

Thoughts and Worries About Appellate Practice Post-Pandemic

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Plagues “are not only times of death and suffering, but also of intellectual disorientation.”¹ For two years, a true plague, the COVID-19 pandemic, has roiled the world. Like professionals in other fields, many lawyers have been left to wonder how law practice will or must change because of this historical earthquake. General litigators worry about the place of the jury trial in the new world of Zoom trials and in the post-pandemic landscape.² Cyber security and privacy specialists are at high alert making sure that the rush to put everything online does not expose critical digital infrastructure and personal information to cyber criminals.³ And experts in the business of law ponder how law firms will change as work becomes more remote and more technology driven.⁴ As a federal judge recently said at a Houston Bar Association luncheon of the effects of COVID-19 on the judiciary,⁵ the pandemic has squeezed thirty years of innovation into just a few years.

Appellate lawyers have been buffeted by these raucous seas along with the rest of the legal profession. Many of the concerns we have are the same as those of other lawyers. But appellate lawyers *are* different. The

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¹ FRANK M. SNOWDEN, EPIDEMICS AND SOCIETY: FROM THE BLACK DEATH TO THE PRESENT 7–9 (2020).

² GBAO, JURY TRIALS IN A (POST) PANDEMIC WORLD—NATIONAL SURVEY ANALYSIS (2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/ncscj-juries-postpandemic-survey-analysis-0620.pdf.

³ For a helpful panel discussion of these issues, see *The Future of Cybersecurity During and After the Pandemic* (U.S. Chamber of Commerce video interview Oct. 7, 2020), <https://www.uschamber.com/on-demand/government-policy/the-future-of-cybersecurity-during-and-after-the-pandemic>.

⁴ There are any number of articles worrying about the future of law as a business. See, e.g., Michelle Foster, *The Effects of the Pandemic on the Legal Industry*, FORBES (Nov. 18, 2021, 10:15 AM EST), <https://www.forbes.com/sites/forbesbusiness-council/2021/11/08/the-effects-of-the-pandemic-on-the-legal-industry/?sh=3fe01f9e7f77>.

⁵ There is no record of this luncheon, and I am paraphrasing the judge’s statement. The reader will have to take my word for it.

trial lawyer's joke is that appellate lawyers are the soldiers "who come onto the field of battle after the fighting is over to shoot the wounded."⁶ This is meant as a wry comment on the appellate practitioner's tendency to arrive after trial and second-guess their work. But it is also an example of the divide that sets appellate lawyers just a little apart. The skills, work, and role of appellate lawyers is different (however subtly) than those of even our trial lawyer cousins.

This essay therefore discusses some of the possible consequences of the pandemic for appellate lawyers. I consider first whether the pandemic will change *writing*, the chief tool of the appellate lawyer. Should we write differently after the pandemic? If so, how and why? Next, I will consider whether the work of the appellate lawyer *in court* will change after the pandemic. Are oral arguments going to be online in the future? And if they aren't, does that mean this period of video oral argument was an anomaly? Third, I will discuss the potential challenges and opportunities presented for a junior lawyer's development. Might the loosening ties of the office *improve* rather than hurt the experience of the average junior lawyer? Finally, I will discuss whether all these developments might sap the famed collegiality of the civil appellate bar. Appellate practice attracts those who are looking for a kinder, gentler, type of litigation. But will that survive in the new world COVID has made?

1. Writing briefs after the plague years: should we change how we do legal writing?

While oral argument is the glitzy reward that appellate lawyers get for their hard work, "the very heart of successful appellate advocacy is superb brief writing."⁷ Briefs are where appellate lawyers put in the most concrete terms their best arguments and where they join battle in detail with the opponent. For that reason, any appellate lawyer thinking about the consequences of the pandemic must think about how this extraordinarily disruptive event could have changed how briefs *should* be written.

At first blush, however, there is no reason for writing to change in the face of the pandemic. Writing is often a solitary task. Most appellate firms and offices staff briefs leanly. And a brief that *is* written by a large group often resembles the famous aphorism about the camel—that it is

⁶ See, e.g., Lee R. West, *Debate between Judge Lee R. West and Judge Robert H. Henry*, 80 DENV. U. L. REV. 783, 785 (2003) (although the joke in this debate is rendered as being about appellate judges).

