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YOUR NEXT JURY

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Live vs. Zoom voir dire

ETHICS AND LOGISTICS OF VIRTUAL JURY SELECTIONS DURING THE PANDEMIC

Whether you're itching to get back in front of a jury in 2021 or terrified of trying a case in the middle of a pandemic, the fact is that civil trials are coming back soon, so you'd better be ready. And when you do find yourself in front of a jury, you'll have much more to worry about than just shaking off the rust of going a year (or more) without a jury trial.

Juror attitudes have been changed by COVID-19. The kinds of jurors who are willing to show up during COVID-19 are different than they were a year ago. And many courts may be asking you – or maybe even demanding – that you select your jury virtually, on a computer screen using Zoom or WebX, instead of conducting voir dire face-to-face in a courtroom.

In the past several months, I've worked with plaintiffs' attorneys in conducting dozens of virtual jury selections in all kinds of cases – several were live demonstrations using mock jurors, while in others I was hired by trial lawyers to run a virtual mock jury selection to prepare for an upcoming trial or simply to practice voir dire skills. And in one Pennsylvania case, I helped select a civil jury in a wrongful-death trial. The judge demanded that voir dire be done virtually, with the jury panel then reporting in person to the courtroom for trial the following week.

In some ways, selecting a jury on Zoom is better than doing it live. In other ways, it is not. But in many ways, it's vastly different, so let's go over the pros, the cons, the ethical concerns you will be facing, and the new considerations that should be on your radar when you pick your next jury on Zoom. Alternatively, this may help you decide how to proceed, if you are given the option of selecting a jury virtually or in person.

Should you agree to a virtual jury?

The most obvious and important difference between a

virtual and in-person jury selection these days is that potential jurors will be required to wear masks during voir dire in face-to-face jury selections ... but not online. And so, if there is a choice between live or virtual voir dire, the most important consideration is to see and assess the jurors' faces and expressions during voir dire. You can certainly learn plenty from hearing the words a juror uses in answering voir dire questions and the tone of their voice – do they sound friendly or grumpy, strident or shy? – but their facial expressions reveal so much more about their attitudes. And even if you *could* see the face of the juror who's talking, keeping an eye on the facial reactions of the other jurors when the speaking juror says something controversial is impossible with masks.

On the other hand, when you voir dire a jury panel on Zoom, they will not be wearing masks. And unlike in a courtroom, where it may be difficult to catch the reactions of other jurors, all your jurors' faces are lined up on-screen. How often have you been asked by a judge to voir dire eighteen or more jurors at once in the courtroom, but had some jurors in the jury box and others in the gallery ... forcing you to face some jurors and turn your back on the others?

With Zoom, you don't have to swivel around, scan the room, or miss raised hands. That's because judges are having lawyers voir dire smaller batches of jurors on Zoom (you may see group sizes of between 8 and 12 at a time), so they are all on screen *at the same time*. And unlike a cavernous courtroom, Zoom allows you to see their faces much more up-close, so you'll likely have less trouble seeing and hearing them, since your laptop speakers are likely better than the terrible acoustics of many courtrooms.

Another benefit of virtual jury selection over the courtroom is the improved demeanor of your jurors. Having selected juries

in the courtroom for the past fifteen years, I can tell you that the jurors on Zoom are much more relaxed, friendly, and candid than they typically are in a courtroom. Why is that? On Zoom, your jurors get to skip the traffic commute to downtown, the security line getting into the courtroom, and the hours waiting in the jury assembly room before being called into the courtroom. Unlike live jury duty, virtual jury duty doesn't burn a juror's entire day; it only takes a few hours out of their day while they are comfortable at home.

Compared to the often-annoyed and sometimes-intimidated jurors in a formal courtroom, the jurors in virtual voir dire have been much more candid and much more relaxed talking with the lawyers. From the jury consultant's point of view, that's another reason to opt for a virtual voir dire. On Zoom, the jurors are not sitting in a sterile courtroom with an imposing judge in the same room (this is not to suggest that our judges are objectively intimidating, but many jurors are intimidated by the idea of a judge hearing them answer questions). Instead, they are simply feeling more comfortable at home. Even though the jurors can see their fellow jurors on-screen, they seem to feel much more willing to share their attitudes from their living rooms than from the courthouse.

