

Considerations in Connection with Remote Jury Trials

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Topics for Discussion

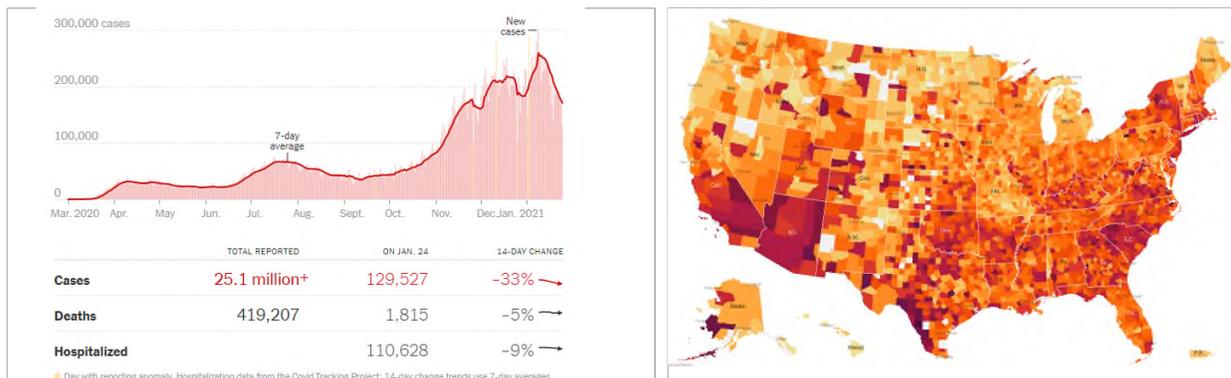
1. The outlook for remote jury trials over remainder of pandemic
2. Framework and lessons learned from first remote trials
3. Impact of the pandemic on juror attitudes

Outlook for Remote Trials Over Remainder of Pandemic

Remote Trials – Here to Stay for a While?

Likely

Infection Rates Remain High

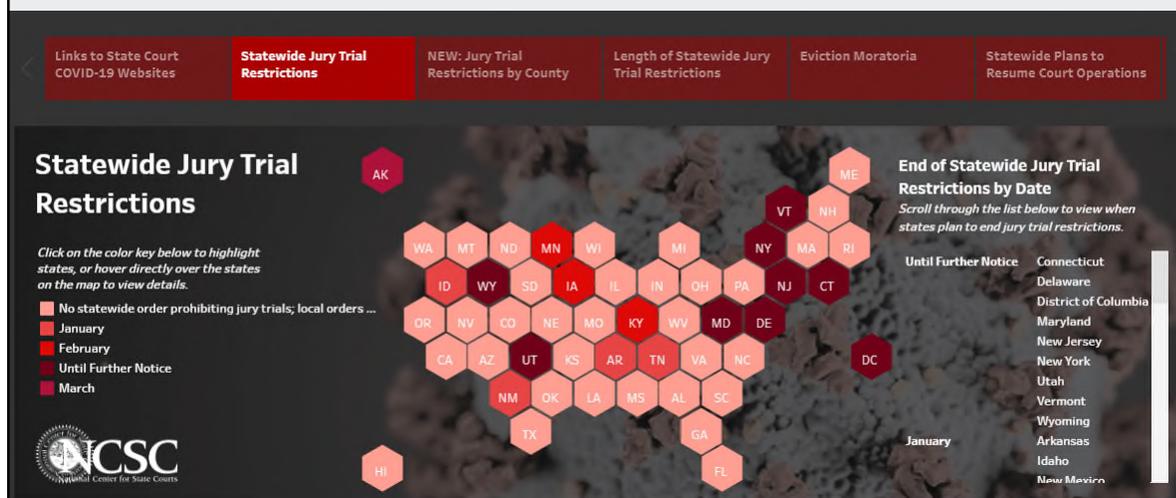


N.Y. Times, January 25, 2021, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

Disclaimer

- Not recommending remote trials
- Should object to remote trials in most circumstances

Different Courts, Different Restrictions



National Center for State Courts at <https://www.ncsc.org/newsroom/public-health-emergency>

What Are Our Courts Doing?

