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Crisis

Virtual Juries

We Can, But Should We?

And If So, How?

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Locking eyes with those seated in the jury box, a judge instructs the jury, “You may begin your deliberations.” Everyone stands. The jurors file out of the courtroom, retiring to a secret room where they will discuss the evidence and law in an effort to reach a verdict. Jury trials are sacrosanct in our system of justice.

And then everything changed. When our world began to face the unrelenting spread of the novel coronavirus in early 2020, the number of in-person jury trials decreased and many were put on hold. But judges, lawyers, and others recognized the importance of keeping the courthouse doors open—even if virtually. Historically, courts move at a pace that would frustrate even the most patient sloth, as we form committees, study options, and analyze unintended consequences. So courts evolved. Fast.

Like many courts, the Arizona State Superior Court in Maricopa County studied and considered over weeks and months what it would have typically considered over years and even decades. We formed a task force with lawyers, researchers, and judicial officers. Among the questions the task force looked at was how to keep jury trials continuing in this pandemic—and perhaps the next one.

“Can we?” was never at the front of our minds. Instead, we asked, “Should we?” and, if so, “How?” While many pondered what could and should occur with jury trials during the pandemic, we got to work collecting facts and data.

The task force focused on two areas: First, could jurors serve from home? And, second, what were the differences—in terms of outcomes and process—among the alternatives to traditional jury trials? To answer this second question, we conducted a series of simulations designed to explore a refashioned in-person but socially distanced jury trial, a virtual jury selection, and a virtual jury trial.

At the outset, we were eager to understand who could and could not serve as a virtual juror. With a population of over 4.5 million people spread over 9,224 square miles, the process of summoning and empanelling Maricopa County jurors carries challenges even when the majority of our population is worried only about the 119-degree heat. Before the pandemic, more than 14,000 people entered our court buildings every day. When the pandemic compromised the safety of our community, we knew changes were necessary to reduce the steady stream of jurors who physically entered our buildings.

Before coming to the courthouse, almost 80 percent of our court’s prospective jurors respond to their summons using our ejuror portal. In May 2020, we revised this portal to create a more robust online questionnaire, expanded in part, to seek information about a prospective juror’s ability to serve as a virtual juror. Regarding virtual jury service, we asked five qualifying questions:

1. Do you have a device with a camera?
2. Do you have reliable internet?
3. Do you have a private space?
4. Do you have a location that is free from interruptions?
5. Do you have the physical ability to serve as a juror from home?

Nearly 40,000 prospective jurors responded to our survey, with a relatively equal response rate across age groups. Of note, those prospective jurors who responded used the court's ejuror portal, so the information gathered has an increased probability that the person has access to the internet and a device.

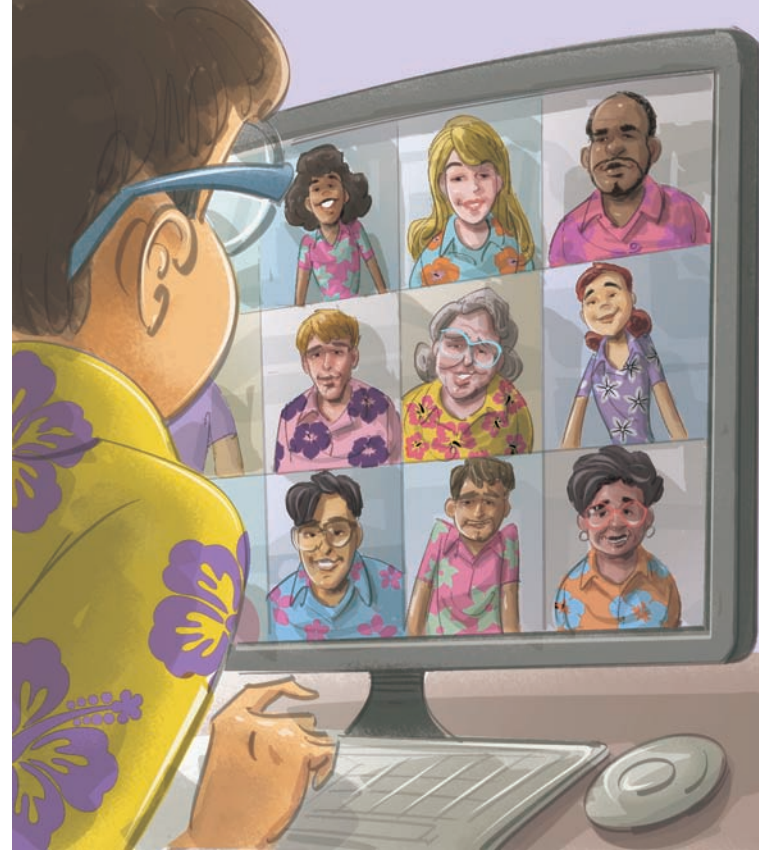
About 62 percent of prospective jurors told us they could participate virtually in jury selection and serve as a juror from home. We also analyzed whether our prospective virtual jurors represented a cross-section of our community. They did. However, our results underscored the need for courts to minimize the impact of the digital divide, as in these examples:

