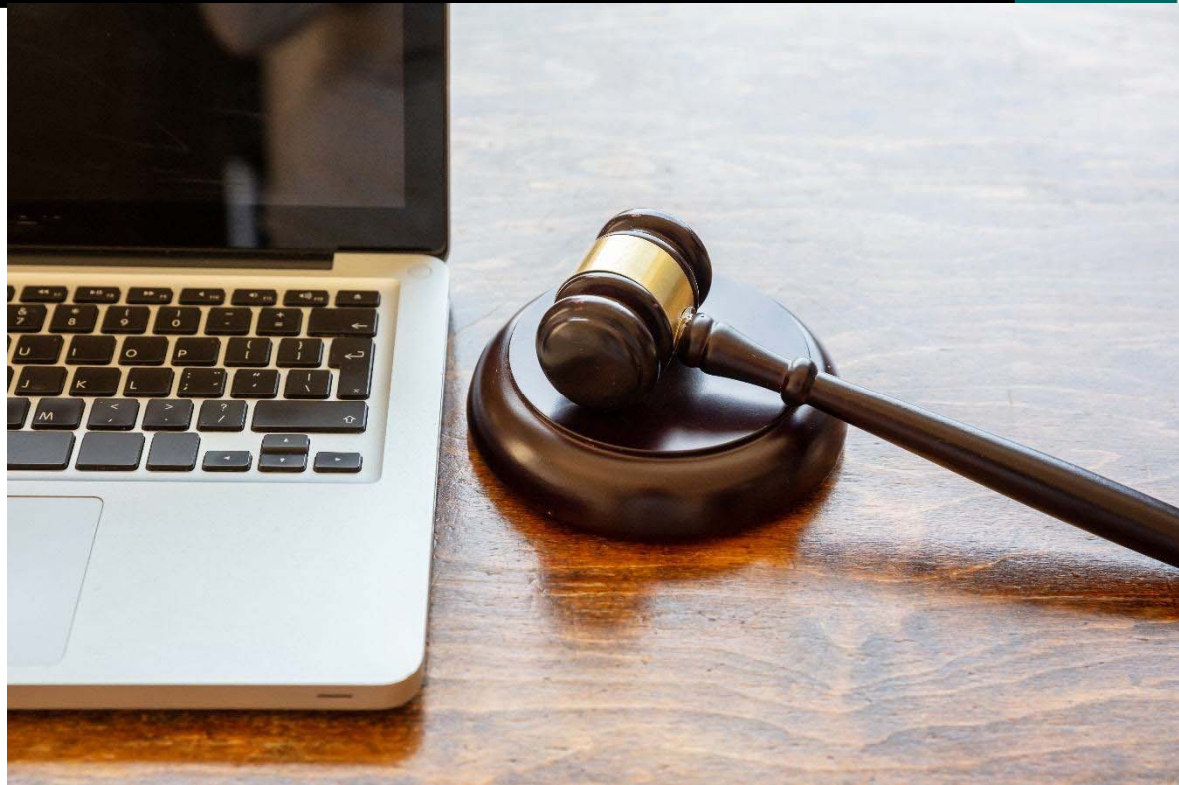


ONLINE COURTROOM PROJECT

# ONLINE JURY TRIALS: SUMMARY AND RECOMMENDATIONS



**ONLINE COURTROOM PROJECT**

*Summary and Recommendations for  
Online Juror Trials*

Released July 15, 2020

[www.onlinecourtroom.org](http://www.onlinecourtroom.org)



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## OCP Demonstration Jury Trial Report

### Introduction

Every year there are more than 100 million cases filed in state trial courts and 400,000 cases filed in federal trial courts. Thus, when the coronavirus forced courts to close across the country, the courts found themselves in new territory, striving to fulfill the Constitutional requirements of the 6<sup>th</sup> and 7<sup>th</sup> Amendments and provide access to our justice system while also preserving public health and the safety of employees and the public. While the COVID-19 pandemic is an unprecedented event, we in the legal profession rely heavily on precedent in most of the work we do.

Given the uncertainty of when and how the courts would re-open, a group of judges, lawyers, researchers, consultants, and technology experts convened to study and discuss how the courts might operate if in-person court proceedings and trials could not convene. As a result, the Online Courtroom Project began. One of the first fundamental questions we asked was whether the justice system was tied to a place, a physical location, or whether it was a process that could be managed in an online environment outside of a courthouse location, and, if it could, *how* could it operate? What ensued were weeks of discussions with judges, lawyers, and court administrators, and research into what, if any, legal restrictions there would be to conducting online proceedings and what technology would be available to conduct these proceedings. What emerged from these discussions and our research were a few common themes. One, everyone believed strongly in our current in-person court system and no one thought it should be permanently replaced with an online system. Two, most judges and attorneys had adapted well to online hearings, depositions, dispute resolution, and even bench trials. And three, online jury trials would be more complicated to conduct than in-person hearings, with judges and lawyers voicing questions and concerns about how the process would work.



These questions and concerns led the Online Courtroom Project to conduct a two-day demonstration to study and learn about the opportunities, challenges, and limitations of conducting a jury trial, entirely online. For this, we wanted to test a number of specific operational procedures:

1. How a court would create an online jury summons as well an online supplemental jury questionnaire for jurors to fill out prior to jury selection.
2. Whether attorneys and a judge would find online supplemental juror questionnaires informative, useful, and efficient in conducting voir dire.
3. How jurors could be technologically prepared to view an actual trial.
4. How courts could manage the various virtual spatial demands of a traditional jury trial in an online setting, including having a separate jury room, courtroom, sidebar, attorney conference rooms, and deliberation rooms.
5. How courts could manage the movement of participants into separate virtual rooms, whether they were jurors, judges, attorneys, witnesses, clients, and courtroom staff.
6. How judges, attorneys, jurors, and courtroom staff could manage the voir dire and jury selection process, including whether attorneys could obtain meaningful information from jurors in order to exercise their cause and peremptory challenges.
7. Whether attorneys could effectively present opening statements, conduct direct and cross examination of witnesses, present demonstrative evidence, and deliver closing arguments in an online setting.
8. Whether jurors could effectively judge witness credibility during testimony as well as remain attentive and engaged during the presentation of evidence, arguments, and jury instructions.
9. How courts could manage objections, the admission of exhibits, and juror questions of witnesses.
10. How the courts could effectively instruct jurors on the law as well as handle juror questions or requests for exhibits during deliberations, if needed.



11. How jurors could deliberate confidentially, see and hear each other during deliberations, and come to a verdict.

These questions encompassed both administrative, operational, and technological issues, as well as the communication and psychological aspects of jury trials. In studying these issues, we had to make some necessary tradeoffs and limitations in conducting our demonstration trial. First, we chose a relatively simple slip and fall case. Second, we would be conducting this demonstration live for an audience as a public trial would also be held, so we would also be managing our audience's view of the trial. And three, all of us would be watching aspects of the trial process that we would not be privy to in a real trial, such as client meetings, sidebars, and deliberations.

What follows is our report on how we prepared for and conducted our demonstration jury trial, observations of our participants and court constituents who were involved in the project such as attorneys, judges, witnesses, and jurors, reflections of what worked and what didn't, and recommendations and considerations for courts and counsel who choose to pursue online jury trials in part or as a whole.

This report is intended to be more than just a summary of how we conducted the trial and what our findings were from the online demonstration. It is intended to be a user's guide of sorts for courts or attorneys who are considering undertaking online trials, in part or in whole. We have chosen to be overly inclusive in detailing our process and observations from various constituents, in case any of the readers of this report would like to gain more in-depth information about the voir dire, examination, or deliberation process. For example, this report is detailed but not comprehensive, as we recognize that additional pilot programs will need to be undertaken to study an online trial system in greater depth. For example, a number of courts are currently conducting an online voir dire process. For those who wish more of a high-level analysis of the demonstration trial, we suggest you review this initial section and the recommendations section on page 66.



We don't imagine that any online court solution is a perfect solution for any court or any case. Notably, there are more constitutionally challenging and complex issues in criminal cases. We also recognize that some courts may decide to use parts of the process, such as online jury selection, witness testimony, or deliberations but not the entire trial.

As of the writing of this report, New York has a backlog of over 39,000 criminal cases. While other courts may not have as severe a backlog, the long current delays in criminal and civil matters getting to trial pose a very real challenge to litigants who rely on the courts. And while some courts are trying to restart in-person jury trials with temperature checks, social distancing, and extensive cleanings procedures, they have strong limitations on how many trials they can actually perform in a given courthouse that has implemented these procedures. Additionally, the current spike in coronavirus infections and the rolling back of state re-openings has made prospective jurors extremely reluctant to show up for court, if called for in-person service. Recently, infections in Georgia and Minnesota courts have prompted renewed quarantines and court closures, highlighting the uncertainty of conducting in-person trials.

The legal profession's reliance on stare decisis has typically made it reluctant to embrace reforms or innovations that may make it function more efficiently and effectively. With this report, we hope to help courts and the legal profession to understand the opportunities, challenges, and tradeoffs involved in an online jury trial so they can make informed choices best suited to their jurisdictions, their resources and infrastructure, their local rules, and their individual cases. This report is laid out to help the reader understand the process by which we studied an online jury trial, the experiences of the participants in that process, and recommendations for courts and legal professionals in implementing online courtroom and trial procedures.

## Overall Findings

- Attorneys found that online questionnaires that jurors filled out before jury selection allowed them to prepare more thoroughly for voir dire questioning.





- Attorneys found that they were able to adequately view jurors and their responses in order to make cause and peremptory challenges. In fact, the attorneys and the judge found that jurors were more candid and forthright in their responses because they were in the comfort of their own homes, and that a view into a juror’s home gave attorneys additional insights into the juror.
- Jurors who were only on smart phones had more difficulty viewing the trial proceedings than those on computers or tablets.
- Jurors were able to clearly view witness testimony and exhibits in both direct and cross examination. Some jurors who had sat on previous juries felt it was easier to judge witness credibility because they had a closer view of the witness rather than looking across a courtroom. Many felt that they were able to clearly view the documents and demonstrative exhibits. Some jurors with previous jury experience also felt they could see documents more clearly because they were on a screen in front of them as opposed to viewing them across a courtroom.
- Jurors were attentive and engaged during the presentation of evidence during the trial.
- Jurors were able to see and hear each other during deliberations and were able to engage in meaningful discussions about the evidence in the case.
- We experienced technical difficulties in our first day of the demonstration trial, while the proceedings ran relatively smoothly on the second day. As with any new technology or implementation of existing technology in a new setting, training and practice for judges, courtroom staff, attorneys, witnesses, and jurors is needed to ensure that court procedures run smoothly.
- Both of the technology platforms we used (Adobe Connect and Zoom) had benefits and limitations. Currently, most platform architectures such as Zoom, WebEx, or BlueJeans are designed for either business meetings or webinars. Courtroom procedures have a different structure. Thus, while some of the existing technology platforms may be able to accommodate online jury trials, or portions of a trial, a customized platform would assist a smoother functioning online courtroom.



- We are more impatient with technology than in an in-person setting. While we have become inured to waiting in court for a delayed juror, the admission of a document, or a judge on a conference call, technological delays seem longer because we have become accustomed to quick or instantaneous connections on our computers or smart phones.
- Overall, aside from some of the technical delays and the obvious difference in format between an in-person and an online trial, most of the participants were able to perform their main job functions as they would in a normal trial. Judges who observed the demonstration trial commented that the proceedings looked like “a real trial.” All of the jurors who participated in the demonstration trial said they would be willing to participate in a real online jury trial.

## **Overview of Demonstration Trial and Report Layout**

In order to give the reader context for the various sections of this report, here is an overview of our process of preparing and conducting the online demonstration trial.

1. Analysis and selection of the technology we would need to use in the online trial, including the advantages, limitations, and tradeoffs of certain technologies, as well as how those technologies worked in the trial.
2. Our recruiting process to “summon” a pool of jurors to participate in our demonstration trial.
3. The process of preparing for and conducting jury selection, including the use of online questionnaires and the voir dire process with the exercising of cause and peremptory challenges to the final selection of the jury.
4. The preparation process for delivering opening statements, closing arguments, and conducting witness examinations in an online trial format.
5. The process of instructing the jury and their deliberations, as well as interviewing them about their questionnaire responses about the online process.
6. The experience and perspectives of the judges and attorneys involved in the online trial.



7. The Online Courtroom Project's recommendations and considerations resulting from the demonstration online trial.

## Design and Preparation Process

### Technology Platform Issues

In studying how to bring portions of or all of a jury trial online, we focused on how we could create a secure, technically viable virtual courtroom that allowed all participants to perform their essential job functions. In order to accomplish this task, we looked at technology that had the following capabilities:

- Smooth and well-synchronized audio and video that closely replicated the experience of speaking and listening to participants in an in-person court hearing.
- Sufficiently high-quality and high-volume audio to understand all speakers clearly.
- Sufficiently well-lit and high-quality video to be able to observe facial expressions and body language.
- Tools that allowed for attorneys and the court to smoothly present exhibits and documents.
- Tools that allowed for effective courtroom management of participants.

For our demonstration trial, we screened our jurors to ensure they had adequate technology to participate. No one was dismissed from the pool due to lack of adequate technology.

Currently, there are no online technology platforms designed specifically for use in an online jury trial. Generally, there are two types of platforms that are currently being tested or used to conduct online trial and jury research, ADR and trial proceedings online:

- Videoconferencing and meeting platforms such as Zoom Meetings, WebEx, BlueJeans, Cisco, CourtCall, GoToMeeting, and Microsoft Teams.



- Webinar and online training platforms, such as Adobe Connect, Zoom Webinar and WebEx Webinar.

Webinar and online training platforms offer more options for presentations, private viewing and production management, but are typically more complex to use and require more training. Some also do not offer break-out rooms and small group management tools.

Meeting platforms offer break-out rooms and tools for small group management but are limited in the ways in which presentations can be delivered to a large group, generally relying on screen sharing. They also do not offer as much capacity for private viewing although, like webinars, they can be live-streamed.

Currently, Zoom Meetings is the most popular platform currently in use by courts and ADR facilities. Other platforms currently in use by courts include WebEx, BlueJeans, GoToMeeting, CourtCall, and Microsoft Teams.

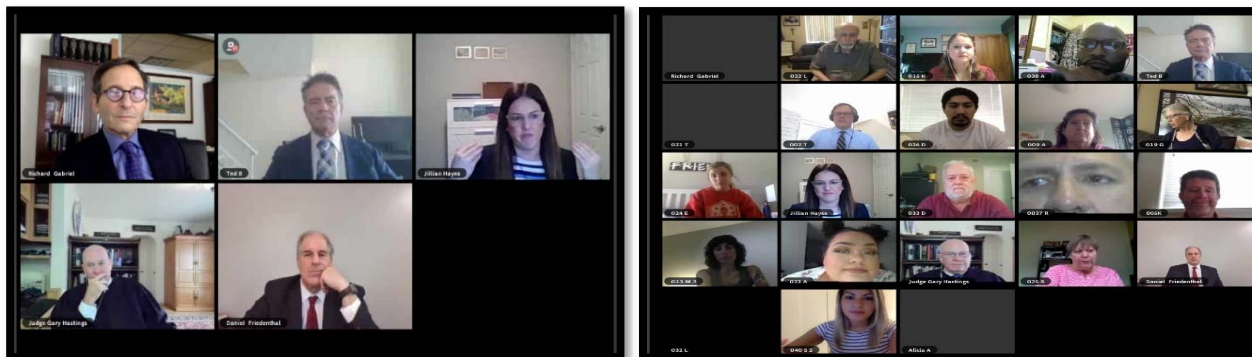
We decided to test two platforms for use during the demonstration trial:

On Day 1, we used Civicom’s Adobe Connect platform, which is a Webinar, Videoconference and Online Training platform.

On Day 2, we used Zoom Meetings, which is a Videoconferencing and Meeting platform.

We chose to test Adobe Connect which allowed for the creation of custom online “rooms” (such as might be needed for a jury room, sidebars, and client conferences) as well as a high level of centralized control over who enters and exits a given “room.” Additionally, this platform allowed a host to control the placement of individual “tiles” within each room, which we wanted to test to ensure attorneys could keep track of jurors during the voir dire process. We chose to test Zoom for its ease of use, current popularity with court systems for both trial and non-trial purposes, and its high quality of audio and video streaming due to the company’s processing methods of audio and video.

## Day 1: Adobe Connect



Day 1 of our online trial covered:

- Jury assembly
- Court's introduction
- Voir dire and jury selection
- Opening statements

Adobe Connect is designed to be managed by a host who exercises centralized control over the event. This gives a greater level of management control than currently possible with Zoom and other meeting programs; it also requires significantly more technical training. There is therefore currently a tradeoff between functionality and ease of use.