- Suspension of Jury Trials
 - For Example: Seven states have suspended jury trials until further notice.
- Trial Continuances
- Bench Trials
- In Person Jury Trials
- Remote Trial - Jury vs. Bench
- Hybrid Trials

Practical Realities of Jury Trials

- Criminal jury trials will take priority
 - Large backlog of Criminal Trials
- Safety precautions (costly and difficult)
 - Fewer jurors per day
 - Fewer jurors per panel
 - Courtroom changes to facilitate jurors
 - Cleaning costs
 - Retrofitting courtrooms
- Jurors may not report
 - Fear of COVID-19
 - Schools remain closed
 - Jurors looking for work



Examples of Where In-Person Jury Trials Have Occurred

- State Courts:
 - New Jersey (Bergen County Online Jury Selection/In Person Trial)
 - Pennsylvania (Lycoming County)
 - California (Kern, Orange County, San Bernardino, and San Diego)
 - Michigan (Wayne County)
 - Washington (Seattle, Kent, and Meydenbauer)
 - Florida (Flagler County)
- Federal Courts:
 - Maryland • North Carolina • Texas • CA • NY (Southern District)

Concerns & Limitations With In-Person Jury Trials

- Reporting jurors are not representative of community
- Courtroom not big enough to allow social distancing
 - Especially in complex matters with multiple defendants)
- Masking issues
- COVID-19 could still spread even with precautions



“All it takes is one positive test or somebody to say they got COVID,” and “You’re going to have a total disruption of the court system.”



Los Angeles Superior Court



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Orange County Superior Court



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Legal Challenges To In-Person Jury Trials

- Marissa Freeman v. California State University (**Six-Week In-Person Jury Trial**, San Bernardino, CA)
- “COVID superspreader event.”
- Petition to the Court of Appeals denied (November 2020)
- Petition to the Supreme Court denied (November 2020)

Current Status

- Defense counsel tested positive amid trial
- Jury selection halted until February 15, 2021

Examples of Where Remote Jury Trials Have Occurred

California

Select Counties

Washington

Hybrid of Zoom trials and use of Convention Center

Florida

Pilot program (Deval County: 1st binding (civil) jury trial in the country conducted entirely in zoom on August 10, 2020)

Texas

Stipulated test trials (Travis County: 1st binding criminal (misdemeanor traffic ticket) jury trial conducted entirely in zoom on August 11, 2020)

Legal Challenges To Remote Jury Trials

- Jurors vulnerable to distractions
- Technology Issues
- Impact on jury selection
- Expense of Trial
- A remote trial is not authorized by statute or local rule.

CA (Unsuccessful):

- Rosalino Reyes
 - Writ summarily denied
- Robert Fenstermacher
 - Ex Parte Application denied
- George Sweikhart
 - Motion Objecting to a Virtual Trial

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Our Remote Jury Trial Experience Setup and Lessons Learned

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Problems Encountered with Remote Jury Trials

- Distracted jurors
- Difficulties with exhibit exchange
- Multiple technology difficulties
- Improper juror contact
- Difficulties with online deliberations



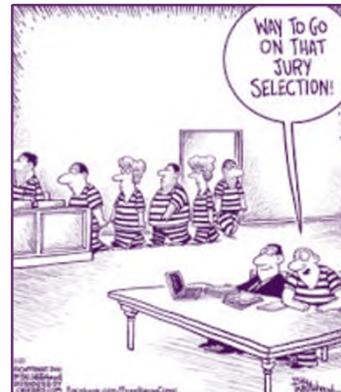
Voir Dire Set Up

- 80+ Jurors appeared for Voir Dire
- All but 3 appeared from their homes.
 - 3 in Courthouse on Zoom via court computer
- Initial questioning involved first 18 jurors
- Jurors had to speak to appear on first Zoom “screen”
 - Jurors identified by name and Juror Number, i.e. “Jane Doe – 3”
- Challenges handled outside presence of jury



