



# Trials and Tribulations

## Jury Trials in the Context of COVID-19

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The arrival of COVID-19 has brought so many changes for all of us and more changes are likely to come in so many

ways. The insurance and legal industries have been significantly impacted and continue to be impacted as we figure out how to return to offices, depositions, and courtrooms.

One question on the minds of many in the insurance and legal industries is what will in-person jury trials be like after COVID-19. This article addresses the many issues involved in bringing juries back to courtrooms and the related issues of how COVID-19 may impact on jury trials.

This is a new frontier. These are hard questions. The answer. Well, that's the thing about hard questions, there often aren't answers, only more questions. So, we present to you the difficult questions we must ask ourselves in analyzing liability, damages, and whether to pursue settlement or other alternative dispute resolution methods, rather than proceeding to court. We recommend that trial attorneys use this article to create an outline of discussion topics to address with judges in pre-trial conferences.

### In-Person Juries

As we write this, courts in some parts of the country are opening. Simple court procedures involving few

people and therefore fewer logistics are moving forward. However, the sacred jury trial, the Constitutional process central to our justice system, remains essentially on hold as we continue to examine the costs and benefits of in-person jury trials during a highly contagious health pandemic with no known cure and no vaccine, versus the virtual alternative.

### *In-Person Trials – Logistical Issues*

How will an in-person jury trial during COVID-19 look? This raises many questions before jurors even arrive at the courthouse. Will those receiving a summons be granted greater leeway to defer, and if so, will the criteria be objective, such as age, health status, economic or essential worker status? Or, will there be more of an honor system in place, where a deferral will be automatic if one chooses? Will unwillingness to take public transportation provide a basis to avoid jury duty? Will free or reduced parking be provided and if so, at whose expense?

Then, when a potential juror arrives at the courthouse, what processes will be used:

- Will jurors be required to take a COVID-19 test?
- Will jurors be required to have a temperature check?
- Will jurors be required to answer questions regarding their health?

- Where will this medical screening occur – inside the courthouse? Outside the courthouse?
- How long will it take to get jurors to the jury pool room and then to a courtroom, with social distancing, especially if elevators must be used?
- Once in the jury pool room, how should the jurors be seated?
- Is there enough room in the jury pool room to be 6 feet apart?
- Must everyone wear a mask?
- How will the jury pool room be cleaned? How often?
- What about food and water for the jurors: will they have to bring it or will the court provide it? What if they forget?
- How will bathroom breaks work with social distancing? Will the bathroom need to be cleaned after each juror uses it?

Once it is determined that there is a large enough jury pool to proceed with jury trials, how many cases should proceed at a time? In a non-pandemic world, it is good to have many cases proceeding, so if a prospective juror is stricken for one type of case, they can go back into the pool and be selected for another. In a pandemic world however, it is probably too risky to have many cases proceed simultaneously. Further, trials may be delayed due to inadequate numbers of jurors to seat a jury, particularly if 12 people plus alternates are needed.

If these questions are resolved and we proceed to the courtroom, more questions are raised:

- How will the jurors be seated for voir dire?
- Will spots be cleaned once a prospective juror is stricken, before another takes their place?
- Will jurors be able to adequately hear the judge, lawyers, and witnesses when they are wearing a mask? Or will they be allowed to take off their masks?
- If jurors aren't able to fit into the jury box due to social distancing, how will that impact on the trial – will they be able to see and hear the judge, lawyers, and witnesses?
- What about assessing demeanor without having the benefit of seeing half of their face?
- Many courts primarily try jury cases half days – will that change to allow for fewer days in the courthouse?
- Additionally, courthouses may not have adequate space to conduct more than multiple jury trials at a time due to the additional space needed to address all the individuals involved in a trial – parties, attorneys, judge, clerk(s), security, legal support, not to mention public access to the proceeding. There may be also further delays if jurors simply don't appear for jury duty resulting in inadequate potential juror numbers to proceed with trial.

Jury trials will take longer. The Chief Judge of the United States District Court for the District of Massachusetts estimated that jury trials will take 50-100 percent longer than before COVID-19. Many of the above issues regarding the jury's arrival at the courthouse and their movement within the courthouse will occur each day. In addition, issues may arise when attorney or courtroom staff touch evidence or equipment and needing to clean it before someone else touches it, e.g. audio-visual equipment in courtrooms.

