

COVID-19: CAMERAS IN THE COURTROOM & POST-PANDEMIC ACCESS TO APPELLATE PROCEEDINGS

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INTRODUCTION

While federal and state appellate courts have historically been cautious about allowing cameras in the courtroom, the COVID-19 pandemic has pushed courts toward live audiovisual broadcasting to preserve public access to proceedings. Appellate courts' new practices for virtual arguments and live audiovisual broadcasting¹ present expanded opportunities for client engagement in the appellate process.

HISTORY OF PUBLIC ACCESS TO APPELLATE PROCEEDINGS

The founders did not countenance secret justice, believing that the operations of the courts were “matters of utmost public concern.”²

In the early years of the federal judiciary, Supreme Court justices lived this value when they rode circuit—traveling the country and hearing appeals in different courts. This allowed the public to view courtroom proceedings, showing the ways in which the new government, and its appellate judges, could serve their needs.³ Since circuit riding ended, however, both federal and state judiciaries have lagged in ensuring public access to court proceedings.

Only in 1980 did the Supreme Court first recognize a constitutional right to courtroom access. In *Richmond Newspapers, Inc. v. Virginia*,⁴ a criminal defendant on trial for murder asked that the courtroom doors be closed to the public, and the judge granted that request.⁵ A local newspaper sued, raising the issue of whether the public had a right to access the trial court's proceedings.⁶ The Supreme Court said yes: The press and the public have a First Amendment right to access criminal trials.⁷

The public may have the right to attend criminal trials, but the Fourth Circuit is the only federal court to hold that the public has a constitutional right to attend appellate court proceedings.⁸ The Ninth Circuit and Seventh Circuit, the only two other federal courts to address the issue, stopped short of finding a constitutional right, instead concluding that there is a presumption of public access to appellate proceedings.⁹ Among the states, about half have general and presumptive “open court” constitutional provisions or statutes.¹⁰ Only six states have specifically addressed the issue of public access to appellate proceedings -- Connecticut, Maine, Missouri, New Mexico, and Rhode Island each have rules of appellate procedure that call for public access to appellate court proceedings.¹¹ The Florida Supreme Court recognizes a “presumption of openness [that] continues through the appellate review

process.”¹² The Nevada Supreme Court has stated that it agrees with other courts' recognition of a public policy towards public access to appellate proceedings.¹³

Even among appellate courts that recognize or practice public access, however, there has been disagreement as to whether that access should include live audiovisual broadcasting.

APPELLATE COURTS' CONCERNS ABOUT CAMERAS

Until recently, many, if not most, litigators, judges, and scholars opposed allowing cameras in the courtroom.¹⁴ They worried that lawyers and judges would grandstand in the presence of cameras, becoming more dramatic, argumentative, or long-winded knowing that their image was being broadcast on television.¹⁵ Other lawyers and judges might feel self-conscious and limit their arguments or their questions.¹⁶ Justice Kennedy expressed concern that allowing audiovisual broadcasting in the Supreme Court would encourage lawyers and justices to engage in sound bites rather than make legal arguments.¹⁷

Another concern has been that cameras would create a “circus” atmosphere and undermine the seriousness of or politicize the matter before the court.¹⁸ The American Bar Association in 1937 drafted a model rule for state bar associations that admonishes judges:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.¹⁹

This rule—or, more accurately, ban—was adopted by all federal jurisdictions and all but three states.²⁰

Incremental change began in the 1980s. After demonstrations urging the Supreme Court to permit cameras in the courtroom and a letter from C-SPAN offering to help make that a reality, Chief Justice Rehnquist formed an ad hoc committee in 1988 to study the issue.²¹ From 1990 to the mid-2010s, federal circuit and state supreme courts began to explore the idea of cameras in the courtroom. A pilot program began in 1991 in which the Second and Ninth Circuits televised appellate arguments.²² While the program did not result in the Judicial Conference mandating cameras in all courtrooms, the Ninth Circuit was permitted to continue using cameras.²³ State supreme courts followed similar test-and-see approaches. The Pennsylvania Supreme Court, for example, spent six months testing audiovisual broadcasting before formally approving oral arguments to be broadcast live on the Pennsylvania Cable Network.²⁴

Nonetheless, many courts remained cautious about allowing cameras in the courtroom. For example, the Alabama Canons of Judicial Ethics prohibit live audiovisual broadcasting of proceedings unless authorized by the presiding judge.²⁵ Such authorization requires obtaining advance consent from the attorneys who will be recorded and establishing a plan to ensure that the live broadcasting will not detract from the “dignity of the court proceedings.”²⁶ The Fourth Circuit, despite having expressly recognized the public's right to access appellate proceedings, refused to permit cameras in its courtrooms, instead opting to broadcast only audio of oral arguments.²⁷

Such hesitancy has largely evaporated during the COVID-19 pandemic.

THE RISE OF LIVE BROADCAST VIRTUAL ORAL ARGUMENTS DURING THE PANDEMIC

The COVID-19 pandemic pushed judicial proceedings, including appellate proceedings, onto virtual platforms. This encouraged appellate courts to consider their commitments to open access and adjust accordingly. Federal courts, including the Supreme Court, instituted live audio broadcasting.²⁸ State supreme courts took this opportunity to bring cameras into the courtroom.

