

# **Jury Trials in a COVID World: Online, In Person, Jury Selection and Alternative Methods**

Presentation by

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# Overview

- Resuming in-person jury trials
- Online jury trials
- Jury selection in an online jury trial
- Alternatives to a jury trial

# Our Presenter...

Betty Dunkum is the Chief Executive Officer of Victory Trial Consulting, LLC, a full-service national trial consulting firm providing assistance to attorneys in case evaluation, jury research, trial strategy, thematic development, jury selection, trial communication, and witness evaluation.



Her clients have over \$1 billion in jury verdicts and settlements during trial. Ms. Dunkum is an honors graduate of Harvard Law School. She is currently serving as a jury consultant advisor to the New York University School of Law Civil Jury Project, which is working with thought leaders around the country to develop ways jury trials need to change in light of the coronavirus epidemic.

# Big Picture Issues

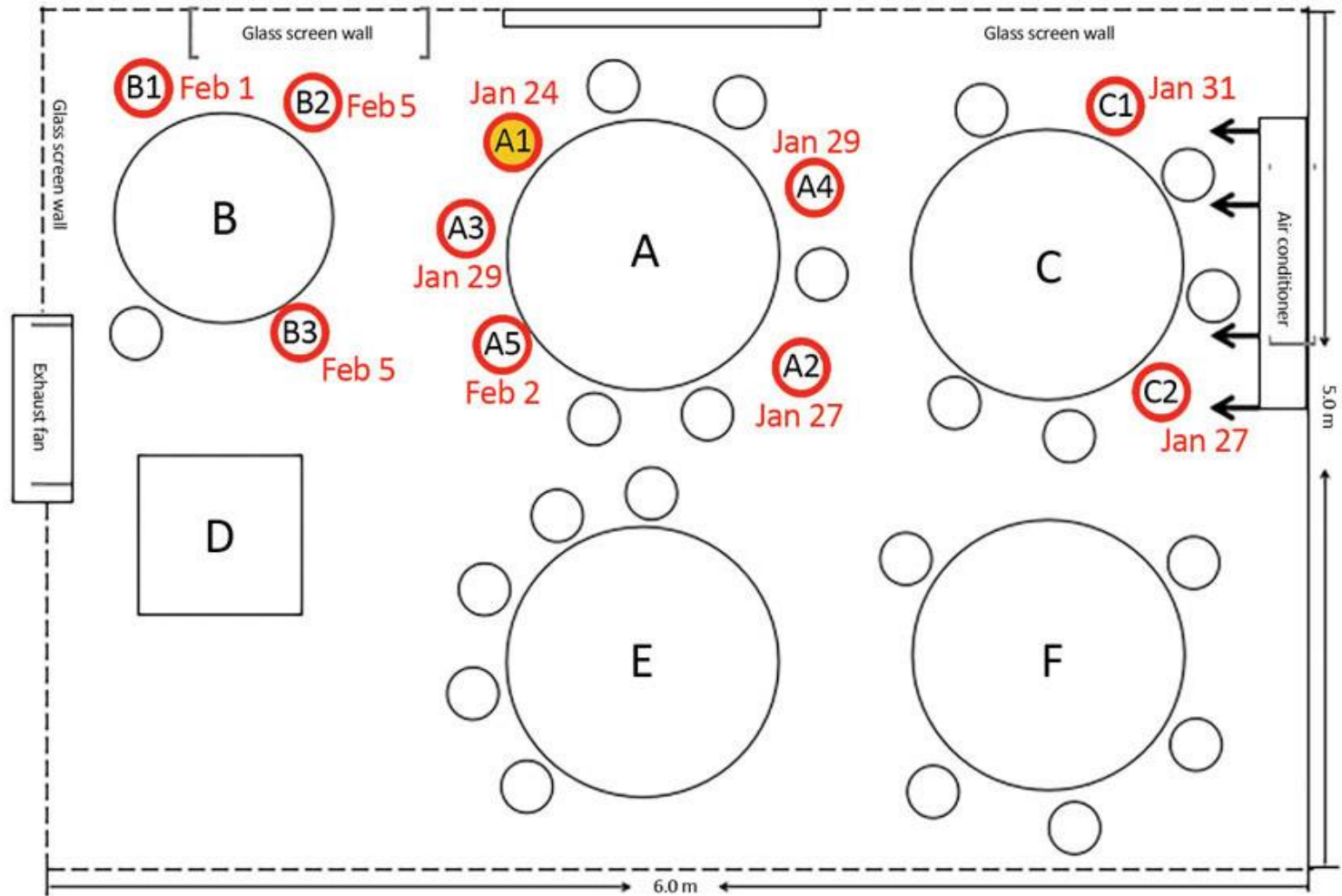
- Social distancing and wearing masks likely to continue long after courts reopen.
  - Potential for additional waves of the epidemic
  - Harvard study: Social distancing may be needed into 2022. See <https://www.statnews.com/2020/04/14/some-social-distancing-may-be-needed-into-2022-to-keep-coronavirus-in-check-new-study-says/>

