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Ahead of the Supreme Court's First Telephonic Arguments, Some Tips From the Trenches

Morrison & Foerster's Joseph Palmore recently argued his first telephonic oral argument before the highest court in Massachusetts. He shares his thoughts on what makes a successful session.

BY JOSEPH PALMORE

The U.S. Supreme Court announced this week that it will hold oral arguments in May **by teleconference** and that "[d]etails will be shared as they become available." Those details matter—they'll help determine whether the Court's pandemic-forced innovation will succeed.

I argued an appeal by phone last week. That gives me exactly one more such argument than many appellate lawyers—who, like me until very recently, have done zero. That doesn't make me an expert, but my experience has led to thoughts on how the Supreme Court can make the best of this format.

First a bit of background. I argued before the Massachusetts Supreme Judicial Court, the commonwealth's highest court. Like the U.S. Supreme Court, it's hearing arguments by phone. And the Massachusetts court has seven justices, which makes it similar in size to the U.S. Supreme Court. All of this means the Supreme Judicial Court is something of a test case for the justices and court officers now planning the Supreme Court's phone arguments.

The Supreme Judicial Court follows this standard format for its phone arguments:

First, each advocate gets three minutes at the start of their time to speak without interruption.

Second, justices are recognized in descending order of seniority by the chief justice to ask their questions. The chief justice goes last. After one full round, the chief asks the justices if they have any additional questions.

Third, while each side still has a formal time limit of 15 minutes, no buzzer or chime marks it. Allowing each justice to ask questions in turn (with a second round when necessary) means that many of the arguments have gone over time.

Fourth, the argument audio is live-streamed to the general public.

The Clerk for the Commonwealth Fran Kenneally and his excellent team clearly communicated this format to advocates in advance. The chief justice then reiterated it at the start of each argument.

The U.S. Supreme Court's prior practices and already-announced plans mirror some of this. The

Supreme Court recently began allowing advocates two minutes of uninterrupted time to open their arguments. And the high court has already announced it will livestream the audio of its telephone arguments. A first for the court, livestreaming is a welcome move in favor of public access to its work.

The main challenge of telephone arguments at the Supreme Court will be justices' questioning. A typical Supreme Court argument can be like an 8-on-1 game of ping-pong, in which advocates answer questions in rapid succession from different, often-interrupting Justices. (It's 8-on-1 instead of 9-on-1 because Justice Clarence Thomas is famously silent during oral argument.)

That free-for-all, rapid-fire mode of argument may be ill-suited to a teleconference. Some federal courts of appeals, like the Federal Circuit, have allowed judges to ask questions in the ordinary, unstructured way during phone arguments without much problem. But what works for a three-judge panel may be unwieldy for a nine-Justice Supreme Court.

Anyone who has participated in a large conference call knows how common it is for people to talk over each other, awkwardly pause and then do it again. The slight time lag on the phone and the inability to see visual cues that someone is about to speak can make for a frustrating conversation. Those difficulties are compounded when multiple people are eagerly trying to interject or disagree—people like the justices at a typical argument.

Another problem with attempting the court's traditional, freewheeling approach on the phone would be identifying which Justice is speaking. Veteran court observers may be able to guess a questioning Justice by voice, but first-time advocates and members of the public may not.

One solution would be to follow the Supreme Judicial Court's approach of having justices ask questions in seniority order. That would avoid cross-talk and limit interruptions. It would also allow participants and listeners to identify a justice who speaks because the chief justice would have called on them. But that format would not allow Justices to easily follow up on other Justices' questions, as often happens in live arguments.

If the court prefers a less-rigid approach, it could use a hybrid system. Justices could notify the chief justice by email that they have a question, allowing him to call on each in turn. The chief could use this air traffic-control power to spread questions equitably, identify each speaking justice by name and keep the arguments roughly within their assigned time limits.

On the other side of the equation are the advocates who will argue by phone in May. From the attorney's perspective, what is different about presenting argument by phone? Not much actually. Whether in person, over the phone or on video, the oral advocate's goals are the same: Make the important affirmative points, directly answer questions and know the record and relevant law cold.

To prepare for my phone argument, I had the same kind of moot courts as always. I did the "in-role" portion telephonically to simulate the coming argument, followed by a debrief session on video. I also made the same kind of argument outline I always do. But, just as I never look at an outline during an in-person argument, I did not do so during the phone argument, preferring natural conversation to reading.

A final word on technology and the need for testing. During my argument, audible static could be heard on my line when I spoke, likely due to storms moving through Washington, D.C., at the time. The high court should consider a pre-argument audio check, in which advocates and justices can call in, test sound quality and ensure a good connection.

I commend the court for proceeding with oral arguments. With careful planning and communication, its telephone sessions will be successful. And they will provide the public valuable access to a part of their government that has shown admirable flexibility in proceeding with its business in these difficult times.

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