

## **Jury Selection a Year After the Pandemic: Thinking Outside the Box**

By Susan G. Fillichio

On Friday, March 13, 2020, when communities across the nation were preparing to go into lockdown because of the pandemic, our team finished up a jury research study in Los Angeles. We were scheduled to assist with jury selection the following Monday. Our clients dashed to LAX to avoid getting stuck here and we were ready to hunker down and take advantage of some breathing room, thinking maybe the trial would begin a few weeks later. As our communities struggled to deal with the impact of the virus, courts across the land hit the pause button several times and eventually the civil jury trial machine quietly shut down.

Now, as trial dockets are coming alive, we are increasingly in courtrooms, both online and in person, experiencing unexpected changes in the process of conducting civil jury trials and jury selection in particular. The pandemic has posed challenges to what have been tried and true methods of jury selection, or getting jurors in the jury box. While changes in the process are evolving through local rules in full view of counsel, what is far less apparent is how these newly adopted processes and the residual effect of the pandemic itself will impact juror behavior. With a limited sample of trials thus far and the data still developing, we are far from reaching definitive conclusions. Preliminarily, we have observed that jurors have settled down to business and are performing the task at hand. They are behaving as if we have passed a state of crisis. Likewise, despite the challenges inherent in online and in-person jury trials, trials are moving forward relatively efficiently.

For the moment, with this limited sample, we observe no “trend” in verdict preferences that is linked to either the new processes or the pandemic itself. In the months (and years) to come, we will develop additional information on how these “out of the box” changes may impact juror behavior. In the meantime, below are some highlights that the Fillichio & Hastings team have experienced first-hand which may be useful to counsel in preparing for upcoming online and in-person trials.

Online jury trials: some said it could not be done. Prior to the pandemic, many lawyers had already discovered the utility of online jury research, which had been conducted for about 5 years. Online focus groups (a traditional mode of opinion research conducted in an opened-ended and non-deliberative format) were gaining in popularity. Those early studies typically involved shorter time frames, half-day sessions, sometimes with fewer jurors than in live jury research; they were cost efficient as they required no travel for the legal and consulting teams and were suitable for a quick read on a straightforward case or a few issues within a more complex case. While there were limitations, the benefits were significant (think half-day study on

a contract case venued in Florida conducted online two days before Christmas and no one got on a plane).

In March of 2020, when jury research moved completely online, many raised an eyebrow about the efficacy of deliberative studies in a videoconferencing format. However, some consultants and their innovative clients adapted quickly and held single and multi-day mock trials with jurors deliberating to verdict in the early days of the pandemic. Online mock trial and focus group studies are routinely conducted by the Fillichio & Hastings team, in cases involving product liability, patent infringement, insurance coverage issues, contract disputes, and construction cases, to name a few. We engage research subjects who are juror eligible participants from small and large venues across the country and prepare these studies with significant input from the trial team. Since many trials are proceeding online, with jurors deliberating to verdict in this vary same videoconferencing format, the methodology is more pertinent than ever, arguably more of an “apples to apples” comparison for a case moving to trial online.<sup>1</sup>

In the face of unprecedented backlog, it is not surprising that some courts across the country are moving forward with online jury trials. Necessity is indeed the mother of invention. Online jury trials are a natural outgrowth of the Covid-19 crisis coupled with the reality that America has achieved a high level of proficiency in internet usage.<sup>2</sup> The Pew Research Center reported just weeks ago that only 7% of adult Americans do not use the internet.<sup>3</sup> That statistic is down by 43% from 2000, when 50% of adult Americans did not use the internet.<sup>4</sup>

Some courts have been more aggressive than others in experimenting with online trials. State courts in Alameda County (Oakland), California, have led the way in conducting approximately a half dozen jury trials online, despite counsel’s well-argued due process and other challenges to the online medium. It has been the privilege of F&H to support trial counsel in nearly all of those online trials.<sup>5</sup> The courts themselves have faced technical challenges, including:

- The choice of the most suitable video conferencing platform;
- Training court personnel to handle a large number of jurors and counsel at one time;

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<sup>1</sup> We do not suggest that any online or in person study is predictive of verdict. These studies have been successfully utilized by counsel in obtaining information about juror attitudes pertinent to case themes, trial preparation and settlement evaluation, particularly when such studies are well-designed and seamlessly executed.