### Adobe Connect's Features and Performance

Like other platforms, Adobe Connect allows for the creation of multiple virtual rooms in advance. This enabled us to create a main courtroom, a sidebar, a jury room, and private meeting rooms for counsel to discuss strike decisions with their team. This platform also allowed for uploading of exhibits and demonstratives prior to the start of the trial, allowing centralized document management by the court or the ability of attorneys to use this feature for trial presentations.



Adobe Connect also allows for two simultaneous written chat channels to be run. One is a private “back channel” that is equivalent to a bench or in camera conference, and the other is a general public chat that is equivalent to open courtroom conversation. This ability to have a private group chat channel – the ability for a technical bailiff or clerk to communicate with a judge privately and not currently available in Zoom – was one of the reasons we chose to test a platform like Adobe Connect.

We also chose to use Adobe Connect for Day 1 specifically because of the challenges of conducting voir dire online.

Meeting platforms like Zoom dynamically place participants in a rolling sequence of tiles based on the time that participants enter and exit the meeting. If a participant drops off because of a technical problem, that person will be placed at the “end of the line” when rejoining. The Host has no ability to reposition that person’s visual image (“tile”) to return them to the same location they had earlier. This could make voir dire and jury selection difficult. We wanted to test a platform that offered the ability of a courtroom host or technical bailiff to bring jurors into view in a structured order, that could be maintained or recreated even if a juror dropped off and had to rejoin the trial. This was done to ensure that jurors kept their same visual positions in the virtual jury box, making it easier for attorneys and judge to keep track and associate juror answers and faces with the correct juror questionnaires during the selection process.

Jurors were admitted initially to a waiting room, where a technical bailiff or clerk entered the juror’s Juror Number on the juror’s tile view so jurors could be identified by their pre-assigned juror number, which represented a randomized order. Jurors were then admitted to the virtual courtroom one at a time, in their randomized numerical order. We had all jurors in the pool enter and be visible for initial introductions and instructions and then “called” only the first 10 jurors, turning off the video stream of the remaining jurors so that counsel and judge could focus on and sufficiently see the faces of all jurors currently being questioned. When voir dire of this group was complete, the next group was called. A total of three separate

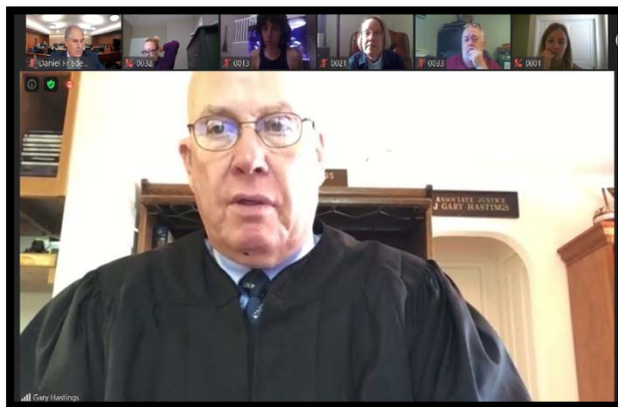
small groups of jurors were called for questioning. In smaller groups of jurors, this allowed the “tile size” of the jurors to be much larger and allowed counsel and the judge to have a clearer view of the jurors’ responses and their nonverbal behavior.

The above features were helpful in managing the trial process. However, we experienced numerous problems with audio and video quality that overwhelmed the benefit of these features. The audio and video problems resulted in frequent drop-offs of both counsel and jurors, time lags in audio and video that made reception of the evidence difficult, and poor-quality audio that made it difficult for some participants to hear.

For example, plaintiff counsel lost audio connection during her opening statement and was unaware of this for one to two minutes. Once alerted, she was able to adeptly refocus and repeat the portion of her opening that the court and jurors failed to hear initially. Were this a real trial, the proceedings would have needed to be stopped and reconvened when the court and the parties had time to resolve the technical problems.

The problems we experienced highlight the challenges of any process that is dependent on technology. Whichever platform is used by a court, it is important to anticipate how the demands of an individual trial (number of participants, use of streaming video, animations, communication of documents, etc.) might impact a platform’s performance.

## Day 2: Zoom Meetings





Day 2 of our online trial covered:

- Presentation of plaintiff and defense fact and expert witnesses
- Judge's preliminary instructions
- Closing arguments
- Reading of the jury instructions
- Jury deliberations and verdict

Zoom Meetings is designed to be used by participants in a meeting who have an equal need to speak, hear, and be seen by others.<sup>1</sup> It was originally designed for use as a videoconferencing program for remote business meetings to compete with earlier entrants in the market such as WebEx and GoToMeeting. It does not allow for much pre-event configuration. Once the meeting is started, it allows for the main Host to assign others as Co-Hosts to assist with courtroom management. It also allows pre-assignment of participants to break out rooms.

Zoom has made its reputation based on its ease of use and the high quality of its audio and video streaming. Zoom has quickly become a ubiquitous tool for all kinds of meetings during this time of sheltering-in-place, including court proceedings, mediations, and depositions.

Zoom Webinars offers additional presentation production management features, including three levels of participants (Host and Co-Host; Panelist; and Attendee) instead of two (Host and Co-Host; and Participant) but it does not allow break out rooms.<sup>2</sup>

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<sup>1</sup> This is in contrast to webinar platforms, where most participants need only to view and hear the presenters, not to interact through audio and video. Most webinar programs use a chat feature to allow viewers to participate.

<sup>2</sup> <https://support.zoom.us/hc/en-us/articles/115005474943-Meeting-and-webinar-comparison#:~:text=Webinars%20are%20ideal%20for%20large,people%20speaking%20to%20an%20audience.>



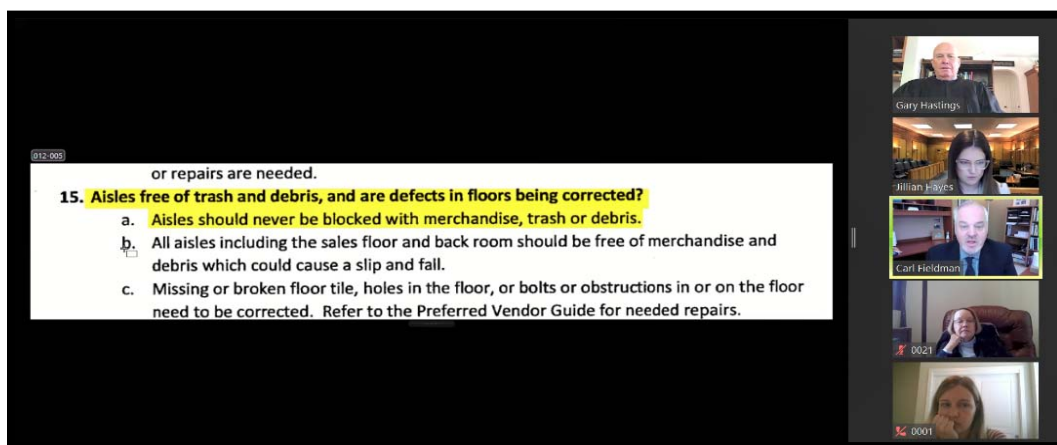
Zoom also has Zoom Government and Zoom Enterprise offerings which have some additional features than the commercially available Zoom Meetings. Our observations throughout this report are based on the commercially available Zoom Meetings.

## Zoom Features and Performance

On the whole, Zoom performed well on the second day of the demonstration trial. The quality of the streaming audio and video was consistently high, and participants experienced only occasional connection problems, all of which appeared to result from local bandwidth or internet connection issues.

It was fairly easy to manage the entrance and exit of witnesses from the courtroom and the witness stand: witnesses were held in the Waiting Room until called to the stand. On being called, the Technical Bailiff admitted the witness to the courtroom. Once entered, the Technical Bailiff selected the Spotlight command to make the witness's image the largest on the screen. When the witness's testimony was complete, the Technical Bailiff turned off the witness's video, muted their audio, and then removed the witness from the virtual courtroom.

Evidence was shown during witness testimony by a trial technician using the Share Screen feature. There were a few lags bringing evidence onto the screen, but in general, the quality of the evidentiary presentation in the form of demonstrative exhibits was good. We suggest that all technical bailiffs and trial technicians know how to use this feature.

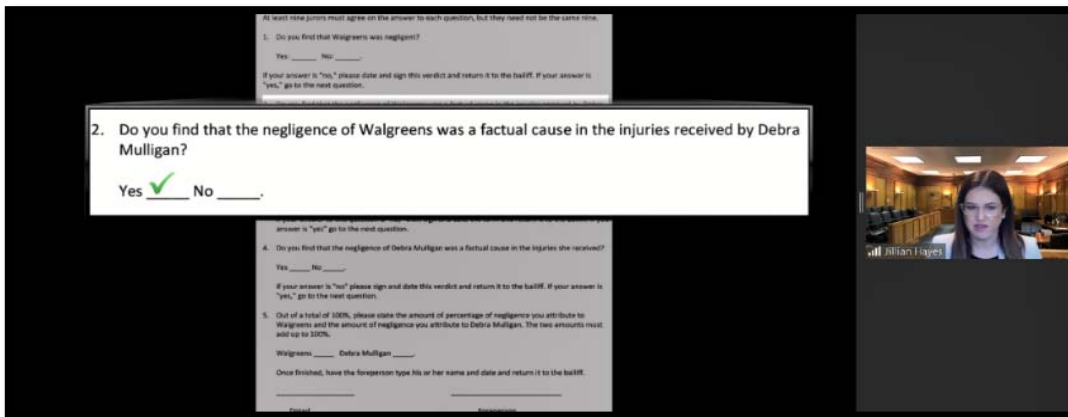


At the end of the trial, jurors reported that they had difficulty seeing details on the surveillance video that was a key part of the trial evidence. Whether this was due to the overall poor quality of the recording or a compression issue that affected the streaming quality, litigants who need to present video or audio evidence in trials need to be aware of how the quality of their recordings in the form of recorded depositions or demonstrative exhibits might be affected and therefore received by a judge or jury when streamed in an online trial.



Zoom performed ably for the judge’s presentation of instructions – the Spotlight feature enabled us to put the focus on his presentation and the audio and video quality were good.

In closing arguments, we used the Spotlight feature combined with Share Screen to put focus on counsel when they were speaking without demonstratives, then shifted to a large view of the demonstratives and a thumbnail of counsel when they were using visuals. Switching back and forth was relatively smooth.





Moving jurors during the trial to waiting (breakout) and deliberation rooms was easy. However, at one point, when the Technical Bailiff realized we needed to bring in a juror who was in a waiting room, the Bailiff had no way to directly bring the juror back into the courtroom, and it took some time for the juror to realize that she was being requested to exit her break-out room and return to the main group. It is important to work out contingency plans for anticipated participant movement in a virtual courtroom during the trial to facilitate smoother trial proceedings.

At the end of the trial, deliberations proceeded smoothly. Jurors had a vigorous discussion, with most of the jurors speaking up. Jurors felt comfortable talking with one another, and they indicated in debriefing discussions that they found it easy to use Zoom and the technology did not hinder their connection.

One juror fell asleep, however, and could not be roused from within the event itself. It could be useful for a court to have a “bell” or “buzzer” feature in the platform or other communication plan to allow the court to try to reach jurors who are falling asleep or are away from their computers.

A weakness in Zoom for running a jury trial is that it does not allow individual management of break-out rooms – once the break-out feature is activated, all participants assigned to all break-out rooms are sent to their rooms at once. This meant, for example, that while we could create a Bench Conference break-out room and a Jury Room break-out room, we could not pre-assign members of both groups to their respective rooms unless we wanted the jury to be sent off to the jury room any time a bench conference was held in another break out room.

## **Platform Security**

Although a fair amount has been written about Zoom security issues and risks, some of the more publicized Zoom security issues have been addressed by the company through the introduction of new features like the Waiting Room, the ability to lock a meeting, better management controls for the Host, and the ability to report email addresses of those abusing



the platform to Zoom for exclusion from Zoom use. These new features have also made Zoom more usable for managing aspects of jury trials and courtroom proceedings. However, the security settings of any and all platforms are an important issue for courts and parties to consider before making any choice of technology.

## **General Observations**

No current technology platform offers all the features that would make managing an online trial smooth and seamless. For that reason, the OCP is working to develop a detailed list that specifies the features we believe are needed to create a more effective online trial experience. Some of the features are listed in the *Recommendations* section of this report, but we will be producing a more detailed list in the near future, a list that we will continue to refine and update as the courts and technology companies develop new approaches and software solutions.

## **Pre-Trial Jury Issues**

### **Recruit Process: Goal of a Representative Jury**

While courts typically pull from voter registration and DMV lists and some mock trial exercises rely on volunteer students, one of our goals is to see how jury qualified individuals that were a representative cross section of a given community would respond to a summons and qualification process.

To accomplish this goal, we accessed the latest census data to create a set of demographic criteria to recruit jurors for the demonstration trial that would be representative of a cross-section of the United States.

The next phase was to design the online screener questionnaire. This questionnaire was designed in Microsoft Forms Pro and the hyperlink to the online form was sent to prospective jurors via email as well as posted on social media. Jurors were informed from the outset that the Online Demonstration Trial would be conducted in four-hour increments over the course of



two days, that participation was voluntary, and that we would be broadcasting the event live and recording it. The prospective jurors who clicked on the hyperlink would view the online form to fill out. That form asked questions about the potential participant's gender, age, race, employment status, and education. Additionally, this questionnaire asked about the availability during the scheduled time of the event as well as access to a computer with a camera, a microphone, speakers and/or headphones, and broadband access. During this process, we learned through research that approximately 90%<sup>3</sup> of the U.S. population own a computer and approximately 80%<sup>4</sup> have broadband internet access.

Once a day, the database was checked to determine the number of jurors filling out the screener questionnaire and a quota document was updated. The list of prospective jurors was shared via Excel spreadsheet with members of the OCP. One week prior to the event jurors received email notifications from OCP notifying them if they were accepted for the event or were not eligible based on their questionnaire responses.

## **Jury Selection**

The first phase of the Online Courtroom Project's jury trial demonstration examined the use of online juror questionnaires as a first step in conducting online jury trials. Our approach was to test the feasibility and utility of employing online juror questionnaires. Our goals were two-fold: (a) demonstrate that juror questionnaires could be effectively employed online and (b) determine if online administration of these questionnaires would be of value to the courts and attorneys in the jury selection process.

Traditionally, courts use pretrial questionnaires in one of two major ways. The first, and more predominant approach, is to require potential jurors to complete questionnaires (jury summons) aimed at establishing the necessary qualifications for participation on juries (e.g., citizenship and residency requirements) and, perhaps, addressing standard hardships or

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<sup>3</sup> <https://www.pewresearch.org/fact-tank/2017/05/25/a-third-of-americans-live-in-a-household-with-three-or-more-smartphones/>

<sup>4</sup> <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/eighth-broadband-progress-report>



exclusions (e.g., age and occupation exemptions, economic, physical, mental, and scheduling hardships). The second pretrial questionnaire approach is that of the supplemental juror questionnaire. These questionnaires are designed to supplement voir dire questioning. Supplemental juror questionnaires can be generic or case-specific in nature and generally include relevant information on the jurors' backgrounds, experiences, and opinions.

## Study Online Juror Questionnaire

Given the condensed nature of this study and the desire to reduce the number of steps needed by volunteer jurors to participate in the study, we combined the qualification/jury summons and supplemental juror questionnaires to produce one single juror questionnaire, although the courts may decide to do these in two separate stages. Both of these questionnaires included samples of questions normally found in one or the other type of questionnaire.<sup>5</sup> The first part of the questionnaire (“Juror Qualification and Hardship Form” or jury summons) contained 37 questions addressing a number of qualification-related questions. Areas considered on this part of the questionnaire included:

- Contact information (e.g., name, cell phone number, and email address)
- Basic demographics (e.g., age, gender, race/ethnicity, and employment/occupation)
- Juror qualifications (e.g., citizenship, residency requirement, no felony conviction without civil rights being restored)
- Hardship (e.g., economic and physical hardship issues)
- Online jury service capabilities (e.g., quiet and private space during court hours, type of internet service, possession of video camera enabled devices, and ability to watch and listen to proceedings on an appropriate device during court hours)

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<sup>5</sup> This questionnaire contains some questions or adaptations of questions found on pretrial questionnaires used in California, Arizona, and New York, among other sources. A blank copy of the questionnaire can be found in Appendix A. A sample completed copy of the questionnaire can be found in Appendix B, with personal identifiers redacted.



- COVID-19 issues (e.g., having experienced relevant symptoms, exposure to others with the COVID-19 virus, and being in at-risk categories).

The second part of the questionnaire (“Juror Questionnaire”) contained a case-relevant supplemental juror questionnaire. This questionnaire contained 34 questions and included background information, such as marital status, educational attainment, occupation of the juror, and significant other, information on children, and prior jury service, among other areas.

As we chose a “slip and fall” case to test in our demonstration trial, various case-relevant experiences were addressed including involvement in prior lawsuits, experience with certain medical conditions, and exposure to certain types of injuries arising from accidents or falls at a store or other business, among others.

