



Virtual Trial – Real Error

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Tina M. Glezakos is a Partner whose practice focuses on diverse complex civil litigation, including products liability, asbestos defense, environmental torts and civil appeals. Since her admission to the California State Bar, Ms. Glezakos has gained extensive state and federal trial court experience, including conducting virtual *voir dire* in one of the first virtual trials in Alameda County, and has argued before several California Courts of Appeal. Ms. Glezakos manages a wide array of clients and coordinates local dockets for national clients.

Bina Ghanaat is a Partner with experience in toxic torts, insurance coverage, bad faith, habitability, and personal injury cases. Ms. Ghanaat has defended a wide range of clients, including manufacturers, suppliers, contractors, insurance carriers, building owners, and trucking companies. Recently, she served as co-counsel with Mr. Hugo in one of the first Zoom trials in the Superior Court of California for the County of Alameda and she was able to observe the ethical pitfalls of a fully remote trial firsthand.

I. INTRODUCTION

In proceeding with virtual jury trials during the COVID-19 pandemic, courts have unwittingly opened up a Pandora’s Box of unforeseen problems which implicate numerous due process and ethical concerns. As recent cases in Northern California illustrate, traditional safeguards are lost during remote trials. For example:

- The inability to ensure that the persons selected for jury service constitute “a representative cross-section of the population.”
- The inability of counsel to participate because they are muted.
- Juror inattention, such as attending *voir dire* while driving or witness examination while seated in a car.
- *Ex parte* communications between a party and the jurors.
- Juror absence, such as dropping off the Zoom trial due to connectivity problems.
- Jurors pre-forming opinions before being allowed to deliberate by viewing the evidence before they are authorized to do so.
- Witnesses relying on undisclosed notes.

Virtual trials challenge the Court’s ability to control all of the participants involved and increase the risk that misconduct on someone’s part will violate the due process rights of at least one of the parties. In addition to juror ethics, virtual trials also implicate judicial ethics, including the rules governing judicial impartiality and judicial communications.

II. DISCUSSION

A. Virtual Trials Raise Concerns Regarding Whether the Jury Venire Is Composed of a Representative Cross-Section of the Community.

Article 1, section 16 of the California Constitution states that a trial by jury is an “inviolable right” and “shall be secured to all.” Similarly, California Code of Civil Procedure¹ section 361 guarantees the right to a trial by jury as “inviolable.” The Trial Jury Selection and Management Act, contained within Code of Civil Procedure Section 191, states that it is the “. . . policy of the State of

¹ Unless otherwise indicated, all statutory references are to California’s statutes.

California that all persons selected for jury service shall be selected at random from the population of the areas served by the Court” and that “. . . all qualified persons have an equal opportunity, in accordance with this chapter, to be considered for jury service in this state.” Code of Civil Procedure Section 197(a) states that “[a]ll persons selected for jury service shall be selected at random, from a source or sources inclusive of a representative cross-section of the population of the area served by the Court.” Finally, Code of Civil Procedure section 203(a) states that no eligible person shall be exempt from service as a trial juror by reason of occupation, economic status, or any characteristic defined in Section 11135 of the Government Code. These mandates can be violated where jurors are improperly disqualified during the hardship process “on grounds of competency, suitability, [or] undue hardship.” (*People v. Wheeler* (1978) 22 Cal.3d 258, 273.) Against this backdrop, any proposed “virtual” or quasi-virtual procedure for conducting juror hardships has the potential for violating these “inviolable” mandates.

For instance, in the matter of *Ronald C. Wilgenbusch and Judith A. Wilgenbusch v. American Biltrite, Inc., et al.* (Alameda County Superior Court, Case No. RG19029791), at the pretrial conference, the Superior Court of California for the County of Alameda (“Alameda Court”) noted that if it could secure a large enough courtroom, the trial would be conducted in person. Absent that, the Alameda Court’s stated intention was to proceed via remote methods, with potential jurors who had access to high-speed internet participating from home and those without being physically present in the courthouse. This distinction fundamentally treats prospective jurors differently based solely on their economic status. Code of Civil Procedure Section 203 specifically identifies “economic status” as an improper justification to exclude someone from serving as a juror. If potential jurors cannot serve on a jury simply because they do not have access to the necessary audio-visual equipment to do so, or lack the required technological acumen to properly participate, it is certain that a large swath of the potential jury pool will be excluded from serving, effectively prohibiting a jury based on a representative cross-section of the community.

Moreover, even attempting to proceed with trial and jury selection during the COVID-19 pandemic will unintentionally, but inevitably, ensure the proposed jury venire does not represent an adequate cross-section of the community. Elderly jurors will undoubtedly refuse to serve given their enhanced susceptibility to disease contraction, and thereby be systemically excluded from serving. These exclusions from the jury pool will not result in a representative jury.

