



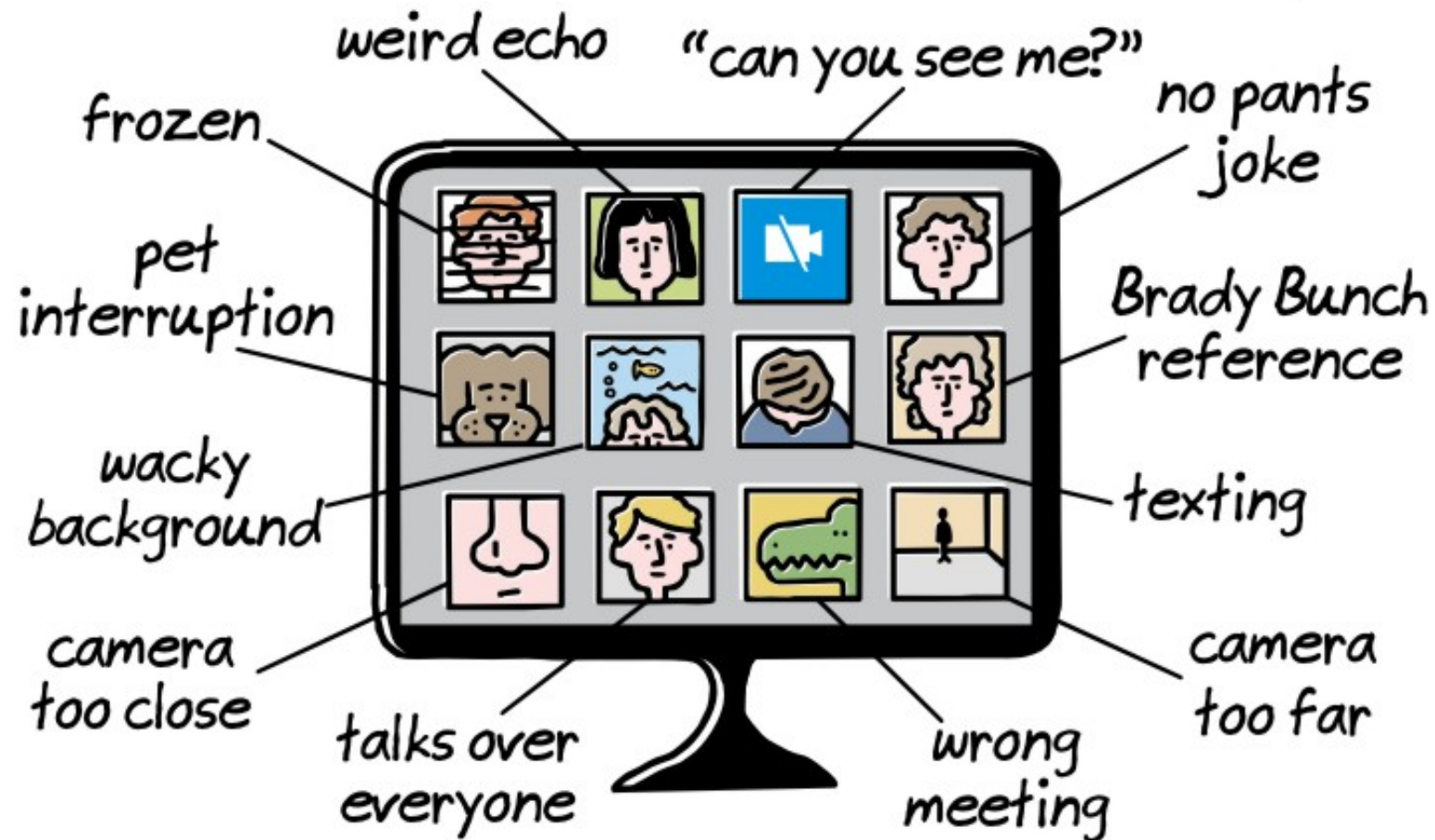
The Virtual Courtroom

William S. Boyd School of Law, UNLV
Professor Joe Regalia

every virtual meeting

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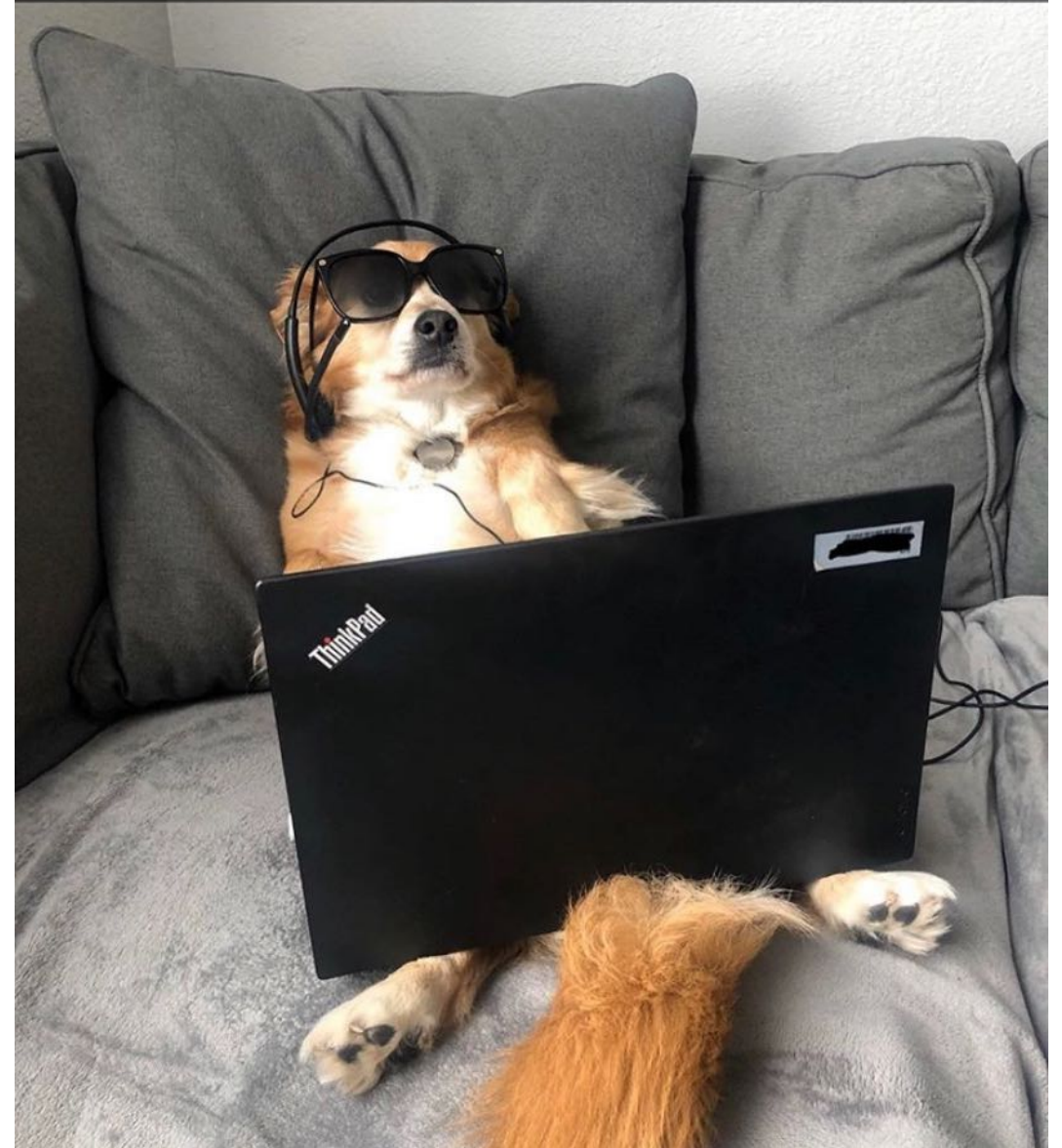
**We've learned a few things
during the virtual transition.**

