



Conducting Appellate Arguments by Use of Remote Video

INTERIM GUIDELINES

This document was developed in response to the COVID-19 pandemic. It is meant to contribute to the ultimate development of “best practices” as courts and advocates adapt in an effort to ensure that Justice in the courtrooms of our two countries does not become a victim of the current economic and health crisis. Readers are (a) encouraged to provide feedback about their experiences with these and other ideas for addressing the issues identified in the Interim Guideline; and (b) continue to visit the College website to see the latest version of the document. Please email comments, orders, rules, etc. on this topic to advocacy@actl.com.

Task Force on Advocacy in the 21st Century

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American College of Trial Lawyers

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

Task Force on Advocacy in the 21st Century

The purpose of the Task Force on Advocacy in the 21st Century is to develop and make available the College's expertise on the issues that will confront the administration of justice in a post-pandemic world, in particular those issues that impact the discovery component and trial of civil and criminal cases and oral arguments before appellate courts.

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Interim Guidelines on Conducting Appellate Arguments By Use of Remote Video¹

The American College of Trial Lawyers recognizes the impact COVID-19 has had on the ability of judges to assure timely and effective access to appellate courts. Many jurisdictions are using or considering the use of remote video to conduct appellate arguments. The ACTL Task Force on Advocacy in the 21st Century has gathered various policies, procedures and orders from the United States and Canada in an effort to assemble the wisdom and experience gained from the use of remote video in appellate argument and share a summary of issues that should be considered with respect to such arguments.

The College believes that courts and lawyers should strive to preserve the traditional formality and solemnity of the courtroom even in remote judicial proceedings. The College further believes this can best be accomplished if courts adopt, by order or rule, a comprehensive set of procedures for remote hearings that will be available to attorneys, parties, and colleagues, as well as the media and the public at large.

To that end, this Interim Guideline endeavors to focus the attention of the Bench and Bar on issues that should be considered when appellate arguments will be conducted by remote video.² Not all of these issues may be applicable to every argument in which remote video is used, but it is suggested that each of them bears consideration to reduce the chance of error and confusion and to increase the likelihood that the argument will result in an effective and useful conversation with the court. The plan should be reviewed frequently to take advantage of evolving knowledge and lessons learned.

1. **The plan for the oral argument by use of remote video should be set forth in writing and made available to all counsel sufficiently in advance of the argument so that they can be prepared to use the technology properly, securely, and effectively.** Putting the plan in writing will help avoid confusion and problems in the use of the technology, allow counsel to make the most effective presentation possible, and allow the court to address jurisprudential concerns such as access to the public and confidentiality of certain evidence or proceedings. While this guidance relates to remote video argument, much of it also may be useful for telephonic arguments.
2. **The plan should identify the remote video platform to be used and the security measures to be employed.** It also should provide the identity and contact information of the court employee who will be responsible for managing the technology during the argument and who can provide assistance and accommodation for advocates with specific

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² This document may also be of assistance to those conducting hearings that do not involve a presentation of evidence. The College’s “Interim Guidelines for the Conduct of Hearings by Use of Remote Video,” which may be found at www.actl.com/advocacy, provides guidance for hearings in general, including those which involve the presentation of evidence.

concerns, such as a disability. In order for the argument to proceed smoothly and effectively, each attorney will need to know exactly how the technology will operate. Links to sources providing information about the technology and its use should be included in the plan, as should procedures to be followed in the event of loss of audio or video connection with the platform, and proper techniques for secure internet connection. The video manager responsible for managing the platform during the argument should be identified, with cell phone numbers for the attorneys to call in the event of technical problems. The video manager's duties should be spelled out in the plan.

3. **The plan should establish a form to be completed by counsel before the argument.** Among other things, the form should require counsel to advise the court who will be presenting argument, the display name of each attorney appearing at the argument, and how they plan to split their time (if applicable). The form should also include the direct dial or cell telephone number of each attorney who will be presenting argument. Counsel also should raise any concerns about privacy or confidentiality and their proposed steps to address those concerns. The relevant terms of any confidentiality orders, protective orders or publication bans should be disclosed.
4. **The plan should ensure that public access to the argument is provided to the extent possible.** The plan should explain how access to the argument can be obtained real-time by clients, colleagues, the public, and the media, while also protecting confidentiality and privacy as necessary. Such information might also be set forth in a standing order or rule. The plan should make it clear that no one other than counsel presenting argument and the court will have an active microphone during the argument, and that all of the court's policies, including with respect to recording the argument, remain applicable.
5. **The plan should address how exhibits, transcripts, or other record materials can be shared, if at all, on the screen.** This is an issue that should be addressed with court personnel. Any confidentiality issues with exhibits should be resolved before the argument. Counsel should be advised to have ready access to all materials they plan to share.
6. **The plan should disclose what undertakings will be required of participants.** Such undertakings could be required on a range of different matters, including whether recording and broadcasting the argument and taking screen shots is permitted. Special undertakings may be necessary for self-represented parties.
7. **The plan should provide for a practice run-through conducted by court personnel before the actual argument.** Such an exercise will allow counsel to become comfortable with the technology and get answers to any questions they have about how the argument will proceed. This also will assure that the technology works for all of the attorneys. This exercise should inform attorneys of the procedures to be followed if technical problems arise during the argument. Attorneys should assure ahead of the argument that all of the equipment is functioning properly and fully charged or plugged in properly, and that the internet connection is suitable for a video argument. Attorneys should take part in this exercise from the same location in which they will participate in the argument.