Under the California State Constitution, as well as various statutory provisions, parties are entitled to a jury drawn from a representative cross-section of the community, and “[t]hat guarantee mandates that pools from which juries are drawn must not systemically exclude distinctive groups in the community.” (*People v. Anderson* (2001) 25 Cal.4th 542, 566.) Under any virtual or semi-virtual procedure, parties cannot receive that guarantee.

In the *Wilgenbusch* matter, Hugo Parker attempted to determine whether

the jury pool was drawn from a representative cross-section of the community, or, as it feared, whether certain segments of the population were being excluded from participation. Hugo Parker tried to answer this question by issuing a subpoena duces tecum to the Alameda County Superior Court Jury Commissioner to determine (1) How many summonses were issued; (2) How many people reported; (3) How many people asked to be excused/deferred due to health concerns; (4) How many people failed to show up; and (5) How many people who reported were turned away based on medical screening. However, these questions were never answered because the process server was unable to serve the summons given that the courthouse was locked and closed to the public.

B. Virtual Trials Create Opportunities for Juror Inattentiveness and Other Misconduct.

The California Constitution provides that “[t]rial by jury is an inviolate right and shall be secured to all.” (Cal. Const., art. I, § 16.) Thus,

a jury’s failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party. (See Code Civ. Proc., § 657, subd. 2.) *The duty to listen carefully during the presentation of evidence at trial is among the most elementary of a juror’s obligations Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled.* (U.S. Const., 6th & 7th Amends.; Cal. Const., art. I, § 16.)

(*Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 411 (emphasis added).)

To ensure the selection of a jury that will abide by its “duty to listen carefully during the presentation of evidence,” Code of Civil Procedure section 222.5(b)(1) provides that:

...counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable the counsel to *intelligently* exercise both peremptory challenges and challenges for cause...During any examination conducted by counsel for the parties, the trial judge *shall permit liberal and probing examination* calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court. (emphasis added).

In *People v. King* (1987) 195 Cal. App. 3d 923, the Court of Appeal stated as follows regarding an attorney’s ability to conduct an effective and adequate voir dire:

...in practical terms, observing potential jurors may reveal as much about them as counsel may learn from listening to them. As if to

underscore the importance of the visual aspect of jury selection, the legal term used to describe this process – voir dire – is itself a combination of two French verbs meaning “to see” and “to say.” The importance of observation during voir dire extends to court and counsel alike.

(*Id.* at p. 932.)

Inadequate *voir dire* that is “fundamentally unfair” is a basis for reversal later as the right to *voir dire* is “a means to achieve the end of an impartial jury.” (*People v. Fuiava* (2012) 53 Cal. 4th 622, relying upon *People v. Carter* (2005) 36 Cal. 4th 1215, 1250.) Without adequate *voir dire* the trial judge’s responsibility to remove prospective jurors who will not be able to impartially follow the court’s instructions and evaluate evidence cannot be fulfilled. (*People v. Roldan* (2005) 35 Cal. 4th 646 (disapproved on other grounds by *People v. Doolin* (2009) 45 Cal. 4th 390); *see also* Cal. Code Civ. Proc. § 128(a)(3) (court has the power “[t]o provide for the orderly conduct of proceedings before it”); *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal. App. 4th 12, 19 (judges “are responsible for ensuring . . . that juries are properly cared for and that all court cases assigned to them are fairly and efficiently heard and decided”).)

1. Inability to Object During Jury Selection

In several recent Northern California cases, jury selection was fraught with prejudicial irregularities. For instance, in the matter of *Fred Hartley Van Tassell, Jr. and Bernice Lucille Van Tassell v. Asbestos Companies, et al.* (San Francisco Superior Court, Case No. CGC-19-276806), there were instances when plaintiffs’ counsel was given audio control, allowing them to mute defense counsel who were attempting to interpose objections. Similarly, in the *Wilgenbusch* matter, during *voir dire* there were times that the attorneys were put on mute by the moderator (the Alameda Court clerk) and could not unmute themselves to object. The attorneys had to e-mail the court clerk multiple times requesting to be taken off mute. The clerk responded the first several times that the attorneys should be able to unmute themselves. The attorneys reiterated that they could not do so and were missing opportunities to object. This same exchange repeated several times between counsel and the clerk for approximately half an hour, during which time various attorneys were unable to object.

