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## CIVIL JURY TRIALS BY ZOOM: WE'RE ALL PLUGGED INTO ONE WORLD NOW

### I. INTRODUCTION

In the spring of 2020, the question of whether any given civil dispute should proceed to trial or be continued for an indeterminate period of time was commonplace in the United States. In most cases, the answer was to order a continuance. The pandemic resulted in courthouse shutdowns throughout the country, and the constitutional requirement for “speedy trials,” the one reason a judge might choose to forge ahead despite the health risks, applied to criminal, not civil cases.<sup>1</sup> So, civil cases in courts throughout the United States ended up on the back burner, like they do whenever the courts get too busy to keep up with their “speedy trial” obligations<sup>2</sup> and as was certainly bound to happen when the spread of COVID-19 escalated into a worldwide pandemic.

The coronavirus pandemic presented a remarkable and unprecedented scenario for most court systems, forcing everyone to stay home, closing the doors to the courthouse altogether, and leaving more than a few chief judges \*72 unsure of what steps to take next.<sup>3</sup> Some cases could be placed on hold indefinitely, to be sure, but others, like criminal cases that were ready for trial, civil cases involving witnesses whose health was infirm, and cases involving injunctive relief, involved a degree of urgency that could not just be ignored and meant more in the way of problems, particularly in the early days of the pandemic.

Balancing public health with these concerns proved difficult because courts had to tread uncharted waters. Moreover, the increasing number of backlogged cases complicated courts’ efficiency and ability to hold jury trials. The courts had to comply with new COVID guidelines and conform their practices to a great many new regulations. As the Seventh Circuit concluded in *Cassell v. Snyders*:<sup>4</sup>

The world has not suffered a pandemic this deadly since 1918 .... Governments and citizens have thus been forced to act with imperfect knowledge. It has been difficult to quantify the risks of infection posed by different public activities like worshipping or shopping, how the virus affects different subpopulations, whether hospitals might run out of beds, and to estimate when ‘herd immunity’ might be achieved through vaccination--to list just some examples. Accordingly, while ‘the Constitution cannot be put away and forgotten ...,’ as judges without scientific expertise, we must appreciate these uncertainties and choose the course of action that will minimize the costs of being mistaken .... [E]ven in *Roman Catholic Diocese*, the Court recognized: ‘Members of this

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Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area.<sup>5</sup>

While the Center for Disease Control cautioned against personal contact of any kind,<sup>6</sup> the courts turned to telephones and videoconferencing as ways to move forward without worry over whether people wore their masks or engaged in social distancing. As judges started ordering the parties to proceed to trial using Zoom and other videoconferencing tools, however, some litigants pushed back, either because of genuine concern with the process or to avoid having to proceed to a trial on the merits.

\*73 Some of the arguments made by counsel were make-weight, while others had more substance to them. Collectively, these disputes added more than an already-crippled system should have been expected to bear. In *Forescout Technologies v. Ferrari Group Holdings*, for example, the court's finding that the trial could proceed via Zoom was met with a petition for leave to appeal which, under the circumstances, the trial court felt compelled to grant.<sup>7</sup> The Delaware Supreme Court's order permitted both live and remote civil proceedings, though it encouraged virtual means whenever possible.<sup>8</sup> However, whether virtual trial testimony could satisfy a defendant's due process rights was unresolved.<sup>9</sup> On one hand, the defendants raised due process concerns regarding the right to cross-examination a key witness in-person. On the other hand, requiring the witness to travel from California to Delaware to testify live would be a great burden given the COVID-19 health climate.<sup>10</sup>

Yet, *Forescout* is not remembered as the first civil case to be tried via Zoom because, as these layers of litigation cost added up, the parties recognized how difficult it was becoming to resolve a civil case during the pandemic. According to the court docket, they settled the day after the court entered this decision.<sup>11</sup>

Other civil cases did proceed to trial online, however, with some even proceeding to trial by jury. That introduced a great many issues into the process which, in the usually slow and steady course of the common law, might not otherwise have ever been answered.<sup>12</sup>

