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## Impactful use of trial and pre-trial technology

FROM DEPOSITION TO TRIAL, WHAT TO KNOW AND WHEN TO SAY NO

Trials are still about human contact. In the age of social media, it's not uncommon for technology to replace human interaction. Our everyday lives are consumed with technology, which frequently replaces face-to-face interactions with text messages, emails, and social media. Even more, our interactions have become oversimplified – we now communicate with the click of a “like” or “thumbs up.” Today's social media culture provides novel and unique challenges that were not present in the past. This has become even more true since the COVID-19 global pandemic has struck our nation, making in-person, face-to-face human interaction an anomaly.

Nevertheless, jury trials are still about evaluating the credibility of human beings. We cannot forget that our primary role as trial lawyers is to seek justice through this sacrosanct and venerable system. Jury trials provide lawyers, judges, and jurors a unique opportunity: human connection. Human connection is lacking in most people's daily activities, and any good trial lawyer knows that despite the advancements in technology, all jurors are innately curious. Despite the admonition, they watch you and your client. You are onstage from the minute you pull into the parking lot to the minute you leave the courthouse. No form of technology can replace the way that human interaction feeds their curiosity.

This does not mean there is no place for technology, in fact we should embrace all forms of technology to make trials interesting, cost effective and successful. Technology can help keep jurors engaged, entertained, and curious. This goal can be accomplished by partnering with technology, not by becoming a slave to it. Just because there is some cool new program or platform is not a good reason to use it. Bottom line: Know when to use

it to enhance your skills and know when to say no.

### Videotaped depositions

Before COVID-19, remote depositions were both rare and sparse. For example, a few weeks before the legal system shut down, our office sent a young associate to New York for a three-hour expert deposition. While certainly a waste of time and money, we had no legal basis to object. It was the way we all did things. Today, that deposition would be taken remotely. In the midst of the post-pandemic era, live deposition testimony will become an option instead of the norm. The cost and time savings will revolutionize the practice. We imagine a time when most depositions in most cases will be taken with at least someone attending remotely. Indeed, we have already conducted depositions where everyone has attended remotely. New challenges arise in the new era. Do you need to be in the same room with your client or the witness? Is the other lawyer playing games to delay the deposition because he or she wants to be there?

Code of Civil Procedure section 2025.310 relates to the use of remote means for a deposition. Subdivision (b) specifically provides for remote depositions if there is good cause and no prejudice to any party. (Code Civ. Proc., § 2025.310, subd.(b).) However, the code requires a party deponent to appear at the deposition in the presence of the deposition officer. (*Ibid.*) California Governor Gavin Newsome has recognized the hardship that this rule can create in the pandemic era and has responded accordingly. Executive Order N-38-20, issued on March 27, 2020, specifically suspends subdivision (b), to the extent that it “limits the court's authority to provide that a party deponent may

appear at a deposition by telephone.” Legislation sponsored by Consumer Attorneys of California is pending to make some of these rules permanent.

### Witness credibility and secret coaching

But the biggest concern right now is a combination of judging a witness's credibility and recognizing unethical coaching on a video. Can you see what opposing counsel is doing and/or telling the witness during the deposition? Is the witness able to get the full effect of your questioning without you in the same room? We have to find ways that we can put checks and balances on adversarial witnesses, to ensure that their integrity – and that of the judicial system – is not compromised.

Los Angeles County Superior Court, Local Rules, rule 3.26 specifically prohibits an attorney from coaching or suggesting answers to a deponent during a deposition. (Local Rule 3.26, Appendix 3.A(e)(8).) One common form of coaching has been texting the witness while he/she is testifying. Communicating with a witness during a deposition is prohibited. If you are not in the room, how can this be prevented? How can these rules be enforced in this remote world?

One possibility is having two cameras to allow you to see the room in addition to the witness. This will allow another set of “eyes” in the witness's room. Another possibility is having remote depositions take place at the court reporter's office. A portion can be added to the reporter's certification that can certify the actions of the witness, as well as others who were present in the witness's room during deposition, did not involve any coaching. Even a simple admonishment at the beginning of the deposition can help ensure that the witness is following the

*See Pacheco-Kabateck, Next Page*

rules throughout the deposition. Counsel should explain that the use of cell phones, electronics, or any type of communication with anyone during deposition proceedings while on the record is improper. Counsel should even ask that the witness position themselves, so their hands and cell phone are within view of the camera during the deposition. While nothing in the law presently requires a witness to comply with such requests, the request itself may deter the unethical conduct.

