

**Remote Jury Trials Work Group  
Best Practices in Response to Frequently Asked  
Questions (FAQ)**



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## INTRODUCTION

The Remote Jury Trials Workgroup is an ad hoc committee commissioned by the Washington State Supreme Court to make recommendations regarding best practices for remote jury trials in light of the on-going challenges posed by the COVID-19 pandemic. Our goal is to help courts analyze issues involved with remote jury trials, and to recommend best practices for them. We are not making recommendations on whether or not courts should conduct remote jury trials. Our recommendations prioritize practical and equitable issues. We are not providing legal advice or analysis.<sup>1</sup>

The primary take-away from the workgroup is that remote jury trials must be structured around inclusivity. The parties, lawyers, judges, and prospective jurors all need access to high quality broadband internet. They also require adequate hardware and software, as well as training to ensure the remote trials satisfy constitutional, statutory, and court rule requirements. These demands are resource-heavy, but access to justice principles demand nothing less.<sup>2</sup> Remote jury trials may require targeted budget allocations and infrastructure investments such as high quality broadband access.

Our workgroup has confined its work to the specific topic of remote jury trials. We have not assessed issues regarding remote bench trials or other remote court proceedings. While remote proceedings have become quite common over the past year, remote jury trials are still fairly rare. We anticipate it will be necessary to revise our recommendations as we gain experience.

The following is a list of frequently asked questions regarding best practices for remote jury trials, along with the workgroup's answers. This document will be placed on the Washington State Court's COVID-19 web page, along with links to various court orders and training materials regarding remote jury trials.

## BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTIONS

### CONCEPTUAL QUESTIONS

#### **1. How should courts decide whether to hold remote jury trials?**

Our justice system has developed in the context of in person proceedings. Concerns exist as to whether remote proceedings will be fair and equitably accessible. Many worry that remote jury trials will cause the judicial system to become more automated and less humane. However, remote jury trials hold much promise, especially during this public health crisis when courts are otherwise closed or limited in operation. Preliminary experiences indicate remote jury trials can be handled fairly, efficiently, and inclusively. Nevertheless, courts must recognize that the concept of remote jury trials may be met with reluctance. Concerns about moving forward with remote jury trials need to be acknowledged and considered.

Prior to opting for a remote jury trial, a court should assess whether public health and safety considerations can be satisfied by modifying in person proceedings to ensure the welfare of participants by employing masks, social distancing, and adequate air filtration. This analysis should consider local facilities used for court operations, virus transmission rates, and health

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<sup>1</sup> At times this document references court rules and statutes. Such references should not be taken as a substitute for independent legal research.

<sup>2</sup> The Washington State Supreme Court adopted the Access to Justice Technology Principles on June 5, 2020, available [here](#).

concerns of the trial participants. To the extent remote jury trials are to be utilized, the court should ascertain which phases of the trial should be conducted remotely. It should not necessarily take an all or nothing approach.

The court should also engage in community outreach in determining the appropriateness of remote jury trials for a particular jurisdiction. Consideration must be given to whether remote trials will meet the needs of diverse community members who utilize the justice system. The court might conduct outreach by meeting with stakeholders from the bar and the public. The court might also develop a survey for court users to assess the feasibility of remote jury trials. Issues such as transportation, parking, access to broadband internet services, and virus transmission rates differ throughout the state. In some communities, juror participation will be increased through the use of remote proceedings.<sup>3</sup> In other areas, participation might be reduced.

The court should emphasize the need for the equitable inclusion of diverse populations in the jury pool in deciding whether to utilize remote jury trials. Specific attention must be paid to marginalized communities who have historically been excluded from jury service because of race, ethnicity, and economic status. A study from 2016-2017 shows Black, Indigenous, and People of Color are underrepresented in jury pools throughout Washington.<sup>4</sup> Courts must be sensitive to the potential impact of remote jury trials on these communities.<sup>5</sup>

Health concerns and the need to timely adjudicate large backlogs of cases may warrant remote jury trials. However, they should never be conducted at the expense of limiting participation by parties, counsel, or potential jurors. If remote proceedings are utilized, the needs of all participants must be met so they can fully and equally participate. See further discussion [here](#).

## **2. Are civil and criminal cases equally amenable to remote jury trials?**

The short answer is no. Different constitutional and statutory considerations apply.<sup>6</sup> Criminal trials generally require more caution than civil trials.

- Considerations for both Civil and Criminal Cases.

Under current COVID-19 restrictions, there are disadvantages to in-person proceedings. These include: (1) a difficulty hearing and seeing participants due to social distancing and mask-wearing, (2) an inability of attorneys to effectively communicate with their clients and co-counsel while maintaining appropriate distancing, (3) barriers to assessing credibility and attentiveness due to mask-wearing and distance, (4) a lack of appropriate

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<sup>3</sup> U.S. Census data reproduced by Washington's Office of Financial Management includes information regarding internet access in Washington's cities and counties. See [here](#).