#### \*74 II. USE OF ONLINE JURY TRIALS IN CIVIL CASES DURING THE PANDEMIC

The first spike in the pandemic led to a series of urgent and unprecedented orders to stay proceedings, even in some cases that were actually in the middle of trial,<sup>13</sup> as trial judges throughout the country quickly adapted how their caseloads were handled in search of a way for the court's business to go forward. In *Quinn v. City of Tuskegee*, for example, the Court struggled with how to proceed in an environment in which the relevant medical advice continued to change and evolve.<sup>14</sup> Initially, this federal civil trial was set to be the first one in the United States after the COVID-related court closures.<sup>15</sup> Leading up to the trial, the court stated that jury trials could not be stalled indefinitely, continued to assess COVID risks and mitigation strategies, and denied two motions for a continuance.<sup>16</sup> The court in *Tuskegee* found that after "having tried everything--purchased personal protective equipment, implemented mitigation measures, consulted local and federal officials, and sought the advice of medical professionals," it could not move forward with this trial, especially given "the minimal degree of risk appropriate for a civil proceeding."<sup>17</sup>

Thus, while judges handling criminal cases dealt with how to comply with the Constitution's requirement that each defendant be granted a "speedy trial," on the civil side, the courts and counsel likewise argued over what procedural safeguards were necessary for jury trials online. The courts generally allowed additional time to those who asked for it.<sup>18</sup> For those who wanted to go forward, there were a great many questions to be answered.

\*75 The courts had to consider three fundamental questions. Does a trial online ensure the litigants a jury drawn from a fair cross-section of the community? Is the right to confront witnesses unduly compromised, if it applies at all in a civil setting, by limiting counsel's view to whatever they can see through the lens of a video camera? And does the right to proceed in "open court" require in-person attendance even when the litigants, counsel, and jurors will all be wearing masks that obscure the bottom half of their faces?

For months, the courts consistently found that the urgency and risks associated with COVID-19 justified compromise.<sup>19</sup> As time went on, however, and the prevailing view on how best to deal with the pandemic became itself the subject of an increasingly vigorous debate, the courts found ways to ensure that “trial by Zoom” still complied with the Constitutional and statutory safeguards that civil trials had historically enjoyed.

### III. THE CONSTITUTIONAL REQUIREMENTS FOR CIVIL JURY TRIALS

#### *A. The Seventh Amendment Right to Trial by Jury*

As the Supreme Court observed in *McDonald v. City of Chicago*, the Seventh Amendment right to a jury in civil cases is among a limited number of Constitutional rights which the Court has not found to be applicable to the states under the Fourteenth Amendment.<sup>20</sup>

Thus, the Seventh Amendment “bears not only on the allocation of trial functions between judge and jury ... it also controls the allocation of authority to review verdicts .... The Amendment reads: ‘In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be \*76 otherwise reexamined in any Court of the United States, than according to the rules of the common law.’”<sup>21</sup>

This is not to say that there is no right to trial by jury in the state courts. Indeed, quite to the contrary, each state constitution has guaranteed at least some jury rights in civil trials since the post-Revolution era.<sup>22</sup> In fact, at that time, state constitutions were “the sole source of the right to a jury trial in the United States” and referred to the rights “as being ‘sacred’ and ‘one of the best securities of the rights of the people.’”<sup>23</sup> Today, the right to a jury trial in civil cases still finds its roots in the various state constitutions, most often in the “Declaration of Rights.”<sup>24</sup>