# Big Picture Issues

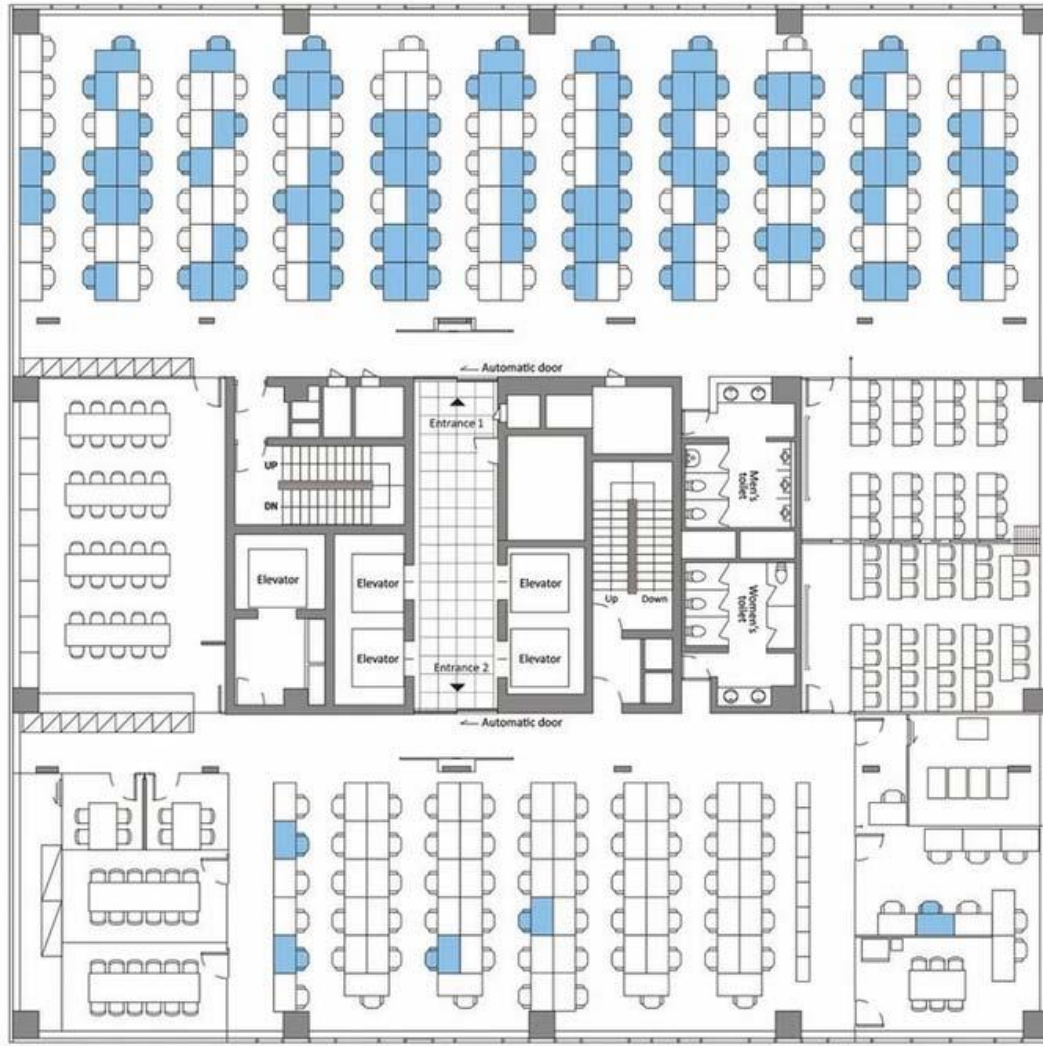
- One plan calls for continued bans on gatherings of more than 50 people.
  - See Advisory Board “How long will social distancing last? It could be years, experts warn”(April 16, 2020), available at <https://www.advisory.com/daily-briefing/2020/04/16/social-distancing>