Many lawyers are concerned that jurors may be distracted, inattentive or disengaged on Zoom. Fortunately, this has not been an issue during my virtual jury selections. The Zoom jurors were just as attentive, engaged, and professional online. Now, have I seen a juror fall asleep on-camera during voir dire? Yes. However, I have seen plenty of jurors fall asleep in the courtroom over the years. Not all your jurors might be attentive and professional on camera. One mock juror attended mock voir dire while sitting in a golf cart smoking a cigarette. But when they do, you will learn so much more about that juror based on their distractions, their behavior, and their environment than you would have if they were sitting in the vacuum of a

courtroom. All the distractions and eccentric behavior you may see from jurors online is valuable information you can use in assessing the juror.

And that brings up another unintended benefit of picking your next jury virtually: the extra clues you will learn about jurors when you get an unexpected peek into their homes and their real lives. When I was picking a *real* jury on Zoom in November last year, there were more than a few important clues I learned about jurors based on things I saw on-screen that I never would have seen in a courtroom: posters or books in the background, accidental interactions with children or spouses, and a few other gems. You will likely get a little glimpse of their homes and maybe even family or pets. You will see how they dress in real life, not what they feel obligated to wear when they show up in a courtroom. One example that seems small but is not: your male jurors are much more likely to wear baseball caps online than in a courtroom, and I have a pet theory about jurors who wear caps (most are awful for plaintiffs; contact me if you are curious why).

One more reason to choose a virtual jury selection over a live one – or at least not to fear it – is that so many more judges than ever before are expressing a willingness to allow written jury questionnaires to screen out jurors for hardship, screen out jurors for cause (often before they are even called in for voir dire), and speed up the voir dire process so that it might take only a day or two, instead of a week like many judges fear.

Not only are judges allowing questionnaires, they are allowing *extensive, liberal* questionnaires of 10 pages or more, covering multiple important topics involved in the case and denying the typical defense attempts to neuter appropriate questions through objections. It may not be a good idea to use a questionnaire in every trial, since, in some cases, the defense benefits from them more than the plaintiff does. However, in those cases where you need one, you are

much more likely to get one in virtual jury selections, so that you only need a short amount of time to voir dire each panel.

How to keep jury selection from taking a week or more

The next time you are asked to pick a virtual jury, make sure to demand a written questionnaire. What's more, you may want to make an extensive questionnaire a *condition* of agreeing to a virtual voir dire, if you are given the discretion. Tell your judge that it will drastically speed up the jury selection process by screening out obvious cause challenges before you call up the panel for voir dire and that it will drastically cut down on the amount of voir dire time you will need.

The ideal model for picking a virtual jury – which King County, Washington, has been doing for months – is to virtually “summon” a large jury panel on day one, have them fill out a jury questionnaire (ideally, online) and give the lawyers the afternoon and evening to review the questionnaires. On day two, the court should hold a (virtual) hearing to go over the hardships and obvious cause challenges based on the questionnaires, which should whittle the jury pool down to only those who likely can serve without bias. And so on day three, when the jury pool is summoned to voir dire in smaller groups in different time slots, the voir dire process will be much more efficient, you will lose far fewer jurors to cause and hardship, and you will need to voir dire far fewer panels to get yourself a jury panel.

And here is a strategic tip from me: Cover as much as you can in the jury questionnaire, but don't judge your jurors entirely on paper. It is sometimes easy to misread a person's attitudes based only on their “on paper” experiences and answers. Go ahead and give your jurors a “grade” based on their questionnaire answers, but go into the voir dire open-minded about each juror so that you can quickly re-assess them based on the vibes and attitudes you are getting from them on-screen.

I can't tell you how many times I've changed a jurors' grade from an "F" on a questionnaire to an "A" based on how they came across in the courtroom. So even though you will not need a ton of voir dire if you have been given an extensive jury questionnaire, make sure to ask for at least 30 minutes per panel of jurors and hold back a few open-ended, no-right-answer, touchy-feely questions for voir dire that will give you a read on your jurors' true feelings about the key issues.