<sup>4</sup> [Peter A. Collins & Brooke Miller Gialopsos, "Answering the Call: An Analysis of Jury Pool Representation in Washington State," 22 Criminology, Criminal Justice, Law & Society 1, 36-49 \(2021\).](#)

<sup>5</sup> Virtual jury trials raise concerns regarding inclusivity for populations disadvantaged the digital divide. This may include Black, Indigenous, and People of Color, as well as the elderly. See [here](#). Nevertheless, with appropriate support, virtual jury trials hold the potential of being more inclusive, as they may allow greater participation from jurors with child care responsibilities or limited transportation.

<sup>6</sup> For a discussion of constitutional issues in criminal cases, see [Vazquez Diaz v. Commonwealth, 2021 WL 1773873 \(May 5, 2021\).](#)

physical space for holding a socially-distanced trial (5) a potential risk of costly disruptions due to changing health directives, and (6) a risk of a non-representative jury pool due to health concerns of potential jurors, including jurors from marginalized communities who have historically been under-represented in jury service and who have found themselves at an increased risk of COVID-19 complications.

The advantages of remote jury trials include: (1) maximizing safety; (2) enhancing options for prompt case resolution in light of backlogs; (3) reducing costs for expenses such as travel, physical space, expert witnesses, and sanitation; and (4) potentially increasing jurors' abilities to assess witness credibility and view exhibits. See [here](#).

- Considerations for civil cases: Civil cases involve fewer constitutional concerns and are therefore more conducive to remote proceedings.

Despite the advantages of fully remote proceedings set forth above, some cases may call for a hybrid approach with certain phases, e.g., voir dire, occurring remotely, and other phases occurring in person. Remote evidentiary proceedings may not be appropriate in cases where there are large illustrative exhibits, courtroom demonstrations, physical evidence to be handled by the jury, multiple parties, parties with disparate experience or sophistication in remote proceedings, or a significant volume of documentary evidence. Consideration should include when a party has significant non-financial interests at stake. If a case involves interpreters, the court should inquire as to whether the use of remote interpreting services will detract from the participants' ability to fully and fairly participate in the case.

- Considerations for criminal cases: Constitutional and legal issues in criminal cases make them less conducive than civil cases for remote jury trials. The workgroup recommends no aspect of a remote criminal jury trial occur without the defendant's consent.

Where the defendant consents to a remote jury trial, caution remains appropriate. Remote criminal jury trials should be limited to voir dire and certain witnesses for whom credibility is not a central concern, e.g., records custodians and chain of evidence witnesses. Every case should be evaluated individually. The court should involve the defendant and counsel in deciding which aspects of the trial would be appropriate for remote proceedings.

In all aspects of remote jury trials (including presentation of evidence) defense counsel and their clients need the ability to confer privately in the same physical room. Text communication may be a viable method for private attorney-client communication, so long as the client is comfortable using this technology. However, the ability to communicate with text is not a substitute for the attorney and client being in the same room. Text communication simply provides the attorney and client another method of private communication. In addition, some platforms, such as Zoom, may allow for defense counsel and the defendant to confer privately in a virtual breakout room. It is likely the only feasible venue for appropriate attorney-client contact during trial is in the courtroom. This solution helps ensure that defendants will not be clothed in a jail uniform and perceived as being in custody. As is true for all participants in remote

proceedings, the attorney and the defendant should each have their own communication devices so they will be displayed on the screen to jurors, participants, and the public in the same manner as everybody else.

Along with ensuring space for the defendant and defense counsel, the court should also inquire as to whether accommodations should be made for private spaces for counsel and other participants such as family members, victims, victims' representatives, and witnesses.

### **3. Which phases of a jury trial are most conducive to remote proceedings?**

Voir dire is the portion of a jury trial that appears most amenable to remote proceedings. Remote voir dire allows jurors to comply with jury service with minimal disruption to their daily lives. Remote voir dire holds the potential for making jury service more accessible and less burdensome to individuals who have childcare responsibilities, who must take uncompensated leave from work, who have underlying health conditions, or who face transportation challenges in traveling to a courthouse. It also may allow for more diversity in the jury pool.

Remote voir dire works best when used in conjunction with a detailed written questionnaire that allows the parties to make an initial assessment of hardships and conflicts. The questionnaire should be provided to the jurors before they are questioned by the court and the parties. The responses should be distributed to the parties before they question the jurors. Remote voir dire should generally be conducted with jurors divided into panels of no more than 18, to prevent screen-crowding. Remote voir dire allows the parties and the court to see a juror up close, without a mask, and it allows attorneys to talk more directly to individual jurors, instead of directing comments to a large venire. However, it may be difficult for lawyers to generate group discussions; therefore, courts should consider giving more time for voir dire than they have previously done.

Remote voir dire is currently occurring in some jurisdictions, including King and Snohomish Counties. Initial feedback from trial participants and prospective jurors participating in remote voir dire has been positive. In addition, it appears jurors appearing remotely are more comfortable participating from their homes. The workgroup is in the process of surveying jurors who have served on remote venires to assess their experiences.

### **4. Should courts order remote jury trials only with the consent of all parties?**

As [noted above](#), it is the consensus of the workgroup that no phase of a criminal remote jury trial should occur without the consent of the defendant and the prosecuting authority.

