

Will Virtual Jury Trials be Part of the “New Normal” Ushered in by the COVID-19 Pandemic?

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Just a few months ago, the idea of a virtual jury trial probably seemed inconceivable to most judges and lawyers. Now, with the COVID-19 pandemic shuttering courthouses throughout the nation and most in-person proceedings suspended, many judges and attorneys are left wondering when and how civil jury trials will be able to safely resume. We suspect that most prospective jurors will not be enthralled with the idea of sitting shoulder to shoulder in a jury box while the outbreak is still raging. As litigators and the courts become comfortable with Zoom and other videoconferencing tools, it is apparent that we have the technology to hold virtual trials – the question is should we?

The prospect of remote jury trials raises a host of serious issues ranging from how to overcome the constitutional hurdles to ensuring that witnesses, parties and jurors have access to high-speed internet so that they can participate in the first place. Some potential solutions for accessibility concerns are having pre-wired government offices for those who lack access or distributing common technology (such as an iPad, with a cellular connection). In addition to technology access, there will also be questions of whether a potential juror has access to a room where they can be alone and deliberate in private.

Video can be distorting and courts will need to consider how framing, lighting and camera angle may impact a juror’s assessment of the credibility of a witness or create bias. In the physical world, when it comes time to deliberate, you shut the door to the jury room. With jurors deliberating from different locations, there will be a need to ensure that everyone has equal access to strong wifi (something those of us who have been working remotely over the last several months are all too well aware is not always the case). There will probably need to be some sort of “virtual bailiff” to monitor connectivity and security, ensure that jurors are paying attention and maintaining the sanctity of the “virtual deliberation room” and call for a break in deliberations when needed.

Some courts are already considering these issues and balancing them against the hope that virtual jury trials can alleviate the backlog of jury trials caused by the pandemic. On May 21, 2020, the Supreme Court of Florida ordered that “[t]o evaluate the feasibility of conducting jury trials through remote means, the establishment of a remote civil jury trial pilot program is hereby authorized [...] to establish the framework and identify the logistics of trying a case remotely.” See *In re: Remote Civil*

Jury Pilot Program, Admin. Order No. AOSC20-31 (May 21, 2020). The Court's Administrative Order requires that all parties to a particular action must consent to participation in the pilot program.

Recently, a court in Dallas, Texas held what is believed to be the first virtual jury trial in the United States in an insurance dispute. See, The Associated Press, *Texas court holds first jury trial via videoconferencing*, Fortune (May 23, 2020). More than two dozen potential jurors logged in by smartphone, laptop and tablet for jury selection, which was streamed live on YouTube. The one-day trial was a summary jury trial, in which jurors hear a condensed version of a case and deliver a non-binding verdict, making it an ideal opportunity to test the viability of holding remote jury trials. Nearly all of the participants reported that it was a better experience than they were expecting. The jurors were broken up into two six-juror virtual rooms "where they could talk privately and look at evidence in Dropbox folders." *Id.* They ultimately returned two verdicts that were designed to give the parties more information to assess whether to go to trial or set the matter down for mediation and try and negotiate a settlement.

No doubt, many courts and attorneys will remain resistant to the idea of virtual trials, and for good reason. However, if the COVID-19 pandemic continues for another 18-24 months as many epidemiologists and scientists predict, we may be forced to embrace virtual trials, at least in some circumstances – or the old adage, "justice delayed is justice denied" will be the unfortunate reality for far too many litigants.

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