OHIO JUDICIAL CONFERENCE OJC CREATED 1963

for the RECORD

NEWS FOR THE OHIO COURTS

What is Justice?

It seems to be a simple three-word question. Whether you recognize it or not, as a judge, that question is constantly surfing through the shallows of your mind.

You should stop reading right now, pause and see how you do formulating a coherent answer. Say it out loud to see how it sounds. Be bold an try your answer on a trusted friend or confidante. Ask them how they would answer the same question in return.

You are charged with providing well-measured justice each day as you perform you constitutional duties. By now you should feel a bit like Justice Potter Stewart who famously said in Jacobellis v Ohio regarding obscenity: "I know it when I see it."

Here is the challenging second question: Is "justice" what others are seeing? For more than a year our shared national history and our institutions of governance have been under attack, sometimes by mindless mobs, and sometimes by articulate opinion makers. Most of the passion has been directed at policing, but our nation's courts have not been, and cannot stay, immune.

It is impossible to control the national dialogue, but strive to listen carefully, demonstrate courteous patience, and above all fully explain your decisions and reasoning. Do that and most will know they have seen "justice" being administered in your courtroom.

Paul
419-563-4966
paul.pfeifer@sc.ohio.gov

"And the survey says….": Returning to In-Person Appellate Arguments

By Judge Mary Jane Trapp, Presiding & Administrative Judge, Ohio Court of Appeals, Eleventh Appellate District

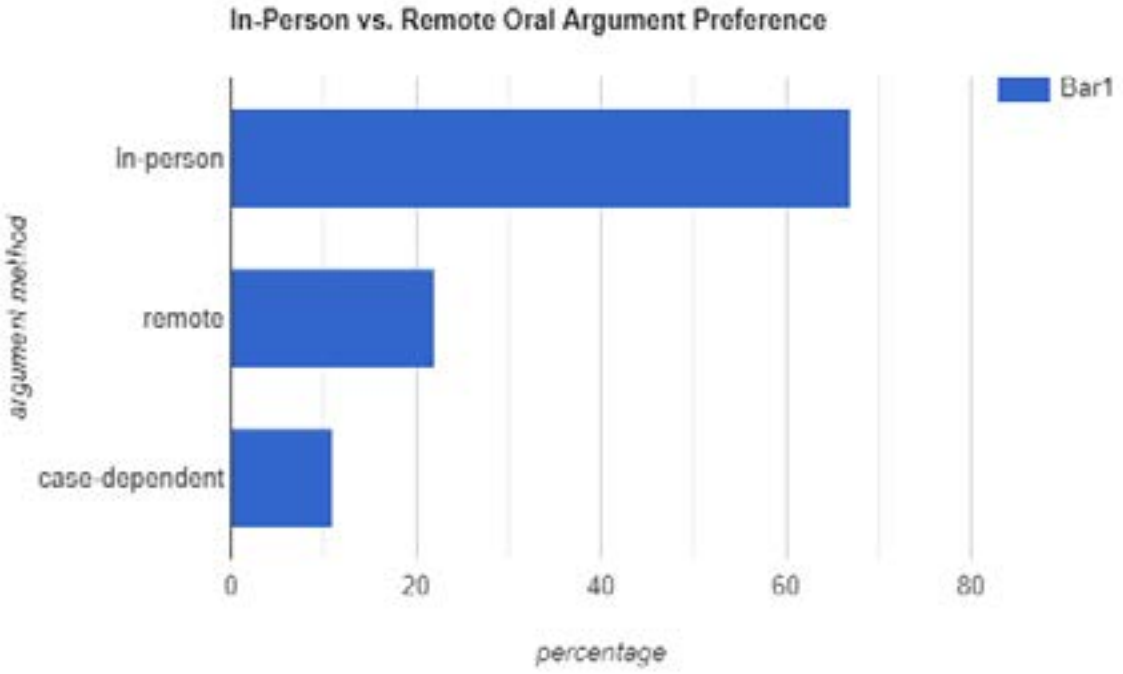
To quote a popular game show host, "And the survey says…," an overwhelming number of appellate practitioners want to return to in-person oral arguments, and more than half want to return immediately or within the next month.

Early in the pandemic, the Eleventh District Court of Appeals, which serves the five most northeastern counties in Ohio, moved all oral arguments to the Zoom® platform. With almost a year's worth of experience conducting virtual oral arguments and the increasing number of fully vaccinated practitioners and judges, the court decided to survey frequent appellate practitioners in the district to better understand the efficacy of and preference for virtual oral argument and the Zoom® platform; the willingness to and timing of a return to in-person arguments; and whether practitioners would opt for a virtual oral argument if the court offered a hybrid of in-person and virtual appearances post-pandemic.

