CLIENT ALERT

Appeal Without Argument: A Coronavirus Contingency, or the New Normal?

Mar.24.2020

Last week, the Supreme Court, the D.C. Circuit, the Ninth Circuit, and several other federal and state courts of appeals took the unusual step of suspending or postponing all upcoming in-person oral arguments. On March 16, the Supreme Court issued a press release postponing arguments for the March session (through April 1), stating that the Court "will examine the options for rescheduling those cases in due course in light of the developing circumstances." The press release noted that this step was not unprecedented, pointing back to the Court's postponement of arguments a century ago, in 1918, during the Spanish Flu pandemic, as well as to episodes in the late eighteenth century when the Court shortened its calendar in response to yellow fever outbreaks.

Several courts of appeals have moved more decisively to rewrite their standard operating procedures for at least the near term, indicating that they will hear some cases via tele- or videoconference, while some arguments may not take place at all. The D.C. Circuit issued an order explaining that each panel would decide whether to (a) proceed by teleconference, (b) postpone argument, or (c) decide without argument. The Ninth Circuit issued a similar order, explaining that, through April and likely May, hearings will be rescheduled, submitted on the briefs, or argued remotely via teleconference or video. That court—an early adopter of video-streaming technology among the federal courts of appeals—also noted that any arguments held would be live-streamed to ensure continued public access. Not all courts of appeals have discontinued in-person argument, however. The Third Circuit, for example, is so far continuing to hear cases as usual, while the Second Circuit is allowing counsel to appear at the courthouse, but with the judges participating remotely. As more localities issue shelter in place orders, however, we expect to see more courts following the examples of the Ninth and D.C. Circuits.

Appellate advocates might fairly ask whether, if the COVID-19 pandemic continues for months or longer, appeals without in-person oral argument will become an accepted new norm. Or even if just short-lived, will the COVID-19 experience lead appellate courts to conclude they could make due just fine with fewer oral arguments? Only time will tell, of course, but scholars and judges alike have cast doubt on the usefulness of appellate oral arguments for years, arguing—with empirical support—that they rarely change the outcome that would have resulted from a decision on the briefs. *See* Michael Duval, *When Does Oral Argument Matter*, A Judicial Clerk's View of the Debate, 9 J. APP. PRAC. & PROCESS 121 (2007) (collecting scholarship on the subject). Justice Thomas of the U.S. Supreme Court, for example, has sometimes explained his habit of declining to ask questions during Supreme Court arguments with comments that suggest that he doubts the efficacy of oral argument. Similar doubts have been raised about argument before state appeals courts. For example, Professor Daniel Bussel has noted that oral argument rarely changes the outcome in the California Supreme Court, which drafts and votes on opinions *before* argument, and must issue them within 90 days after. While some outcomes do change after argument, most observers have concluded that it is a relatively small minority.

After several months of deciding cases without holding in-person oral argument, perhaps some courts of appeal may move permanently to a model where fewer cases are allocated arguments (or at least fewer cases are argued in the traditional courtroom setting) and more are decided either on the briefs or via teleconference. Not only does that approach avoid the

potential for germ transmission during public health emergencies—which will hopefully remain rare—it may alleviate the pressure on the courts associated with an ever-increasing docket, compounded by unfilled vacancies. Having tasted a new and potentially less time-consuming approach to resolving appeals, some judges may thereafter advocate for more authority to decline to allow argument in relatively straightforward cases, or exercise existing authority to that end more freely. While it seems unlikely that the courts of appeals would permanently move away from in-person oral argument, on which both judges and lawyers have historically placed great emphasis—and many on both sides of the bench view as the most enjoyable part of their practice—only time will tell whether the courts' COVID-19 contingency plans will permanently change the way some of the federal and state courts of appeals handle their dockets.

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