

## The Remote Jury Trial Is A Bad Idea

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Over the last several months throughout the nationwide quarantine, we have been asked dozens of times: “Do you think we should start conducting jury trials via Zoom? Should remote jury trials be the solution to our current problem?” We are confident many of you have been asked or have discussed similar questions.

These are questions we take very seriously. We take them seriously because they are aimed at navigating a very challenging time—a time when we must prioritize the safety and health of our community.

But this article does not simply provide a list of pros and cons to consider. Rather, we provide you our answer to these questions without hesitation—a resounding “no,” remote jury trials should not be the solution to our current backlog.

This answer is not mutually exclusive with ensuring the safety and health of our communities—particularly because we are advocating for the jury trial to resume when the proper infrastructure is in place, as outlined below.

While it was an interesting idea to explore early in the quarantine, it became more apparent as time passed that a remote jury trial was and is simply a bad idea. While some legal experts have floated the idea as a near certainty, and indeed some jurisdictions are engaging in remote civil jury trial pilot programs (Florida and Texas), any scenario where major players are missing from a trial—especially the jurors—is simply not feasible in our view. Most practicing trial lawyers are starting to realize this reality (and, in fact, many courts are starting to resume in-person jury trials), but this is our effort to put an end to a serious debate about remote jury trials.

Since March 1, over 97,000 cases have been filed in U.S. district courts,<sup>[1]</sup> many more have been filed in state systems. Most courts have charged full steam ahead, operating remotely throughout the pandemic; however, without the ability to hold jury trials, some courts have become significantly backlogged.

The search for a solution to the backlog has created buzz around how we can continue to move the docket virtually. Courtroom technology can be quite advantageous for routine hearings such as status conferences, discovery

disputes, and even some kinds of significant motions, including case-dispositive ones. These administrative tasks can be (and often are) handled effectively via phone or video. In fact, several judges have even been able to conduct complex Markman hearings in patent cases and even some bench trials using teleconference or video technology. Jury trials, however, are much different.

Technology should be used only as a stop-gap measure to keep us afloat during these uncertain times. We should work with the medical community and government officials to focus on how to get back into the courtroom safely, keeping health at the forefront. The question we should all be asking is how do we safely bring people to a location to resolve disputes in the same way we have been doing for hundreds of years? Many courts are already planning to do just that.

## The Trouble With Virtual Courtrooms

### Technological Limitations and Inequality in Availability

The technological challenges alone should halt all conversation surrounding virtual jury trials. Our entire legal system is built around the idea that members of our respective communities—our peers—should be the individuals helping us resolve our disputes. A virtual courtroom presents significant issues with accessibility and equality.

Access to internet and other necessary technology is inconsistent at best. Various courts face unequal access to resources, including technology. Data shows that 10% of Americans do not use the internet.<sup>[2]</sup> And a significant portion of our communities either do not have regular access to the internet or do not have reliable access to the internet.

We should, at all times, strive to have a diverse jury pool, and virtual courtrooms inherently eliminate a large segment of the population. We do not want a system where certain members of the public are systematically prevented from serving as jurors due to challenging logistics, or where people are essentially priced out of the ability to serve as a juror due to a lack of stable internet or computer access.

With these issues in mind, how would courts or attorneys guarantee the same internet capability for each juror throughout the duration of the trial? How would we ensure that all jurors had a quiet, distraction-free place to view the proceedings, much less the equipment needed to observe all of the nuance in the trial setting?

Some proponents of a remote jury trial might argue that if we start back with in-person jury trials, we will still have the problem of retaining a diverse jury pool because the elderly or individuals who are particularly at risk might not be able to attend the jury trial. This is precisely why we are arguing for jury trials to resume when we can ensure the safety of the jurors, and this is also why we are advocating for the courts to develop very clear steps to ensure the environment in which jurors enter is safe and prepared for their arrival.

User error in remote jury trials would present additional challenges. An untimely muted (or unmuted) microphone, bad lighting, or poor choice of background would affect both the quality of the presentation and the listener experience. Other issues with technology such as delays in audio or video feed would also detract from the jurors' ability to assess the evidence in a case.

Additional difficulties arise when more than one person speaks at once (common during objections to testimony), or when there are auditory or visual interruptions. There would be no way to troubleshoot or teach away these issues in real time, which would inevitably result in a juror missing key evidence or a witness (or attorney) experiencing a testimony-influencing distraction.

The traditional courtroom setting eliminates a number of these issues. The decorum created by being in person in a formal setting adds a measure of seriousness to the proceedings.<sup>[3]</sup> Everyone is placed against the neutral backdrop of the courtroom, given the same view of the witness and evidence, and presented with the same opportunity to hear witnesses and advocates. This type of environment simply cannot be replicated virtually.