# Big Picture Issues

- Successful Infection = Exposure to Virus x Time.
- Workplaces, restaurants, and public toilets are areas of concern. “Any environment that is enclosed, with poor air circulation and high density of people, spells trouble.”
  - See Bromage, Erin, “The Risks – Know Them – Avoid Them,” available at <https://www.erinbromage.com/post/the-risks-know-them-avoid-them>; see also Bromage, Erin, “I’m an Essential Employee. How can I keep safe at work and not bring the virus home to my family?” available at <https://www.erinbromage.com/post/i-m-an-essential-employee-how-can-i-keep-safe-at-work-and-not-bring-the-virus-home-to-my-family>



Restaurant in Guangzhou, China



Call Center in Seoul, South Korea



# Big Picture Issues

- It is hard to completely eliminate COVID exposure.
  - Conflicting studies: Lower initial exposure may reduce severity of disease. See <https://www.sciencealert.com/does-the-amount-of-covid-19-virus-you-are-exposed-to-determine-how-sick-you-ll-get>

# Big Picture Issues

- Judges and attorneys need to work together to move cases and dockets forward.
  - Generate ideas
  - Start a conversation

# In-Person Jury Trials in an Era of Social Distancing

# Supreme Court of Louisiana Orders

# April 6, 2020, Order

- Courts may only conduct in-person proceedings to address emergency matters that cannot be resolved virtually
- Specified list of criminal and civil emergency matters.
- The time period of the court's continuance shall be excluded from speedy trial computations.

# April 6, 2020, Order

- “This Order expressly does not prohibit any court proceedings by telephone, video, teleconferencing, or any other means that do not involve in-person contact with consent of all parties and the judge.”

# April 22, 2020, Order

- Jury trials suspended until June 30
- Judges are “encouraged” to use remote conferencing.
- Consent for remote proceedings in civil matters “shall not be unreasonably withheld by any party.”

# April 29, 2020, Order

- “To the extent that proceedings can be conducted by remote conferencing, judges are encouraged to conduct all court matters.”
- Prohibition on in-person proceedings extended until May 18.



# What are Other States Doing?

Only a handful of states have plans to reopen courts

# Montana

- Key recommendations from the Montana Supreme Court (4/27/20 Order):
- Continue remote hearings when possible.
- Allow attorneys and litigants at high risk if exposed to COVID-19 to appear remotely.
- Six-feet of physical distancing.
- No more than 14 people in “circumstances that don’t allow for social distancing.”

# Montana Supreme Court

- Screen individuals entering the courthouse.
- Courts “strongly encouraged” to require face masks. State working to provide masks.
- Manage voir dire “beginning with enhanced questionnaires to identify those in the potentially at-risk category”
- Excuse jurors who may be at high-risk or have other appropriate reason not to report (lack of childcare; caring for a high-risk person, etc.)

# Montana Supreme Court

- Call jurors in smaller groups and space jurors throughout the building for voir dire.
- Seat jurors in compliance with physical distancing during the trial and deliberations.
- Limit in-court spectators
- Make hand sanitizers and masks available to jurors and others in the courtroom.

