As federal courthouses limit their in-person operations because of COVID-19, telephonic oral arguments will become more common. Already the Second Circuit has announced that all of its oral arguments will proceed by teleconference until further notice. Similarly, the Seventh Circuit will hear oral argument by phone through April. For scheduled oral arguments in the D.C. Circuit, each panel will decide whether to proceed by phone, postpone the argument, or submit the case on the briefs. So it’s worth taking a moment to think through how to make the best of a telephonic oral argument.

I’ve argued in the neighborhood of half a dozen cases telephonically, for both appellants and appellees, and in my experience, telephonic oral arguments are certainly a different breed. (The Sixth Circuit used to schedule a telephonic oral argument calendar routinely, in the days when the court had a significant number of vacancies and a daunting backlog of cases.) Oralists and judges alike are deprived of the visual cues that can make argument so efficient and effective—body language and facial expressions that indicate confusion or disagreement or interest. Just asking and answering questions become more challenging.

These challenges make the strategy behind oral argument preparation all the more important.
Every oral argument presents the opportunity for advocates to ensure that the judges understand their position (and its implications) and to clean up any factual or legal confusion, however small, that arises from the briefing. Giving significant thought to how to accomplish those goals as directly as possible is even more important when an advocate cannot rely on the ease of conversation that often develops in a productive, in-person oral argument.

In addition to that central, strategic point, here are six tips that should help advocates preparing for a telephonic oral argument.

1. Take special care to ensure that the words you’re speaking are understood. Speak a little more slowly than you normally would. Be conscious of the need for clarity. Test your own equipment ahead of time; you’ll want to know, for example, which device produces the crispest sound of your voice.

2. Prepare for a colder bench. Because judges are people too, they may hesitate to jump in when they can’t tell visually when they have an opening. As compared to an in-person argument, advocates are more likely to be able to speak for longer intervals without interruption.

3. Think about opportunities to invite questions. A cold bench can be a dangerous one, especially if part of the reason for the temperature is the social awkwardness of interrupting someone whom the judge can’t see. Consider pausing for a beat after completing a point to give extra space for questions. Signposting the different parts of your argument (again, more than usual) can also be helpful to draw out questions.

4. There might be a temptation to treat a telephonic argument as an open-book exam—you might think that you can have lots of documents open on your computer screens at once and refer to them all. Resist that temptation. A huge binder doesn’t work at the podium, and there’s even less room for distraction and fumbling when you need to pay even closer attention to what everyone is saying.

5. Be aware of your own space more generally. I recommend against conducting the argument in any space where you might be distracted. If you’re going to conduct the argument from your regular desk, my own two cents are to turn your computer off entirely and to make sure that everyone in the vicinity—whether that means family members if you’re working from home or colleagues in an office—knows that you’re not to be disturbed.

6. For telephonic arguments as for all oral arguments, preparation is key. Conduct one or more moot arguments by phone if at all possible.

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