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Appellate Litigation in the Age of COVID-19

The United States Supreme Court and other federal and state appellate courts are adjusting their practices in response to the COVID-19 pandemic. Courts are canceling arguments, postponing them, or providing for telephonic arguments and are making other adjustments in procedures, schedules, and formats. We provide an overview of the steps taken to date by the United States Supreme Court, federal courts of appeals, and state appellate courts in light of the ongoing emergency.

Key Takeaways

- The United States Supreme Court has indefinitely postponed arguments from its March and April sittings.
- The Supreme Court is otherwise proceeding with its business, issuing opinions by posting them on its website; the Justices have continued to hold their scheduled conferences, calling in from their homes rather than convening in person.
- The Supreme Court appears to have slightly slowed the pace at which it grants review in new cases. If the Court reschedules this spring's arguments to the fall, it may grant review in fewer cases to compensate.
- The Supreme Court has issued an order modifying certain deadlines, including extending the deadline for petitions for review and signaling that other extension requests will be granted in the ordinary course. But it has not yet modified its paper filing requirements.
- Lower courts of appeals have generally either postponed oral arguments or proceeded with telephonic arguments, encountering some technological difficulties. Several courts have extended deadlines and dispensed with or modified paper filing requirements.

United States Supreme Court

Oral Arguments

At the beginning of the COVID-19 emergency, the Supreme Court had two argument sessions remaining this term: a March sitting, slated to run from March 23 to April 1, and an April sitting, slated to run from April 20 to April 29. On March 16, the Court indefinitely postponed the oral arguments that were scheduled for the March sitting, announcing that it "will examine the options for rescheduling those cases in due

course in light of the developing circumstances." On April 3, the Court likewise postponed the April arguments. It announced that it will "consider rescheduling some cases" from the two sessions before the end of the Term "if circumstances permit in light of public health and safety guidance." The Court further indicated that it will "consider a range of scheduling options and other alternatives if arguments cannot be held in the Courtroom," suggesting that it would at least contemplate arguments by audio or video conference.

The cases scheduled to be heard in the two sessions include the disputes over President Trump's financial records, which had been scheduled to be argued on March 31, and cases challenging "faithless elector" laws that seek to bind the vote of a State's presidential electors, which is scheduled to be argued on April 28. The sittings also included many significant but potentially less time-sensitive cases, including cases involving the government's ability to place conditions on expressive policies of groups receiving federal funds; Oklahoma's ability to exercise jurisdiction over serious crimes on a large portion of its land; a conscience exemption from the Affordable Care Act's birth-control mandate; copyright protection for a software interface; and the ability of courts to adjudicate employment-discrimination claims by employees of religious schools.

The Court has three options for resolving the March and April cases. *First*, it may decide the cases without oral argument, as it does sometimes when it summarily reverses the decisions of lower courts. *Second*, it may choose to conduct oral arguments by video or audio conference or by some other means. *Third*, the Court could simply postpone arguments and reschedule them after the COVID-19 emergency subsides. That could push arguments to the fall, if not later.

We think the third option is the most likely outcome for cases that are not time-sensitive. We think the Court will be reluctant to decide many of the significant and contentious cases before it without conducting oral arguments. Likewise, we think the Court is unlikely to opt for telephonic arguments for the full slate of cases, given the Court's historical reticence to alter the argument format by, for example, allowing for live streaming or cameras in the courtroom. The technical difficulties that have been marring lower-court telephonic arguments, discussed below, would likely be amplified at the Supreme Court level given that most of the Justices are very active at argument and given the Court's deeply ingrained adherence to formal traditions. By contrast, there is no major downside to deferring argument for cases that are not especially time-sensitive, assuming the delay is for no longer than a few months.

If the Court does opt to reschedule the arguments after the COVID-19 emergency subsides, it may choose to hold the arguments in October, when it would normally begin arguments for the 2020 term. The practical effect of doing so would be delaying by a few weeks the cases currently slated for next term and any additional cases in which the Court grants review. Such a delay would be immaterial; if anything, it would enable the parties in those cases to get more generous extensions of time for their briefing. Of course, if the COVID-19 emergency is not over by October, the Court may need to postpone arguments for even longer.

As for the cases mentioned above that are time-sensitive, it is unclear what the Court will do. Because many of the lawyers involved in those cases are based outside Washington, any sort of modified in-person argument before the end of the term seems exceedingly unlikely. Argument by video or audio conference carries the risk of technical difficulties, which would be particularly pronounced in those high-profile cases. And it is unclear whether the Court will feel comfortable deciding such important cases without argument. While the Justices could issue written questions and ask the parties to submit written responses, that also seems unlikely, as it would require a majority of the Justices to agree on the questions themselves.