The survey was conducted via email during the week of March 15 through March 19, 2021. The survey was sent to members of each bar association in the five-county district, as well as the bar associations in Mahoning and Summit counties and to the litigation and appellate sections of the Cleveland Metropolitan Bar Association. Surveys were also directed to each prosecuting attorney and public defender office in the district, along with the Ohio Attorney General and the Ohio Public Defender's offices.

Sixty-seven responses were received, and as noted, the court learned that most appellate lawyers want to argue their cases in person. The observations from the respondents validated our court's decision to go to a videoconference platform at the start of the pandemic.

67% of the respondents preferred in-person oral arguments. 22% preferred remote arguments, and 11% responded that their choice depended on the case.



As a former appellate practitioner, I recognized that non-verbal communication was critical. Sometimes it took just a look from a judge to let me know it was time to move on to another point in my argument or that I was missing the point of a question.

Many respondents noted that practitioners want to be able to see the judges' facial expressions and body language, without which the practitioners believe context is sacrificed. Another comment was that when speakers [judges] are talking over each other, there is an inability to determine who is asking the question.

While attorneys liked the videoconference option during an emergency, as one noted, oral argument is a "medium that loses quite a bit without personal interaction." Other respondents felt that certain cases were not appropriate for virtual argument, but none specifically identified the type of cases.

One interesting comment from an attorney who believes hearings should be in person, focused on virtual hearings as affording the "opportunity for people to 'participate' off-camera/off-audio, whose intent and actions may not always be honorable." I have heard that criticism from trial lawyers concerned with off-camera coaching during remote depositions or trial testimony, but not from appellate practitioners.

The effect on professionalism was also raised. An attorney observed "ours is a difficult profession; experience teaches [him] that time with other lawyers affords us psychological and moral support. Things work better in person. Remoteness can dilute mutual respect as well as the gravitas of what we do."

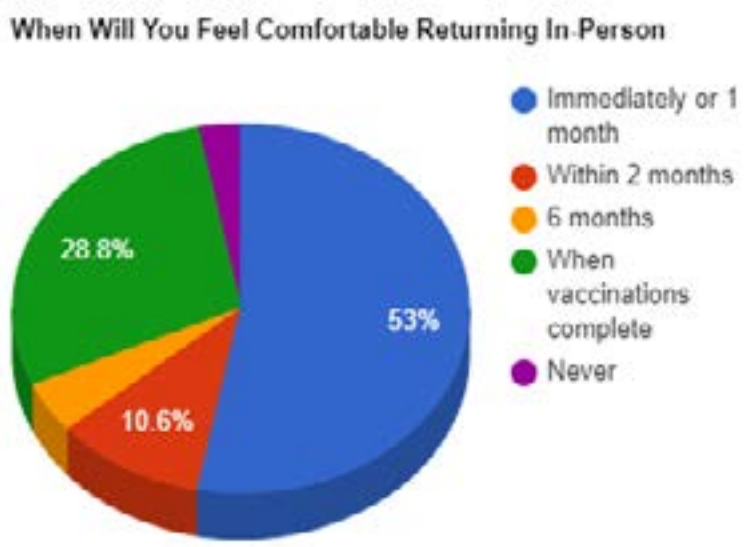
Another observed that judges were “less active and engaged during virtual arguments.” While another felt the virtual arguments were “more direct because the judges can very clearly see you and you them because of the way Zoom® focuses the camera.”

Some find it helpful to be able to watch arguments before their own; a benefit lost in the Zoom® conference world.

Finally, time efficiency and cost-savings to clients were also cited as reasons for preferring virtual arguments.

Thirty-one respondents had argued remotely via some videoconference platform either in the Eleventh District or another, and one respondent had argued via telephone, only. 45% of the respondents were either “Highly Satisfied” or “Satisfied” with the technology for remote arguments. The respondent who had argued via telephone noted the experience was “difficult” because he could not “tell when a judge was about to ask a question, at which point [he] would normally stop [his] argument” or he did not know when a judge had stopped talking, and this “made the flow of the argument more difficult and cumbersome.”

As to the question of when they would feel comfortable appearing again at in-person oral arguments, 53% said they would return immediately or in one month. The number increases to 64% with a start in two months. 5% would only return after 6 months. 29% would return after vaccinations are complete, and 3% would never return. On a lighter note, one wag responded that he has “never felt comfortable appearing before any panel.”



