COVID-19, ZOOM, AND APPELLATE ORAL ARGUMENT: IS THE FUTURE VIRTUAL?

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The days when the titans of the Supreme Court bar, folks like John W. Davis,[1] could command the justices' attention (or at least their indulgence) for hours, even days, are but a distant memory.[2] Indeed, to the modern appellate lawyer, even contemplating an oral argument longer than fifteen minutes might seem like a flight of fancy. Some courts restrict certain arguments to five or ten minutes.[3] And nationally, the percentage of cases with *any* oral argument continues to plummet.[4]

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1. *See* WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 462 (1973).

2. Stephen M. Shapiro, *Oral Argument in the Supreme Court: The Felt Necessities of the Time,* SUP. CT. HIST. SOC'Y Y.B. 22, 23 (1985) ("Arguments in the Supreme Court sometimes lasted as long as ten days.").

3. *See, e.g.*, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 170 (2020), http://www.ca7.uscourts.gov/rules-procedures/Handbook.pdf ("Since the court generally hears six appeals each day, it screens appeals in advance to determine how much time should be sufficient in each case, and limits the time in many to 10 to 20 minutes per side."); SECOND CIRCUIT CIVIL APPEALS: ORAL ARGUMENT, DISPOSITION, AND REHEARING, PRACTICAL LAW PRACTICE NOTE 9-519-4890 ("The Second Circuit commonly allots between 5 and 15 minutes per side. Time allocations vary depending on which judge is presiding over a given calendar and on the particulars of the cases on that calendar.").

4. *See, e.g.,* David R. Cleveland & Steve Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROC. 119 (2012); Robert P. Coleman III, *The Vanishing Oral Argument: Why It Matters and What to Do About It*, A.B.A. (Feb. 18, 2020), https://

Against this backdrop, the global COVID-19 pandemic arrived. While the pandemic poses a multitude of questions that might well cause us to re-evaluate certain prior practices and assumptions, I focus in this article on its impact on oral argument. We have all seen (and perhaps even participated in) the new phenomenon of Zoom oral arguments, but the concept of telephonic or video arguments is actually not novel. Several courts incorporated them, often on an ad hoc basis, even before the pandemic.[5]

What is novel now is the ubiquity of virtual oral arguments, with the majority conducted on the Zoom platform (and I will use "Zoom" generally as a shorthand for video oral arguments, recognizing some courts might use different platforms). Many appellate courts have been forced to embrace this technology, like it or not, because the virus greatly limited options for in-person arguments. The question now posed for all appellate courts is: how should we view oral argument when matters return to "normal"? Will these experiences convince us that oral argument should be curtailed further, as a relic of a bygone era, or will they underscore how much we miss the experience and persuade us that we need to explore ways to increase the percentage of oral arguments? My guess is that most appellate judges will fall somewhere between the two extremes, but it is worth taking a moment to re-evaluate the practice of oral argument and see what lessons the pandemic might offer.

Part of the debate over the efficacy of oral argument emanates from something I've observed at countless continuing legal education seminars on appellate practice where, invariably, the presenting judge is asked: "Does oral argument ever change your mind?" Often, the

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www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/the-vanishing-oral-argument/.

5. *Videoconferenced Arguments Guide*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide (last visited Oct. 16, 2020); Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Court of Appeals*, FED. JUD. CTR. (2006), https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf.

answer is "almost never," or something to that effect.[6] To the practitioners, this sends the message that oral argument does not really matter. And if that's the case, then why worry about it? Why go the extra mile in preparing if you don't think your effort will matter? Or, worse, why show up at all—why not just submit on the briefs without oral argument?

In this article I explore these questions by examining the impact of oral arguments on appellate decision-making. In Part I, I review the appellate practice backdrop, where oral arguments have been on the decline over the last number of years. In Part II, I examine the effect of COVID-19 on oral arguments in the appellate courtroom. Part III explores my personal experience and the response of practicing attorneys and judges to virtual oral arguments. Finally, in Part IV, I defend the concept of oral arguments, concluding that judges and lawyers alike need to learn to appreciate the importance and impact of oral argument on appellate decision-making, and that, in keeping with that perspective, we should incorporate the practice of Zoom arguments in an appellate court's repertoire.

As I will explain below, the seminar participants above ask the wrong question and, as appellate judges, we need to reframe that question when it is posed to us in order to highlight the benefits of argument. We want to encourage lawyers to request oral argument and to be fully prepared. In a post-pandemic landscape, I see a path to broadening the importance of oral argument as well as expanding opportunities for lawyers (particularly

6. Such answers have often caused people to ponder whether oral argument matters at all. *See, e.g.*, Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451, 451 (2002) ("I detect among judges a growing disdain for oral arguments. We don't look forward to them as much as we used to."); Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC: JALWD 45, 49 (2017) ("This article will contend that despite judges generally averring that they are open to changing their minds on cases during oral argument, in practice they are predisposed not to do so because they often approach oral argument with a particular inclination regarding the outcome."); Coleman, *supra* note 4, ("One might wonder, though, why the presumption appears to be against oral argument, rather than for it.").

junior lawyers) to partake of it. Zoom arguments will enable counsel to present arguments that clients might have vetoed previously for travel and costs reasons, particularly in courts with a broad geographic reach. Some counsel have discovered that they are better suited at Zoom arguments than gripping a lectern in an appellate courtroom (some judges might find it more suited to them as well). I don't mean to suggest we should allow Zoom arguments to supplant in-person ones, but making Zoom arguments available will broaden the overall availability of oral argument, hopefully expand opportunities for junior lawyers to argue, and stimulate counsel to better appreciate oral argument's significance.

This article, in short, presents an argument for the continued significance and importance of oral argument (including reasons why I believe the practice is valuable), but also suggests that we can avail ourselves of new technologies (such as Zoom) to potentially broaden the appeal of oral arguments and increase public access to them.

I. THE DECLINE OF ORAL ARGUMENTS

Years ago, when I served as a law clerk on the U.S. Court of Appeals for the Sixth Circuit, the court permitted every (counseled) party the opportunity for oral argument so long as counsel requested it. Over time, however, perhaps owing to the perception of subpar oral arguments, the court gradually pared back that practice and began screening cases in advance to determine whether they warranted oral argument.[7] Fast-forward to today, and oral argument at the Sixth Circuit, much like most of its sister circuits, is essentially a rarity.[8] Indeed,

7. SIXTH CIRCUIT INTERNAL OPERATING PROCEDURES § 34, 94 (amended 2012), ca6.uscourts.gov/sites/ca6/files/documents/rules_procedures/Full%20Rules%20w%20FRAP%20.pdf ("Panels determine which of the cases assigned to them will receive oral argument and which do not require oral argument."); Squire Patton Boggs, *Case Management in the Sixth Circuit*, SIXTH CIR. APP. BLOG (Aug. 26, 2011), https://www.sixthcircuitappellateblog.com/news-and-analysis/case-management-in-the-sixth-circuit-the-future-of-oral-argument/.

