
Kluwer Arbitration Blog

How the Auditory Dominates the Visual: A Case for Online Advocacy

Claudia Syn Yue Nyon (City Law School and The Honourable Society of Middle Temple) · Sunday, July 5th, 2020

While the hurdles of [virtual hearings](#) have been documented with numerous intelligible solutions, little attention has been turned towards how advocacy is faring in the offline-online migration. It is an attractive notion to think that advocacy, in its subjective glory, can be seamlessly transplanted from the offline world and into the virtual dimension with little opportunity costs to fear of. However, such a notion ignores the fact that the thrust of advocacy is the ability to connect with one's audience. With one's audience now rendered onto a 12×8" screen, the way we advocate must accordingly adapt.

After participating in the Willem C. Vis Moot's first virtual iteration as a student, and later conducting a cross-examination assessment online as part of the Bar Professional Training Course ('BPTC'), this author respectfully submits that offline advocacy, for lack of a better phrase, uses both visual and auditory cues in equal effect. Online advocacy, on the other hand, gives auditory cues more persuasive terrain than it does for visual cues. In a virtual hearing, there is greater persuasive weight placed on how we are heard rather than how we are seen.

In advocacy, eye contact and body language make up the bulk of visual presentation; auditory presentation is comprised of pitch and pace. In advocacy, we instinctively adjust, like sliding scales, the amount of visual and audio cues we deploy in order to present our arguments with persuasive effect.

Claiming that the auditory dominates the visual in a virtual hearing may perhaps be counterintuitive, as we may naturally think of ourselves as 'viewers' online. However, much of advocacy is about putting forth a sense of gravitas. A good advocate understands the importance of commanding a room - online advocacy takes the room away. Conducting virtual hearings in lock-down dampens any remnant of gravitas the advocate hopes to convey. Only the auditory remains largely intact; the only opportunity cost lost through the offline-online migration is that our speech is projected through speakers, but we nonetheless remain heard. It is even arguable that advocates are heard to a greater effect in a virtual hearing than in an offline hearing, for virtual hearings benefit from having the tribunal hear you up close from their personal headset.

Consider the rhetorical question by way of an example. It is a technique to be used carefully, and perdition awaits those who throw out a rhetorical question without first gauging where the tribunal stands with you on your point. Rhetorical questions thus rely on visual cues; eye-contact is used by an advocate to accurately assess where, and when, the rhetorical question should be used for maximum effect. Rhetorical questions also use audio cues for persuasive effect. We may pause to allow the full effect of a question left unanswered to audibly hang over a tribunal's head like a damoclean sword. Even the humble technique of emphasizing a single word relies on both visual and audio cues for persuasive effect, for we make eye-contact and adjust to a slow pace as we muse over the chosen word.

Given the fact that most persuasive techniques naturally rely on how they are visually and orally presented for persuasive effect, it is worth reviewing our advocacy in the offline-online migration. Visual cues cannot be relied upon as they normally would be in a virtual hearing. Instead, greater emphasis should be placed on how an advocate sounds. Preparation for an audio hearing should, therefore, include preparation for how an advocate is going to be heard.

To prescribe an exhaustive list of what makes for good online advocacy is a herculean effort. Advocacy, in its primal offline context, is a slippery craft to master. It is tiresomely subjective. A combination of innate instinct and intuition is sometimes all an advocate has left when the unexpected rears its, painfully and poetically, expected head.

Instead, the author hopes that the following points will prompt the reader to explore ways to maximise the persuasive weight of their own advocacy in their next virtual hearing.

General Advocacy

- **Never lose sight of the fact that the tribunal is hearing your oral submissions for the first time.** The act of parties muting themselves offers the advocate the floor, albeit virtually, more so than they would in an offline hearing. Subject to tribunal's intervention, the advocate is promised absolute attention. Therefore, concinnity becomes a powerful tool. Each point should flow from one to the next, and be watertight against an arbitrator innocuously asking you 'why?'. After all, this makes for more efficient advocacy, and efficiency is a valuable commodity in our present times. Also, consider that, sometimes, it may be worth drawing out why the point one is making, or about to make, is relevant. It would indicate to a tribunal that a point has come to an end.
- **Do not let the best be the enemy of good.** Make your point once, and make it twice if you have to. Understand that the tribunal can hear you very well, and are likely to pay more attention to your voice than how you appear. This means that repetition in a virtual hearing may saturate the point, and backfire more quickly than it would in an offline hearing.
- **The line between being assertive and being aggressive is fine in a virtual**

setting. An advocate speaks with full confidence that other parties, excluding the tribunal, have muted themselves. The mute button is effectively a physical representation of parties surrendering themselves and their time to the speaker. Such a mechanism of absolute surrender does not exist in a real hearing. Therefore, it is worth considering whether points need to be submitted as forcefully as an advocate might naturally incline to in an offline hearing. In a virtual hearing, the proximity between the advocate and the tribunal is effectively the proximity between the arbitrator and their screen/headset. We are closer to our tribunal in a virtual setting. Unfortunately, this runs in acute juxtaposition to a virtual hearing conducted during lockdown.