Further, one or more seated jurors may not pass



medical screening for all the days of the trial. What happens if a juror becomes ill, tests positive, or is exposed to someone ill during the trial? Is it enough to install an alternate? Could this be the basis for a mistrial? Does the entire jury and/or court and legal personnel need to quarantine if such event occurs?

### *In-Person Juries – Theoretical Issues*

Logistic issues aside, one of the primary concerns with a traditional, in-person jury regards the statistical concept of “selection bias” which is when the jury pool seated, is not representative of what the jury pool would look like pre-COVID. A post-COVID in-person jury pool will likely be younger and healthier and include fewer parents of young children.

Older people and those with medical conditions are more likely to defer jury service or simply refuse to appear for jury duty. Another example that could result in a non-representative jury pool post-COVID is if individuals with diabetes do not serve, which could result in lower representation of minority communities that have a higher incidence of diabetes.

The jury pool is also likely to skew towards a combination of unemployed or those very securely employed, because those who are precariously employed are more likely to defer service for fear of losing their job.

Childcare issues are likely to have a bigger impact on jury service than in the past due to school age children likely being at home for all or a portion of the school day. For parents of younger children childcare options will likely be more limited, resulting in a higher likelihood of juries having fewer parents or caregivers for young children, likely resulting in fewer women appearing for jury duty. Further, the jury will likely have a dearth of essential workers such as those in the healthcare profession. The jury may also skew toward

those who have a car and do not need to take public transit, particularly in urban venues. Since COVID-19 is disproportionately affecting minority communities, there may be a disparate impact regarding resulting representation issues. All of the above concerns can of course lead to appellate issues.

### **Virtual Jury Trials**

*It is unclear whether jury trials will go forward virtually (e.g. using Zoom or some other online platform). A virtual jury trial is a novel concept and presents many issues not involved in a traditional in person jury.*

### *Virtual Jury Trials – Logistical issues*

Many of us are becoming increasingly comfortable using technology for educational webinars, large conferences, hearings, depositions, and mediations. In fact, attorneys and mediators rave about the convenience, efficiency, and cost savings of conducting these procedures virtually. Mock trials have been conducted remotely for years and have continued during the pandemic. The technology and the logistics are not difficult and are in fact just slightly more involved than a mediation. Unquestionably, the largest benefit is of course there is no threat to health, with the added side benefit of not having to deal with any of the related logistical issues discussed in the live jury trial section. No masks, no cleaning, no distancing.

However, the access to consistent and adequate wi-fi connections will impact on virtual trials both in the composition of the jury and how well jurors receive the evidence. Although this could impact any of the individuals involved in a trial, it is particularly likely with jurors whose internet may not be as robust as the Court's or the offices of the lawyers involved. Also, will it be clear to the attorneys or the judge if a juror is having difficulties seeing or hearing the witness, judge or lawyer? If yes, what will the remedy be? If testimony



is repeated, does that create an undue emphasis on that evidence for the jurors who hear it twice? If the judge and lawyers cannot tell whether there are issues with jurors receiving the evidence and later someone suggests one or more jurors were having difficulty, is that reversible error?

Additionally, although virtual platforms allow for documentary evidence to be shared, it generally requires advanced planning and agreement among the lawyers and the judge regarding the documents. To the extent something unexpected comes up during the trial and a party wants to use a document not previously planned for use, there will be delays and, potentially, confusion. Additionally, evidence that is not in the form of the document will not be able to be shared digitally. Is the picture of an object the same as seeing and feeling the object? Likely not.

### *Virtual Jury Trials – Theoretical Issues*

The more difficult issues with the virtual jury trial model are theoretical issues, many of which may be appealable. Like an in-person jury trial, juror selection bias is going to be an issue with a virtual trial as well. Although the elderly and those with health conditions may not face the same biases as they would for an in-person trial, there will be other selection biases. Those who do not have access to technology, or who do not know how to use technology, will likely not be able to participate. This may result in a distinct advantage for one side in a highly technical case, and a disadvantage for their adversary. Those who have small children to care for may have to either defer, and if they don't, they may face serious distraction hurdles during the trial.

There are also a myriad of privacy issues to consider. What if this is a highly sensitive trial and there is a juror with a large family in close living quarters? Will they defer or be struck? If so, this is

selection bias. A related issue may involve voir dire. If a virtual juror is being questioned about personal issues, it may inhibit them from answering truthfully if family is nearby and they do not want them to know.