Finally, jurors were asked in their questionnaires about case-relevant opinions, including beliefs concerning lawsuits and damage awards, support or opposition to limiting jury awards, and potential fault of those involved in slip and fall events, among other opinions.

## **Online Delivery Method**

Online surveys allow an individual to log on to a secure website and complete a questionnaire on their own time. To create and administer an online survey requires an online survey program and a Web host that is set up to host the survey.

There are many free and commercially available programs that allow for the creation and administration of online surveys. Some are hosted entirely in the cloud and sold as a “Software as a Service product (“SaaS”). Some are sold as stand-alone programs to be installed on local computers. Some have both a local installation and a cloud component. These programs vary in their costs and levels of security as well as in their programming features. The most common use of these programs is to conduct online marketing surveys, which typically are short and simple to encourage completion by volunteers. A smaller number of online survey programs have more robust programming features and security protocols that online juror questionnaires require. It is not our purpose here to evaluate the variety of available products



or to offer endorsements, but it is helpful background to understand that not all programs offer the features that are needed to optimally create and administer court-issued questionnaires with the needed security features and complexity of juror questionnaires.

The most popular program for sophisticated online surveys in the U.S. is Qualtrics, although we used a competitor product to Qualtrics, Snap Surveys, which had similar features, functions, and capabilities.

As with most new technologies, there are trade-offs in moving from court-administered paper questionnaires to online questionnaires.

Online survey programs are primarily database tools, not document creation software like Microsoft Word. This means that the upfront work of creating a questionnaire requires some additional learning to navigate these programs. Online questionnaires seek to minimize entry errors and require you to make decisions about prospective juror answers to create “skip logic” to indicate what follow up questions should be skipped or shown, based on a person’s answers.

Although this may sound daunting, once you create a base questionnaire and have tested its programming, you can save it as a template and reuse it again and again. You can also “clone” existing questions, with all of the programs’ tools to create new questions. Nonetheless, while these programs provide more security and allow more options and flexibility in the design of questionnaires, they also add a level of complexity in creating juror questionnaires.<sup>6</sup>

Advantages of online questionnaires include centralized administration and collection of questionnaire data; and eliminating the need for photocopying of both blank and completed questionnaires, saving considerable court time and money. Online questionnaires also allow

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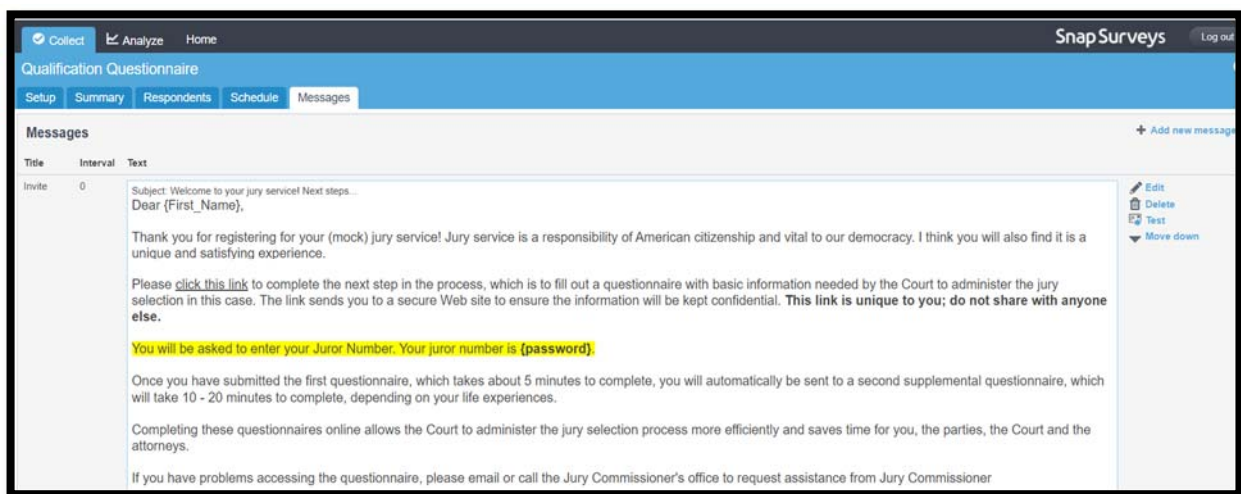
<sup>6</sup>There are various ways that courts might handle this. One is to hire the software vendor to program the questionnaires for the court. Another is to have one or two court staff trained in how to use the program. A third is to require the parties in a civil suit who wish to administer a supplemental online questionnaire to jointly cover costs and oversee the creation and administration of the questionnaire.



jurors to complete questionnaires at home, before coming to court, which saves time in the trial process, allows both the court and attorneys to prepare for the voir dire process, and in the time of COVID-19, lessens the time jurors must spend in a public setting. Online administration of qualifying questionnaires also makes it easy for the jury commissioner and court administrators to collate cross-department statistics on their reporting juror pool.

For this demonstration project, the Qualifying and Supplemental questionnaires were both created from scratch in a locally installed version of Snap Surveys. A simple Excel spreadsheet was created with the contact information for the mock jurors and their assigned log-on and password to generate a secure link to access the survey. This spreadsheet was linked to the Qualifying questionnaire to generate email notices and to validate respondents.

After the programming had been tested and validated, the surveys were then uploaded to the Snap Survey's Web host. The Web host allows for emails to be sent automatically to jurors, based on a schedule that we established. The emails include a customized message from the Court and a unique, secure link that gives the juror access to the questionnaire when clicked. The screen capture below shows what the initial email message looked like on the "back end" of the Snap Web host, where we created and managed the emails.

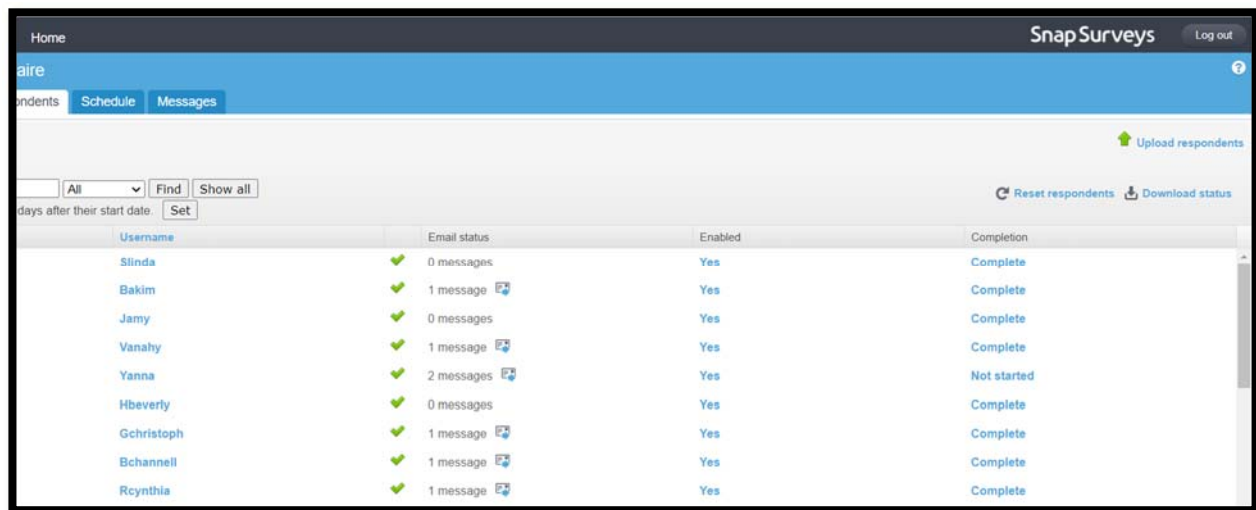


Sending the survey requires having jurors' email addresses or cell phone numbers (as the messages can be sent via email or SMS.) All of our jurors had email addresses, and it is estimated that of the people in the United States that have computer or smart phone access,

approximately 90% of the population with internet access and approximately 75% has at least one email address<sup>7</sup>. Even those who do not own a computer can access email at the public library using a web browser and would be able to complete an online juror questionnaire at that location. Jurors unable to access an email account would need to show up to court or other specified location and complete a questionnaire on a tablet or laptop there.

Some of our emails to recruits ended up in spam folders and so a few jurors did not complete the questionnaires in a timely manner. Courts would need to reach out to jurors in advance to let them know to “white list” the court domain sending the juror questionnaire links so that the emails are not routed into jurors’ spam or junk folders or to check their spam folders for messages.

In addition to the initial email, we set up the system to send two reminder emails, at specific intervals, to prod those jurors who had not already completed the questionnaires. The Snap Surveys Web host keeps track of the completion status, as seen in the image below. It is possible to manually modify the list of jurors, if needed, to reflect juror completion, and to send reminder emails.



Username	Email status	Enabled	Completion
Slinda	0 messages	Yes	Complete
Bakim	1 message	Yes	Complete
Jamy	0 messages	Yes	Complete
Vanahy	1 message	Yes	Complete
Yanna	2 messages	Yes	Not started
Hbeverly	0 messages	Yes	Complete
Gchristoph	1 message	Yes	Complete
Echannell	1 message	Yes	Complete
Rcynthia	1 message	Yes	Complete

<sup>7</sup> <https://www.statista.com/topics/4295/e-mail-usage-in-the-united-states/>



We are not aware of any jurors who failed to complete the survey due to technical problems, other than the three jurors whose email notices were routed to their spam folders. Those three jurors all completed the questionnaires successfully once they were able to access the questionnaire.

As questionnaires were completed, PDF reports of each juror's completed questionnaire were produced and placed in a shared Dropbox folder to which all parties and the Court had access. The data were also exported in Excel and SPSS dataset formats for further analysis.

## **Findings**

To evaluate the online questionnaire approach, we looked at (a) the willingness of jurors to complete the questionnaire in terms of response rates; (b) how much time it took to complete the online questionnaire; (c) how useful the questionnaire was in identifying either follow up questioning areas for the attorneys or to prompt jurors during subsequent voir dire questioning; and (d) the views of the participating attorneys and trial consultants on how helpful the online juror questionnaire was in this setting. From all indications, the use of online juror questionnaires was successful.

## **Completion Rates**

As noted above, the online questionnaire consisted of two separate questionnaires. Jurors were allowed to complete the overall questionnaire on their own schedule. A total of 30 jurors completed the "qualification"/jury summons section of the questionnaire. Of these jurors, 28 jurors went on to finish the second section or supplemental juror questionnaire. The completion rate was 93% for the online questionnaire.

## Completion Times

The two components of the online questionnaire consisted of more than 71 questions.<sup>8</sup> The qualification/jury summons questionnaire consisted of 37 questions and the supplemental juror questionnaire consisted of 34 questions. The time to completion for each questionnaire was tracked separately. Table 1 reports the elapsed times associated with each component of the online questionnaire. The elapsed times for completing the qualification/jury summons questionnaire ranged from 3.17 to 15.65 minutes with an average (mean) elapsed time of 6.68 minutes.

**Table 1**

### Elapsed Times in Minutes for Completion of Both Components of the Online Questionnaire

Type of Questionnaire	Minimum	Maximum	Mean	Sample Size <sup>9</sup>
Qualification/Jury Summons	3.17	15.65	6.68	30
Supplemental Juror Questionnaire	4.10	26.15	10.89	28

The supplemental juror questionnaire consisted of 34 questions. As shown in Table 1, the elapsed times for completing this questionnaire ranged from 4.10 to 26.15 minutes, with an average (mean) elapsed time of 10.89 minutes.

<sup>8</sup> Normally, the qualification and supplemental juror questionnaires would be administered separately. However, because of time constraints we decided to combine the questionnaires to enhance ease of use by the jurors.

<sup>9</sup> We report data on all of the jurors who completed either component of the online questionnaire. As a result, there are more individuals who completed questionnaires than participated in the demonstration. However, it was felt that a truer picture of how long it took jurors to complete the sections of the online questionnaire would benefit from including all respondents, even if some respondents did not attend the demonstration.

## Uncovering Unreported Bias and Follow Up

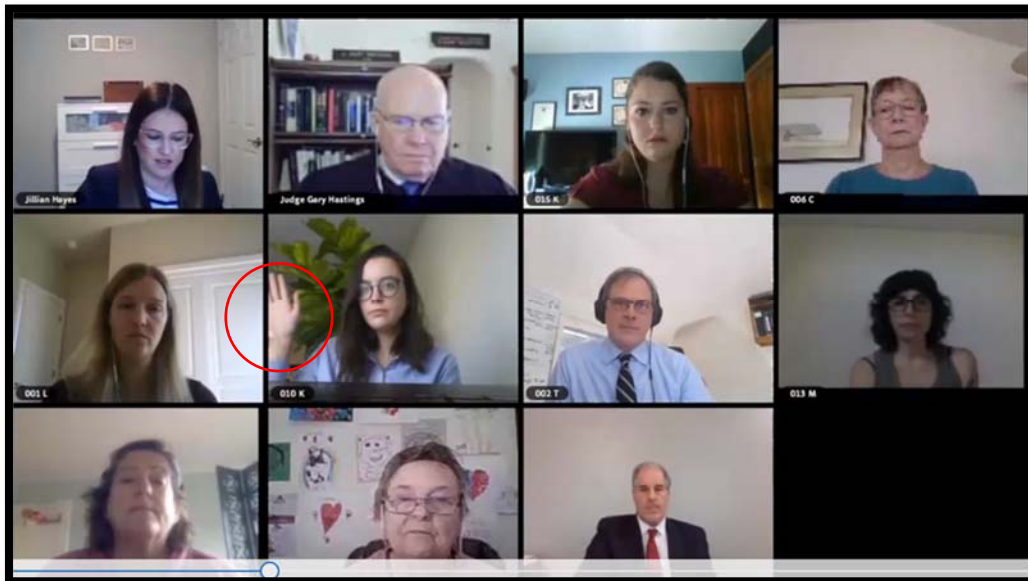
The major benefits of supplemental juror questionnaires include their ability to (a) elicit candid answers as compared to oral voir dire; (b) provide information that attorneys can use to follow up on experiences and opinions of jurors; and (c) produce more focused and, perhaps, shorter voir dire questioning. To illustrate the potential of supplemental juror questionnaires to uncover bias not otherwise revealed during voir dire, consider the following exchanges:



**Plaintiff's Attorney**

(Addressed to the group) . . . *Anyone automatically have some bad feelings about personal injury cases/slip and fall?*

As shown below, only one juror raises her hand (red circle on Juror 10's hand)



After Juror 10 is questioned, the plaintiff's attorney turns her focus on Juror 6 armed with the knowledge gained in the supplemental juror questionnaire.



**Plaintiff's Attorney:**

*(Juror 6's questionnaire answer)*

*I want to thank you all for filling out a questionnaire, a very detailed questionnaire as part of the process today and I want to follow-up with Juror 6 on something in the questionnaire. Um, I noticed that you said that most slip and falls happen in stores as a result of customer inattention. Would you mind telling us your feelings on that?*

Q27 Do you believe that most "slip and fall" accidents that happen in stores are a result of customer inattention or unsafe conditions at the business?

- Customer inattention
- Unsafe conditions at the business
- Both equally likely



**Juror 6:**

*So, I guess, I probably shouldn't have said "most." I think "many" just because I have heard stories about, you know, people, you know, who have slipped or have planted something and have slipped and try to sue the store. But I don't have any strong feelings either way. I know that a lot of slip and fall cases certainly are valid and I think each case has to be looked at separately because I think there are a lot of reasons and causes that things like this might happen.*



(Addressed to the group) *Does anyone here have kind of that same initial reaction to a slip and fall, you may need a little more evidence to evaluate the case? **You may be a little skeptical about the credibility of the plaintiff?** Anyone feel that way?*

**Plaintiff's Attorney:**

As shown below, no hands were raised (but Juror 6 is highlighted in red).



*Sticking with you, Juror 6, I also noticed on your questionnaire that you said people who slip and fall at stores are probably lying. Tell me a little bit more about that.*

**Plaintiff's Attorney:**



*Did I say that?*

**Juror 6:**

*(Juror 6's questionnaire answer)*

Q32 Do you believe people who slip and fall at stores and claim significant bodily injuries are probably telling the truth or probably lying?

- Probably telling the truth
- Probably lying
- Unsure



*(continues) I don't remember saying that. Wow, uh, um. Well again, it is just stories I heard. Maybe that's why I thought that because, um, just stories I have heard about people trying to cheat the system or do something dishonest.*

**Juror 6:**



*Anyone else?*

**Plaintiff's Attorney:**

*(No response)*



Attorneys can also use the answers provided in supplemental juror questionnaires as a starting point for a more focused discussion of a trial issue. On several occasions, the attorneys used the answers provided by jurors as a launching pad for a discussion of the issue. For example, consider the questioning of Juror 5:



**Plaintiff's Attorney:**

*How many think that there are too many lawsuits today and I think I saw Juror 5's written questionnaire where you say there are too many lawsuits these days and that the money awarded by jurors is too high. Can you tell us your thoughts on that?*



**Juror 5:**

*Um, I think it is possible like, I don't remember his juror number, but I think a lot of things can be settled out of court and probably should be, if possible. And that's my only reason to say that there are too many lawsuits. And, as far as settlements, that's a tough one for me. I see so many of these, you know, maybe it's just the big ones in the news that bother me when they are in the hundreds of millions of dollars but that's when I think it is too much.*

In addition, jurors' answers on their questionnaires can be and were raised in support for challenges for cause, as was the case concerning a cause challenge to one of our jurors in the study.