⁷ Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 533 (2010). As the sources Hungar and Jindal cite make clear, the notion that the "brief is much more important than oral argument in affecting the outcome of the case" is conventional wisdom (and rightly so) among appellate lawyers. *Id.* at 533, n.101 (quoting MYRON MOSKOVITZ, *WINNING AN APPEAL* 17 (1985) and citing various other scholars and practitioners).

a horse designed by committee.⁸ For all those reasons, brief writing is usually a solitary endeavor, with the appellate brief writer hunched over a screen or a piece of paper thinking about how to crisply present the issue to the court. Brief writing was a monastic task before, and it will remain so. While serendipitous discussions with colleagues to flesh out ideas and pressure test arguments are an important part of law practice, my experience during the pandemic is that even this kind of personal interaction can be replicated online with video conferences and phone calls.

My conclusion that brief writing remained the same during pandemic conditions ignores one important point. The process of *writing* may not have changed very much. But the back end—the way judges *read* and process lawyer’s writing—likely has changed, and permanently. Even before the pandemic, surveys of judges suggested that the newer generation of decisionmakers tended to read briefs on screens.⁹ But in most courts, there remained the back-up of paper copies. Before the pandemic, for example, the Fifth Circuit required paper copies for every appeal, to be provided shortly after the briefs were filed electronically.¹⁰ The Supreme Court of the United States required forty paper copies of many filings.¹¹ Even to courts as august as those, the pandemic brought immediate and startling changes. The Supreme Court dispensed with the need for paper copies in many circumstances.¹² The Fifth Circuit too required paper copies only in some cases. Indeed, we know that at least one Fifth Circuit judge was marooned on a cruise ship for a month, and nonetheless was able to take care of all her work and continued to issue opinions at pace.¹³ It’s safe to say she was not receiving briefs by pontoon boat. Although there cannot yet be any hard data, we can therefore

⁸ The aphorism has no clear author, but it is cited in court cases as early as 1968. *Mettee v. Boone*, 251 Md. 332, 341 (1968).

⁹ Jeff Richardson, *The Use of iPads by U.S. Fifth Circuit Judges and Law Clerks*, IPHONE J.D. (May 8, 2019), https://www.iphonejd.com/iphone_jd/2019/05/fifth-circuit-ipad.html (noting that two of four Fifth Circuit judges asked at a conference responded that they preferred to read briefs on iPads); see also Judge David Nuffer, *Judges + iPads=Perfect Fit?*, 3 GEEKS AND A LAW BLOG (June 12, 2012), <https://www.geeklawblog.com/2012/06/judges-ipads-perfect-fi.html> (noting a survey suggesting that 58% of federal judges as early as 2012 used an iPad for their court work); Nicole Black, *Today’s Tech: A Federal Judge and His iPad*, ABOVE THE LAW (Aug. 21, 2014, 10:15 AM), <https://abovethelaw.com/2014/08/todays-tech-a-federal-judge-and-his-ipad-part-1/> (describing Second Circuit Judge Richard Wesley’s use of technology to read briefs and during oral argument).

¹⁰ 5TH CIR. R. 31.1.

¹¹ See, e.g., SUP. CT. R. 12 (requiring forty copies of a petition for writ of certiorari).

¹² *Order Rescinding Prior COVID Orders*, Miscellaneous Order (U.S. July 19, 2021) (discussing pandemic orders of March 19, 2020 and April 15, 2020 relieving printing requirement).

¹³ Portfolio Media, Inc., *Coping with a Pandemic: 5th Cir. Judge Jennifer Elrod*, LAW360 (Apr. 10, 2020, 8:26 AM ET), <https://www.law360.com/articles/1261915/coping-with-a-pandemic-5th-circ-judge-jennifer-elrod>. Judge Elrod was not the only judge working away from chambers. Justice Richard Bernstein of the Michigan Supreme Court worked from the Middle East for nearly three months in 2021 as part of an effort to spread cultural and disability awareness. Beth LeBlanc, *Justice Bernstein Worked from Dubai for Nearly Three Months*, DETROIT NEWS (Apr. 8, 2021, 9:36 AM ET), <https://www.detroitnews.com/story/news/local/michigan/2021/04/08/justice-bernstein-worked-dubai-weeks-now-israel/7137426002>.

speculate that long brewing trends towards e-reading have accelerated. I too spent time away from my office during the pandemic. My habits changed, towards a paperless environment. They had to. If that experience is universal, then our writing as appellate practitioners must also adapt to consider the new circumstances with which we are faced.