2. Juror Inattentiveness or Absence

Further violating the constitutional and statutory right to a fair trial, in *Wilgenbusch*, numerous jurors who appeared remotely were either not present for portions of *voir dire* or visibly distracted. For instance, during portions of *voir dire*, Juror 104501419 was laying in what appeared to be a bed, curled up, and it was unclear if the juror was sleeping. Juror 103818273 was working out on an elliptical machine. Juror 101366277 had a child that was in and out of the room, and the juror appeared to leave the room at times with the child. Multiple jurors

appeared to be using computers while having the Zoom meeting playing on another device.²

Juror inattention and absence were also on display in the matter of *Rosalino Reyes III and Gemma Reyes v. Johnson & Johnson, et al.* (Alameda County Superior Court, Case No. RG20052391). In *Reyes*, some jurors were unable to pay attention or even stay in the virtual “jury box” during *voir dire*. As the Alameda Court observed, one day during jury selection Prospective Juror No. 54 “seemed to be moving around and doing things and not really sitting still in the virtual jury box.” The prospective juror explained that the reason was that he was taking “delivery of a Peloton.” The next day, Prospective Juror No. 54 was forced to attend the trial in his car because there was a power outage in Montclair and the only place he had power was in his car. To cite another example regarding juror absence, due to confusion regarding whether she needed to continue to report to the courthouse, one prospective juror missed several hours of *voir dire* and then attended the remainder of *voir dire* on that day while driving in her car. In addition, throughout *voir dire*, some prospective jurors were absent for stretches of time, and counsel was unable to see the faces of some of the jurors due to their camera angle. In addition, at one point a prospective juror reported to the Alameda Court that another juror was listening to a loud news broadcast, which was very distracting.

In the matter of *Ricardo Ocampo and Elvia Ocampo v. AAMCO Transmissions, Inc., et al.* (Alameda County Superior Court, Case No. RG19041182), jurors were observed walking around when the Alameda Court was giving instructions, a juror was seen working from another computer during the parties’ opening statements, and an alternate juror was laying down during the trial.

There were also instances where through no fault of the jurors they missed portions of trial. For instance, in *Reyes*, during a defendant’s opening statement, a juror lost internet connectivity and it was unclear how much of the opening statement he missed, which forced the defendant’s counsel to repeat a portion of his opening statement.

3. Improper Communications between Jurors and a Party

Most troubling of all, in the *Wilgenbusch* matter, a defendant was forced to move for a mistrial because the plaintiff communicated directly with the jury in violation of CACI 100 (jury instruction providing that there shall be no contact with any witness or party during trial) while the court and counsel were otherwise engaged. As the court explained,

The incident occurred during a ‘breakout’ of counsel and the court during the cross-examination of plaintiff. An issue arose which

² See also, “Civil Jury Trials in the Time of COVID-19,” *The Daily Journal* (August 14, 2020) by Edward R. Hugo, Tina Glezakos & Bina Ghanaat.

required a side-bar. The lawyers, court reporter and the court and court clerk were transferred to a different zoom room' for the side-bar. The jurors, and plaintiff, remained in the main room. The court attendant also remained in the main room . . . during the side-bar, one juror, who had a 'virtual background' showing a courtroom behind him in his video feed, was asked by another juror whether he was in the courtroom. He explained that he was not and began showing the jurors various backgrounds. At this point, plaintiff asked the juror how he did that. Another juror asked the plaintiff what type of computer he had and then explained how to change background. Plaintiff then showed various backgrounds, none of which showed people but were pictures of locations such as of the San Francisco Bay. He showed one picture and asked the jurors if they could guess where it was, revealing it was in Spain. The plaintiff then said he had to get back to his own room before the judge came back.³

Ultimately, the court denied the motion for mistrial, but this incident serves as a warning regarding the perils of virtual trials.⁴

4. Other Misconduct

In addition to the inability to conduct sufficient *voir dire* (due to inability to object, juror absence, or inability to see jurors due to their camera angles), juror inattention, and improper communications between the jurors and a party, other misconduct during recent virtual trials include the following. In *Wilgenbusch*, after closing arguments, Juror No. 12 emailed the Alameda Court to express his concern regarding the fact that some jurors had begun evaluating the evidence (which had been delivered to them in binders) independently prior to deliberations, and, as a result, already had strong opinions when deliberations began. This clear violation of the judge's instructions to wait to form opinions until the time for deliberations would not have happened in an in-person trial where jurors are required to leave their notes and copies of exhibits in the courtroom when they leave each day.⁵

Misconduct during virtual trials is not limited only to jurors, however. For example, in the *Reyes* matter, when the plaintiffs began their case-in-chief and called an expert witness to the stand, an issue arose because the expert witness appeared to be reading from a document that had not been provided to all counsel. Once again, this issue would not have arisen if the trial had been conducted in person.

³ See also, "Trial by Trial and Error," *Harris Martin Publishing* (August 19, 2020) by Edward R. Hugo, Tina Glezakos & Bina Ghanaat.

⁴ See also, "The Rush to Justice During a Pandemic," *Mealey's Litigation Report: Asbestos* (September 23, 2020) by Edward R. Hugo, Tina Glezakos & Bina Ghanaat.