Perhaps the most palatable option would be to reschedule those cases as soon as arguments can safely be held—perhaps even over the summer, when the Court would normally be in recess and the Justices would ordinarily be traveling and speaking all over the world. Given the uncertainty about when the COVID-19 emergency will subside and the time-sensitive nature of the cases, however, the Court may ultimately decide to proceed with arguments in those cases by video or audio conference, perhaps adopting procedures to minimize the potential for Justices and lawyers to speak over each other.

Grants of Review and Decisions in Argued Cases

The COVID-19 emergency also appears to be affecting the process of granting review (or "certiorari") in new cases. Since the beginning of the widespread shutdowns, the Court has granted review in only one case. Although the sample size remains small, the Court appears to be moving slightly more slowly in filling its docket, perhaps anticipating the potential backlog of this term's cases that will need to be pushed into the fall. In particular, the Court may be particularly reluctant to grant review in contentious, closely divided cases. It is not yet certain, however, whether there will be a material effect on the overall number of grants of review going forward.

In other respects, the Court is proceeding with its normal work. The Justices convened for their scheduled weekly conferences on March 20 and 27, with the Justices largely participating remotely. The Court has also been issuing opinions, dispensing with the traditional procedure of the Justices taking the bench to provide an oral summary of their opinions. Instead, the Court has been posting opinions on its website. It is possible that the Court will proceed more quickly to issue some of this term's anticipated opinions in cases that have already been argued, given the additional time the Court will have to work on the opinions in lieu of preparing for oral arguments.

Procedures for Litigants

The Supreme Court issued an order modifying certain procedures in light of the COVID-19 emergency. For parties seeking review, the Court has extended the applicable deadlines. Petitions for review are now due 150 days, rather than 90 days, after the applicable lower-court ruling. Notably, by operation of statute, the Court cannot grant additional extensions beyond that time in civil cases. The Court has also stated that motions for extensions of time to file other documents—such as briefs in opposition, reply briefs, and merits

briefs—will ordinarily be granted. The changes do not apply to cases in which the Court has already granted review. The Court has not dispensed with paper-copy filing requirements, and we believe it is unlikely to do so. It has, however, implemented enhanced screening procedures for hand-delivered filings, "strongly encourag[ing]" parties to send filings by mail or commercial carrier instead.

Federal Courts of Appeals

Although the practices in the federal courts of appeals vary, those courts have generally chosen to hold arguments telephonically; dispense with oral argument altogether and decide case on the written briefs; or postpone arguments until the end of the COVID-19 emergency.

Telephonic arguments pose particular problems for appellate courts because multiple judges are on each panel, often accustomed to peppering advocates with rapid-fire questions in no particular order. Some circuits seem to have greater technological capabilities than others. The Ninth Circuit, for example, is conducting video arguments. The court has extensive prior experience with videoconferencing technology, as it has permitted both judges and lawyers to appear by video in certain circumstances even before the current crisis. Consistent with past practice in that circuit, the arguments have been live-streamed, and they are also posted online for subsequent viewing. Even in the Ninth Circuit, however, there have been some glitches as judges and lawyers have adapted to the virtual format. Delays in the video feed in the Ninth Circuit sometimes caused participants to talk over one another. The D.C. Circuit's first telephonic arguments likewise faced various technical difficulties, including dropping participants from the line, eliciting frustration from the judges on the panel.

The Second Circuit has adopted a process specific to telephonic arguments, providing three minutes of uninterrupted time for the advocate, followed by a dedicated period for each judge to ask all of his or her questions. Those modifications have helped to avoid confusion. We expect to see other courts adopting similar procedures to fit the new argument format.

Aside from making adjustments to oral argument, many courts of appeals are also either postponing all filing deadlines for a certain period or indicating that they will liberally grant motions for extension, and many are also dispensing with paper-copy filing requirements.

State Appellate Courts

On the whole, state appellate courts appear to be more technologically adventuresome than their federal counterparts. Many state appellate courts are providing for videoconference arguments, including courts in California, Texas, and North Dakota. Some have even been using commercially available videoconference programs such as Zoom, seemingly without cataclysmic consequences. Others, including New York, Pennsylvania, and Washington, have postponed or canceled arguments. Many state appellate courts are also extending filing deadlines.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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