



Remote jury trials

OUT OF DISRUPTION ARISES GREAT INNOVATION: TRIAL BY ZOOM?

We've been watching a science fiction movie we didn't buy tickets to see, and we can't leave the theater.

While slowly, like a beast emerging from hibernation, some courts are starting to reopen, the internet is rife with speculation about the future of jury trials. Florida has put them on hold until July. Given the priority of criminal trials, many believe Los Angeles won't see a civil jury trial until late this year, or even next year.

Meanwhile, the gate is open for innovation in California. In her statewide order staying all jury trials, Chief Justice of California Tani Cantil-Sakauye said that courts may conduct jury trials at a date earlier than her stay orders "upon a finding of good cause shown or through

the use of remote technology, when appropriate." As of this writing, the Los Angeles Superior Court has not finalized any policies (although, they may have by the time you read this), and whatever protocols we adopt could shift depending on the virus. Other jurisdictions are also starting to evaluate protocols. Many individuals have suggested that future jury trials take place, in whole or in part, through distance technology. In that connection, it's worth rounding up some of what's happened elsewhere. Furthermore, several academics and consultants have already performed deep dives into the issue.

As of this writing, the author is not aware of any court that has conducted a fully remote jury trial, but by the time

this article is published, one may have occurred. Many attorneys have conducted depositions via the internet. Several divisions of the Second District Court of Appeal are hearing oral arguments remotely, and around the country, some trial courts have held non-jury events online. Below is part of a growing list:

- The United States District Court for the Southern District of New York recently began allowing grand jurors to convene and deliberate via videoconference. (Rule 6 of the Federal Rules of Criminal Procedure does not require that a grand jury be physically located in the same room during deliberations.)

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- Richard Gabriel wrote in Law360, “U.S. District Judge Alison Nathan in Manhattan allowed one of the 11 jurors in the trial of an Iranian banker to deliberate by FaceTime because the juror reported feeling sick. In light of the coronavirus, Judge Nathan stated the court was under ‘extraordinary circumstances’ and in ‘untested waters.’ After being assured the juror would be secluded in an apartment, Judge Nathan stated to the juror, ‘You must think of yourself as present in the jury room.’”

- On April 22, 2020, Beau A. Miller, a state-court judge in Houston, Texas, began conducting a bench trial over videoconference.

- Recently, closing arguments occurred via Zoom in a voting rights case, but the participants encountered numerous glitches as U.S. District Judge Cathy Seibel and the attorneys tried to operate the new technology.

- In late May, the country’s first completely remote jury trial occurred, over Zoom, in a suburban Dallas, Texas court. The verdict wasn’t binding. It was a one-day summary jury trial involving a disputed insurance claim. The jurors viewed evidence in Dropbox folders. Overall, according to one article on Fortune.com, “Those involved seemed pleased with the process....Matthew Pearson, a San Antonio lawyer for the plaintiff, said the comfort of their homes seemed to make the jurors more responsive to questions. They were attentive as he presented evidence by sharing his computer screen over Zoom, Pearson said, and his firm saved money because it didn’t have to fly an expert witness in from Minneapolis.”

As we move into this brave new remote world, a plethora of issues and questions await. Here are some, with the caveat that this article only scratches the surface.

The needed hardware

Absent support from her court, an individual superior court judge’s ability to conduct a remote jury trial would be doubtful. The machinery that needs

to be put in place is complicated and expensive.

Richard Gabriel of the Civil Jury Project observes that before anything else, a court must establish a relationship with a videoconferencing service like Zoom, Adobe Connect, Google Hangouts Meet, GoToMeeting or Webex. Everyone who would be involved in the trial – judges, courtroom staff, court administrators, attorneys, and court reporters – would have to take a tutorial in order to help them use the technology as seamlessly as possible, enabling them to make rational choices about camera placement, sound levels, and lighting in order to craft more uniform presentations. Thorough tutorials are essential. Think back over the experiences you’ve had with technology during conventional jury trials. How many times have glitches delayed the proceedings? An article in *The Verge* contained an anecdote about Alan Rupe, an employment lawyer at Lewis Brisbois, who popped into a videoconference with a Zoom background framed by majestic sunbeams. “I apologize for the background,” he told U.S. District Judge Vince Chhabria. “I was at a Zoom happy hour and I don’t know how to get it off. It is a beautiful Kansas sunset.” Chhabria cracked a smile. “Kansas sunsets are perfectly welcome here,” he said.

Gabriel’s list of pupils for tutorials also includes witnesses. That makes sense, and witnesses who are parties will probably agree, but what about nonparty witnesses? Will they, with alacrity, be willing to spend an extra couple of hours learning to navigate one of these conferencing platforms? Experts probably will, but most likely they will charge for their time.