### **Attorney/Trial Consultant Reactions**

The attorneys and trial consultants who were involved in the jury selection were asked for their feedback concerning the use of the online juror questionnaires. The attorneys felt that the questionnaires provide them with "in-depth insights" and were "helpful timesavers." Also, the attorneys felt that such questionnaires provided access to more honest and candid



answers, noting that the jurors tend to moderate their answers in a public voir dire process. Finally, the attorneys felt that supplemental juror questionnaires would be useful in future remote as well as in-person jury trials.

The trial consultants concurred with the observations of the attorneys. In addition, they observed that using supplemental juror questionnaires: (a) provided critical information several days before trial that shaped their voir dire and peremptory challenge strategies; (b) allowed them to focus subsequent voir dire on critical areas to discover potential bias (some of which were not covered in the questionnaire); (c) provided more honest and candid answers from the jurors; and (d) shortened the voir dire process.

The trial consultants stressed the need for attorneys to have sufficient time for review and evaluation of the completed questionnaires (a few days in our study) to maximize their utility and to achieve the above-mentioned benefits. Additionally, it would be important for the parties to have the randomized order of the jurors to ensure consistency between the online questionnaire and the tile view of the juror when they are questioned. If allowed, it would also be advantageous for the attorneys to be able to take screen shots of the jury panels for review later when they are considering cause and peremptory challenges, as well as follow-up voir dire questions.

## **Conclusion**

In sum, from all indications, the use of an online questionnaire was successful. Almost all jurors who started the online questionnaire completed the questionnaire and completed the components in a reasonable time, with average completion times of 6.68 minutes for the qualification questionnaire and 10.89 minutes for the supplemental juror questionnaire. The supplemental juror questionnaire was successful in identifying at least one juror who failed to respond appropriately during voir dire and was successfully used as a starting point for follow-up questioning on critical opinions with a number of jurors. Finally, those using the questionnaire felt that it was extremely helpful to them in planning out and conducting voir dire and jury selection in an intelligent and efficient manner.



## Preparing for and Conducting the Online Trial

### Evaluating Online Pre-trial Questionnaires

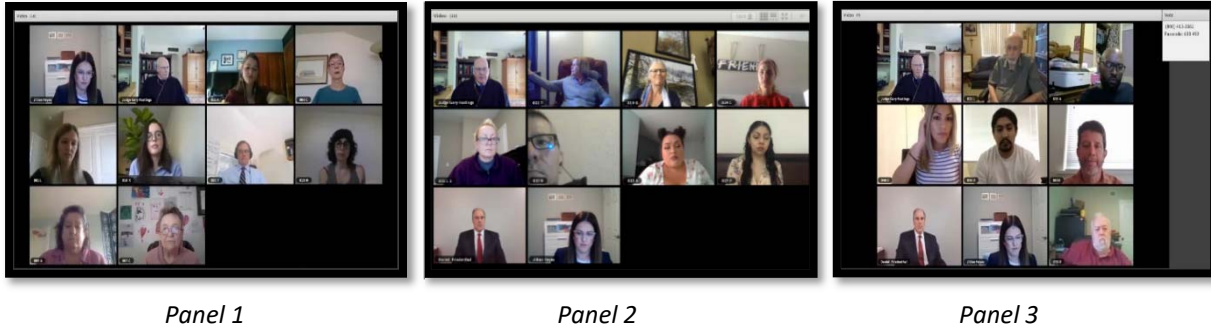
When jurors were “summoned” for the OCP Online Demonstration Trial, they filled out two online questionnaires: a Juror Qualification and Hardship Form and a Supplemental Juror Questionnaire (SJQ). Attorneys for each party were provided with a link to each questionnaire online, several days in advance of the trial. This allowed the attorneys and their trial consultants to more thoroughly plan for voir dire. Juror questionnaire responses were evaluated by the parties, and they drafted follow-up questions to ask during oral voir dire.

### Conducting Voir Dire

Having the SJQ responses in advance of trial saved precious time during oral voir dire, enabling the lawyers to skip some questions that otherwise would have been asked orally and to focus instead on areas of particular concern. The written responses provided vital information and revealed biases not mentioned during the oral voir dire. The combination of both oral and written responses allowed the trial teams to develop an informed strategy for exercising cause and peremptory challenges.

To ensure that each juror could be viewed during questioning, the panel of jurors was divided into three separate groups for voir dire. As they would in many courtrooms, the jurors who were not being questioned were still able to hear and view the process, although their cameras were off. Only the group currently “in the jury box” was visible at any given time. This worked quite well – the attorneys were able to focus their attention on a more manageable group or prospective jurors and observe their verbal and non-verbal responses. The ability to also have these small groups of jurors in a fixed tile position on the screen also allowed the attorneys to more clearly keep track of juror responses.

In fact, there is some indication that the attorneys had a better view of each and every juror than they would in an in-person voir dire.



If courts could schedule jurors in groups at set times, it would also allow those jurors to work or conduct personal business rather than waiting to be called. If a judge were to evaluate cause challenges at the time the individual smaller panels are called, the court could even evaluate the necessity of calling additional jurors or releasing them for other trials or to release them from service.

Following the questioning of all three groups, the jurors were removed from the main “courtroom” into a jury waiting room during a break, and cause challenges were discussed in a sidebar discussion between only the lawyers and the judge. The movement of jurors into a waiting room and the sidebar discussion all ran smoothly. During the break, we tested the ability of attorneys to meet with their clients or consultants in a virtual conference room to discuss peremptory challenges, which also ran smoothly without any technical problems.



Attorney Sidebar

The judge then reconvened both attorneys into the courtroom to exercise peremptory challenges outside the presence of the jury using an alternating “struck” system. Each party was allowed three strikes, and the first “unstruck” 13 jurors (12 + 1 alternate) comprised the seated jury. After the exercising of challenges, all of the jurors were recalled back into the courtroom and informed of the seated jurors and alternate. The other jurors were excused but retained to form our shadow jury to provide an additional set of information on juror perception of the trial process.

In all, there are numerous elements in the use of online questionnaires and online voir dire which could make the jury selection process quicker and more efficient.

### Preparing for Online Trials

As with an in-person trial, the preparation and presentation skills of the lawyer can impact the jurors’ perceptions of the case. While jurors are observing the attorneys in court from a distance and separated by the bar in the jury box, lawyers presenting online are in “close-up,” and can be scrutinized more closely.



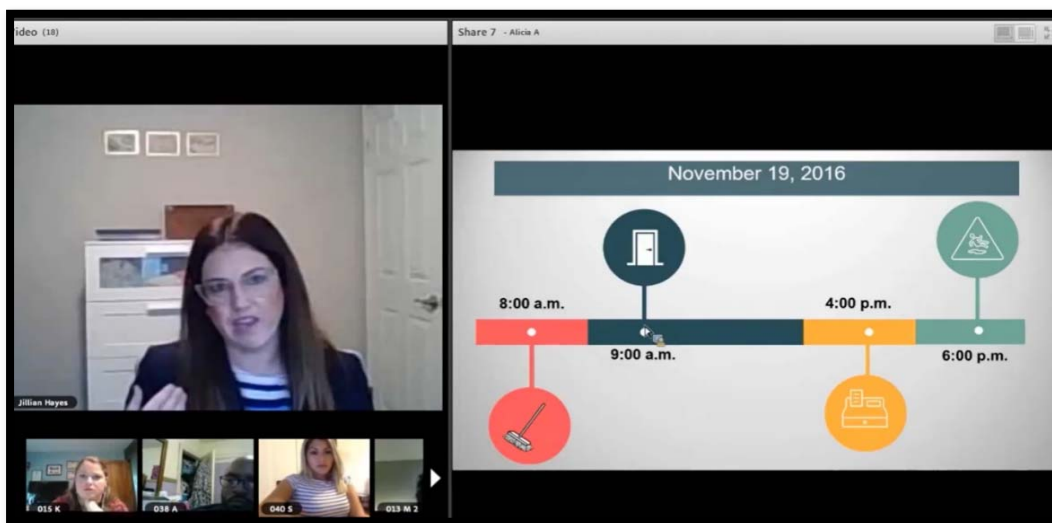
*I thought it was fascinating to participate as a juror. I did feel like presentation and professional conduct were even more important over the internet because each person is so close and personal. It's a lot easier to see nerves and unpreparedness when the people are filling your screen instead of several feet away.*

**Juror 13:**

On a similar note, if the parties are visible online for an extended period, they may find it difficult to be watched so closely for so long. Further study needs to be done on the effects of close-up viewing of plaintiffs, defendants, attorneys, and jurors for the duration of an extended trial.

## Preparing Opening Statements

Preparation for opening statements was much the same as preparing for this part of a traditional in-person trial. Because of the shortened nature of the demonstration trial, special attention was given to preparing a comprehensive outline for opening statements that were clear and concise. In addition, exhibits and demonstratives were prepared which could be shown side-by-side with the lawyer, to provide additional visual interest to keep the jurors engaged. Only exhibits that had been stipulated by both sides were shown during opening statements.



When exhibits were not being shown, the technical bailiff was instructed to bring the lawyer's image into the full screen. This change in view – between a split screen and a full screen image of the presenting attorney – further helped to engage the jurors in the presentations.

## Preparing Witness Examinations

Preparing witness direct and cross-examination outlines for the online trial was essentially the same as preparing a witness outline for an in-person trial, although again the attorneys had to prepare for shortened examinations due to the expedited nature of our demonstration trial.

However, preparing the witness to testify online requires additional work. The witness should be taught how to connect with the jurors on camera and how to express themselves credibly and effectively within a tightly framed shot. Small movements are more pronounced than they would be “live,” and making effective eye contact is more difficult, usually requiring the witness to envision the questioner in the eye of the camera rather than looking further down the screen at the tile of the attorney or the jurors. Looking just at a camera lens can tend to make a witness look more detached as it is more difficult for the witness to respond and connect to the nonverbal signals of live person. Therefore, it is advisable for attorneys and witnesses to practice camera eye contact in their testimony ahead of their actual testimony during an online trial.

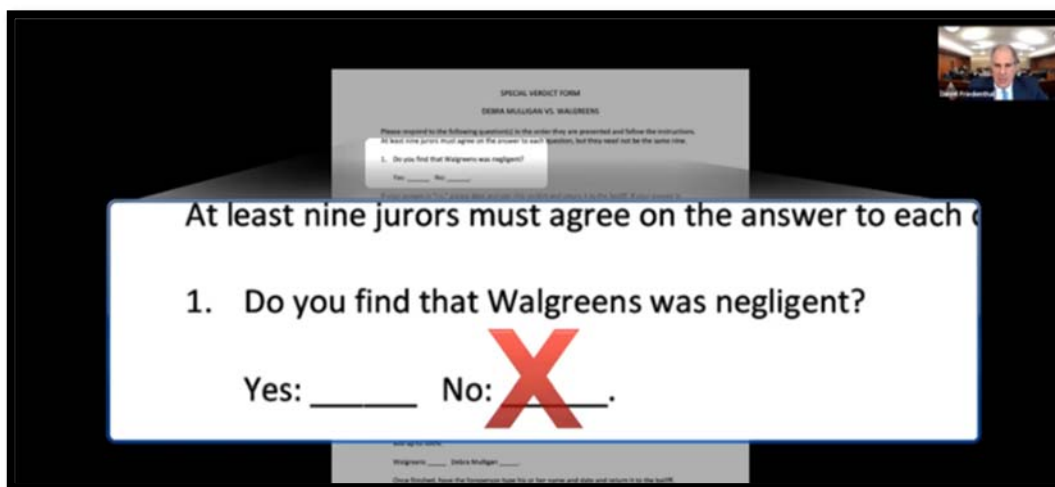


### **Preparing Closing Arguments**

In preparing for closing arguments, the trial teams focused on sharing the verdict form and arguing their positions on each of the verdict questions. Again, preparing closing arguments was no different than in a normal in-person trial. With Zoom, the presentation of demonstrative evidence in both witness examinations and in closing arguments tended to function with relative ease and stability. However, presenting closing arguments to the camera did require additional thought and practice, as the attorneys had to make their arguments to the camera lens to provide the needed eye contact, rather than lowering their eyes to look at

notes or to try and look at the jurors. In person, attorneys are able to gauge juror reactions to their statements, examinations, and arguments, something which is much more difficult in an online format.

Some evidence may compete for juror attention in an online trial. Therefore, summarizing key elements of the evidence in a closing argument may be even more important than it is in a normal trial.



## Conclusions

Voir dire worked quite well in an online environment. The attorneys and consultants remarked that they were able to see and hear the jurors more clearly online than they usually can in the courtroom.



**Plaintiff's Attorney:**

*It seemed like the jurors were more relaxed and expressive than they usually are in a live courtroom. I was also able to see a lot more of their non-verbal information and reactions than I am often able to see in a courtroom, where I am often trying to see the panel from across the room, with tables and a podium in my way.*



Similarly, several jurors remarked that they found it easier to see and hear the lawyers, and the other jurors, in the online platform.



*It was really nice being able to see the other jurors face-to-face. Usually, we would be sitting side-by-side, not able to look at each other.*

**Juror 13:**

As the demonstration trial was publicly available to watch live, the viewing audience noticed these differences, as well. In a survey taken after the entire trial process, one viewer commented:



*I thought the observation about being face-to-face with other jurors was interesting. Close up study of faces, expressions, body language is a positive. I think jurors are more comfortable and it's easier for them to participate.*

**Viewer:**

Online voir dire can also be a bit more flexible, and more responsive to scheduling challenges. Voir dire online can be conducted in much the same way it is conducted “live” – the entire pool can be “present” the entire time, but with only a small group “in the box” at one time. Or, it can be totally redesigned, with jurors reporting in half-hour time blocks, which results in much less waiting time for the jurors. Instead of calling all jurors to assemble at the courthouse by a designated time, jurors can report in groups, beginning after anticipated motions in limine or other procedural matters. Further, voir dire can be conducted at any time – days or even weeks before trial – which gives the jurors who are seated time to make arrangements for childcare, privacy, technology or other concerns.

However, some traditional methods for tracking juror responses did not easily transfer to the online platform. First, unlike the seats in the jury box in a courtroom, the online juror



“seats” are not fixed in a particular order in some online platforms. Additionally, while a majority of the screen is filled with the attorney presenting or questioning, a witness testifying or demonstrative exhibits, it is more difficult to check on the smaller juror tiles to gauge juror reactions. Therefore, it is more incumbent on the attorneys to be vigilant in checking juror reactions during the trial to ensure that the evidence and arguments they are using are having the desired effect on the jury.

After conducting this exercise, the concerns expressed by many attorneys that they will not be able to observe, or express, body language as much as they would in a normal trial appear to be unfounded. The observation, by necessity will be different than in a traditional trial. However, the attorneys were quite capable of observing the body language of jurors, and jurors were able to do the same of the attorneys and witnesses. Additionally, the technology made the sharing of exhibits during a witness examination quite easy, or certainly no more difficult than it is in a normal trial.

## **Jury Instructions, Deliberations and Verdict**

After viewing openings, witness testimony, trial exhibits, closing arguments and instructions, seated jurors remained assembled in the main viewing Zoom “room,” which was visible to the public audience and was recorded. Jurors were given the verdict questions and jury instructions by the judge to guide their deliberations. As this was a public demonstration trial, the main jury deliberated in the main room used for the courtroom, observable by viewers, and the shadow jury (jurors who were not chosen on the first day) deliberated in the breakout room they had been assigned on the first day. In an online trial on an actual case, jurors would have to be designated to a secure “deliberation room” where only they would be able to discuss the case with each other.

Because of the public nature of the demonstration trial, a “technical bailiff” was assigned to the main deliberating groups who monitored the group for technical issues with her



camera off. Jurors were also instructed on how to send a question or notice of the verdict to the court through the technical bailiff.

The panel followed the same sequence that we generally see in in-person mock jury deliberations involving ‘around-the-table’ sharing of individual opinions. First, mock jurors readily elected a foreperson, who immediately turned to the discussion of the negligence element of the case. They were able to easily speak, were easily recognized in the virtual room through either the Speaker or Gallery view by Zoom’s color surround of the active speaker. Jurors were able to be heard and managed turn-taking during their deliberations. The resulting deliberation seemed to be as fluid as it would have been in person.

