (Jul. 2, 2020) (on file with author).

33. Telephone interview with Justice Catherine R. Connors, Associate Justice, Supreme Court of Maine (Jul. 2, 2020) (on file with author).

34. Telephone interview with Chief Justice Daniel E. Wathen, Chief Justice (Ret.), Supreme Court of Maine (Jul. 15, 2020) (on file with author).

but mediated a case with lawyers in five different states via Zoom. By his own description “someone who resists technology,” he approached the mediation “with great trepidation and certain that something would be lacking without the personal connection.” To his surprise, the process worked well and served as a lesson to “stay open to new ways.”

2. Lawyers’ Reactions

For Reichl, as for Judge Barron and Julia Lipez, the audio-visual format created an argument environment that was more intimate than in person because everyone’s image was the same size. It may have been the circumstance of presenting the first COVID-19 argument, but Reichl thought the atmosphere was entirely collegial and there was almost a sense of kinship. Reichl was conscious of all the visual cues he might give, which the Zoom format accentuated. On his “best behavior,” he avoided slouching, audible sighs, or facial expressions.

Nevertheless, Reichl was aware of the features of the courtroom experience that were absent. The majestic courtroom in which the Law Court sits, which is lined with the portraits of generations of justices, creates a sense of dignity and significance that was lacking in the remote format. Like Zurier, Reichl also felt less of an adrenalin rush. If anything, the sense of isolation he experienced when arguing from his home created a bit of nervous energy. Unlike in-person presentations, Reichl was unable to size up his opponent at the beginning of his argument or shake hands at the end.

D. Massachusetts

After the virus hit, the Supreme Judicial Court of Massachusetts (SJC) began hearing oral arguments tel-

ephonically.³⁵ Several days in advance, the clerk³⁶ reviewed with the lawyers the protocol and did a dry run to work through any issues regarding audibility. The SJC followed the same protocol as the United States Supreme Court, with justices asking questions in order of seniority. One difference was that unlike Supreme Court Chief Justice Roberts, who aimed to enforce the time limitations, the late Chief Justice Ralph D. Gants³⁷ adhered to his previous practice of allowing arguments to continue as long as any justice had questions. As a result, the remote arguments tended to be longer than in-person. A change in practice, which Chief Justice Gants said the lawyers appreciated and the SJC likely will keep, was that the court allowed lawyers a few minutes of uninterrupted time to present the essence of their case before the justices launched in with questions.

According to Chief Justice Gants, the SJC's first experience with telephonic arguments was its most challenging. Only weeks after the court closed, an emergency pleading was filed that sought the release of pretrial detainees in light of COVID-19. It involved seven parties with different perspectives and lasted three hours. Although the justices were concerned about public access to the argument, they were not confident that the sound quality would be good if the argument were broadcast live, so they opted for a delayed feed. Even that was delayed, however, because of the three-hour duration of the argument.

In Chief Justice Gants's view, telephonic arguments were more controlled and contained than in-person arguments because of the need for lawyers to be able to identify invisible justices and the interest of

35. As of this writing, all of the SJC's arguments were telephonic. If in-person arguments could not resume in September 2020, the court planned to transition to Zoom.

36. Chief Justice Gants described Francis Kenneally as "our quite wonderful clerk."

37. Telephone interview with the late Chief Justice Ralph D. Gants, Chief Justice, Supreme Judicial Court of Massachusetts (Aug. 5, 2020) (on file with author).

preventing lawyers and justices from talking over each other. The protocol of justices asking questions in order resulted in “some clumsiness” in waiting their turns and a tendency to ask questions that otherwise might not be asked. In-person arguments produce “a cleaner exchange” and make it possible to ask questions when they arise.

Chief Justice Gants suggested that for the lawyers, telephone conferences require a “different voice” in order to strike the conversational tone that makes oral argument effective. There were occasional mishaps that took lawyers off balance, for example, arguing from phones with poor reception, but they were resolved quickly. Chief Justice Gants measured the quality of argument “not in terms of its drama, not in terms of the capacity of people or how a justice is going to react to an answer. That may be what an advocate cares about, but I don’t.” He agreed with some of his federal colleagues that “a good advocate is going to be a good advocate whether it be in person or on Zoom or on the phone.”