**Some folks are
doing it right.**



**Some folks
are not doing
it right.**

My sister hired my dog as her intern and let him
join in on web meetings



Video

The Virtual Courtroom

- 1 | A Quick Tour Through Hot Topics in Virtual Hearings
- 2 | Tips for Communicating With Your Audiences Virtually
- 3 | Tips for Helping Parties Help You

Hot Topics in Virtual Hearings

Hot Topics in Virtual Hearings

- Legal Challenges During COVID
- Pro Se, the Digital Divide, and A2J
- Notice and Guidance Challenges to Attendees
- Attorney-client Communications Difficulties
- Assessing Live Testimony
- Documentary Evidence
- Access Issues (public access, ADA, and so on)
- Recordings and Security Issues
- Virtual Hearing Management
- Inconsistent Implementation

Have you experienced any of these challenges?

The Virtual Hearing Boom Leads to Challenges



- Pre-COVID: Virtual hearings were already catching on
- COVID expanded the number of virtual hearings
- COVID expanded the types of hearings courts heard virtually
- COVID caused courts to overrule party objections to virtual

The Wild West: Little Reported Caselaw on Key Criminal Issues Since the Pandemic

- Some courts have held that the pandemic emergency overcame CC objections; others held that the pandemic wasn't enough
- No reported cases yet on virtually selecting juries
- No reported cases yet on right to a fair and impartial jury
- No reported cases yet on effective assistance of counsel
- Little guidance on physical presence requirement

Civil Cases are a Different Story

- Numerous courts found that the COVID-19 pandemic was a compelling circumstance to authorize remote bench trials, and even jury trials, via videoconference and over parties' objections.
- Numerous courts have rejected due process objections to remote civil trials during the pandemic, including ruling that remote cross-examinations meet the requirements of due process

Virtual Hearing Hot Topics Across the Nation

The Digital Divide and Access to Justice

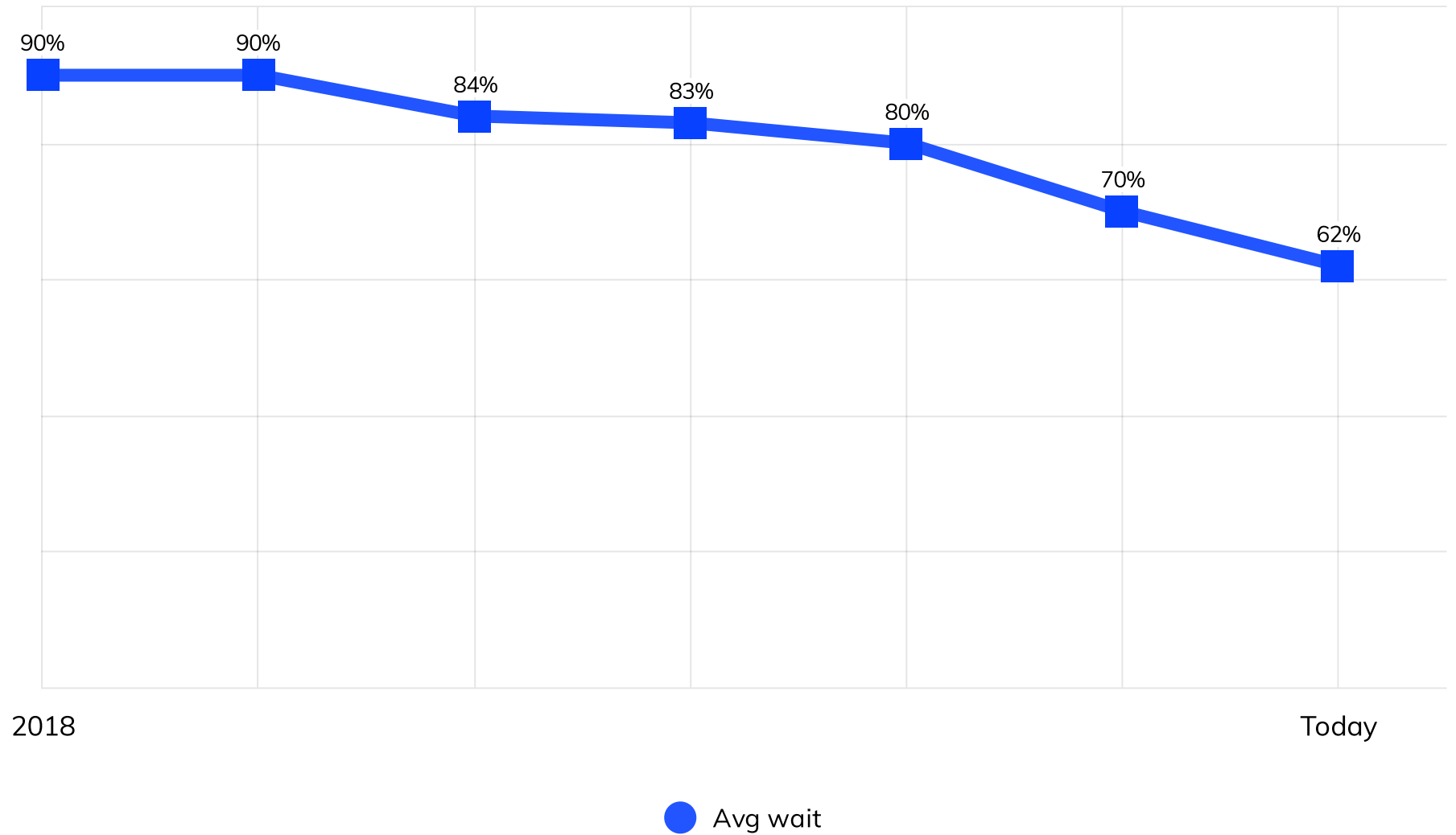


- Some data suggests virtual hearings help parties
- Quicker time to hearing
- Legal aid and other resources going farther
- More affordable lawyers and services

