

# Report of a Survey of Videoconferencing in the Courts of Appeals

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Federal Judicial Center  
2006

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct education programs for judges and judicial branch employees. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

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## **Overview of Survey Findings**

Several courts of appeals have established programs by which oral arguments are heard via videoconferencing. Fourteen federal appellate judges with varying degrees of experience with videoconferencing were interviewed for this project. The judges spoke about advantages and disadvantages of using videoconferencing for oral arguments and other court business, the extent to which videoconferencing altered the dynamic between judge and attorney during oral arguments, and any problems they had encountered in using the technology. The following is a brief overview of the project's findings.

- Videoconferencing is used for conducting oral arguments in the Second, Third, Eighth, Ninth, and Tenth Circuits. It has also been used to discuss cases that are not scheduled for oral argument in the Fifth Circuit (in a now-discontinued program) and the Ninth Circuit.
- The quality of the technology involved is a critical factor and clearly shaped the judges' evaluations of their experiences.
- All judges cited the way in which videoconferencing saved travel time and money as the primary benefit to conducting oral arguments via videoconferencing. Other benefits cited included increased scheduling flexibility for the courts and attorneys, increased access to the courts for litigants, and a more timely hearing of cases.
- For the judges interviewed, the benefits of videoconferencing outweighed the disadvantages. The most frequently mentioned disadvantages were technical difficulties (such as dropped or bad connections) and the decreased level of personal interactions during videoconferencing.
- Judges rarely cited the audio delay that accompanies remote transmissions as a problem. Improved technology was credited with significantly reducing the audio delay.
- All of the judges indicated that videoconferencing did not significantly hinder their ability to understand the case, although some judges believed they asked fewer questions and were less likely to interrupt when the argument took place via videoconference.
- The extent to which judges had experience with videoconferencing was also a factor in their perceptions of the technology.
- When used to discuss cases not scheduled for oral argument, videoconferencing results in a significant savings of travel time for judges, and Ninth Circuit judges cited that as the primary benefit.
- Videoconferencing is also used to conduct court business, such as committee or court meetings, in the Second, Third, Eighth, Ninth, and Tenth Circuits. The judges who have used videoconferencing for these purposes cited the reduced travel time as the primary benefit.

## **Introduction**

Videoconferencing permits participants at different locations to see and hear one another via audio and visual transmission. In the appellate court system, oral arguments can be conducted without the presence of all participants at a single location, and judges sitting in different locations can confer and collaborate.

Five courts of appeals have established programs by which oral arguments are heard via videoconferencing. In those courts, the attorneys generally appear remotely while the judges convene in a courtroom; occasionally, however, attorneys may appear in court with fewer than three judges, with the remaining judge or judges appearing remotely. The ability to appear remotely (either as a judge or an attorney) saves considerable travel time (particularly in circuits encompassing vast areas) and allows for more flexibility in case processing. Videoconferencing can also permit appellate judges to discuss cases without meeting in the same physical location.

A videoconference is essentially a televised telephone call, in which both audio and visual signals are transmitted both ways. Both the near side (generally the courthouse) and the remote side (generally the location of the attorneys) have cameras to generate the video signals and monitors to display the video signal, as well as microphones and speakers for the audio signals. The signals are transmitted via data lines and processed into readable format by equipment called a codec.

In the case of oral arguments in appellate courts, the courtroom layout can include cameras that capture the images of the judges at the bench and transmit those images to the monitors in front of the attorneys at the remote location. Similarly, cameras in the remote location transmit the images of the attorneys to monitors located in front of the bench in the courtroom. Most monitors used for videoconferencing are equipped with picture-in-picture capabilities so that, for example, judges can see the image they are projecting in a corner of the monitor. Microphones at each location pick up the audio signals and speakers allow each side to hear the others.

Audio signals in a videoconference are not transmitted simultaneously with the video signals, as microphones and speakers loop back and cause interference. In practical terms, that means conversations cannot overlap as they can in a telephone conversation, and participants must make sure the other side is finished speaking before they themselves can speak. This audio delay is one of the potential frustrations with videoconferencing. Other aspects of the technology may also hinder the argument process, by, for example, making it more difficult for judges to interrupt a speaking attorney to ask a question. Such potential problems were identified and examined in this project.

### **Appellate Court Use: Oral Arguments**

Oral arguments in appellate courts, unlike such arguments in trial courts, do not involve assessing credibility or weighing pieces of evidence, and thus

many of the criticisms aimed at the use of videoconferencing in trial courts do not apply. For example, because it is not the job of the appellate courts to determine credibility, the effect of remote appearances on witness credibility is not relevant. However, some different concerns attend the use of videoconferencing in appellate courts.

Oral argument provides an opportunity for counsel and judges to discuss the major points in the case in a limited amount of time (usually only fifteen or twenty minutes per side). The argument often focuses on particular points of law or questions about the facts in the record. It can involve probing questions from the judges, and effective advocacy can depend on counsel's demeanor as well as the content of the responses. If videoconferencing impedes this process and hinders the ability of the court to address key issues, the use of the technology may need to be adjusted to accommodate these problems.