## **Judges Could Not Maintain Control Over the Virtual Environment (Nor Could They Be Expected to Do So)**

In a normal courtroom setting, courtroom staff and judges work together to ensure that jurors are present, safe, and attentive. Juror interactions and access to the “outside world” are also more easily managed when the judge and jury are in the same location. These controls prevent, or at least impede, jurors from being influenced by externalities. There would be no way for a judge to subtly wake a juror before he nods off during testimony, or to know whether there were individuals (or electronic devices) off-camera influencing jury members during trial or during the deliberation process.

The safety of potential jurors could also be a concern. While it is true that jury trials are open to the public, in a virtual setting, there would be limited protection against screenshots of potential jurors’ names, faces, and the insides of their homes. Holding a trial virtually would deprive the judge of the ability to exercise this control and the jurors of their ability to have a separate, isolated environment dedicated to the jury trial.

### **Absence of Valuable Nonverbal Communication**

Even if these technological concerns could be addressed, our refusal to sign on to a remote jury trial continues for another important reason. A virtual jury trial would prevent jurors from observing critical, nonverbal communication from advocates and witnesses.

Oral advocacy is more than the spoken word. So much of what happens in a courtroom is nonverbal. Clients make eye contact with their attorneys, signaling a discrepancy in testimony or a piece of evidence that should be revisited at a later time. Attorneys observe the jury and the judge to see whether his opponent is being effective or whether she is making her point. The judge commands respect by sitting slightly above everyone else and by maintaining a watchful eye. And jurors observe all of these nonverbal cues while also watching the person speaking, the evidence being presented, and the other participants in the trial.

In our experience, the ability to judge nonverbal communication is a critical piece of what jurors do in assessing credibility. In a virtual jury trial, jurors lose the ability to lay eyes on witnesses in real-time, and as a result, may miss nuances in behavior, speech patterns, or other clues relevant to whether the witness is telling the truth.

An analogy we often use is attending a sporting event or a concert live versus viewing the event on television. When you view an event on television, you are at the mercy of the camera operator and producer. You see what the camera operator and producer want you to see. But when you are at the game or at the concert, you have the ability to observe what you believe to be important.

Similarly, during an in-person jury trial, you have the ability to see the entire room at one time. You can see the attorney’s reaction to the witness’s answer. You can see the witness’s leg shaking. You can see an associate frantically writing a note to the partner. All of these observations are part of the decision-making process in a live jury trial.

Some supporters of the remote jury trial could argue that a juror would still have the ability to view all participants at the same time via Zoom or another videoconference interface. By now, we know that staring at a screen of 12 faces for eight hours a day is not a feasible way for any of us to digest information that will be critical in resolving the dispute at issue. Additionally, viewing someone’s face on a screen is not an adequate substitute for surveying a room and interpreting many of the nonverbal cues we discussed above.

The process of jury selection would be significantly impeded by remote technology. A virtual voir dire process is almost no voir dire at all. Sure, questionnaires could be employed, but jury questionnaires are a supplement, not a substitute.

Trial lawyers want to be able to see the reaction of other jurors when another panel member is asked a question. The best trial lawyers can sense a panel member’s dissatisfaction or potential biases, and can pick up on even a

subtle eye roll, frown or chuckle when in the same room. These analyses and interpretations would simply not be feasible in a remote jury trial setting.<sup>[4]</sup>

We are mindful that, as two trial lawyers who have been practicing for over a combined 70 years, some might suggest we are simply reluctant to change. Not so. We have welcomed many different trial innovations over the years in the way evidence is presented and the way jury trials are conducted.

For example, we both favor, in many circumstances, time limits for trials, interim jury argument, and juror questions of witnesses. The issue is not whether to keep the status quo or change it; the issue is keeping intact the fundamental genius of the jury trial that can only exist in a live, in-person setting in a courtroom.

### **Pressure to Participate in Pilot Programs**

Some states are launching remote trial pilot programs, where the parties can consent to remote civil jury trials. Since economically disadvantaged litigants are arguably more susceptible to the consequences of waiting for traditional trials to resume, they are more likely to quickly consent to participate in these pilot programs. As a result, economically disadvantaged litigants might be used as guinea pigs as some courts toy with the idea of remote jury trials.<sup>[5]</sup> These litigants might be forced to choose between waiting an additional month for a trial and agreeing to a remote jury trial despite all of the technological disadvantages described above.

Smaller cases (such as soft-tissue injury car accidents) are likely to have lower financial stakes in the grand scheme of civil litigation, but this does not mean that these cases are any less important or that they should be used as experiments. Nevertheless, economically disadvantaged litigants (as opposed to large companies) are more likely to consent to this experimentation by agreeing to engage in a remote jury trial in an effort to recover damages or injunctive relief more quickly.

And while there may undoubtedly be some exceptions, it is our view that no one will benefit from feeling rushed to participate in a remote jury trial pilot program. This is why we should focus our energy on creating a safe in-person alternative so that economically disadvantaged litigants do not have to worry about making these types of ill-advised decisions.