# Arkansas

- Key recommendations from the Arkansas Supreme Court (4/24, 5/1 and 5/8 Orders):
- Screen all visitors as if entering a medical facility (e.g., fever in last 14 days, cough, shortness of breath, pneumonia, travel to a high-risk state in last 14 days, contact with COVID-19 patient).
  - High-risk states: Tennessee, Washington, California, Colorado, Texas, Louisiana, Illinois, Georgia, Florida, Michigan, Pennsylvania, New York, New Jersey, Connecticut, or Massachusetts

# Arkansas Supreme Court

- Stagger court appearances (e.g., 9 a.m. and 1 p.m. depending on defendant's last name)
- Court events should not exceed ten persons.
- Identify facilities large enough to host a jury with social distancing, e.g., school auditorium, performing arts venue, National Guard armory
- Lists of hearings that are to be prioritized (e.g., cases with speedy trial issues, cases with victims under age 14, temporary restraining orders)

# Tennessee

- Jury trials still suspended.
- Key portions of the Third District plan to reopen:
- No more than 10 people in a courtroom exclusive of the judge, court personnel, and court security.
- Sit only in designated spaces on benches.
- Podium sprayed with disinfectant after each appearance by counsel.
- Jurors encouraged to bring their own coffee cups.

# Third District of Tennessee

- Packages of juror pens and notepads left sealed for up to 7 days.
- Jurors provided gloves, hand sanitizer, spray, and wipes.
- Must wear gloves when touching paper that is handled by others.
- Cases should be staggered.
- Chairs placed in open courtrooms with at least six feet between and around each chair.



# Third District of Tennessee

- Witnesses will wait in their cars until called.
- Public defenders and district attorneys discuss pending cases “most likely outside the building and only bring the litigants in when the case is ready.”
- Separate courtrooms utilized for different types of cases, depending on the number of people scheduled to appear (but no more than 10).
- Empty courtrooms used as waiting areas.

# Sixteenth District of Tennessee

- Key portions of the plan to reopen:
- Wiping down areas in each courtroom used and touched by members of the public, judges, court personnel, witnesses, attorneys, and court security at regular intervals during the day.

# Sixteenth District of Tennessee

- Tape six-feet apart at the courthouse entrance.
- Limit of 3 people per elevator; elevators marked with X's to suggest where patrons should stand.
- Courtroom benches marked with X's six feet apart indicating where to sit.

# Sixteenth District of Tennessee

- An officer will take temperatures and log them on a sign-in sheet. Anyone with a temperature above 100.4 degrees Fahrenheit will be denied entry.
- All persons entering the building will receive hand sanitizer.
- No minors allowed without leave of court.

# Sixteenth District of Tennessee

- One door for entry and separate door for exit.
- Witnesses remain outside the courthouse until called.
- No lengthy discussion of cases inside the courthouse.
- Criminal dockets limited to ten persons each and staggered hourly.

# Sixteenth District of Tennessee

- Non-party witnesses shall be called “out of order” in order to allow them to testify first and then leave the building immediately after testifying.
- The Judge, prior to calling the docket, will survey those individuals in the courtroom to ensure they are a party, lawyer, or a testifying witness. Anyone who does not meet these criteria will be required to exit the building immediately.

# Sixteenth District of Tennessee

- No friends, onlookers, or family support allowed.
- Public courtroom doors are to remain open so as to minimize touching of surfaces.
- Personal property bins at the metal detector shall be sanitized after each use.
- Hand sanitizer will be available in the hallway and must be used before entering the courtroom.

# Sixteenth District of Tennessee

- The judge and court clerk must be six feet away from each other. The witness chair must be six feet from the judge's bench.
- No papers, driver's licenses, writing implements, or other potentially contaminated items may be passed among persons cited into court, court personnel, or the judge.
- Inmates will be transported one at a time.



# West Virginia Supreme Court

- “Call dockets” where multiple matters are scheduled for a set time are prohibited. (May 6, 2020, Admin. Order)
- Recommends that attorneys and parties wait in their cars.
- Witness testimony should not be limited to the traditional witness stand.