## **Method**

### **Clerk Interviews**

To reduce the amount of judges' time needed for the interviews, we first interviewed the clerk of court in each of the circuits in which videoconferencing is used for appellate oral arguments. These courts of appeals were identified by the Administrative Office as using videoconferencing technology.<sup>1</sup> The clerks provided valuable background information about the history of videoconferencing in their particular circuits, basic technological information, the way in which videoconferenced oral arguments are scheduled and conducted, and the typical courtroom setup for a videoconferenced oral argument. The clerks also provided information about any other ways in which videoconferencing was used in the circuit. Finally, the clerks suggested judges for us to speak with regarding videoconferencing.

Interviewing the clerks before speaking to the judges allowed us to understand the status of videoconferencing in each circuit and ensured that, when we did speak to the judges, we did not have to waste time covering the basics and could instead focus on each judge's personal experience with videoconferencing.

We interviewed clerks of court of the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits.<sup>2</sup> Although we interviewed the clerk for the Eighth Circuit, we interviewed a Bankruptcy Appellate Panel judge rather than a court of appeals judge in that circuit, at the clerk's suggestion. We did not query appellate clerks in other circuits about BAP usage of videoconferencing, nor did we speak with the BAP clerks.

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1. As reported on the J-Net at [http://jnet.ao.dcn/Facilities/Courthouse\\_Technology/Videoconferencing\\_Courts.html#Appellate\\_Courts](http://jnet.ao.dcn/Facilities/Courthouse_Technology/Videoconferencing_Courts.html#Appellate_Courts).

2. We also interviewed the clerk for the Court of Appeals for the District of Columbia, who said videoconferencing was not used in that circuit. As a result, we interviewed no judges from the D.C. Circuit.

## **Judge Interviews**

Before the interviews with appellate judges, researchers developed a series of interview questions to help the judges characterize their use of the technology and their opinions about its use. Such questions included questions about frequency of use (e.g., How often have you been involved in oral arguments that have used videoconference?); general opinions about videoconferencing (What do you see as the benefits to holding oral arguments via videoconference? Have you noticed any disadvantages to holding oral arguments via videoconference?); and specific issues about videoconferencing (Is there an audio delay? Do you feel you are left with incomplete information after a videoconferenced oral argument? Do you think you ask as many questions during a videoconferenced argument as you would in a live argument?). We also asked judges in the Fifth and Ninth Circuits about the use of videoconferencing in discussing cases that were not scheduled for oral arguments. A copy of an interview template is included as an appendix.

The fourteen federal appellate judges who were interviewed for this project represented five different circuits and were identified by the appellate clerks as having had experience with videoconferencing. The breakdown by circuit was as follows: two judges from the Second Circuit, four judges from the Third Circuit, one judge from the Fifth Circuit, one judge from the Eighth Circuit, four judges from the Ninth Circuit, and two judges from the Tenth Circuit. One additional judge in the Fifth Circuit declined to participate in the project. The judge in the Eighth Circuit was a member of the Bankruptcy Appellate Panel; all other judges were court of appeals judges.

Interviews were conducted in the fall of 2004, and judges were asked about their videoconferencing experiences for the twelve months preceding the interview date. With one exception, responses cover the time period from late fall of 2003 to late fall of 2004. One judge no longer heard videoconferenced oral arguments at the time of the interview; he had opted out of his circuit's videoconferencing program approximately eighteen months before. However, he had extensive experience with videoconferenced oral arguments in the several years before his withdrawal and was included in the survey for that reason.

The fourteen judges who participated in this project illustrate the variety and extent to which videoconferencing is used in the appellate court system. However, the small sample size should be remembered when considering the results, and those judges' views should not be assumed to represent the experiences that all appellate judges have had with videoconferencing technology.

## **Results**

### **Clerk Interviews**

The following is a summary of interviews with the clerks of the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits. Judges in each of these circuits have conducted oral arguments via videoconferencing for several years. Depending

on the circuit, the remote participant is usually either a single judge or one or both attorneys involved in the appeal.

### *History and Overview*

The Second Circuit uses videoconferencing primarily for oral arguments, and has done so since approximately 1999, when the court's original videoconferencing system was installed. The original system was replaced with an updated one in 2001 when courtrooms were renovated. The newer system has been quite successful, according to the clerk, and is intended for attorneys to appear remotely. When that occurs, one attorney is generally in the courtroom with the panel of judges and the other attorney appears remotely from a courtroom in another courthouse within the circuit. In a typical week, two or three oral arguments are scheduled to be heard via videoconference, representing about 10% of the total number of oral arguments conducted by the circuit per week.

The Third Circuit has used videoconferencing for oral arguments since 2001. The original system was installed for reasons of convenience, to make the arguments more accessible to attorneys in relatively remote locations and to judges who would prefer not to travel beyond their assigned courthouse due to illness or advanced age. It has not been used as often as anticipated, and currently an average of one oral argument a month is heard via videoconferencing. In those cases, it is generally a single judge (although not the same judge each time) who participates remotely. Both attorneys and the other two judges appear together in the courtroom.

