

Bloomberg Law

INSIGHT: Virtual Criminal Jury Trials Pose Practical Challenges

June 22, 2020

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

The Sixth Amendment guarantees a defendant's right to confront his or her accuser, and courts have consistently held that a virtual confrontation isn't sufficient; however it's unclear if that view will change in light of the current pandemic. In the first part of a two-part series, Ballard Spahr attorneys examine practical challenges accompanying virtual trials.

“If it doesn't fit, you must acquit,” O.J. Simpson's defense attorney argued as he looked into the eyes of the 12 jurors tasked with deciding his client's fate.

Although now an infamous phrase, at the time, it mattered only to these jurors. They sat only a few feet away, and watched as Simpson struggled to put on a glove that was much too small. Now imagine that these jurors were not watching this drama in person, but rather over Zoom. Would the performance have been nearly as effective?

From jury selection through closing arguments, every second in front of a jury counts. Part 1 of this two-part series examines the practical challenges accompanying virtual trials, while Part 2 will address concerns regarding a defendant's rights.

JURY TRIALS ARE ART FORM

Jury trials are an art form, a production where all the players—the lawyers, judge, jury and witnesses—appear on the same stage.

Simply watching a trial may not reveal the dozens of strategic choices an attorney makes—how close to stand to a jury box and when to make eye-contact with a particular juror; when to place a humanizing arm on the defendant's shoulder; whether to stand behind a jury box for direct examinations (allowing witnesses to make eye contact with the jurors); and when to stand in the middle of the room for cross examinations (focusing witnesses away from jurors).

How a lawyer uses a particular exhibit with a witness may be just as meaningful as the substance of the exhibit itself. All of these actions, often made in the moment based on instinct, could be lost in a virtual trial.

In front of jurors, first impressions are key. In a “normal” scenario, a defendant has the right to dress nicely and sit next to his attorney, which helps humanize the defendant. The humanity of a person appearing in a small box on the bottom of a screen, however, is not as evident as when the person is sitting feet away.

During a virtual trial, a defendant that's in jail may be displayed alone, without his attorney or a support system, and in a room that is easily identifiable as being inside a jail. Jurors may immediately question why the defendant is not on bail, and wonder if he is a danger to the community.

Defendants out on bail face different challenges, such as finding a suitable room, devoid of distractions and fit to show to a jury. At no point in history have litigants contemplated a scenario where a defendant's bedroom would be in the background as a jury decides his guilt or innocence.

With virtual witnesses, jurors, and even attorneys, how smoothly could a virtual trial function? Litigants have increasingly relied on technology during trials. They use screens to display pictures and videos, PowerPoints during speeches, and virtual demonstratives to depict complex concepts.

If technological problems arise during an in-person trial, however, litigants have the backup option of hard copies available. Overcoming this challenge, although possible, would be incredibly difficult during a virtual trial.

EVIDENTIARY CONCERNS

There are also evidentiary concerns to consider, such as: ensuring that a witness is truly sequestered and not subject to influence before testifying; preparing to refresh a witness' recollection without the juror seeing the evidence; and authenticating physical evidence, if it can be used at all, with a witness viewing it virtually.

The potential problems, however, do not stop there. An attorney may be in the middle of a speech when a juror's internet freezes; a juror may be watching a defendant's reaction to harmful evidence when the defendant's internet cuts out; or during cross examination, the witness may confess to lying while no one is listening.

We have to wonder if jurors will act differently when they are watching the presentation of virtual evidence from their couch as opposed to a courtroom. It will be difficult for a judge to ensure that jurors stay off the internet and pay attention to the evidence being presented.

If jurors are having a hard time understanding a concept or do not know the meaning of a word that is repeatedly used, they no longer have to wait for a witness to define or explain the concept. They can simply Google the phrase, making resort to their own investigation, which is strictly forbidden. While on the internet, they may also research the defendant or legal principles.

There are few methods of patrolling this conduct, and the concerns are amplified during deliberations. By the time deliberations roll around, jurors may have to tend to their family or pets, leaving little time to meaningfully participate in the process. There may be no way of ensuring that deliberations remain private, that jurors only rely on the evidence that was presented during the trial, or that they meaningfully participate at all.

While technological advancements have made virtual jury trials possible, they still do not offer the perfect solution. Technology can be unreliable. It's not easily policed. But most importantly, it simply does not transfer human emotion and connection—vital elements to a fair trial.

Without that connection, will a virtual jury trial give a defendant a viable opportunity to prove his innocence, or are we in danger of doing an injustice? Stay tuned for Part II where we discuss the obstacles that virtual criminal jury trials present to a defendant's rights.

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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 a 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.