Under Code of Civil Procedure section 2025.510, subdivision (a), the parties may agree to forgo the transcription of a deposition. (Code Civ. Proc., § 2025.510(a).) Moreover, Code of Civil Procedure section 2025.540, subdivision (a) allows the parties to record the depositions by either video or audio recording. (Code Civ. Proc., § 2025.540, subd. (a).) Consider recording depositions with video or audio without a court reporter to save costs and to help with the current shortage of court reporters. If the parties find that the testimony might be useful, or a transcript is necessary (i.e., for trial), they can later have a reporter transcribe the testimony from the audio or video recording. If you choose to forgo transcription, be aware of Code of Civil Procedure section 2025.530 regarding certification requirements of the audio or video recording by the deposition officer. (Code Civ. Proc., § 2025.530.) There may come a day in the future when no stipulation is required and depositions will be videotaped first before a court reporter is hired to transcribe the deposition, as needed.

### Remote jury questionnaires

Jury questionnaires are a useful tool for lawyers to learn about the panel from which their jurors will be chosen and to expedite the jury selection process. The Judicial Council of California provides Form JURY-001, which is a general questionnaire that can be used in civil cases. Although the general form is simple and basic, it is generally good. However, there is no prohibition against lawyers preparing their own

questionnaires which may be more case-specific. Some trial judges are reluctant to use questionnaires, and the use of questionnaires is generally within the broad discretion of the trial judge. It may be that judges think the jury questionnaire will consume unnecessary time to fill out, copy and distribute. Code of Civil Procedure section 222.5, subdivision (f) prohibits a trial judge from arbitrarily refusing to submit reasonably written questionnaires to the prospective jurors. (Code Civ. Proc., § 222.5, subd. (f).)

If you use a jury questionnaire, don't bother to have them professionally copied (at exorbitant costs). Instead, bring an inexpensive scanner into the courtroom, scan the questionnaire and then email the other side and your team, who can review them for follow-up questions. It may take jurors forty-five minutes to fill out most questionnaires. If you have them scanned in as they are turned in, the whole process can be completed in less than two hours. There are also applications available for smart phones and tablets, which allow you to scan right from your phone or tablet. You can use a stylus to make notes on the questionnaires on your iPad or tablet and have the questionnaires marked up and ready for follow-up questions with jurors.

There is also an ongoing discussion about the efficacy of using a remote jury questionnaire. This could be as simple as the juror receiving a very generic questionnaire on a platform like Google Forms the night before they are to appear for jury service. Or it could be a remote questionnaire tailored for the jury trial they have already been assigned to for voir dire. While it is true that more and more people having access to electronics and remote questionnaires can increase efficiency and give lawyers access to important information, the decision to use a remote questionnaire has plenty of pitfalls too. While internet and electronic access is becoming more and more common, those who do not have access to technology must not be forgotten. During the COVID-19 shutdown of schools, the Los Angeles Unified School District

reported that about 70% of their students had access to both technology and internet to attend classes.

Accessibility issues can be due to economic status, or other relevant factors. Whatever the reason, disenfranchisement of these jurors is something that should be kept in mind. Remember, the very jurors that may not have technology access may be the very jurors you want for your case. Moreover, disenfranchisement isn't just about the rights of your clients to have a fair jury, but the rights of all citizens to serve on a jury too.

One possible solution: computers in the jury room while the jurors are waiting to be assigned to a particular courtroom. During this time, jurors can fill out questionnaires on computers or tablets available in the jury room, which eliminates the issue of accessibility, and still allows the lawyers to receive the responses before the panel is brought in. This type of questionnaire also might allow jurors and judges to review claims of hardship *before* the panel is called. Ultimately, the decision to use a remote questionnaire may be the trial lawyers' because it may not be lawful for the court to simply order its use over objections. This is new territory, so the ultimate outcome of appellate decisions is hard to predict.

### Research of prospective jurors

The judge is required to provide counsel with the list of prospective jurors in alphabetical order as well as a list in the order that each juror will be called at the "earliest practical time." (Code Civ. Proc., § 222.5, subd. (g).) Counsel should be using technology to research the jurors. Once counsel gets the random list, they can either scan or take a picture of the list and email it to their office. Office staff should be quickly conducting an ethical and legal further investigation regarding publicly available information about the prospective jurors. With the internet providing access to a plethora of information, prospective jurors can be researched through various social media

*See Pacheco-Kabateck, Next Page*

platforms. Counsel can even determine political party affiliation by often having someone standing by at the county registrar recorder's office. Such information can be helpful during voir dire, both in connecting with each potential juror, and in determining which jurors you don't want.