The workgroup recognizes that the best practice is to have the consent of all parties before a remote civil jury trial occurs. Things will simply work better with full buy-in. However, even without the full consent of the parties, the court should balance the parties' competing interests in determining whether a remote civil trial should occur. The court should also consider its backlog, the goals of the justice system, access to justice principles, and other factors, some of which are listed [below](#).

When the court obtains consent (either in criminal or civil cases), it should be done on the record. The court should advise the parties of available options and what a remote trial entails.

If the court proceeds with a remote trial but without full consent of all parties, it should allow those objecting to make a full record.

**5. Is it worth going forward without full consent if there is a risk of reversal on appeal?**

Case law has yet to clarify when remote jury trials can be held.<sup>7</sup> The Washington State Supreme Court's COVID-19 emergency orders authorize the use of remote voir dire in civil and criminal jury trials.<sup>8</sup> The orders also allow all aspects of a civil trial to be conducted remotely.

Washington State Supreme Court Emergency Orders are available [here](#). Many superior courts have held that ordering remote civil jury trials is an exercise of the court's inherent discretion. Examples of such orders are available [here](#).

**6. What should the court include in an order directing a remote jury trial over a party's objection?**

The workgroup recommends the court issue findings of fact and conclusions of law. The findings should state the current state of public health in the venue where the trial should take place; current health-related restrictions; the ability of the court, staff, parties, counsel, witnesses, and jurors to hold an in-person trial consistent with public health restrictions; the length of time trial has been pending; and the potential impact of further delay on the parties, e.g., availability of witnesses and preservation of evidence. The conclusions of law may include applicable Washington Supreme Court emergency orders and case law.

Example findings and conclusions are available [here](#).

**7. What are the consequences of not holding remote jury trials?**

A number of possible negative repercussions exist if courts opt not to utilize remote jury trials. On a systemic level, the COVID-19 pandemic has created large backlogs of cases, unprecedented in recent history. Courts need to employ a variety of tools to adjudicate cases, especially given the prioritization of criminal proceedings and the potential for on-going virus outbreaks to limit in-person proceedings. The failure to use remote jury trials may also have negative impacts on individual cases and individual participants. Evidence may be lost and witnesses may no longer be accessible. The prospect of waiting for an in person jury trial during a pandemic may place pressure on a party to abandon a claim or agree to a settlement that would not otherwise be deemed acceptable. Courts should strive for the just, speedy, and fair determination of every action.

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<sup>7</sup> Emerging case law on remote jury trials is set forth in [note 12, supra](#).

<sup>8</sup> [Order Re: Modification of Jury Trial Proceedings, Order No. 25700-B-631 \(June 18, 2020\)](#); [Amended Third Revised and Extended Order Regarding Court Operations, Order No. 25700-B-626 \(May 29, 2020\)](#).

**8. How can the court ensure access to justice principles are preserved and that a diverse array of community members can participate in remote jury trials?**

A significant concern regarding remote jury trials is that they will not be equally accessible to all potential litigants, attorneys, and jurors. Principles of equity, fairness, and access to justice demand that the courts involve all participants in the justice system in an equal fashion. The courts must maximize full participation. This process begins with community outreach to assess whether remote jury trials are feasible in a particular community. See discussion [here](#). Once the decision is made to proceed with remote jury trials, courts must invest time and resources to ensure all parties, litigants, and jurors have physical space, training, equipment, software, and internet access to allow for meaningful participation. The courts must also ensure the public is guaranteed its right to open and public justice.

- **Physical space:** A judge appearing remotely may do so from the courtroom. Attorneys, parties, witnesses, jurors, and other participants must have appropriate private physical space to allow for meaningful participation.

The court should consider establishing clearly articulated standards regarding the types of spaces appropriate for remote participation. Backgrounds should be neutral and conducive to the solemnity of the proceedings. At the same time, courts must also be sensitive to the participants' limited options in choosing their surroundings.

If a party or juror does not have access to private physical space with adequate technology, it should be provided by the court. This arrangement might include a room at the courthouse or a space provided by the court that is away from the courthouse. If the court lacks the ability to provide participants a private space, it may be necessary to conduct a hybrid trial with some participants participating in the courtroom, with spacing and masks, and others appearing remotely from their own private spaces.

- **Training:** Information on race equity and implicit bias needs to be included in all aspects of remote jury trial trainings. Judges and attorneys need to be sensitive to issues of implicit and explicit bias,<sup>9</sup> non-verbal communication, and trauma when assessing the participation of witnesses and jurors.<sup>10</sup> Courts should consider informing jurors about implicit and explicit bias and instructing them that the witness's method of remote testimony and physical surroundings should not influence them in evaluating the witness's testimony.<sup>11</sup>
- **Equipment:** The judge, attorneys, witnesses, and parties can fully participate in remote proceedings with a tablet or laptop equipped with a camera, and video and audio access. Jurors can participate in voir dire with a smart phone, but during the remainder

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<sup>9</sup> The Western District of Washington has a video addressing implicit bias, available [here](#). King County has a video addressing unconscious bias (which incorporates the federal court video) available [here](#).