In the Fifth Circuit, although the circuit is technically capable of using videoconferencing, the court of appeals has not used videoconferencing for oral arguments since 2001. In that circuit, videoconferencing was primarily used in a one-year experimental program of cases not subject to oral argument. In the program, members of a three-judge panel met weekly via videoconference to discuss cases that were not scheduled to be argued as well as to revise draft opinions for those cases. The program was discontinued after one year, when the participating judges decided it was easier and less time consuming to revert to the circuit's traditional methods for deciding the cases (i.e., all case paperwork is sent to the panel's initiating judge, who prepares a draft opinion and then sends the paperwork and draft opinion to the second and third judges for comments and revisions).<sup>3</sup>

Videoconferencing has been used for oral arguments in the Eighth Circuit since the court moved into its new federal courthouse building in 2000. The new courthouse was designed to enhance the use of technologies such as videoconferencing. The court of appeals has only used videoconferencing for oral arguments a few times, but the Bankruptcy Appellate Panel uses the technology more frequently. For both courts, videoconferencing is only used on an ad hoc basis and it is most often the attorneys who appear remotely, usually from

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3. The videoconferencing equipment is still available for use by the circuit, but to the best of the clerk's knowledge it has not been used.

another courthouse in the circuit. Occasionally, however, a BAP judge participates in an oral argument remotely.

In the Ninth and the Tenth Circuits, the technology has been in use since its installation in 1998. The Ninth Circuit uses videoconferencing for oral arguments infrequently and on an ad hoc basis. When it is used, both attorneys and judges have appeared remotely. The circuit uses videoconferencing primarily for motions and screening panels, certificate of appealability panels, and circuit meetings. For motions and screening panels, a three-judge panel meets for one week each month to hear cases not scheduled for oral argument. In most of the week-long panels, videoconferencing is used and it has been used for approximately six years; judges appear remotely from their chambers and the attorneys are in San Francisco. For the certificate of appealability panels, a two-judge panel meets biweekly to hear those requests in habeas cases. According to the clerk, the majority of these panels are conducted via videoconferencing (occasionally by telephone); as in the motions and screening panels, the judges appear remotely from their chambers and the attorneys are in San Francisco. Circuit meetings are also often conducted via videoconference, and multiple judges participate remotely from their chambers.

The Tenth Circuit, on the other hand, relies heavily on videoconferencing for oral arguments for criminal cases. In most situations, both attorneys appear remotely from the same location (usually a district courtroom within the circuit). One Friday a month, one of the four available courtrooms is devoted to hearing oral arguments via videoconference; the other three are used for live appearances. Thus, in a typical month, six oral arguments are heard via videoconference, and cases are randomly assigned to be heard live or via videoconference.

*General Courtroom Set-Up When Attorneys Appear Remotely.*

The Second, Eighth, Ninth, and Tenth Circuits have set up their videoconferencing so as to permit one or both of the attorneys to appear remotely for oral arguments. In the Tenth Circuit, when appearing by videoconference, both attorneys are in the same remote location. In the other three of these circuits, only one attorney generally appears remotely, with the other attorney appearing in the courthouse in front of the panel of judges.

In the circuits in which a single attorney appears remotely, he or she is usually seen by participants in the courthouse only when speaking at the podium. In the Second Circuit, the remote attorney sees a split screen of all three judges and the other attorney on a monitor. In the Eighth and Ninth Circuits, the remote attorney sees either the three-judge panel or the other attorney, depending on who is speaking. If a judge is speaking, all three judges are visible. In the Tenth Circuit, when an attorney participates in a videoconferenced matter from a remote location, his or her image is visible to the courtroom whenever he or she speaks. All attorneys participating in the videoconferenced matter are able to see the entire three-judge panel. The remote attorneys usually appear from



their local courthouse, although occasionally appear at a public videoconferencing location, such as Kinko's.

#### *General Courtroom Set-Up When Judges Appear Remotely*

The Third, Fifth, Ninth, and Tenth Circuits and the Bankruptcy Appellate Panel for the Eighth Circuit have a setup in which one judge participates in videoconferenced matters from a remote location, most often from his or her chambers. The image of the judge who participates from a remote location is seen on a monitor placed on the bench beside the other two judges in the courthouse. This placement preserves the appearance of a three-judge panel for the arguing attorneys. What the remote judge sees during the videoconference varies by circuit. In the Third and Eighth Circuits, the remote judge can see both the speaking attorney and the other judges; in the Ninth and Tenth Circuits, the remote judge can see only the speaking attorney (and not the other judges). The Fifth Circuit no longer uses videoconferencing for oral arguments, but when it did, it was to accommodate the needs of a judge with a medical condition who could not travel. At the time this project was undertaken, this judge had closed his chambers and was unavailable for comment.

#### *Commonly Reported Problems and Complaints*

Of the five appellate clerks interviewed, the clerk in only one circuit, the Tenth, reported ongoing problems with videoconferencing. According to that clerk, sound problems are the biggest hurdle to videoconferenced oral arguments. Attorneys appearing remotely are occasionally inaudible or difficult to hear. Whereas these types of problems can be easily resolved before the start of the argument, the clerk reported that a noticeable delay in the audio transmission occurs each time the system is used. The circuit has not been able to remedy this delay, so, according to the clerk, participants have worked out hand signals to avoid the worst of it.