However, be cautious when performing searches of potential jurors as Rule 3.5(d) of the California Rules of Professional Conduct prohibits both direct and *indirect* contact with any potential jurors. (Rules Prof. Conduct, rule 3.5(d).) Furthermore, Rule 3.5(h) prohibits the investigation of a potential juror in a manner likely to influence the state of mind of the potential juror in connection with future jury service. (Rules Prof. Conduct, rule 3.5(h).) Although investigating the social media page of a prospective juror is allowed, a friend request to a prospective juror is considered a communication and should be avoided. (See ABA Formal Opinion 466; Model Rule 3.5(b).) Although investigation is a helpful tool, be aware of these restrictions and do not cross any boundaries.

### Technology during trial

#### *Remote jury selection*

The pandemic has required everyone to sharpen their technical skills. Zoom, Blue Jeans, and other similar platforms allow for video conferences. Due to the growing restrictions imposed on courthouses and public gatherings, the idea of remote jury selection is being discussed. Although this practice can save time and eliminate some of the health concerns that so many courthouses are facing today, new challenges arise with this possibility. The California Constitution affords parties the right to a jury trial. (Cal. Const., art. I § 16.) Voir dire allows parties to ensure that their jurors are fair and impartial. (*Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3d 195, 203.) Additionally, several constitutional provisions mandate a party's in-person presence for the entirety of their jury trial, including voir

dire. (*Filippone v. Albion Vein Slate Co.* (1919) 250 US 76, 81.)

Despite these limitations, the United States Supreme Court has suggested that a challenge to remote jury selection may not succeed. (See David A. Carrillo and Matthew Stanford, *Remote Jury Trials Are Possible, but Maybe Not the Best Idea*, Law.com | The Recorder (May 27, 2020), <https://www.law.com/therecorder/2020/05/27/remote-jury-trials-are-possible-but-maybe-not-the-best-idea/?slreturn=20200609163145>, citing *Maryland v. Craig* (1990) 497 U.S. 836.) In addition to Constitutional Challenges, remote jury selection also raises the issue of disenfranchising jurors who have trouble accessing computers due to financial circumstance, age, or other reasons. Further, remote jury selection takes away the human-contact element from the normal process, which poses the risk of inability to connect or even evaluate a potential juror. Ultimately, whether or not a remote voir dire is right for your case will depend on the specific facts of your case and what works for you and your client.

#### *Use of PowerPoint during trial*

PowerPoint and similar programs are a helpful tool during opening statements and closing arguments. They can be used to help the jurors follow along, introduce a glimpse of the evidence that the jurors will see during trial, or even burn an ongoing theme into the jurors' minds through the use of animation, symbols, and/or diagrams. Remember that any opening PowerPoint should be pre-screened by the judge and opposing counsel prior to publication to the jury. Prescreening should be done far in advance of the time that you want to use a PowerPoint, because a sustained objection can change your entire presentation.

Although visual aides can be useful to spark interest in the jurors, your PowerPoint presentation, while a valuable tool, is not a script or a complete opening or closing. You can bore the jury just as easily as you can excite them. Don't let these programs interfere with your presentation. Instead of relying

exclusively on a PowerPoint presentation, consider picking a few items to be printed on a large poster board to be used at various points throughout the trial, starting with opening. Poster boards can include critical pieces of evidence (e.g., a smoking gun document or a powerful photograph) and principles that are important to your case (e.g., the "Basic Standard of Care" jury instruction from CACI 401).

#### *Remote witness testimony and use of depositions at trial*

Although there are certain witnesses who you will want to give live testimony, there are some witnesses with which remote testimony can be beneficial – both for the witness and the lawyers. Sometimes you have no choice because a witness is unavailable. (i.e., the witness is exempted on a ground of privilege, disqualified from testifying, deceased, unable to attend due to physical or mental illness, or incapable of being compelled to testify despite reasonable diligence). (Code Civ. Proc., § 2025.620, subd. (c)(2)(A)-(E).) Other times a deposition for certain witnesses may be preferable to live testimony. However, subject to a few very limited exceptions, you can't just play the witness's deposition unless they are statutorily unavailable. (*Ibid.*)