<sup>10</sup> Some internet resources related to historical trauma: [What is Historical Trauma? University of Minnesota Extension; A Framework for Culturally Based Practice](#); [American Indian: Thinking Twice about Images that Matter](#); [Flourishing in a World of Disasters: An Indigenous Perspective on Historical Trauma](#); and [Surviving Disappearance, Re-Imaging & Humanizing Native Peoples](#).

<sup>11</sup> See [Susan A. Bandes and Neal Feigenson, \*Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom\*, 68 Buff. L. Rev. 1275, 1308 \(2020\)](#).

of trial a juror should have access to a computer or tablet. If a party or juror does not have access to sufficient equipment, the court should supply it. Equipment supplied by the court should be pre-loaded with appropriate software.

Special considerations are required when a case involves an interpreter. Spoken language interpreters need the best possible audio. The interpreter may need a noise cancelling headset. High quality microphones should be used by the judge, attorneys, witnesses, and interpreters. American Sign Language (ASL) and Certified Deaf Interpreter (CDI) interpreters and those using the interpreter's services may require higher definition cameras and displays than what other participants use. An additional screen might be needed for a hearing-impaired person to see the interpreter during communications. The workgroup emphasizes that this document does not provide legal recommendations. GR 11.3 addresses procedural requirements for interpreter services. Further recommendations regarding interpreters are addressed [elsewhere](#) in this document. The workgroup also recommends consulting the Washington State Supreme Court Interpreter Commission's white paper on [Remote Interpreting Best Practices during the COVID-19 Emergency](#) and [Guide to Working with Court Interpreters – COVID 19](#).

- **Software:** The court will need full access to a remote conference platform such as Zoom, WebEx, or Teams. All participants will need to be able to download software or applications to allow them to connect to the service used by the court.
- **Internet:** All participants need reliable high-speed internet with bandwidth sufficient to allow full and sustained participation in the court proceedings. The court should provide participants with appropriate equipment, e.g. a Wi-Fi hotspot to achieve this goal, or it can provide participants access through a [private space](#).
- **Jurors requiring specific accommodations:** The court should continue to consult GR 33 in providing appropriate accommodations. Care should be taken to ensure remote participants are able to access accommodation features in remote platforms, such as screen-reader accessibility functions for visually impaired individuals. A training video addressing working with jurors with disabilities and technology is available [here](#) (available to Washington State judicial officers only).

## 9. What training or preparation should there be before conducting a remote trial?

- **For judges:**
  - **Substantive law:** Judges need to be familiar with any applicable case law, rules, and emergency orders. While the case law is developing on remote jury trials, there are numerous cases involving remote witness testimony and appearances.<sup>12</sup>

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<sup>12</sup> **Pre-COVID Cases on Remote Witness Testimony:** *Maryland v. Craig*, 497 U.S. 836 (1990); *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999); *State v. Sweidan*, 13 Wn. App. 2d 53, 461 P.3d 378 (2020). **Post-COVID Criminal Trial Cases:** *United States v. Davis*, 2020 WL 6196741 (D. De. Oct. 22, 2020); *United States v. Akhavan*, \_\_\_ F.Supp.3d \_\_\_, 2021 WL 797806 (S.D.N.Y. Mar. 1, 2021); *Virgin Islands v. Warner*, 2020 WL 8019120 (V.I. Super. Ct.,

- Logistics: The judge serves as the facilitator of the remote trial. As such, the judge needs to be proficient and comfortable with using the remote conference platform and with helping other users troubleshoot their problems. Prior to conducting a remote trial, the judge should receive training in remote jury selection, the use of electronic questionnaires, how to handle witnesses, bench conferences, electronic exhibits, platform security (e.g., restricting access and removing unwanted participants), and remote deliberations.

A “Zoom Jury Selection for Judges” training video can be found [here](#). Judges new to participating in remote jury trials are encouraged to consult with judges who have conducted remote jury trials for hands-on assistance and practice. Consultations can be arranged by contacting one of the judicial members of the workgroup via email at [remotetrytrials@courts.wa.gov](mailto:remotetrytrials@courts.wa.gov).

A judge who has discomfort with technology may need technical support during remote jury trial. The workgroup recognizes not all jurisdictions have access to adequate support. Lack of support may militate against holding remote trials.

- Equity and inclusion: Judges conducting remote jury trials must familiarize themselves with principles of diversity, equity, and inclusion. They need to monitor the proceedings to ensure juror attention and participation. This role will require an understanding of both [implicit and explicit bias](#), as demeanor will be different according to a juror’s physical stature, background, and experiences. Demeanor may also be altered by the use of video technology, due to factors such as lack of eye contact, limited familiarity with the platform, and technology delays.<sup>13</sup>
- For attorneys: Attorneys should brief the court on legal issues that may arise because of remote jury trial proceedings. Attorneys will require training in the logistics of voir dire and trial. They should also be able to troubleshoot issues that arise. The workgroup recommends the Washington State Bar Association and its professional affiliation groups host trainings for their members. In addition, courts may provide written or video instructions, such as those currently made available by King County. See [here](#). Regardless of what generalized trainings are provided, attorneys should also be given an opportunity to practice connecting to the court’s system and using various remote platform tools prior to trial. This practice might take place during a pretrial conference devoted to issues related to the court’s remote jury trial process.