- About 63 percent of those prospective jurors who reported lacking a private space or a space free from interruptions identified as female.
- Responding individuals who identified as Hispanic/Latinx reported a reduced ability to serve as a juror from home on all five qualifying questions.
- Individuals under 50 and over 70 responded at a higher rate than other age groups that they lacked a private and quiet space.
- Responders over age 70 reported, at an increased rate, an inability to serve as a virtual juror based on at least one of the five qualifying questions.

When we asked about an appropriate device, we informed prospective jurors that any smartphone, tablet, desktop, or laptop with a camera qualified. Now that our virtual jury trial simulations are in the rearview mirror, we would note that while all devices assessed are appropriate for jury selection, the limited functionality of smartphones and tablets leads us to discourage their use for virtual trials. Courts in some jurisdictions have addressed the digital divide by providing laptops and internet access to seated jurors.

We kicked off our virtual jury selections with more questions than answers and came out of the experience with answers to questions we didn't realize we even had.

To approximate the steps for assembling a jury for jury selection, we asked all remote jurors to complete a jury summons questionnaire (through an email-provided link) before trial and an online supplemental juror questionnaire (SJQ) on the day of trial. The jury summons questionnaire containing 46 questions covered (a) qualifications for jury services, (b) general



background information, (c) hardship issues, (d) ability to participate (both technological and environmental criteria), (e) COVID-19-related issues, and (f) willingness to participate in a remote capacity and an in-person capacity. The SJQ consisted of 17 questions addressing (a) additional background and experience questions, (b) knowledge of the parties and witnesses, and (c) opinions related to civil lawsuits and the instant lawsuit (e.g., perceptions of students and professors concerning the conduct at issue). The parties, the trial consultants, and the judge received electronic copies of all completed questionnaires and spreadsheets containing the critical information for all jurors before the jury selection process began. You can view our questionnaire at <https://tinyurl.com/Litigation-SJQ> or below:

View an Online SJQ

Point your camera at the image and tap the banner that appears.



All the participants, the judge, both attorneys, and the trial consultants thought the online questionnaires were very helpful, were easy to use, and provided a basis for follow-up questions during voir dire. However, important questions remained: What did the jurors who completed these questionnaires think? Would they have difficulty completing the questionnaires and would they be unwilling to complete a questionnaire if given a choice? Their responses showed just the opposite. Most jurors rated both types of online questionnaires as easy to use and said they would

Illustration by Jimmy Holder

be willing to complete an online questionnaire if it reduced the time needed to select a jury. Certainly, the SJQ responses allowed the judge and attorneys to spend less time during oral voir dire covering those topics.

The jurors in our online simulations came from a pool of volunteers summoned for traditional jury service but released before any trial service. We conducted two virtual jury selections with a total of 35 jurors. At the start of each virtual jury selection, the judge introduced the case, provided instructions, and asked preliminary questions. Then the attorneys asked the venire questions. After that process concluded, the attorneys, trial consultants, and judge met in a virtual bench conference to consider challenges for cause and the exercise of peremptory challenges. A portion of the virtual jury selection is available at <https://youtu.be/CMYznuy1QY0>.