8. Most of the recent data, at least on the federal side, puts the percentage of oral argument around 20% of the cases (which is a roughly 50% drop from 20

a Task Force Report prepared by the American Academy of Appellate Lawyers ("AAAL") concluded: "there is no doubt that [oral argument] is declining almost everywhere."[9]

So why has oral argument declined? Courts justify the decline in oral arguments for various reasons, but I want to highlight a few of them. First, courts typically protest that the demands of their dockets just do not permit frequent oral arguments. Time spent preparing for and participating in oral argument, so the reasoning goes, detracts from other matters at hand for a busy appellate judge, such as opinion writing.[10] This is a fair critique—to a point. While time spent on the bench refereeing oral argument could certainly be allocated elsewhere, I'm less convinced that the time spent "preparing" for argument represents a lost cause. Judges should spend time on the case regardless of whether oral argument will occur, and I do not see the harm that comes from some more focused effort on particular cases. After all, if the case is open and shut, a judge is unlikely to burn the midnight oil preparing for it.

Second, the appellate judicial mindset has shifted a bit, and I suspect that many judges simply do not find oral argument as helpful as in generations past.[11] A

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years ago). *See* ADMINISTRATIVE OFFICE OF US COURTS TABLE B-10, https://www.uscourts.gov/data-table-numbers/b-10 (last visited Aug. 16, 2020). The phenomenon is not unique to the federal appellate courts. *See, e.g.,* J. Mark White, *"Request for Oral Argument Denied:" the Death of Oral Argument in Alabama's Appellate Courts*, 69 ALA. LAW. 123, 123 (2008) ("During the last six years, an average of 2,100 cases were filed each term in the Supreme Court of Alabama. However, during this same period, the average number of oral arguments were only 25 each year. During this entire six-year period, the Alabama Court of Civil Appeals granted oral argument in only 12 cases, and there were two consecutive years where no oral argument was held. Over the last seven years, the Alabama Court of Criminal Appeals has averaged only 22 oral arguments annually.").

9. James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 J. APP. PRAC. & PROCESS. 89, 99 (2018).

10. *Id.* at 94–95.

11. *See* Shapiro, *supra* note 2, at 28–29 ("The importance of oral argument in furnishing information is reduced by the plenitude of relevant written material and the assistance the Court receives in analyzing that material.").

number of factors might explain this perspective, but generally, I think it involves the wealth of information that we, as judges, now have at our fingertips before we step to the bench for argument. In many courts, the practice of circulating bench memos among judges in advance of argument telegraphs how judges are inclined to rule. If Judge Smith is the authoring judge on a case and she sends me a bench memo prior to argument that thoroughly analyzes the case and reaches the result (affirm or reverse) that I was already leaning towards, and I then learn that our third panel member, Judge Jones, agrees as well, the cascading effect of these assessments has the tendency of suggesting that oral argument is unnecessary. The caliber of contemporary law clerks and the level of preparation in advance (by clerk and judge alike), often leaves little to debate by the time that argument arrives in many cases. Indeed, we sometimes know aspects of the case better than the lawyers; if we uncover relevant authority not cited by the parties and raise it at argument, we often encounter blank stares. And if lawyers go through the motions because they do not think arguments matter much,[12] you have a recipe for disaster, with everyone walking away from the argument thinking they have wasted their time.

Third, and tied into the two points above, judges are sensitive to the costs and delays attendant to oral argument, and courts often think they are doing parties, but perhaps not lawyers, a favor by dispensing with argument.[13] This attitude might seem somewhat paternalistic, but I have heard several appellate judges express, in some form or fashion, the notion that argument in a particular case would just subject the clients to needless expense if we (the appellate panel) have already made up

12. Coleman, *supra* note 4 (noting the responsibility of attorneys to "be better prepared for arguments" and expressing the author's frustration that "underprepared attorneys could be ruining the chance for the rest of us to participate" in oral arguments).

13. William H. Pryor Jr., Opinion, *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html ("Fewer oral arguments mean lower attorneys' fees for litigants.").

our minds.[14] Having spent almost twenty years in private practice, with clients keeping a vigilant eye on billings, I can certainly appreciate that concern. So, while I am not insensitive to the costs of legal proceedings, I also recognize that a lawyer and client can make an educated choice about whether oral argument—or even pursuing an appeal, for that matter—is worth the cost.

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

II. ENTER COVID-19 AND ZOOM

With a backdrop of declining oral arguments nationally, the COVID-19 pandemic began to sweep through the country (and world) early in 2020 and caused dramatic changes in our legal system as courts struggled to remain open without jeopardizing the health and safety of everyone who entered the courthouse.[15] We appellate judges had a little easier time with this because we don't have to worry about trials, grand jury proceedings, probation departments, and the like. I do not mean to suggest our work has been easy by any stretch, but we just do not have the same daily interactions with the public that our trial colleagues do.

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14. *See, e.g.,* Coleman, *supra* note 4 (discussing a "widely held judicial belief that briefing is sufficient for a determination of a case on appeal, and that it is beneficial to forego oral argument, so as to not waste resources"); Martin & Freeman, *supra* note 9, at 102 ("Some judges express concern about the cost of oral argument to the parties.").

15. AMERICAN ACADEMY OF APPELLATE LAWYERS TASK FORCE ON REMOTE ORAL ARGUMENT RECOMMENDATIONS FOR COURTS HEARING ORAL ARGUMENT REMOTELY 1 (last visited Aug. 16, 2020), [hereinafter AAAL REMOTE ORAL ARGUMENT REPORT] https://www.appellateacademy.org/publications/AAAL-Remote-Task%20ForceCourt-Recs.pdf ("The COVID-19 pandemic poses extraordinary challenges for the nation's appellate courts and the lawyers who practice in them.").

But our primary interaction with lawyers and the public occurs during oral argument. As states across the country shut down during the early stages of the pandemic, appellate courts confronted a difficult choice with what to do about oral argument. Many courts suspended oral argument for at least a while, sometimes affording parties the chance to submit the case without oral argument in order to avoid delay.[16] Such measures were necessarily interim in nature, as appellate courts wrestled with how to proceed, particularly as we became aware that COVID-19 was not going away anytime soon. In light of that reality, courts considered various alternatives: telephonic argument,[17] video/Zoom arguments, enforced social distancing arguments sometimes with masks,[18] and arguments with plexiglass barriers.[19]

Arguments by telephone might have initially been attractive to several federal appellate courts, particularly since those courts already had a track record of utilizing that medium for argument.[20] But oral argument

16. For a very helpful overview in how state supreme courts approached the pandemic, please see MOSTLY SUNNY WITH A CHANCE OF ZOOM, FIX THE COURT, (April 17, 2020) [hereinafter, "FIX THE COURT REPORT"], https://fixthecourt.com/wp-content/uploads/2020/04/Remote-state-supreme-court-report-FTC.pdf.