For Chief Justice Gants, the point of argument was being able to ask questions, obtain answers, and explore concerns in an effort to reach the right decision. Ultimately, jurists “read and we write and we listen and we can do all of that virtually.” He saw “no material chance” that any decision turned out differently because it was argued remotely.

II. BENEFITS OF REMOTE ARGUMENTS

One benefit of remote arguments is that, with live broadcasts or YouTube postings, the public may have greater access to the courts. Zurier pointed out that the victim in her case would have been unable to attend a hearing in Boston but felt engaged in the process by being able to listen to the argument on the court’s YouTube posting. Judge Barron’s view was that if extended public access has been possible by remote means in the unusual circumstance of a pandemic, it may be

advisable to continue YouTube broadcasts after the crisis abates.

In-person arguments require litigants to incur significant expenses: travel costs, hotels, meals. In geographically dispersed circuits like the First Circuit,³⁸ the same is true of the judges. YouTube broadcasts may be a reasonable and cost-free substitute for the attendance of a lawyer's co-counsel or a client who lives at a distance and may help to reduce the financial burden of an appeal.

Especially now that many courts have the technology in place, there could be an efficiency in holding arguments remotely. As Chief Justice Mead explained, remote arguments may be particularly helpful for emergency proceedings in jurisdictions like Maine, where the litigants and judges may be geographically far apart, but remote access allows them to convene quickly.

Maine's Supreme Court has experienced an unexpected benefit from its remote arguments. That court sits in a large, stately courtroom in which voices tend to echo. Although all seven justices are equipped with microphones, there is a single amplifier, which poses the danger that advocates who are unfamiliar with the justices' positions on the bench or voices can become confused as to which jurist is addressing them. Because the Zoom protocol lights up the screen of the justice who is talking, this issue does not exist.

III. DOWNSIDES OF REMOTE ARGUMENTS

Everyone saw as a significant cost of remote arguments reduced eye contact or the loss of it entirely. Judge Selya recalled that when he was in practice, he could often get a good sense of how the panel was reacting just by looking at them. In audio-only arguments,

38. The First Circuit hears appeals from the Districts of Maine, Massachusetts, New Hampshire, Rhode Island, and the distant District of Puerto Rico. *About the Court*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <https://www.ca1.uscourts.gov/about-court> (last visited Oct. 8, 2020).

there are no visual cues. Zurier, among other advocates, struggled to find a reasonable substitute. Even with audio-visual arguments, Chief Justice Mead estimated that eye contact is at best 80% effective. Justice Connors, who recently rose to the bench from an active appellate practice, reinforced the view of many judges that the ability to turn oral argument into a conversation is much harder in remote formats because of the physical separation of the judges from each other and the lawyers and the pauses occasioned by the technology.

Judge Selya pointed out with a regional court like the First Circuit, whose northernmost district is Maine and southernmost district is Puerto Rico, a significant part of the argument experience for the judges is being in each other's physical presence. The brief moments the judges spend together talking about the particulars of a case before entering the courtroom and the chemistry that develops when questions are being asked by three people who know each other well, understand how each other works, and can see each other's reactions, are all either lost or diminished in either remote format. So was Judge Selya's habit of passing an occasional note to his colleagues during an argument. For Maine's Law Court, remote arguments make it impossible to follow that court's tradition of inviting lawyers who argue for the first time back to the justices' chambers.

As Chief Justice Gants observed, oral argument requires significant focus in any event, but audio-only arguments require an even higher level of concentration because "one is relying on one's ears as opposed to one's eyes." Confirmed by Justice Breyer and Chief Justice Gants, Judge Selya found remote arguments to be more physically taxing for the judges.

IV. ADVICE FOR LAWYERS ARGUING REMOTELY

A. Substantive Advice

Many of the judges believed that the shortcomings they observed in remote arguments are common to oral arguments generally but are accentuated by the remote formats. Their suggestions for improved technique when arguing remotely reinforced what the judges have said about in-person arguments.