The other circuits reported only minor problems. Clerks in the Second and Third Circuits cited initial connection problems as the most frequent technical difficulty they experienced. The clerk in the Fifth Circuit reported a short loss of audio during one videoconferenced oral argument, and the Ninth Circuit reported occasional dropped phone lines during arguments. With the exception of the Tenth Circuit's, all of the technical problems were easily resolved or avoided entirely by testing the equipment prior to commencing oral arguments.

In most circuits, either the court's information technology specialist or a knowledgeable courtroom deputy remained on hand (either physically or within range of paging) to assist when problems arose.

### **Judge Interviews**

#### *Videoconferenced Oral Arguments*

The judges' experiences with videoconferencing for appellate oral arguments varied widely and reflected a range of uses, including hearing arguments from a remote site (i.e., their chambers or a different courthouse), hearing arguments

in which one or both attorneys appeared remotely, or both. Judges were asked how many times they had appeared remotely themselves for oral arguments. They were also asked how many times they participated in oral arguments in which one or both attorneys appeared remotely.

Because the judges we interviewed reported a wide range of videoconferencing experiences, their responses have been categorized in the discussion that follows as “more experienced” or “less experienced” with videoconferencing. To arrive at these categorizations, we calculated the judges’ estimates of how many times either they or the attorney(s) involved in matters before them had appeared remotely in the twelve months preceding our interview, and a median split was performed. The seven judges who reported eight or more instances of videoconferencing were categorized as “more experienced” and the seven judges who reported fewer than eight instances of videoconferencing were categorized as “less experienced.”

Of the seven more experienced judges, five had appeared at least twice remotely for oral arguments. Two of these, due to arrangements with the circuit, had heard all arguments in the past year via videoconferencing. Of the rest, two judges appeared remotely six times and one judge twice. All seven had heard at least six oral arguments in which one or more attorneys appeared remotely. Four judges indicated they had heard oral arguments with remote attorneys more than thirty times (including the judge who no longer participated in videoconferenced oral arguments and one of the two judges who had heard all arguments in the past year via videoconferencing), one judge twelve times, and the remaining two judges had heard six arguments with remote attorneys.

Of the seven less experienced judges, only three had appeared remotely, and each of those had only appeared one time. Six judges had been involved in oral arguments in which one or more of the attorneys had appeared remotely, with frequencies ranging from once to six times. One judge had no personal experience with videoconferencing for oral arguments but had been involved with videoconferencing for cases not orally argued.

#### *Advantages to Videoconferenced Oral Arguments*

All judges were asked to identify what they viewed as the primary benefits associated with using videoconferencing for oral arguments. Regardless of the amount of experience judges had with videoconferencing, almost all of them cited, as its primary benefits the way in which videoconferencing saved travel time and money. One judge cited only the time savings as a benefit; all others mentioned both reasons. Because travel time is often billed back to the client, it is difficult to separate the time savings from the financial savings. In cases in which U.S. attorneys and federal defenders appear remotely (as in the Tenth

Circuit), videoconferencing also provides substantial financial savings to the government.<sup>4</sup>

The time savings are a major benefit for judges, especially in geographically large circuits. With videoconferencing, “you don’t have to deal with the dead time of spending all that time in a hotel.” Another judge noted that eliminating travel time also reduced costs, saying that “it’s critical to save as much money as we can in these times and videoconferencing is a good way to do it.”

The judges are not the only ones to benefit from videoconferencing. As a judge in the Second Circuit observed, “For the lawyers, it’s a great savings of time and expense. They can go back to their offices after the argument, and the whole thing will be done in about an hour. If they have to come to New York, they have to pay for hotel and airfare, and it takes a day and a half of their time and their client’s money.”

Several judges mentioned scheduling flexibility as an additional benefit because oral arguments can take place even if a judge or attorney faces a one-time health problem or other emergency that prohibits him or her from reaching the site of oral arguments.

Videoconferencing also allows the court to make special accommodations for judges who may be ill or unable to travel or might otherwise be unable to participate. Two of the judges interviewed for this project heard all of their oral arguments via videoconference as a result of arrangements with their circuits. Both praised the convenience of videoconferencing for sparing them and their clerks significant travel time, and they noted that the arrangements worked well.

Three judges also mentioned the way in which videoconferencing can promote access to the court, by permitting litigants to appear who might not otherwise be able to afford oral arguments. As one Ninth Circuit judge put it, “More cases can be scheduled for oral argument. There are many litigants, especially Social Security litigants, who can’t afford to come for oral argument, but would be able to via videoconference.” Another Ninth Circuit judge raised a similar point, saying, “Not every lawyer wants to show in court, and it’s not a lack of commitment to the case, but more an economic decision. Videoconferencing solves that. We’re definitely better off with videoconferencing than with no argument at all, which is often the only alternative.”

