



VIRTUAL JURY TRIALS

A CONCEPT WITH NO CLEAR ANSWER

DAN KOTIN AND BRIAN BALOUN

We preface this article by noting it is written in November of 2020. We are in the thralls of the coronavirus pandemic and amid an era characterized by uncertainty and constant change. For all we know, the country could change its mind about its approach to the virus tomorrow and render everything said in this article irrelevant. But, since states are beginning to implement virtual trials or portions thereof on a regular basis, we felt the need to comment.



The coronavirus pandemic has changed daily life more than anything since World War II. From school, bar, and restaurant closures, to entire industries adopting work-from-home models, it's safe to say the world since March 2020 looks much different than it did in the past.

And, frankly, it needs to look different. From a safety standpoint, we simply cannot go back to business-as-usual without causing millions of sicknesses and deaths. With that in mind, the measures industries have adopted – from curfews and closures to work-from-home models – have been well-intentioned and necessary.

Many of these changes also might stick around well beyond the virus's expiration. So many previously live activities are simply easier and cheaper when done virtually.

This rings particularly true for the legal profession. What separates our profession from others is that most industries have adopted changes strictly tailored to the virus itself: one can only hope once the virus is over we will be able to send our kids back to school and won't have to wear a mask to talk to a waiter in a restaurant. But in the legal profession, the pandemic has forced a sort of industry-wide introspection. Concerns about things like administrative efficiency simmered long before 2020, but the coronavirus brought them to a boil. Big law firms have realized that beautiful downtown offices with 40-foot ceilings are an unnecessary expense. And most of us have been thrilled to discover that we can have a great one-hour meeting with an expert over Zoom without spending the time and expense associated with packing up records and flying to New York or San Francisco.

However, aside from basic efficiencies like office space and travel costs, the pandemic has also prompted fundamental, systemwide changes that may be here to stay.

At the forefront of those changes is the virtual jury trial.

The concept arose as a necessary discussion early in the pandemic. In recent months, with the pandemic getting worse, then better, and then worse again, the concept has spread like wildfire. Many states are getting closer and closer to giving it a shot.

To be sure, most trial lawyers shudder at this idea. From a practical sense, a virtual jury trial is the antithesis of a traditional jury trial. As cliché as it may sound, human connection is what makes trial law trial law: any trial lawyer will tell you it is absolutely essential to connect with jurors, to look a juror in their eyes, to learn to gauge – just by the feeling in the courtroom – whether your case is resonating. In-person interaction is a necessary component of all of that. Most trial lawyers believe taking that connection away and replacing it with a webcam will fundamentally change the craft.

But if our new, 2020 world has taught us anything it's that we better learn to get comfortable with fundamental change.

What we intend to do here is not to jump to the immediate conclusion that virtual trial practice marks the end of trial practice as we know it, but to lay out what we see as the pros and cons of our potential new world. We do not know where we go from there we're certain the more we, as trial lawyers, talk about the issue, the closer we'll get to a solution that is both mindful of health and safety and that preserves the rights of those seeking justice through the courts.



We'll start with the pros of virtual trial practice because, admittedly, the idea does have its perks.

The first, and most obvious, benefit is safety.

Even the most ardent opposers of trial-by-webcam must face the grim reality that we have no idea when this pandemic is going to end. And, until it does, every time we usher members of the populous into courtrooms, we're increasing their risk of contracting the coronavirus. When push comes to shove, and health and safety gets pitted against our desire to resume practice-as-usual, most would agree that the former takes priority.

For those quick to jump to the "we can still implement mitigatory safety measures" argument, don't forget juror anxiety. Even if extraordinary safety protocols are enforced, it's inevitable that most jurors will feel anxious to sit through an entire trial. It's difficult enough at times to keep a jury's attention, imagine where their minds will go the first time someone coughs.

Another upside: we don't have to wear a mask on Zoom.