Every court would need a help line and computer-savvy personnel to make sure these systems run smoothly and strongly enough to support a conversation by everyone. If one juror says later, “My connection was slow, and I couldn’t tell what everyone was saying,” then you risk a mistrial. In each trial, counsel should agree on a tech maven

(an IT bailiff if you will) to track the proceedings gavel to gavel. Inevitable problems – power outages, slow internet speeds, comprehension difficulties, and user error – will occur, and these will become more serious in light of the need for the judge, attorneys, witnesses, and jurors to be present for prolonged periods online.

Courts will confront the same dilemma with respect to access to computers that our schools now face: You can’t make the class-based assumption that “everyone” has access to a computer, but you don’t want to let a lack of access by relatively few people limit the majority who have it. Richard Gabriel makes the interesting suggestion that pre-wired government offices could be provided for those who lack access. Others have suggested standardizing the technology by, for example, distributing iPads with a cellular connection. This would provide the additional advantage of locking the devices so that jurors could log only into the proceedings and wouldn’t be tempted to surf the net or jump on social media during boring parts of a trial.

At the time they receive a summons, prospective jurors should be asked if they have a working computer with a camera and functioning internet access. They should also be asked, in a discreet manner, if they will have access to a private, quiet space for the trial’s duration. If they don’t, courts should devise procedures to let them participate, such as sending them to a government office or cubicle with appropriate social distancing to log onto a designated computer with a camera and internet access.

How many jurors?

Discussions are already occurring with respect to whether civil trials should take place with fewer than twelve jurors. Eight would be consistent with the Expedited Trials Act. Six would match the practice in many federal courts. The United Kingdom is considering seven jurors rather than the normal twelve. Such a change would not be new there;

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that country also dropped their juries to seven during the Second World War.

Several have voiced doubts about the ability of smaller juries to render results as fairly as juries of twelve. Steve Susman of the Civil Jury Project disagrees with reducing jury size. "Virtually all academic research," he writes, "shows that larger juries get better results (partly because they are likely to be more diverse and partly because the more minds, the better), and technology allows there to be more jurors with less expense. Watching twelve faces in a gallery view is not more difficult than watching six." Because he and others may be right, should legislation occur in this area, it would be wise to add strict sunset provisions, most likely one year, enough time to compare verdicts from remote trials with verdicts from similar trials that occurred the old-fashioned way.

Summoning jurors

The next issue involves how one summons jurors. Will they be told to come to the courthouse? How many will be summoned? How many jurors will beg off because they are afraid to travel? Will jury assembly rooms be large enough for social distancing? Unless those rooms are quite large, it is likely that a much smaller number of people than usual will be called. Those who are, may be summoned directly into courtrooms rather than to jury assembly rooms. Jurors could choose to receive orientation through a written communication, by telephone, or online. To provide room for social distancing, jurors could be summoned in smaller groups staggered at different times throughout the day.

Social distance in the courtrooms

Courtrooms are being measured in order to determine how many people they can accommodate. Very likely jurors will not all be sitting in the jury box. Many may be in the audience. For in-person trials, consider a round robin protocol pursuant to which jurors rotate so that one day they occupy the box and the next day they sit in the audience.

Privacy

The court and counsel may want to establish one blue screen backdrop for every juror and witness. Especially if they are logged in from home, jurors may not want everyone to see where and how they live. They won't want others to observe their spouse, pets, and children should any of them interrupt the proceedings.

To minimize distractions and avoid informality, one report suggested standardizing the background environments and degree to which each person's face and torso was in the picture, and then putting a coat of arms behind the judge.

Masks

According to Kevin Brazile, its Presiding Judge, the Los Angeles Superior Court plans to order judges, staff, attorneys, and litigants to wear masks in court. For judges who have difficulty wearing masks, shields may be installed. Although masks enhance safety, they make it harder for counsel, as well as jurors, to evaluate nonverbal cues from jurors and witnesses. It can make it harder to hear a witness. Must interpreters wear masks? If the trial is in-person, must interpreters socially distance to six feet from the person whose language they're interpreting? Should wearing masks be optional, required, or barred? If jurors and witnesses wear masks, at some point will counsel want to require jurors – especially prospective jurors – and witnesses to shed their masks, however briefly, so that everyone can get a complete look at them?

If masks are allowed or required, the court or counsel should add to their voir dire checklist questions about how jurors will react to a party, a lawyer, and a witness who remain masked through the trial. Will you hold it against a person who wears a mask? Who does not wear a mask? How will you feel about a witness who testifies while wearing a mask? What about counsel who continually wear masks except when they are questioning a

witness? Will you have trouble evaluating a person's demeanor and credibility if they testify while wearing a mask?

Voir dire – Hardships and fears

Jury selection could occur remotely under two possible scenarios: Jurors can log on at scheduled times and be individually interviewed by the judge and lawyers, or an entire jury panel can log onto a webinar type of interface.