In voir dire, ask them just a small number of important questions with no easy or obvious answers. In employment cases, good questions may be "What are your feelings about whether or not companies *have* to be fair to their employees in the working world?" In injury cases, it is helpful to see jurors struggle with questions like "Do you think companies should have to take into account common customer mistakes when they design products, or expect customers to keep themselves safe by following the instructions?"

And because on-screen, remote voir dire does lack the personal connection of being face to face with your jurors, be sure to directly engage each of your jurors at least once – with eye contact, by addressing each one personally and engaging in a personal discussion with each juror at least once, and avoiding group questions. If you have used a written jury questionnaire, the time for group questions and fact-finding should be over. Your voir dire should be devoted to engaging and assessing your jurors one by one.

Contrary to what you may think, defense lawyers or engineers may be good jurors for you, even though they may look iffy on paper but warm and caring (or ethical and angry about irresponsible conduct) in person, and even deliver huge verdicts. So, use the rare opportunity for questionnaires to get tons of information about their experiences and beliefs, but a few moments in voir dire to get a sense of your jurors' personalities, so that you can reconcile the whole person.

The only real drawbacks of virtual jury selection involve the potential mishaps of technology – what if a juror freezes up or drops off the screen? What if the lawyer struggles with the technology? The loss of the personal touch of in-person voir dire is another serious concern. You will not be able to build quite as much rapport on a screen as you would live, but I have observed trial lawyers build effective rapport on Zoom, so it can be done. And again, if your choice is between on-screen voir dire without masks and in-person voir dire with masks (likely both you and the jurors), keep in mind that building rapport is much tougher with masks on.

Skewed juries and other ethical landmines

That said, there are some unique ethical issues that come up when you are conducting a jury selection electronically. The most unavoidable one involves the makeup of your jury, because the technological requirements of Zoom will likely disenfranchise some parts of the jury pool.

The idea of selecting the jury online instead of in person was obviously based entirely on public safety concerns of packing large groups of jurors in a jury assembly room, but also based on the practical considerations of fitting even 12 jurors at a time (six feet apart, for social distancing) in the cramped civil courtrooms of LA's Stanley Mosk. But when the idea of "assembling" and selecting jurors virtually was first proposed, one of the primary concerns was that Zoom might skew the jury pool by excluding those jurors who didn't have access to dedicated laptops and reliable high-speed internet access. Some families may have a computer and internet access but have to share the computer, so what happens when they have a child needing the computer for a remote classroom or a spouse who needs the computer to work remotely?

And that concern remains, especially in a county with a relatively large share of poorer citizens like Los Angeles.

Skewing the jury pool even more is the reality that courts are being much more lenient in excusing jurors for financial hardship during the COVID-19 crisis, so poorer jurors will make up even less of the jury pool than they used to until the unemployment rate returns to pre-2020 levels.

Ethically, you no doubt feel a duty to your clients to avoid unnecessary delays in trial. But if you are given the choice between starting a virtual jury trial in spring or summer of 2021 or waiting until 2022 to start a live trial, you may want to consider the impact of a skewed jury pool on your client's chances of success in trial. In my experience, not all plaintiff cases do better with jurors from lower socioeconomic levels, and many cases do better with wealthy jurors. But the fact patterns of many plaintiff cases do resonate better with poorer jurors, so you will need to diagnose your ideal jury and take into consideration how a virtual jury selection might harm your client's chances.

There's also the uncharted ethical issue of researching jurors online during the virtual jury selection process. Researching your jurors online to see if you can find clues about their histories and their attitudes, possible connections with the defendants, prior lawsuits, or telling posts on social media gives you insight into their values. But during a virtual voir dire, two things are different: unlike in a courtroom, you will be in front of a computer (with the internet at your fingertips) and your jurors will also be in front of computers (and the internet) during the voir dire process. You will be able to look up your jurors *as you're voir diring them*, which you could never do from a podium. And they will be able to look up the lawyers, the parties, or the facts *during voir dire or during the trial...* without the judge or the parties knowing they are doing it!