<sup>2</sup> Notably, we are not advocating one way or the other for online jury trials. We assist our clients in evaluating the utility on a case-by-case basis.

<sup>3</sup> Andrew Perrin and Sarah Atske, Pew Research Center, April 2, 2021, “7 percent of Americans don’t use the internet. Who are they?” The report was based on a survey of 1,502 American adults conducted from January 25 to February 8, 2021, using landlines and cellphones. The study reports a difference in internet usage among adults over 65 years old and those with higher levels of education; the survey reports no statistically significant differences in internet usage among other demographic categories such as race, ethnicity, gender, or community type. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> The Alameda County online trials thus far have ended in verdicts, mistrial, and resolution prior to verdict.

- Figuring out how to administer supplemental juror questionnaires in ways that are least disruptive to jurors;<sup>6</sup>
- Configuring the online jury box (jurors are typically numbered 1-18 but juror images bounce all over the screen);
- Arranging for side bars (regularly done in videoconference breakout rooms); and
- The inevitable occasional loss of internet connection at one time or another by everyone involved (court personnel, counsel, jurors, and witnesses).

Despite these technical challenges, however, the jurors themselves have experienced relatively few technical issues from their personal hardware set-ups.

The impact of not being in person. Amongst the significant challenges counsel have faced in this new environment is keeping jurors' attention during trial and identifying instances where jurors are not on screen or in view. For example, the courts have called dozens of jurors to "appear" online for jury selection all at the same time. Given the number of people participating in the videoconference at one time, all jurors are not visible on the same screen; counsel and consultants must scroll through several computer screens to get a look at all of them.

Reports of unusual and unacceptable juror behavior in online trials are widespread. Jurors have engaged in many other activities besides participating in the trial (e.g., cooking, exercising, talking on cell phones, caring for children and pets, engaging in other online activities, and even driving). Many jurors whom we interviewed after trial admitted that it was just too tempting to catch up on emails, texts, or online news as it popped up on their screens throughout the day. Even those jurors who were otherwise committed to being completely free of distraction sheepishly told us that they succumbed to doing other things occasionally during trial because they were bored.<sup>7</sup> Some courts have been better at policing juror activities online than others. One juror, who was called out by a court recently for failing to appear fully in the video frame, admitted to us after trial that he was doing other things at the time. He was slightly embarrassed in the moment, but said he was grateful for the court's intervention because it kept him on task during the remainder of the proceedings.

Even so, jurors who admitted to engaging in "multi-tasking" during trial had nonetheless formed opinions about the case. Counsel are well aware that jurors do not process all information conveyed by counsel or witnesses at trial because of cognitive limitations inherent in all of us. However, this new variable, the physical environment of the individual juror (which may not be fully perceptible to the court or counsel), is of unknown impact. It is more challenging to assess

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<sup>6</sup> Alameda County has recently utilized Survey Monkey to administer the multi-page juror questionnaires, which avoids jurors visiting the courthouse at all.

<sup>7</sup> Of course, we have observed jurors in the physical courtroom who are not paying attention; indeed, some jurors have slept through large portions of evidence at trial.

how multi-tasking and/or distractions in the juror's physical environment impact the process of decision-making, or even when those distractions occur. While we might see what happens in the tiny video frame (the cat hopping up on the desk, another person entering the room), we cannot hear what goes on in the juror's surroundings since the juror is on mute. Anticipating that jurors' attentions spans will wander, and it is more difficult to notice a wandering eye on a video screen, it is more important than ever for counsel to visually enhance verbal communications and to plan those visual communications carefully.

Documentary exhibits are not enough; graphic depictions of themes and concepts are expected by jurors in today's world and provide essential assistance in this medium.<sup>8</sup>

Many counsel have expressed skepticism about the ability to effectively conduct voir dire in an online trial. It is indeed different to ask questions of jurors in an online environment compared to being at a podium in the courtroom or (as some of you do so well) moving about the courtroom. Nonetheless, it can be done, and the objectives are the same: get the jurors talking and listen to them. Notably, time passes slowly online. You may be drawn into the idea of shortening the process of voir dire, but we recommend that you resist that challenge as it takes time to connect with jurors in this medium, more time than in person. Counsel have succeeded with considerable preparation and practice and taking their time.

