

The Virtual Jury Trial: *Concerns and Considerations in Conducting Remote Trials*

“Ladies and gentlemen of the virtual jury...” To be sure, this is a phrase which few litigators thought would ever commence a trial, yet it is an increasing likelihood in the courtrooms of many large American cities. The global pandemic which has gripped the world has, particularly in the United States, severely restricted the operations of the judicial system. As American courts adjust to a new normal, conferences, appearances and even motion arguments have transitioned to a virtual format in many pandemic-impacted jurisdictions. A question remains, however, whether such a transition will, or even can, be applied to that most quintessentially in-person centerpiece of the American judicial system: the jury trial.

To their credit, those court systems which have taken the lead in adapting to this new paradigm have done so relatively seamlessly. New York’s Unified Court System, situated in a state which has endured much of the brunt of the pandemic, suspended in-person court appearances early in the pandemic. In other jurisdictions, in-person appearances have either been prohibited or, at the very least, deadlines have been suspended.^{1 2}

However, many jurisdictions have already begun to adapt. New York, for example, has implemented virtual appearances following the directive of the Chief Judge of the New York State Court of Appeals.³ Thereafter, motions before the court, settlement conferences, and appellate arguments have all been held virtually through a video conferencing platform.

Aside from mandated court appearances, essential out-of-court legal tasks, such as meetings with clients and opposing counsels, mediations, and even depositions, all seem to

¹ See *In Re: Covid-19 Pandemic Emergency Response*, Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days, (Supreme Court of Alabama), March 13, 2020

² See *In Re: Response to the Coronavirus Disease (COVID-19) Pandemic*, (Supreme Court of Missouri), March 22, 2020

³ Hon. Janet DeFiore, Chief Judge of the New York State Court of Appeals, *Message from the Chief Judge*. March 30, 2020

translate to a virtual medium in a relatively painless manner. Jury trials, however, present an altogether different challenge.

Perhaps the most difficult obstacle to overcome in assessing the viability of a jury trial during the pandemic is the assembling of the jury to begin with. Even in less-impacted jurisdictions, the idea of even a small group of strangers sitting close together, often for hours, while they are interviewed to be potential jurors is anathema to every tenet of safe and responsible health practice which authorities have issued throughout the pandemic.⁴ A virtual jury, therefore, is likely the only form of a jury which will be possible in many jurisdictions for the foreseeable future.

Yet, moving the jury online is unlikely to be as fluid of a transition as it has been for routine court appearances. A primary issue at the outset is access to technology. Many school systems around the world spent the end of the 2019-2020 academic year engaging in online learning, but a pressing concern was many students' lack of access to technology.⁵ Live video lessons and online educational resources can only prove useful if every student has access to a computer and a high-speed internet connection, yet many do not.

For a legal community which is increasingly reliant upon technology notwithstanding the pandemic for instant access to e-mail, e-filing systems, and countless other basic needs, it is jarring to note that, as of 2015, only 78 percent of Americans had access to a computer at home and only 77 percent had access to broadband internet.⁶ Data from the Federal Communications

⁴ See e.g. Centers for Disease Control "Social Distancing Guidelines," updated July 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last accessed on July 19, 2020)

⁵ Truong, Debbie. "As Classes Move Online, What Happens to Students Without Internet or Computers?" *NPR* (2020), <https://www.npr.org/local/305/2020/03/18/817691597/as-classes-move-online-what-happens-to-students-without-internet-or-computers> (last accessed July 19, 2020)

⁶ Ryan, Camille; Lewis, Jamie M. "Computer and Internet use in the United States: 2015," American Community Survey Reports (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf> (last accessed on July 19, 2020)

Commission found that, as of 2016, the number of Americans without high-speed internet was 34 million.⁷ Aside from the logistical predicament facing courts on this front, this lack of access would present even greater Constitutional questions in the context of juries.