Adapt how, though? Even before the pandemic, leading practice academics and appellate practitioners had suggested that reading digitally was “re-wiring” our brains.¹⁴ Screen-only readers skim more text. They get more headaches. Multiple screens “promote multitasking.”¹⁵ And even the path the eyes take over the page changes. Rather than reading across and down the entire page, as lawyers do when reading a printed sheet, the eyes follow an “F” pattern, down and across.¹⁶ On top of that, many courts now have digital access to record citations (i.e., they can click on the brief in their iPad or computer and be taken directly to the page in the appellate record) and even direct links to cases embedded in the briefs.

What of it? At the very least, this means that the keen appellate lawyer must experiment, and must convince clients and superiors to part ways with now-obsolete methods. I have recommended to my colleagues (and try in my own briefs) the following ideas and strategies:

- *Extra care in citations (whether cases or record citations)*: What might once have required ordering a physical record to check can now be disproven in seconds. While it was always true that citations needed to be scrupulously honest and correct, the penalty for even an honest mistake now is higher.
- *Use pictures and charts*: Experiment with charts and graphics to illustrate points. If your point is that a hazard is open and obvious, show the court. If every published case in a circuit supports *you* and is against *them*, make a chart. Don't leave your point to chance if it can be illustrated in a clear and persuasive way.¹⁷
- *Scientific hierarchical structure*: Some observers have recommended using scientific hierarchical structure for section headings (i.e., “Part 1 is followed by Section 1.1 and subsection

¹⁴ ROBERT DUBOSE, ALEXANDER DUBOSE & JEFFERSON LLP, *LEGAL WRITING FOR THE REWIRED BRAIN 1* (2020), <https://adjtlaw.com/wp-content/uploads/2020/06/Legal-Writing-for-the-Rewired-Brain.pdf>.

¹⁵ *Id.* at 4.

¹⁶ Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 *LEGAL COMM. & RHETORIC* 1, 11–12 (2015).

¹⁷ For further information about the craft of “visual” legal writing, I recommend the extensive bibliography compiled by Professor Ellie Margolis. This work brings together in one place many of the leading guides to using pictures and other visual elements in briefs and other legal writing. See Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 *LEGAL COMM. & RHETORIC* 195 (2011).

1.1.1” because this method makes it easier for judges to know where in an argument they are).¹⁸ While in a traditional brief it is easy to flip back to a previous page to check the structure, that process is more disruptive on an e-reader, especially if electronic bookmarks are hard to access. Although this is a fairly dramatic change from traditional briefing methods, in briefs that involve many subparts it makes sense. 1.5.1.1.1 (for example) is sometimes better than I(C)(3)(a)(iii).

- *Repetition*: If judges are skimming, then they miss your killer argument if it appears in only one place. Although this can lead to clunky writing, in the new world of e-reading elegance must sometimes be sacrificed on the altar of effectiveness. Again, the barriers to flipping back and forth in a physical copy increase the need for repetition. This might especially be true when the appellate lawyer is writing in trial court, where the judge might not have the assistance of law clerks or the time to read things several times, or when the lawyer is writing in a context where the court is under time pressure (whether it might be a Petition for Mandamus or a motion seeking stay pending appeal).
- *Typography*: The old fonts may no longer serve as well in the context of iPads and smart phones. Specialists on typography like Matthew Butterick should be consulted to understand what kinds of fonts, spacings, and margins work better for electronic readers.¹⁹
- *Video*: Some cases are decided by a dispositive video. For example, in some cases where a police officer invokes qualified immunity in a suit involving excessive force, there is a video of the confrontation between police and the plaintiff that led to the claim. In a personal injury case, there might be a video of the slip-and-fall. While the Court will find the video no matter what, why not embed the dispositive evidence *in* the brief if possible? Yes, it’s unorthodox. But it may also be decisive.
- *Avoid footnotes*: As many writers have observed, footnotes are less effective on iPads because they require extra scrolling to access the footnote. On some readers, footnotes do not even appear properly. In short, if you expect your judicial reader to be e-reading, leave out footnotes to the extent possible. And

¹⁸ *Maximizing Your Appellate Brief for the iPad*, COUNSEL PRESS (July 25, 2014), https://www.counselpress.com/page_blog_single.cfm?bid=117.