Recommendations for Remote Voir Dire

- Propose calling only 12 or 18 jurors at a time
- Group voir dire remains important
 - Need to know who is comfortable speaking via Zoom
- Attorney setup for voir dire may be different than trial presentation
 - Consider being further from camera when asking questions
 - Consider toggling between speaker view and gallery view
- If possible, engage in at least one mock jury selection process



Providing Jurors With Technology

- Equal Protection concerns raised by orders forcing parties to provide technology
 - Limits court access to wealthy parties
- Under no scenario agree to opposing counsel providing the technology
 - Serious tampering concerns
- If ordered to provide technology, consider:
 - Neutral Third Party Vendor
 - Company providing technology

| Box Inventory | | |
|---------------|-------------------------------------|-----------------------------|
| 4 | | |
| 5 | 1 Monitor | 1 HDMI cable (marked green) |
| 6 | 1 Monitor power cable (marked blue) | 1 Headphones |
| 7 | 1 Laptop | 1 Power strip |
| 8 | 1 Laptop AC adapter (marked red) | 1 Network Cable |
| 9 | | |
| 10 | | |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | Monitor | Laptop |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | Laptop AC adapter | HDMI |
| 26 | | Headphone |

Test, Test, and Test again

- Test camera, lighting and audio under multiple conditions
- Set-up might be different for voir dire, openings/closings, and witness examination
- Test PowerPoint Presentation
 - Test screen share
 - Test other alternatives to display PowerPoint
- Practice working with and marking up exhibits



Witness Examination

- Work with witnesses on their online set-up
 - Invest in technology experts to assist witnesses
- Perform mock examinations under “trial conditions”
- Pre-negotiate exchange of exhibits
- Consider Zoom attention spans
 - Outline and benchmark examination
 - Short and tight examinations where possible



Handling Exhibits: Cross-Examination

- Consider an exhibit sharing platform

- Benefits:

- Fast exchange of exhibits
- Limits can be placed on access to folders
- Judge, counsel and witness can view simultaneously

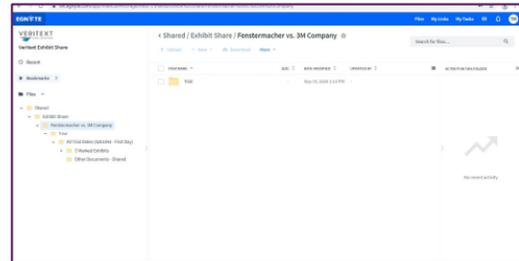


Photo courtesy, Veritext, Exhibit Share System

- Drawbacks:

- Relies on technological sophistication of adverse witness and judge
- Seek system that allows for direct markup of documents within program

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Juror Comments Post Trial

- Jurors were paying attention to the technology used – lots of advice
- Jurors had concerns about remote deliberations
- Preferred the use of exhibits in Zoom - closer to exhibits on computers
- Jurors felt they had to be more “on”
- Jurors preferred Zoom trial over an in person trial.
- Jurors liked that the attorneys would put a D or a P next to their name – easier to follow
- Attorney locations (home or office) and whether they sat or stood made no difference jurors
- Drawing images by hand did not work as a demonstrative

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Early Virtual Trial Results

- Ocampo - Alameda
 - Defense Verdict
 - Jury found the following:
 - Plaintiff exposed to asbestos from brakes
 - Honeywell was not negligent
 - Exposure was not a substantial factor in Plaintiff's peritoneal mesothelioma
- Wilgenbusch – Alameda
 - Plaintiff verdict of \$2.5 Million
 - Lone remaining defendant found 7% responsible
- Budd - Kings County, Washington
 - Plaintiff verdict against Kaiser Gypsum
 - \$13 Million in Noneconomic damages
 - Large portions of the trial conducted via Zoom
- Dallo - Western District of Washington
 - Plaintiff verdict of \$1.69 Million
 - Alleged brain bleed and cognitive problems from a head injury
 - On a Holland America cruise ship
 - Plaintiff 20% responsible

