

Streaming of Appellate Arguments at the First Department

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Live streaming and video archiving of oral appellate arguments is now occurring with frequency in New York state and other state and federal courts—but *not* in the Appellate Division, First Department. The First Department, a leading forum for resolving important commercial disputes, is presently out-of-step with other courts in our state and across the country that have embraced the technology necessary to facilitate live or archived video viewing of oral arguments. At present, real-time streaming of oral arguments at the First Department is available on closed-circuit to justices at that court and other court personnel *only* at the courthouse. Thus, the necessary technology already exists at the First Department and would likely not involve a costly upgrade. Although footage is archived, the Bar and the public are not permitted to access this important work of the First Department.

We believe that the First Department should promote transparency by joining other appellate courts in New York state and elsewhere that permit live streaming of oral arguments to the Bar and the public. Adopting this approach would be a long overdue policy change that would enable the First Department to keep pace with the digital age as well as other important appellate courts.

Federal appellate courts provide varying levels of accessibility for oral argument. The Second Circuit offers the audio of its oral arguments but does not offer streamed oral arguments live. The Third Circuit offers an archive of video and audio recordings of oral arguments. The Ninth Circuit offers live streaming of oral arguments and various other circuit courts, including the Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, offer recordings either on the same day or within 24 hours of the oral argument date. Information about the individual policies of each of these courts is available on their webpages. The U.S. Supreme Court does not offer live streaming but does archive audio recordings of its oral arguments and these are easily accessible from its webpage. So, in the federal system, oral arguments, while far from being universally offered through live streaming, are either available through an audio or video recording or both. Most are available at no cost through the webpage of the specific court.

Beginning with its September 2016 session, New York's highest court, the Court of Appeals, began live streaming its oral arguments on the court's own YouTube channel. The court also maintains archives of oral arguments dating back to 2010, which are available on its website. For oral arguments prior to September 2016, such files are in the Windows Media format and viewers need the Windows Media Player to view them. The live streaming and archives are available via a direct link from the court's webpage. Oral arguments are available on the Monday following the argument.

The Second and Third Departments offer live streaming of oral arguments, and the Fourth Department offers both live streaming and an archive of its oral arguments.

Federal courts and the intermediate appellate courts in New York, other than the First Department, therefore offer either live webcasts and/or archiving of oral arguments and make these available through readily accessible links on their websites. No specialized technological background is required to view the important work these courts perform. The First Department's reluctance to provide the level of transparency these other courts provide sets it apart from other appellate courts and, given its

commercial prominence in resolving high profile disputes, its refusal to provide live streaming is an unfortunate loss for the legal community.

While the issue of live streaming of appellate arguments certainly brings up the arguments that have been advanced in the past against cameras in the courtroom, the positives far outweigh the negatives.

Those who have opposed permitting live telecasts or streaming often highlight what is believed to be the deleterious effect that real-time broadcasts will have on the behavior of judges and lawyers. They believe that the participants are likely to deviate from their historic roles and become captives of making "sound bites" capable of airing on the evening news or perhaps censor their questions or remarks. The increasing pervasiveness of available video and audio of oral arguments would seem to undermine the strength of this view. On the other hand, there is much to support live streaming of appellate arguments. First, this kind of access supports the principle that the public has a fundamental right of access to what occurs in a court. Access increases public confidence in the fairness of our judicial system. Web streaming technology is a common element of everyday life. It involves the same procedures and concepts that are used to provide Internet users with online news, videos and other forms of enlightenment. Viewing videos of newsworthy events is commonplace in today's technology and creates the opportunity to view a primary source, without the overlay of the views of a media source or reporter.

Streaming of appellate oral arguments is also an important educational tool for lawyers, law students and the public. Viewers may observe the demeanor, preparedness and competency of those involved in the process—both judges and lawyers alike. Law schools could use the vast repository of arguments as a teaching tool in trial and appellate advocacy classes as well.

The benefit to practitioners would be huge. Live streaming would enable those attorneys who have worked on the preparation of the appeal to assist their courtroom colleagues with discrete messages sent real time that would help, for example, a respondent to more precisely focus on a point the appellant just raised or give a similar benefit to the appellant on reply. The result might very well be a more focused, pincer-like argument that would assist the panel in arriving at the correct and just result.

The archiving of streamed arguments might also assist the Bar in the First Department in another way. Suppose an attorney finds out the afternoon before argument (when the composition of the next day's panel is released) who will be sitting on the panel. An examination of past advocacy contained in an available archived repository could possibly uncover certain types of presentation and approaches that might be more effective or less effective than others or point to an approach that might be more tailored to the particular panel.

Finally, while it is universally acknowledged that the First Department is a hard-working, energetic, prepared and often "hot" bench, live streaming would provide a focused means to assist in the evaluations of justices that is mandated from time-to-time.

All in all, live streaming of appellate arguments in the First Department is long overdue and should, it is respectfully submitted, be adopted without further delay for the benefit of the Bar and the public.

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