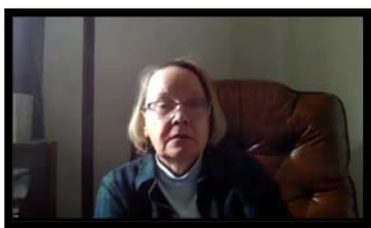
Despite a vigorous debate on liability, the main jury was unable to come to a verdict in the time allotted for the demonstration trial and the shadow jury arrived at a unanimous verdict. Zoom’s technology did not allow for a verdict form or requested exhibits to be sent to only the jurors within their platform, so their verdict forms were filled out afterward. However, in an actual trial, jurors would need to be sent a verdict form by email, a system like Dropbox, or a link to secure site.

## **Post-Deliberation Interview Feedback**

Having concluded deliberations, the jury was then interviewed about a number of issues. We sought jurors’ opinions on their overall impressions of the web-conferencing format as it functioned during each phase of the trial process, their impressions about being able to meaningfully deliberate as a group over a web-conferencing system, the strengths and weaknesses of the web-conferencing format for the online trial, and opinions about whether the online format affected the professionalism of the judge and attorneys.

## Phases of Trial and Functional Impact of the Web-Conferencing Formats

During this portion of the interview, jurors' discussion initially focused around the voting process during jury deliberation and concerns with the perceived lack of anonymity when voting and potential challenges with the ability to persuade jurors to one side of the case to the other. One juror suggested a possible solution based on her prior experience with the Zoom platform. Still, another juror shared her suggestions on using the web-conferencing platform during the voir dire process. Those opinions are as follows:



**Juror 21**

*“Well, I think having been on a jury before that doing it online and people having to raise your hands as you vote, in a jury room, normally you can do a paper/pencil and you don’t know how [specific] people are voting. Sometimes that’s important, other cases it would not be important. But I know if we were forced to stay online until we had gotten 9 people one way or the other, I don’t know how being far away - I don’t know if coercion is the right word - how to help someone change their mind to your point of view.”*



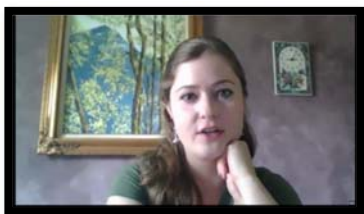
**Juror 33**

*“Also, when you do change your mind anonymously, I think that that is easier than changing it once everybody has seen your vote a lot of people don’t want to admit they’re changing their minds.”*



**Juror 27**

*“There is a way on Zoom to do a poll so that it would be anonymously. I don’t know if only the host can do that or if in the breakout rooms the person in charge would be able to. I don’t know exactly how that works but I have experienced that so maybe that could be looked into for the vote to be done anonymously.”*

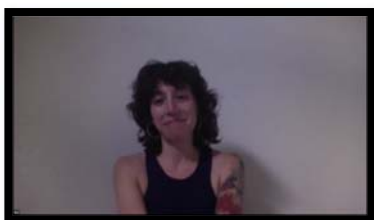


**Juror 15**

*“Just with the voir dire, I think jury duty is a lot of sit around and wait when they are first choosing the jury, but I think the online platform maybe provides something where you could say ‘okay this group of people, you are going to log on for this 20 minutes’ and then the next group log on for the next 20 minutes until we get a full jury. Because you have the opportunity to not have everyone in a waiting room.”*

## Jury Group Dynamic

Overall, jurors felt that the online trial process did not affect their ability to discuss and debate the merits of the evidence as a group. Two jurors expressed their reasons for feeling *more* connected in the online trial setting:



**Juror 13**

*“I think it’s interesting because trials and the whole process of the trial can seem very formal and very impersonal, but because we are facing each other and looking at one another, it seems like there is an extended level of connection that you don’t experience in the courtroom and you get to know each other in another way whereas in the courtroom you’re all sitting face forward and looking straight ahead. So, I think there is a newfound level of connection that you wouldn’t find in a brick and mortar courtroom.”*



**Juror 19**

*“I think when we got to the jury room, I feel a lot more connection, and even with the witnesses because you are right there. You can really see their expressions.*

*In the trial I took part in [prior jury service], when we moved into the jury room, then [we] were face to face. But still, [this online platform] wasn’t a negative at all.”*

## Impressions of the Professionalism of the Judge and Attorneys

Jurors' perceptions of the judge's and attorneys' professionalism remained generally positive when discussing the format of the online trial presentation. One juror did express a perceived negative impression of attorneys when those attorneys encountered technical issues during the online jury trial, but others expressed empathy for the court participants, as they were dealing with technical problems. As any online trial format would encounter some technical problems, juror comments highlight the need for technology training and practice for trial participants, instructions for jurors on not letting technology lapses affect how they judge evidence, and patience for all.



**Juror 9**

*"I think for me it's pretty easy to distinguish a technical issue versus another issue. So I think we got a clear sense of them yesterday in terms of their professionalism, independent of any technology glitches. So for me it was easier to view them when they weren't freezing up, which I think is really important when you want to see facial expressions and presentations. Knowing that that was just a technical issue, it was easy to forgive that in terms of dealing with the attorneys and the judge."*



**Juror 13**

*"I agree with Juror 9. The only thing about yesterday - and it didn't take away from their professionalism at all - I had this empathy factor any time any of the things froze up, and so that was the only thing that took me out. And I was thinking 'I feel so badly for them' because it's their exhibit and they want to show something and they're not able to show it, and it didn't reflect on their professionalism whatsoever."*



**Juror 15**

*“I think actually the exact opposite of the empathy thing. Even though I know they are technical issues and that things happen, for me, it’s just subconsciously. If I see someone having technical issues on a platform that I feel like I can use - there is just something that’s like, ‘Okay maybe you don’t know what you’re doing’. That’s probably just me personally and something I need to fight and work against, but I do think you know if one side is having more technical issues than the other side, there might be a subconscious thing there.”*

On the second day of the online trial, attorneys used Zoom’s ability to choose an alternative background. We specifically sought jurors’ impressions of the change of background and whether that change positively or negatively affected jurors’ perceptions of professionalism and whether jurors would prefer having a uniform background rather than a personally selected background or the background from their own personal space. Opinions varied, with some jurors wanting a professional court or more neutral background and other preferring to see the personal spaces of the court participants to gain insight into their personalities.



**Juror 26**

*“There are pros and cons. I had a class that had 150 students and they would use silly backgrounds, so I think it can be a little distracting. I think just a plain background would be fair. I guess it gave like a false sense of being in court. At least they had very similar backgrounds, so we weren’t like judging them based on it.”*

## Shadow Jury Deliberation/Interview

Even though the main focus of this project was on a seated jury formed after the exercise of cause challenges and peremptory strikes, we retained the struck and otherwise unseated jury as a “shadow jury” so as not to limit the feedback we could receive from a larger group, as well as provide a second opportunity for deliberations.



The shadow jury watched the trial in the same manner as the regular jurors but were not always on the screen because we wanted to maintain a realistic focus on one jury.

There were three design features incorporated into the deliberations and debriefing for the shadow jurors:

- A separate room outside the public’s viewing.
- A “technical bailiff” who monitored the group for technical issues with her camera off.
- Instructions on how to send a question or notice of the verdict to the court through the technical bailiff.





## Findings, Deliberations, and Debriefing

After viewing openings, witness testimony, closing arguments and instructions, the shadow jurors deliberated to a verdict fairly quickly. The panel followed the same sequence that we generally see in in-person mock jury deliberations involving ‘around-the-table’ sharing of individual opinions. They were able to easily speak, be heard, and manage turn-taking. The resulting conversation seemed to be as fluid as it would have been in person. However, there was no serious disagreement on the issues within this jury and, as a result, we were not able to see in this jury how they handled conflict or a more divisive conversation in remote setting.

## Challenges

The following are some of the problems or issues that we observed during the shadow jury’s deliberation and interview:

- There were some delays in forming the groups, as some individuals were temporarily in the wrong group.
- One shadow juror spent some time without a camera on during deliberations and dropped off for an unknown reason during the interview.
- More broadly, all of the jurors felt they did not have a clear “identity” as a jury and did not have any opportunity to chat or to get to know each other prior to deliberations.

## Interview Feedback

Having concluded deliberations, the main items of feedback from the shadow jurors were the following:

- Despite the inevitable technical delays on both days, jurors could attend and understand the proceedings.
- Jurors wanted to have the opportunity to talk and get to know one another as a distinct jury prior to deliberations. They suggested that having their own room to gather and speak to each would have gone a long way toward making the delays tolerable.



- Jurors appreciated the immediacy in being able to see a close facial view of the witness testifying.
- Jurors wanted to have the ability to show and to manipulate exhibits themselves during deliberations.

## Questionnaire Data Results

At the conclusion of the post-deliberation interview, both seated and shadow jurors individually responded to two questionnaires related to the technical aspects of each day's online trial experience, attentiveness, connectedness, fairness of the online trial concept, and jurors' willingness to serve in an online trial in the future. The specific results and data analyses follow, with the summary results as follows:

- While only 59% of jurors were generally able to hear and see the questioning during the jury selection process on the first day, all jurors were able to see and hear the witnesses' testimony well on the second day of the online jury trial.
- Almost all jurors (90%) felt connected to their fellow jurors during jury deliberations.
- Overall, on the first day of the online trial, 77% of jurors felt conducting the trial in this remote manner was fair to all parties, but that perception strengthened with 83% jurors who felt the remote trial was fair to all parties after the second day of the online trial.
- Finally, 82% of jurors expressed their willingness to serve in a trial conducted in this remote manner after the first day, while 100% of jurors expressed a willingness to serve at a future time after the second day.
- While the differences between the two days are certainly accounted for by the technical problems we encountered during the first day, it is not unexpected that all court participants will encounter a learning curve with greater ease of use as a trial progresses, with all participants getting used to online courtroom technology.

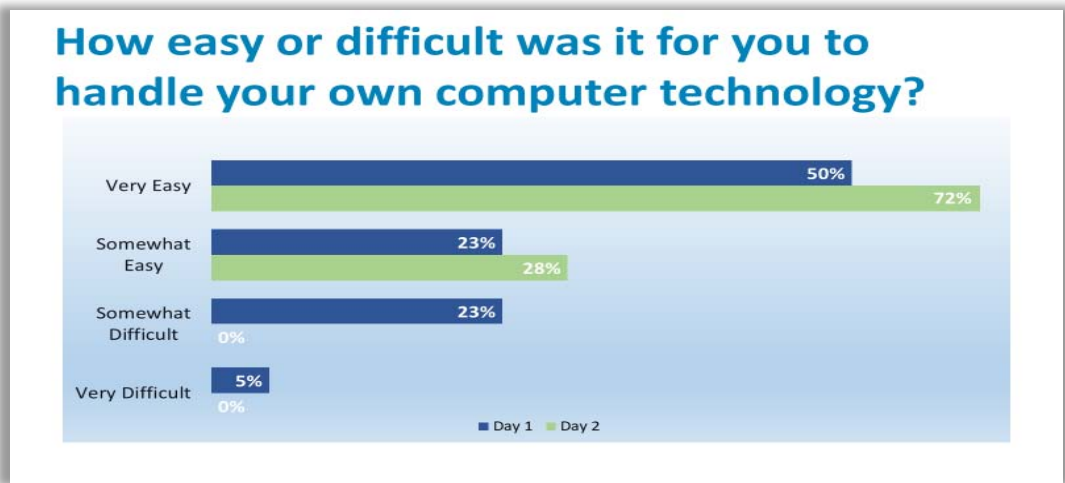
## Technology Aspects of Each Day’s Online Trial Experience

Most jurors (73%) found it easy to handle the technology of the online video-conference on the first day of the online jury trial while 100% of jurors felt it handling the technology was easy on the second day (see chart below), which resulted in a statistically significant increase<sup>10</sup> in the ease with which jurors were able to handle the technology on the second day of the online jury trial.

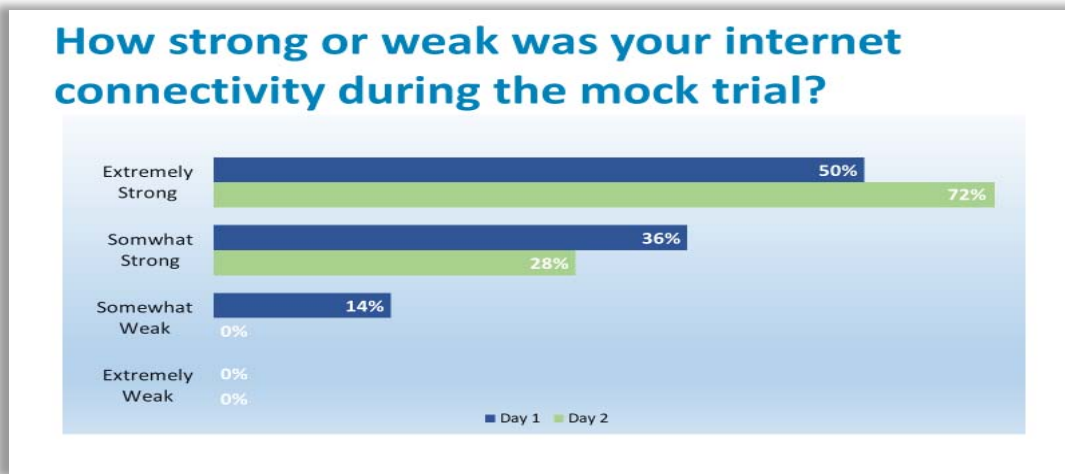


Seventy-three percent (73%) of jurors also found it easy to handle their own computer technology on the first day of the online jury trial with 100% of jurors feeling ease when handling their own computer technology on the second day (see chart below).

<sup>10</sup> We conducted a pair-samples *t*-test to evaluate the impact of the different online web-conferencing platforms on jurors’ perceptions of their ease in handling the technology on Day 1 ( $M = 2.0, SD = 0.97$ ) to Day 2 ( $M = 1.22, SD = 0.43$ ),  $t(17) = 3.29, p = .004$  (two-tailed). The mean decrease was 0.78 with a 95% confidence interval ranging from 0.28 to 1.24. The eta squared statistic (.39) indicated a large effect size.

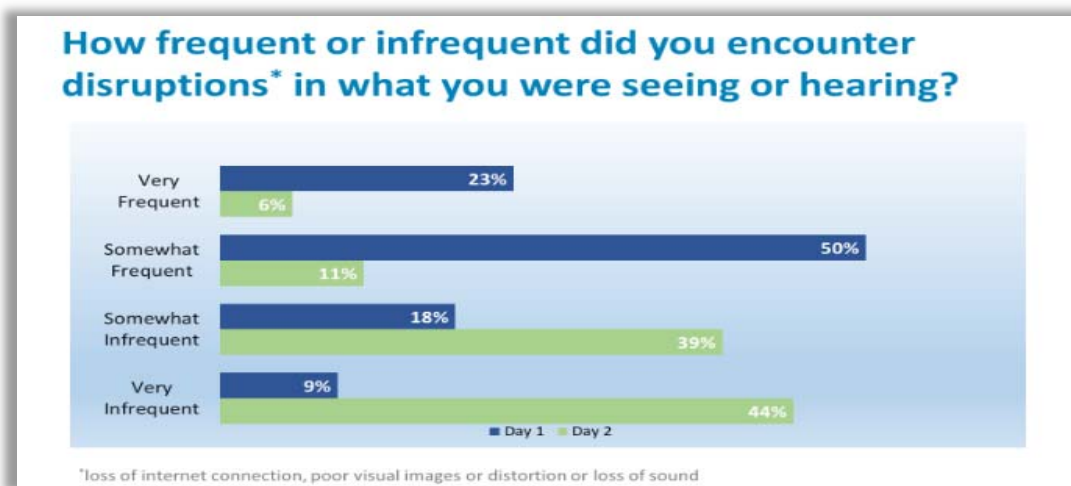


Most jurors (86%) had a strong internet connection during the first day of the mock trial, and 100% of jurors felt they had a strong internet connection on the second day. Importantly, there was a statistically significant increase<sup>11</sup> in the strength of jurors’ internet connectivity on the second day of the online jury trial (see chart below).



<sup>11</sup> We conducted a pair-samples *t-test* to evaluate the impact of the different online web-conferencing platforms on jurors’ perceptions of their internet connectivity on Day 1 ( $M = 1.72, SD = 0.67$ ) to Day 2 ( $M = 1.28, SD = 0.46$ ),  $t(17) = 2.68, p < .05$  (two-tailed). The mean decrease was 0.44 with a 95% confidence interval ranging from 0.09 to 0.80. The eta squared statistic (.30) indicated a large effect size.