This may seem frivolous, all things considered, but it's not. As we said before, it is essential to connect with jurors and be able to look into their eyes. In other words, you need to be able to read the jury. It's difficult, if not impossible, to read a jury box of twelve half-covered faces. And that's exactly what a jury box will look like if we resume in-person trials.



Perhaps even more concerning is the jury's inability to truly judge the credibility of masked witnesses.

As long as COVID exists, safe, mask-less, in-person trials won't be an option. The lawyers will wear masks. The judges will wear masks. The witnesses will wear masks. And the jury will wear masks. A trial via Zoom will at least provide the opportunity to see the faces of the people you are trying to persuade, and it will provide the jurors the opportunity to see the faces of the witnesses they are trying to evaluate.

There's also efficiency.

Zoom court calls are quicker and less laborious. Zoom depositions cut costs by lessening travel expenses. Zoom bench-trials even have their perks when it comes to efficiency. If technology has rendered these things more efficient, why would jury trials be any different?

But for each one of these pros there's a corresponding con, and the cons go beyond practical considerations and right to the center of the United States Constitution.

Now, because no court has ever stumbled upon the necessity to decide whether trial participants must be physically present to conduct a jury trial, case law on the topic is more or less non-existent. What we do know is that the Constitution guarantees a jury trial in both criminal and civil cases.¹ It guarantees a jury selected from a fair cross-section of the community. It guarantees due process of law. It guarantees the right to confront witnesses against you. So this begs the question: does trial-by-webcam protect these rights?

The intersection of the Sixth and Seventh Amendment may lead many to answer no. The Sixth Amendment guarantees us a right to a trial by an impartial jury, chosen from a fair cross-section of the community. The Seventh guarantees a right to a jury trial in civil cases.

The purpose of both Amendments is to encourage full and complete participation in our republic, and to counteract gross exercises of power. In advocating for the right to a jury trial, Thomas Jefferson explained that his aim was “to introduce the people into every department of government as far as they are capable of exercising it.”²

Is that introduction possible considering the limitations of the trial-by-webcam model? At a bare minimum, it requires internet access, technological devices with webcams, and base-level technological competence. In a city like Chicago, which in 2020, continues to struggle to provide its underserved communities with internet access, the Sixth and Seventh Amendments may be the figurative nail in the coffin of the virtual jury trial.

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1 U.S. Const. amend. VI & VII.

2 The Writings of Thomas Jefferson, Vol. 5, 103 (Paul Leicester Ford, ed.) (G.P. Putnam's Sons, 1895) (letter to L'Abbe Armond, July 19, 1789).

In response to the inevitable – it’s 2020, everyone has computers – argument, we offer Kids First Chicago’s April 2020 study. It found that nearly half of the school-age children in Chicago’s West Englewood neighborhood lacked internet access.³ And a slew of jarringly high percentages in other, predominantly black neighborhoods followed West Englewood.⁴ The city’s predominantly white neighborhoods, on the other hand, showed internet rates higher than 90%.⁵



Combine those statistics with the first question on the Illinois Supreme Court’s Model COVID-19 Juror Pre-Selection Questionnaire: Do you have access to a computer or internet device that allows you to communicate by voice and video?

Presumably, a no disqualifies you from the venire. The result is the widespread exclusion of persons without internet access, who largely happen to be poor and black.

This exclusion deprives every party to a case of their right to select a jury from a pool of persons that are representative of the community at large. It’s flatly unconstitutional. And it gets worse when you consider the fact that those statistics only deal with internet access. They say nothing of the percentages of people who are unable to afford webcam-equipped devices, or who lack the technological competence to be able to use them properly. Whose job is it, for example, to teach senior citizens summoned for virtual jury duty to use a webcam?

These are hard questions. It would be one thing if civil practice was the only area affected, but it’s not. The right to a fair cross section applies to criminal practice as well, and criminal lawyers face additional issues when it comes to due process and the confrontation clause.