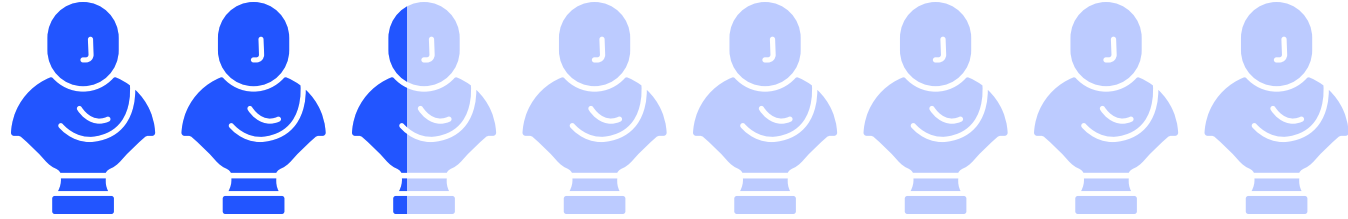
31%

AVERAGE TIME
TO WAIT FOR A
HEARING

Speed to hearing since COVID

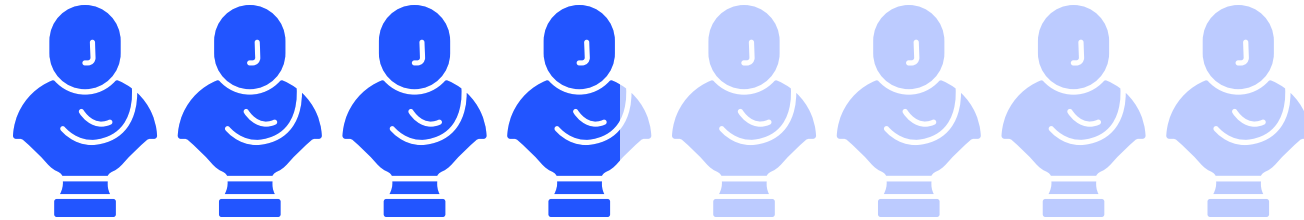


29%



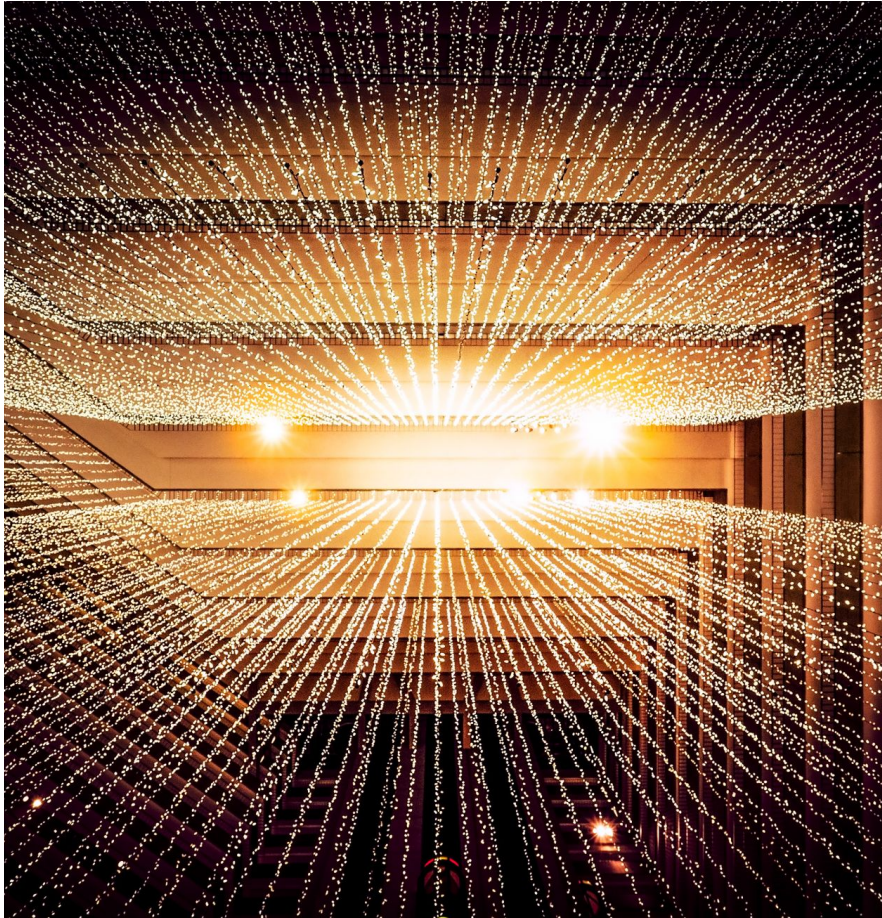
of adults with an income under \$30,000 don't have a smartphone

46%



of these adults don't own a computer

Pro Se, the Digital Divide, and Access to Justice



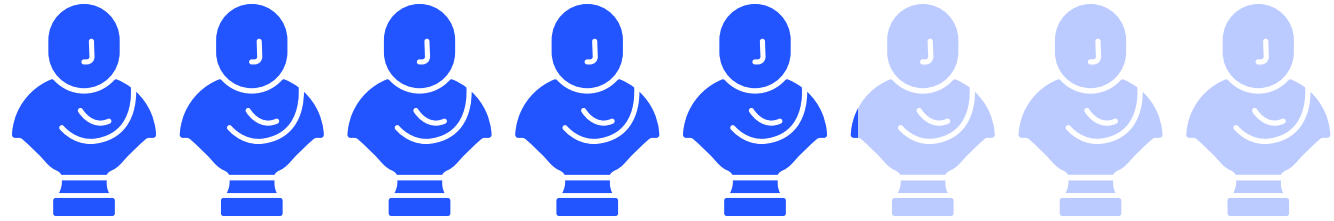
- Not everyone has access to technology or good internet
- If no access to free WiFi, participating becomes even harder
- Needing extra time to manage virtually (or not being able to operate virtual conference)
- Skills gap: Certain demographics really struggle to use tech competently
- Lawyers taking advantage of pro se folks' challenges in virtual
- Poor quality internet can prevent folks from hearing or seeing clearly (one study suggests that even with good net, 25% of hearings experience freezing or lagging)

**How have pro se parties
been in virtual hearings?**

Notice and Guidance to Parties

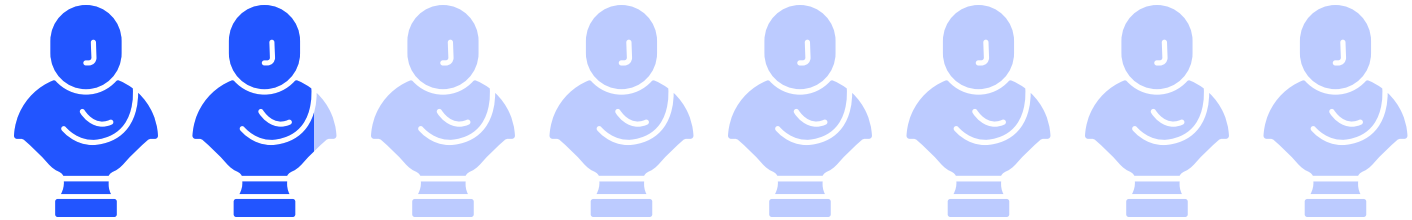
- Not enough (or clear enough) notice of video hearings so that parties can arrange equipment in time
- Complaints about pro se folks not being able to understand process or logistics
- A recent settlement challenged WA Courts because not enough notice and guidance to pro se folks

63%



defense attorneys who say virtual hearings impede attorney-client communications

21%



judges in the same survey who agreed

Attorney-Client Communications



- Attorney surveys have cited this as the #1 issue in virtual hearings
- Some judges use breakout rooms (but creates logistics and other issues)
- Some clients saying they don't feel comfortable sharing confidentially in a breakout room
- Some judges encourage texting with clients

Attorney-Client Communications



- Concerns about third parties accessing or recording confidential communications
- ABA latest on-point opinion raises issues around confidentiality and special precautions that may need to be taken virtually
- How have you dealt with this issue?