The use of the videotaped depositions of witnesses such as first responders and various experts may be particularly useful at the time of trial if the witness is unavailable or if the witness, and the parties will benefit from video testimony. Code of Civil Procedure section 2025.620, subdivision (d), allows for the use of the video deposition of any treating or consulting witness, or of any expert witness, regardless of whether or not the witness is unavailable to testify at trial. (Code Civ. Proc., § 2025.620, subd. (d).) However, the deposition notice *must* reserve the right to use the video recording at the time of trial. (Code Civ. Proc., § 2025.220.) Beyond experts and medical treaters, the Code of Civil Procedure provides for additional uses of

*See Pacheco-Kabateck, Next Page*

depositions at the time of trial. (See Code Civ. Proc., § 2025.620 [allowing use of adverse party's deposition for any purpose]; Code Civ. Proc., § 2025.620, subd. (c)(2) [providing for use of the video recording of deposition of an unavailable witness]; Code Civ. Proc., § 2025.620, subd. (a) [providing for use of video recorded deposition for impeachment of non-party].)

If you are taking the deposition of a third-party witness, you should assume that the witness will be unavailable at the time of trial and should take their deposition accordingly. Remember, there is a substantial difference between questioning a witness at deposition (for discovery) and at trial (for presentation). If you are video-recording a witness for use at the time of trial, make sure to ask foundational questions and set the stage as if you were in front of the jury. If you fail to do this, the jurors will have difficulty following the testimony.

Another potential pitfall to using video-recorded depositions at trial is potential objections to the proffered testimony, and even worse, a sustained objection to this testimony. To avoid this problem, provide your deposition designations to the court and opposing counsel far in advance of the time that you intend to offer the recorded testimony. This way, the court can rule on these objections prior to the time that you introduce the video at trial. Although less than ideal, courts do not always rule on deposition designations quickly, and sometimes you will be forced to play testimony right after certain objections have been sustained. Due to the uncertainty of trial, it is best to come prepared with a way to quickly edit any video testimony on the spot, to avoid having to read the testimony from the transcript.

Another great use of video-recorded depositions is for impeachment. Witnesses are not as prepared for their depositions as they are for their trial testimony. Catch them off guard by being prepared to question them for use at the time of trial

in a video-recorded deposition. This is especially useful for impeachment, as the reading back of prior testimony does not have quite the same impact as watching the witness answer the question differently on video. However, beware of the overuse of video depositions for impeachment. Lawyers fall in love with their depo cuts and want to use every last one that they can. Resist the urge. Although technology can spice things up, it can also bore the jury. Too much impeachment loses its effect. Instead, impeach sparingly and use impeachment to show a repeated and common theme rather than to nitpick the witness's testimony.

#### ***Technology and introduction of exhibits***

Technology can be used to introduce exhibits. There are some great and affordable applications that allow you to introduce exhibits right from your tablet. Certain available features in these applications can help highlight important points to the jury as they allow you to blow up and highlight each exhibit when necessary. The low costs of these applications can save thousands. However, the overuse of your tablet during trial can be distracting to the jury. Have your law clerk or second chair use the application so you can focus on putting on your case without taking away from your presentation. The overuse of the highlight and zoom features in these applications can also be very distracting to the jury. Be sure to only use as necessary to get your point across.

#### ***Use of demonstratives and animation***

Demonstrative exhibits such as timelines, graphs, diagrams, illustrations, and animations are useful in explaining complicated or convoluted topics to the jury. They are also expensive. When considering using demonstratives, keep in mind that they are subject to court approval and can be excluded for a lack of foundation, being argumentative, or providing an undue emphasis on certain facts. (Evid. Code, § 352.) This is especially a gamble given that animations and demonstratives are expensive.

#### ***Have a backup plan***

Anyone who has tried a case will tell you that anything that can go wrong at trial will go wrong. Technology has the risk of malfunctioning, leaving you fumbling around the jury. Whatever format you chose, always assume that technology may fail. Come prepared, and always have a backup. Never let the jury see you panic. If you are using a PowerPoint, print out important demonstrative evidence that you want to show the jury in your opening statement. Always have your PowerPoint printed out for your reference so you have it available if it fails. Always have multiple copies of your exhibits and an Elmo or similar projector available in case your trial application, trial tech's screen, or computer fails. Assume that your deposition clips will not play and have hard copy transcripts available if you need to read from them during the trial. *Always have a backup plan.*

#### **Mix it up, don't overdo it and know when to say no**

With the advancement of technology there are several options open for use of technology in the courtroom. Jurors today expect a multimedia presentation. Keep the jurors on their toes but don't overwhelm them with too many gadgets and tricks. From PowerPoints to the Elmo, to poster boards to electronic exhibits, to videos to in-person testimony: Mix it up, choose carefully, and don't overdo it.

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