Once attorneys and jurors became accustomed to the videoconferencing platform, jury selection felt like any other jury selection with one novel exception. Our view of the jurors mirrored the opening credits of a Brady Bunch episode. The only quandary was that jurors' locations on the screen shifted if others entered the gallery view, making it difficult to keep track of their locations on a traditional seating chart.

David Rosenbaum, one of the trial attorneys who questioned our virtual jurors, noted that

[v]oir dire questioning conducted face-to-face on a video platform is in some ways more intimate and personal than in-court examination conducted from six to ten feet away. And, unlike the traditional courtroom setting, jurors see their fellow jurors' expressions and reactions head-on. That introduces an entirely new and, I think, helpful dynamic.

With relative ease, lawyers and the court noticed when jurors strayed from the screen and started reading emails or checking BuzzFeed for the best products to organize a closet. When in person, judges and lawyers have become skilled at identifying jurors who text and work on their phones during jury selection. In the online setting, those detection skills are the same, but the "tells" are slightly different.

Overall, jurors told us their experiences were positive as well. Jurors felt it was easy to handle the videoconferencing platform technology. They reported few disruptions in service and were able to see and hear the attorneys well. The jurors using smartphones were instructed to use a view feature to spotlight the speaker. Jurors reported that they found it easy to stay attentive during the proceeding. Some jurors felt the online setting generally increased their willingness to participate in the questioning process as reflected in comments in interviews. One juror told us her increased willingness to be candid in answering the court's questions stemmed, in part, from the fact that she felt secure

seated in her son's bedroom, far away from the intimidating environment of a courtroom.

We asked jurors for their "bottom line" perspectives, and their answers were almost unanimously uniform. They preferred the online setting for both jury selection and trial. After their simulation experience, all of the jurors said that they would be at least somewhat willing to participate in online jury selection for an actual case. However, the same cannot be said for in-person jury selection during the pandemic. Only a slight majority of these jurors said they would be at least somewhat willing, and close to half said that they would be at least somewhat unwilling to attend an in-person jury selection. In fact, when given the choice of location (online or in person) for the entire trial and not just for jury selection, the vast majority of jurors expressed a preference to be online.

Lance Broberg, another one of the trial attorneys in our simulation, reached a similar preference:

I came away from the process preferring virtual voir dire. First, the jurors appeared more comfortable and therefore more candid. Second, everyone was right in front of me so I could easily monitor the group; no scanning the room. Third, there is something to be said about seeing the prospective jurors in their own homes. You just feel like you better understand who they are. And you can't get that in a sterile courtroom setting.

For courts considering virtual jury selection, we encourage an evaluation of how the digital divide will affect the jury panel. To facilitate diversity and representativeness, potential jurors who do not have the appropriate technology, internet access, or a suitable remote environment should be provided what is needed for jury service, either the appropriate technology or an appropriate location or space (e.g., a technology-equipped kiosk, cubicle, courtroom, or other setting) in which to participate. Panel size should be limited to 12–15 potential jurors at a time, where possible, given the limits of screen size and display issues. This may mean pulling in three or more panels in separate time slots, but the resulting screen quality is worth it. Another essential aspect of virtual jury selection or trial is the "tech check" with potential jurors to ensure technology capability, user capability, and viable internet connectivity, and to troubleshoot inevitable issues.

Virtual jury selection allowed all participants to see the prospective jurors up close without the need for a face covering. The prospective jurors reported an increased willingness to provide candid answers to the questions of the court and counsel. Moreover, the online jury selection process allowed the jurors to answer case-specific questions using an online questionnaire to streamline the questioning process.

Courts are responsible for ensuring that every eligible citizen has a right to participate in jury service. We suggest that courts

using virtual jury selection give individuals the chance to report in person (in a safe manner) if they prefer to appear in person or lack the ability to serve as a juror from home. Alternatively, courts can provide individuals who report in person with a device to connect to the courtroom for virtual jury selection.