As far as the due process clause is concerned, it guarantees us notice and a fair hearing in front of a neutral decisionmaker before we can be deprived of our life, liberty,

3 Kids First Chicago, Digital Equity in Education in The Coronavirus Era, <https://kidsfirstchicago.org/digital-equity-coronavirus> (April 2020).

4 *Id.*

5 *Id.*

or property.⁶ To that end, courts have broadly held that judges have the power to sua sponte remove jurors that demonstrate a continued inability to pay attention during a trial.⁷ Those cases largely prescribe the same rule: an inattentive juror should be removed if their inability to pay attention deprives the defendant of a fair trial.⁸

While at first glance the rule seems straightforward, the issue with it is the highly subjective nature of the term inattentive.

It wasn't necessarily an issue before COVID. Most of the case law on the topic deals with the phenomenon of the sleeping juror.⁹ A major blow to the self-esteem, no doubt, but it is also a fairly cut-and-dry case of a due process violation: a fair hearing requires the factfinder to be awake.

The virtual trial space is going to create cases dealing with juror distraction that are anything but cut-and-dry. Whose job is it to make sure Juror 4 isn't watching ESPN highlights behind their computer? What about the juror who's watching their kids during the trial – is he or she supposed to leave home to avoid distraction (presuming they have somewhere else to go in the first place)? And don't forget pet lovers. Is it okay for a juror to be petting her dog during your entire closing argument?¹⁰

These kinds of behaviors are inevitable in virtual trial-practice. And if our readership does not think so, we offer this bit of self-reflection: since March, how many times have you caught yourself doing other things while purportedly deeply engaged in a Zoom meeting?

Exactly.

6 U.S. Const. amend. V.

7 People v. Jones, 369 Ill. App. 3d 452, 455–56 (1st Dist. 2006).

8 United States v. Freitag, 230 F.3d 1019, 1023 (7th Cir. 2000).

9 *Id.* at 1023 (holding that a sleeping juror should be removed from the jury if his sleep either makes it impossible to perform his duties or would otherwise deny the defendant a fair trial); *see also* People v. Simpkins, 16 A.D.3d 601, 792 N.Y.S.2d 170 (2005) (holding that a juror who was repeatedly seen sleeping during trial was “grossly unqualified”); *see also* United States v. Barrett, 703 F.2d 1076, 1083 (9th Cir.1983) (holding that the trial court has a duty to investigate when a juror directly informs the court that he had been sleeping during trial); United States v. Cameron, 464 F.2d 333, 334–35 (3d Cir.1972) (holding that a juror who cannot remain awake during much of the trial is unable to perform his duty).

10 These aren't just hypotheticals, either. For a real-life example, look no further than the Texas judge who had to admonish a juror for taking a phone call while in the middle of virtual jury selection. *See* Angela Morris, Juror Walks Off to Take Phone Call as Texas Tests First Jury Trial Via Zoom, Law.Com (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/>.

That behavior will be ubiquitous, and it will be impossible to police. Simply put, proceeding with the virtual jury trial means accepting a drastically lower level of jury engagement. And when jury engagement drops, due process follows suit.

There's also the Confrontation Clause. The Sixth Amendment gives us the right to confront witnesses against us. Are we truly confronting witnesses against us if we are doing so through a 1" x 1" box on a 13" x 15" screen?

It looks to us like the answer is no.

The Supreme Court has gone to great lengths in stressing that the core concern of the Confrontation Clause is “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing...”¹¹ That rigorous testing includes things like physical presence, cross-examination, and observation of demeanor by the trier of fact.¹²

All these things are, at best, diluted in an entirely virtual trial. Even putting our inner-cynics aside and presuming that the witness is not being coached from behind the computer during the entire examination, there's still no comparison between cross-examining a witness from their couch and doing so in open court. The rigors of cross-examination go away when physical presence is no longer a prerequisite. And that, in turn, results in the jury observing (if they are observing anything at all) the adversarial witness in a comfortable, relaxed setting. That defies the purpose of the Confrontation Clause.

So, with all of that said, do we really have to choose between safety and preserving bedrock constitutional rights? Are there viable alternatives?