Assessing Witnesses and Physical Presence

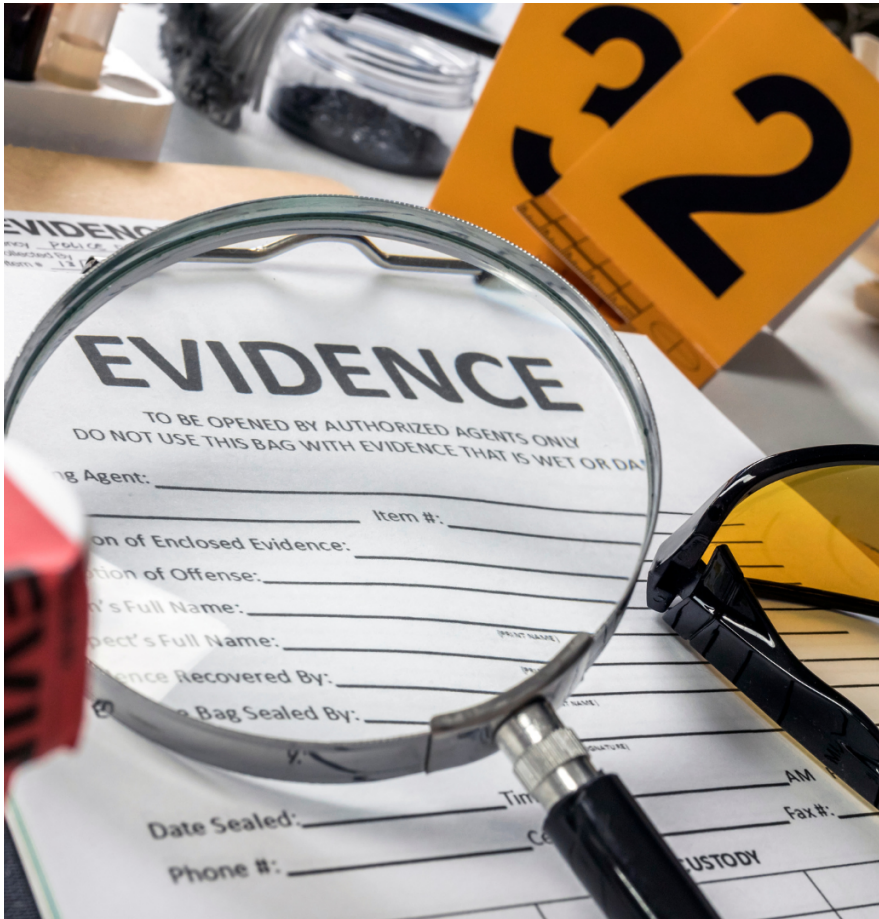


- Litigants have challenged: assessing credibility, cross-examining, impeaching, and demand for physical presence
- Research suggests video vs. physical does make a difference
- Judges nationally have been fairly split in surveys so far

Assessing Witnesses and Physical Presence

- **USGAO study:** 50% of judges changed credibility determinations of same witnesses between virtual and remote hearings
- **Immigration court study:** Detained folks who appeared in person were 90% more likely to seek relief, 35% more likely to obtain counsel, and 6% more likely to apply for voluntary departure
- Some judges have used this as a basis for rescheduling trials and important hearings at key stages
- But some judges disagree: “I can see witnesses' full faces rather than someone's left ear peering from the bench”
- **Where do you fall in?**

Documentary Evidence



- Complaints about viewing content shared by folks with poor connections or equipment
- Some courts have permitted evidence submission by holding documents up to the camera
- Logistical issues in marking, keeping track of, and displaying evidence (more required prep helps!)
- Pro se challenges: In Missouri, a Pro Se got a new trial B/C didn't have video capability to share evidence

Managing the Virtual Courtroom



- Distractions caused by attendees
- Witness coaching and sequestering
- Overlapping talking or background sound
- Distracting names, labels, or background pictures

Managing the Virtual Courtroom

- One pending case seeks mistrial because juror was distracted by kids
- Reports of folks showing up naked, asleep, lying in bed, and much more...
- A plastic surgeon showed up to a hearing while performing surgery?!
- Challenges because judges did not mute or stop improper conduct like this...

Recordings and Other Security Issues



- Many reports of unauthorized recordings by parties/witnesses
- Attendees may be logged in on insecure WiFi or devices
- Attendees may not use healthy password and access controls to their conference account
- Smart speakers picking things up behind attendees
- Insecurely sharing evidence outside of the conference
- Insecurely recording or storing sealed hearings

Public Access and Moree



- Courts have varied in what sorts of public access is given, leading to some challenges
- Quality of access another complaint
- ADA needs for live transcripts or special conferencing software

The Loss of Practical Obscurity

- Where before no one might show for a hearing, a streamed one is easy for many folks to come (or for malicious folks to snoop in on)
- We don't know what the ramifications will be when evictions and other embarrassing but everyday matters are available to everyone on the web instantly and forever
- How do you practically expunge a criminal record when the recording of the hearing is all over the net?
- Very difficult to track who posts videos or audio recordings to embarrass others (even if sealed!)

Interesting Take on Public Access

- At least one court determined that a corresponding video display of the public and press watching be available. The court stated that this two-way video feature serves a vital purpose: it reminds “those in the courtroom that the proceedings are indeed public and that members of the public are watching the proceedings”

Inconsistent Implementation and Lack of Rules

- Growing number of challenges and complaints because practices can vary so much within the same jurisdiction
- One litigant may get video, another only audio. One may be able to share their screen and documents, another may not.
- And a general lack of guidance or standards about what can and can't be done in a virtual hearing...

Zoom meeting,
audio only

Zoom meeting
with video



**Communicating
with Your
Audience
Virtually**

Big Takeaways

- 1 | Microphone, camera, and work area setups matter for many reasons
- 2 | Listeners in virtual hearings struggle more to pay attention and follow along
- 3 | Speech rate and emphasis are more important now