Finally, videoconferencing can also promote a more timely hearing of cases in the Bankruptcy Appellate Panels. According to one Eighth Circuit BAP judge, “We have so few cases that we tend to save them up until there are enough to justify traveling to a court. When you have to fly all the judges and staff to [the appeals] location just for one case, it’s expensive and time consuming. So we try to wait until there are enough cases in that location that we can combine them. But what that means is that a case might get old while

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4. Once the equipment is installed, there are minimal per-use expenses associated with videoconferencing. For example, in the Ninth Circuit, the courts lease the DSL or T-1 lines and the long distance service is covered by the court’s FTS contract.

we're waiting for enough other cases to justify our travel. With the videoconferencing option, we can save the trip, and the case can be heard sooner."

### *Disadvantages to Videoconferenced Oral Arguments*

Judges were also asked to identify any disadvantages associated with conducting oral arguments via videoconferencing. The disadvantages mentioned by the judges were more varied than the advantages. Whereas every judge recognized the time and money saving benefits of videoconferencing, they agreed less on the technology's downsides. The most frequently mentioned disadvantages were technical difficulties (dropped or bad connections) and the decreased level of personal interactions during videoconferencing.

*Technical Difficulties.* Among the seven judges with more videoconferencing experience, four mentioned technical problems as disadvantages to videoconferencing. In all four cases, however, judges reported the problems to be minor, easily resolved, and infrequent. A Ninth Circuit judge summed up his experiences by saying, "the biggest problem is the reliability of the technology . . . and you can't always guarantee that it will work the way it is supposed to." However, reported technical problems were rare. One judge (from the Third Circuit) said he had only been part of one videoconference in which a connection had been dropped, and judges from other circuits concurred, stating that with improved technology, "there aren't too many problems." When a connection is poor or is lost, courts usually either reconnect after a brief pause, postpone the argument, or reschedule it for live arguments. Two judges said they had experienced no technical problems with videoconferencing.

The seven judges who had less experience with videoconferencing tended to express fewer concerns about the technical difficulties. Only one judge reported dropped connections, but then only at a time when his circuit's videoconferencing program was beginning; since then, the connection glitches, "have all been worked out and we haven't had any problems recently." A second judge mentioned only that it was occasionally difficult to hear other speakers when everyone was not in the same courtroom.

*Decreased Personal Interactions.* The decreased ability to make personal connections with the other participants (i.e., the lack of face-to-face interaction) was another commonly mentioned disadvantage to hearing oral arguments via videoconference. These sorts of problems were more often mentioned by judges with less videoconferencing experience than by those who had participated in many videoconferenced arguments. Only two of the seven more experienced judges mentioned the inability to personally connect with the other participants as a downside. One judge missed the "personal association with [his] colleagues," whereas the other judge missed the ability to have face-to-face interactions with the attorneys involved in an oral argument. As one of the judges put it, "You didn't have the chance to see the demeanor of the attorneys, and it just wasn't the same quality as it would have been if they were in front of you in the court." The remaining experienced judges did not mention the lack of personal connections as a downside.

Among the seven judges with less videoconferencing experience, the inability to connect personally with other judges and the attorneys was a more salient problem. Four judges cited the lack of eye contact as the primary disadvantage to videoconferencing. One stated that, “there’s just an artificial nature [to the argument] when it’s on video,” and another commented that, via videoconferencing, “you can’t pick up voice inflections and you lose some of the body language.” As a result, occasionally the exchanges between the judges and the attorneys, “are not as smooth as they might otherwise be.” However, even these difficulties are “not much of a drawback,” and “the benefits balance them out.” The remaining judges with less videoconferencing experience did not mention the lack of personal connection as a disadvantage.

*Audio Delay.* One of the primary concerns mentioned about appellate court videoconferencing by the judges we interviewed, as well as by others, is the audio delay that accompanies remote transmissions. Because audio signals are not transmitted simultaneously, the audio track does not always match perfectly with the visual picture, creating a situation in which judges are unable to interrupt attorneys as smoothly as they would if all participants were in the same room. By the time the attorney recognizes that a judge has begun to ask a question and stops talking to hear it, the beginning of the question is lost.

In the course of the interviews, judges were asked about the existence of an audio delay, and, if there was one, what measures were normally taken to minimize the disruption. Surprisingly, the audio delay was cited rarely as a problem by any of the judges, regardless of their experience with videoconferencing. Among the more experienced judges, only one said that the audio delay had been problematic. As a result, he said, “there was always the problem of ‘stepping on someone’s line’. . . and it created the impression that the lawyer was ignoring the judges, although that was not what was happening at all.” At the time he was involved in videoconferenced oral arguments, there was no way to get around the audio delay, and, “we just had to deal with it.”<sup>5</sup> All of the other judges with more videoconferencing experience either said there was no audio delay at all (three judges) or said that it was so slight as to be almost unnoticeable (three judges). Five of the judges noted significant diminishment in the audio delay as the videoconferencing technology has improved. According to one judge, “it used to be worse and annoying, but the technology has improved and we don’t even notice it anymore.”

