

The Virtual Trial: Is It Our New Normal?

By Ricky A. Raven and Austin K. Yancy



The COVID-19 pandemic has changed nearly every aspect of our society, including not least of all the legal profession. Although in our profession we pride ourselves on our abilities to adjust and adapt, this pandemic has tested and stressed those talents. Social distancing guidelines and procedures implemented across the country have rendered in-person jury trials impossible. On September 3, 2020, I completed a fifty-five-day-long jury trial on Zoom in the Superior Court of California, Alameda County, before the Honorable Jo Lynne Lee in the matter styled *Ricardo and Elvia Ocampo vs. Aamco Transmissions, Inc., et al.* Although I was in Oakland with some of our local counsel, the remainder of our trial team worked out of Los Angeles and Houston.

If my experience could be reduced to a few words, which it cannot, I would say the most important take-away would be to plan and practice, practice, practice. The format is too novel for counsel, judges, court staff, witnesses, or jurors to have gained enough experience to forego practicing the skills necessary to get through a virtual trial. Because all are adjusting, your trial team should practice every aspect (e.g., use of exhibits, lighting for remote witness, and sound) before trial begins.

In the interest of full disclosure, I am a staunch advocate of trial by jury in the traditional sense. In my view, that is manifested by in-person jury selection and jurors deliberating collectively in each other's presence. I believe a right to trial by jury is one of the cornerstones of democracy and should be cherished and protected. Thus, after experiencing the virtual jury trial first-hand, I felt the need to describe what I think are the five best practices critical to the preservation and protection of this right in the virtual setting.

Best Practices

Prepare as you would for any other trial. Yes, successful preparation for a virtual trial requires your team to treat it the same as any other, at least initially. Establish an office or war room near the court, and, to the extent possible,

have your trial team together as you normally would. From there, conquer the remote issues.

Use technical support as much as possible. Consult your conferencing platform's internal personnel to discuss their features. These companies have the expertise needed to use the technology effectively and efficiently, and they have a vested interest in ensuring that their platform operates properly. Gain an understanding of their capabilities and limitations, and leverage this information to maximize the use of their technology to aid your virtual trial. As a result of this type consultation, we better understood how to use Zoom features like breakout and waiting rooms to improve our internal communication and witness examination during trial.

Plan. Make a plan for your physical workspace. A newly important issue is proper spacing. Yes, more than six feet is required for trial members in the same location, but it is also necessary to prevent sound reverberation that results from laptops being too close together. In our case, counsel occupying the same conference room in Oakland were constantly reminded by various levels of feedback to pay particular attention to volume levels and which mics should be live and when.

Plan how you will be viewed on the screen, from background settings to how much of your torso is visible. Get feedback from your team and maintain awareness of what you are presenting to your audience to avoid creating additional distractions.

Create a plan to monitor juror conduct. Prescribing a set of rules (i.e., keep video running at all times, mute microphones, notify the court immediately of technical issues, etc.) sets clear expectations for the jurors, and provides advanced notice to the judge of issues you may raise if jurors fall below the prescribed standard of conduct.

Include a plan for technical issue communication. Identify an internal point of contact responsible for immediately notifying the judge and/or IT team of issues or anticipated delays.

Plan for all witnesses and jurors to wear headsets or headphones during all proceedings, and prepare to test the technology on a daily basis to determine if there are audio

or visual issues. Developing a technical checklist to work through before each session helps to identify problems that can be solved in advance.

Practice (with the trial team) Each trial team member appearing before the jury should practice using the platform before trial. Sufficient practice ensures that each member is capable of operating the technology independently and competently.

Practice the offering of exhibits with IT support personnel and trial team members. For example, understand *how* you want to offer exhibits: will you use screen-sharing technology or provide advanced copies of exhibits to minimize unnecessary delays during trial.

Practice (with the court) Develop a plan with court personnel to execute the trial because they understand the technical limitations of their particular court. Providing a virtual trial plan in advance allows them to practice, as well, particularly if their staff includes a Zoom point person responsible for managing aspects of the technology from their end.

Practice (with witnesses) Practice with your witnesses so they are acquainted with the technology and how it operates. Spend sufficient time with each witness to familiarize him/her with aspects like gallery view and speaker view, and check audio and video transmission with each witness prior to actual trial testimony.

Capitalize on the limited advantages wherever possible. For example, the most critical aspect of any trial, civil or criminal, is voir dire. It was my sense that jurors were more responsive and willing to share than usual because they were in the confines of their homes. Capitalize on this openness by directing all questions to prospective jurors individually to continue curating an environment where they feel comfortable responding.

Additionally, in the *OCampo* matter, the court provided each of the twelve jurors and three alternates a laptop with a hotspot power source, creating a unique opportunity for counsel to control what software is accessible to

jurors while the computers are in use. The laptops were configured so that the juror could only click on the Zoom application and could not use the laptop for any other purpose.

Convincing the court that there should be a technology manager whose sole responsibility is to observe the demeanor of jurors and validate the integrity of the technology allows immediate identification of inattentive jurors and admonishment from the court.

If possible, don't do it. While our team was successful, the right to trial by jury may ultimately prove too important to risk the inefficiencies, primarily with witnesses and jurors, that come with virtual trials.

In my fifty-five day California trial, I had an expert on direct examination and as I displayed an exhibit on screen, the screen went to speaker view. He no longer saw me on the screen, and he stopped to ask, "Where did Mr. Raven go?" Even though we practiced this very scenario the day before, he evidently forgot.

On a more serious note, because more outcomes are decided in voir dire than any other segment of trial, the biggest concern about virtual trials is the inability to build a rapport with jurors that results from being in their physical presence. Equally important is the rapport that develops between jurors when

they are impaneled, serve together, lunch together, and deliberate together. In my view, there is no substitute for this process.

And, the potential for juror misconduct during a virtual trial is very high. In my trial, although the jurors had court-provided laptops, there were still technological challenges that required jurors to return to their own personal laptops, providing a number of additional distractions and privacy concerns. Thus, consider jury instructions prohibiting reviewing the exhibits, jury instructions, or verdict forms outside the presence of the other jurors. Jurors should not take any "individual" breaks or absences, nor should the court allow other non-jurors, pets, or any

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other distraction to be in the room with the jurors while the jury is deliberating.

Post-trial juror investigation and interviews also raise new considerations in the context of virtual trials. While general questions regarding juror misconduct still apply, virtual trials require additional considerations absent from pre-pandemic jury trials, like whether jurors viewed other devices during trial, experienced technical problems, or performed internet research.

And if the court must hold virtual deliberations, consider the following post-trial interview questions:

1. How did deliberations go, what was the dynamic among the jurors?
2. Did all jurors remain on screen and participate during deliberations?
3. Was any non-juror visible or audible to the other jurors during deliberations?
4. Did you experience technical problems during deliberations (problems with Zoom, Wi-Fi, etc.)?

Conclusion

As virtual trials become more of the norm, it will become incumbent upon all trial team members to appreciate the advantage of exposure to the new technologies and

to strive to gain technical competencies. So, practice, practice, practice.

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