Zoom meeting,
audio only

Zoom meeting
with video



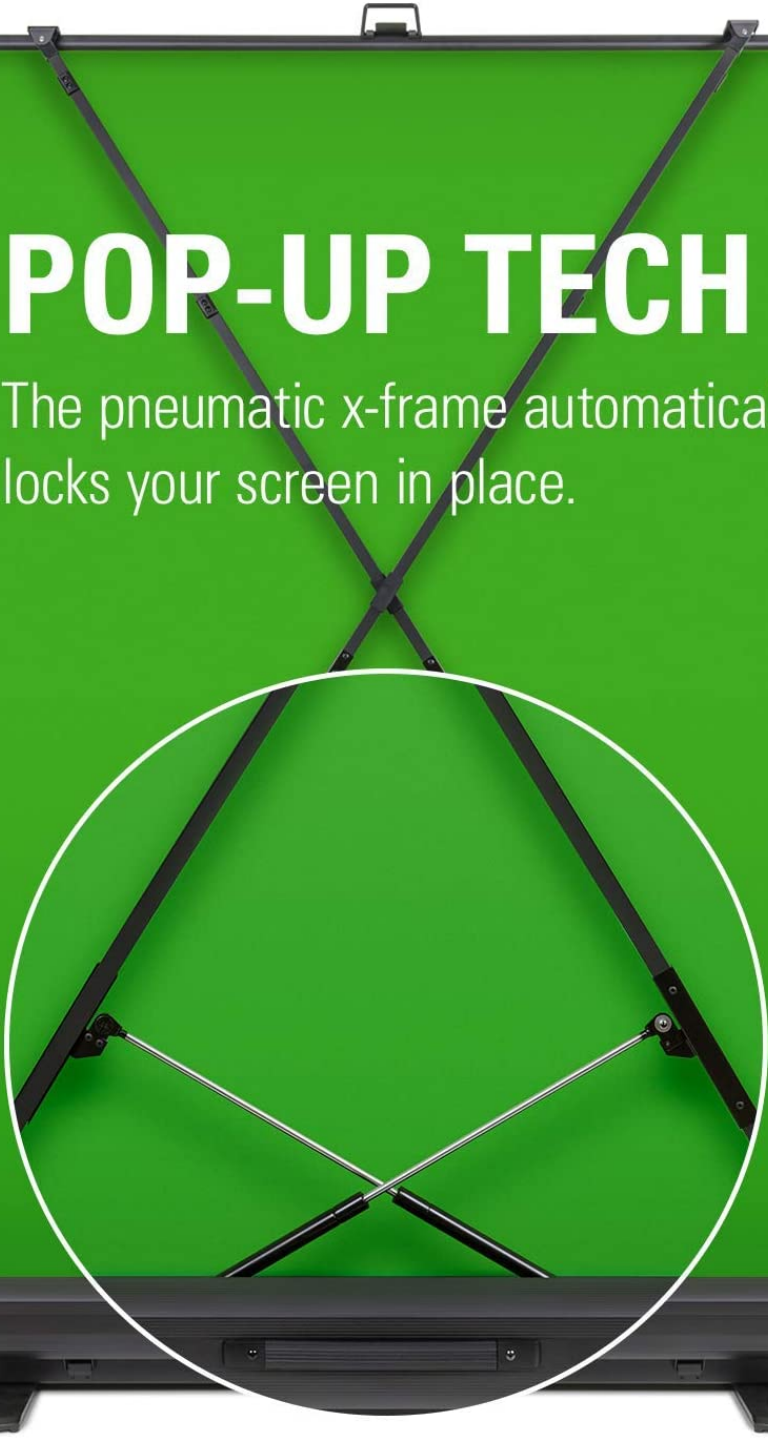
Setting Your Setting

Setting Your Setting

- 1 ■ Environment
- 2 ■ Microphone
- 3 ■ Lighting



A plain wall is best!



Virtual Backgrounds

A little risky...

Without a green screen, they can pick up distracting things and thus distract audiences

Green Screens

Green screens do wonders and they're cheap now!

How do you background?

Microphone



- External is best
- Background sound is the audience's nemesis (cardioid mics!)
- Make sure it's far enough from your hands that you won't bump it
- Too close will also pick up breaths and other random sounds

Lighting



- Light behind you (like a window) bleeds you out
- Best case: Light pointed at your face (an office lamp you have is fine!)
- Cheap ring lights work wonders!

Tips for Speaking Virtually

Three things can drastically change how listeners perceive you virtually.



Virtual Body Language



Voice



Clarity

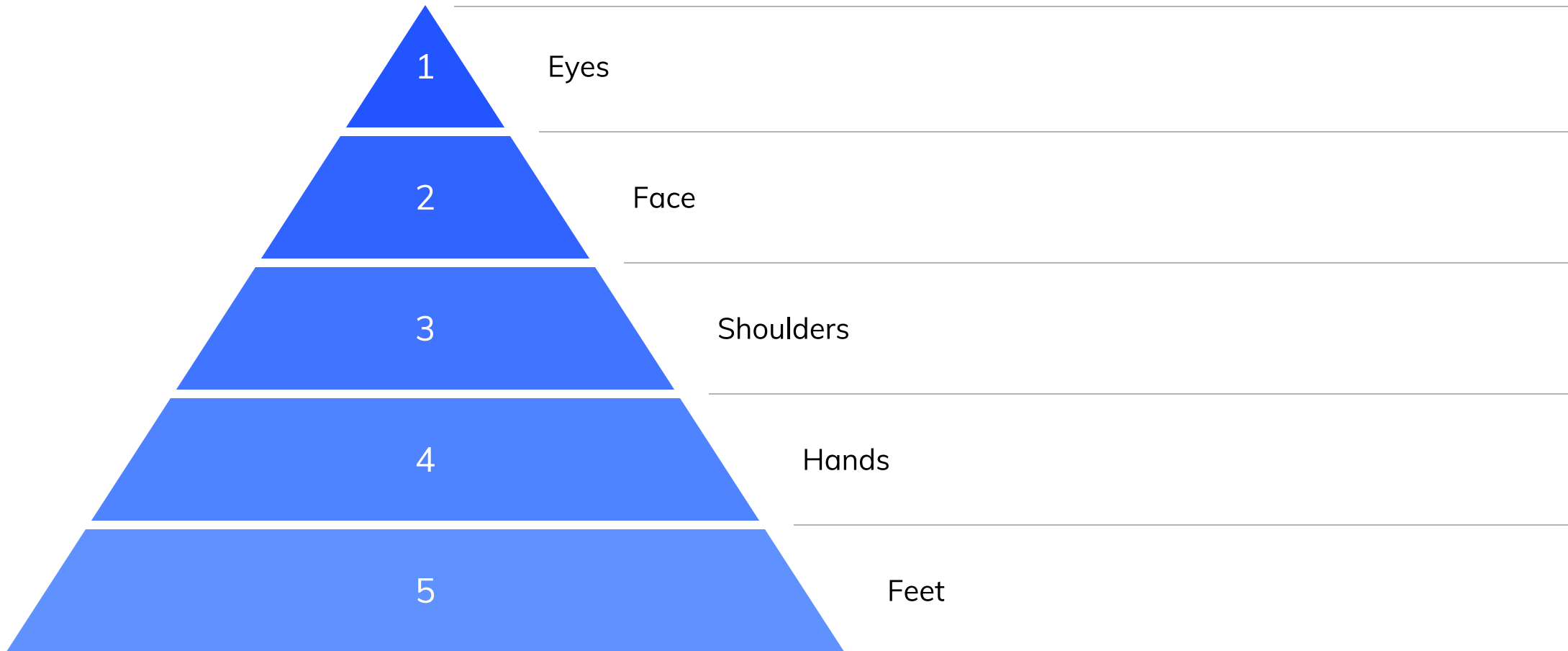
We all have our delivery areas to work on!

- Rising intonation (up-speak)
- Fidgeting with pens or papers or glasses
- Talking fast
- Clenching hands
- Swaying
- Crossing our arms
- Long, dense statements