A similar trend was seen among the judges with less videoconferencing experience. Again, only one judge noted that the audio delay was a problem, but noted that it often depended on the quality of the equipment in each videoconferencing location. As he noted, “it really kills the spontaneous nature of the exchange between the lawyers and the judges,” and can result in “long silences when people are trying to figure out who will speak.” The remaining judges, however, did not find the audio delay to be problematic. Two judges said there was no audio delay at all; three judges said it was very slight and easily ig-

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5. This finding corresponded to the report of the Tenth Circuit clerk.

nored. Only one judge mentioned that his court had a strategy for dealing with the delay, saying, “we worked around it by raising our hands before we wanted to speak.”

### *Quality of Argument Experience*

Due to the slight audio delay and other technical problems, it is possible that judges may get a less well formulated understanding of the legal issues from the attorneys when oral arguments are conducted via videoconference. We asked judges about their perceptions of quality and thoroughness of the oral arguments in videoconferenced hearings in order to determine whether judges may be more hesitant to ask questions during videoconferenced oral arguments. We asked this question also to determine if critical information may have been lost when parties are not in a face-to-face environment.

All judges in this sample, regardless of experience, indicated that they were not left with incomplete information or unanswered questions after a videoconferenced oral argument. This was true whether the judge or the attorney had appeared remotely. As one judge put it, “If I still had questions, I’d keep the lawyers there until I had gotten them answered!” Two others stated that if they were left with incomplete information after the argument, it was “not because of the videoconferencing!”

Additionally, judges were asked whether they believed they got the same understanding of legal issues when the oral argument was videoconferenced. Again, all of the judges we interviewed, regardless of experience, indicated no difference in their understanding of the legal issues in arguments that were videoconferenced versus those that were not. This was the case when the judges appeared remotely, as well as when they were present in the courtroom but were listening to attorneys in a remote location.

### *Number of Questions Asked*

Judges were asked whether they believed they asked more or fewer questions during a videoconferenced oral argument as compared to one in which all participants were present in the courtroom. In general, judges who have appeared regularly via videoconferencing indicated they were likely to ask the same number of questions via videoconference as they would have had they been in the courtroom. This was particularly true for the experienced judges. One judge noted, “it may take more getting used to, but I ask the same number of questions.”

Of the judges with less experience with videoconferencing, two indicated they would perhaps ask fewer questions when they were participating remotely. However, both were aware of the difficulty of drawing conclusions based on so few instances. As one remarked, “I haven’t really had enough experience to make a blanket statement. It’s not an appreciable difference, I don’t think.”

A similar pattern was seen in the judges’ responses regarding videoconferences in which the attorneys appeared remotely. All seven judges with more

experience and four of the judges with less experience indicated they asked the same number of questions when the attorneys were appearing remotely as they would have if the attorneys had been in the courtroom with them. Again, two of the judges with less videoconferencing experience indicated they asked slightly fewer questions as compared to when attorneys are present in the courtroom. Both noted caveats about the small number of videoconferences on which their responses were based. One judge had no experience in oral arguments in which an attorney appeared remotely, and did not answer the question.

#### *Reluctance to Interrupt*

Finally, judges were asked about their reluctance to interrupt during a videoconferenced oral argument. In general, judges found it moderately more difficult, but not impossible, to interrupt when someone else was speaking (either an attorney or a fellow judge) via videoconferencing. Of the judges with more experience in videoconferencing in which they participated remotely, three indicated they were just as likely to interrupt, but that it took more effort to do so. As one stated, “In my experience, it took a bit more effort to interrupt. When appearing remotely, you can’t see the body language to judge when there is an opening to speak.” Another stated, “Sometimes interrupting is difficult, because of the [audio] delay, and you might be speaking over someone else.” However, that judge also noted, “In most arguments, there just isn’t that much interruption necessary.” Two other judges indicated that they were slightly less likely to interrupt when they were appearing via videoconference, but would do it when necessary. According to one, “I am not inhibited by appearing via videoconference, but it makes me a bit more selective in what I say.” The two other judges with more videoconferencing experience had never appeared remotely and hence did not answer this question.

Experienced judges demonstrated the same pattern when one or more of the attorneys appeared remotely (but the judges were in the courtroom). Two judges said they were slightly less likely to interrupt an attorney speaking from a remote location, one specifying that this reluctance was due to the audio delay. The remaining experienced judges stated they had no trouble interrupting a remote attorney. As one noted, “you tend to forget that you are doing it via videoconference, and just proceed as normal.”

The judges with less videoconferencing experience exhibited the same pattern as their more experienced colleagues. One noted that he was slightly less likely to interrupt when he was appearing remotely; two others stated there was no difference. The remaining four had never appeared remotely and were not asked the question. When the attorney appeared remotely, two judges said they were more reluctant to interrupt the speaking attorney. One stated, “It’s hard to do. It’s awkward and embarrasses them and you.” Three other judges stated they had no trouble interrupting a remote attorney. Two others had never heard attorneys appear remotely and were not asked the question.

### **Other Uses of Videoconferencing in the Appellate Courts**

In addition to using videoconferencing for hearing oral arguments, some courts of appeals judges have used the technology to discuss and dispose of cases that are not scheduled for oral argument. Judges in different locations within the circuit meet via videoconferencing, thereby saving time and money.