¹⁹ See, e.g., MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* 78–81 (2d ed. 2018), <https://typographyforlawyers.com/system-fonts.html> (noting that different fonts are appropriate for different scenarios).

remember, some courts hold that arguments made only in footnotes are forfeited.²⁰ Those rules are likely to expand in an e-world.²¹

To be sure, all of these tools are likely to face resistance from those used to more traditional brief writing. But just as less traditional office arrangements have gained some acceptance during the pandemic, so too will these writing techniques if they are tried and pay dividends. Clients deserve this effort even if it makes lawyers uncomfortable.

2. What of the video argument and hearing?

While changes to writing are perhaps the most important changes wrought by the pandemic, the most immediately dramatic innovation for appellate practice has been the advent of oral arguments, hearings, and trials on video conference. Perhaps the most important specific consequence of this sea-change has been the increased public interest in watching important proceedings. Texas trial courts have streamed almost all proceedings by Zoom since the start of the pandemic. Courts of Appeals have also hurried their adoption of YouTube channels to allow public viewing of oral arguments where possible. During the fraught litigation surrounding the 2020 Presidential election, for example, tens of thousands of members of the public listened to arguments in courts around the country on topics as diverse as Houston's drive-through voting system to Rudolph Giuliani's attempt to explain the standard of review (i.e., strict scrutiny, rational basis, etc.) for the government actions he was challenging.²² Although of course we cannot know for sure, livestreaming those arguments likely helped, rather than hurt, the public's acceptance of the results of the election and of the litigation.²³ Members of the public were able to see judges carefully and honestly addressing these highly charged issues, and hopefully were persuaded that no matter the result, litigants' claims had been heard in good faith. Nor did fears of showboating come true (although we must remain vigilant). Once lawyers got over the initial surprise of having the public listening in to their arguments, they

²⁰ See, e.g., *John Wyeth & Bro. Ltd. v. Cigna Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) (holding that arguments "raised in passing (such as, in a footnote), but not squarely argued, are considered waived"); *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal[.]").

²¹ Eugene Volokh, *Writing Briefs When Judges Read on iPads*, VOLOKH CONSPIRACY (Jan. 17, 2014, 9:37 AM), <https://volokh.com/2014/01/17/writing-briefs-judges-read-ipads/>.

²² Jon Swaine & Aaron Schaffer, *Here's What Happened When Rudolph Giuliani Made his First Appearance in Federal Court in Nearly Three Decades*, WASH. POST (Nov. 18, 2020), https://www.washingtonpost.com/politics/giuliani-pennsylvania-court-appearance/2020/11/18/ad7288dc-2941-11eb-92b7-6ef17b3fe3b4_story.html.

²³ I have previously written on this topic to argue that video arguments are good for access to justice. See Raffi Melkonian, *Zoom Hearings: Might they Survive the End of the Pandemic?*, THE BENCHER, Nov./Dec. 2021, at 22.

got on with the work. It stands to reason given the success of streamed arguments during the pandemic that the public will demand at least some live access to court hearings in the future. It is no coincidence that the Supreme Court has continued livestreaming its arguments even after lawyers returned to in-person arguments, when before observers had to wait until Friday afternoon for the audio recordings.²⁴ Lawyers who often litigate high-profile cases might consider whether they ought to be trained for those public-facing opportunities.

But the transition to video oral arguments changed practice for lawyers handling more day-to-day cases as well. Practitioners have hurried to prescribe tips and hints for doing a good appellate argument on Zoom, me included. These have ranged from making sure to stand at a podium (or not),²⁵ checking your lighting,²⁶ making sure to have back-up technology available, making sure to moot the case like you are going to argue it (i.e., online),²⁷ clearing your desk of distractions, and even printing a copy of the judge's face and taping it to your screen to provide a target for your eyes.²⁸ Perhaps most important, don't appear as a cat!²⁹ All of these have been crucial practice tips for lawyers struggling to provide value to their clients and ensure that their client's important legal issues are given the full consideration they deserve. And appellate lawyers who are embedded with a trial team have been working hard throughout this period to figure out how to preserve appellate error during a video-conference bench or jury trial. How do you make sure the exhibits are properly tracked? What if the video feed dies at a crucial moment? What if people say important things on the video chat that are not captured in the appellate transcript?³⁰ What if someone is coaching the witness just off screen?