**All of these quirks disappear
with: Awareness + Practice**

Your Body

From Top to Bottom



Your Eyes

Video

The Sweet Spot



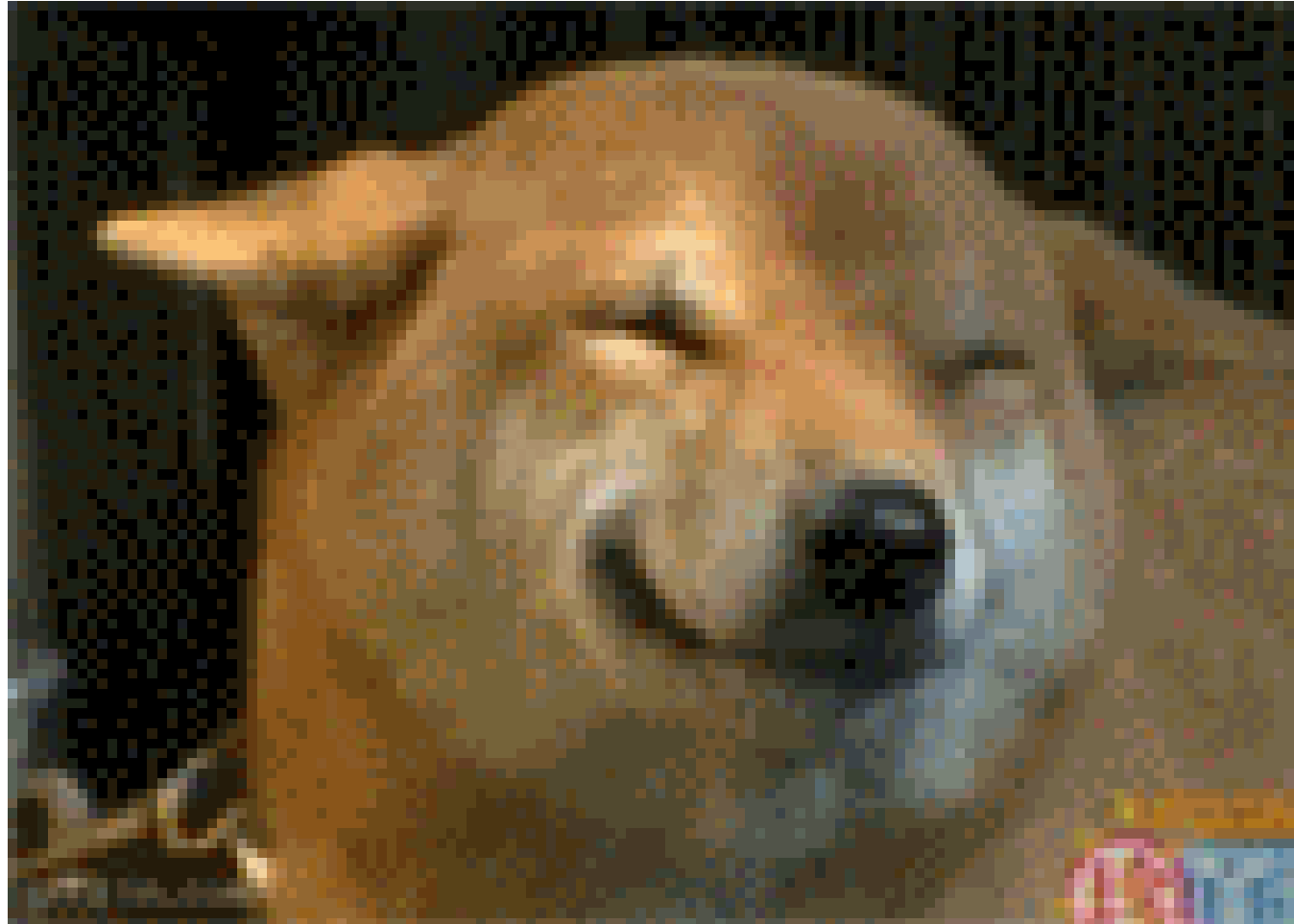
Research suggests that you need at least 6 seconds of continuous looking into the camera for your listeners to feel like you are making eye contact.

Cameras are the trick...



- The angle is key: Hairline level pointed down to your eyes
- People can often see what you're looking at if you wear glasses

Face

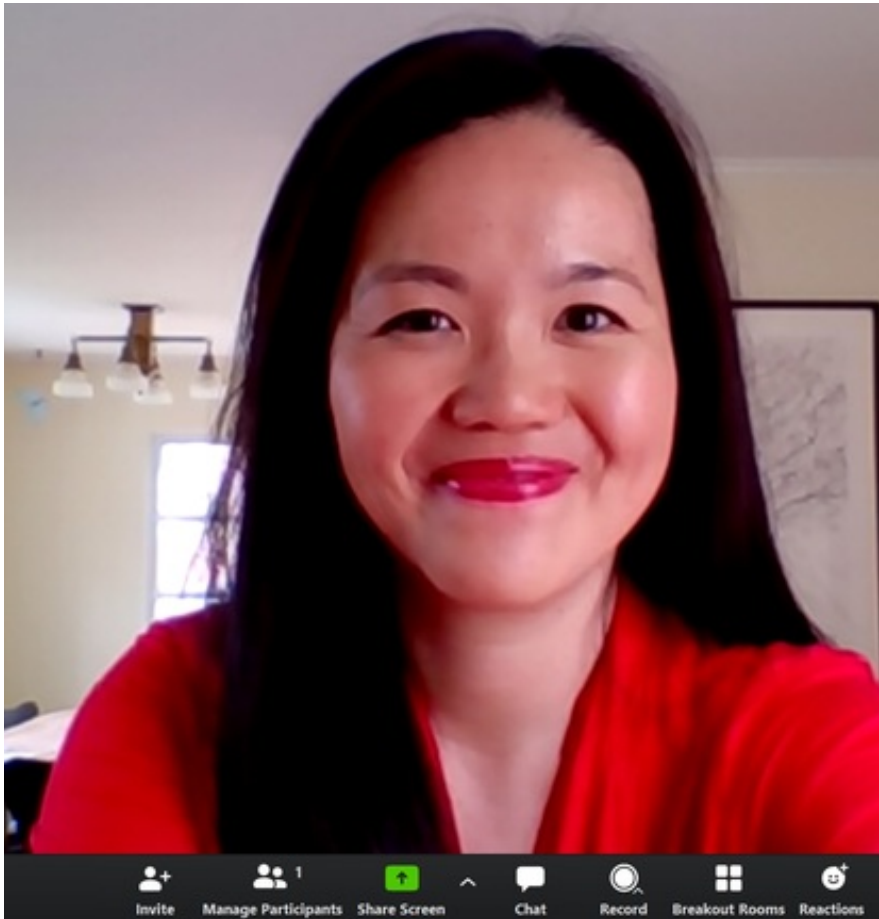


Your Face



- Head slightly tilted forward is perceived as thoughtful and attentive in studies.
- Tilted back is perceived as aloof and uncaring in studies.

Position: Your Body

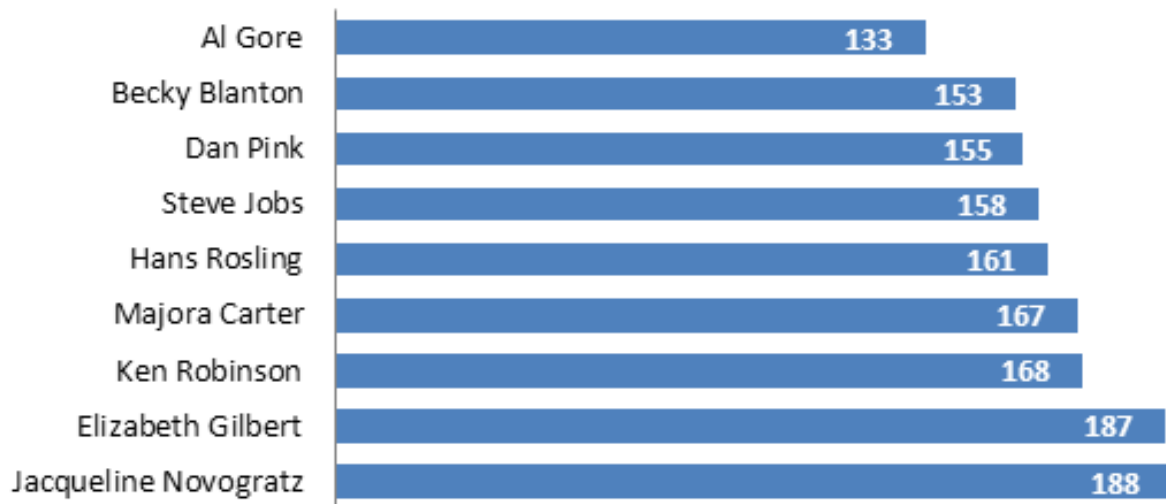


- Ergonomics matters to your health!
- Head in center of camera
- Far enough away that folks can see your shoulders (experts say about 2 feet)

Rate, Pitch, and Pauses

Rate

Speaking Rate for TED Talks (Words per Minute)



- Rate consistently ranks as the number one indicator of how easy it is for audiences to understand you virtually
- Practice is the only way here!