In the second scenario, the judge and attorneys can ask questions of the entire panel. Jurors who have responses can identify themselves through raised hands or chat responses. Then they can be questioned individually by activating their cameras.

Whether jurors receive an online questionnaire via survey-type software or whether they are examined orally, questions about this pandemic and its effects would be not only inevitable, but essential. Counsel should determine if they are willing to stipulate that anyone who claims a financial hardship may be excused without further inquiry. Among the questions suggested by Gabriel are these: If a juror is unemployed, will they be willing to put their job search on hold for one or more weeks? How has COVID-19 impacted them during the stay-at-home period? Did they, any member of their family or close friends come down with COVID-19? Or test positive for it? Or for the antibodies? Has anyone close to them died? Are they fearful of sitting on a jury? If the jury comes together for deliberations, even if in a room large enough for social distancing, will that make them nervous? If the plaintiff/defendant had COVID-19, would that affect their ability to be fair?

Social distancing may present a voir dire topic. For example, will it trouble you to watch the trial from a place other than the traditional jury box? Will you have difficulty deliberating in a large space and from a social distance?

COVID-19 voir dire questions can be even more focused. For example, if counsel is trying a trip and fall occurring

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at a market, jurors may consider every employee there (including the person who failed to sweep the floor in accordance with the schedule) as heroes, essential workers who had the courage to come to work and risk infection in order to serve the public. Could they rule against them? Would they have trouble finding liability for that reason? If a front-line employee (e.g., a cashier) is suing for discrimination, would you have trouble ruling for the employer? In a case involving a delivery truck, could you rule against the driver? In an insurance bad faith case, how does the person feel about technicalities in this new normal? In product liability litigation, ask whether the person has lost faith in a system allegedly designed to protect consumers? Right now, health care professionals are highly respected, but it is too early to say what effect that will have, if any, on how jurors will react in trials involving, for example, nurses.

Issues arising during the trial

If a judge allows jurors to ask questions while a witness is being examined, they can submit their questions with the appropriate chat tool. Jurors could also take notes on their computers or on a separate pad, with an admonition to keep their notes away from others in their household and not to review their notes outside of court hours.

In a plan for online jury trials, the law firm of Holland and Knight mentioned that “judges would likely need to see an alert of some kind if a juror steps away from the camera at any time other than a break. In addition, it would be useful to have a separate channel where attorneys could make objections or hold bench conferences that jurors would not be able to see. There should also be an interface for judges and attorneys that is much more robust in controls, and an interface for jurors that is more passive.” That last suggestion is crucial. Heaven forbid someone clicks the wrong icon

and a jury hears what’s being said at the sidebar.

A judge may want to add a note about personal appearance. Dennis Bailey, a judge in Florida, wrote a public letter admonishing lawyers to dress appropriately. What triggered his missive was a lawyer who showed up shirtless and another who appeared while still in bed, under the covers. “So, please, if you don’t mind, let’s treat court hearings as court hearings, whether Zooming or not.”

Breaks and recesses

Richard Gabriel has suggested that if jurors will be “sitting in front of a computer watching the trial, human-factor studies that discuss technology attention spans should be considered. Taking more frequent but shorter breaks might be necessary in order to make certain that jurors are tracking and retaining the evidence.”

Deliberations and verdict

After closing arguments, jury instructions can be downloaded onto their computers. Once they have chosen a foreperson, a verdict form could be sent to that individual with copies to the others so they can keep track of their votes. There would also be guidelines on how to make sure all the jurors have the opportunity to speak and be heard during their online deliberations. They would then log onto a separate videoconferencing meeting from the trial site in order to preserve the confidentiality of their deliberations. The IT maven/IT bailiff would make sure all jurors (except the alternates, unless allowed) were present and everyone could see and hear each other. If jurors ask for readbacks, have questions for the court, or would like to see exhibits, they could communicate with the IT maven over a secure channel and then receive the relevant information. Once they have filled it out, an electronic verdict form could be sent to the clerk.

One alternative: If the courthouse has adequate space, jurors could be brought there to conduct their deliberations.

Costs

While Code of Civil Procedure section 1033.5, subdivisions (a)(13) and (15) arguably allow costs for many of the items that will be needed to conduct a remote jury trial, the legislature should be urged to add to that statute a provision specifically authorizing the recovery of costs for all of the technology that will be necessary to conduct a remote trial.

Conclusion

One interesting byproduct of remote trials is that researchers have noted that virtual trials place “a huge amount of trust” in the jurors who were instructed to locate themselves alone in private rooms, to comply with their legal responsibilities during the trial. My guess is that most jurors will take their responsibility seriously.

This article is hardly all-encompassing or authoritative. Its purpose is to provide a springboard for further discussion of procedural methods that may be utilized in order to resume trials during the surreal era that we’re stumbling through.

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