Although the Seventh Amendment does not specifically apply in state court cases, states have adopted what amounts to roughly analogous law under their own Constitution or state statutes. Therefore, there are a number of specific protections which any civil jury system in the United States, whether it is conducted in person or online, should be expected to ensure. These include (a) either unanimity or a consensus vote which otherwise ensures that group dynamics play a significant role in the deliberative process;<sup>25</sup> (b) ensuring that prospective jurors are drawn from a “fair cross- \*77 section” of the community; (c) that the trial be conducted in “open court”; and (d) that the parties be afforded a reasonable opportunity to confront or cross-examine any witnesses who may appear to testify. The fundamental question before every court seeking to conduct a jury trial online has thus been whether these safeguards could still be maintained in such an environment. Reviewing the case law from this period, one commonality stood out as the most noteworthy. The degree to which trial court judges recognized a need to be flexible during the pandemic was not the gravest concern; rather, it was how well they found the use of Zoom or other videoconferencing technology would serve the constitutional rights of the parties.

#### *B. The Right to a Jury Drawn From a “Fair Cross-Section” of the Community*

In *Malvo v. J.C. Penney Co.*, the Court found that, despite the absence of specific language in the Seventh Amendment, the Supreme Court’s 1946 decision in *Thiel v. Southern Pacific Co.* was clear in its holding that the “American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”<sup>26</sup> Thus, in developing a process that allows for prospective jurors to participate through a videoconferencing application, rather than in-person in a courthouse, the first question of any consequence must be whether the process facilitates or detracts from the creation of a jury pool drawn from a fair cross-section of the community.

*Thiel* relied upon the Court’s “administrative powers over the federal court system and did not specifically reach the constitutional issue with regard to civil and criminal jury trials”; yet, the Court in two other cases from that era concluded that

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the “fair cross-section” was based upon constitutional grounds, “lending support to the proposition that a civil jury must also be drawn from a ‘fair cross-section’ to meet constitutional standards.”<sup>27</sup>

It is thus of particular concern, in the COVID era context, that some population groups are statistically more likely to answer a summons for jury duty if it provides for them to attend in-person rather than online. The National Center for State Courts (NCSC) conducted a national public opinion \*78 poll surveying what demographics are most comfortable with in-person jury trials.<sup>28</sup> According to this poll, “older individuals, racial minorities, and women are less likely to be comfortable with in-person jury service during the pandemic than are young white males.”<sup>29</sup> This indicates that jury selection for these live trials may not change much because women and minorities are already under-represented in certain jury pools.<sup>30</sup>

Furthermore, some minority jurors may have reported that they would be more comfortable attending remote trials because they were among the populations most heavily impacted by COVID-19.<sup>31</sup> For example, African Americans were polled as feeling less comfortable with reporting for in-person jury duty during the pandemic, which could be attributed, in part, to the African American population being particularly hard-hit by the coronavirus.<sup>32</sup>

To some extent, though, these speculations may be seen as begging the question: why conclude that the same responses would not be just as likely, due to other factors, had there been no pandemic?<sup>33</sup> To be sure, many attorneys have argued that “the use of videoconferencing may have prevented \*79 lower-income individuals and those who lack access to technology from appearing for jury service.”<sup>34</sup> But, so far anyway, these arguments have been made without supporting evidence, which may well be because the evidence does not support any such conclusion.

It is true that lower-income families in the United States have less access to smartphones, tablets, and desktop computers than do wealthier households. As Pew Research concluded in 2021, “13% of adults with household incomes below \$30,000 a year do not have access to any of these technologies at home, while only 1% of adults from households making \$100,000 or more a year report a similar lack of access.”<sup>35</sup> At the same time, however, access to automobiles is a much more significant factor for lower-income families. In fact, “the Bureau of Labor Statistic’s Consumer Expenditure Survey has shown that transportation is the second highest American household expenditure, only exceeded by housing costs.”<sup>36</sup>

Adding in the statistical evidence which shows African Americans to be more likely to have experiences which lead them to mistrust the courts generally,<sup>37</sup> and it is not difficult to conclude that reasons other than COVID-19 may contribute to what we are seeing in these studies. African American jurors may simply prefer to participate via Zoom because going to court is both expensive and stressful. That possibility supports the conclusion, in turn, that allowing for jury trials to be conducted via Zoom will enhance rather than discourage minority participation and that would, in turn, lead to online juries being more clearly drawn from a fair cross-section of the community.