17. The U.S. Supreme Court was the most notable example of a court utilizing telephonic argument. Hilary Reed, *A Historic Day for the Supreme Court*, APP. ADVOC. BLOG (May 4, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/05/a-historic-day-for-the-supreme-court.html ("Today the Supreme Court heard oral argument via telephone conference for the first time. . . .").

18. *See* FIX THE COURT REPORT, *supra* note 16; *The 12th District Court of Appeals During COVID-19*, CLERMONT SUN (July 30, 2020), https://www.clermontsun.com/2020/07/30/the-12th-district-court-of-appeals-during-covid-19/ ("The judges, attorneys, court staff and the public are required to wear face masks when in the courtroom and common areas and all have their temperatures taken before entering the courthouse. The courtroom itself is sanitized between arguments in order to combat potential spread of the virus.").

19. My own court experimented, for a while, with arguments with masks and plexiglass barriers. Some of these arguments went fine, but oral argument can be a stressful experience for counsel under normal circumstances and adding a mask to the equation made for some awkward moments. Counsel sometimes had trouble hearing the judges' questions as well. At the same time, several lawyers thanked us for letting them come into court because, to them, it almost felt like a return to "normal."

20. Jill M. Wheaton, *Appellate Advocacy in the Age of COVID-19*, A.B.A. (May 27, 2020), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/special/appellate-adovacay-in-the-age-of-covid-19/ ("Some judges,

by phone is often a challenging endeavor—counsel cannot observe facial expressions of the judges to gauge reactions or to pause for a question.[21] And oftentimes advocates run over a judge's question because it may be difficult to hear the interruption. Judges can also encounter challenges as they trip over their colleagues' questions or perhaps (inadvertently or not) interrupt them. Nor can judges pick up on nonverbal cues being telegraphed by their colleagues. The U.S. Supreme Court experimented with questioning in order of seniority to try to bring some structure to telephonic arguments, with mixed success.[22] As veteran Supreme Court advocate Carter Phillips observed, the telephonic arguments "seemed stilted to me because there was no real interaction among the justices in the questions they asked beyond the frequent comment that a question was a follow-up to a previous question by one of the other justices."[23]

Zoom quickly emerged as the default choice for many appellate courts. On the one hand, it seemed simple enough (I mean, people were doing Zoom happy hours, right?). But on the other, it did require some basic technological resources that not every court, particularly state courts, had.[24] Several state supreme courts stepped

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especially in the federal court system, are more comfortable doing phone arguments than video."); AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3 ("Audio-only technology is an option that some appellate courts have employed for several decades.").

21. AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3 ("The 'cues' that visual interaction brings to an argument are lost when argument is conducted over the phone.").

22. *See* Kent Streseman, *Chief Justice Roberts, Timecop: data-driven analysis of telephonic oral argument in the Supreme Court*, APP. ADVOC. BLOG (May 20, 2020), https://lawprofessors.typepad.com/appellate_advocacy/2020/05/timecop-litman-on-telephonic-oral-argument-in-the-supreme-court.html; Reed, *supra* note 17.

23. Randy Maniloff, *8 of the Nation's Leading Lawyers Discuss Impacts of COVID-19 on Their Practice Areas*, ABA J. (June 2, 2020), https://www.abajournal.com/web/article/leading-lawyers-discuss-the-impact-of-the-pandemic-on-practice-areas.

24. Charles R. Macedo, *The Impact of COVID-19 on Law Firms: Disruption, Acceleration and Innovation*, LAW.COM (June 8, 2020), https://www.law.com/mid-market-report/2020/06/08/the-impact-of-covid-19-on-law-firms-disruption-acceleration-and-innovation/ (discussing court systems that lacked computer infrastructure to make use of certain technology).

up to provide technology grants to facilitate remote work as well as remote court appearances.[25] Before too long, most federal and state appellate courts embraced Zoom arguments.[26] That evolution thus begs the question—how has that worked so far?

III. APPELLATE JUDGES AND LAWYERS' REACTIONS TO ZOOM ORAL ARGUMENT

A. Reactions to Zoom

Early in the pandemic, I circulated a survey to several federal and state appellate judges and lawyers who I know and I requested that they share it with colleagues.[27] I also posted a link on #AppellateTwitter, which reached an audience of Twitter users (judges and lawyers) as well. While this was not methodologically sound survey with an appropriate sample, it was designed to gather an impressionistic sense from judges and lawyers (with many responding across the country) as to the efficacy of this new medium of Zoom arguments as all of this unfolded in real time. I've also supplemented my results with my own experiences in Zoom arguments as well as reactions in the press or blogosphere.

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25. Anne Yeager, *Chief Justice's Program Funds $6 million in Technology Grants For Local Courts*, CT. NEWS OHIO (May 1, 2020), http://www.courtnewsohio.gov/happening/2020/remoteTechGrants050120.asp; Press Release, Michigan Courts News Release, Michigan Courts Receive $4.5 Million Grant to Respond to COVID-19 Pandemic (June 19, 2020), https://courts.michigan.gov/News-Events/press_releases/Documents/CESF%20Press%20Release.pdf.

26. Madison Alder & Allie Reed, *All U.S. Appeals Courts Embrace Argument Streaming Due to Covid*, U.S. L. WK. (Aug. 4, 2020), https://news.bloomberglaw.com/us-law-week/all-u-s-appeals-courts-embrace-argument-streaming-due-to-covid (noting that, by July, all federal circuit courts were livestreaming oral arguments); Wheaton, *supra* note 20 ("Having studied what other state courts were doing, Jim learned that most court systems were using Zoom or WebEx. Other platforms being used, although not as often, include GoToMeeting, Microsoft Teams, and Skype.").

27. All survey results (of the nearly sixty responses) on file with the author. [hereinafter "Survey"]. I will leave it to a political scientist, in the aftermath of this pandemic, to conduct an appropriate survey in keeping with norms of statistical analysis.