Don't romanticize an in-person jury trial during the pandemic. Jurors are not likely to be together in the jury box. In fact, some jurors may be located behind you. Your client may be seated the distance of two shopping carts away from you. Your tech person and paralegal may be back at the office doing their best online shopping because courtrooms aren't large enough to fit all trial participants safely. A snapshot video of the court's in-person trial allows parties and litigants to compare the realities of an in-person jury trial against the alternative of a bench trial or virtual jury trial. The court's video from our in-person simulation is publicly available at <https://youtu.be/ekZxR-ME7Es>.

The two attorneys who participated in the Arizona trial simulations presented the same arguments in person and again online. We all wondered: How would this experience sit with jurors and how would it feel to the attorneys?

David Rosenbaum noted:

Particularly for a two- to three-day civil trial, the advantages of a mask-free virtual trial, in my view, will often outweigh the perceived benefits of in-person witness confrontation. Socially distanced in-person trials, with their skeletal trial teams and masked lawyers, judges, and clients, create special challenges that virtual trials avoid.

If you are appearing in person for a jury trial, visit the courtroom before trial if permitted. Find out where the jurors will sit. Determine whether you need a privacy screen to eclipse your computer if jurors are seated behind you. You will also want to select a face covering that allows jurors to hear you and that fits well without slipping down, which is distracting. Ensure that your witnesses and clients have proper face coverings for trial and ask whether the court is willing to use a Plexiglas enclosure around the witness stand to allow in-person witnesses to remove their face coverings while testifying. While our sample size was small, in-person jurors preferred an unobstructed view of the speaker, either via Plexiglas (most desired) or a face shield. They felt they could better gauge witness credibility and attorney advocacy through those modes. If Plexiglas is not an option, consider a clear face covering or a face covering that does not unnecessarily impair the jury's ability to see or hear you. If presenting in a socially distanced courtroom, increase your volume and make your enunciation extra crisp to compensate for the muffling effect of a mask, face shield, or Plexiglas. While not every sentence should be as loud as the one before it, a strong volume throughout conveys confidence.

In the socially distanced courtroom, movement around the courtroom is also likely restricted. To avoid sharing documents and to reduce the physical interaction among trial participants, use witness and juror notebooks with individual copies of key exhibits. To help ease jurors' health and safety concerns, let the jurors know you are taking these steps to ensure their safety.

Talk to your trial judge regarding options and whether virtual alternatives are available for jury selection or trial. The "hybrid trial" is currently in use in jurisdictions where the courts are conducting parts of the trial online (e.g., jury selection) and where some witnesses may appear via live video feeds while others appear in person.

The Trial

Once the jury is selected, executing the virtual trial is another challenging but not insurmountable phase. Like anything new, the virtual trial requires more preparation than the in-person counterpart. Before trial, lawyers should ensure reliable internet connections for all witnesses and members of their team. Lawyers should test the equipment with their witnesses and encourage witnesses to use a background that is free from distracting items. For adverse or hostile witnesses, consider asking your judge for an opportunity to test the witness's equipment and background outside the presence of the jury.

Our research indicates that smartphones and tablets with restricted gallery view options present significant challenges to a uniform jury experience. The primary problem occurs when the view of the trial is different for jurors based on the functionality of their individual device. For example, jurors using a smartphone likely are limited to simultaneously viewing a maximum of six participants. Although a smartphone user can activate speaker view, the juror will not see the image of the witness until the witness begins speaking. Conversely, a juror using gallery view or the "pin" function can see the immediate expression of the witness as the lawyer asks the question. If all jurors have full gallery view, the judge can provide instructions to jurors before each witness testifies to ensure that all jurors are able to see the same individuals. Certain platforms, such as Microsoft Teams, allow the judge to spotlight the witness for all participants or permit the jurors to select certain individuals to view with a larger image. For example, in a Teams-based platform, the judge could instruct the jurors at the start of a witness's testimony to "pin" Lawyer A, Witness Susan, Lawyer B, and the judge. All other videos will be visible in smaller images, and the screen will fill with the videos of the four primary participants. This allows all jurors to have the same trial experience and permits jurors to watch a witness's demeanor throughout the testimony.