⁵ See also, "A Virtual Dilemma" *Northern California Super Lawyers Magazine* (August 2020) by Edward R. Hugo, Tina Glezakos & Bina Ghanaat.

C. **Virtual Trials Highlight the Importance of Judicial Ethics.**

In addition to juror ethics, virtual trials also implicate judicial ethics, including the rules governing judicial impartiality and judicial communications. A trial judge is required to be “patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom [he or she] deals in an official capacity ...” (Cal. C. Jud. Ethics, Canon 3B(4); *see Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1003.)

1. Judicial Impartiality

Pursuant to Canon 3 of the California Code of Judicial Ethics, a “judge shall perform the duties of judicial office impartially, competently, and diligently.” “‘Impartial,’ ‘impartiality,’ and ‘impartially’ mean the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge.” (California Code of Judicial Ethics – Terminology.) Accordingly, “[a] judge shall not make any public comment about a pending, or impending, proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing.” (California Code of Judicial Ethics – Canon 3B(9).)

In California, the standard for evaluating whether or not “a person, aware of facts, might reasonably entertain a doubt about the [challenged] judge’s impartiality” is an objective one. (Code Civ. Proc. § 170.1(a)(6)(A)(iii); *People v. Freeman* (2010) 47 Cal.4th 993, 996; *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 319.) There must exist “the probability of actual bias on the part of the judge or decision maker [that] is too high to be constitutionally tolerable.” (*People v. Freeman, supra*, 47 Cal.4th at p. 996 (quoting *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 877).) The fundamental question is whether a reasonable person, aware of the facts, would entertain doubts about the judge’s impartiality at the present time. (*United Farmworkers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) The person who might “reasonably entertain a doubt” about a judge’s impartiality in Code of Civil Procedure section 170.1(a)(6)(A)(iii) is a “disinterested,” “objective,” well-informed, thoughtful observer,” and not a “hypersensitive unduly suspicious” person, litigant or party representative. (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 390-391.) Conduct prejudicial to the administration of justice has been defined as either conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office or willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity.” (*Geiler v. Comm. on Judicial Disqualifications* (1973) 10 Cal.3d 270, 284.)

Technology that brings the judge and jurors into the virtual courtroom has numerous potential pitfalls, including the proverbial “hot mic” mishap. For

instance, in a recent asbestos-related personal injury virtual trial, during jury selection, the judge, unaware that his microphone was live, commented to his clerk about his personal experience with asbestos. This comment, which was heard by the virtual trial participants, led to a defense motion to disqualify the judge. Prior to the hearing on the motion, the judge recused himself to avoid delaying the trial. This incident underscores the importance of having staff monitoring all virtual spaces, including when “off the record.”

2. Judicial Communications

The California Code of Judicial Ethics, Canon 3B(7) provides that “[a] judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending, or impending, proceeding, and shall make reasonable efforts to avoid such communications.” However, “[a] judge may initiate, permit, or consider ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.” (*Id.* Canon 3B(7)(b).)

The Code of Civil Procedure section 611 admonition given by the court to the jury upon separation “not to converse with, or suffer themselves to be addressed by any other person” includes communications with the judge. Also, Code of Civil Procedure section 614 requires that when jurors “desire to be informed of any point of law arising in the cause” after deliberations have begun, they are to be brought into court and the information required must be given to them in the presence of, or after notice to, the parties or counsel.” (*See Asplund v. Driskell* (1964) 225 Cal.2d 705, 712 [strict compliance with Section 614 required].) As part of the court’s initial explanations to the jury, the judge usually admonishes the jurors to address any communication to the judge (e.g., request for excuse, etc.) through the bailiff or court attendant. Such communications are then reviewed with counsel. Thus, unless counsel stipulate otherwise, any communications between the judge and jurors during trial must take place in the courtroom and in the presence of counsel.

In a virtual trial, the “courtroom” is transformed and communications are transformed with it. Jurors have the court’s email contact and can send electronic communications to the judge out of the purview of counsel. Unlike the physical courtroom, there will be times when the judge may find herself/himself in the virtual space with one or more jurors without counsel present. *Prior* to the start of trial, counsel should address with the court how such ex parte communications will be disclosed and handled.

III. CONCLUSION

Virtual trials raise a host of real due process and ethical concerns. The Northern California virtual trials that have proceeded to date incurred irregularities during all stages of the proceedings.

Considering the myriad ethical concerns raised by remote trials, it is imperative to create a complete record for future motion practice and/or appellate relief. Parties should seek the court's permission to create a complete audio and video recording of all aspects of the trial, with the exception of the jurors' communications and images. In addition, counsel should have their paralegals or other staff members monitor the jurors and the off-the-record proceedings. In this way, trial irregularities can be observed and documented in real-time, and the affected party can immediately seek all appropriate remedies.