Judges throughout the country think there are.

Take Judge James Denver out of the Eastern District of North Carolina for example. Judge Denver astutely observed that “there is no pandemic exception in the Constitution, and the Constitution has stood the test of time for more than 230



¹¹ Maryland v. Craig, 497 U.S. 836, 845 (1990).

¹² *Id.*

years.”¹³ He’s resumed his trial docket after adopting protocols such as reconfiguring courtrooms and jury deliberation spaces for social distancing, mandating all trial participants wear a mask or a shield, strategically placing plexiglass barriers, vetting jurors for health issues, and heavy-duty cleaning.¹⁴

Chief Judge Barbra Lind out of the Northern District of Texas has been comparably innovative.¹⁵ She adopted many of the same measures and sent prospective jurors a letter explaining the safety measures and listing valid reasons to be excused from jury service.¹⁶

Judge Lynn Winmill from Idaho who went as far as hiring an epidemiologist to evaluate the measures put in place to prevent the spread of the virus.¹⁷ The court adjusted the air circulation system so that every hour the courtroom was replenished with 100% fresh air from the outdoors.¹⁸

There’s also The Administrative Office of U.S. Courts, which published a report titled, “Conducting Jury Trials and Convening Grand Juries During the Pandemic.” It is a detailed, 20-page list of suggestions for judges who want to resume their trial dockets and provides guidance on exactly how to proceed with in-person trials.

Can all courts around the country follow these examples? Are in-person trials simply too dangerous for the times? Would they be too tedious? Can we protect constitutional rights without them? Will this pandemic end soon enough for us to hang on and wait a little bit longer? Those are the thought-provoking discussions we hoped to start in writing this article. They are controversial. They don’t have easy answers, and the chances that they’ll be answered any time soon are slim to none.

What we can all agree on is if we don’t engage in this sort of thoughtful, well-rounded discussion, we’ll never reach an acceptable solution. The more we debate, the closer we get to ensuring a safe trial practice that continues to protect the constitutional rights of the injured, underserved, and criminally accused.

13 United States Courts, Federal Judges Reinventing the Jury Trial During Pandemic (August 27, 2020), <https://www.uscourts.gov/news/2020/08/27/federal-judges-reinventing-jury-trial-during-pandemic>.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

Daniel M. Kotin is a founding partner and trial lawyer at the Chicago law firm Tomasik Kotin Kasserman. He handles personal injury and wrongful death cases in the areas of transportation, product liability, medical malpractice, and construction. Throughout his career, he has obtained \$75 million in jury verdicts and another \$175 million in settlements on behalf of his clients.

Outside of the courtroom, Dan has held distinguished leadership positions with various legal and civic organizations. Presently, he serves on the Executive Council of the National Conferences of Bar Presidents, and in the American Bar Association House of Delegates. He was the 140th President of the Chicago Bar Association. He has also served as president of the Society of Trial Lawyers, and serves on the Board of Managers of the Illinois Trial Lawyers Association. He previously served as President of the Loyola Law School Board of Governors, and he currently teaches a course in Civil Procedure each spring. He was recently elected to serve as a Trustee of the National Institute for Trial Advocacy. In addition to his teaching, Dan has presented at more than 115 programs and has been published more than 25 times.

The Illinois Supreme Court has appointed Dan to serve on the Hearing Board of the Attorney Registration and Disciplinary Commission, and he was recently named to the Supreme Court's Character and Fitness Committee.

Brian Baloun took the October 2020 bar examination and will start his career as an associate attorney with the Chicago law firm, Tomasik Kotin Kasserman, in early December. He will handle personal injury and wrongful death cases primarily in the areas of transportation and medical malpractice.

Brian graduated magna cum laude from Loyola University Chicago School of Law in May 2020. While in school, he learned under the tutelage of several NITA-trained trial lawyers. By the end of his law-school tenure, he was recognized as one of the top student advocates in the country, having won several national titles in his two years with Loyola's distinguished advocacy program.