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Nov. 2, 2020); *United States v. Donzinger*, 2020 WL 5152162 (S.D.N.Y., Aug. 31, 2020); *Missouri v. Smith*, \_\_\_ S.W.3d \_\_\_, 2021 WL 1619283 (Mo. Ct. App., Apr. 27, 2021); *Strommen v. Larson*, 401 Mont. 554 (Mt. S.Ct. 2020). **Post-COVID Criminal Pretrial Motions Cases**: *Vazquez Diaz v. Commonwealth*, 2021 WL 1773873 (May 5, 2021); *Massachusetts v. Masa*, 2020 WL 4743019 (Mass. Super. Ct. 2020); *United States v. Rosenschein*, 474 F. Supp. 3d 1023 (D. N.M. 2020); *United States v. Sheppard*, 2020 WL 6534326 (W.D. Ky., Nov. 5, 2020); *United States v. Nelson*, 2020 WL 3791588 (N.D. Ca., July 7, 2020). **Post-COVID Criminal Grand Jury Proceedings**: *New Jersey v. Vega-Larregui*, \_\_\_ A.3d \_\_\_, 2021 WL 1652563 (N.J. S.Ct., Apr. 28, 2021). **Post-COVID Criminal Probation Violation Hearings**: *Clarington v. Florida*, \_\_\_ So.3d \_\_\_, 2020 WL 7050095 (Fl. 3d Dist. Ct. App., Dec. 2, 2020), rev’w den. April 21, 2021 (Fl. S.Ct).

<sup>13</sup> See Bandes and Feigenson, [supra n. 11](#) at 1292.

- For witnesses: Witnesses should be educated about the remote jury conference platform and allowed to practice connecting to the court’s system prior to trial. This training can be done informally and facilitated either by court staff or the parties, as appropriate.
- For unrepresented parties: Remote jury trials may prove especially challenging for unrepresented parties. If unrepresented parties participate in a remote jury trial, the court will need to ensure the parties have access to extensive training on remote proceedings. This training might be made available through a webinar. Regardless of the training method chosen by the court, unrepresented parties should be given an opportunity in advance of trial to practice connecting to the court’s system and using the court’s remote platform tools. The court should take special care to advise unrepresented parties of the mechanics of a remote jury trial.
- For court staff: Court staff play an important role in building the venire. Staff members tasked with jury selection will need training and support regarding how to develop a list of remote jurors and conduct initial inquiries, such as questions sent through an electronic survey. Court staff must also be familiar with how to handle witnesses, electronic exhibits, and oversee deliberations.
- For jurors: Jurors will require education on how to participate remotely.
  - Logistics: The court should provide webinar information addressing topics such as how to access the remote platform, how to ask questions during trial, how to take notes during trial, how to access electronic exhibits during deliberations, and how to return a remote verdict. As jurors appear for voir dire, the court may work with them individually to familiarize them with the various features of the video platform.
  - Code of conduct: Training materials provided by the court should emphasize the jurors’ code of conduct and the types of behaviors that are permitted and prohibited.

## QUESTIONS REGARDING TECHNOLOGY, ADMINISTRATION AND ACCESS

### 1. What technology is necessary for remote trials?

The workgroup does not recommend a specific hardware, software, or conference platform. What is important is ease of use and accessibility for all court participants, including those who do not have their own computer devices and internet access. In selecting technology and equipment, the court should keep in mind that if the products used by the court are deficient, the public may lose confidence in the integrity and dignity of the proceedings. Discussed below are the various technological and hardware requirements for different jury trial participants.

For judges and court staff: The only technology necessary is a computer with audio/video capacity, stable internet, and a video conferencing platform service. The recommended minimum for video streaming quality is 720p. The court will likely need a license for the conference platform in order to allow for prolonged sessions. Judges may consider having two

computer monitors in order to better assess juror attentiveness, particularly when evidence is being presented through screen sharing.

For attorneys or unrepresented litigants: Attorneys and unrepresented litigants will need hardware and internet capacity similar to a judge's. They will also need the same software conferencing platform, e.g., Zoom, Teams, WebEx that is used by the court. As explained [here](#), the court may need to provide technological and Wi-Fi accommodations to participants who do not have their own access.

For jurors: The court's platform should allow it to interface with jurors who are using their own electronic devices or those supplied by the court, including smart phones. If a trial is fully remote, jurors should be offered court-issued laptops or tablets, if needed. Jurors will need access to reliable high-speed internet access. As explained [here](#), accommodations must be made at every stage in the proceedings for jurors who do not have their own access to technology or internet broadband services.

For cases involving interpreters: Most video platforms will be conducive to consecutive interpretations. Some platforms, such as Zoom have a button specifically for simultaneous interpreting. When a case involves a team of interpreters, the interpreters will need a way to communicate between themselves.