As she would with an in-person argument, Judge Lynch advised counsel who argue remotely to “be prepared to answer any possible question they think they are going to get.” She explained that judges become frustrated when, instead of answering questions, lawyers read from a prepared script. Although this is a problem with in-person arguments, she thought it occurred more frequently in the audio-only presentations, perhaps because the litigants believed that because the judges could not see them, they did not know that the lawyers were reading their remarks.

Judge Barron agreed that there is no “upside” to failing to answer a question whether arguing remotely or in person. Even though in the remote setting, a lawyer might more easily avoid discomfort and get away with dodging an inquiry, an unanswered question will only leave the judges with lingering concerns. Especially in the audio-only format, “there are no second chances.” Judge Barron also agreed that giving a speech rather than engaging in a dialogue is not effective in person and even less so in the remote formats.

Judge Lynch stressed the importance of listening, which is another common problem but is only more apparent in remote arguments. She advised, “if you do not understand the question, you are better off stopping and saying you don’t understand and asking for clarification than you are just proceeding with your canned remarks.” Judge Lynch conceded that in audio-visual remote arguments, there are more cues and facial expressions can be seen to some extent. With audio-only

arguments, there are only verbal cues. Her experience has been that “counsel seemed to ignore even the verbal cues that were given by the judges that they were not answering the question.” During in-person arguments, judges are aware of how their colleagues are reacting. With audio-only arguments, the judges cannot see each other—and the lawyers cannot see them—so being attentive to verbal cues becomes even more important.

Chief Justice Gants advised that even a remote argument “needs to remain conversational. It needs to focus on the substance. One needs to put aside the idea that you need to be dramatic, but you need to be equally persuasive.” Judge Selya emphasized that lawyers’ answers should be shorter, more succinct, and clearer in remote arguments. He found that in in-person presentations, lawyers tend to build up to an answer before giving it. He advised lawyers arguing remotely to give short answers to questions first and then explain them. Judge Kayatta encouraged lawyers to have a colleague in the room who is not visible but can find facts in the record or relevant cases on a computer and pass notes to the arguing advocate.

B. Staging Advice

When a lawyer argues in person, all of the staging decisions have already been made. The lighting, placement of the podium in relation to the judges, microphone, and background, for example, are in place and are the same for all advocates. According to Judge Kayatta, a skilled lawyer knows how to take advantage of the idiosyncrasies of each courtroom. With remote arguments, all of those fixtures are absent, and the advocate must create them. Although the lawyers who argued remotely say they prepared the substance of their arguments no differently than when appearing in person, both judges and advocates highlighted the greater need to pay attention to the logistics.

1. Technology

For judges and lawyers alike, the greatest source of anxiety in remote arguments has been the technology: whether they had the proper equipment and whether it would be reliable. Almost everyone reported witnessing at least one technical snafu. The type of computer, size of the screen, and location of the microphone and camera are all important. Internet reliability has been a major concern. Although Julia Lipez had no difficulties arguing from her home, she listened to an argument that was presented after hers and heard the lawyer's connection fail. The consensus of both judges and lawyers was that hard-wired, broadband internet access is more stable and consistent than hot spots. For audio-only arguments, landlines have less static and fewer interruptions than do cell phones. The lawyers generally tested their equipment multiple times before they argued to make sure it worked.

2. Physical Surroundings

Several lawyers opted to argue from their offices, where they could minimize the risk of disruption by putting a Do Not Disturb sign on the door. Even in the office setting, it was necessary to eliminate possible distractions. Personal and office telephones and call-forwarding features were silenced. Audible notices of emails and calendared events on such programs as Microsoft Outlook were disabled. Additional computers were turned off.

Other lawyers were unable to go to their offices and instead argued from their homes. Some of them experienced the same connectivity problems as the judges. There were also added complications of young children in the house who might be tempted to interrupt the argument or pets that might sneak into the room and wander onto the speaker's lap or desk.