All but one respondent indicated their preferences regarding implementation of protective measures that would make them feel more comfortable attending in-person oral arguments.

If everyone in the courthouse and in the courtroom wears masks, 47 respondents would feel comfortable. Some of the responses stated that although masks should be worn, they should not be worn while an attorney is arguing, and the judges should not wear them, so their facial expressions can be observed.

52 respondents wanted social distancing enforced, some noting an appellate courtroom is quite conducive to this because the attorney's podium is already socially distanced from the bench.

40 respondents wanted temperature checks, and 35 wanted all in the courtroom to have been vaccinated.

When asked "How likely would you opt for a virtual oral argument if the court offered a hybrid hearing where attorneys in the matter could choose to argue in person or via video conference," 60 out of 67 respondents expressed their opinions about the virtual option post-pandemic.

Again, the overwhelming response (67%) was that they would be unlikely to opt for a virtual choice, if offered. 25% were likely to choose the virtual option, while 8% were indifferent. Some respondents were fine with having the option for "unusual circumstances," but most all were also clear that if one attorney argues in person, both should. Recognizing the value of videoconferencing in unusual circumstances, our court has published an amendment to our Loc. R 21(B) that provides: "In the event of adverse weather, public health emergencies, a joint motion of the parties, or other good cause shown, this court may conduct oral arguments via video conference."

There was some overarching philosophy underlying many of the responses. This philosophy was best summarized by one respondent who wrote, "There is something to be said, too for the solemnity of entering a courtroom * * * seeing judges assembled on the bench, of feeling the gravity and weight of the courtroom atmosphere. This is especially true for lawyers, who may become too accustomed to appearing before judges. We all need to be reminded from time to time of the gravity of what we are doing as lawyers representing clients whose lives are impacted by what we do in representing them."

The judges of the Eleventh District will be meeting to review the data from the survey and make decisions regarding the resumption of in-person oral arguments. In any event, the court's ability to travel to each county for hearings will depend on the restrictions in place in each county's courthouse and the availability of a courtroom. Please pay close attention to your hearing notice. Our hearing schedule and COVID-19 journal entries for each county are posted on the court's website.

http://www.11thcourt.co.trumbull.oh.us/ed_schedules.html

Thank you to all who responded to our survey and stay well.

Social Media, Cancel Culture, and the Restriction of Free Speech

Judge Matt Lynch

Sounding a variation on a familiar theme, evangelical author and pastor Rick Warren has been quoted as saying: "Law is downstream from culture. By the time you make a law about something, you're reacting, not acting." This observation appears particularly appropriate in the present time, where "cancel culture" has resulted in the withdrawal of support or a platform for those who express opinions with which others merely disagree. Our country is currently confronting the novel issue of internet censorship by private technology companies and social media platforms, manifested by "deplatforming" and "shadowbanning." Given the frequency with which this "cancellation" is occurring, it is important that we examine how this can implicate legal principles when it goes too far, particularly when applied by technology giants like Google, Facebook, Twitter, or YouTube. Interference with one's ability to communicate on these platforms can occur either from such entities acting on their own political or personal beliefs or at the behest of state actors, who may request that opposing political figures be prohibited from utilizing these platforms. In such cases, the question is whether free speech and our rights under the First Amendment are endangered.

While the issue of internet censorship is one that society and the law has only begun to grapple with, the broader issues of the regulation of private speech and the First Amendment's application to private actors are not so novel. Throughout the past century the law developed different approaches to dealing with the regulation of private actors depending on the media by which the speech was communicated. To the print media and private publishing, the law has endeavored to afford the maximum freedom

from interference. So it is that content-based restrictions by government on speech are presumptively unconstitutional. *See*, *e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Even the possibility of incitement to violence is generally insufficient to justify restricting such speech. "There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 722 (1931).

Television and radio, on the other hand, are subjected to both government regulation and licensure by virtue of the airwaves being deemed part of the public domain. The Federal Communications Commission is charged with promulgating rules and regulations for broadcasters "as public convenience, interest, or necessity requires." 47 U.S.C. 303. In the execution of this mandate, the Commission has exercised considerable regulatory authority over the content on radio and television. For example, content deemed profane or indecent (as opposed to obscene) is subject to the Commission's authority whereas such content in print media is free from similar regulation. In fact, the FCC may revoke a station license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, * * * by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. 312(a)(7).