Stepping back from the immediate changes to our practice, however, the most lasting consequence of the new world for argument is likely to

²⁴ See, e.g., *Supreme Court to Continue Live Audio Streaming Arguments Through Fall*, EPIC.ORG (Sept. 9, 2021), <https://epic.org/supreme-court-to-continue-live-audio-streaming-of-arguments-through-fall/>.

²⁵ RAFFI MELKONIAN, *HOW TO MAKE YOUR ZOOM ORAL ARGUMENT A HIT* (Bloomberg Law 2020), <https://www.linkedin.com/feed/update/urn:li:activity:6716774844341608448/>.

²⁶ *Virtual Oral Argument*, JENNIFER M. COOPER, <http://www.jennifermcooper.com/virtual-oral-argument/> (last visited Apr. 7, 2022).

²⁷ Jordan S. Rubin, *Paul Clement on Pandemic Arguments, Moot Courts, and Scalia*, BLOOMBERG LAW (Feb. 22, 2021, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/paul-clement-on-pandemic-arguments-moot-courts-and-scalia>.

²⁸ Martin A. Stern, *Appellate Pointer—Top 10 Tips for Zoom Arguments*, ADAMS & REESE LLP (Feb. 16, 2021), <https://www.adamsandreesee.com/news-knowledge/appellate-pointer-top-10-tips-for-zoom-arguments>.

²⁹ In February 2021, an unfortunate Texas lawyer appeared in a state trial court as a small, very afraid, white cat, due to a Zoom filter. The moment of levity went viral across the world. See, e.g., 7News Australia, *Viral "Cat Lawyer" and Texas Judge Explain Feline Zoom Fail*, YOUTUBE (Feb. 10, 2021), <https://www.youtube.com/watch?v=0EMzDA9kiN8>.

³⁰ David A. Timchak, *Preserving an Accurate Record for Appeal in the Time of COVID-19 Virtual Proceedings*, ABA APP. ISSUES (Jan. 13, 2021), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/winter/preserving-an-accurate-record-for-appeal-in-the-time-of-covid19-virtual-proceedings/.

be in terms of access to justice, even if remote appellate oral arguments eventually disappear as judges return to in-person court. Being able to broadcast arguments has changed practice dramatically. Clients can now listen to court proceedings without expensive travel and hopefully make better decisions about their representation. In the case of incarcerated defendants, this may allow them to see legal proceedings on appeal they are currently barred from. But another, less appreciated, piece of value appellate lawyers bring to the table is being able to handle significant legal hearings in trial courts. In my practice, this can include dispositive motions arguments, post-judgment motions, motions about supersedeas or appellate bonds, and a wide range of other trial court appearances that benefit from an appellate focus. At least in Texas, this requires travel around the state, sometimes for short hearings with little content. For an individual or a small business embroiled in litigation, these travel costs are prohibitive. Even if they can pay them, each dollar a lawyer is paid for travel time is another dollar unavailable to settle the case or to reinvest in the wounded business. By allowing lawyers to attend trial hearings virtually, courts would take a crucial step towards broadening access to justice and allowing more clients to afford the right lawyers, wherever they might be. And technology may allow lawyers to help more clients who are now without legal counsel. If a pro bono effort means flights to far-flung parts of your state, that is harder for a lawyer to justify to a supervisor who wants to provide the service than if the client can be effectively served by appearing on a video link.