Such reliance upon technology as a de facto requirement for jury service would almost certainly create or compound racial disparities within the jury pool.⁸ The socioeconomic barrier which it would establish would similarly worsen an already significant drawback of jury service for many Americans.⁹ The Seventh Amendment guarantees entitlement to a trial by jury in nearly all civil matters.¹⁰ Yet, a jury which is unavoidably comprised of less diverse backgrounds, skewed by lack of access to technology, would seem to be in defiance of the spirit, if not the letter, of that Constitutionally-protected right. Courts have broadly protected the sanctity of juries and clearly expressed a principal desire to avoid such disparities.¹¹ These concerns would likely require specific policies to address them before courts would broadly permit the implementation of virtual jury trials.

Assuming that such issues could be satisfactorily addressed, the jury selection process itself would likely be relatively unchanged. Providing of course that technological glitches such as sound and video lag or inconsistent internet connections are limited, a prospective jury would be interviewed and assessed in much the same way it has always been. The practical obstacle for attorneys in this respect would involve assessing the demeanor and fitness of potential jurors

⁷ Federal Communications Commission, *2016 Broadband Progress Report* (2016)

⁸ National Center for Education Statistics. *Student Access to Digital Learning Resources Outside of the Classroom* (2018), finding significantly larger portions of Black and Hispanic family access to high-speed internet than white and Asian families. As such, technology as a barrier to jury service would likely result in a similarly disparate impact upon those ethnic groups.

⁹ Preller, Alexander E., [Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service](#), 46 *Columbia J.L. & Soc. Probs.* 1 (2012)

¹⁰ U.S. Const., Amendment VII

¹¹ See e.g. *Batson v. Kentucky*, 467 U.S. 79 (1986)

through the inherently less personal medium of a video screen. Ultimately, this assessment of the credibility and believability of potential jurors is an issue which would run in both directions.

Theorist Marshall McLuhan famously said, “the medium is the message.”¹² An attorney’s task of evaluating potential jurors through the filter of a screen would be undeniably more difficult. More critically, the jurors’ central responsibility of making factual and credibility assessments of witnesses and evidence through that same filter would not only be similarly challenging but would fundamentally alter their core role in the court system. It is well-settled that a jury, as finder of fact, is exclusively tasked with the responsibility of resolving questions of fact.¹³ Inserting a technological wall between the juror and the trial would make doing so a much tougher road to navigate.

The American legal community has historically never been an early adopter of new technology, and, in fact, still lags behind Europe in its implementation.¹⁴ However, statistical evidence suggests that any reticence toward virtual trials is not merely the result of professional ambivalence. Rather, a study has shown that a delay in another person’s response in a conversation, even of just 1-2 seconds, results in a negative impression.¹⁵ Such delays in the natural give and take of speaking are unavoidable in a virtual setup. Furthermore, it has been found that participants in a virtual setting can be more apprehensive and less natural due to seeing themselves on screen.¹⁶ As a result of these inherent differences between an in-person and a virtual setting, virtual conference participants have even been found to often endure more

¹² McLuhan, Marshall; Fiore, Quentin, The Medium is the Message (1967)

¹³ See e.g. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); see also U.S. Const., Amend. VII; Sir Edward Coke, Commentary on Littleton, 460 (J.H. Thomas ed., 1818).

¹⁴ Foges, Emily. “Insight: U.S. Adoption of Legal Tech Lags Behind Europe, But Set to Grow,” *Bloomberg News*, 2019, <https://news.bloomberglaw.com/tech-and-telecom-law/insight-u-s-adoption-of-legal-tech-lags-behind-europe-but-set-to-grow> (last accessed on July 19, 2020)

¹⁵ Jiang, Manyu. “The Reason Zoom Calls Drain Your Energy,” *BBC* (2020), <https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting> (last accessed on July 19, 2020)

¹⁶ *Id.*

stress and fatigue.¹⁷ The cascading consequences of these negative aspects of virtual communication upon both jurors and witnesses offering testimony are potentially serious. Fact witnesses providing more hesitant and uncomfortable testimony and jurors assessing their credibility through the limits of their computer screens would invariably alter perceptions and trial outcomes.