#### *Fifth Circuit Screening Panels*

The Fifth Circuit conducted a yearlong pilot program in which a panel of three judges met weekly to dispose of cases not scheduled for oral argument.<sup>6</sup> Instead of the previous round-robin format, in which one judge wrote an opinion, sent it to the second judge for comments, and then sent the revised opinion to the third judge, the videoconferencing option allowed simultaneous back-and-forth discussion and helped clear the panel's summary calendar. The pilot program, however, was not renewed after its one-year trial, primarily because the judges preferred to work on these cases on their own schedules instead of at the fixed weekly meeting. One of the Fifth Circuit judges involved with the pilot program was interviewed for this project.<sup>7</sup> He described how videoconferencing was used to screen the summary calendar:

We had a panel established for twelve months to screen together cases that had not yet been determined whether they would be orally argued or decided without arguments. The videoconferencing program was designed to try to introduce more collegial discussion and to expedite the time. Once a week we had a panel discussion. All of the papers/briefs went to all of the judges, and we would then discuss a whole bunch of cases during the same session.

The two primary advantages to the program were an increased collegiality between the judges on the panels and a significant savings of judge and attorney time. According to the judge, "At enhancing collegiality, it was better than a phone call, and there was definitely a benefit to discussing the case. We were actually having a conference discussion." Additionally, because all three judges received all of the relevant papers, and were able to review the briefs before the videoconference, decisions on cases were reached more quickly.

There were, however, unexpected disadvantages. Surprisingly, the largest inconvenience was not directly related to the technology. Rather, the judges found the scheduling to be burdensome. It was difficult to predict in advance when all three judges would be free to meet, and it "became a real impediment to each of our individual scheduling flexibility." According to the judge, "it definitely infringed on our normal working habits, and expedited disposition of cases at a considerable expense of chambers flexibility." The few technical problems with the videoconferencing were limited to occasional connection malfunctions; "mostly, the conferences worked as scheduled and the hookups worked as planned." The judge also noted that there was a slight audio delay

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6. See the May 2001 issue of *The Third Branch* for more discussion of the Fifth Circuit practices.

7. The other two judges who served on the panel were unavailable.



for all of the videoconferences, which made it more difficult for the judges to discuss the cases. The judges attempted to work around it by watching to see when someone had finished speaking, but, according to the judge, “we never got used to it.”

As far as the quality of information that was gathered during the videoconference, the judge said that he was not left with incomplete information or unanswered questions after each session, noting “it was better than the screening we did before.”

#### *Ninth Circuit Motions and Screening Panels*

The Ninth Circuit uses videoconferencing in ways similar to that of the Fifth Circuit’s pilot program. In addition to videoconferenced oral arguments, the technology is used to bring judges together for motions and screening panels, and for certificate of appealability panels.

For motions and screening panels, a three-judge panel meets for one week each month to hear cases that are not scheduled for oral argument. Panel judges are selected from throughout the Ninth Circuit, but the panels take place each month in San Francisco. To save travel time and money, judges from outside San Francisco can participate via videoconferencing. Four of the judges interviewed had participated in motions and screening panels via videoconference.

All four judges have had positive experiences with the videoconferenced panels, and the only reported problem was unrelated to the technology: “With videoconferenced motions and screening panels, as opposed to oral presentations where everyone is together, you have to deal with the logistics of getting the materials to the judges . . . and sometimes it takes a while for everyone to get the right piece of paper.”

The advantages to using videoconferencing are, according to one judge, “the same as for oral arguments, but in spades.” Videoconferencing eliminates the need for traveling, which is an enormous benefit to the judges. As one put it, “Doing it via videoconference saves having to go away for an entire week, which is a big thing.”

Two judges also reported having participated in certificate of appealability panels via videoconference. These two-judge panels are required in habeas cases, and the panel must grant a certificate of appealability before the appeal can go forward. Neither judge experienced any problems with videoconferenced certificate of appealability panels.

#### *Videoconferencing for Court or Committee Meetings*

Court meetings are another popular use of videoconferencing. Half of the judges we interviewed had participated to some extent in a videoconferenced meeting. The primary benefit, as with oral arguments, is the time and money savings. All seven judges who had been involved with a videoconferenced meeting spoke positively about the experience, and praised the time that was saved, especially in geographically vast circuits. As one Ninth Circuit judge

said, “It doesn’t make any sense for me to go to San Francisco for an hour meeting. It will take me an entire day for that meeting, and there’s the airfare and maybe even a hotel. It just makes a lot of sense economically to do it via videoconference.”

None of the judges mentioned any downsides to videoconferenced meetings, but one did caution that people must “come to it as they would a live meeting. As long as everyone minds their manners, it’s fine.” One Ninth Circuit judge remarked that he seems to have had more problems with telephone conferences than with videoconferenced ones.