The limited functionality of smartphones and some tablets is particularly challenging during jury deliberations when the

jurors all want to view one another, the jury instructions, and the exhibits. Courts' determination to provide seated jurors with identical devices minimizes part of the problem. Will video platform providers eventually create a "courtroom setting" that ensures all jurors have the same screen view? Time will tell. In addition, a court-provided device could be configured with only the necessary applications for accessing the "virtual trial site," thereby restricting the jurors' access to other computer applications during trial.

And we can't forget about the lawyers. Effective online advocacy is a bit different. In the Arizona study, jurors found the lawyers to be consistently effective whether they appeared in person or virtually. Participating trial attorney Lance Broberg shared his perspective:

There is a certain showmanship that accompanies a live, in-person jury trial. That magic is lost when you are removed to a conference room, seated, and find yourself staring at a screen and camera. That was uncomfortable for me and negatively impacted how I think I presented my case. However, a number of jurors expressed appreciation for the limit to the courtroom theatrics. They wanted facts and the facts can be explained equally well, with practice, virtually.

In the virtual trial setting, witness examination was a paramount concern. How well would jurors be able to see and hear the witness? How well could they see the exhibits? How attentive and involved would jurors be in the process? Would the witness's emotion and credibility fall flat on screen? On almost all measures, jurors rated the witness experience at the top of the scale. Our online trial jurors said it was easy to attend to the proceedings and they felt involved in them. Jurors felt that it was easy to see the exhibits. Finally, almost all, and in most cases all, jurors felt that they could see and hear the witnesses' testimony and attorneys' presentations very well.

Other than the obvious requirement that you must finally change out of your "pandemic sweatpants" and into professional dress for an in-person trial, we found as many similarities as we did differences when comparing the virtual and in-person trials.

Online Witness Credibility

Online jurors felt capable of weighing witness credibility. The judge similarly reported being able to evaluate the credibility of online witnesses. Jurors did mention their fascination with items appearing behind witnesses (and lawyers). Therefore, encourage your online participants to blur their background, use a virtual background, or remove the "Show Me the Money" poster of Tom Cruise in *Jerry Maguire*. Some courts make a

standard background available to participants to replace variable backgrounds.

The defendant in our simulation cried on the stand, both in person and online. In-person jurors reported a decreased ability to corroborate her genuine emotion when her face was covered with a mask. Conversely, the online jurors watched as her eyes teared up about 12 inches from the screen.

In Arizona, jurors are allowed to ask questions during the trial. Typically, jurors are provided forms, and at the end of each witness examination, the court asks the jurors whether they have any questions. Jurors with questions signal the courtroom assistant, who collects the questions and takes the forms to the judge. The judge confers with the parties during a bench conference to review the questions, and the parties lodge objections. The process and public nature of submitting questions may deter some in-person jurors from asking questions. During the virtual trial, jurors were instructed to "chat" privately with the judge or use another electronic means to send the judge questions, at the conclusion of a witness's testimony. The chat was not visible to the lawyers or the public. After receiving questions, the judge and the parties moved to a different virtual channel or courtroom to discuss the questions outside the presence of the jury. During the in-person trial, the court received a few questions from a few jurors. In the virtual trial based on the identical fact pattern, jurors *flooded* the judge's private chat with questions. The ease and anonymity of asking questions without everyone in the courtroom knowing you are asking a question may have led to this greater participation by jurors. If a jurisdiction allows for jury questions, the judge will want to build in additional time for juror questions. While this fact creates a heavier lift for the court, the fact of so many juror questions indicated the questioners were engaged in the trial.

The process for instructing the jury is similar whether in person or online. For virtual trials, the court will need either to email the jurors a copy of the instructions or to use a platform that allows documents to be uploaded and viewed by the jury. The court can also screen-share as instructions are read to the jury to ensure everyone is following along.