# West Virginia Supreme Court

- Masks or face coverings must be worn in a courtroom or judicial office.
- Hand sanitizer may be required. Gloves “not recommended” for employees.
- Jurors called to the courthouse in manageable numbers.
- No large jury pools.

# West Virginia Supreme Court

- Juries not limited to jury box.
- Judges should give special consideration to a juror seeking relief from jury duty if the juror establishes that they are a "vulnerable individual."
- Consider moving jury trials to alternative locations with adequate space

# West Virginia Supreme Court

- If a party, attorney, witness, or juror is adversely impacted by continued community efforts to stop the disease, such as extended school closures, the court system should make efforts to reasonably accommodate the individual to support public health efforts.

# Michigan

- Phased return to full capacity plan. (5/6/2020)
- “We must change our philosophy and only require attendance when absolutely necessary.”
- “Gone are the days when employees with symptoms of respiratory illness, even if mild, can be allowed to ‘tough it out’ and conduct the court’s business as usual.”

# Michigan Supreme Court

- Public will be asked questions to screen for COVID-19.
- Banned from entry if COVID-19 symptoms, close contact with someone with COVID-19 diagnosis, or travel outside Michigan in last 14 days.
- Face masks will be required.
- In-person proceedings limited to 10 people.

# Florida: Task Force

- Best practices guide for pro-se litigants, managing evidence in remote hearings, witnesses appearing remotely, and out-of-county inmates (May 11, 2020).
- Includes a link to a video of a mock online jury trial conducted by Broward County judges.

# Arizona

- Timetables for individual courts may vary
- Consider overtime, weekends, and evenings
- Refrain from simultaneous hearings
- Public access through streaming
- Use pagers for courthouse access
- Use retired and pro tempore judges
- Temporarily shift criminal cases to civil and family judges



# Arizona

- If limits on capacity, prioritize cases in the following order: criminal, juvenile, mental health, family (minor children), family (no minor children), probate, civil, tax and administrative
- Criminal cases prioritized: (1) defendant in custody; (2) felony cases, defendant not in custody; (3) misdemeanor cases, defendant not in custody

# Issues Going Forward with In-Person Trials

Need Jurors Willing to Serve While  
Protecting Those At Risk

# Need Jurors Willing to Serve While Protecting Those At Risk

Even before the coronavirus epidemic, there was a low rate of response to juror summonses.



# Jury Representativeness

# Survey of Potential Jurors

- Willing to serve (48%); afraid to be in a room with a large group of people (27%); other (25%)
- Willing vs. afraid: White, non-Hispanic (72%); African American (58%); Hispanic (50%); Asian (41%)
- Strongly disagree that an important function of juries in America is to send messages to corporations to improve their behavior (80% willing to serve).

# Survey of Potential Jurors

- Strongly disagree that people of color are being hit harder when companies make staffing cuts due to the coronavirus (86% willing to serve)
- Disagree that too many corporations have put profits over safety during the coronavirus pandemic (79% willing to serve).
  - Gallipeau, D., *Who Will Show Up for Jury Duty?* (available at <https://calemploymentlawupdate.proskauer.com/files/2020/05/COVID-jury-differences.pdf>)

# Reassure Potential Jurors

- Include a statement of safety protocols with the jury summons.
- Update court website and social media with photos/video showing safety measures. Show jurors what you are doing.
- Issue public service announcements
- Jurors are our heroes!

# Need Jurors Willing to Serve While Protecting Those At Risk

- Because of social distancing requirements, you don't want to overwhelm jury assembly areas with crowds of people, some of whom could be high-risk for COVID-19.
- Need to handle hardship and COVID-19 issues BEFORE jurors arrive at the courthouse.



# Juror Qualification Questionnaire

- Federal courts have the eJuror system.
- Everyone is mailed a paper copy of a qualification questionnaire which they are required to complete online or mail back within ten days.
- Jurors then call an automated phone system to determine if they have been excused, disqualified, or deferred from jury service.
- This could be modified to add COVID-19 related hardships and questions about available technology for potential online trials.