- **Not everything needs to be said aloud.** A written memorandum offers the opportunity to air out all arguments an advocate may have. We may flex our critical muscles gently in a written memorandum, and feel at liberty to try including as many good points as possible. Those reflexes are usually discarded in an oral hearing, where there is emphasis on making the best points first and foremost. In a virtual hearing, advocates should strenuously strive for brevity, and consider that a large proportion of ‘good’ points should be kept in their back-pocket, so to speak, as material to use during tribunal intervention. It is increasingly accepted that virtual hearings are more tiring than offline hearings, and it may be in the advocate’s interest not to overwhelm the tribunal. If it is agreed that not everyone can withstand, and process, an hour-long podcast, then it is agreed that not everyone can similarly withstand an hour-long hearing.

Cross-examination

- **Choose your witnesses, wisely.** Party autonomy allows parties to select which of their factual/expert witnesses should be called for cross-examination, and cross-examining for cross-examination’s sake may backfire spectacularly in a normal offline hearing. The same applies for a virtual hearing. Witness testimony gets breathed new life when spoken aloud, and will be further uplifted in an online setting where the auditory dominates the visual.

- **Consider a list in cross-examination.** Cross-examination is about the advocate’s questions. To demonstrate, students on the BPTC course are marked on their questions, and on how they incorporate a witness’ answers. Little regard is given to what the witness gives as an answer. Online advocacy places emphasis on audio presentation over visual presentation. This need not be fatal to the persuasiveness of cross-examination if one is critical in how they present. Consider making a list of all the things the witness says that are in disagreement with one’s case, and make it a point to transition from one discrepancy to the next, tying any strings up along the way. This list will go towards the earlier point of helping narrow down witnesses to call for cross-examination. Not all discrepancies will need to be picked up on, and listing all the issues down may make clear what is an important matter and what needs to be placed in one’s back-pocket. The tribunal, in return, may appreciate your brevity, especially when members of a tribunal are not from a common-law background. To those not trained in common-law, cross-examination has long run the

risk of coming across as irritating, or worse, as hostile. Because virtual hearings are more auditory than an offline hearing, the risk of sounding aggressive in a virtual hearing is something an advocate should be alert to.

- **Put your case.** ‘Putting your case’ is a phrase often thrown around at the BPTC, because there is an ethical dimension letting the witness and opposition know the case they have to meet. But in an online context, putting your case may be crucial as well. It is not just enough to bring up one’s version of the case, but to bring up what the witness’ version of the case is. If one is persuading the tribunal that their client’s case is to be chosen over the other side’s version, it is worth mentioning in cross-examination what the opponent’s version is e.g. “You did not [insert opponent’s case] as you say. Instead, [insert client’s case]”, or “You are fabricating XYZ because ABC”.

- **Lastly, be creative in showing credibility.** A witness’ credibility is harder to show offline, much less so online. Cultural differences often come into play when assessing credibility – some tribunals may perceive hesitancy or stuttering as a lack of candor in a witness. Thus, drawing comparisons may be a creative way to overcome this hurdle. Consider posing a few questions to the witness which you believe they will answer credibly. Often, this means asking questions one knows the witness will answer yes to, before then moving to grounds of contention. It may be very persuasive for a tribunal to hear a stream of ‘yes’s before a sharp turn into a stream of uncomfortable ‘no’s and a series of fumbled explanations. Sometimes the witness’ answers is less important than the manner in which they answer, and if an advocate can creatively make use of how a witness is heard, this may go towards showing credibility effectively in a virtual hearing.

To conclude, online advocacy makes a case for brevity, and cross-examination emphasizes how an advocate will need to re-consider their usual cross-examination techniques. The room for persuasion lies in the auditory in a virtual hearing, and visual presentation accessorizes how we are heard.

Where an advocate may endeavour to be heard in an offline hearing, the advocate is perhaps heard too well in a virtual hearing.

The author would like to kindly thank Professor Gary Watt, for he has been a tireless source of inspiration.


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