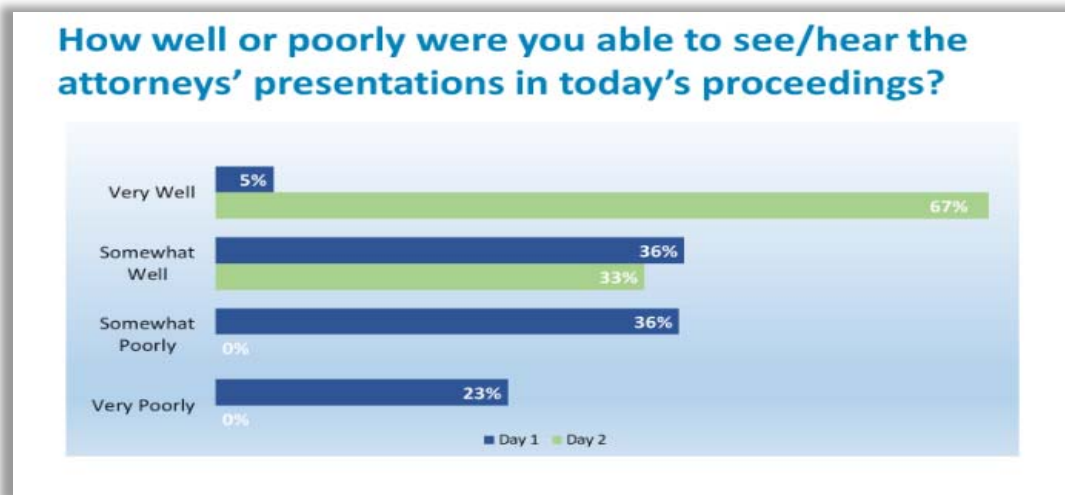
Many jurors (78%) encountered some disruptions, such as loss of internet connection, poor visual images or distortion or loss of sound) during the first day of the online jury trial, However, on the second day, only 17% of jurors reported that they had frequent disruptions, which was a statistically significant decrease<sup>12</sup> in the frequency of disruptions on the second day of the online jury trial compared to the first (see chart below).



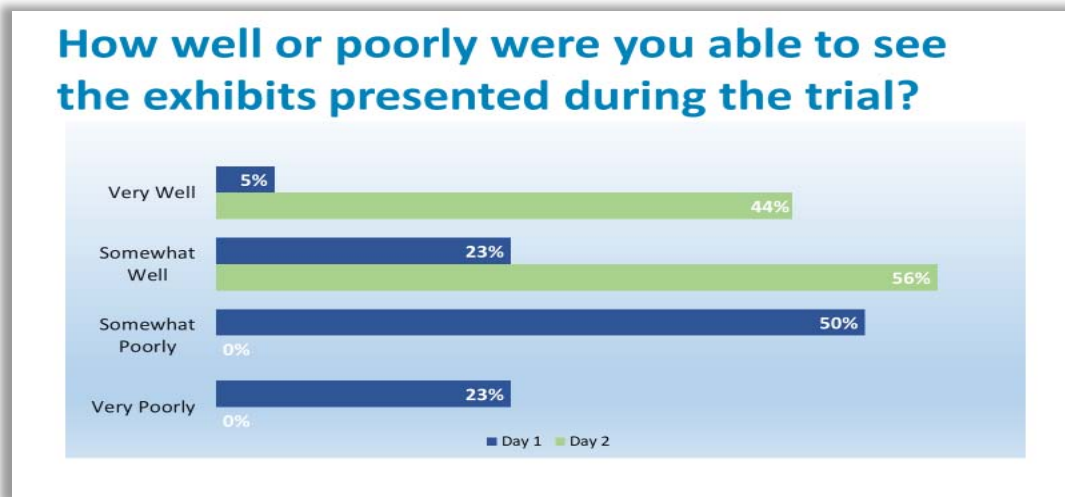
On the first day of the online jury trial, only 39% could see and hear the attorneys' presentations well. Importantly, however, there was a statistically significant increase<sup>13</sup> on the second day, with 100% of jurors being able to see and hear the attorneys' presentations well (see chart below).

<sup>12</sup> We conducted a pair-samples *t-test* to evaluate the impact of the different online web-conferencing platforms on jurors' perceptions of the frequency in which they encountered disruptions such as loss of internet connection, poor visual images or distortion or loss of sound on Day 1 ( $M = 2.06, SD = 0.87$ ) to Day 2 ( $M = 3.22, SD = 0.88$ ),  $t(17) = -3.21, p < .005$  (two-tailed). The mean increase was -1.17 with a 95% confidence interval ranging from -1.93 to -0.40. The eta squared statistic (.38) indicated a large effect size.

<sup>13</sup> We conducted a pair-samples *t-test* to evaluate the impact of the different online web-conferencing platforms on jurors' perceptions of how well they were able to see/hear the attorneys' presentations on Day 1 ( $M = 2.78, SD = 0.88$ ) to Day 2 ( $M = 1.33, SD = 0.49$ ),  $t(17) = 6.23, p < .001$  (two-tailed). The mean decrease was 1.44 with a 95% confidence interval ranging from 0.96 to 1.93. The eta squared statistic (.70) indicated a large effect size.

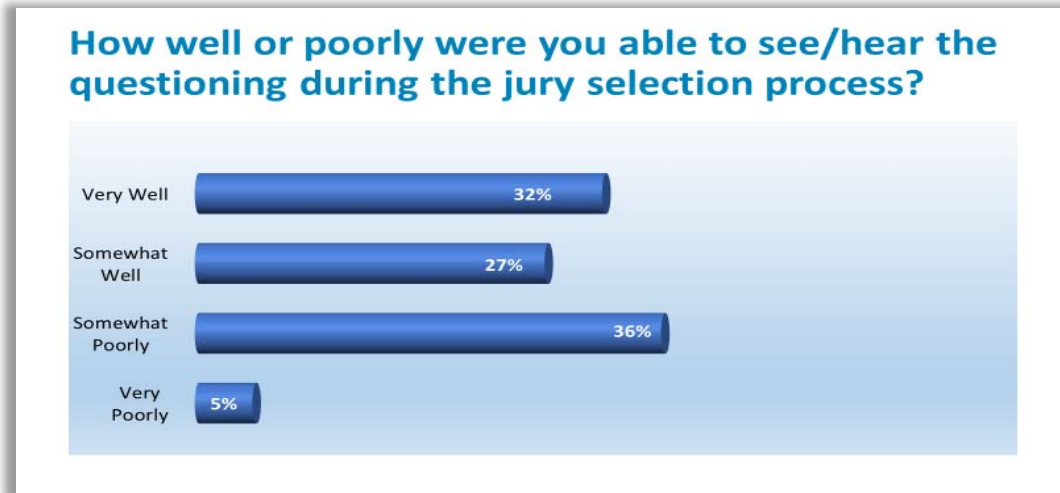


Similarly, only 28% of jurors could see the exhibits presented during opening statement well. But, 100% of jurors could see the exhibits presented during the trial well on the second day. This was a statistically significant increase<sup>14</sup> in how well jurors were able to see the exhibits presented on the second day compared to the first (see chart below).

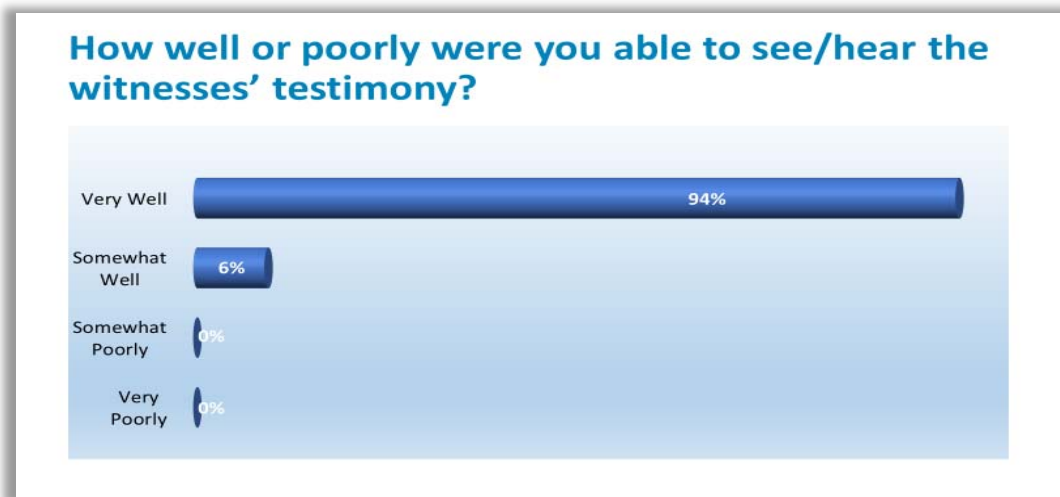


<sup>14</sup> We conducted a pair-samples *t*-test to evaluate the impact of the different online web-conferencing platforms on jurors' perceptions of how well they were able to see the exhibits presented during the trial on Day 1 ( $M = 2.94$ ,  $SD = 0.87$ ) to Day 2 ( $M = 1.56$ ,  $SD = 0.87$ ),  $t(17) = 5.68$ ,  $p < .001$  (two-tailed). The mean decrease was 1.39 with a 95% confidence interval ranging from 0.87 to 1.91. The eta squared statistic (.66) indicated a large effect size.

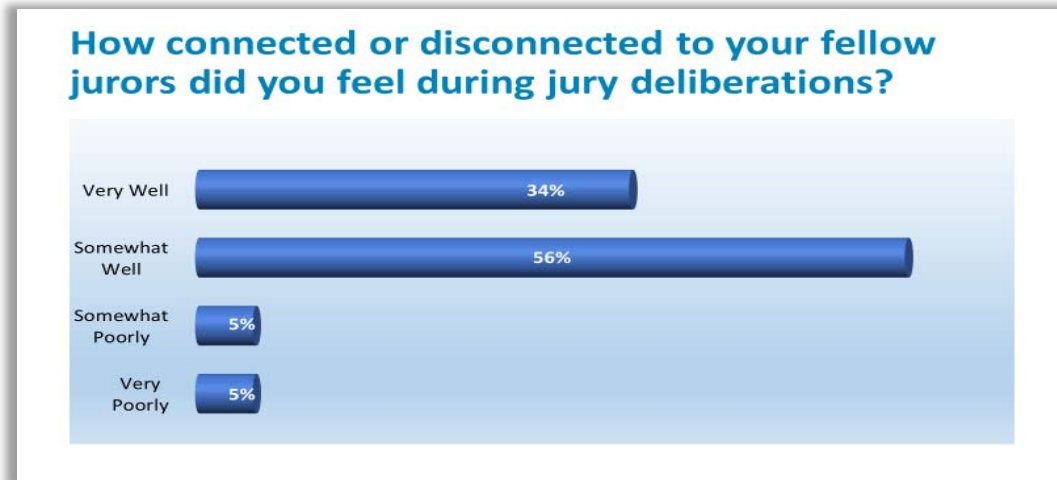
Specifically related to the first day of the online jury trial, 59% of jurors were generally able to see and hear the questioning during the jury selection process (or oral voir dire) (see chart below).



Conversely, 100% of jurors were able to see and hear the witnesses' testimony well on the second day of the online jury trial (see chart below).



Importantly, 90% of jurors felt connected to their fellow jurors during jury deliberations (see chart below). This sentiment was underscored in the previously mentioned post-deliberation interview with jurors.

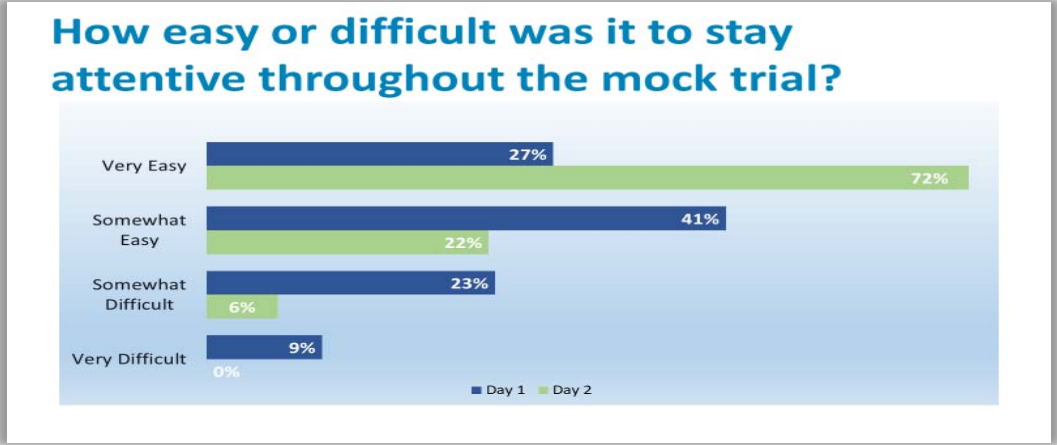


### Attentiveness and Comfortableness During Each Day’s Online Trial Experience

Most jurors (68%) found it easy to stay attentive throughout the mock trial on the first day compared to 94% of jurors who found it easy to stay attentive throughout the mock trial on the second day. This was a statistically significant increase<sup>15</sup> in how well jurors were able to stay attentive on the second day compared to the first (see chart below).

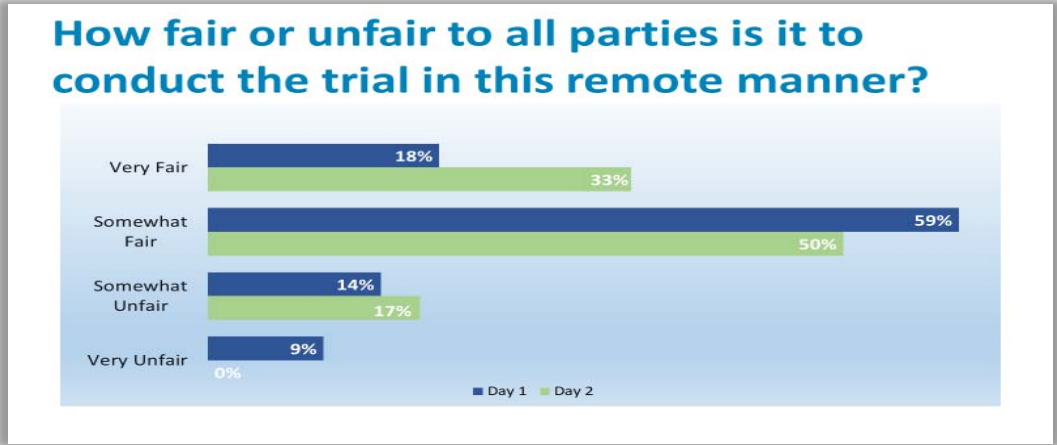
<sup>15</sup> We conducted a pair-samples *t-test* to evaluate the impact of the different online web-conferencing platforms on jurors’ perceptions of how easy or difficult it was for jurors to stay attentive throughout the mock trial on Day 1 ( $M = 2.22, SD = 0.94$ ) to Day 2 ( $M = 1.33, SD = 0.59$ ),  $t(17) = 4.19, p < .001$  (two-tailed). The mean decrease was 0.89 with a 95% confidence interval ranging from 0.44 to 1.34. The eta squared statistic (.51) indicated a large effect size.





### Fairness to All Parties to Conduct Trial in a Remote Manner

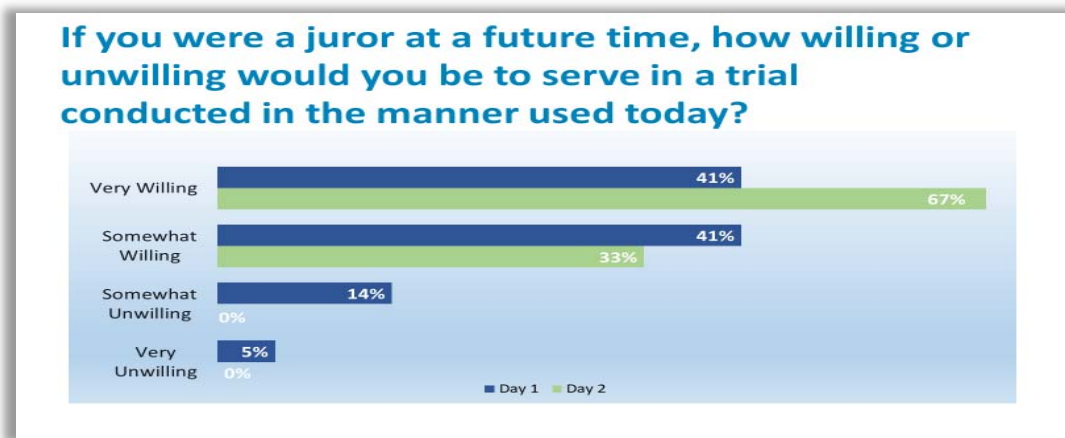
On the first day of the online jury trial, most jurors (77%) felt it was fair to all parties to conduct the trial in this remote manner. This perception was strengthened on the second day, with 83% of juror who felt conducting the trial in this remote manner was fair to all parties. This was a statistically significant increase<sup>16</sup> in jurors’ belief of fairness on the second day compared to the first (see chart below).