System requirements for Zoom can be found at:

<https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux>

Information about common troubleshooting problems for video issues can be found at:

<https://support.zoom.us/hc/en-us/articles/202050538-Audio-Echo-In-A-Meeting>

An internet speed of 20Mbps is recommended for video conferencing. A hard wire connection may be more stable than a wireless connection. Internet speeds can be tested at:

<https://www.speedtest.net/>

## **2. How can the court protect the public's right to an open and public trial?**

The public must be provided access to remote jury trials. The court should provide public notice of how public access will be provided. The notice should be in multiple languages and be posted at the courthouse and on the court's website. In cases where the courthouse is open to the public, the simplest way to provide a public access is through opening a courtroom where members of the public can see and hear the proceedings while engaged in social distancing. But simplest is not always best. The use of a broadcast service would allow greater community access to court proceedings and should be considered. If the court wishes to broadcast its proceedings, it should be aware of the potential that third parties will record or rebroadcast the proceedings. The court should be particularly mindful of sensitive issues such as child testimony and jurors' names and images. The court must ensure that all means of public access to remote jury trials remain functional throughout trial.

### 3. How can the court address technology problems that arise during trial?

Pre-trial, the court (either the judge or designated court staff) must provide the public and trial participants with instructions about what to do and who to contact in the event of a breakdown in technology. The court must provide a phone number and email address for the parties, witnesses, jurors, and counsel to use in case of a connection problem. For the same reasons, the court must have phone and email contact information from the parties, witnesses, jurors, and counsel. During trial, judges and court staff need to vigilantly watch for connection or audio and video quality problems.

It is rare for a trial to flow flawlessly, whether in person or remote. Technological problems can be resolved and often will simply require patience and problem-solving. When technological problems arise, the proceedings must be stopped and, if possible, jurors should be placed in a remote waiting room. Standard instructions should be given regarding not discussing the case until the conclusion of the proceedings.

### 4. How does having a remote jury trial impact trial administration?

- How should the court reach jurors?

Courts should use existing methods for making initial contact with jurors, e.g, through a mailed summons. When possible, courts should provide information allowing jurors to respond electronically, e.g., by email or through an online portal.<sup>14</sup> For jurors who provide an email address, court-juror communications can then take place by email. If a summoned juror does not provide an email, then follow-up should be by phone and mail. Jurors who are unable to communicate with the court via email must be allowed alternate means for communicating, including the potential option of coming to the courthouse in person.

- How can the court ensure jurors have access to necessary technology?

If courts have a juror's email address, they can include technology access information in an electronic questionnaire. Jurors who do not have email addresses must be allowed to report to the court in person to obtain necessary equipment and arrange for appropriate internet access (see discussion of Hardware and Internet [here](#) and [here](#)).

- What court staff are necessary for remote jury trials?

Ideally, a court will have dedicated staff to serve as a remote jury trial administrator and a remote jury trial bailiff. If not, existing staff may need to take on additional duties.

For remote jury selection, courts need a designated person to correspond with jurors by email and, when necessary, by phone and mail.

During trial, it would be ideal to have a staff member help manage the video conference platform and coordinate the flow of exhibits and trial participants. The staff member may also need to help the judge monitor juror attention throughout trial. In appropriate

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<sup>14</sup> King County uses an online portal, available [here](#).

circumstances, a bailiff or clerk may also help the judge with technical issues that arise during trial.

## LOGISTICAL QUESTIONS REGARDING JURORS AND VOIR DIRE

### 1. How are jurors contacted?

Jurors should initially be contacted by mail and then provided the ability to connect with court staff remotely and provide an email address. This can be done through an online portal or email.<sup>15</sup> After summoning jurors, court staff should strive to handle further communications with jurors by email if possible. To ensure inclusivity, jurors should be given an option to appear in person on their summons date in order to obtain appropriate access to equipment and internet access (see discussion of Hardware and Internet [here](#) and [here](#)).

### 2. Who runs voir dire?

While court staff should handle initial communications with jurors, actual remote voir dire should be run by the judge. A “Zoom Jury Selection for Judges” training video can be found [here](#).

### 3. How should voir dire be conducted?

- How should questionnaires be used?

For jurors who have provided an email address, the court can use an electronic questionnaire in advance of trial to ask: (1) the court’s general questions, (2) hardship questions, and (3) any case-specific questions from the lawyers that the court agrees to ask. Excusals for hardship may be possible prior to having the jurors appear for voir dire. See RCW 2.36.100. Jurors unable to access the electronic questionnaire should be contacted by phone or mail and provided options for their appearance (see discussion of Hardware and Internet [here](#) and [here](#)). An example questionnaire can be found [here](#).

- How to keep jurors organized and avoid screen crowding?

The workgroup recommends voir dire take place in panels of no more than 18 jurors, depending on the particular platform used. The jurors can be arranged on screen by juror number and the non-video participants can be hidden, depending on platform.

The judge should assign jurors to seats after jurors are eliminated due to hardship, for cause challenges, and strikes. The judge shall inform the parties of all new assignments.