Distraction and even improper influencing of jurors, intentional or otherwise, is a critical issue to overcome as well. With physical, in-person juries, painstaking efforts are made to keep jurors away from influential media. In fact, it is a universal precept that jurors refrain from discussing an ongoing case or consuming media related to a case. Of course, human nature dictates that these rules are broken on occasion even in the context of an ordinary, in-person jury trial. However, the likelihood of a juror becoming improperly influenced is obviously heightened if said juror is listening to trial testimony with their television, internet, and anyone living with them just steps away. Moreover, there is no credibly effective method of enforcement to prevent a juror from accessing any of these potential influencers, not only during trial recesses, but in real time during the trial itself.

Finally, though juries are cautioned to not be swayed by the arguments or style of counsel but by the evidence, it is a fact of jury trials that these aspects of an attorney's presentation are critical. Trial lawyers spend their careers finely honing trial skills, incorporating movement, gestures, well-timed pauses, eye contact and countless other almost imperceptible techniques. Evoking empathy and presenting a case persuasively would become an almost insurmountable, or at least drastically different, task when restricted to the edges of a screen.

¹⁷ *Id.*

Notwithstanding the dramatic shift in determining credibility for all involved, the evidentiary issues in transitioning to a virtual trial format would be mainly logistical. Marking documentary exhibits and utilizing demonstrative evidence would essentially be reduced to a slideshow format, and evidentiary arguments and objections would be handled no differently than virtual motions are in jurisdictions such as New York. Judges, who would obviously be required to be increasingly tech-savvy, would even be able to remove or separate certain feeds from the virtual trial as a way of sequestering a jury or permitting confidential conferences. Of course, as the prevalence of such virtual formats increases, even more well-suited technology and tools to meet the moment will naturally improve and propagate as well.

Until then, logistical issues will remain thorny. A recent profile on how the New York Criminal Court system is handling the pandemic-imposed paradigm.¹⁸ While some issues are unique to criminal proceedings, such as the nexus of the speedy trial rule and trial dates which are indefinitely postponed, other examples would likely be endured by civil litigators as well.¹⁹ Among those identified by the criminal court profile were clients making outbursts, unaware that they were unmuted or in the presence of the judge or jury, and poor lighting presenting a defendant in an unflattering manner, potentially influencing the jury's perception of him.²⁰

Nevertheless, many jurisdictions have boldly ventured into this great unknown in an attempt to begin holding virtual trials, albeit few have attempted virtual jury trials. According to the National Center for State Courts, 16 states, along with the territory of Puerto Rico, have held virtual hearings or bench trials since the pandemic began, but jurisdictions willing to attempt

¹⁸ Feuer, Alan; Hong, Nicole; Weiser, Benjamin; Ransom, Jan. "N.Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases" *New York Times*, <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> (last accessed July 19, 2020)

¹⁹ *Id.*

²⁰ *Id.*

virtual jury trials thus far have been hard to find.²¹ That may be changing, as a matter of necessity.

This past May, Texas held what appears to have been the first virtual jury trial, held as a summary jury trial as part of an experimental program within the state.²² Jurors were selected virtually and appeared at trial to listen to evidence via Zoom.²³ Similarly, in Florida, a pilot program has been created to test the viability of virtual jury trials. On July 14, 2020, a court in Miami-Dade County held the state's first virtual jury trial.²⁴ A caveat there is that, while the jury selection was held via Zoom, the trial itself involved witnesses in masks testifying before a jury separated by plexiglass, and was, in truth, quasi-virtual.²⁵ Nevertheless, these programs signify an important first step in what will surely be a lengthy path toward more widespread adoption of virtual jury trials.

Such policies and programs will become increasingly necessary, particularly in jurisdictions such as New York, which face the untenable combination of heavy caseloads and high numbers of COVID-19 infections. In 2019 alone, New York's court system handled 3.5 million new civil or criminal matters.²⁶ With jury trials, and most trials generally, suspended in New York and in many other major cities around the country, the backlog will only worsen. On July 20, 2020, New York County Criminal Court will attempt to hold its first virtual, or at least

²¹ Hurtado, Patricia. "Closed Courts No Barrier to New York Easing Its Case Backlog" *Bloomberg News* (2020), <https://news.bloomberglaw.com/us-law-week/closed-courts-no-barrier-to-n-y-easing-case-backlog-from-virus> (last accessed July 19, 2020)