### ***C. Rule 77’s Requirement that Trial Be Conducted in “Open Court”***

As the District Court in the Western District of Washington concluded in *Liu v. State Farm Mutual Auto. Insurance*, the requirement that trials be conducted in “open court” is somewhat flexible in how it should be \*80 interpreted.<sup>38</sup> The ability to conduct a jury trial through videoconferencing arises from [Federal Rules of Civil Procedure \(“FRCP”\) 77\(b\)](#).<sup>39</sup> Specifically, [FRCP 77\(b\)](#) states that “every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom.”<sup>40</sup> On its face, [FRCP 77\(b\)](#) appears to contemplate “open court” to consist of a traditional, in-person courtroom.<sup>41</sup> Yet, this rule is flexible because it allows for online trials when “exigencies make traditional procedures impracticable.”<sup>42</sup> In this case, the plaintiff had already waited five years for this trial and remote proceedings were possible with modern platforms.<sup>43</sup> Therefore, because the court could satisfy [FRCP 77\(b\)](#) through videoconferencing, it was unnecessary to delay the jury trial for even longer.<sup>44</sup>

Allowing for the use of an online jury would thus appear to make sense, not only during a pandemic, but also whenever the circumstances make “traditional procedures impracticable.” As the U.S. District Court for the Eastern District of Michigan concluded in *Gould Electronics v. Livingston County Road Commission*, Rule 43 provides similar flexibility for witness

testimony:

[T]he tenor of [Rule 77\(b\)](#)--as evidenced by the phrase 'so far as convenient'--is the allowance for flexibility in conducting trials in nontraditional ways when exigencies make traditional procedures impracticable. Without that flexibility, the federal judiciary would be paralyzed from utilizing an essential tool in dispensing justice to civil litigants. This same flexibility is found in [Rule 43\(a\)](#) .... [Rule 43\(a\)](#)'s requirement that testimony take place in open court was designed to serve two functional purposes: (i) to ensure that the accuracy of witness statements may be tested by cross-examination, and (ii) to allow the trier of fact to observe the appearance and demeanor of the witnesses. In 1996, [Rule 43\(a\)](#) was amended to permit witness testimony to take place by contemporaneous transmission for good cause and in compelling circumstances .... This amendment reflects an acknowledgment that advances in technology render it possible for remote testimony to \*81 nevertheless take place in open court. To be sure, the advisory committee notes indicate a strong preference for live testimony ... [b]ut many recent cases acknowledge that the near-instantaneous transmission of video testimony through current technology permits the jury or, in a bench trial, the Court to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, and his calmness or consideration.<sup>45</sup>

Thus, all that was necessary to proceed with an online trial in these cases was that the trial judge maintain procedures to ensure the process afforded the parties the same safeguards--the same ability to examine prospective jurors and witnesses and the same opportunity to be heard on the issues as would have been required in any case. When the necessary safeguards under the Seventh Amendment and [FRCP 43](#) are met, then it is possible to conduct remote trials where the jurors still engage the evidence and testimony to reach a verdict.<sup>46</sup> Judge Pechman, who has conducted several remote trials,<sup>47</sup> summarized what the court did to ensure a fair trial:

During this trial, the Court employed two courtroom deputies to monitor the proceedings and juror attention. Jurors and the Court are able to assess witness demeanor and credibility in much the same way as happens in open Court, with the added benefit of seeing faces head-on. To convene a jury for this case, the Court summoned 100 potential jurors, 31 of whom participated in voir dire. As part of the juror orientation and prior to voir dire, the Court required the jurors to complete a questionnaire that the parties prepared. And to accommodate requests from counsel, the Court conducted two rounds of voir dire so that counsel could view all jurors on a single computer monitor. After these voir dire rounds and allowing the parties to make for-cause and peremptory challenges, the Court empaneled 8 jurors.<sup>48</sup>

