

How Appellate Practitioners Can Adapt To Pandemic Measures

By **Tim Droske** (April 1, 2020, 5:42 PM EDT)

The U.S. Supreme Court — notwithstanding its reputation as a slow-moving institution — has responded rapidly to the COVID-19 pandemic sweeping the nation. On March 12, the court closed the Supreme Court building, citing health and safety concerns for the public and Supreme Court employees.

Recently, the court postponed its March session oral arguments and invoked past precedent — noting that its October 1918 arguments were postponed in response to the Spanish flu epidemic, and in 1793 and 1798, the court's argument calendars were shortened in response to the yellow fever.



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And on March 19, the court issued a new order, recognizing the impacts “the ongoing public health concerns relating to COVID-19” may be having on attorneys, by ordering deadlines on petitions for a writ of certiorari to be extended to 150 days from 90 days, and ordering that motions for extensions will ordinarily be granted as a matter of course if the grounds cited are related to COVID-19 and the requested extension is reasonable.

Most federal courts of appeals across the country are responding similarly. Public access to the courthouses has largely been restricted. Scheduled arguments have largely been postponed, although courts like the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Seventh Circuit and the U.S. Court of Appeals for the Federal Circuit, for example, are instead hearing arguments telephonically. And many courts are advising attorneys that they are relaxing certain filing deadlines or paper copy requirements, and are also allowing extensions as a matter of course for COVID-19-related reasons.

For appellate practitioners, there are a few key things to keep in mind amid this situation.

Things are changing daily.

It is thus critical that attorneys continue to check the appellate court's homepage on a daily basis to see if there are new updates that could impact the briefing or argument in a case.

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Courts are exhibiting flexibility on deadlines. But attorneys should not treat the deadline to file the

notice of appeal as being similarly flexible. The U.S. Court of Appeals for the Third Circuit has been explicit in this respect, specifically stating that “[t]he due date for a notice of appeal, petition for review or other document that confers jurisdiction on the Court is not altered by [its] notice” extending deadlines for other filings.

And while Federal Rule of Appellate Procedure 4(a)(5), for example, provides a means to request that the district court extend the time to file a notice of appeal, it is unclear whether citing COVID-19 would be an adequate basis for such relief, which in any event would be subject to the district court’s discretion.

Additionally, while appellate courts are being increasingly flexible on deadlines, it is important to make sure the particular circuit’s rules are being carefully followed. While some courts have extended deadlines automatically, many others — even those granting extensions as a matter of course — still require that the extension be specifically requested and cite COVID-19 interruptions.

Use the extra time well.

While appellate brief writing is one of the easiest things to do whether in the office or now, from home, the interruptions due to COVID-19 are real. Productively working from home presents new challenges for attorneys who are parents and now have their children at home. Coordination with clients and getting appropriate approvals on the briefs could take more time as businesses are scrambling to address the COVID-19 situation.

And the new economic environment — along with the possibility of a longer period of time before an appellate decision issues — could change a client’s view about pursuing an appeal. It is important to factor all of this in when scheduling your brief writing.

Write briefs that are easily read electronically.

Over the past few years, judges have been increasingly reading briefs electronically. But with many circuits no longer accepting paper copies due to the public health concerns surrounding COVID-19, judges reading briefs electronically will become even more prevalent. It is thus more important than ever that briefs be easy to read on iPads and other electronic devices, and not only when printed and bound.

For example, clear, succinct, and frequent headings and subheadings are critical to break up the text. Moreover, there is a greater risk of overly long paragraphs being skimmed rather than fulsomely read. And hyperlinks and interactive tables of contents and authorities are small things to consider that can make it easier for judges when reading briefs electronically.

Prepare for remote oral arguments.

Federal appellate courts around the country are postponing or cancelling oral arguments or holding argument telephonically. Some courts may solicit the attorneys’ views, in which case counsel will need to weigh the value in potentially earlier disposition by waiving oral argument, as opposed to the utility in having oral argument held telephonically and perhaps at a later date.

Furthermore, as courts move to telephonic oral arguments, the dynamic of oral argument may change. While the goal for oral argument has always been to have a conversation with the judges about the

case, a telephonic conference call with multiple people on the line is inherently different from a conversation with people physically gathered in the same room. Visual cues will be lost. And the limited amount of time allotted for oral arguments could feel even shorter if time is taken up with people unintentionally interrupting each other, speaking over each other, or expressing difficulties in hearing what someone has said.

To mitigate this, judges may be inclined to ask fewer questions in a telephonic hearing than they otherwise would in person, meaning the rapid-fire question and answer most appellate attorneys are accustomed to at oral argument may not occur. To prepare for these new dynamics, counsel should be sure to hold moot courts that attempt to replicate as closely as possible how the actual oral argument will be held, whether telephonically or otherwise.

Will there be any impact on opinions?

One thing that remains to be seen is what impact, if any, the COVID-19 pandemic will have on opinions issued by the federal appellate courts. The strains on the judiciary could mean that it takes longer for courts to issue their decisions. It is also possible that there will be an increase in the number of nonprecedential and per curiam decisions issued by the appellate courts, particularly if more cases are decided on the briefs and without oral argument.

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