Something magic happens when individuals serve on a jury. The jury forms a community. Commonly, jurors bring in cake to celebrate another juror's birthday or leave to eat lunch together. They work on jigsaw puzzles during breaks. Jurors decide to all wear Hawaiian shirts to court on a Wednesday or go to karaoke bars together. During trial, they learn about one another. They assess one another. Courts should consider mechanisms that allow online jurors to build similar bonds. In our online courtroom, our jurors have a private "breakout room" where they arrive, wait during breaks, and deliberate. Alternatively, courts could consider giving jurors a separate link to a private room to gather before trial and during breaks. The courtroom assistant

can enter the virtual space to ensure everyone is ready and then provide the link to the courtroom, allowing all jurors to move to the virtual courtroom.

Juror Deliberations

Our online trial jurors reacted positively to the online setting, with about one-half of these jurors saying that the online setting increased their fellow jurors' and their own ability and willingness to participate fully in deliberations. This was not the case for in-person trial jurors. The necessity of wearing masks and social distancing tended to have a slightly negative influence on the in-person jurors' perceptions of the other jurors' overall ability, and to a lesser extent their own ability, to participate fully in deliberations.

When we started this process, we asked whether we should conduct virtual jury trials. The answer is yes.

How jurors select a foreperson is as mysterious as what happened to Jimmy Hoffa. Online jurors may decide to consider a juror's comfort with the online platform when selecting their foreperson, understanding the person will likely be responsible for helping provide digital access to exhibits, ensuring the verdict form is signed, and communicating with the court. During our online trial, jurors were screen-sharing and highlighting portions of the jury instructions as they deliberated.

The biggest change in using verdict forms in an in-person setting centers on maintaining social distancing while signing the document. The use of verdict forms in the virtual world is a little more challenging. Platforms such as Microsoft Teams allow a verdict form to be uploaded, and each juror can electronically sign the verdict form. However, other platforms require a supplemental software such as DocuSign to allow jurors who are not in the same location to sign the same verdict form.

Finally, in case you were wondering, in our admittedly plaintiff-leaning case, the trial medium made no meaningful difference. The in-person jury returned a verdict for the plaintiff of \$60,000, and the online jury returned a plaintiff's verdict of \$50,000.

When we started this process, we asked whether we should conduct virtual jury trials. The answer is yes, particularly in civil cases and given the building backlog of cases. We don't expect virtual jury trials to instantly become the dominant forum over in-person trials in the short term. In our jurisdiction, parties can choose to use a virtual jury to accelerate their trial. We understand embracing change is difficult and brings an element of uncertainty. Moreover, altering tradition should also result in an improvement.

Features to Keep

Even if full virtual jury trials do not become commonplace, there are a number of features that could translate into more effective and efficient fully in-person or "hybrid" jury trials. Given our experiences and the experiences of the attorneys and jurors, we think that certain aspects of virtual trials will stay—even when we return to "normal."

In particular, we think that online juror questionnaires were shown to be very easy to use and jurors were willing to complete them if it would reduce the time needed for jury selection. Online questionnaires proved to be flexible and easy to track. They resulted in valuable resources (such as electronic copies of completed questionnaires, databases, and spreadsheets) for attorneys, trial consultants and trial team members, and the court in providing a foundation for voir dire questioning. They are cost-effective and save valuable court resources (e.g., staff time for mailing, distribution, tracking, copying, and postage costs) and still allow for jurors who cannot complete online questionnaires to do so via alternative means (e.g., through a limited number of mailed questionnaires or court-supported kiosks). Finally, there are several methods for online delivery, including ejury portals, links to online survey platforms, and scanning of QR codes.

In the short term, online voir dire and jury selection likely will be the exception. However, the potential for greater inclusiveness, improving accessibility (several methods of delivering technology and internet access), flexibility in scheduling "panels" for questioning, juror comfort and convenience, and possibly greater juror candor as compared with in-person jury selection should increase the use of online jury selection over time, at least in civil trials.

Where witnesses are precluded from testifying in person because of distance or illness, virtual testimony can transfer to a "hybrid trial setting" in which some witnesses testify in person and others testify live by video. This option may not always be the right choice, as when a witness needs to physically demonstrate something that is difficult to see outside the courtroom setting.

Virtual jury trials? Can we? Yes. Should we? In certain circumstances, probably so. How do we? See above! ■