# Other Software for Online Juror Qualification Questionnaires

- JURY+ Web software by Jury Systems, Inc.:  
[www.jurysystems.com](http://www.jurysystems.com).
- Judicial Systems:  
<http://www.judicialsystems.com/ijuror/>
- Courthouse Technologies:  
[http://www.courthouse-technologies.com/Feature\\_eResponse.asp](http://www.courthouse-technologies.com/Feature_eResponse.asp)

# Generous Deferrals and Hardship

- First deferral as a matter of right
- Second deferral for good cause.
- Loosen up language that might discourage jurors from sharing their concerns.
- Make sure jurors clearly understand we want to know everything and then judge can decide.
  - High risk for COVID-19
  - Child or elder care issues

# Spread Out Juror Arrival Times

- Stagger juror arrival times (e.g., 8:30 a.m., 10:30 a.m., 12:30 p.m.).
- Evenly spread out jurors to arrive each business day, and not all on Monday.
- Open up additional areas for potential jurors to wait while maintaining social distancing.

# Issues Going Forward with In-Person Trials

## Social Distancing

# Social Distancing

- Mark stadium seating/benches with allowed seating areas.
  - Consider temporarily replacing stadium seating and benches with individual chairs at proper intervals.
- Courtroom function based on size
  - Largest courtrooms for jury selection; medium courtrooms for jury trials; and small courtrooms for individual hearings
- Find other large spaces in the area for trial use

# Social Distancing

- Jury box is too small; have jurors sit in the well and/or gallery.
- Create one or more large areas for juror deliberations
  - Individual desks with plexiglass shield.
  - Individual copies of the evidence; hand sanitizer
- Plexiglass around the witness stand; sanitized between witnesses.

# Social Distancing

- Longer lunch break so attorneys and jurors can leave courthouse and separate.
- Witnesses remain outside until 15 minutes before needed
- Select an extra alternate juror, in case issues arise during trial
- Reduce size of juries?



# Issues Going Forward with In-Person Trials

## Jury Selection With Social Distancing

# Expanded Case-Specific Juror Questionnaires

- Once a certain number of jurors clear hardship, assign a group of potential jurors to a case before they come to the courthouse and have them complete a paper/online case-specific questionnaire.
- Any legitimate question either side could ask in open court is proper for the questionnaire.
- Give counsel some time to review completed questionnaires.

# Software for Online Juror Questionnaires

- Can e-Juror, iJuror, Jury Systems, Judicial Systems, or Courthouse Technologies handle a second questionnaire?
- Other software programs for online case-specific questionnaire: SoGoSurvey, Typeform, Google Forms, SurveyMonkey, SurveyGizmo, Qualtrics

# Question Jurors in a Series of Small Groups

- Four to ten jurors at a time, depending on the size of the courtroom.
- Focus is on following up on the questionnaire.
- Other jurors can wait outside the courthouse until needed.
- Jury selection will take more time under this model, especially in larger cases.
  - Can't see faces of jurors wearing masks

# Issues Going Forward

**Continuing to Move Cases**

# Working Together

- Courts and counsel need to work together to continue to move cases forward.
- All aspects of pretrial work (depositions, lengthy hearings, mediation) can be handled remotely
  - No excuse for delay (“I have to be in the same room with my client”; “This is a document-heavy case.”)
  - Encourage motions to compel
- Medical examinations in personal injury cases can go forward.
- Pressure of a trial date pushes settlement.

# Pennsylvania Supreme Court

- “To the degree necessary, attorneys should counsel their clients that the public health emergency can in no way be used to secure strategic advantage in litigation, including by means of dilatory conduct. (April 28, 2020, Emergency Order)
- The Court cited several rules of professional conduct, including the duty to expedite litigation (Rule 3.2), the duty of candor toward the tribunal (Rule 3.3), and the duty of fairness to opposing party and counsel (Rule 3.4).

# Florida Supreme Court

- The following proceedings are amenable to being conducted remotely: alternative dispute resolution proceedings; status, case management and pretrial conferences; non-evidentiary and evidentiary motion hearings in all case types; . . . non-jury trials in all case types, except for criminal, juvenile delinquency, and termination of parental rights. (May 4, 2020, Admin. Order)
- These proceedings “shall be conducted” using telephonic or other electronic means unless inconsistent with statute/rule or infeasible because of lack of technical resources.