While the internet and social media have enjoyed similar freedom from regulation accorded to print media, there are several paths that might be pursued to address the cancellation of free speech. Although the First Amendment typically applies to

government actors prohibiting free speech, there is a case to be made that this prohibition can be extended to certain private entities to prevent them from acting to censor speech on their platforms. An exception to the state action doctrine, which generally applies the First Amendment only to government restriction of free speech, has been applied when private entities function in an area generally reserved to the government, such as in the case of a company-operated town. *Marsh v. Alabama*, 326 U.S. 501 (1946). As the Supreme Court wrote in *Marsh*, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

While the federal courts have generally declined to specifically apply the First Amendment to private entities, states have more broadly recognized the necessity of protecting free speech when interfered with by private entities. States have found that private entities providing a space where the public freely congregates are subject to rules requiring free speech. For example, the New Jersey Supreme Court held that the right to free speech applied in regional and community shopping centers, noting that while the purpose of the shopping centers was commercial, "their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events" and the public was invited to use the property. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp*, 650 A.2d 757, 761 (N.J.S.C.1994). California has similarly extended rights to use private shopping centers and sidewalks as forums for free speech. *Robins v. Pruneyard*

Shopping Center, 592 P.2d 341 (Cal.S.C.1979). Such rationale easily applies to public forums online, where individuals are encouraged to use the platforms to communicate with others and the forum for free speech is even larger. Today internet service providers provide a public forum where users believe they have the ability to express themselves freely. However, users are subject to speech rules they may not even be aware of and not regulated by anyone but the private company.

It is without question that internet service providers and social media platforms wield tremendous power. For example, in the 4th quarter of 2020, Facebook had approximately 223 million users in the US alone[1], approximately 68% of the US population. The United States Supreme Court has recognized how critical social media is for free speech, holding in *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017), that the state of North Carolina could not make it a felony for a registered sex offender to access commercial social networking sites where minors are members: "North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, [and] speaking and listening in the modern public square[.] * * * [T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." If such platforms are necessary to exercise the First Amendment, it is legitimate to question why their decision-making is not subject to regulation. It may be the case that these platforms, or portions thereof, could be designated as a public forum.

1. Statista, *Number of Facebook Users in the United States from 2017 to 2025*, https://www.statista.com/statistics/408971/number-of-us-facebook-users/ (accessed Mar. 16, 2021).

When considering the cancel culture and social media, it is particularly important to focus on political speech, as this is an area where cancelling runs rampant. Political speech is of particular importance because it is "entitled to the fullest possible measure of constitutional protection." *Members of the City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984). It can be argued that private companies should be subject to First Amendment protections when they act in a manner not dissimilar to the government. It has been maintained that internet service providers "are essentially acting as agents of the government in the way that they are shaping the minds of the populace towards their own political agenda." Salter and Ramkhelawan, *Section 230 Immunity: How the Trump Era has Exposed the Current Conflict between the First Amendment and the Good Samaritan Clause in the Modern Public Square*, 43 U.Ark. Little Rock L.Rev. 239, 256 (2020). Further, if these platforms remove or block communications by a political user acting at the behest of a government agent who requests such speech be prevented, a legitimate concern given the current lack of regulation, this would only strengthen the case that they are acting as an agent of the government. Andrew Blake, *Democrats Call Upon Twitter to Suspend Donald Trump*, (Nov. 4, 2020), https://washingtontimes.com/news/2020/nov/4/democrats-call-on-twitter-to-suspend-donald-trump-/ (accessed on Mar. 16, 2021).

Protection of free speech would be beneficial regardless of the reason these platforms banned users or speech they did not agree with, whether it be personal beliefs of the owners and leadership or political pressure to ban certain users. Political social media accounts, such as a President's Twitter account in fact, have been recognized as a public forum. *Knight First Amendment Inst. at Columbia Univ. v.*

Trump, 928 F.3d 226, 237 (2d Cir.2019). If they are a public forum for the purposes of preventing a politician from activities such as blocking users, it stands to reason that they should be a public forum available for *all* to use without being blocked.

Even if courts are unwilling to extend the protections of the First Amendment to cover speech while using a private company's service, it is not unreasonable or unprecedented for some degree of regulation to occur, as is the case with television and radio stations noted above. The United States Supreme Court has recognized that "[t]o condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press." *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 394 (1969).

Regulating social media and other internet entities to require that there is fair treatment of users, including political figures, and access to free speech would not be inconsistent with how this country has regulated other communication entities. It is time that the laws and interpretation of such laws recognize the power of the internet and social media and ensure that private companies with their own agendas, which can be influenced by political actors, not be permitted to shape views by prohibiting free speech from users of both political perspectives. Otherwise, we may soon have nothing left to cancel.