The Court then read the preliminary jury instructions and the eight-day trial commenced. The parties put on 14 live witnesses who appeared on screen without masks and whose facial expressions and demeanor could be readily discerned .... [W]hile the jurors were appearing remotely from their homes, the Court found that the jurors took their role seriously and none showed signs of distraction. After the parties' closing arguments, the Court \*82 read the final set of instructions to the jury and sent them to the virtual jury room to deliberate where each juror had unfettered access to review the admitted exhibits. After more than a full day of deliberations, the jury returned its verdict. The Court polled each juror and confirmed the verdict was that of each juror.<sup>49</sup>

Therefore, so long as courts put measures in place to ensure trials are conducted fairly, with the parties afforded an opportunity to examine witnesses in an open proceeding, remote trials serve as a way to continue proceedings during and after the pandemic.

#### *D. Limits on the Right to Confront Witnesses in Civil Trials*

Online proceedings affect parties' opportunities to confront and cross-examine witnesses. Courts must first question whether [FRCP 77](#) allows for conducting trials online<sup>50</sup> and then whether the parties would be denied due process by whatever limits such a process might have on their ability to confront witnesses through videoconferencing. In *Gould Electronics v. Livingston County Road Commission*, the court held that due process rights were not violated by conducting the trial through videoconferencing because "any argument that principles of due process require that testimony and cross-examination take place in-person is undercut by the Federal Rules of Civil Procedure."<sup>51</sup> In the FRCP, it is permissible to use contemporaneous transmission for testifying if there is good cause in compelling circumstances.<sup>52</sup> Additionally, parties can effectively evaluate the testimony and cross-examine witnesses using videoconferencing platforms by being able to view witnesses live so as to see their demeanor including their hesitation, confidence, or variations in language.<sup>53</sup>

The court thus held in *Gould* that videoconferencing technology affords litigants a reasonable means of ensuring their case is decided by a jury drawn from a fair cross-section of the community, provides an open forum in which to conduct the trial, and affords the parties an ability to confront or cross-examine the witnesses called to testify.<sup>54</sup> It may be that the process passes **\*83** constitutional muster and may be effectively utilized by both the state and federal courts even after the pandemic has finally passed.<sup>55</sup>

#### IV. USING SUPPLEMENTAL JURY QUESTIONNAIRES TO POLL PROSPECTIVE JURORS BEFORE COMING TO COURT

One way to protect jurors from pandemic-related health issues while still ensuring access to justice for the parties is to proactively address juror concerns. The COVID-19 Judicial Task Force for the United States has specifically recommended that, even in cases in which the voir dire and trial are to be conducted in-person, at least during the pandemic, the courts and counsel could bring some efficiencies to the process by sending out supplemental jury questionnaires ("SJQs"). The use of SJQs in advance of juror attendance both allows for those with unique health concerns to avoid coming into court<sup>56</sup> and allows for other possibly disqualifying concerns to be identified in advance before anyone has to make the trip to the courthouse. The purpose of SJQs in this context, at least according to the Task Force, would be to "explain[] the steps that the court is taking to keep [the jurors] safe."<sup>57</sup> For example, the SJQs could inquire whether the jurors are in a high-risk COVID category or whether someone close to them has contracted COVID to determine whether it is safe for the juror to serve on a trial in-person.<sup>58</sup>

The Task Force recommended that the court and counsel work together to frame the questions for such a questionnaire and that it include questions regarding whether prospective jurors would be more likely to be at risk if exposed to others during the pandemic, about whether they suffered from any other hardship that could impact their ability to attend, and about general background information that would help the parties begin the process of **\*84** determining who should be subject to challenge.<sup>59</sup> By implementing SJQs, jurors remain protected from contracting COVID while serving on a jury, and the parties are able to continue the proceeding and maintain a fair cross-section of the community.

