

Virtual Persuasion: Advice from the Michigan Supreme Court

By Jennifer Copland and Jesse Kirchner

As COVID-19 swept the nation, businesses closed, jobs evaporated, and many of us quarantined at home. But courts could not put everything on hold. They could not ignore, for example, emergency matters brought by prisoners or complaints alleging violations of constitutional rights. Thus, as Michigan went on lockdown, the Michigan Supreme Court pivoted to meet the new challenge.

As a substitute for its in-court proceedings, the Court turned to two-way video technology. Between April 15 and May 6, the Court held six oral arguments using Zoom. We surveyed the justices for tips on remotely interacting with appellate courts.

Tip #1: Be professional.

The justices agreed advocates must maintain professionalism even within the virtual environment. “For matters that would otherwise be in the courtroom, professional attire is a must,” said Justice Brian K. Zahra. “This rule applies also to the background during such matters. A home office or a blank wall will suffice.”

Chief Justice Bridget Mary McCormack used a virtual background of the Court’s

courtroom interior, considering it “informal” to see inside someone’s home. Justice Elizabeth T. Clement said she would prefer to use a virtual background, but she used a blank wall at home because her technology did not support a virtual background. “This may not be the most visually appealing,” she admitted, “but I think it minimizes distractions.” For those who do use virtual backgrounds, Clement cautions them to avoid moving in and out of the frame because too much motion can make the background “become more of a distraction than a benefit.”

Minimizing ambient noise is also important. Zahra commented that “professional life is encroaching on the safe harbor of our homes. Thus, it may be difficult to impose new boundaries on children and pets not accustomed to sharing their home.” McCormack imposed those boundaries by asking the others in her home to be “especially quiet” when the Court heard oral arguments or conducted other official business.

On the other side of the screen, lawyers should mute their microphones when they are not speaking. “Even if you’re alone with no pets or other people in the home,” Clement observed, “clearing your throat,

moving papers, or taking a drink of water can all be easily picked up,” causing Zoom’s focus to switch from the intended speaker to the source of the distracting sound.

Tip #2: Make the connection.

Many justices agreed that persuasion is not hampered by a virtual format. Zahra said he is “moved by the substance of the argument, not the physical expression of the person advancing the argument,” and he noted that at times it was “easier to follow an argument by listening to the words articulated and not looking at the orator.”

But as McCormack recognized, “something is lost when you aren’t physically in the same room.” Justice Richard H. Bernstein, who is the first blind justice on the Michigan Supreme Court, called virtual argument “cold and impersonal.”

“I want to just emphasize—put it in bold—that I hate everything about it,” Bernstein said. “I’m a really positive person, but I hate it.” For Bernstein, “human connection is everything. So when you take away human interaction, you are literally taking away the entire way I appreciate the world.” He further

“Best Practices” is a regular column of the *Michigan Bar Journal*, edited by Gerard Mantese and Theresamarie Mantese for the Michigan Bar Journal Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

The Michigan Supreme Court’s transition to Zoom arguments, in the midst of a pandemic, was near-seamless. Yet the justices agreed there is room for improvement.

Nobody expects video proceedings to become our “new normal” or for the journey to be without hitches and bumps.

observed that, in general, lawyers arguing virtually are “not as intense or focused. It doesn’t have the same energy that you’d have in person. You’re at home. It’s just different.”

What should lawyers do to personalize the experience? Bernstein urges lawyers to make an effort to convey their energy, a sense of who they are; he would like virtual arguments to carry the same intensity as in-person arguments.

Clement cautions lawyers to be mindful of pacing to ensure they are understood. They should also be careful not to interrupt or answer a question before it has been fully asked. “Although awkward, a brief pause before answering is better than speaking too quickly.” She also observed that “standing while speaking created more distractions with movement and difficulty hearing the speaker.”

Zahra advises that oral argument should be “delivered like a conversation rather than a lecture,” which is best achieved, in both virtual and live proceedings, “when the orator uses the cadence and tone with which she is most comfortable.” McCormack wants lawyers to be more solicitous when answering questions. “Ask us, ‘Did that address your concern?’ Make sure you got to what we were asking about.”

And lawyers must ensure that their technology works. McCormack recommends, foremost, that lawyers have “a good microphone and reliable internet. Make sure we can hear you.”

Tip #3: Practice!

It takes practice to make virtual technologies work smoothly. The justices also recommend that lawyers avail themselves of training opportunities. Practice helps lawyers

become more comfortable with speaking into a camera and can alert them to potential problems.

Experts on oral advocacy have long recommended recording, and then studying, oral arguments. Zoom makes this even easier, and more crucial. By recording a practice argument, a lawyer can identify issues with “background, audio, poor camera placement, speed, eye contact, and movements, to see what needs to be adjusted,” said Clement. Participants also need to “understand how the views work, how to use mute and other functions, and how to identify any audio or visual issues before the actual hearing.” Zahra recommends that lawyers “practice their argument in a mock Zoom proceeding and watch and critique their own presentation.” McCormack echoes that advice, adding that lawyers must get used to the “back and forth and the timing and pacing” of questions and answers.

Tip #4: Recognize that we’re all learning.

The Michigan Supreme Court’s transition to Zoom arguments, in the midst of a pandemic, was near-seamless. Yet the justices agreed there is room for improvement.

Take the process for questioning advocates, for example. In the Court’s April and May arguments, the justices took turns asking questions after a period of uninterrupted lawyer argument. Workable, but not dynamic. All the justices participating in this survey had suggestions to improve the process, including allowing questions earlier, giving the lawyer a longer period without interruption, tweaking the muting procedures, and using Zoom’s built-in chat or “raised hand” signal to facilitate questions

and interruptions. The answers are not yet clear, but this experience has taught us that courts and lawyers will adapt through experience and patience.

Nobody expects video proceedings to become our “new normal” or for the journey to be without hitches and bumps. For some, like Bernstein, the bumps were severe. Bernstein reported difficulties with technologies that were not designed for disabled persons. While recognizing the advantages of technology, Bernstein described the Zoom environment as a “cold, impersonal, harsh world” and looks forward to the resumption of in-person proceedings.

Zahra, on the other hand, “likes the new ride” and would consider using virtual arguments more often, “especially where counsel needs an accommodation.” McCormack called Zoom a “serviceable alternative,” and Clement reflected that remote hearings require “an adjustment” and “that all participants need to work together to minimize the bumps.”

The process has not been perfect, but we are fortunate in Michigan to have judicial leaders willing to adjust to change and confront challenges.

Zoom on. We are all in this together. ■



Jennifer Copland is an associate clinical professor of law at Michigan State University College of Law.



Jesse Kirchner is a judicial clerk to Justice Elizabeth Clement and an adjunct professor at Michigan State University College of Law.