8. **The plan should explain the procedures by which the argument will be called and ended, and who will be a participant.** Lawyers making the argument need to know the procedures by which the initial and successive cases will be placed into the remote argument, and whether they should call in early. How time limits during the argument will be communicated to each counsel should be made clear. They also need to know if their clients and colleagues in the case should be introduced and visible on the screen.
9. **The plan should set forth the practices, if any, that the court has adopted with respect to questioning of counsel by the court.** Some courts have adopted the practice of allowing each advocate a short time for argument at the beginning of their argument without any questioning. Some courts have determined that questioning by the judges will take place in order of seniority. Lawyers should be advised to pause frequently for questions, especially before moving on to another point, and to avoid talking over a judge seeking to ask a question. If the court will mute all participants except the speaker, this should be explained in the plan and participants should be told to raise their hand if they wish to speak.
10. **The plan should set forth the protocol and court etiquette of counsel during the argument.** It should include a reminder to counsel that the rules of ethics and professionalism apply to remote arguments, and that counsel are expected to conduct themselves with the same level of dignity and professionalism as if they were in open court. Counsel also are expected to work collegially with other counsel or self-represented parties to ease any technology burden and should not take advantage of technology problems. Counsel should be prepared to use the technology in an appropriate and effective manner. Some specific matters that could be included in the plan are as follows:
 - **Act as if you were in court in person.** Dress professionally as you would for the courtroom. Solid color clothing is preferable. Counsel should not stand when the court convenes and when making the argument or bow. The judge and other counsel should be addressed as if they were in a courtroom. As in a courtroom, refrain from eating or drinking anything other than water during the argument. Attorneys should not move away from the view or turn the camera off without permission of the court.
 - **Avoid Visual Distractions:** Use an appropriate and professional background and recognize that the lighting will affect the background. If possible, sit in front of a blank, neutral-colored background or use a virtual background provided by your platform.
 - **Avoid Audio Distractions:** You should treat this remote argument as though you were in court. Ensure that all devices, such as cell phones and tablets, are silenced. All applications on computers that are not needed for the argument should be closed. All notifications should be muted. Don't use a keyboard to take notes as the sound of typing can be distracting. Ask others who may be at your location to remain quiet while you are participating in the oral argument and

eliminate potential outdoor sources of noise. Ensure that pets, children, and all other things that may serve as a distraction are in a different room.

- **Audio Advice:** Find an audio system you are comfortable with and practice speaking with it and playing it back to yourself so you hear how you sound. Joining from a smaller room with carpet prevents echoes. If your internet connection is unreliable, dial your audio feed in by phone so you will remain connected if you lose your internet connection. Also consider how you will look if you use headphones with a built-in mic; they may present you visually in a distracting way.
- **Lighting:** Make sure your face is well lit. This usually requires, at a minimum, that the light source should come from in front of you and/or slightly off to one side in front of you. Do not have bright lights visible to the camera from behind you, including open windows to the outside, lamps, or the like. If there is a window behind you, close the blinds.
- **Appearance on Camera:** Each attorney who will be speaking should have an individual camera and be “on camera” during the argument. Position the camera at your eye level or slightly above eye level and about an arm’s length away from you. Position yourself so the camera is seeing you from the chest or waist up. If necessary, place something under your computer to raise it. Use a non-swiveling chair.
- **Use the Mute Function:** During the argument, if it is not your turn to speak, you must mute your microphone.
- **Speak directly into your microphone; don’t shout at a speaker phone.** Don’t be too far away from the microphone. Watch the volume level rise and fall on your computers to make sure you’re not too loud or too soft. Using a speakerphone is discouraged, as it picks up background noise and may be indistinct to the listeners. Counsel should remember to pause from time to time to allow questioning, speak slowly, and avoid talking over another speaker.
- If any or all participants are connected only by phone, everyone should identify themselves each time they speak.
- A more detailed description of items to be potentially addressed is set forth in the College’s Interim Guidelines on Mastering Zoom Advocacy, found at www.actl.com/advocacy.