# Issues Going Forward with In-Person Trials

## Restarting Civil Jury Trials

# Restarting Civil Jury Trials

- Criminal trials will take precedence, because of Sixth Amendment right to a speedy trial.
- Confrontation Clause: even having witnesses appear on videotape is rare in criminal cases
  - *Maryland v. Craig*, 497 U.S. 836 (1990): uphold live video testimony when necessary to further an important public policy
- Until the backlog has passed, have civil, family, and/or retired judges hear criminal cases.
- Two-track approach: criminal cases take available in-person jurors and civil cases go online when possible.

# Online Jury Trials or Grand Juries

# Do We Need Online Trials?

- It depends on how many jurors are willing to show up in person.
- Because there will likely be a high demand among criminal judges for all available jurors, civil judges could use online trials.
- Potentially large number of jurors will not want to come to courthouse but could hear an online trial.

# Can a Jury Trial be Done Online?

- Yes! Video conferencing services (e.g., Zoom, GoToMeeting, WebEx) provide platform for an online trial
  - Can do a split screen to share evidence.
  - Can put jurors in a separate virtual hangout when lawyers need to argue over an objection.
- Witnesses can testify without a mask.
- Clients can observe.
- Need consent of parties and witnesses
- Jurors complete electronic verdict form

# Online Grand Juries?

- Minimum quorum required
- Rules of evidence do not apply
- Confrontation Clause does not apply
- Must safeguard secrecy (ZoomGov)
- Require a non-disclosure agreement
- Defendant and counsel can appear remotely
- Two-track approach depending on ability to get jurors to show up in person

# Considerations for Jurors

- Ensure jurors can isolate themselves at home, so others cannot listen, and focus without excessive background noise
  - Consider headphones
- Jurors can hold up an ID card to the screen.
- Jurors can take their own notes and submit questions via chat

# Considerations for Jurors

- Jurors without technology at home could go to a government office with a workstation.
- Judges can instruct jurors to keep their camera on at all times.
  - Court clerk or bailiff can monitor jurors to ensure they are paying attention.



# Considerations for Attorneys

- Consider impact of computer display on juror perceptions of the case.
  - A lot of things are seen and noticed in person that would be missed
- Consider juror representativeness
- Carefully prepare documents and graphics for both opening and each witness.
- Louisiana: Backgrounds for attorneys should be a blank wall.

# Considerations for Attorneys

- Consider camera angles, lighting, and eye contact.
- Heavier use of Power Points and other trial graphics to highlight key points.
  - Have a graphics person available
  - Be careful about pop-ups on a shared screen
- Second back channel for communication among attorneys and their clients.
  - Need two monitors.
- Potential delays if a juror has tech issues

# Considerations for Witnesses

- Pre-test the technology or come to an office
- Have a hard copy of relevant exhibits
- Consider camera angles, lighting, and eye contact.



# Considerations for Witnesses

- Background should be plain
- No backlighting
- Practice testimony and technology
- Consider using headphones to avoid echo

# Benefits of Going Online

- Huge concern about how many people are going to show up for jury duty.
  - Seattle: Half of what would have been expected
- Those who might not otherwise be able to serve can do so safely from home.
  - No worries about transmission of disease.
  - No worries about transportation to court.
- If possible, proceed with both in-person and online.

# Juror Attention Span for Online Proceedings

- Maximum of 2.5 to 3 hours a day.
- It is harder to sit in a chair all day staring at a screen when you are at home.
- Best to have breaks every 30 to 45 minutes; one hour at the limit.
- Attorneys need to be creative about chunking information.

# Dynamics of Online Jury Deliberations

- Not as much juror interaction prior to deliberations.
  - Can encourage jurors to converse about things other than the case while waiting for rulings.
- Video has a slight lag.
- Potential for outside interference
- Jurors' ability to stare at attorneys and clients during trial.