Jurors we interviewed after trial reported that they much preferred being at home while serving, as compared to being in the courthouse. Almost every juror discussed the convenience of not having to drive to the courthouse, find parking, wait in an uncomfortable place and plan for meals away from home; not surprisingly, many reported that they would not have been comfortable in the courthouse because of the pandemic. I cannot recall a single juror interviewed after an online trial who told us they would rather have served in the courthouse. Our sense was that, even without a pandemic, jurors would prefer being at home. While several expressed some discomfort with deliberating with other jurors without having gotten to know them as they would have in person, they seemed to muddle through the process; some appeared to form bonds typical of in-person deliberation processes (exchanging personal information to stay in touch after trial, etc.).

Regardless of the challenges, online jury trials are moving forward and likely will become more common in the months to come as federal and state courts around the country attempt to manage their dockets.

In person, the jury box as we knew it is not the same. In Los Angeles County, the very first two in-person civil jury trials post-pandemic were recently tried. As the court in the first case repeatedly told jurors, it was historic, as the courts had not seen jurors for a year.<sup>9</sup> Both cases

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<sup>8</sup> Visual enhancements in the online world are a topic all their own and best addressed by my colleague, Layne Hastings. Suffice it to say that there are differences in what reaches jurors in the online world versus the in-person courtroom.

<sup>9</sup> The Fillichio & Hastings team was privileged to support counsel in both cases.

involved claims of exposure to asbestos from talc, which allegedly caused or contributed to disease. In both cases, the courts allowed administration of a detailed supplemental juror questionnaire. The first case went to verdict; the second case resolved after the jury heard the testimony of one witness and part of the testimony of another.

While both cases were venued in the iconic Spring Street federal courthouse, they were in different courtrooms, with two very different jurists presiding, and somewhat different protocol observed in each.

When the first in-person civil jury trial started in March 2021, the building was empty; but for security personnel and an occasional jurist and court staff, the halls were deserted. The courthouse café remained closed. Downtown Los Angeles was just waking up from a very long hiatus of inactivity.

Parking lots were roped off and very few restaurants were open anywhere near the courthouse. In that first trial, counsel and I found an open Starbucks several blocks away and we walked there every day at lunch; the jurors were left to find their own way around the downtown area. By the time the second trial started, things had opened up a bit more; the courthouse café was serving in the morning hours and there were more people present in the courthouse.

Inside both courtrooms, there was an atmosphere of cooperation amongst nearly all present. The court and counsel were in high spirits. Ample courtroom attendants were friendly and present to monitor the Covid-related protocol, including the proper use of masks, social distancing and the comings and goings in the courtroom. The new-normal kiosk of hand-sanitizer sat at the back of each courtroom. In both cases, the court clerk provided counsel with both a random and alphabetical list of jurors on the first day of jury selection, and on each subsequent day when new jurors were called in for the hardship process. County officials had approved the placement of appropriately distanced seats. While each courtroom was configured differently, there were 18 numbered seats for jurors; two people were present at counsel table, distanced six feet apart. Given the social distancing requirements, only four prospective jurors were seated in the jury box, with the remaining 14 spread to the far corners of the courtroom. All present wore masks of their own choosing. In one courtroom, gloves were placed at every juror's seat. Because jurors were no longer in the traditional jury box, we relied heavily upon a diagram of the seat numbers during jury selection in both cases.