#### *Additional Uses for Videoconferencing*

The judges interviewed have also used videoconferencing for other purposes, including interviewing potential law clerks (two judges) and observing ceremonial occasions such as courthouse dedications (one judge). One judge also used videoconferencing to participate in an international ethics training session with fifteen judges from Ecuador, saying that although “the quality [from Ecuador] wasn’t quite as good [as we were used to], it worked fine.”

### **Conclusions**

The fourteen appellate judges interviewed had positive experiences with videoconferencing. All greatly appreciated the way in which videoconferencing saved them both travel time and money, and named those savings as the technology’s primary advantages. Other benefits included increased flexibility, the capacity to conduct hearings in a more timely manner, and the ability to accommodate judges with special needs. On the whole, for the judges interviewed, the benefits of videoconferencing outweighed its disadvantages.

The quality of the technology involved is a critical factor and clearly shaped the judges’ evaluations of their experiences. As one judge noted, “It is so dependent on the technology; if the equipment is bad, the experience is bad.” However, most judges were pleased with their court’s technology and had very few technical problems to report. Additionally, judges who had had experiences with earlier incarnations of videoconferencing technology reported that problems had significantly decreased as the technology improved. This was especially true of the audio delay, which was not a salient hindrance for most judges.

Hearing oral arguments via videoconference also did not appear to significantly hinder the judges’ abilities to understand the case at hand. Although some judges believed they asked fewer questions and were less likely to interrupt when the argument took place via videoconference, no judge reported being left with incomplete information or unanswered questions after a videoconferenced oral argument.

The extent to which judges had experience with videoconferencing was also a factor in their perceptions of the technology. Judges with more videoconferencing experience noted that the decreased personal interactions were less of a

problem, suggesting that at some point judges become accustomed to this mode of interaction. The more experienced judges also encountered more technical problems than did judges with less experience, perhaps due to the fact that those judges have had more opportunities for things to go wrong.

Many of the judges we interviewed had used videoconferencing for more than oral arguments and, again, felt positively towards the technology, largely due to the reduction in travel time that resulted. Judges in the Ninth Circuit who used videoconferencing for motions and screening panels and certificate of appealability hearings appreciated not having to travel, and judges in other circuits who used the technology to attend meetings felt similarly. The Fifth Circuit experiment with using videoconferencing to decide on cases not orally argued was discontinued, due to the increased burdens it placed on judges' schedules.

The fourteen judges interviewed for this project are just a small piece of the appellate court system, and their views should not be assumed to represent the experiences that all appellate judges have had with videoconferencing technology. However, the positive response toward videoconferencing voiced in these interviews suggests that the technology can be beneficial, when used correctly, in the courts of appeals. In the words of one judge, "Videoconferencing is the wave of the future."

## **Appendix**

### **Interview Protocol for Appellate Judges: Template**

#### **Personal Experience**

1. Have you personally been involved with oral arguments that have used videoconferencing?
2. When you've been involved with videoconferenced for oral arguments, have you appeared remotely? Approximately how many times?
3. Have you also heard attorneys appear remotely? Approximately how many times?
4. Approximately what percentage of the oral arguments you've heard in the past 12 months have involved videoconferencing?
5. Would you say that percentage is increasing or decreasing?

#### **Advantages**

6. What do you see as the primary benefits to holding oral arguments via videoconference?
7. What would you say is the most useful aspect about using videoconferencing for oral arguments?

#### **Disadvantages**

8. Have you noticed any disadvantages associated with holding oral arguments via videoconference?
9. Is there an audio delay? Has it been a problem? How have you dealt with it?
10. What would you say is the most difficult/bothersome aspect about using videoconferencing for oral arguments?
11. Do you feel you are left with incomplete information or unanswered questions after a videoconferenced oral argument?

#### **Interactional — Remote Judges**

12. Do you get the same understanding of the legal issues when you appear remotely as you do when you appear live? If no, how do the situations differ?
13. Do you feel you ask more questions in an argument in which you appear via videoconferencing than when you are in the courtroom with the rest of the participants?
14. Are you more reluctant to interrupt a speaking attorney when you appear remotely via videoconferencing?

#### **Interactional — Remote Attorneys**

15. Do you get the same understanding of the legal issues when one or more of the attorneys appear remotely as when they appear live? If no, how do the situations differ?
16. Do you feel you ask more questions in an argument in which one or more of the attorneys appears via videoconference?
17. Are you more reluctant to interrupt a speaking attorney when the attorney appears remotely via videoconferencing?
18. Do you have any difficulty establishing a rapport with attorneys who appear remotely?

**Other Uses**

In our conversation with [circuit clerk], s/he told us that your court of appeals also uses videoconferencing for [insert other use(s)].

19. Have you used videoconferencing for any/either of these purposes?
20. What benefits have you noticed with using videoconferencing for this purpose/these purposes?
21. What drawbacks have you noticed with using videoconferencing for this purpose/these purposes?

**Wrap-Up**

22. Does your court use videoconferencing in any ways that we haven't talked about yet?
23. We would like to speak to as many judges who have experience with videoconferencing as possible. Who else in your circuit would you recommend we speak with?
24. We'd also like to speak to attorneys who have been involved with videoconferenced oral arguments. Do you have any suggestions for attorneys we may speak with?

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