#### V. CONDUCTING VOIR DIRE ONLINE

Some courts have found that voir dire may be conducted online just as easily as an entire trial could be done through Zoom. During the pandemic, the Supreme Court of New Jersey considered a challenge to this idea, premised upon the notion that the litigants have a Constitutional right to voir dire in person.<sup>60</sup> *New Jersey v. Dangeil* involved an arson claim and the use of "virtually picked jurors, a practice necessary to hold trials during the pandemic but controversial for its potential to create younger, economically privileged juries."<sup>61</sup> *Dangeil* involved a criminal defendant's right to an impartial jury,<sup>62</sup> and not the less stringent requirements for jury trials under New Jersey's 1947 Constitution, so the court's decision should certainly be construed as having equal weight in both arenas.

Wildemar Dangeil was convicted of attempted arson under a new hybrid trial model where potential jurors were interviewed virtually before they were to go serve on the trial in person.<sup>63</sup> The Supreme Court of New Jersey held that this virtual, hybrid

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model satisfied the defendant's Sixth Amendment rights in part because this hybrid process was "substantially similar to pre-pandemic practices."<sup>64</sup> The hybrid process improved the juror- \*85 selection procedures because it increased the size of the representative pool as prospective jurors were more willing and able to participate with these pandemic-related precautions.<sup>65</sup> Moreover, if potential jurors needed equipment to access the preliminary interviews, then this was given to them.<sup>66</sup> Thus, this process balanced "the fundamental rights established by the United States Constitution and the New Jersey State Constitution, including meaningful participation by attorneys and parties in the jury selection process."<sup>67</sup>

While this case was pending, both the New Jersey State Bar Association and the American Civil Liberties Union ("ACLU") filed *amicus* briefs questioning "whether the jury pool was in fact drawn from a fair cross-section of the community and whether dismissal of jurors was based on impermissible factors such as race and gender ...."<sup>68</sup> Curiously, though, neither *amici* appeared to claim that the use of virtual voir dire is itself inherently unreliable, the argument being instead that "unfettered and unrecorded discretion" exercised by the jury management office was likely to result in the disproportionate exclusion of some groups of jurors.<sup>69</sup>

In its brief, the ACLU acknowledged that "recent polls indicate that, in the wake of the pandemic, young Black and Hispanic women and older white women were among the most hesitant to appear in court in response to a summons while younger white politically conservative males were more likely to appear in court ...."<sup>70</sup> But, while the ACLU drew this conclusion from the June 2020 survey conducted for the National Center for State Courts, it ignored how the questions were framed and the fact that "older individuals, racial minorities, and women" were found, in the survey, to be more comfortable participating in virtual proceedings.<sup>71</sup>

The ACLU also pointed out that there was statistical evidence to show that minorities were more likely to qualify for exemptions from service \*86 because of the pandemic.<sup>72</sup> In fact, one survey found that "Black people [were] 30 percent more likely to qualify for a COVID-19 jury duty exemption, such as being in a high-risk category or working at a hospital, than white people."<sup>73</sup> Additionally, if required to serve on a jury during the pandemic, they had a higher likelihood of facing economic hardship.<sup>74</sup> Thus, the ACLU concluded that these jury pools are not likely to fairly represent the community.<sup>75</sup>

But *amici*, again, rested their complaints on the idea that a more carefully scrutinized hardship process was necessary to ensure that the number of prospective jurors claiming hardship as a result of COVID-19 did not result in the systemic exclusion of any particular class of jurors:

[T]o safeguard a defendant's right to a jury pool that contains a fair cross-section of the community, all requests for excusals and deferrals, including those related to COVID-19, should be decided by the judge in the presence of the parties. Every request should be evaluated on an individualized basis, with no across-the-board grant of requests related to COVID-19. While some COVID-19 related requests will undoubtedly result in excusal or deferral, an individualized assessment of the validity of each request will presumably reduce the number of individuals, many of whom may be minorities, who are eliminated from the jury pool.<sup>76</sup>

