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The immediate future of jury trials

AS CIVIL JURY TRIALS RESUME, THEY WILL LIKELY RELY ON ZOOM AND SIMILAR VIDEO-CONFERCING FOR ALL OR PART OF THE PROCEEDINGS

The emergence of a global pandemic has presented a slew of unexpected challenges for the American legal system. Some courts decided to shut down entirely for a period out of an abundance of caution and in compliance with health and safety measures. While some courts had opened, they are now closing back down because of rising numbers. State courts in Connecticut, New York, New Jersey, Washington and Colorado, among others, have suspended jury trials and grand jury proceedings

because of rising infection rates and too few people showing up for jury duty. In Los Angeles County, all civil jury trials have been postponed until 2021 while criminal trials have taken precedence under state law.

The pandemic has presented numerous challenges for jury trials. The disproportionate impact that the virus has had on certain communities raises the issue of whether the jury pool has become unrepresentative as a sample of the local population. There has been speculation as

to whether a jury came to a decision too quickly in order to avoid having to continue attending the trial after a juror was hospitalized with the virus. Another challenge has been adapting the courtroom to adequately socially distance and prevent the spread of the virus. In Orange County, there are four rooms dedicated to jury trials. Preference is given to those with short time estimates, to the most aged cases, and to litigants who will accept a jury of eight, with fewer peremptory challenges.

In Los Angeles County, various places for jury selection which can accommodate larger groups, at least for jury selection, are being readied.

Courts across the country have come up with different solutions in order to adapt to the reality that the pandemic is not going anywhere in the foreseeable future. Since the courts must follow the COVID-19 guidelines of the jurisdiction in which they are located, some courthouses have continued with limited operation, while others have resumed in-person trials with modifications. The main safety measures being implemented are allowing fewer people into courtrooms, safely social distancing, mandating face coverings, holding trials on the ground floor of courthouses in order to avoid people being confined to elevators, and regularly sanitizing the courtrooms and buildings. A court in Idaho even hired an epidemiologist to evaluate measures to put into place in order to safely resume operations, which resulted in the adjustment of the courthouse's air circulation system so that the air would be 100% replenished with fresh air every hour. Another suggestion being widely discussed has been to allow remote trials to commence over platforms like Zoom.

The fluctuation in the courts has also given defendants the opportunity to get creative in their arguments to either delay trial or request judges to reconsider their verdicts. For example, one federal judge in Missouri was asked to reconsider a verdict on compensatory damages because one of the jury members had tested positive for COVID-19 during the earlier phase of the trial.

In a Texas lawsuit, Samsung asked to delay a patent trial by three months after a recent trial in the same district was declared a mistrial when fifteen of the participants, including jurors, counsel and court staff, tested positive for the virus. In the first New Jersey trial to be held since the start of the pandemic, defense counsel moved for jury proceedings to be suspended until normal selection processes can resume. In a

Keys to your Zoom trial

- Don't use the chat feature.
- The witness should be seen without a mask.
- If the court will allow it, use face shields instead of masks in order to monitor expressions.
- Consider iPads for each juror so they can see the exhibits and jury instructions.
- Don't bore the jury. Get to the point quickly. Jurors hate lawyers who like to hear themselves talk.
- Speak loudly enough so that everyone can hear.
- The jury will be spread across the courtroom, which makes communication difficult, but you will be able to stand in the well (including, if the judge will allow while examining a witness), and do your best to get through to the jury.
- Speak slowly.
- Take pauses. (President Obama is a good example.)
- Do not overly rely on PowerPoint and exhibits.
- A trial is not a place for jokes.
- Practice makes perfect, especially in a remote trial world.

recent Alameda County trial one of the jurors fell ill. The trial then continued with the jurors remotely as some refused to return to the courtroom.

Here then is guidance on how to navigate the coming months and maintain some semblance of control over the uncertainty of what the future holds for jury trials.

Master the tech

There is unanimous agreement that counsel be familiar with all aspects of the technology required. This means practice, preferably with judge and staff and opposing counsel present.

Expect hybrid trials with remote jury selection

Expect the possibility of a hybrid trial, with the jury being selected remotely, and once chosen, coming in person to the trial. If this occurs, you will want to use the gallery view feature (à la *The Brady Bunch*) as to see the reactions of all the prospective jurors. Fifteen jurors in the gallery at a time is recommended.

The pandemic has led courts to re-evaluate how to proceed with trials in person. The attorney should always evaluate the circumstances and make a plan accordingly. An attorney preparing for an in-person trial should inquire as to the measures being taken and evaluate

whether those measures will affect the impact of their trial strategy.

If jurors are required to be seated farther away from the witness stand than is customary, an attorney could request the implementation of a live video feed display so that the jury can adequately see the witnesses as well as any visual demonstrations being used. Using larger courtrooms could require the use of microphones so that all individuals in the room can properly hear the trial.

The same principle of preparation discussed goes for limited in-person trials and the accompanying changes such as the use of masks and plexiglass barriers. For example, if the space that the attorney is permitted to use may be smaller than is customary, it would be beneficial for the attorney to modify their demonstrative plan and practice making statements in a more confined space. If part of the jury will be in the box and the rest in the gallery, the attorney should prepare to address both groups of jurors adequately. If microphones are not available in the courthouse, the attorney should practice projecting their voice to ensure everyone in the court room can hear properly.