²² The Associated Press. "Texas Court Holds First U.S. Jury Trial Via Videoconferencing" *Fortune* (2020), <https://fortune.com/2020/05/23/texas-court-jury-trial-videoconferencing/> (last accessed on July 19, 2020)

²³ *Id.*

²⁴ Shepard, William. "Miami-Dade Court Holds State's First Virtual Jury Trial Amid Pandemic," NBC Channel 6 News South Florida (2020), <https://www.nbcmiami.com/news/local/miami-dade-court-holds-states-first-virtual-jury-trial-amid-pandemic/2262205/> (last accessed July 19, 2020)

²⁵ *Id.*

²⁶ Hurtado, Patricia., *Id.*

socially distanced, jury trial.²⁷ The success of that experiment will likely dictate policy going forward for one of the nation's largest court systems.

Indeed, despite the noted differences between the two, civil courts can look to their criminal court counterparts for inspiration. Criminal courts, having faced much more dire and Constitutionally impactful questions concerning not only the speedy trial rule but also the confrontation clause for several months of the pandemic already, have necessarily found workarounds. Conferences and even grand jury hearings have been held outdoors, others have been held remotely by video or phone. Dial-in numbers for the public have even been established, in order to allow legally-protected public access to court proceedings. Indeed, cooperation and synergy between these sibling divisions of court systems nationally has never been more important.

While the difficulties and problems associated with the prospect of virtual jury trials are certainly significant, there may be unintended benefits of this new system, if prudently and effectively implemented. First and foremost is the obvious incentivization of parties to settle, mediate, or otherwise resolve matters without the need for court intervention or trial. Such a shift would prove to be a sea change, not only in increasing amicable resolutions, but decreasing the congestion that has overwhelmed many of the nation's largest court systems.

Another potential benefit of a virtual system is ease of use, for jurors, court personnel, lawyers, and even the public. The presiding judge in the Florida pilot virtual jury trial noted that, in some jurisdictions, responsiveness to juror summons swung from 90 percent no-shows to 80 percent participation.²⁸ Similarly, for lawyers, judges and court personnel, appearing for routine

²⁷ See generally, <http://www.nycourts.gov>

²⁸ *Id.*

court conferences virtually cuts travel time and unnecessary delays, further decreasing court congestion.

A more nuanced potential benefit of virtual jury trials requires a reassessment of the essential role of a juror. It is well-settled that a jury must assess the facts and evidence dispassionately.²⁹ Indeed, failure to do so could constitute jury nullification. It bears consideration, therefore, to weigh whether a reduction in the ability of a juror to be as swayed by the polished techniques of an experienced trial attorney or to unduly sympathize with a party or witness as they might be prone to do in person, is actually a net-positive. Removed from the interpersonal elements of communication, persuasion, and emotion often at play in a jury trial by virtue of an inherently more filtered medium, a juror could potentially be more effective in appropriately evaluating the facts and evidence. It is at least conceivable that such a system would result in more consistent, fair, and reasonable jury verdicts.

The COVID-19 pandemic has unquestionably shifted the legal landscape, requiring a more flexible and forward-thinking approach to the American legal framework. Many jurisdictions have already attempted to implement virtual court appearances, and a few have even developed virtual jury trial programs. As backlogs increase with each day of the pandemic, more such efforts will become necessary. While a learning curve, possibly a steep one, is assumed, there appear to be no insurmountable logistical hurdles of a virtual trial. Rather, the critical challenge will be redefining the very essence of what it means to be a juror or a trial attorney.

The legal, practical, and even Constitutional concerns implicated by the concept of virtual jury trials are serious and not easily dispensed with. Nevertheless, those jurisdictions which have

²⁹ See e.g. New York Civil Pattern Jury Instruction 1.25: Consider Only Facts and Testimony

attempted such virtual jury trials have proven that they can be viable. Indeed, with a concerted effort of the nation's court systems, implementation of new technology, and a creative approach, temporary pandemic-imposed adaptations may actually prove to inspire longstanding improvements to the American legal landscape.

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