As [fictitious] President Bartlet observed in a certain early episode of *West Wing*, however, *post hoc ergo propter hoc* is a logical fallacy,<sup>77</sup> and the problems with hardship claims are not at all unique to the pandemic. On the one hand, community surveys appear to show that "[e]ven in the absence of a pandemic, black jurors are more likely than white jurors to request and receive temporary excusals from jury service."<sup>78</sup> On the other hand, it is \*87 historically a rare thing for the courts to allow, let alone require any involvement by the parties in hardship decisions and, as the Third Circuit concluded in *United States v. Penn*, the bar for such excusal is not particularly high in any case.<sup>79</sup> For example, jurors may be dismissed for a variety of reasons even when they could still come into court such as "a planned business trip; sinus problems that were a distraction to the proceedings even though the juror in question was well enough to continue; when a juror had a serious argument with her husband on the telephone the night before; the illness and hospitalization of the juror's 87-year old mother in New Mexico; and when a juror-nurse's patient suffered a heart attack ...."<sup>80</sup>

Thus, while the New Jersey State Bar Association and the ACLU may be right to point out that hardship dispositions are

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rarely subject to the same level of scrutiny as peremptory challenges<sup>81</sup> or to examine the jury commissioner's random selection process for bringing in prospective jurors for jury duty,<sup>82</sup> this is not a problem which is at all unique to either the pandemic or the use of online voir dire. Because the decision to excuse a prospective juror for hardship also happens before jurors are assigned to a specific room, the New Jersey Supreme Court rejected the defendants' arguments, as well as of those of the ACLU and the state bar, finding that **\*88** these procedures had been in place long before the pandemic and were thus completely irrelevant to whether virtual voir dire should be permitted:

Defendant fails to provide a persuasive reason why he was entitled to be present and represented during the process of statutory qualification, excusal, and deferral set in place long prior to the pandemic. Indeed, it is difficult to envision how defendant and counsel could have meaningfully participated in a process in which jurors were removed based on substantiated hardships, scheduling conflicts, and similar considerations. Further, defendant fails to articulate what vital information he and counsel may have gleaned from participation, given that disqualifications, excusals, and deferrals precede the revelation of any case-specific information. To recognize this process as a critical stage would require the participation of countless sets of parties and counsel on the off chance that one of the prospective jurors will be directed to a particular case.<sup>83</sup>

Therefore, virtual voir dire provides the parties the same level of meaningful participation as was afforded before the pandemic and should pass constitutional muster.

## VI. USE OF ONLINE JURY TRIALS IN CIVIL CASES AFTER THE PANDEMIC

Since the pandemic first brought the United States court system to a screeching halt, the one thing which allowed it to get back underway in short order was the availability of technology that had simply not existed the last time this country endured such a crisis. That technology, including the internet, videoconferencing, and programs like Zoom which allow for participants to meet together or separately in "break-out rooms," was the source of considerable debate, in large measure because it had never been utilized for such procedures before. As those arguments have been addressed over the course of this last year or so, however, what has also become abundantly clear is that videoconferencing not only affords litigants the same procedural safeguards and access as live courtroom proceedings, it may well provide a much better forum for many reasons.

Now that the dust has settled a bit and procedures have been developed to address some of the technological nuances,<sup>84</sup> the efficacies of online trials are clearer. Like settlement conferences which allow for the insurance company's representative to be actually present rather than "available by **\*89** phone,"<sup>85</sup> online trials allow for witnesses to attend who might have been previously considered unavailable. The cost and expense of traveling to court every day is eliminated and the lack of access to documents or other evidence is reduced. Prospective jurors from disadvantaged communities, who might otherwise be afraid of court, have trouble getting the time free, or lack the resources necessary to travel into court, can dial in through an application on their smartphones, which is a resource statistically more likely to be available than an automobile.