The Good, The Bad and The Ugly

| Good | Bad | Ugly |
|---|--|---|
| May be only way for trials to resume safely | Extremely slow | No control over jurors |
| Online is a fair replication of an in person trial | Lose direct confrontation of witnesses and direct connection with jurors | Presentation limitations due to technology |
| Early results suggest it may favor the defense: <ul style="list-style-type: none"> • Online may create less empathy • Remote voir dire may lead to fewer bonds amongst jurors limiting runaway juries • Technology limitations could lead to smarter, more sophisticated jury pool | Technology problems and Juror Inattentiveness are inevitable and will lead to evidentiary issues that could impact case outcomes | Unknown – we do not know the ultimate impact of online trials |

Impact of the Pandemic

How the Pandemic Has Impacted Juror Attitudes

The Role of the Jury to Decide Civil Cases

- Jury duty provides rare opportunity for citizens to directly govern themselves.
- Jury duty enables ordinary citizens to hear evidence, make sense of conflicting facts, and apply legal rules to reach an agreed verdict.
- But jury trials also raise concerns that:
 - Lay people cannot process complex evidence and follow legal instructions.
 - Jurors are swayed by sympathy.
 - Jurors award extravagant sums of money for marginal claims.

General Background on Juror Decision Making

- Jurors filter facts and evidence through their own life experiences, values, and beliefs.
- As a result, jurors who hear identical pieces of conflicting evidence may reach different conclusions.
- When making these judgments, implicit bias comes into play.

Juror Bias

• Anchoring Bias

- Causes jurors to rely too heavily on first piece of information provided regarding topic. Used by plaintiffs' attorneys to drive up damages awards.

• Confirmation Bias

- Tendency to interpret new evidence as confirmation of one's existing beliefs or theories, and to reject evidence that challenges those same beliefs or theories. Used by plaintiffs' attorneys to demonize large corporations or insurance cos.

• Hindsight Bias

- Tendency to look back at unpredictable events and conclude that actual outcome was predictable. Used by plaintiffs' attorneys to support causation/attribution.

The Impact of COVID-19 on Juror Attitudes

- Jurors' life experiences through which they filter evidence have dramatically changed.
 - Healthcare companies and workers are viewed in more favorable light. Other industries also benefitted, including transportation, grocery, and technology.
 - Enhanced expectation of individual responsibility for safe behavior, e.g., wearing masks, social distancing, hand sanitation, monitoring personal health, etc.
 - Massive shift to remote working and learning.

Juror Approach May Vary Depending on Trial Format

- Remote trials involve different dynamics than in-person trials.
- Key differentiators of remote trial from juror attitude perspective:
 - Less opportunity to socialize with other jurors.
 - Less opportunity to observe non-speaking counsel and parties during trial.
 - Much greater opportunity to (i) conduct independent online/social media research, (ii) ignore dull or non-confirming testimony or evidence, and (iii) multi-task during trial.
 - Much greater risk of technical issues or delays.
 - Much more convenient and efficient for jurors.

Jurors' Preference for Remote Trials

- For now -- and perhaps going forward -- jurors appear to prefer remote jury service over in-person attendance.
- Florida survey of prospective and seated remote jurors:
 - More than 90% of those summoned agreed or strongly agreed that they were able to easily participate in the selection process.
 - More than 80% preferred remote jury selection over in-person selection
 - When asked if remote jury selection should be used in more cases, 76% agreed.
 - All eight jurors that heard the case agreed or strongly agreed that they were able to easily participate in the process.
 - Seven of eight agreed or strongly agreed they were able to hear the judge, attorney and witnesses during the remote trial.
 - Six of eight jurors agreed or strongly agreed that the remote trial process was efficient; the other two responses were neutral.
 - Five of eight jurors strongly agreed that they preferred remote jury appearance over in-person; three were neutral.

Juror Attitude Take-Aways

1. Understand and account for the significant life experiences and cognitive biases that impact juror attitudes.
2. Use the strengths and limitations of remote trial presentations to maximize the effectiveness of jury presentations.
3. For the foreseeable future, plan for remote trials and/or hybrid trials.

Conclusion/Q&A



Thank you



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