Now, nearly two years into the COVID-19 pandemic, 38 out of the 50 state supreme courts are offering live audiovisual broadcasting of oral arguments:

<u>Alaska</u>	<u>Iowa</u>	<u>New Mexico</u>
<u>Arizona</u>	<u>Kansas</u>	<u>New York</u>
<u>Arkansas</u>	<u>Kentucky</u>	<u>North Carolina</u>
<u>California</u>	<u>Louisiana</u>	<u>North Dakota</u>
<u>Colorado</u>	<u>Maryland</u>	<u>Ohio</u>
<u>Connecticut</u>	<u>Massachusetts</u>	<u>Oregon</u>
<u>Delaware</u>	<u>Michigan</u>	<u>Pennsylvania</u>
<u>Florida</u>	<u>Minnesota</u>	<u>South Carolina</u>
<u>Georgia</u>	<u>Mississippi</u>	<u>Tennessee</u>
<u>Hawaii</u>	<u>Nebraska</u>	<u>Texas</u>
<u>Idaho</u>	<u>Nevada</u>	<u>Washington</u>
<u>Illinois</u>	<u>New Hampshire</u>	<u>West Virginia</u>
<u>Indiana</u>	<u>New Jersey</u>	

In states that have adopted a live audiovisual broadcasting system in response to the COVID-19 pandemic's impact on court access, public engagement has greatly increased. For example, hundreds of viewers logged on to the Hawaii Supreme Court's first-ever live audiovisual broadcast oral argument regarding a water rights case.²⁹ Will a return to in-person arguments prompt retrenchment, or is the genie now out of the bottle? We cannot know for sure, but fear of the unknown and dark predictions of grandstanding have lost much of their power in the debate over cameras in the appellate courtroom.

HOW PUBLICLY ACCESSIBLE, VIRTUAL ORAL ARGUMENTS HELP CLIENTS

Live audiovisual access to appellate proceedings promotes public access and transparency. No audience has a bigger stake in these proceedings than the clients that are a party to them. Here are just a few ways they benefit from audiovisual access:

- Attorneys can share recordings of or links to live audiovisual broadcasts with clients that are new to appeals, so they can learn what to expect of the proceedings.

- Clients no longer have to travel to watch oral argument, saving them significant money and time.
- Clients can view the work of counsel they are interested in hiring, the approach of opposing counsel, and the ways in which appellate judges and justices engage with attorneys, all of which audio recordings and written transcripts only imperfectly reveal.

Clients should, therefore, welcome this development and encourage its continuation.

FOOTNOTES

¹ This client alert uses the term “live audiovisual broadcasting” to describe both live television broadcasts and livestreaming of video as well as audio content via the Internet.

² *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535 (1978); see also JOHN ADAMS, A DISSERTATION ON THE CANON AND THE FEUDAL LAW, NO. 3 (1765), <https://founders.archives.gov/documents/Adams/06-01-02-0052-0006> (last accessed Jan. 3, 2022) (“[L]iberty must at all hazards be supported. . . . And liberty cannot be preserved without a general knowledge among the people, who have a right from the frame of their nature, to knowledge . . . of the characters and conduct of their rulers. Rulers are no more than attorneys, agents and trustees for the people; and if the cause, the interest and trust is insidiously betray[ed], or wantonly trifled away, the people have a right to revoke the authority, that they themselves have deputed, and to constitute abler and better agents, attorneys and trustees. And the preservation of the means of knowledge, among the lowest ranks, is of more importance to the public, than all the property of all the rich men in the country.”).

³ David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1716–17 (2007).

⁴ 448 U.S. 555, 100 S. Ct. 2814 (1980).

⁵ *Id.* at 559–60.

⁶ *Id.* at 562–63.

⁷ *Id.* at 580.

⁸ *United States v. Moussaoui*, 65 F. App'x 881, 890 (4th Cir. 2003) (“[T]he First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court. Such hearings have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings.”).

⁹ *United States v. Sedaghaty*, 728 F.3d 885, 892 n.2 (9th Cir. 2013) (recognizing a “strong public policy in favor of public access to judicial proceedings” to explain why it heard nearly all of the issues on appeal in open court); *In re Krynicki*, 983 F.2d 74, 75–76 (7th Cir. 1992) (“Judges deliberate in private but issue public decisions after public arguments based on public records. . . . Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification. . . . Public argument is the norm even, perhaps especially, when the case is about the right to suppress publication of information.”).