In the first trial, the court handled hardships in groups of 18, with the overflow of jurors housed in two separate locations in the empty courthouse. Social distancing protocols were observed in each of those ancillary locations. Once a handful of jurors were dismissed from the trial (for hardship, cause or after exercise of peremptory challenges), replacement jurors were brought into the courtroom. Given that replacement jurors were not all waiting in one place, there was

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remarkably efficient communication between courthouse personnel and very little delay in getting jurors in and out of the courtroom. When it came time to question jurors, it was a challenge for counsel to address them, and to hear them, as they were scattered across the large space. As in the online jury selection, we strained at first to locate jurors. Still, eventually counsel found their rhythm and were able to fully inquire of jurors about their pertinent attitudes and beliefs. As counsel and jurors adjusted to the masks and social distance, jurors spoke into a hand-held microphone (sanitized carefully after each use) and we seemed to forget that jurors were wearing masks. Aside from the occasional request from the court reporter to repeat the response to a question, there were few interruptions. Sidebars were conducted at a distance at sidebar, or after jurors had left the courtroom. Hardships and voir dire of the main panel of 12 and four alternates was completed in 6 days, a typical time frame for jury selection in a complex case in Los Angeles Superior Court.

In the second trial, the court required the parties to jointly prepare a detailed trial plan of how the case would proceed. Hardships lasted two weeks; the court called in one panel of jurors at a time to complete the hardship process. Jurors who were not in the courtroom were not permitted to be in the courthouse. The court ordered the parties to conduct voir dire on all 62 time-qualified jurors; voir dire of that entire time-qualified panel of jurors was completed rapid-fire over three days, in groups of 18 at a time.<sup>10</sup> Cause challenges and sidebars were conducted in chambers, with only one lawyer per side in attendance, accompanied by the court reporter. One interesting wrinkle was that the court ordered that peremptory challenges take place outside the presence of the jurors, with only counsel and consultants present.<sup>11</sup> All told, the jury selection process was completed in just under three weeks and worked reasonably well.

The impact on juror attitudes. Much has been studied and written about the impact of societal crises on juror attitudes, including the Enron scandal in the early 2000's and the financial crisis of 2008. There has been considerable concern and speculation about how jurors will react following this current crisis once the system regains additional functionality. As expected, some jurors in both online and in-person civil jury trials have expressed doubts about their ability to serve as fair and impartial jurors because of the Covid-19 crisis. Those jurors were excused by the courts, both online and in person. Also, as is typical in any type of civil jury trial in jurisdictions across the country, some jurors expressed a mistrust of corporations generally. In certain instances, this mistrust has intensified during the pandemic, particularly toward companies like Amazon or others, which have experienced profit and growth during the pandemic while so many individuals and small businesses have suffered loss. Other jurors have been open to consider the role large corporations currently play in our changing economy. As in all cases, the details matter: details

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<sup>10</sup> In many cases, counsel does not question the entire list of time-qualified jurors, since the parties begin to exercise peremptories once a panel of 18 or so jurors (the California "six pack") survive the hardship process. As always, there was some attrition for hardship in the panel of 62 over those three days of voir dire.

<sup>11</sup> While unprecedented in trial counsel's and this author's experience, there is evidently no provision in the California Code of Civil Procedure that speaks to the issue of jurors being present for the exercise of peremptory challenges.

about the case, industry and companies at issue, and the individual juror's attitudes and experiences.

Importantly, with the administration of massive quantities of the vaccine, jurors seem to see the end in sight; in the short term, they are behaving as if the current crisis has passed. Overall, we have seen incredible patience displayed by jurors both online and in person; while some still would prefer not to serve, others are more willing to engage in the process. Some are motivated to help the country move forward; others are looking for activities to relieve the monotony of life in the pandemic. Notably, we do not have sufficient data to answer the question of how such changes will impact verdict or damages preferences in civil litigation.

Concluding comments. Unlike crises experienced in the past, the pandemic has had a direct impact on the current process of civil jury trials. The courts have shown that they are willing to alter decades-old practices and procedures to move cases forward. For example, some California courts have urged the parties to agree to a jury of fewer than 12, the requisite number of jurors required in a civil case under California law.<sup>12</sup> As of the date of this article, no such agreement has been reached. As courts struggle to clear their dockets, there may be other "out of the box" suggestions proffered to accommodate the backlog of trials. What remains important for counsel is preparation for the changes to come and to understand the possible impact of such changes on juror behavior and verdict tendencies; for this challenge, there is no substitute for experienced counsel and consultants. As we face additional systemic adjustments, and gather more data, we will continue to evaluate how the pandemic may impact juror attitudes in civil jury trials.

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<sup>12</sup> See California Code of Civil Procedure §220.