Aereo's business model is to enable thousands of paying strangers to watch live TV

1 2 3 4 5 6 7 8 9 10 11 12 13 14

online. Aereo's legal argument is that it can make all of that happen without publicly

15 16 17 18 19 20 21 22 23 24 25 26 27 28 29

performing. But Congress passed a statute that squarely forecloses that rather

30 31 32 33 34 35 36 37 38 39 40

counterintuitive submission. Because although the Internet and the thousands of mini

41 42 43 44 45 46 47 48 49 50 51

antennas are new, the basic service that Aereo is providing is not materially different

52 53 54 55 56 57 58 59 60 61 62 63 64 65

from the service provided by the cable company before this Court in 1969.

66 67 68 69 70 71 72 73 74 75 76 77 78

Video



Pitch: Lower, Louder, and Emphasized is More Engaging Virtually

- Lower
- Louder
- Emphasis

We can all get to a lower register with practice

- Chin towards your chest
- Push up from your diaphragm physically (testing your range up and down will help you feel it)
- We all have ranges. Most of us choose one by default!

Not emphasizing (changing your tone up within each sentence or so) makes it harder to follow along virtually when all we have is that audio stream...

Video

The Speaking Superpower: Pauses

- Pausing is the single most helpful tool for virtual speaking.
- Helps with retention and following along.
- Powerful to combat “umms” and “ahhs” and fillers (if you care about that; the research suggests most are not noticeable if only occasional).
- Helps with transmission delays and folks asking questions.

Video

Video

The Speaking Superpower: Pauses

- Pausing is a **skill**.
- Practice pausing after every **comma** and **period**
- Practice pausing on hard **consonant words** ending with t, d, and k sounds (that, but, could, and so on) to train your pausing skills
- Train yourself to **emphasize** words that matter (vary volume and pitch)

Speaking in Virtual Hearings Recap

- Speech rate much more important here
- Transmission delay requires pauses or folks can't talk
- Emphasis is also more key

Guiding Parties and Participants

Help Litigants Help You...

- 1 | Lawyer/party/witness virtual hearing standing orders
- 2 | Lawyer/party/witness tip sheets
- 3 | An oral script read at the beginning of the hearing with guidance and ground rules

**Do you have special guides,
cheat sheets, or standing
orders for virtual?**

BEST PRACTICES

Representing Yourself and Using Remote Appearance Technology with the Courts

May 6, 2020

Remember, even though your hearing is happening over the phone or through the internet, it is a court proceeding. You should act the way you would if you were in the courtroom in person. Court rules and standards apply.

Please review the following tips:

Do:

- Do let the court know if you don't have a phone or access to the internet. The court may be able to help you find a way to participate or may postpone the hearing.
- Do visit the video call website (such as [Zoom](#)) or a video sharing website ([YouTube](#)) for guides, helpful videos, and additional information.
- Do prepare for your virtual hearing. If you plan to participate in your hearing by video, download the video application before your scheduled hearing. Be sure to test your speaker, microphone, and camera before the hearing. Video call software websites often provide a test link to try your equipment before the actual event (Zoom test example [here](#)).
- Do dress appropriately, like you would if actually going to the courthouse.
- Do limit distractions during your hearing. Put all pets and other things that may be a distraction in a different room. Find a quiet place to participate in the hearing.
- Do keep your device on mute when not speaking. Keeping your phone, mobile device, or computer on mute unless speaking reduces feedback and limits background noise.
- Do call the court in advance if you want to present evidence. If you have documents or witnesses you want available for your hearing, check the judge's website or call the court for more information.
- Do make sure others using your Wi-Fi network minimize their usage during your hearing so you have the best possible connection.

Don't:

- Don't ignore the virtual hearing. If you cannot make the hearing or have a conflict, notify the court.
- Don't talk over others, it makes it hard for the judge and others to hear. Wait to speak until asked to by the judge.

Remember, even though your hearing is happening over the phone or by video, it is still a court proceeding. You should act in the same manner that you would if physically present in the courtroom. **Court rules and etiquette apply.**

Do:

- ⇒ Do check Metro Court's [website](#) for the current week's call-in/video information. The information is located on the homepage.
- ⇒ Do prepare for your virtual hearing. If you plan to participate in your hearing by video, download the video application before your scheduled hearing. Be sure to test your speaker, microphone, and camera before the hearing. Video conferencing websites often provide a test link to try your equipment before the actual event (Zoom test example [here](#)).
- ⇒ Do have all paperwork or documentation that you may need for your hearing.
- ⇒ Do dress appropriately, like you would if actually going to the courthouse.
- ⇒ Do realize that other hearings may be taking place as you join the call or video conference. Please mute your phone, mobile device or computer immediately and wait to be called on before speaking. The judge, clerk and others in the virtual courtroom are alerted when somebody joins by video or phone.
- ⇒ Do limit distractions during your hearing. Put all pets and other things that may be a distraction in a different room. Find a quiet place to participate in the hearing.
- ⇒ Do keep your device on mute when not speaking. Keeping your phone, mobile device, or computer on mute unless speaking reduces feedback and limits background noise.
- ⇒ Do make sure others using your Wi-Fi network minimize their usage during your hearing so you have the best possible connection.
- ⇒ Do make sure the court has good contact information for you. To update your mailing address or telephone number, please call (505) 841-8151.

Don't:

- Don't ignore the virtual hearing. If you cannot make the hearing or have a conflict, notify the court immediately. If you fail to appear, a bench warrant may be issued for your arrest.
- Don't talk over others. Doing so makes it hard for the judge and others to hear. Wait to speak until asked by the judge.
- Don't do other things while on the call. Just like in an actual courtroom, you must pay attention to make sure you don't miss something important that is said or something the judge asks you to do.

**“If I could ask lawyers to do one thing,
it would be to take a breath so I can ask
questions. In person, it's a lot easier”**



- Request folks pause every minute to give you (or others) a chance to interject
- Because of transmission delays it's hard to break in

“Please stop with the audio feedback and background sounds. It drives us all crazy in the courtroom.”



- Absolutely instruct on muting practices
- Also instruct on arranging a location that avoids background sounds

“Sound and video quality matter, perhaps even Constitutionally.”



- Sound quality guidance (external microphone, thoroughly test quality and output volume before hearing)
- Minimum needed internet connection for video; for audio only

“It's critical that parties understand how to use our video conference platform. When they don't, it creates all sorts of problems.”



- Practices for sharing visuals, presentations, and so on.
- Ability (if applicable) to confidentially discuss with client

“Pro Se folks are a real challenge, and we will need to keep figuring out how to make virtual hearings work well for them.”