Another issue with a virtual trial is similar to that of trying a live case with a mask. At a virtual trial, it can be more difficult to assess body language, demeanor and social cues of lawyers and witnesses. During deliberations, jurors may also be biased against each other based on their perceived socioeconomic status - which may be easier to ascertain when jurors are deliberating from their home rather than a neutral in-person deliberation room.

### **Litigation Funding and COVID-19**

Another issue, recently the subject of a June 20, 2020 New York Times article, is how since economic downturns almost always see an increase of litigation in just about every possible field, there will be an expected increase in the shadowy, niche field of “litigation financing.” Litigation financing is when financiers, often private equity firms or hedge funds, invest in the outcomes of cases and take a portion of the recovery in return. The cases and firms that litigation financiers support often lack the resources to finance their own litigations to completion.

Prior to COVID-19, litigation finance of plaintiff firms was one of several reasons given for the increase of “nuclear verdicts” and resulting social inflation. Investments of litigation funds can be used to finance everything from experts to jury research and mock trials. Accordingly, with COVID-19 related litigation on an upward trajectory, the litigation financiers will have the choice to invest in what they perceive is the best chance for the highest return. As one financier was quoted, “To survive you need discipline. You cannot take a flier. We’re not funding



on coin tosses. We're not funding on maybes." See "When Legal Disputes Lead to Lofty Returns," Paul Sullivan, New York Times, June 20, 2020. Lucky for them, it appears to be an investors' market with respect to COVID-19 related litigation.

## How Does This Change Pre-Trial Analysis of Cases?

The likelihood of an appealable issue relating to the make-up of the jury could occur with either an in-person or a virtual jury, although the issues will be different, as noted above. For virtual trials, it is unclear if they would even meet constitutional requirements and/or requirements of state law.

Additionally, some courts may not have the technology or IT infrastructure to properly conduct virtual trials, not to mention attorneys and jurors. Ultimately, the likelihood for appeal on a jury trial, whether done in person or virtually, is higher than prior to COVID-19. Additionally, there are also issues to consider when evaluating the likelihood of a plaintiff's verdict and the amount of damages to be awarded. The venue will greatly impact on how impactful these issues are. The perspective of a juror from an area hit hard by COVID-19 may have been very different on both liability and damages than a jury from an area with very limited COVID-19 cases and/or limited governmental limitations on its residents. Will the medical screening of jurors each day before trial impact on their view of medical liability or damages?

These issues are ones that both insurance professionals and lawyers need to consider in evaluating cases. The old analysis may no longer apply! Should a bench trial be considered, especially if it can go forward significantly sooner than a jury trial? COVID-19 may also impact on jurors' determinations of liability and damages in many contexts, including the following:

- Changed views of health care workers and essential workers;
- Jurors' fear and anxiety relating to jury service may result in less focus on trial testimony and evidence; Jurors' primary desire may be to finish quickly rather than reach an accurate verdict;
- Increased damage awards for future medical care for plaintiffs due to daily reminder of potential exposure to COVID-19;
- Changed attitudes towards governments; and
- Less certainty, because previous verdicts may no longer be instructive. Additionally, the cost of defending cases may be impacted in many ways, including:
  - Delays in civil trial dates, especially with in-person trials, resulting in higher pre-judgment interest;
  - Longer in person trials resulting in increased defense costs;
  - Potential decreases in legal fees to the extent discovery and/or trials are conducted virtually; and
  - Higher likelihood of appeal, resulting in additional legal fees and additional accumulation of post-judgment interest.

In this new world, insurers and defense counsel need to consider the logistical and theoretical impacts of COVID-19 on jury trials, whether in-person or virtual, in the venue at issue and also how potential jurors in the venue may have been impacted by COVID-19.

Beyond this, trial attorneys have an opportunity to show their clients and the court that they've thoughtfully approached trials in this, hopefully temporary, new era.



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Sloane and Walsh, LLP is a national law firm with a focus on litigation and insurance law including large loss subrogation, insurance coverage, extra contractual and bad faith law, appraisal law, personal injury, property damage, construction law, complex litigation, professional liability, class action law, privacy, cyber law, medical malpractice law, employment law and legal malpractice law.

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