3. *Audio Quality*

Making sure the judges could hear was high on the advocates' list of priorities. Zurier, who argued by telephone conference, had to sit during her argument in order to be close enough to the speaker on her telephone. Reichl, who argued by Zoom, obtained a separate, high-quality microphone that he placed below his computer so that his voice was amplified, but the microphone was not visible. Julia Lipez also spoke through a microphone that was plugged into her computer. She was told by colleagues who listened to the recording of her argument that she could be heard more clearly than other lawyers. Kromm said he practiced speaking more slowly than he does in person to account for time lags in the audio-only format. Volume was another focus of attention. Some people tended to speak more loudly on remote methods, and they could seem to be shouting.

4. *Lighting*

Whatever space is used for presenting a remote argument, the advice was that it should be well lit, whether by natural or artificial means. The light should not come from behind, above, or beside the advocate because of the shadows such lights cast. Although mystery is useful in theater, one objective of oral argument is creating an atmosphere of candor and openness, which can be achieved in part by aiming light directly at the advocate's face. According to Rachel Cossar,³⁹ a Boston-based consultant on remote presentations, a ring light that distributes the light is preferable to a single bulb, which both can be blinding to the advocate and can illuminate only part of the speaker's face.

39. Telephone interview of Rachel Cossar, Founder, Choreography for Business, LLC (Jul. 17, 2020) (on file with author).

5. Background

Cossar also recommended using an actual background instead of a virtual one because notwithstanding advances in technology, any movement made against a virtual background appears artificial and detracts from the advocate's professionalism. Whatever actual background is chosen should be well-organized, intentional, and free of distractions. Bookcases or office settings are often the best actual background.

6. Camera Placement

Reichl recommended that any lawyer arguing by Zoom use the HD video setting because it creates a sharper image. The camera used to project the argument should be at the advocate's eye level. If the camera is placed too high, the advocate can appear like a plaintive child. A camera placed too low can cause the advocate to stoop, which risks losing the appearance of command and authority that are essential to communicating an advocate's sense of confidence. Looking directly into the camera at eye level fosters eye contact with the judges, which is critical to reading what visual cues there are and appearing engaged in the argument. Reichl, who argued from home, lowered the chair to his desk to achieve the best angle.

The judges recommended against advocates staring blankly into the camera. Using external monitors while the argument takes place on a computer with a built-in camera can be problematic because the judges see the advocate in profile, not head-on. Advocates should try not to look down or away from the camera to avoid having the judges see only the top of their head and or giving the impression of paying less than full attention. Any notes that are required should be placed so that the lawyer can consult them without looking down.

There should be enough distance between the camera and the advocate to allow for hand gestures. Bringing the camera too close to the advocate's face can appear invasive. According to Cossar, the best distance is

an arm's length plus 2½ to 3 inches from the speaker's fingertips to the back of the screen. Few speakers can avoid the temptation of looking at themselves on camera and doing so is almost always distracting. Some, but not all, platforms have a "hide yourself" function. To increase engagement with the judges, a true professional will activate that function.

7. *Body Placement*

One objective in effective remote presentations is to replicate as much as possible the atmosphere of a courtroom. Zurier pointed out that many advocates are accustomed to arguing on their feet and from a podium. Several lawyers who presented audio-only arguments chose to stand nonetheless. Some found it useful to obtain a podium for either audio-only or audio-visual arguments.⁴⁰ However, Julia Lipez was advised not to stand so she would not be tempted to roam, and her image would remain fixed on the screen.

In audio-visual arguments, the camera should capture only the upper body. When Judge Lipez sat with the Ninth Circuit, one advocate was shown full-body, looking up as if to a bench. To both Judge Lipez and his law clerks, the effect was distorted. Even in an in-person argument, the podium generally allows only the upper torso to be visible to the judges. Good posture is especially important because of the sense of control it creates.

8. *Dress*

Part of any lawyer's preparation for oral argument is doing whatever is necessary to put the advocate in the proper frame of mind. Wearing the same type of

40. Lisa Blatt, who presented the first telephonic argument in the Supreme Court, opted for a lectern placed on her dining room table. Brandon Sanchez, *She Has Argued 40 Cases in Front of the Supreme Court. The Latest Was From Her Dining Room*, WALL ST. J. (May 21, 2020), <https://www.wsj.com/articles/she-has-argued-40-cases-in-front-of-the-supreme-court-the-latest-was-from-her-dining-room-11590053400>.

clothes the advocate would wear in an in-person argument can help.⁴¹ Although Zurier's and Meisler's arguments were audio-only, both of them dressed the same way they do for in-person presentations. One caveat with respect to audio-visual arguments is that the color of the advocate's clothing should contrast to—not blend in with—the color of the background. Cossar's view was that solid colors generally project better on screen than do patterns. What should be avoided is any suggestion by the lawyer's appearance that remote arguments are more casual than in-person ones. Chief Justice Mead reported hearing complaints from other courts about lawyers appearing in T-shirts or even pajamas.

