

Bloomberg Law

INSIGHT: Virtual Criminal Jury Trials Threaten Fundamental Rights

June 23, 2020

by Henry E. Hockeimer Jr., Terence M. Grugan, and Izabella Babchinetskaya

During the pandemic, as virtual trials are considered, we are steps away from having defendants waive all that they are due. In the second part of a two-part series, Ballard Spahr attorneys examine the impacts of virtual trials on a defendant's constitutional rights.

Criminal defendants have a constitutional right to trial by a jury of their peers. As we discussed in Part 1 of this two-part series, a jury trial allows defendants and attorneys to speak to a group of laypeople, to tell a story, appeal to emotions, and persuade through a compelling presentation of evidence.

In Part 1, we discussed the practical concerns of a virtual trial, Part 2 focuses on the constitutional issues surrounding a virtual criminal jury trial.

The right to counsel in a criminal case is more than just a right to a mouthpiece arguing points at a trial. The right to counsel embraces the right to communicate and work with counsel. Virtual trials will limit a lawyer's ability to confer with the defendant before and during the trial.

Before Covid-19, attorneys and their clients could communicate through phone calls and in-person meetings to go over trial strategy. But now, for defendants who are in jail, phone privileges are harder to come by, and jails may not have access to secure virtual platforms that could provide the same level of preparation as in-person meetings. Even those who are not behind bars may face the same issues if they do not have access to high-speed internet or devices with webcams.

During trial, the defendant's inability to contemporaneously communicate with counsel presents a significant obstacle. Even if there are ways to allow for private communication between the defendant and counsel, such as "breakout rooms" on Zoom, that communication cannot happen in the same moment that harmful evidence is presented.

By the time the defendant has the opportunity to confer with counsel, if private communication is possible, his comments and thoughts may be moot, and his rights may have already been severely jeopardized.

CONSTITUTIONAL CONSIDERATIONS

Furthermore, the Confrontation Clause of the Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” Courts have repeatedly recognized the importance of the Confrontation Clause. As technology evolved, and virtual testimony became a possibility, courts emphasized that no form of technology can replace the requirement that a defendant be allowed to look his accuser in the eye as he testifies.

In fact, virtual testimony is allowed in extremely limited circumstances, usually only when a young child testifies against their abuser to help avoid traumatizing the child. Violations of the Confrontation Clause have led to thousands of mistrials and overturned convictions. But now, courts will have to decide whether a widespread public health crisis is an exception to the Confrontation Clause.

Virtual trials also raise concerns about a defendant’s right to a representative panel of jurors. A Texas judge recently made headlines after broadcasting a virtual jury selection in a summary trial, which is an alternative dispute resolution procedure with a non-binding verdict designed to facilitate mediation. Except for a juror walking off camera to answer a phone call, things seemed to go smoothly.

Yet, the nature of a virtual trial required the jurors to have high-speed internet, access to a webcam, and arrange for things like childcare to ensure that they could focus their attention on the trial. The necessity of having access to certain technology and childcare will inevitably alienate the poor. The potential pool of jurors for virtual trials will likely lead to imbalance among gender, race, and economic status.

SIGNIFICANT OBSTACLES TO RIGHTS

Virtual trials present significant obstacles to a defendant’s rights—rights often called “fundamental,” “critical,” and “unalienable,” and right that many have spent years fighting to achieve. Yet, we are steps away from having defendants waive all that they are due.

Given these obstacles, some have advocated for a hybrid approach to virtual jury trials with lawyers, the defendant, the judge, and court staff in the physical courtroom, and jurors and witnesses connecting virtually.

Others have rejected the idea of virtual juries and suggested moving jury trials to large spaces such as an empty school gym, or rearranging courtroom furniture and having all participants, except potentially the defendant, wear a mask. But, each suggestion brings its own set of challenges. For example, where the defendant is the only one without a mask, jurors may have preconceived notions that the defendant does not care for the wellbeing of those in the courtroom.

If virtual trials do become a reality, even if it is through a hybrid approach, for litigators, one thing is certain: they will be forced to master the art of a virtual jury trial, where lines like “if it doesn’t fit, you must acquit” may not invoke the same emotional response and may not produce the same outcome.

And for defendants—they will have to weigh their options: will they choose a virtual bench trial over a virtual jury trial, decide to waive the right to a speedy trial and wait until in-person trials can resume, or choose a virtual jury and potentially waive many of their fundamental rights?

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

AUTHOR INFORMATION

Henry E. Hockeimer Jr. is a former federal prosecutor and the Practice Leader of Ballard Spahr's White Collar Defense/Internal Investigations Group. He represents businesses and individuals facing investigation by state and federal authorities. An experienced trial lawyer, he has represented clients in federal and state courts throughout the country.

Terence M. Grugan is partner-elect with Ballard Spahr. He is a litigator with extensive experience counseling and defending clients from the preliminary stages of a government investigation through trial in both state and federal courts.

Izabella Babchinetskaya is an associate in the firm's White Collar Defense/Internal Investigations Group.