1. A New Leaf: Appellate Judges Embrace Virtual Technology

Let's turn first to the judges. With the caveat that just about everyone said that they preferred in-person arguments to Zoom, appellate judges seemed to embrace this new technology with somewhat surprising enthusiasm. Part of the reason for that is that many viewed telephonic arguments as inadequate, and thus not a viable option.[28] But appellate judges found the Zoom technology relatively easy to use and a reasonably adequate substitute for in-person oral arguments.[29] One state supreme court justice remarked, "The video oral arguments have worked well. I'm looking forward to returning to live oral arguments, but I think there may be a place for video oral arguments in the future."[30] A justice from a different state echoed the point: "Zoom has been fantastic."[31]

One state intermediate appellate judge found the video arguments "quite effective" and saw an "unexpected" benefit that the video arguments increased public access to the proceedings: "The public, other attorneys or out of town attorneys can easily view [the arguments] whereas before the audience was far less."[32] Another judge, however, expressed concern that "the Zoom arguments are not as open to the public as our previously held arguments in open court."[33] This debate over access is important, and perhaps we can explain the contrasting perspectives by examining how, or if, an appellate court posts its arguments online and its method for allowing access to outside participants. The AAAL Remote

28. One federal appellate judge captured the point well: "Video is far superior to phone." *See id.*

29. *See id.* By all accounts, "[t]echnologically, the cases have gone off largely without a hitch." Olivia Covington, *Zooming In: Lawyers Describe Pros and Cons in Remote Oral Arguments*, IND. LAW. (May 26, 2020), https://www.theindianalawyer.com/articles/zooming-in-lawyers-describe-pros-and-cons-in-remote-oral-arguments.

30. *See* Survey, *supra* note 27.

31. *Id.*

32. *Id.*

33. *Id.*

Argument Report highlights this point, urging courts to consider public access issues in implementing a video argument protocol.[34]

Another state appellate judge, whose court covers multiple counties, relayed positive feedback from lawyers on Zoom arguments who previously had to travel significant distances for the arguments: "Zoom arguments have been welcomed by counsel who would [otherwise] have to travel."[35] A state supreme court justice from a more rural state echoed the point: "My state is quite large geographically, so it might be a good option for lawyers who have to travel."[36]

While Zoom certainly had its converts, other judges remained on the fence. A state intermediate appellate judge professed uncertainty as to whether "video oral arguments are an adequate substitution for in-person arguments" given that their court had not conducted that many, but still acknowledged that the video arguments were "helpful."[37]

The debate will certainly linger on the virtues of Zoom arguments, but the survey I conducted, reinforced by a number of discussions I've had with appellate judges, confirmed an openness to a future in which video arguments will continue to play an on-going role. As one state supreme court justice explained, although her court has not yet discussed that point, "I think they will continue to be part of what we do."[38] Other judges appeared a bit more reticent, suggesting that Zoom arguments should be limited post-pandemic to "special circumstances," but even that limitation seems to acknowledge a future for the practice.[39] As one judge synthesized these points, he admitted that Zoom provided a useful tool to navigate these uncharted waters, but observed "a different level of advocacy by the parties, and while the

34. AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 4.
35. *See* Survey, *supra* note 27.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

judges are engaged, it is simply not as intense and focused as in the courtroom."[40] Building on this, several judges unequivocally checked "no" when asked if they envisioned any future for video arguments in their courts. Other commentators have likewise expressed uncertainty as to whether courts should livestream oral arguments in the future.[41]

2. Appellate Lawyers Share Their Thoughts

On the other side of the lectern, appellate lawyers have (not surprisingly) a multitude of views on Zoom oral arguments. Appellate practitioners generally found the technology reasonably user-friendly, and they appreciate efforts of bar associations and courts "to provide assistance and training to appellate lawyers."[42] In addition to local bars, national organizations such as the National Center for State Courts published resources to help lawyers and courts as they climb the learning curve on video oral arguments.[43]

Some lawyers appreciated certain "luxuries" allowed by the new format, such as having case files, relevant precedent, and exhibits at the ready on their desk when they typically would be unable to lug all of those materials to the podium.[44] And certainly, despite all efforts to maintain formality, a reduced formality necessarily comes with Zoom, which might be comforting, particularly to less-experienced lawyers who might find the courtroom imposing.

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40. *Id.*

41. Adler & Reed, *supra* note 26 ("Not every federal appeals court that adopted livestreaming is certain to keep it once the pandemic is over.").

42. *Id.*

43. NCSC, *Remote Oral Arguments: A Checklist for Judges and Justices*, Version 1 (June 25, 2020), https://www.ncsc.org/__data/assets/pdf_file/0027/41787/RRT-PPP-Appellate-Judges-Checklist-for-Remote-Oral-Argument-6-48-2020-v2.pdf.

44. Covington, *supra* note 29. Practice pointer—this poses a danger for lawyers as well. Do not get buried in a sea of paper and be unable to find the key document that the panel is likely to question about.

Technology-related concerns remain top of mind for lawyers, with one lawyer expressing frustration with other lawyers' failure to "shut[] down distracting apps [or] knowing how to mute the device."[45] Both the judges and lawyers should possess adequate knowledge of equipment they are using. But, of course, even the most technologically savvy of us cannot completely guard against everything that could go wrong in a Zoom argument—as one Indiana lawyer reported, during his Zoom argument before the Indiana Supreme Court, the fire alarm in his building went off.[46]

Others picked up on the access point, suggesting that Zoom be relegated to a "temporary fix" because "it's important that oral arguments occur in a public courtroom."[47] Access certainly emerges as a theme in this article, and both lawyers and judges continue to debate which way this point cuts. I, for one, am encouraged by the attention on this issue and think it bodes well as we consider future utilization of streaming arguments.

Some lawyers suggested retooling the framework of argument for this medium: "Remote argument would probably be best if attorneys had less opening remarks (or none at all) and just more opportunity to provide substantive answers to the panel[']s questions."[48] This comment reflects a broader theme that cut across a number of the survey results, when I posed the question of what change(s) would lawyers like to see at oral argument—many respondents seemed interested in receiving a list of topics to be prepared for in advance.[49] The AAAL describes this practice as "focus letters" that would specify "which issues counsel should be prepared to argue orally" as a means of increasing the efficiency and value of oral argument (more on that later).[50]

45. *See* Survey, *supra* note 27.
46. Covington, *supra* note 29.
47. *See* Survey, *supra* note 27.
48. *Id.*
49. *Id.*
50. Martin & Freeman, *supra* note 9, at 106.

One lawyer bemoaned the fact that "oral argument has been dying slowly for the past several years," and viewed Zoom arguments as a harbinger of its finale.[51] That point, of course, is particularly worrisome and represents part of the genesis of this article. Oral argument could be marching off to the sunset unless we advocate for its rightful place in appellate practice and look critically at how we can improve it.

B. Cautionary Tales: Not All Practical Solutions are Practicable

One issue that appellate courts must be mindful of, notwithstanding the Zoom cheering section, is that Zoom arguments are not necessarily a practical solution in many corners of our country that lack reliable internet access.[52] I had a conversation with a supreme court justice from a rural state who recounted an argument in which the lawyer's internet access kept failing, so that the court probably heard only around half of his argument. Vermont Chief Justice Paul Reiber expressed a similar concern about the effects of poor internet connection and other technology gaps in his state.[53] And this problem is not confined simply to lawyers as many courts permit pro se litigants to present oral arguments.[54] How can we ensure that pro se litigants have adequate access

51. *See* Survey, *supra* note 27.