¹⁰ ALA. CONST. ART. I, § 13; COLO. CONST. ART. II, § 6; CONN. CONST. ART. I, § 10; DEL. CONST. ART. I, §

9; FLA. CONST. ART. I, § 21; IDAHO CONST. ART. I, § 18; IND. CONST. ART. I, § 12; KY. CONST. § 14; LA. CONST. ART. I § 22; MISS. CONST. ART. III, § 24; MONT. CONST. ART. II, § 16; NEB. CONST. ART. I, § 13; N.C. CONST. ART. I, § 18; N.D. CONST. ART. I, § 9; OHIO CONST. ART. I, § 16; OKLA. CONST. ART. II, § 6; OR. CONST. ART. I, § 10; PA. CONST. ART. I, § 11; S.D. CONST. ART. VI, § 20; TENN. CONST. ART. I, § 17; TEX. CONST. ART. I, § 13; UTAH CONST. ART. I, § 11; WA. CONST. ART. I, § 10; W.VA. CONST. ART. III, § 17; WYO. CONST. ART. I, § 8; IOWA CODE § 602.1601 (2018).

¹¹Conn. R. App. P. § 70-9; M.R. App. P. 12B(e); Miss. Sup. Ct. Op. R. 20.02(c); N.M. R. App. P. 12-322; R.I. Sup. Ct. R. 22(b).

¹²Barron v. Fla. Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988).

¹³Whitehead v. Comm'n on Jud. Discipline, 111 Nev. 70, 119–21 (Nev. 1995) (citing *In re Krynicki*, 983 F.2d at 75, and Barron, 531 So. 2d at 118., in justifying its decision to refuse to seal its review of charges of judicial misconduct).

¹⁴Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1514–17 (2012).

¹⁵*Id.* at 1514.

¹⁶*Id.* at 1515.

¹⁷*Id.* at 1514–15.

¹⁸*Id.* at 1517.

¹⁹ABA CANONS OF PROFESSIONAL ETHICS, CANON 35 (1937); see also Richard B. Kielbowicz, *The Story behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 14 (1979).

²⁰Kielbowicz, 63 JUDICATURE at 14.

²¹Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and are Cameras Next? Let's Hope So.*, AM. BAR ASS'N (Aug. 24, 2021), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/.

²²*History of Cameras in Courts*, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts> (last accessed Jan. 3, 2022).

²³*Id.*

²⁴Amy Worden, *Pennsylvania Supreme Court to Allow Cable TV Cameras*, PHILA. INQUIRER (Aug. 15, 2011), https://www.inquirer.com/philly/news/breaking/20110815_Pa__Supreme_Court_to_allow_cable_TV_cameras.html.

²⁵Ala. Canons Jud. Ethics 3.A(7); 3.A(7B), <https://judicial.alabama.gov/docs/library/rules/can3.pdf> (last accessed Jan. 3, 2022).

²⁶*Id.*

²⁷*Electronic Device Policy*, U.S. Ct. of Appeals for the Fourth Cir., <https://www.ca4.uscourts.gov/oral-argument/visiting-the-court/electronic-device-policy> (last accessed Jan. 3, 2022).

²⁸ U.S. Sup. Ct. Audio Broad., https://www.supremecourt.gov/oral_arguments/live.aspx (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the First Cir. Audio Broad., https://www.youtube.com/channel/UCiq_Kg0zEPjMFK_s-KP5_g (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Second Cir. Audio Broad., <https://www2.ca2.uscourts.gov/court.html> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Third Cir. Audio Broad., https://www.youtube.com/channel/UCLSXp4JMYiFc7BHD_In3d-w (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Fourth Cir. Audio Broad., <https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Fifth Cir. Audio Broad., <https://www.ca5.uscourts.gov/> (last accessed Jan. 3, 2022) (audio broadcast links posted weekly); U.S. Ct. of Appeals for the Sixth Cir. Audio Broad., <https://www.ca6.uscourts.gov/live-arguments> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Seventh Cir. Audio Broad., https://www.youtube.com/channel/UCWvXsHIWdsIJHy3R_znCUa (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Eighth Cir. Audio Broad., <https://www.ca8.uscourts.gov/> (last accessed Jan. 3, 2022) (audio broadcast public access telephone numbers posted weekly); U.S. Ct. of Appeals for the Tenth Cir. Audio Broad., <https://www.youtube.com/c/theuscourtsofappealsforthe10thcircuit> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Eleventh Cir. Audio Broad., <https://www.ca11.uscourts.gov/live-streaming-oral-arguments> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Dist. of Columbia Cir. Audio Broad., <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20Calendars%20-%20Live%20Audio%20Streams%20of%20Oral%20Arguments> (last accessed Jan. 3, 2022); U.S. Ct. of Appeals for the Fed. Cir. Audio Broad., <https://www.youtube.com/channel/UC78NfBf28AQe3x7-SbbMC2A> (last accessed Jan. 3, 2022). The Ninth Circuit is the only federal appellate court to date to offer audiovisual broadcasting. U.S. Ct. of Appeals for the Ninth Cir. Audiovisual Broad., <https://www.youtube.com/c/9thCircuit> (last accessed Jan. 3, 2022).

²⁹ Madison Adler & Allie Reed, All U.S. Appeals Courts Embrace Argument Streaming Due to Covid, BLOOMBERG (Aug. 4, 2020), <https://news.bloomberglaw.com/pharma-and-life-sciences/all-u-s-appeals-courts-embrace-argument-streaming-due-to-covid>.

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