Screenshots should be taken of the jurors to assist counsel with for cause challenges and strikes. The court can assign responsibility for taking the screen shots, but should ensure either that the screen shots are destroyed at the end of voir dire or that the screen shots are not distributed without permission of the court.

### 4. How to address health concerns by jurors or other participants?

Jurors with health issues are subject to standard hardship excusals, keeping in mind that the remote platform may allow for broader involvement.

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<sup>15</sup> King County uses an online portal, available [here](#).

The court should keep in mind that health concerns may persist, regardless of the use of remote proceedings. The mere fact of going to trial may force attorneys, staff, and clients to collaborate in person for preparation for the proceedings. This situation could especially occur in complex cases, involving multiple parties. The court should be sensitive to health concerns, regardless of what type of proceeding is deemed most appropriate in a given case.

#### **5. How can the court and counsel connect with jurors during remote voir dire?**

Remote voir dire offers courts and counsel unique opportunities to connect with jurors. Unlike in-person voir dire where larger groups of people are brought into a courtroom, remote voir dire happens in smaller groups and therefore allows the court and counsel a better opportunity to observe each juror individually. Video technology enables the court and counsel to see a juror's facial expressions up close, without a mask. When the court uses an advance electronic questionnaire, the court and counsel may have more information about jurors before beginning voir dire.

### QUESTIONS REGARDING PRESENTATION OF WITNESSES AND EVIDENCE

#### **1. How can the court ensure juror attention?**

The court should instruct jurors at the beginning of trial regarding their participation. Examples of those instructions can be found [here](#). Jurors must be reminded that, regardless of physical location, they are participating as jurors in a trial and that they should conduct themselves accordingly. The court must also ensure that jurors can hear all participants adequately. It may be necessary for some participants to use a microphone or headset.

Judges and court staff must be vigilant in observing jurors on screen, ensuring they can see and hear the proceedings, and making certain that there are no distractions in the juror's physical space. Courts may wish to take more frequent or longer breaks to avoid screen fatigue. Increased recesses are especially important if a case involves an interpreter. The court should consult with the interpreters with respect to frequency of breaks. In addition to monitoring and taking breaks, courts should look for other signs of juror engagement, e.g., in a civil trial, juror questions for witnesses indicating a grasp of the issues.

While juror attention is a serious concern, some attorneys who have participated in remote jury trials have reported that jurors tend to pay greater attention during remote proceedings because they are able to participate from a relaxed setting.

#### **2. Is it possible to assess witness credibility over live video?**

For many jurors and witnesses, video technology may not significantly hamper credibility determinations. Modern video technology is generally high quality and allows for interactions between participants in real time. In addition, video technology has the advantage of allowing jurors to see a witness's face up close.<sup>16</sup>

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<sup>16</sup> The court should keep in mind that difficulties in assessing credibility can exist regardless of whether a proceeding is in person or virtual. See *State v. Saintcalle*, 178 Wn.2d 34, 94, 309 P.3d 326, 359 (2013), (J. Gonzalez, concurring), *abrogated by*

Despite the potential benefits of remote technology, concerns regarding credibility assessments remain significant.<sup>17</sup> The court may determine in-person testimony is necessary to assess credibility. In such circumstances, priority should be given to having the jury and parties present in the courtroom with the witness.

### **3. How to protect against witness misconduct such as coaching?**

Counsel must adhere to the rules of professional conduct when presenting evidence. They are not to coach witnesses during their testimony. See RPC 3.3, 3.4, 8.4(c), (d). All witnesses should be reminded of their oath and the penalty for violating the oath. Prior to providing remote testimony, the witness can be asked to pan their camera around their space to ensure no one else is present. It is also possible to provide secondary video camera viewing during testimony for use by opposing counsel. However, courts should be sensitive to the likelihood that jurors will be participating from private spaces, such as their homes.

### **4. What steps need to be taken when a case involves an interpreter?**

The court should ensure that the interpreter and participant with limited English proficiency are able to access the platform's interpretation features, e.g., Zoom interpreter channels. As stated [elsewhere](#) in this document, when a case involves a spoken language interpreter, the court should ensure high quality audio for all participants, including the likely use of noise canceling headsets with microphones. ASL and CDI interpreters require the best possible video and camera technology, including possible use of a screen dedicated to the ASL/CDI interpreter.

The workgroup recommends consulting The Interpreter Commission's white paper on [Remote Interpreting Best Practices during the COVID-19 Emergency](#) and [Guide to Working with Court Interpreters – COVID 19](#). The court must also keep in mind rules applicable to court interpretation, including GR 11.3.

### **5. What special instructions are necessary during a remote trial?**

Jurors will require instructions on how to use the remote meeting platform, how to ask a question of a witness during a civil jury trial, how to alert the court about connectivity problems (including identifying where in the proceedings the disconnection took place), how to access electronic exhibits during trial, and how to alert the court during deliberations that the jury has a question or has reached a verdict.

The court should ensure the parties are provided copies of all instructions prior to the first remote session. The parties must be permitted to make exceptions to the court's instructions or propose additional instructions, as appropriate.

Example instructions are available [here](#).

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*City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 Conn. L. Rev. 1 (2000).