52. *See* Matthew Krumholtz, *Coronavirus Highlights Unequal Access to Legal Services in Rural Communities*, N.Y. ST. BAR J. (Apr. 28, 2020), https://nysba.org/coronavirus-highlights-unequal-access-to-legal-services-in-rural-communities/.

53. *See* Bob Kinzel & Lydia Brown, *Vermont's Chief Justice on COVID-19 and the Court System*, VPR (Jun. 10, 2020) (discussion of the topic of broadband access starts at 22:20), https://www.vpr.org/post/vermonts-chief-justice-covid-19-and-court-system?utm_source=dlvr.it&utm_ medium=twitter#stream/0.

54. In Ohio, for example, state rules require appellate courts to permit oral argument, unless one of the parties is both incarcerated and pro se or the local jurisdiction has adopted a rule requiring parties to request oral argument. OHIO APP. R. 21(A) (2020); s*ee* Pierre Bergeron, *Pro Se Appellate Arguments—"Thank You for Listening to Me,"* PROCEDURAL FAIRNESS BLOG (Mar. 3, 2020), https://proceduralfairnessblog.org/2020/03/03/pro-se-appellate-arguments-thank-you-for-listening-to-me/.

to technology sufficient to present a Zoom oral argument?[55]

As alluded to earlier, Zoom also presents questions about public and media access to oral argument.[56] Some courts, including many state supreme courts, already provided streaming video access to oral arguments (live and archived) pre-pandemic.[57] Other courts provided audio recordings of oral arguments on their websites.[58] While some appellate judges see a virtue in Zoom as increasing access to argument, such an increase only happens if the courts permit streaming viewing of the arguments and provide a reliable archive of them. For the courts that did not provide access pre-pandemic via the internet or other means, public access now presents certain challenges like how to house video files on a court's website, although some courts might turn to YouTube for help in this regard.[59]

Beyond access issues, Zoom poses various data and security concerns, particularly for courts with aging

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55. *See* Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies; Jamiles Lartey, *The Judge Will See You on Zoom, but the Public is Mostly Left Out*, MARSHALL PROJECT (Apr. 13, 2020), https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out.

56. *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, U.S. CTS. (Apr. 3, 2020), https://www.uscourts.gov/news/2020/04/03/judiciary-provides-public-media-access-electronic-court-proceedings?utm_campaign=usc-news&utm_medium=email&utm_source-govdelivery. Needless to say, the process is not uniform on the state court side.

57. *See, e.g.,* Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 14 (Summer 2017) (noting that, as of 2017, "[t]hirty-five state courts of last resort regularly live stream or televise their arguments.").

58. *See Audio Files of Completed Arguments,* U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, https://www.ca6.uscourts.gov/audio-files-completed-arguments (last visited Oct. 16, 2020).

59. The Ninth Circuit's website, for instance, contains an archive of oral argument videos that are stored on YouTube. *See Audio and Video*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/media/ (last visited Oct. 16, 2020). My court recently started a YouTube channel, https://www.youtube.com/channel/UCzkPGbm2ibQ-_NoA_LHFucA?view_as=3Dsubscrib=.

technological infrastructure. The recent surge in the use of videoconferencing platforms has revealed privacy and data security vulnerabilities. For example, Zoom users have experienced "Zoombombing," whereby intruders interrupt a call, often armed with inappropriate material, and these interruptions have invaded judicial proceedings.[60] Recordings of sensitive conversations conducted through Zoom and which include personally identifiable information have also been found scattered online.[61] And, of course, courts house reams of sensitive information, posing a lucrative target for hackers.[62] Although Zoom software updates have addressed many of these security flaws (and these examples do seem rather isolated), the company's security practices remain under scrutiny.[63] Maryland's second highest court actually suspended Zoom arguments for a period of time out of security concerns, but eventually resumed them after the implementation of further security protocols.[64]

Whether a court uses Zoom or some other provider,[65] the AAAL provides some helpful considerations in implementing any type of remote video argument system. These reflect a variety of issues that virtually all appellate courts have wrestled with during the pandemic: (1)

60. Anne Cullen, *Markey Calls for Privacy Rules on Videoconference Providers*, LAW360 (Apr. 8, 2020), https://www.law360.com/articles/1261740/markey-calls-for-privacy-rules-on-videconference-providers; Raychel Lean, *Hacker Streams Porn into Florida Court Hearing by Infiltrating Zoom: An Intruder Marred the Court Proceedings*, LAW.COM (July 10, 2020), https://www.law.com/dailybusinessreview/2020/07/10/hacker-streams-porn-into-florida-court-hearing-by-infiltrating-zoom/.

61. Drew Harwell, *Thousands of Zoom Video Calls Left Exposed on Open Web*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/technology/2020/04/03/thousands-zoom-video-calls-left-exposed-open-web/.

62. Tim Starks, *The Cyberthreat to U.S. Courts*, POLITICO (July 13, 2020), https://www.politico.com/newsletters/weekly-cybersecurity/2020/07/13/the-cyberthreat-to-us-courts-789121.

63. Rae Hodge, *Zoom Security Issues: Zoom Buys Security Company, Aims for End-to-End Encryption*, CNET (May 8, 2020), https://www.cnet.com/news/zoom-security-issues-zoom-buys-security-company-aims-for-end-to-end-encryption/.

64. Steve Lash, *Court of Special Appeals Postpones Arguments: Cites Concerns with Zoom*, DAILY REC. (Apr. 10, 2020), https://thedailyrecord.com/2020/04/10/court-of-special-appeals-postpones-arguments-cites-concerns-with-zoom/.

65. Wheaton, *supra* note 20 (discussing various options besides Zoom).

ensuring that the sound quality is accurate and consistent, investing in technology infrastructure improvements if needed; (2) guaranteeing public access in some form or fashion while also making sure that the remote public cannot interrupt or interfere with an oral argument; (3) putting in place a technology support system to assist judges and lawyers; and (4) recommending "dry runs" with the technology to maximize the chances of everything running smoothly during the actual arguments.[66]

C. Wither SCOTUS?

Much ink has been spilled debating whether the Supreme Court should allow cameras in its courtroom in order to broadcast oral arguments.[67] But this is really a one-sided "debate," with many commentators urging the Supreme Court to permit cameras, but the Court steadfastly holding the line against it. I won't rehash all of the points ably made by prior commentators on the wisdom of opening up the Supreme Court to televised argument, but instead I will offer this: even the Supreme Court had to adapt during the pandemic, as it resorted to telephonic arguments. One might question why the Supreme Court went the subpar telephonic route rather than availing itself of video argument. I have to believe that the answer lies in the Court's concern that permitting Zoom arguments, even on a temporary basis, would undermine its historic refusal to permit video transmission of oral arguments. The Court has typically brushed aside pleas for video access to arguments as something that might encourage grandstanding or that might enable comments to be taken out of context.[68] But as Judge Steve Leben points out in an article written pre-pandemic, "state

66. *See* AAAL REMOTE ORAL ARGUMENT REPORT, *supra* note 15, at 3–5.