Does this mean every hearing should be virtual? Of course not. Jury trials likely are better in person. For constitutional and policy reasons, most criminal proceedings should be in person. I am sure we can think of other examples of hearings that are inappropriate for virtual treatment. But for many hearings and cases, there is no reason to gather everyone in person at a cost of up to tens of thousands of dollars. Technology can help provide the access to justice that is so lacking throughout the United States. This time, we should not stand athwart that progress yelling, “stop.”³¹

3. Associate development

Developing junior appellate lawyers is one of the most important—and most rewarding—parts of appellate practice. This is partly out of self-interest. Whether the appellate lawyer works in private practice,

³¹ This is the famous aphorism of William F. Buckley, the staunch mid-century political conservative: A conservative is one who “stands athwart history, yelling Stop, at a time when no one is inclined to do so[.]” William F. Buckley, *Our Mission Statement*, NAT’L REV. (Nov. 19, 1955, 1:00 PM), <https://www.nationalreview.com/1955/11/our-mission-statement-william-f-buckley-jr/>.

government service, or for a public interest organization, it's important to have talented junior colleagues who can help juggle the enormous burden of work lawyers face. Developing excellent junior lawyers might help private clients lower costs, increase the diversity of their lawyers, and develop relationships with counsel who might have more time to understand their business and their daily concerns.³² After all, while a senior lawyer with many clients may not have time to devote to learning the client's business in detail, a newer lawyer may have the bandwidth to devote to the client, and the long-time horizon needed to grow and develop with them.

Though all of that is true of nearly every lawyer, appellate practitioners perhaps add a dash of evangelization. Appellate practice is a special practice within litigation. It requires unusual dedication to *doing* appellate litigation—otherwise, the path to trial work is always easier to find—and it provides appellate lawyers with unusual levels of pleasure and collegiality. It stands to reason, then, that appellate lawyers are also eager to bring willing new lawyers to the craft. When an enterprising lawyer created a program to match appellate lawyers with aspiring litigators from communities of color, the program was overwhelmed by volunteers looking to mentor the next generation.³³ I like to imagine that this was partly because appellate lawyers are unusually dedicated to growing appellate practice as a whole.

But what will the pandemic do to the process of developing appellate talent in the future? Junior lawyers can now easily work from places outside the office or even from another city. Some significant firms have already announced that lawyers may always work from home or from other locations going forward.³⁴ Even more conservative firms have tried to balance their skepticism of the new work-from-home regime with some provision for flexibility.³⁵ The days where junior lawyers were expected to appear at the office every day for “face time” may well be over.

Still, many law firm and law office leaders are worried that weakening the in-person aspect of legal practice will have serious consequences for the development of lawyers. That mentors will not have the same

³² See, e.g., Richard Liu, *How Should Law Firms Develop Their Junior Lawyers?*, ABA L. PRAC. TODAY (Sept. 15, 2020), <https://www.lawpracticetoday.org/article/how-should-law-firms-develop-their-junior-lawyers/>.

³³ Cheryl Cole, *The Appellate Project: Empowering Law Students of Color to Aim High*, DIVERSITYQ (Oct. 26, 2020), <https://diversityq.com/the-appellate-project-empowering-law-students-of-colour-to-aim-high-1510581/>.

³⁴ Chris Opfer, *Quinn Emanuel Says Lawyers Can Work from Home Indefinitely*, BLOOMBERG LAW (Dec. 20, 2021, 4:10 PM), <https://news.bloomberglaw.com/business-and-practice/quinn-emanuel-tells-lawyers-they-can-work-from-home-indefinitely>.

³⁵ Ruiqi Chen & Jasmine Ye Han, *Big Law Agrees: Give Attorneys Flexibility as Offices Reopen*, BLOOMBERG LAW (Nov. 10, 2021, 6:01 AM), <https://news.bloomberglaw.com/business-and-practice/big-law-agrees-give-attorneys-flexibility-as-offices-reopen>.

close connections with their mentees, that the invisible teaching that happens when junior lawyers shadow senior ones can't happen through a video link. There is something to these criticisms, to be sure. Observational learning is part of human learning, from the time we are infants.³⁶ Dispersed workplaces will necessarily have some costs to the development of lawyers.

But electronic communication needn't be all downside risk. Personal connections advantage a certain type of lawyer and person—that is, someone who is good at interacting in person and navigating the politics that suffuse every workplace. But that talent, valuable as it can be, is not necessarily related to the talents needed to be an excellent lawyer. I have always wondered whether excellent interpersonal skills end up dictating career success in ways that are not conducive to the best results for clients. Why should the lawyer who is good at making small talk be the most successful one?