<sup>16</sup> We conducted a pair-samples *t-test* to evaluate the impact of the different online web-conferencing platforms on jurors’ perceptions of how fair or unfair to all parties it is to conduct the trial in this remote manner on Day 1 ( $M = 2.17, SD = 0.92$ ) to Day 2 ( $M = 1.83, SD = 0.71$ ),  $t(17) = 2.38, p < .05$  (two-tailed). The mean decrease was 0.33 with a 95% confidence interval ranging from 0.04 to 0.63. The eta squared statistic (.25) indicated a large effect size.

## Willingness to Serve in an Online Trial

After the first day of the online jury trial, and even with the technical problems, most jurors (82%) expressed their willingness to serve in a trial conducted in the manner used during the first day of the online jury trial, while 100% of jurors expressed their willingness to serve in a trial conducted in the manner used during the second day (see chart below). This was a statistically significant increase<sup>17</sup> in jurors’ willingness to serve in a trial at a future time on the second day compared to the first (see chart below).



<sup>17</sup> We conducted a pair-samples *t*-test to evaluate the impact of the different online web-conferencing platforms on jurors’ perceptions of how willing a juror would be to serve in a trial conducted in the manner used on Day 1 ( $M = 1.89, SD = 0.90$ ) to Day 2 ( $M = 1.33, SD = 0.49$ ),  $t(17) = 2.76, p < .05$  (two-tailed). The mean decrease was 0.56 with a 95% confidence interval ranging from 0.13 to 0.98. The eta squared statistic (.31) indicated a large effect size.



## Judicial Observations

### General Overview

Each of the judges involved agree that online jury trials can be accomplished. The process of the trial is the same whether in court or online. The focus needs to be on the platform used, the equipment used by participants, and the training of all participants on use of the platform.

### Existing Online Platforms

In time, online platforms will be developed that are designed specifically for remote trials. In the interim, there are preexisting platforms that can be used successfully to conduct online trials. In switching to the new modality of an online platform, particularly one that is not specifically set up for online trials, the pretrial conference is key to discuss the logistics and mechanics of the online platform, necessary adaptations, and associated technology. Like with any theatrical performance, key players must be involved in planning and understanding the new stage, the lighting and sound, and the other features. A primary distinction is that online trials require different ways of communicating to and moving participants. Troubleshooting needs to happen early.

### The Platform

Ideally, it would be most beneficial for courts to obtain a platform that is specifically designed for use as a virtual courtroom. However, whether using a specifically designed platform or platform technology already in use, it should be staffed and organized along the lines of an actual courtroom:

- Jurors should have a dedicated room for themselves where they can be organized for jury selection and placed when court is not in session. This should allow them to communicate with each other. When court is in session, they should all be placed on the same screen apart from the judge, lawyers and witnesses. They do not need to see



each other when court is in session. When in deliberations all jurors should be able to see each other, call up jury instructions that have been given and exhibits that have been introduced into evidence, and be able to vote anonymously.

- Witnesses should have a dedicated room where they can assemble and be moved into the courtroom when they are called to testify. When witnesses testify, they should be in their own box on screen and should be seen by the judge, lawyers, jurors and the parties.
- The judge, lawyers, and parties should be in their own box on the screen and be designated according to their role. They need to be seen by the jury and the other participants but do not necessarily need to see themselves on screen. The judge and lawyers should be able to move to a side bar conference not observable by the jury. And lawyers should be able to move to another room with their client or witnesses if a confidential discussion is necessary.
- At least one “technical bailiff” should be trained and designated to gather the jury and all other participants in the virtual courtroom. This bailiff would be able to communicate with all participants and also be able to move the jurors and other participants freely among the designated rooms as needed during the trial.
- A court clerk should be trained and designated to control and display exhibits on screen as well as document the daily activities in the court minutes.

The platform should allow exhibits to be displayed and utilized while at the same time the jurors and the witness remain on screen. It should also allow the virtual courtroom proceedings to be recorded if a court reporter is not used.

## Equipment

Not all prospective jurors will have the necessary equipment to be able to participate in online trials. Unless courts take steps to address this inequity, it is likely to reduce the potential jury pool and possibly impact the ability to get a balanced jury. Basic juror questionnaires



should be used in the beginning to screen for hardship claims and to learn about what type of equipment potential jurors have. Courts may have to consider providing computers and training for those who need them for purposes of the trial. Public schools have addressed this issue by providing equipment to students without sufficient resources. Everyone should have back-up equipment, such as another back up device, if possible, and a phone contact for when technical issues arise on the platform.

## **Training**

Everyone who will be participating in the trial must be trained and tested in use of the equipment and platform selected. As court personnel learn how to use the equipment and the platform, it will become necessary to focus more on the attorneys, witnesses and jurors for each trial. Instruction and testing should be accomplished ahead of the actual trial date so matters run smoothly during the actual trial.

## **Trial Issues**

There will be different issues to be addressed if the trial is civil versus criminal. Sixth Amendment constitutional issues must be considered in connection with criminal trials.

It is important to emphasize that all participants should be adequately prepared to participate in the trial. When possible, the attorneys should exchange and stipulate to exhibits that will be used during the trial. If there are evidentiary issues that need to be addressed, they should be handled at a pretrial conference, if possible. Scheduling should also be addressed by the attorneys and the court at the pretrial conference. Potential jury instructions should be exchanged and lodged with the court along with objections, if any. If juror questionnaires are to be used for purposes of voir dire the attorneys should agree on them or address issues at the pretrial conference. If issues arise during trial which have not been previously addressed, a side bar conference may be necessary, but if possible, the issue should be addressed at the end of the day or before the trial begins the next day so that jurors are not inconvenienced.

Coordinating entrances is a classic part of a regular trial. There is ceremony and formality that



conveys the seriousness of the substance and process. Without the physical surroundings of a courtroom that assist in conveying the sense of solemnity, in an online proceeding it is even more important to have structure, announcements, and predictability to lend formality and seriousness to the trial. As in a regular trial, the audience and lawyers should be warned that court is about to resume.

Breaks should be scheduled in a clear manner, so people know exactly what time they have to be back. As most computer clocks are automatically synchronized to the correct time, participants can be directed to look at their clocks to ensure they are all back on time. Like in a regular trial, some people will be late so there will need to be the ability of the bailiff to check in to get a count of whether all jurors have returned and are ready to return to the courtroom. Giving the bailiff the host role will enable the bailiff to enter the jury room to see if everyone is there. Alternatively, some texting, phone, or other messaging method should be used to let the bailiff and others know all jurors are present. In regular trials, when the jury room is a distance from the courtroom, this method is already used by many bailiffs.

Exhibits should be introduced by Exhibit number and name and attorneys should wait until the judge has approved an exhibit's use before broadcasting it on the screen. Since most platforms do not allow for selective projection of exhibits, the judge and lawyers should have electronically delivered exhibit notebooks prepared in advance so the exhibit can be pulled up on their own screen before the exhibit is shown to the witness and jury.

A designated person, potentially the bailiff, needs to keep track of whether all the jurors, counsel, judge and witness are consistently present and stop the proceeding when someone gets bounced off the platform. This, of course, would be easier on a platform where everyone is in a designated area on the screen instead of intermixed.

Because the messaging capabilities of most of the available platforms are limited, everyone involved in the trial should have a cell phone available to receive text messages or calls. These numbers should be entered into phones with the associated names or juror numbers for ease of communication.



Juror fatigue must be considered. Articles have suggested that online meetings and trials challenge a person's ability to concentrate. Regular breaks should be included in pretrial discussions. And consideration should be given to shorter trial segments over more days.

### **Positives to Online Platform**

- Safety from COVID-19 infection in court.
- The justice system can move forward and avoid a crippling national backlog of cases. Those civil cases suited to an online jury trial can move forward. Other trials that require in-person presentation can have access to the first juries.
- Jury selection is more efficient and can be less frustrating to prospective jurors who can do other things in their home until they are needed for questioning.
- Jurors have the ability to see exhibits clearly.
- All participants can control the volume on their devices so they can hear clearly (not always possible in a courtroom setting).
- Organizing the jury is far easier and reconvening after breaks less laborious. Everyone is in their own home where they have access to food, drink and bathroom facilities.
- It is easier to see all the participants. A benefit is that they don't know when others are looking at them and observing their reactions.
- The logistics of allowing jurors to submit questions is easier.
- Sidebar conferences are easier.

### **Negatives to Online Platform**

- Lacks the in-person interaction
- Technological issues can delay things



## Attorney Observations

### Reading and Evaluating Questionnaires

The attorneys felt this portion of the voir dire was really no different than the in-person trial presentation. Judges usually allow the attorneys a couple of hours to go over the questionnaires or overnight, depending on the timing. Many judges will not allow questionnaires unless there is an agreement to do so by all sides, so they felt it would be advisable to obtain agreement with the opposing party if the judge would allow a supplemental juror questionnaire. In our demonstration trial, the attorneys struggled a bit with matching the questionnaire with the juror number, name, and picture on the screen. So, it is advisable, as in an in-person jury trial, to develop a systematic approach to accurately matching juror names, numbers, questionnaires, and a visual of the juror.

### Opening Statements

Preparing the opening statement for the virtual trial was the same as doing so in for an in-person trial. As these attorneys typically work with a trial technician to prepare a PowerPoint and rehearse, in the case of the virtual trial, the attorneys felt additional technical checks should be done, to anticipate the additional layer of technology as compared to just a projected PowerPoint slides in the courtroom. They also felt that deciding on the on-screen placement of PowerPoint slides is important, as having the jury focus on what the attorney is saying in opening versus drawing the jury's attention to a slide should be determined. Simply putting up slides while the attorney is speaking is likely not the best option but showing the attorney's face and the slide at the same time could make the size of the slide too small to be effective. Deciding on the focus of the presentations should be worked out in advance.

### Witness Examinations: Direct & Cross

Witness examination is a bit clumsier in a virtual setting than in an in-person trial. In a courtroom, the attorneys can ask to "approach the witness" to direct the witness's attention to





something in the exhibit binder in front of him/her, which cannot be done virtually. Also, a communication channel needs to be set up for the attorney to send a document to a witness before publishing it to the jury for foundational purposes or to refresh a witness' recollection.

The biggest concern that the attorneys had during the trial was ensuring that the jury was seeing what they were seeing on my screen during the trial. For example, in the demonstration trial, there was a store video that captured the entire incident and what preceded and followed the incident. While the attorneys felt that the video was clear and unambiguous, they did not anticipate that the jurors would have difficulty seeing what they were pointing out in witness testimony and closing argument. They also felt that there should be a process of confirming that the nature and quality of exhibits is uniform on the remote devices that are being used. Thus, they felt that attorneys should practice streaming important visual evidence to ensure that their representations to the jury are accurately received.

In court, attorneys felt it was more difficult to time objections in an online trial. They usually are able to object prior to or while the witness is actually answering an objectionable question. Because it is not always apparent who is speaking in an online trial with multiple tiles of participants, they felt it would be useful to work out an objection system with a hand raise or some other type of signal that allows the objection to be heard prior to the witness's response.

### **Closing arguments**

The attorneys also felt they should be given time, just like in an in-person trial, to comb through the jury instructions to see if some need to be deleted or if there is a need for additions (to conform to how the evidence came in), and also to get clarity as to what exhibits have been admitted and which were just marked and not admitted. The attorneys will need to know the exact form of each exhibit that will be sent in the deliberation room with the jurors. Just as in an in-person trial, it is desirable to eliminate portions of multi-page exhibits that were not referred to and need to be redacted before the jury sees them while deliberating.



Overall, both the attorneys and the judges felt the online trial format, while initially unfamiliar and needing additional preparation, performed essentially like a normal trial, with its procedural stops and starts and flow of evidence, arguments, and legal instruction.

## **OCP Demonstration Jury Trial Recommendations and Considerations**

These recommendations and considerations are a combination of our observations from preparing and presenting the demonstration trial, discussions with judges, attorneys, jurors, court administrators, trial consultants, and technology experts, as well as observation of other online courtroom proceedings and mock trials. While some of these may be clear recommendations based on our research, others may be issues the court or attorneys and their staff should consider in preparing for online trials.

While we experienced some technical issues that interrupted or delayed the proceedings at times, the ability of the judge, attorneys, witnesses, and jurors to participate as intended in a trial did not appear to be impaired. In fact, the judge, jurors, attorneys, and witnesses commented that generally, some online procedures allowed them greater comfort, clarity, and engagement in the trial.

### **Technology and Court Operations**

- All participants in an online trial should have a desktop, laptop, or tablet with a screen surface large enough to allow clear viewing of all trial participants. In order to be able to clearly view evidence, witnesses, and each other during deliberations, we do not recommend that jurors use a smart phone or small tablet to participate in an online trial.<sup>18</sup>

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<sup>18</sup> Note that as currently configured, some technology platforms do not allow the use of tablets – only laptops and desktops.

This is an example of Juror 37 using his cell phone for the demonstration trial.



- If possible, judges, court personnel, and attorneys should have two or more screens to handle various online court and trial functions in order to more effectively handle jury selection, viewing and presenting motions, witnesses, and evidence, sidebars, and deliberations.
- If not using a desktop computer, jurors should always have charging devices available since online conferencing uses significant battery power. Ideally, jurors would have their device plugged into a power or charging cable at all times during the trial.
- If possible, jurors should also have an additional back-up device.
- If jurors do not have a desktop, laptop, or tablet computer, depending on budgets courts can purchase, lease, or rent relatively inexpensive computer equipment. For example, there are some laptops sufficient to stream an online trial starting at under \$200 without a government discount.
- Some courts may want to rent, lease, or purchase equipment and require all jurors to use court issued equipment in order to ensure the consistency of the viewing experience of jurors and to monitor or control access to outside sources of information during the trial. Depending on the venue, the equipment can be picked up by a prospective juror or could be delivered to individual juror residences. Alternatively, the equipment could be maintained in a dedicated government or court office space with social distancing protocols in place. Maintaining the equipment in centralized office spaces would ensure jurors have equal access to both appropriate equipment and a



sufficient broadband Internet connection for an online trial. If the courts would provide its own equipment, it would need to consider how to distribute and return the equipment, how to repair or replace damaged equipment, any agreements that participants would need to make to use the equipment, and any special instructions that participants would need to operate the equipment.

- The court may also discuss with counsel in civil cases the possibility that the parties would fund the rental, lease, or purchase of computer equipment. The parties would meet and confer to ensure integrity in the same manner as when trial presentation equipment costs are shared. The court would retain control over the procedural elements of the equipment and software used by jurors during an online trial, such as what the attorneys would be able to show and what jurors would be able to view.
- All participants in an online trial should have an internet upload speed of at least 1.5 Mbps to ensure sufficient quality of participant audio and video, and an internet download speed of at least 5Mbps per second to be able to receive high definition video evidence from the trial. All participants can test their internet speed, free of cost, at <https://www.speedtest.net/>.
- If there are areas with slower internet speeds that would not accommodate the viewing of high definition trial streaming, courts can consider getting parties in civil trials to agree to fund modem rental, lease or purchase for jurors who do not have sufficient broadband access. Alternatively, the courts can seek contributions from internet companies to provide such equipment or to boost internet speeds for jurors who would need increased access.
- The courts can also consider setting up “hot spots” with faster internet service in libraries, convention centers, or other government buildings along with socially distanced workstations, booths, or rooms to provide access where jurors might have none, control and supervise jury environments, and to ensure sanitation.



- The courts can advise civil litigants who wish to go to trial that they may also provide independent funding to set up juror internet access or to control jury environments in hotels or other independent venues. The court would need to approve the venue and would maintain control of procedural rules regarding juror reporting and use of the chosen site to participate in the trial. If the chosen site would need to accommodate many jurors, the courts should consider whether a technical bailiff would need to be assigned to monitor and secure jurors at that location.
- With any technology platform that is used, the following features are desirable for an online jury trial:
  - A “jury room” for jurors to check in and report for duty on the assigned date and time that allows court staff to enter and view who is waiting, to broadcast chat messages to all jurors, and to send chat messages to specific jurors.
  - A secured document storage platform that can be used for jurors and the court to exchange electronic notes and documents such as doctors’ notes from jurors and court forms attesting to jury service from the court. Several options include OneDrive, Dropbox, Box, and Sharefile or other messaging platform with the ability to upload documents. This should be configurable to allow the court staff to have full access to all documents while jurors can have access only to documents with their juror number.
  - A virtual courtroom for jury selection and evidence presentation.
  - A messaging system, such as a “chat” or “Q&A” function that allows jurors to communicate with the court if a judge chooses to employ question asking after witnesses.
  - A “room” for sidebar or in-chambers discussions.
  - “Meeting rooms” for plaintiff and defendant or prosecutor and defense sides to meet for private conferences outside of the hearing or viewing of others. The



parties may choose to communicate on their own private videoconferencing, telephonic, or messaging systems.