9. *Facial Expressions*

Natural facial expressions are, of course, entirely absent in audio-only arguments. As good as technology can be, facial expressions tend to get lost even in the audio-visual format. Appropriate gestures like a nodding one's head can signal a sense of engagement and paying attention. However, these signals may take more time to be transmitted and should be slower than in person. A bit of exaggeration also helps to fill the small square of the visual image. When listening to questions, although the advocate should look directly into the camera, attempts to make eye contact should be with the judge who is posing the questions, not someone else.

10. *Gestures*

Cossar pointed out that on a remote screen, an advocate needs to maximize the space. Although the temptation is to keep hands and arms below the screen, when arguing in person, advocates generally bring their hands above the rim of the podium. They should do the same in remote arguments so that any hand gestures

41. Admittedly superstitious, Blatt is reported to wear the same suit every time she argues. *Id.*

appear normal. However, because any movement can be seen, Judge Kayatta warned lawyers not to touch their face during the argument and to avoid wandering.

11. Practice

Even in the era of in-person arguments, advocates participated in moot courts in which peers tested the substance of their arguments and critiqued such aspects of their presentation as the responsiveness to questions, the timbre of the advocate's voice, the pace of speech, the appearance of engagement, and any annoying mannerisms.⁴² Such practice is even more important for remote advocates. All of the lawyers recommended conducting moot courts using the same technological medium as will be used in the actual argument. As a result, for their audio-only presentations, Zurier and Meisler declined their colleagues' offer of in-person moot courts in favor of multiple test runs held by conference call so that they could become accustomed to any time lags. Both of them did more than one moot court, each with a different group of lawyers. They also listened to remote arguments given in other courts to get a sense of what the differences would be.

V. CLOSING REFLECTIONS

How long remote arguments will be the norm is anyone's guess. In Chief Justice Gants's view, which Judge Selya and Chief Justice Mead shared, if any function of the judicial system is amenable to returning to more normal arguments, it is an appellate court. Judge Selya envisioned the possibility of holding arguments in the en banc courtroom so that the judges can be distanced from each other, and lawyers can speak from separate microphones.

42. Margaret D. McGaughey, *May It Please the Court—or Not: Appellate Judges' Preferences and Pet Peeves About Oral Argument*, 20 J. APP. PRAC. & PROCESS 141, 159 (2019).

Chief Justice Gants suggested that in the future, remote arguments may be used more frequently in intermediate appellate courts, where the cases can be more routine, than in courts of last resort. Most advocates given the chance to argue in a state's highest court will seize it. Zoom or Teams arguments may also be logistically easier for intermediate courts, where there are only three judges on the screen, not seven or nine.

Regardless of the benefits in costs and efficiency, no one appeared to hope that remote arguments will replace in-person presentations. As Judge Kayatta pointed out, human beings are essentially social creatures and communicate better in person. Judge Selya agreed that something is lost by the absence of human contact. For him, part of the enjoyment of oral argument is facing the lawyers directly, the brief exchanges among the judges before and after the arguments, and the in-person contact during conferences.

As echoed by Judge Lynch and Chief Justice Gants, Chief Judge Howard was confident that even remotely, justice is being meted out and no party is suffering from a lack of attention to their cause. Nevertheless, something is lost. As Chief Judge Howard summed it up:

One of the real hallmarks of our democracy and our experiment in republicanism is the majesty and mystique and on the other side of it, the friendliness of a courthouse, where any person can come in and have their case heard in front of other people. It's not some remote electronic mechanism and then you get an opinion whether you won or lost. There's the give and take in a personal atmosphere. So for me personally, I'll miss that.