67. *See generally* Chemerinsky & Segall, *supra* note 57.

68. Steve Leben, *Getting It Right Isn't Enough: The Appellate Court's Role in Procedural Justice*, 69 U. KAN. L. REV. 13, at 40–41 (2020).

courts have not had a problem with grandstanding attorneys (or justices)."[69]

In all the articles and reports I have read in a judicial system awash with Zoom arguments, I likewise have not heard of episodes where lawyers or judges acted inappropriately because cameras were rolling. If anything, what we are seeing now simply normalizes the practice of video oral arguments. Attorneys and judges are starting to view such arguments as nothing really out of the ordinary. And with Zoom arguments becoming pervasive at the federal circuit courts of appeals as well as at the state supreme courts and courts of appeals, the Supreme Court's antiquated notion about video broadcast of arguments becomes even more difficult to defend. If virtually every appellate court in the country has at least experimented with video oral arguments, why can't the Supreme Court? The Court can seize this moment to effectuate this change, which will help with transparency and legitimacy. After all, as Judge Leben argues, televised oral arguments can "demonstrate to the public that [the Court] is sincerely interested in the parties' arguments and trying to decide the case based on neutral principles."[70] While it may be overly optimistic to expect the Supreme Court to change its practices anytime soon, maybe these cracks in its façade will grow and ultimately usher in a more user-friendly Court from the technological perspective.

IV. A DEFENSE OF THE MODERN ORAL ARGUMENT AND HOW WE INTEGRATE ZOOM

Oral argument has been a fixture of appellate arguments since the dawn of appellate courts. But just because a practice is long-standing does not prove that it should be retained. The effects of the pandemic have caused us to reevaluate so many practices, both in our lives and in the judicial system. This begs the question

69. *Id.* at 40.
70. *Id.* at 40.

that I started with: does oral argument have a future, and if so, what does it look like? Of course, my answer to the first part is yes, and I jump off with that defense before taking a peek at a potential future.

A. Why Retain Oral Argument?

One could offer numerous reasons for why we should retain oral argument, but I would like to focus on three: procedural fairness, improved decision making, and the value of forced collaboration.

1. Oral Argument Ensures Procedural Fairness

We must remember that the lay public often misunderstands appellate courts because they seem shrouded in mystery.[71] Our only "communications" to the public occur during oral arguments and when we release our opinions. Oral argument "puts the decision-making process on display, reinforcing the court's role as a viable branch of government."[72] This exercise thus provides clients and the public alike with a glimpse into the appellate court's decision-making process that (hopefully) cultivates "an appreciation that informed judges decide their disputes."[73]

Sitting in our ivory towers and never letting the public see our work process firsthand will inevitably lead to an erosion of trust and confidence in the judiciary. We would become just another faceless bureaucracy, viewed with mistrust and skepticism. On the other hand, every time that we appear in court and actively listen and show by our questions that we are familiar with the case and understand the issues, we help build public confidence that we are doing our jobs. (I will acknowledge the risk of the opposite occurring. In one high-profile appeal I

71. Martin & Freeman, *supra* note 9, at 103 ("The judicial branch is the least understood branch of government, with intermediate appellate courts the least understood among the judicial branch's sectors.").

72. *Id.* at 94.

73. *Id.* at 95.

argued years ago, the panel sat stone-faced throughout the argument and didn't ask a single question, prompting my client to wonder whether they even read the briefs.) Judge Leben puts it more eloquently than I could: "The way a judge acts during oral argument leaves an impression about whether the judge genuinely seems to want to hear the litigant's position, acts in a respectful manner to the parties and their attorneys, and seems sincerely interested in a fair resolution."[74]

The opportunity to at least glimpse the sausage being made is particularly important for courts that might issue perfunctory orders to decide some cases. Put yourself in the position of someone reading a two-page decision that basically says "you lose" without much explanation.[75] How does that person feel? Do they believe that the court seriously entertained their case and arguments? Oral argument can play a role here in showing that the judges did their homework. If a party loses but believes their case has been thoroughly considered, they are more apt to respect the process.[76]

I also believe that judges have an obligation to be visible in the community, and oral argument is one facet of that. Further erosion of oral argument or just going through the motions in oral argument "risks alienating the public we serve."[77] In my experience, many lawyers enjoy the experience of getting to come to court and debating their case with the appellate panel. The more we chip away at that right and experience, the more we remove that connection and render the lawyers less vested in the appellate process and less likely to defend the institution when questioned by their clients. We must also appreciate that the fewer opportunities for argument render it difficult, if not impossible, for junior lawyers to

74. Leben, *supra* note 68, at 31.

75. I'm not suggesting that every case needs a lengthy opinion; some cases can be appropriately resolved in short order. I'm just considering this point from the party's perspective.

76. Leben, *supra* note 68, at 22 ("Researchers have convincingly shown that the public's view of the justice system is driven more by how they are treated by the courts than whether they win or lose their particular case.").

77. *Id.* at 21.

gain experience presenting oral arguments. We do a disservice to the next generation of appellate lawyers by continuing to scale back argument opportunities and may create subpar oral arguments as a self-fulfilling prophecy.

2. Oral Argument Impacts the Decision-Making Process

Recall the hypothetical question I mentioned at the outset about how often oral argument changes a judge's mind. That question reflects too narrow a focus because "[o]ral argument can sharpen issues and reveal their nuances," even if a judge walks out of argument with the same inclination—to affirm or to reverse—with which she entered the argument.[78] That is why the question lends itself to a false perception. I could offer numerous examples during my time on the bench of oral argument that might not have changed the ultimate result, but that certainly changed how we approached the opinion.

But sometimes it can definitely change minds. I recall a case from about a year ago where both sides waived oral argument, electing to submit on their briefs. I arrived at the conference where we were going to discuss the case with my two fellow judges, only to learn that the three of us harbored three vastly different perspectives on the case and how to resolve it. What an opportunity squandered by the counsel who did not want to show up! We needed to reach a consensus on the case, and counsel could have served as our guide in that process. Instead, they abdicated, leaving it to us to sort out.

Let me offer another example that ties in with the procedural fairness point above. Many years ago, I represented a client appealing a judgment to a federal appellate court. The appeal was neither a slam-dunk nor a complete long shot, and we requested oral argument. The court denied our request for oral argument and subsequently issued an unfavorable opinion (from my client's

78. Martin & Freeman, *supra* note 9, at 96.

perspective) that evidenced a complete misunderstanding of the facts at hand and our arguments. For whatever reason, the court did not seem to grasp what the case was really about, and if it had granted our request for oral argument, I'm confident that we could have cleared up any confusion. Instead, what happened? Without argument, we receive this decision, and the client thinks that the court did not take their case seriously. So, they instruct us to petition for rehearing, which consumes more judicial and party resources. And after denial of that (probably ill-fated) rehearing petition, the client is soured on the whole legal process. The court could have ruled against us in a defensible manner, which the client would not have been happy about but could have accepted. But denying oral argument and sending out this type of flawed, but avoidable, end product can undermine the losing party's confidence in the judicial system.