- A secure “deliberation room” for jurors to deliberate that allows the foreperson to contact and admit a bailiff when the jury needs to communicate with the judge.
- The deliberation room ideally should have an exhibit repository that allows jurors to access evidence for jury review.
- All participants should sign a videoconferencing agreement that includes a commitment not to record, to maintain confidentiality where required, and other relevant issues. The agreement should also include information about setting up, having appropriate backgrounds and setting out basic functions in writing for those who learn better in that format, want additional references to troubleshooting, and want to prepare in advance. **(See Appendix D)**
- If possible, if a technology platform has the capability to allow a “host” or centralized technical bailiff or clerk to control or move jurors and witnesses in and out of different rooms as well as manage requests to be admitted to a room and allowed entry as needed and appropriate.
- Additionally, private and confidential video or teleconference accounts should be employed by counsel and clients as well as judge and courtroom staff to ensure confidentiality in their own communications. This would allow counsel and clients and judge and staff to communicate confidentially with each other.
- If possible, a technology bailiff or clerk should be able to control the camera views of the jurors, the judge, the witnesses, the attorneys, and their clients.
  - The judge, the attorneys, and the clients should be able to clearly view all of the jurors in the voir dire process.
  - If possible, during the voir dire process, juror tiles should be fixed and not shuffled so the judge, clerk, and parties can more easily keep track of the jurors.



- Depending on court preferences, juror names and/or numbers should clearly visible during the voir dire process.
- Once selected, the judge, the attorneys, and the clients should be able to view the jurors at all times during the trial.
- Depending on the court's and the attorneys' preferences, speaking jurors in voir dire and witnesses in testimony would be spotlighted so trial participants would have a fuller view of their responses to questions. For witnesses who are questioned on demonstrative evidence, the court and the parties should determine whether the demonstrative alone would be shown while the witness testifies verbally, or the witness and the demonstrative would be shown side-by-side. When showing evidence such as videos or photos with annotations, it may also be appropriate to have witness and evidence side-by-side initially, to then be followed by a full screen view of the visual evidence to allow for sufficient juror review.
- The courts should determine the best method for conveying exhibits to jurors, either for inclusion in personal exhibit notebooks or for review during the deliberation process. This system can also be used to communicate the verdict form and jury instructions to jurors as necessary.
- A training program should be established for judges, court administrators, and court personnel to familiarize them with the technology needed to be able to facilitate an online jury trial as well as create standard protocols for setting up and managing the virtual courtroom, including troubleshooting protocols and contingency plans if systemic technical failures or power outages should occur.
- If courts have the resources and personnel, it is preferred to have two court personnel available to both manage the movement of jurors and the flow of information as well as to handle any technical problems that arise.
- The courts should provide prospective jurors with a tutorial about the use of technology in the trial, whether in written or verbal form, prior to the date of service. A technology



check should be conducted prior to the start of the trial to ensure prospective jurors can use their devices appropriately and have an adequate internet connection.

- The court should create standard protocols for setting up and managing the virtual courtroom, including troubleshooting protocols and contingency plans if systemic technical failures or power outages should occur.
- Communication channels, such as contact numbers, text registry, or other app should be set up between the court and jurors to notify them of scheduling changes or of any technical difficulties.
- If jurors have particular disabilities such as hearing or sight impairment, courts should consider various software functions such as speech-to-text to assist those jurors in participating.

### **Trial Scheduling**

- In a pre-trial conference, the court and the attorneys should discuss trial estimates in some detail and how trial procedures will be handled to ensure that the trial proceeds as smoothly as possible.
- Prior to the start of a given trial day, jurors should check in in with the technical bailiff or clerk at least 30 - 45 minutes early to ensure that their equipment and internet connections are stable.
- Research points to computer fatigue in online learning scenarios, which is the closest research we have to a courtroom scenario. Therefore, courts can consider rearranging trial schedules and engage in shorter trial days with more frequent breaks (such as every hour). Shorter trial days may also allow certain jurors to have partial workdays, which would decrease the amount of hardship requests and increase the pool of potential jurors.





- Similarly, in order to minimize computer fatigue over extended periods of time for all participants, the trial judge and the attorneys can engage in pre-trial discussions on the efficient presentation of evidence.
- In addition, in pre-trial conferences, the trial judge and the attorneys can discuss agreements to the pre-admission of evidence and motions to minimize objections and the necessity for virtual sidebars.
- As some witnesses, such as experts, will not have to travel to a particular venue, attorneys may be able to schedule witnesses in a natural sequence of evidence as opposed to accommodating the travel schedule or availability of witnesses.

### **Communication Among Court Participants**

Court proceedings are a unique forum. Evidence is primarily communicated verbally and in the form of exhibits in a highly formalized environment. However, the nature of a dispute between parties in an adversarial forum also determines that arguments, personalities, human intent or motive, and the measurement of intangible elements such as emotional distress, pain and suffering, punitive damages, and victim impact are also considered by a jury. Thus, the following elements should be considered by parties, attorneys, and the court in conducting an online jury trial. Receiving information only through screen and sound can affect the nonverbal aspects of physical presence in a trial.

- During breaks, an online platform should provide a break-out room to allow jurors to congregate and get to know each other and discuss non-evidentiary issues, just as they might in a physical courtroom trial. For those jurisdictions that allow pre-deliberation discussions among jurors, jurors should be given strict instructions that if evidence is discussed, they must ensure that all jurors are present, as they would be in a traditional in-person trial.
- The courtroom itself and its formalized procedures convey a type of gravity to a legal case that cannot be conveyed in exactly the same way in an online trial. The court and the parties should consider instructions and arguments to convey the seriousness of the



matter to the parties in the case. The technical bailiff can also play an important role in creating a proper sense of virtual courtroom decorum. Backgrounds (either virtual or actual) for the judge, witnesses, and attorneys should also convey the serious nature of the proceedings.

- While we have become accustomed to wait times in a normal courtroom procedure, we are more impatient when dealing with delays with technology or online events, such as the waiting for jurors to come back from breaks or for attorneys to find an exhibit. It is advisable for the court and the parties to discuss the inevitable delays in dealing with technology and to urge patience while technical issues are sorted out.
- In having a full view of the jurors in an online trial, the court, court personnel, and the attorneys should monitor jurors for inattention or distraction during the trial. If this is observed, the court should consider breaks, questions or check-in actions to keep jurors engaged, or periodic admonishments if juror attention seems to be lagging or directed elsewhere.
- An interactive system where jurors or the parties can sign in or out during breaks will help the courtroom staff keep track of who is present when court resumes.
- Online learning studies have shown that greater interactivity increases comprehension and retention of information. The court can consider whether they would encourage juror questions after witnesses to enhance juror participation or to periodically ask the juror an innocuous question or two to ensure they remain engaged in the trial.
- As the visual presentation of all participants may affect the perception of a given individual, consideration should be given to advising and instructing jurors about their backgrounds, their lighting, and their camera placement in jury selection. If possible, it is advisable for the court, the attorneys, and witnesses to use a common courtroom background during the trial.
- Communicating in person is different than communicating on camera. The judge, attorneys, and witnesses should consider learning on camera techniques to ensure they



are communicating not only the content of the evidence, testimony, or instruction, but the meaning of that content as well.

- As facial expression, posture, and gesture convey a significant portion of nonverbal impressions, jurors, attorneys, and witnesses should position themselves in the camera so that their faces and upper torso are clearly visible.
- Attorneys should use their best judgement and practice whether they should be standing or sitting during voir dire, openings statements, witness examinations, or closing arguments.
- The disparity in technological expertise and relative smoothness of case presentations may affect the perceptions of the jurors. Whenever possible, attorneys and witnesses should practice their online presentations and discuss with jurors the differences in technology use between the parties, if applicable.

### **Jury Selection Process**

- If not already established, the courts should establish an online jury summons and supplemental juror questionnaire process able to contact jurors through email and SMS text messaging.
- In the jury summons, the court administrator or jury commissioner should ask whether jurors have computer equipment and internet capabilities suitable to stream an online trial. Additionally, prospective jurors should be asked to rate their own proficiency with use of computers, communicating online, and streaming online content. Jurors should also be asked whether they have a space in their home where they can view a trial uninterrupted during a trial day and securely deliberate without interference. In the jury summons, the court can ask if there are any other hardship issues that would prevent a prospective juror from serving.
- If possible, a hardship hearing could be held prior to the official trial date for the court to discuss juror hardships. In a hearing, the court can discuss with the parties the various



juror hardships, jurors could be either called or video conferenced if additional information is needed about the hardship and the judge can rule on the hardship.

- Then, if a court deems it appropriate to use a supplemental juror questionnaire, it can be sent (or a link provided) to the remaining pool of jurors to be filled out and returned in advance of the jury selection date. The parties can then review the questionnaires and plan their voir dire accordingly.
- Although some platforms allow up to 49 tiles of participants to be viewed at once, we strongly recommend that jurors be voir dired in smaller groups (6-12) in order to allow the court and the parties to be able to view jurors and their responses more clearly. Courts may determine if there are standard camera views that would allow the court and the attorneys to have the clearest view of a prospective juror.
- The court may decide jurors need to be interviewed individually or may need to be questioned privately as a result of their questionnaire or voir dire responses. In this event, the court should adjourn with the attorneys into a “sidebar” break out room to discuss the matter individually with the juror.
- In the voir dire process, care should be taken to number jurors and introduce them into the virtual jury box in order to allow the parties to keep accurate track of the jurors. If the court also allows juror names to be used, those can also be included to assist counsel to keep track of the pool.
- If possible and the technology allows, jurors should be in fixed positions to avoid scrambling the pool and causing delays or mistakes as attorneys attempts to locate the correct jurors.
- Cause challenges should also be heard and ruled on in the virtual sidebar break out room.
- Depending on judicial preferences, peremptory challenges can be heard in the virtual sidebar break out room, communicated in written form via a closed chat system, or can be issued after the entire jury pool is assembled back in the main virtual courtroom.



- Depending on the jurisdiction and the predetermination about the technology proficiency and internet stability of the jury pool, the court should consider seating additional alternates in case technology or technical issues prevent some jurors from continuing their participation in the trial.
- Because jurors will be viewed in a “tile” formation and depending on how large a group the court decides to voir dire at once, attorneys and the court should ask jurors to raise hands clearly, take time to mark down responses, and pay close attention to other juror nonverbal clues to make sure they are catching all juror reactions and responses to voir dire questions.
- Whenever possible, it is important to give the attorneys the final randomized list of jurors when they receive supplemental or case specific juror questionnaires, if used to allow them to keep the jurors in order.
- Similarly, during the voir dire process, it is advisable for the parties to be able to take screen shots of the panels to be able to more accurately remember juror placement.

### **Opening Statements and Closing Arguments**

- Special consideration should be given to ensuring these phases of trial – which comprise “monologues” rather than “dialogues” and can therefore contribute to a greater feeling of fatigue among jurors – are concise and well-prepared.
- Prior research indicates jurors find it easier to see exhibits that are displayed on their personal screen, rather than on a courtroom screen which is often too far away, too dim, or otherwise difficult to see. However, attorneys should consider that there is usually a tradeoff – jurors can easily see either the speaker or the exhibit, but likely not both simultaneously. Therefore, care should be taken to spotlight evidence or advocacy with intentionality.
- It is possible to connect and build relationships with jurors through a camera lens. However, it is a different skill set than presenting live. Training and practice are required to develop the ability to do it skillfully.



- Similarly, body language can be used effectively on camera, but requires different skills. Standing can be effective, assuming it can be done without forcing the lawyer too far away from the camera or microphone. The courts and the attorneys should consider whether they want to standardize attorney position or allow attorneys to make their own presentation choices. Whichever approach is used, the court and attorneys should be aware that their nonverbal choices will affect the perceptions of jurors.

### **Witness Examination**

- As mentioned above regarding Openings and Closings, the court and attorneys should consider if or how they want to focus the jurors' attention during witness examinations. Displaying questioner and witness side-by-side can work well until an exhibit is shown, at which point priority must be given to either the witness or the exhibit.

### **Exhibits and Demonstrative Evidence**

- Sharing documents or two-dimensional demonstrative exhibits can be extremely effective in an online environment, since the jurors are able to see the screen clearly.
- One challenge in an online trial is the use of a 3-dimensional exhibit (a model, product, or material, for example). If this type of evidence is required in a particular case, the court and counsel should discuss this limitation, and possible solutions to presenting this evidence most effectively.
- 3-D evidence or animations could be a viable alternative to physical exemplars in remote trials, as they can be rotated and explored by an attorney or an expert witness in examination. There are some platforms that would allow the witness to control the screen however we highly suggest having someone skilled with presenting evidence assist with the examination.



## Jury Instructions and Deliberations

- When delivering jury instructions, the court should consider showing the instructions via a screen share function to aid in juror comprehension and retention of the instructions.
- Jurors should be instructed on how to communicate with the technical bailiff and the court during deliberations through a predetermined messaging system.
- To provide security, jurors should receive a verdict form and requested exhibits to examine in deliberations via a secure FTP site or Dropbox link.
- If desired, jurors can also be instructed on how to use an anonymous polling function in these platforms to allow jurors to vote on verdict questions anonymously.
- Jurors can also be instructed on a share screen function if they want to view a single document brought up by the foreperson or other member of the deliberating jury.
- Jurors can also be instructed on an online white board function that they can use to diagram or map out discussions among jurors.
- Jurors should be instructed that they may not eat while court is in session, and should instruct jurors on its preferences for drinking beverages while court is in session.
- Whenever possible, the court should endeavor to keep jury instructions as simple as possible. Because of the unique nature of online trials, the court and parties can consider writing special preliminary or jury instructions on the following issues:
  - Having jurors locate themselves in a secure private setting where they can view the trial in an uninterrupted and undistracted manner.
  - Turning off all other electronic devices while court is in session in order to prevent distraction and the temptation to research aspects of the case.
  - Preventing jurors from recording the court sessions.
  - How jurors should take and use notes during the trial.



- How jurors should contact court personnel if they are experiencing technical problems.
- How they should remain logged into the court feed during breaks to prevent reconnection problems.
- Proper use of devices to view the trial.
- Not favoring individual parties because of perceived differences in equipment, technological proficiency, backgrounds, or lighting.
- If they are allowed to ask questions of the witnesses, how and when they would submit those questions.
- Whether any strengthening instructions are needed on not conducting independent research or allowing any outside influence.
- The importance and seriousness of the matter and their duty, even if they are viewing the trial in their homes or not in a courtroom.
- How to conduct deliberations to ensure that all jurors are seen and heard in the deliberation process, whether it is through virtual or visual hand raises.
- The importance of being in a secure private setting during the deliberation process to ensure there is no outside influence and to ensure the sanctity of the deliberations.
- How to communicate with the technical bailiff if the jury has a question or if they have arrived at a verdict.
- How to fill out and return an electronic verdict form.

**(See Appendix C- Sample Jury Instructions)**





## Legal Issues

- All parties and counsel should sign waivers of any legal challenges due to the online platform. They should also agree that any legal challenges that they have during the course of the trial be raised and preserved on the record so they do not make an argument later that they wanted to raise an issue but could not do so because of the online nature of the trial.
- It has been argued that online jury panels cannot be as diverse as a normal panel given the technology that a prospective juror would need to participate in an online trial. While we certainly experienced technology issues with a few of our prospective jurors, one must also consider the ease with which one can report for jury service. Rather than have to drive, take a bus, get a ride or otherwise find a way to travel to a central courthouse location, prospective jurors can participate as citizens from the comforts of their homes. Or, if they don't have the proper technology, they can participate from the comforts of their local library. No system will be perfect for everyone. But, given the many people who have limited transportation options or disabilities that prevent mobility, online trials may, in fact, increase diversity and participation in our jury system.

## Public Access to Trials

The First Amendment right to attend criminal trials includes the right to attend jury selection ([\*Press-Enterprise Co. v. Superior Court of California\*](#)), and the Sixth Amendment states, in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” In what we all considered “normal” times pre-COVID-19, anyone could enter most any courtroom to observe the proceedings. Now, with many courts closed or modified to limit the number of people in a given area, streaming video channels such as YouTube can serve that function remotely in a similar manner as the rest of the proceedings.



For example, Zoom includes an option to live-stream the main room (not including breakout rooms) to a YouTube channel or other location. This is not to be confused with or considered an “official record (such as a Court Reporter’s transcript),” and as such should not be recorded. In fact, Zoom and other platforms include an option to “brand” the video with a logo, which may be used to label the video with a “Do Not Record” notice. Appropriate instructions should also be placed on the live viewing channel.

Although YouTube includes an option to save the video file indefinitely, that is not the intent, just as it is not permitted for news crews to film and broadcast every court trial.

We have the great pleasure of submitting this Report.

Respectfully,

The Online Courtroom Project Advisory Board

[www.onlinecourtroom.org](http://www.onlinecourtroom.org)

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## Appendices

- Appendix A- [E-mail template, sample jury summons/questionnaire \(blank\)](#)
- Appendix B- [Sample jury questionnaire and supplemental questionnaire \(completed\)](#)
- Appendix C- [Jury instructions for online trial](#)
- Appendix D- [Agreement for counsel and jurors to proceed with online trial](#)
- Appendix E- Link to OCP's [Demonstration Trial via YouTube](#)