Moreover, the appellate profession suffers (as many parts of law suffer) from under-representation of women and racial minorities. Perhaps these numbers will fix themselves as the pipeline of women and minority lawyers who have the right kinds of qualifications to secure elite appellate litigation positions fills. There is at least some indication that this is already happening. But there is also some reason to believe that the artificial equality of the “Zoom box” might place people on an equal footing in ways that in-person interaction does not.³⁷ Do online meetings prevent the loudest voice from dominating the meeting? Do they allow quieter people to finish their sentences because “interruptions are very messy” in the online space?³⁸ Given these questions, we should be open to the possibility that different kinds of appellate lawyers can be developed in different ways. Some may need in-person time. Others need to be given the opportunity to grow in an environment with less emphasis on in-person interaction. It is and can be a new world.

4. Collegiality

Appellate practice has always been “characterized by collegiality.”³⁹ As Professor Larry Solum has put it, “[P]rovocative behavior by appellate

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³⁶ The psychologist Albert Bandura is credited with coining the term and showing the centrality of observational learning to human development. *See generally* ALBERT BANDURA, *SOCIAL LEARNING THEORY* (1977); *see also* MARK KELLAND, *PERSONALITY THEORY IN A CULTURAL CONTEXT*, 389–90 (2015), <https://cnx.org/exports/9484b2cb-a393-45aa-96bf-e9ae9380dd3e@1.1.pdf/personality-theory-in-a-cultural-context-1.1.pdf>.

³⁷ Alexandra Topping, *How Online Meetings Are Levelling the Office Playing Field*, *GUARDIAN* (Oct. 22, 2021, 4:00 ET), <https://www.theguardian.com/money/2021/oct/22/how-online-meetings-are-levelling-the-office-playing-field?CMP=Share>.

³⁸ *Id.*

³⁹ Scott B. Smith & Diana B. Bratvold, *The Collegiality of Appellate Practice*, *FOR DEF.*, Nov. 2010, at 28.

lawyers is rare although not unknown.”⁴⁰ Despite working in a practice area that is effectively zero-sum—just like other litigators—appellate lawyers rarely engage in the kind of personalized disputes that adorn the disciplinary records of state bars or the pages of the legal press. Of course, parts of appellate practice can be sharp-elbowed. Just ask the lawyers of the Supreme Court bar who must compete to secure ever-rare cases and oral arguments.⁴¹ But in general, appellate practice is genteel compared to the bare-fisted rough-and-tumble of trial litigation practice.

Why is this true? There are law-related answers to the question. The prominent Texas appellate lawyer Rusty McMains, for example, points out that appellate lawyers can “afford to be a little more collegial and open” because there are no secrets—both sides have a complete record in front of them, the question is how those set-in-stone facts can be applied to the law to reach the (right) result.⁴² Appellate lawyers also rarely need to engage head-to-head in private negotiations, where many of the sharpest exchanges occur. In my trial litigation practice, many years ago, some of the most stressful moments involved the meet-and-confer process and discovery. I even practiced with a lawyer who told me his practice was to have a fight every time he defended a deposition—it threw off the rhythm of the deposition, he said. Those tense interpersonal confrontations just don’t happen in appellate practice as a rule. If the parties disagree on something important, the answer is almost always to present the dispute to the court rather than engage in fruitless wrangling.

The same is usually true of judges. Because appellate judges sit in panels of three or five or nine (and sometimes seven), and because even elected judges sit for long terms, appellate judges *must* value collegiality. Judges on the federal courts of appeals often dine together during sittings of the court. In many courts, they shake hands before taking the bench. In the Fourth Circuit, the judges descend the bench to greet each other and counsel. All of these are prophylactics to increase the collegiality of the body and thus allow the court to function more smoothly over time.

But another part of the traditional answer is that appellate lawyers and judges are constrained by the appellate community. The appellate bar is small, even in a state like Texas that boasts an unusually large and well-developed appellate practice. Being unpleasant to hopefully lifelong

40 LAWRENCE B. SOLUM, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE, AND JUSTICE 1, 15 (2013).

41 The prominent Supreme Court practitioner Deepak Gupta, for example, has discussed this issue before the Presidential Commission on the Supreme Court of the United States. See Testimony of Deepak Gupta, *Access to Justice and Transparency in the Operation of the Supreme Court*, WHITEHOUSE.GOV (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf>.