Oral argument can enrich our understanding of cases, which directly impacts how we write opinions, and thus the evolution of case law. Even in simple cases, judges can receive confirmation that the question at hand is really as straightforward as it appears. I know in some cases, whether because of a messy record or mediocre briefing, I thought I understood certain issues, but oral argument helped provide that assurance (or show me otherwise). Cases and record cites often emerge at argument in sharper relief, enabling us go back and consider those points anew in light of the argument. And sometimes, when counsel appreciates at oral argument that his case is about to go down in flames, he can shift gears to try to engineer a "soft landing"—in other words, shifting from trying to win to trying to salvage a palatable loss. This is particularly important for repeat appellate players who, like the judges, may have broader concerns about the direction of the caselaw than just the single case at hand.

I recall my experience in practice, where typically it would be four to six months (if not longer) between the completion of briefing and the argument date. After leaving the case alone for a while, I would pick it back up and

always see it in a slightly different light. Points would emerge that I really wanted to highlight at argument. I do not know whether any of this nuance ever persuaded any appellate judges, but hopefully this refined perspective on the case proved more helpful to them than the briefing alone.

When an appellate judge is asked "how often does oral argument change your mind," I would suggest reframing the question and conveying the many ways in which oral argument can impact a judge's perspective on a case. That sends the message (the correct one, I believe) that oral argument is not just a hollow exercise, but rather a vital part in the decision-making process. If we, as appellate judges, want better oral arguments, we need to let the bar know that it matters.

3. Oral Argument Distills the Value of Collaboration

I do not think anyone should overlook the value of conference in the overall calculus of the worth of oral argument. Particularly in courts with jurisdiction over numerous counties or states, oral argument may be one of the rare occasions when the judges gather together in person, sometimes even breaking bread afterwards. In a world where many judges communicate regularly through email, it is difficult to overstate the value of collaborating in person.

Think back to my scenario above where Judge Smith sends me the bench memo. Without the conference occasioned by oral argument, we might resolve this case by a few terse emails. Maybe (hopefully) we reach the right result. But my experience in conferences is that your colleagues can push you and share perspectives on a case that might differ from your own. That debate back and forth is not only helpful in terms of the resolution of a particular case, but also in building collegiality between colleagues. If you never see your colleagues in person, it is much easier to attack them in a dissent, and far too many examples abound these days of attacks that border on the personal or even cross the line. Therefore, the judicial collaboration that comes along with oral argument

inevitably leads to better decision-making and hopefully a more cohesive court as well.

B. Zoom Increases Access to Justice

Zoom, if properly used, can become a powerful tool to both increase access to justice and to enable courts to modernize.[79] But courts must be mindful that not everyone (lawyers and parties alike) has access to reliable broadband internet.[80] This barrier can spark creativity—in my court, for instance, we resolved to house a computer terminal in our courthouse where someone without internet access could come and log into Zoom in order to present their argument. Such a solution is not perfect—after all, it requires a person to come to court—but we are certainly confronting a situation that defies simple solutions. And many courts have risen to the challenge and resolved to utilize the pandemic as a means to increase public access to the judiciary.[81]

Zoom has also lifted the veil on the process of how appellate courts actually function. The federal D.C. Circuit reported that around 90,000 people logged into to "attend" two high-profile arguments during the pandemic, and a Michigan Court of Claims hearing garnered 50,000 viewers.[82] Needless to say, not even a fraction of those people could actually fit in a courthouse if the courts cut off livestreaming access, nor did many people even bother to attend arguments in person pre-pandemic.[83] This renewed interest in the appellate process

79. *See* Erika Rickard & Qudsiya Naqui, *Coronavirus Accelerates State Court Modernization Efforts*, PEW (June 18, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/06/18/coronavirus-accelerates-state-court-modernization-efforts.

80. *See* Krumholtz, *supra* note 52.

81. *See* John W. Fraser, *Despite COVID-19, Michigan Courts are More Accessible Than Ever*, LEGAL EXAMINER (July 13, 2020), https://lansing.legalexaminer.com/technology/despite-covid-19-michigan-courts-are-more-accessible-than-ever/ ("[T]he Michigan Supreme Court has pioneered public access to Michigan judicial proceedings as part of the judiciary's response to COVID-19.").

82. Alder & Reed, *supra* note 26.

83. Leben, *supra* note 68, at 31 ("[M]ost of the time, few if any members of the public come to watch appellate arguments.").

by the general public has convinced some that "Covid-19 has made U.S. courts more transparent."[84]

And it can continue to do so. I do not think, for a second, that Zoom should take the place of live oral arguments, because like virtually all of the appellate judges with whom I spoke, I can't wait to get back to in-person arguments. But we should be flexible and allow for Zoom arguments, post-pandemic, in situations where the parties request it, particularly when the argument would necessitate travel or other expenses that could be avoided with Zoom. Zoom argument has also shown us that we can livestream arguments and that people actually pay attention. Even if a court decided to dispense with Zoom arguments, it should nevertheless embrace the livestreaming and posting of its oral arguments. Many courts are now seeing what several state supreme courts at the vanguard of this movement have known for a long time: livestream arguments are both a valuable resource for lawyers and clients as well as a transparency tool in this modern age. Given what we have witnessed during the pandemic, I would view it as a step backwards if courts suddenly pulled the plug on this vital means of public access.

C. A Brave New Post-COVID Appellate World Awaits

The Seventh Circuit recently announced that all of its oral arguments for the balance of 2020 would take place virtually, either by Zoom or telephone.[85] Given the spiking COVID-19 cases that we are witnessing as of this writing in August 2020, I would be surprised if nearly all of the appellate courts currently using Zoom didn't follow suit. Even assuming that every court could throw open its doors on January 1, 2021, for in-person arguments, many courts by then will have at least six months or more of experience with Zoom. My prediction is that as

84. Alder & Reed, *supra* note 26.

85. U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ORDER REGARDING COVID-19 (2020), http://www.ca7.uscourts.gov/news/COVID-19_order_through2020_Dec31.pdf.

judges and lawyers alike grow more comfortable with this medium, it will be here to stay in some manner.

We should embrace this medium for at least limited use post-pandemic. Zoom has the potential, as described above, to broaden public access and understanding of appellate courts and their process. In this day and age where mistrust for most governmental institutions runs deep, such transparency can prove vital in protecting the integrity of the judiciary in the public's mind.