## **Methods for Returning to In-Person Jury Trials**

Practically speaking, the thesis of this article may become a moot point in a few short weeks. Some courtrooms around the country are already beginning to open their doors. The U.S. District Court for the Northern District of Texas has an in-person jury trial scheduled for June 15 after a test jury trial last week.<sup>[6]</sup> Additionally, none of the judges we consulted with were even open to the idea of a virtual jury trial in the first place. Many (if not most) were even hesitant to hold virtual bench trials for many of the same reasons listed above.<sup>[7]</sup>

To be clear, we are not suggesting courtrooms reopen at the expense of medical advice or common sense. The advice of health care professionals and government officials should be followed. There is also added variable of location and setting—different parts of the country will open later than others.

Understanding that each jurisdiction will need to act uniquely to address these issues, we are calling on the legal community to refocus the time and energy currently being used to determine how we would conduct a remote jury trial and focus instead on the ways in which we can return to the courtroom safely.

Possible remedies include:

- Sending detailed letters with jury summons to ensure every potential panelist knows they may call the court with any concerns (and they may be excused from service if they are uncomfortable attending service or if they are in an at-risk population. The letter will also outline all of the protocols the court has taken to ensure the safety of the panel members.

- Sending out a larger number of summons with the anticipation that a higher percentage of recipients might not be able to attend.
- Creating a very detailed, choreographed process for panel members the moment they arrive to the courthouse. This involves the process for walking through security, where panel members will sit in the juror room, how many panel members will participate in voir dire at one time, where the panel members will sit in the courtroom during voir dire, and where they will go to deliberate.
- Checking everyone's temperature upon arrival.
- Requiring everyone to wear masks.
- Conducting a daily deep clean of the courtroom and jury deliberation room.
- Maintaining additional alternate jurors.
- Expanding the traditional jury box to allow for seating in the gallery or fewer jurors empaneled to hear a case.
- Any other common sense approaches.

The only way we can effectively get back to in-person jury trials is if attorneys and potential panelists of all different backgrounds think through the process and offer ideas for ways in which they would feel comfortable and less at risk when they participate.

## Conclusion

Communities around the country are developing innovative ways to protect one another as we balance economic and public health concerns. Restaurants, office buildings, retail stores, hospitals, dentist offices and other medical providers are all finding ways to safely adapt to this new normal.

If we can comfortably protect people in a dentist office by allowing a dental hygienist to spend 30 minutes poking around a person's mouth, we can certainly protect people in a courtroom. The health of our justice system is no less important than the health of our teeth.

If we can find ways to keep an air of normalcy in other areas of society, we had better prioritize doing at least as much with our court system. Otherwise, a system that has protected the rights of so many for hundreds of years could be lost to fear and lack of creativity.

Download the full article [here](#).

The authors express their thanks to Grant Schmidt for his invaluable assistance in connection with this article.

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[1] Lexmachina.com (running analysis to determine how many cases have been filed from March 1, 2020, through May 15, 2020).

[2] *Monica Anderson et al.*, 10% of Americans Don't Use the Internet. Who Are They?, Pew Research Center – Fact Tank (April 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>

[3] Matt Reynolds, Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic? *ABA Journal* (May 11, 2020), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>

[4] On May 18, 2020, in Collin County, Texas, a virtual jury selection was held for purposes of a summary jury trial. After a break, a juror did not return to the screen to join the rest of the panel for an extended period of time. The judge tried to explain that these issues often occur during in-person trials as well when, for example, a panel

member is on the phone in the hall. During an in-person jury trial, however, the judge or her staff could simply go in the hallway and ask the juror to rejoin the group. See Angela Morris, Juror Walks Off to Take Phone Call As Texas Tests First Jury Trial Via Zoom, *Texas Lawyer* (May 18, 2020), <https://www.law.com/texaslawyer/2020/05/18/juror-walks-off-to-take-phone-call-as-texas-tests-first-jury-trial-via-zoom/>

[5] Angela Morris, Texas Jury Trials to Resume This Summer Under Experimental Program, *Law.com* (May 27, 2020), <https://www.law.com/texaslawyer/2020/05/27/texas-jury-trials-to-resume-this-summer-under-experimental-program/>

[6] Angela Morris, Jury Trials Are Back in Texas. Here's What You Should Know, *Law.com* (June 8, 2020), <https://www.law.com/texaslawyer/2020/06/08/jury-trials-are-back-in-texas-heres-what-you-should-know/>

[7] Some proponents of remote jury trials will argue that without these remote trials, justice cannot be served, and there are certain parties who might not be able to wait. While we fully acknowledge the significant impact a delay in trial could have on the parties, we do not think the negative effects of the delay outweigh the devastating effects of a jury trial that is improperly held remotely.

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