Researching jurors online

Is it ethical for you to research your jurors? Yes, but you probably should not be doing it while you are actually voir diring them, but only because you will

need all your focus on getting them talking and listening to them. If you get written questionnaires in advance of voir dire, you can do some research before voir dire. If not, you can have someone on your staff do it during the day of voir dire. The ethical line to avoid crossing will be to use real-time research on your jurors to tailor your voir dire and build rapport with them. Don't casually bring up your love of NASCAR in an example in voir dire just because you found out that a juror or two are big NASCAR fans. Don't inadvertently ask jurors follow-up questions on information you have found online, because they will notice and feel that their privacy has been invaded.

An even more ethical temptation to avoid is to use the internet (or your firm's website or social media) to publish excluded or prejudicial information in the hopes of jurors going online and finding it ... because the chance they will is higher than you might think, and you will get in big trouble if you get caught. Sadly, it happens. In a jury selection a few years back, a plaintiff's firm used their social-media page to post prejudicial information about the case (that the defendant was an insurance company hiding behind an individual defendant) and also a demonstrative exhibit that had been excluded by the court. When it was brought to the court's attention, it resulted in an angry judge and immediate mistrial. Now despite admonitions from judges, we all know that some (but certainly not all) jurors research the lawyers, the firms, the parties, and even facts about the case online. You should expect them to, and act accordingly. And when jurors are on Zoom, the likelihood that they will research is exponentially higher, because they are already on a computer and unsupervised.

Watch out for social media

The social media is a serious threat to the integrity of your virtual jury selection. These days many lawyers make social-media posts for entertainment and promotion about cases they are trying, even in the middle of trial. If you do this during a virtual jury selection or virtual

trial, the likelihood of tainting the jury, getting caught, and risking a mistrial and sanctions is much, much higher than it would in a court trial, so please be conservative and careful.

But even if you are doing your best to avoid posting about your case during a trial, what about the jurors researching the case outside of your control? In a virtual trial, be extra aware of what is available about your firm, the opposing lawyer/firm, the plaintiff and defendant, and the facts of the case online. Remove anything negative, or anything that's prejudicial. And be aware of what the defense and defense firm has out there, because that's outside of your control and can be used against them. Ethically speaking, you have the right to cross-examine your defendant on facts that may be impeached by an online search. Certainly, do not do anything that encourages them to do research, but be aware that they may.

In one jury selection in 2019, I looked up the defense law firm and found that the first thing a juror would see on their website (in big, bold letters) was "Insurance Defense Trial Attorneys." What's the point of excluding the presence of insurance if a single juror website search will destroy that illusion? When it comes to your own website – and your plaintiff's social media – consider taking down anything off that would harm you if a juror came peeking.

How to handle COVID attitudes during voir dire

Now that you understand the benefits, drawbacks, logistics, and ethical landmines of picking a jury virtually, let me leave you with one more practical tip about picking a jury in the middle of the COVID-19 crisis. There is no doubt that the pandemic and the effects on health, safety, lives, and your jurors' finances is at the front of their minds, so don't ignore the topic in your voir dire. Some lawyers even insist that you can learn *everything you need to know* about which jurors are good or bad based only on COVID-related voir dire.

Based on my experience of selecting the jury during the pandemic, I do not share this point of view. From the virtual voir dire to the many online focus groups that I have run the past several months, it does not appear that COVID-19 has changed the way that most jurors feel about verdicts and damages too much.

To cover all the bases, it would be helpful to ask jurors directly if COVID-19 has or hasn't changed their view of the value of a job, or a life, or corporate responsibility, or safety, or the quality of life when someone is hurt. Most jurors will honestly say no, but a few jaded jurors will say yes. So, ask them two primary questions: first, "I know that serving on a jury has always been an inconvenience, but how many of you feel like serving on a jury right now, given what's happening in the country and your lives, seems like an unnecessary waste of your time?" Identify the jurors who feel like a plaintiff's need for civil justice is trivial compared to the struggles everyone is facing during COVID-19.

Second, ask them, "We know a lot of people have died and suffered or lost jobs during the past year ... and for those of you who are on this jury, you'll be asked to make an important decision about the value of someone's life (or job, or quality of life, or whatever your case involves). So, what I'd like to ask you is, have your feelings about the value of our quality of life, and how much compensation an injured person deserves in a lawsuit, *changed* at all in the past year because of what so many others have gone through?"

Good luck the next time you are in front of a jury – in person or on-screen!

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