- How should lawyers deal with pro se folks virtually?
- Separate guidance for pro se folks?

“Everyone attending really needs to check what name and background (if applicable) will be presented to the court”



- How should each attendee name themselves on the conference?
- What backgrounds are acceptable?

“We have delays in almost every hearing, either because of the parties or because of the court.”



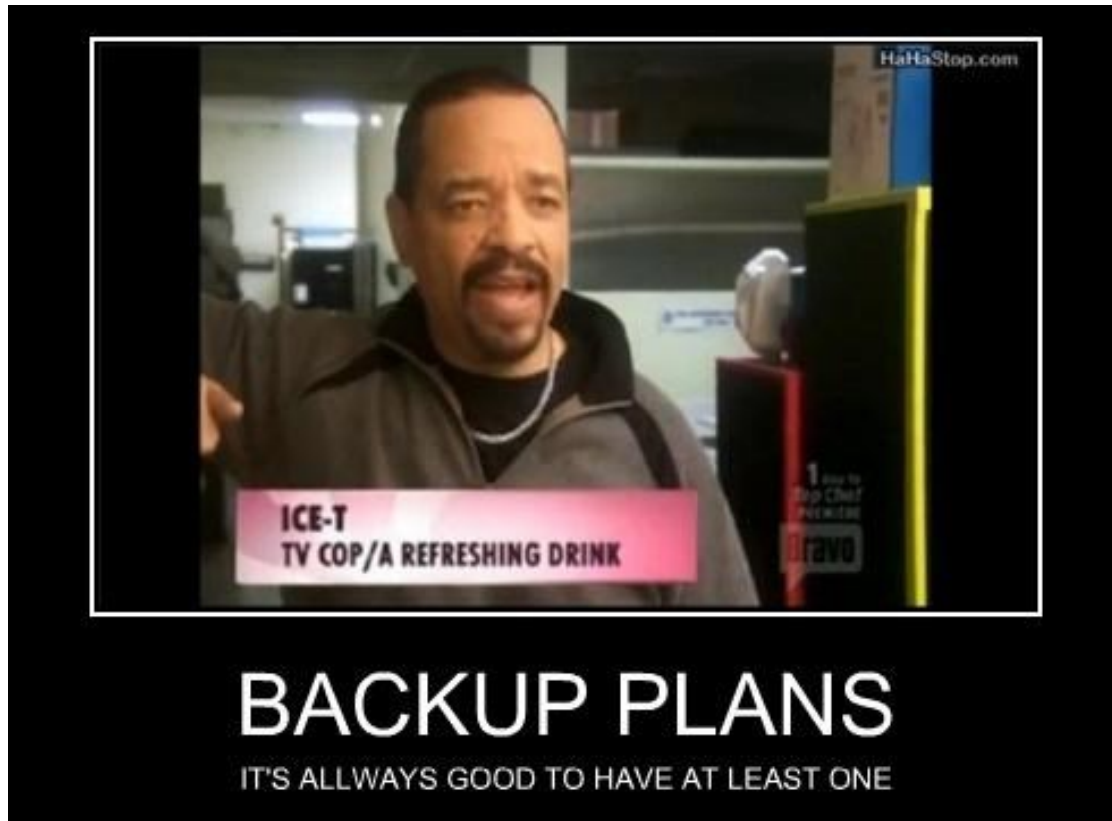
- Delays will happen in this medium
- Ask parties to build in extra time before and after hearings

“I have a harder time following along virtually.”



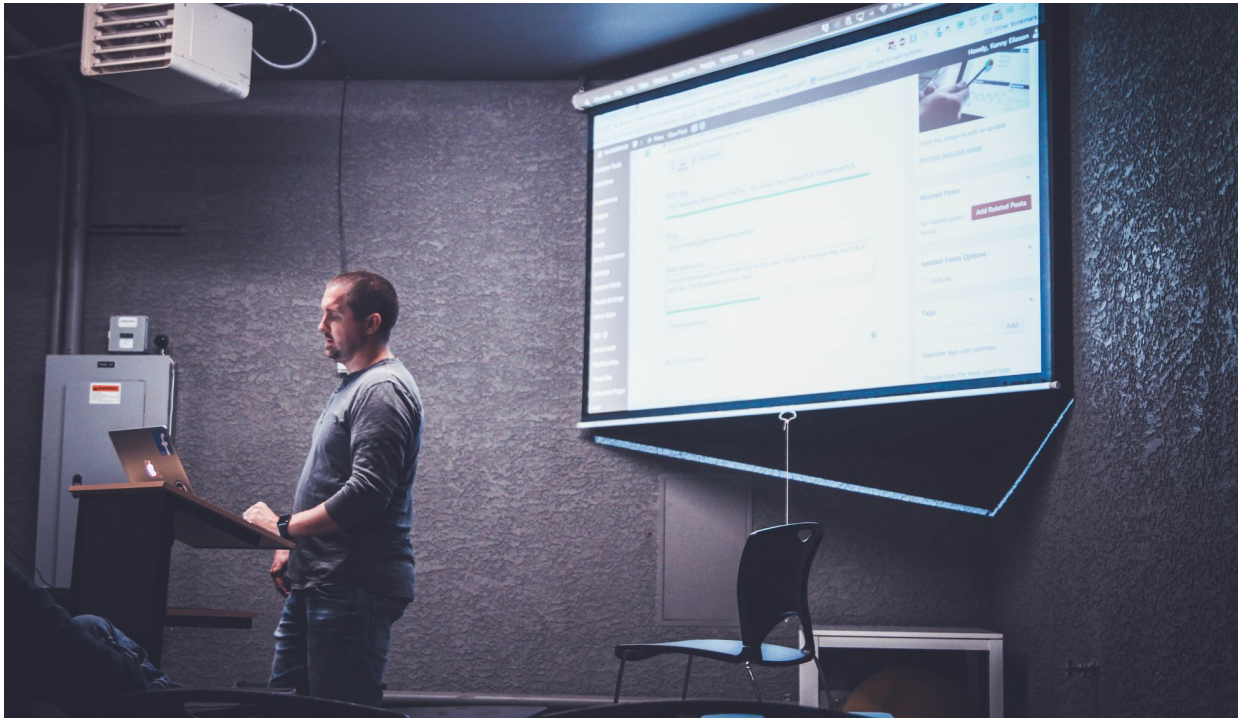
- It's harder to follow oral advocacy virtually
- Consider encouraging handouts or summaries?
- Presentation decks (visuals) beforehand?

“Nothing is more annoying than one of the lawyers disconnecting constantly.”



- Encourage litigants to check equipment and connection with enough time to fix
- At the least, have an audio-only backup plan

“Simple slides would help me. I like slides, but dense ones just distract me from the lawyer. And give me a copy!”



- Consider adopting guidelines for presentation decks
- Number of items on a slide, use of visuals, and so on

“Figure out who will be talking ahead of time, both for the lawyers and witnesses or clients.”



- It's harder to coordinate who should speak next and how to hand things over
- Ask for the litigants to coordinate ahead of time (perhaps in writing and submitted to you)

“It's the attorneys' job to ensure any witnesses with them are doing these same things...”



- Clarify that lawyers are responsible for witnesses virtually.
- Consider offering guidance on witness logistics during virtual.

“Recording and privacy has become a big problem”



- Consider recording and data-sharing policies
- For non-public hearings, this is especially important