The Power of Asking "Are You Ok?" A Message from the Judicial Advisory Group

I recently watched a video that shows the aftermath of suicide and how it affects family members, friends and other survivors. But, to me, the most powerful point the video makes is how important it is just to ask someone if they are ok.

If we notice that a loved one, friend or co-worker are showing signs of mental health issues, why are we hesitant to ask if they are ok? I believe there are several reasons why we do not stop and ask. We were taught to mind our own business. We do not want to get involved. We are too busy. We are afraid of legal implications. We do not know how to help or what to say. It is imperative that we all learn how to ask this question and let others know there is help available and point them in the right direction. Asking a person "Are you ok?" shows the person that you cared enough to ask. Most people do not want to die; they just want their pain to end, but they do not know how to get help or are afraid to ask for help. By asking this simple question, you could save a life.

Read more

Judicial Advisory Group
As a member of the judiciary, do you ever struggle with the day-to-day responsibilities that come along with the job? Do you know other judges or magistrates who are struggling?

The Judicial Advisory Group (JAG) can help. JAG is comprised of judges who work with the Ohio Lawyers Assistance Program (OLAP) to provide confidential assistance to the judiciary. Brought to you by the Ohio Judicial Conference and OLAP, JAG helps the judiciary in several areas:

- Issues of judicial temperament and diligence that on their face do not rise to disciplinary violations
- Burnout, stress, and other debilitating conditions
- Depression or other mental health issues
- Substance use disorder (alcohol and drugs)
- Screen referrals regarding judges/magistrates to be sure they represent genuine concerns
- Respond to judges/magistrates who need help in ways that address the demands of their responsibilities and positions

Click here to learn more about JAG

OJC Tips and Tricks

This is a fluid list that will constantly change. We will always be adding items as they become frequent questions, but if you have anything to add, please feel free to contact **Justin Long**.

- Feel free to submit any articles you would like to have added to the quarterly For the Record in the future.
- The Judicial Advisory Group (JAG) is available for judges who need need a group to extend its ability to provide confidential assistance to judges.
- Please fill out a "Who Do You Know" form to let the OJC know who you know in the legislature or the administration.
- For help signing into the Ohio Judicial Conference's website, www.ohiojudges.org, please see this document.
- Annually, the OJC hosts a Judicial-Legislative Exchange program, which allows a day for judges to come to Columbus to shadow legislators, hopefully from their districts. The idea is for the legislators to then shadow the judges in their court for the day.
- Did you know that if you log in to the Judicial Conference website and go to associations, you can choose your judicial association and see the summer and winter meeting dates?
- The Judicial Conference Jury Instructions Committee posts recently revised jury instructions on the Judicial Conference website.
- The website was recently updated with a few notable changes. One of those changes was the addition of a calendar which is matched up with our list of events.
- Another addition is the "Outreach that Works" link, which allows judges to submit any recommendations that help them to reach out to the public, whether it be publications, websites, suggestions on events, etc.
- A notable connection to help all judges is the National Center for State Courts, or the NCSC. This site helps to promote the rule of law and improves the administration of justice in state courts and courts around the world.
- Judicial Diversity: A Resources Page

Judicial College Offerings

The Judicial College CLE schedule has been upgraded starting this year. To view the calendar and sign up for courses, please visit this site.

Visit The Ohio Judicial Conference Website!

WWW·OHIOJUDGES·ORG

Contact Justin Long at the Ohio Judicial Conference for login assistance

justin.long@sc.ohio.gov

Ohio Judicial Conference Staff

Executive Director
Hon. Paul Pfeifer, Retired 614-387-9762
Paul.Pfeifer@sc.ohio.gov

Legislative Counsel
Marta Mudri, Esq. 614-387-9764
Marta.Mudri@sc.ohio.gov

Deputy Legislative Counsel
Joshua Williams, Esq. 614-387-9767
Joshua.Williams@sc.ohio.gov

Deputy Legislative Counsel
Shawn Welch, Esq. 614-387-9765
Shawn.Welch@sc.ohio.gov

Fiscal/HR Officer
Aleta Burns 614-387-9757
Aleta.Burns@sc.ohio.gov

Legislative Services Specialist
Justin Long 614-387-9756
Justin.Long@sc.ohio.gov

Judicial Services Program Manager
Trina Bennington 614-387-9761
Trina.Bennington@sc.ohio.gov

Judicial Services Program Coordinator
Jennifer Whetstone 614-387-9766
Jennifer.Whetstone@sc.ohio.gov