Preparing for remote jury trials and arbitrations

The realities of holding trials remotely has placed even greater

importance on logistics and preparation. What happens, for example, if a person participating loses their internet connection? How will the parties exchange documents? One court required exhibit exchange, except impeachment documents, two days before testimony. The list goes on and on.

The best way to approach preparing for a remote trial is to be prepared for everything to go wrong. Just as Murphy's Law states, if anything can go wrong, it will. Things will go wrong! An attorney preparing for remote trial should expect everything to go wrong and make a contingency plan to have in their back pocket just in case. Attorneys should meet with opposing counsel and the judge prior to trial to agree on protocol for the trial, alternative protocol in the event that technical difficulties arise, and go over any questions either side may have.

Remote trials are a "cool" medium

Presenting an argument remotely is different than having the benefit of using body language and physical gestures in the courtroom. Remote trials are a cool medium, meaning that the attorney should practice being conversational, speaking slowly, and speaking with confidence. Some, if not most attorneys, prefer standing when they question or argue. Having a setup where the attorney can be standing may be beneficial.

Conduct multiple dry runs to perfect the camera angle and lighting, and practice making eye contact with the camera. Using a teleprompter may be an option for counsel as it will be behind the camera and could make opening statements and closing arguments go smoothly. The attorney must also practice being deliberate with his or her actions. Gestures should be purposeful and coordinate with what is being said.

In addition, dry runs should include witnesses and ensuring that the witness has the appropriate camera and lighting. Note that the court's view of a witness will not be from the side, but straight-on. The attorney should also

ensure that the witness is capable of receiving documents and should plan to provide relevant documents to the witness ahead of time.

Get assistance with the technology

Going to trial remotely requires the mastery of certain technologies, so any attorney preparing for a remote trial should practice using the features of the chosen platform. Have a qualified technologist to assist in the presentation unless you have mastered doing so. Using dual monitors is a must, counsel on one, evidence on the other. Having a dedicated microphone and camera is more reliable than using the microphone and camera of a laptop. Laptops are considered inadequate, but have one on standby just in case there is a problem.

In addition, the computer to be used for trial should be updated and running at optimal speed, which includes clearing cookies in the internet browser and updating Zoom (or whichever platform the court will be using). Internet speed should be tested prior to the trial, with an alternative connection method available in the event that internet speed is not at the preferred speed.

Finally, meet and confer in advance to see if the court will permit jurors to email with any questions for the clerk/judge, and if allowed, suggested questions to be asked of a witness. Also discuss how jury instructions and the verdict form will be handled. In one case, the foreperson took a photo of the verdict on an iPhone and sent that in.

Tips for a seamless remote jury trial

The best way to ensure a seamless trial is to give thorough instructions to all parties involved ahead of time, including jurors and witnesses. Jurors should also do dry runs and get basic Zoom instructions. Many are conversant with Zoom. As remote trials may be around for the foreseeable future, it would be beneficial for courts to designate a court technologist to assist judges and jurors with troubleshooting issues and

monitoring the trial to ensure everything runs smoothly.

Jury selection can be simplified by sending out an online questionnaire to potential jurors ahead of time. During voir dire, the parties should use Zoom in gallery mode so that they can see each potential juror. Once jurors have been selected and trial begins, jurors should be placed in a separate waiting room, monitored by a bailiff to ensure no discussion of the case at hand, so they can get to know each other as they would if the trial were in person. This will make it easier for them to choose a foreman. This should not be the only time that the jury is monitored. A person should be designated to monitor the jury throughout the trial to ensure that they are staying engaged, are attentive, not nodding off or answering the door. One way of ensuring this is to require them to keep their camera on.

During trial, the court should also utilize the breakout room feature in order to provide space for sidebars or deliberations. For example, the jurors can be in the main room with sidebars and witnesses remaining in a separate breakout room.

If the remote jury trial goes smoothly, the jurors and the court will appreciate it. One trial judge reported that jurors had generally positive feelings and enjoyed the experience, especially as there were no parking problems.

Connecting with an audience like a performer

Going to trial is a lot like performing live on a stage. If circumstances change, the performer adapts, and the show must go on. The same thing applies to trials in a pandemic-ridden world. Here are some tips on how to connect with an audience, or rather, a jury.

The attorney should be conversational. Don't use highfalutin words designed to make you sound learned. Zoom is a cool medium and being conversational is the best way to connect with a video audience

that may find it too easy to tune out what is coming from a computer screen. The attorney should make solid and realistic eye contact and deliver statements in terms of what the jury will *need* to deliberate. One rule of thumb is to *never* read verbatim what is being displayed. Jurors know how to read, and the attorney's job is to add value to what they are seeing.

The show must go on

The pandemic is here to stay for the foreseeable future, which means that

attorneys will need to adapt to these changed circumstances just as the courts have had to, especially with respect to jury trials. Justice delayed is justice denied, and we all need to work together. Being a zealous advocate requires preparation, the ability to adapt, and to be able to think on one's feet. Nothing about this has changed because of the pandemic. The only thing that has changed is the context in which a trial will be held. The show must go on, and the goal is to make this transition as seamless as possible.

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