42 JoAnn Storey, P.C., *An Interview of Former Appellate Section Chair Russel Hugh “Rusty” McMains*, 30 APP. ADVOC. 250, 258 (2018).

colleagues will rebound on the person misbehaving. Word will inevitably spread that a lawyer is difficult to work with. And so even lawyers who might be inclined to throw underhanded blows will stay their hand because the short-term benefits aren't worth the consequences in the appellate community. All of that is to the good.

But what happens if personal relationships are replaced with electronic ones? Even twenty years ago, legal scholars began to wonder whether “[a]bsence makes the heart unfamiliar” when it comes to teleconferencing and email.⁴³ But that author could not imagine today's balkanized world, riven by a pandemic that does not even allow lawyers to see each other in person during the worst outbreaks. It would not be surprising if we are faced in the next decade with fraying collegial bonds on both the appellate bench and in the appellate bar. For example, will appellate lawyers be able to maintain their professional courtesy in briefs and other communications if there are fewer instances where they come face-to-face with their interlocutors? An unnecessarily sharp tone is easier to adopt when the opponent is not a frequent opponent or co-counsel. Similarly, one can imagine technology allowing now regional appellate markets to become more national, and this introducing greater friction into the system than before.

Indeed, I wonder if some of the controversies of this past year in the appellate judiciary had something to do with judges being unable to sit with one another at conference and hash out a disagreement in person rather than through sharp email correspondence.⁴⁴ If even appellate judges are experiencing interpersonal strain, then can lawyers be far behind?

Is there a solution to this potential problem? I would say it is the same as what I often preach when using social media—which is to offer your interlocutor some grace and the benefit of the doubt. Tone and inflection are lost online. What may seem like an insult often is infelicity. A challenge might be a joke. Pick up the phone or take a professional colleague to lunch or for coffee.

⁴³ Michal R. Murphy, *Collegiality and Technology*, 2 J. APP. PRAC. & PROCESS 455, 456 (2000).

⁴⁴ Recent incidents in the Fifth and Ninth Circuits are illustrative. See Madison Adler, *Judicial Opinion Barbs Reflect Political Divisions, Twitter Era*, BLOOMBERG L. (Feb. 1, 2022, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/judicial-opinion-barbs-reflect-political-divisions-twitter-era?context=search&index=0>; Debra Cassens Weiss, *The good ship 5th Circuit is afire: Majority invented new Title VII sin in vaccine case, dissenter says*, ABA J. (Feb. 17, 2022, 3:32 PM CST), <https://www.abajournal.com/news/article/the-good-ship-5th-circuit-is-afire-dissenter-says-majority-invented-new-title-vii-sin-in-vaccine-case>.

5. Conclusion

Decades later, I suspect we will remember the pandemic years as world-changing—like 9/11, an inflection point in the history of the modern world. Lawyers can manage those changes in a way that leaves the profession better afterwards. Appellate lawyers cannot be excluded from that responsibility. This essay is intended to be a good start in thinking about the new problems the pandemic has created and the opportunities it has willed into being.

To be sure, this essay is not intended to be comprehensive. Appellate colleagues with different practices might well have different needs—surely, criminal appellate practitioners may have different ideas than mine for the necessary changes to the practice. And it is too early to know what the long-lasting consequences of the pandemic might be. In his early-pandemic book, the social scientist Nicholas A. Christakis analogized the COVID pandemic to Apollo’s onslaught against the Greeks in *The Illiad*.⁴⁵ As he explained, Apollo has not yet “put down his bow” and ended the rain of his “terrible arrows” against us.⁴⁶ And even when the death caused by COVID stops, it will be many years for the full consequences of what we have endured to be clear. Should we look forward to an era of creative destruction, like the 1920s followed the great flu of 1918? Or something worse? In any event, lawyers should think about the consequences now so we and our clients can be prepared. That is the obligation of the forward-looking appellate lawyer.

⁴⁵ NICHOLAS A. CHRISTAKIS, *APOLLO’S ARROW*, xvi (2021).

⁴⁶ *Id.*