Some lawyers will also discover that they present much better arguments in the virtual format rather than in person. Even some judges might have similar revelations about their own questioning at oral argument (consider the noted example of Justice Thomas).[86] I do not mean to suggest that an advocate's whims should dictate whether Zoom arguments persist, but rather if we want to increase the caliber of arguments overall, Zoom may help move us towards that end.

As we consider how technological innovations can enhance oral argument, we must also place a renewed focus on oral argument to ensure its long-term vitality. The AAAL task force report presented a number of ideas in this respect that I would commend to your attention,[87] but I want to focus on a couple of issues.

First, we must help cultivate the next generation of appellate lawyers. Right now, it is exceedingly difficult for junior lawyers to obtain meaningful oral argument experience. I know that when I first started practicing, it probably took a dozen or so arguments before I became comfortable with the practice and found my oral argument "voice." Nowadays, even a self-proclaimed appellate lawyer might not crack double digits in arguments

86. Justice Clarence Thomas rarely asks any questions at oral argument, but he began interjecting regularly once the Supreme Court started utilizing telephonic arguments. *See* 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); Bill Rankin, *Suddenly Gabby Justice Thomas Asks Questions During Oral Argument,* ATLANTA J. CONST. (May 10, 2020), https://www.ajc.com/news/local/suddenly-gabby-justice-thomas-asks-questions-during-oral-arguments/doClBtjLaMaH03n62JNj5H/.

87. Martin & Freeman, *supra* note 9, at 104–08.

until well into their second decade of practice. It is unrealistic to expect optimal arguments if counsel never get the experience.

So how do we do that? A couple of thoughts come to mind. Appellate courts that restrict oral argument should consider granting it—even if it would otherwise be denied—if a junior lawyer is going to argue. The Federal Bar Association advocates for a similar approach at the trial level to ensure that junior lawyers get in-court experience in the district courts, and there is no reason why appellate courts could not implement a similar concept.[88] Hand in hand with that, bar associations or similar organizations should be more deliberate about appellate mentoring, particularly for organizing moots for lawyers undertaking their first arguments. The moot process, properly done, can significantly improve an advocate's presentation. Relatedly, courts should consider creating some type of pro bono appointment program that would also help provide argument at-bats for aspiring appellate lawyers. One of the chronic problems in the legal profession is matching the underprivileged clients who need quality legal representation with junior advocates who desperately need the experience and are willing to work pro bono. Arizona's Court of Appeals has instilled such a program that could be utilized as a model.[89] And consider how we could overlay Zoom on such a program—pro bono lawyers without funding might not be able to afford to travel to an oral argument, and Zoom could solve that problem by obviating the need for travel expenses.

Appellate courts should also revisit their court-appointed list (usually for criminal appeals) with a fresh perspective and consider whether they could diversify their lists and perhaps fold in some of the junior lawyers

88. Robert A. Mittelstaedt & Brian J. Murray, *Who Should Do the Oral Argument*, 38 ABA LITIG. 48 (2012) (discussing programs similar to FBA's proposals and raising interesting points about when junior lawyers, rather than the senior lawyer, should present oral argument).

89. *Pro Bono Representation Program*, ARIZONA COURT OF APPEALS, https://www.azcourts.gov/coa1/Court-Programs/Pro-Bono-Representation-Program (last visited Oct. 16, 2020).

handling pro bono appeals. Moreover, courts should mandate periodic training to ensure that appointed counsel remain abreast of developments in the law affecting these class of cases (training related to Zoom arguments may also be useful). In connection with all of this, courts may wish to reconsider how they handle the whole process related to *Anders* briefs, which is always a subject that inspires debates among appellate judges.[90]

And we should not limit our training focus to lawyers. Several law schools now host appellate litigation clinics that enable students to work on actual cases and sometimes to even present the oral argument.[91] I have seen some really remarkable oral arguments by law students both at moot court competitions and in oral arguments in my court. We need to do all that we can to promote and encourage these efforts in order to spark an interest and passion for appellate advocacy in these students. Zoom can also broaden their horizons by enabling students to appear before courts notwithstanding a lack of funding to travel there.

Second, appellate judges need to play an active role in helping educate lawyers about oral arguments and what we want to see. (Lawyers cannot read our minds, at least most of the time.) We need to be generous with our time and say "yes" to invitations to come speak about oral argument. And during the pandemic, I have seen firsthand a number of appellate judges stepping up in seminars, many of which are free, to help educate the bar about Zoom oral arguments, and we need to continue that work. But we also need to think about the message we convey during those opportunities. If we want better oral arguments, we must explain how oral arguments impact our decisional process. And be proactive—if your local bar does not have some type of appellate mentoring

90. For an excellent discussion of this issue, see Andrew Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness*, 53 AKRON L. REV. 481 (2019).

91. *See, e.g.*, *Appellate Litigation Clinic*, CASE WESTERN RES. U. SCH. OF L., https://case.edu/law/clinic (last visited Oct. 16, 2020); *Sixth Circuit Appellate Clinic,* U. OF CIN. C. OF L., https://law.uc.edu/real-world-learning/clinics.html (last visited Oct. 16, 2020).

program, reach out to someone and see if you can help get that started. Some efforts like that might only need a judicial nudge and could end up having a significant impact.

Third, we need to put ourselves in the advocate's shoes every now and then. Here is where "focus letters" that I referenced earlier could come into play. Both in my survey and in recent articles about oral argument, I've seen great interest from the bar in some type of focus letter practice by which an appellate court would send a letter, in advance of argument, informing counsel where they should focus. I certainly know when I was practicing, I would have welcomed such overtures. While it is unrealistic to expect appellate courts to send out a letter in every such case, as we (judges) prepare for argument, in many cases we might see (1) a question of jurisdiction that the parties did not notice; (2) intervening authority that might impact the disposition; (3) problems in the record that have not been answered by the briefing; or (4) potentially dispositive issues that the parties touched on in the brief but did not fully develop. In my early tenure on the bench, I would notice an issue like one of those and come to argument ready to quiz counsel on it. But then I realized counsel was not prepared for such questions and so I generally did not receive helpful answers. Now, when I see something like this (assuming my colleagues agree), our court will send a notice to counsel advising them to be prepared at argument to address the point (and consider how we can use technology to improve that process). This requires a modest step on our part but often leads to a much more meaningful oral argument, which leads to improved decision-making.

The bottom line is that appellate courts and appellate lawyers are at a moment where we must re-evaluate oral argument and think critically about what is working and what is not. Zoom might be the lightning rod to spark that discussion, and I would encourage courts to step back and use the pause imposed on us by the pandemic experience as a catalyst for improving oral argument overall. Because if we want this tradition of oral

argument to endure, as I suspect most would readily acknowledge, then we need to be open to some changes and to taking a leadership role to implement them.