<sup>17</sup> For a detailed discussion of the advantages and disadvantages of assessing credibility over virtual proceedings see *Vazquez-Diaz* (Kafker, J., concurring), supra [note 6](#).

The court should also consider jury instructions on implicit bias.<sup>18</sup>

**6. How can the judge take up matters outside the presence of the jury?**

A virtual room should be used for jurors when the court needs to take up matters outside the presence of the jury. For example, Zoom has breakout rooms that can be used for this purpose. The use of a virtual room for a sidebar would result in the sidebar being accessible to the public, but not to members of the jury.

**7. How are exhibits handled during a remote trial?**

The court and parties need to address exhibit issues prior to trial. To the extent possible, copies of exhibits should be shared in advance and determinations made regarding admissibility. The court and parties should decide, in advance of trial, how to present exhibits that cannot easily be shared over video conferencing. The trial judge may wish to use a second screen to view exhibits. However, judges in King County have successfully administered remote jury trials without two screens.

- What is considered the “original” exhibit?

For electronic exhibit handling, parties can be required to submit their exhibits to the judge or clerk in advance of trial by a specific deadline. An instruction for pre-trial collaboration can guard against duplication of exhibits. Once exhibits are submitted, court staff can make a copy, designate that copy as the master, and maintain the master as the original in a place where the parties cannot make changes. Parties should be instructed that they cannot make changes to exhibits once they are uploaded.

- How do witnesses access exhibits?

Counsel can display exhibits using screen sharing. Where the parties agree, a witness might be provided copies of exhibits in advance, provided counsel certify the exhibits are identical to the ones on file with the court and do not contain, for example, any annotations. The witness may also be asked questions to confirm the exhibit they possess is identical to the court’s original.

- How are exhibits displayed to jurors?

Exhibits can be shown via screen sharing. Depending on input from the parties, the court may want to instruct jurors not to manipulate exhibits on their screens.

- How are illustrative exhibits created during trial?

Exhibits might be created during trial, e.g., where a witness makes a drawing as an illustrative exhibit. In such circumstances, the clerk should provide an exhibit number, save the exhibit (e.g., by a screen shot), and transmit the exhibit to the court.

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<sup>18</sup> Implicit bias instructions used by the U.S. District Court for Western District of Washington are available [here](#). The instructions are not specific to the remote jury trial process.

- How does the court handle exhibits that are not shared with jurors, such as impeachment exhibits?

The court should momentarily send the jury to a breakout room while the witness is shown the impeachment document over screen sharing. Counsel could transmit the impeachment exhibit to the witness by email or, in Zoom, by Zoom chat attachment, and the witness could access the exhibit on the witness's device. As is true in a traditional trial, the exhibit should be marked and maintained for the record.

- How do jurors access exhibits during deliberations?

Jurors should be provided an electronic index and access to a space, e.g., in Dropbox, to view electronic exhibits.

## QUESTIONS REGARDING DELIBERATIONS AND THE VERDICT

### 1. How do jurors deliberate remotely?

If the court decides to allow remote deliberation,<sup>19</sup> jurors should deliberate in a virtual room that is separate from the primary virtual courtroom. For example, Zoom has breakout rooms that can be used for this purpose. Just as in an in-person trial, jurors must be instructed that they may only deliberate when all of them are present. Jurors must also be instructed that deliberations must occur in private, e.g., that no one else can be in their physical spaces during deliberations. For most platforms, the host can initiate a meeting or breakout room and then leave so that participants can continue in private without time restrictions.

### 2. How do jury questions work during a remote trial?

The court will need a way to take questions from jurors such as: the use of an internet portal; email; or messaging through the remote platform, e.g., Zoom's Ask for Help soft key. The court should save all questions in a document and file them, and may need to modify the applicable WPI or WPIC.

### 3. How does a jury return a remote verdict?

The jury can be provided with a fillable document, e.g., in .pdf or Word, for their verdict. Alternatively, the jury can be provided paper verdict form which can be scanned and then transmitted to the court via email. The jury should contact the court with its verdict in the same way that it would ask a question. The court must oversee the completion of an original verdict form. This action can be accomplished by having the juror foreperson come to the courthouse to sign and date the verdict prior to formal entry of the verdict and polling of the jury. Alternatively, the court may sign the verdict on behalf of the presiding juror after obtaining consent. Or the jury foreperson may sign the form electronically and attest in open court that this is their signature. The workgroup recommends the court poll the jury after it returns a verdict, regardless of request.

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<sup>19</sup> As previously noted, this document is not intended to provide legal advice. The workgroup takes no position regarding the legality of remote deliberations. Nor does the workgroup make a recommendation as to whether this stage of the proceedings should be done remotely.

**4. How can attorneys speak with jurors after the verdict?**

As with an in-person trial, counsel may wish to speak with the jurors after entry of the verdict as permitted by RPC 3.5(c). Jurors willing to speak with counsel can be provided the opportunity to interact with counsel over the remote conference platform, e.g., by bringing the jurors back into the main trial session with counsel. Jurors must be given the opportunity to opt out of meeting with counsel.