# Dynamics of Online Jury Deliberations

- There is one conversation. Everyone has to wait.
  - Heavier role on the foreperson
  - Can't have multiple small groups of jurors in separate conversations
- If a juror lost the internet connection and could not hear or participate in deliberations for a period of time, there would be a mistrial. “IT bailiff”?



# Dynamics of Online Jury Deliberations

- Jurors' ability to review exhibits.
  - Need secure online site for viewing documents
  - Jurors would need to come to the courthouse to review non-documentary exhibits.
  - Jurors would need to break off a Zoom chat to look at document files.
- Do you trust jurors not to do internet research during deliberations?
- Consider bringing jurors into court for deliberations.

# Jury Selection in an Online Jury Trial

# Jury Selection Online

- Detailed case-specific questionnaires completed online some time prior to start of trial.
- General questionnaire covers hardship issues, computer capabilities, and general background.
  - Judge and parties can go over hardships ahead of time.
- Jurors also complete a case-specific online questionnaire. Any question that would have been appropriate for oral voir dire.

# Jury Selection Online

- Limit of 9 to 12 faces on a Zoom screen at one time.
- Jury selection transitions to questioning no more than a handful of people at one time.
- Focus on following up on the questionnaire.
- Encourage group hand-raising when possible, but understand interaction will be limited.
  - Zoom has “virtual hand raising” and chat features

# Jury Selection Online

- With multiple small groups of jurors, selection will not move as quickly.
  - Online questionnaires; day or two to review responses; then segment groups of jurors for questioning.
  - Could select a jury one week and start the next.

# Research Governing Juror Perceptions in Online Trials

# Juror Perceptions

- A Chicago study of bail hearings showed that defendants appearing via videoconferencing were “significantly disadvantaged,” receiving substantially higher bail than those appearing in court
  - Diamond, Shari, et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 898 (Summer 2010) (available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jclc>)

# Juror Perceptions

- Analyzing over 500,000 asylum cases, a study found that use of a videoconference hearing “roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum” as compared with an in-person hearing.
  - Walsh, Frank and Walsh Edward, *Effective Processing or Assembly-Line Justice - The Use of Teleconferencing in Asylum Removal Hearings*, 22 Geo. Immigr. L.J. 259 (2007-2008)



# Juror Perceptions

- Trials using closed-circuit television were less likely to result in a guilty verdict than those in which children testified in court.
- Videoconferencing could affect assessments of demeanor and nonverbal cues (e.g., eye contact, body language) in ways that lessen the speaker's ability to connect emotionally with listeners and that reduce the speaker's perceived credibility
- “Vividness” of in-person testimony versus remote testimony
  - Landstrom and Granhag, 2010

# Juror Perceptions

- British survey: 74% of respondents believed video had particularly negative impact on unrepresented defendants and defendants who did not speak English
- 58% felt video had a negative impact on defendants' ability to participate
- 72% felt it had a negative impact on defendants' ability to communicate with attorneys and judges
- 70% felt it was difficult to recognize on video if someone had a disability
  - Gibbs, Penelope, *Defendants on video—conveyor belt justice or a revolution in access?* TRANSFORM JUSTICE, Oct. 2017 (available at <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>)

# Alternatives to a Jury Trial

# Is Time an Issue for You?

- When jury trials resume, criminal cases will take precedence.
- Can your client wait?
  - Age, Illness, Poverty
  - Client losing money because ongoing litigation is holding a patent/project in limbo
  - Just needs to get this in the past

# Private Jury Trial

- Underlying case is settled on a high-low.
- Hire a retired judge to rule on pending issues and conduct trial
- Recruit jury; complete questionnaires
- Conduct trial in a large meeting space, following COVID safety procedures

# Victory Trial Consulting

## Jury Research

Mock Trials (in person and live-stream), Focus Groups, and Online Jury Surveys

## Jury Selection and Trial Assistance

Prepare voir dire outline and juror questionnaires

Assistance during jury selection

Assistance with case theme, opening, closing

Witness preparation

## Private Jury Trials

## Settlement Presentations

## Case Consultation

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Settlements During Trial**