Additionally, voir dire can be effectively conducted, both remotely and among a more limited population, because the use of previously completed questionnaires limits the number of prospective jurors who actually ever have to go into court (just as resumes are used to limit the number of job applicants who have to come in for an interview). Indeed, the ability to record video conferences makes it possible to limit the effect of discriminatory hardship judgments by court personnel since a record of those communications would then be available to the court and the parties.


Advisory juries may be more readily called upon, both in tandem with ongoing court proceedings and through private dispute resolutions,<sup>86</sup> and the cost of using juries to decide factual questions, generally, could be significantly reduced. In 2019, for example, 1,377 civil cases and 1,883 criminal cases were decided by a jury in the federal courts.<sup>87</sup> \$53.5 million was budgeted for The Fees of Jurors and Commissioners Account.<sup>88</sup> Assuming a 12-person jury in every case with two alternates, for the 45,640 people who may have actually served on a jury that year, that would mean a budget of \$1,161.26 for every juror who



actually served. These numbers are certainly subject to scrutiny because this analysis looks at the issues from a fairly simplified perspective. However, jurors in the federal courts are only \*90 paid \$50 a day.<sup>89</sup> So, unless every federal trial in this country is taking over a month to get through, the bulk of the cost is incurred for administrative expenses and by the substantially greater number of prospective jurors who are called in but never actually serve. The numbers thus suggest a whole lot of reasons to consider ways of reducing these costs. Delivering questionnaires to prospective jurors in advance of their attendance, virtual voir dire, and even the use of virtual trials in some cases would certainly seem likely to help the situation. Therefore, the use of Zoom and other videoconferencing techniques in civil cases for voir dire and conducting other trial proceedings would be beneficial and is a method that should continue to be used even after the pandemic comes to an end.

### Footnotes

<sup>a1</sup> Ted A. Donner is an attorney practicing in DuPage County, Illinois. He served as President of the DuPage County Bar Association in 2016-17, was named Lawyer of the Year by that association in 2011, and received the Public Interest Law Initiative's *Pro Bono* Services Award for DuPage County in 2021. He also serves as an adjunct professor at Loyola University Chicago School of Law where he teaches courses in jury selection and other aspects of trial practice. He is the author of *Jury Selection: Strategy & Science* with Richard Gabriel and a contributing author to *Blue's Guide to Jury Selection* (both for Thomson Reuters). With thanks to Richard Gabriel and the Online Courtroom Project, Melissa Piwowar for her help in the research for this article, and Sara Levine for her extraordinary edits.

<sup>1</sup> See, e.g.,  *Hassoun v. Searls*, 453 F. Supp. 3d 612, 624 (W.D.N.Y. 2020) (“[T]he constitutional and statutory right to a speedy trial applies only in criminal cases.”) (citation omitted).

<sup>2</sup> See, e.g., *In re Approval of Jud. Emergency in Dist. of Ariz.*, 639 F.3d 970, 980 (9th Cir. 2011) (“A surge in a court’s criminal caseload ... will often result in a backlog of civil cases because, under the Speedy Trial Act, incoming criminal cases must be given priority over civil cases.”).

<sup>3</sup> See also *River Ridge Living Ctr. v. Semkiw*, 151 N.Y.S.3d 308, 312 (N.Y. Sup. Ct. 2021) (“To say that the COVID-19 pandemic that affected the United States, and the entire world, beginning March 2020, is unprecedented, appears to be an understatement. No case law that could have originated subsequent to 1962, or even 1921, could have anticipated the effect that a worldwide pandemic would have on the New York court system, and civil actions in particular. It is, therefore, not surprising, that a case that is directly analogous to the one at hand, does not exist.”).

<sup>4</sup> 990 F.3d 539 (7th Cir. 2021).

<sup>5</sup> *Id.* at 549 (quoting  *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2020)).

<sup>6</sup> See *COVID-19: How to Protect Yourself & Others*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (Aug. 13, 2021).



7 No. 2020-0385-SG, 2020 WL 3971012, at \*2-3 (Del. Ch. July 14, 2020).

8 *Id.* at \*2.

9 *Id.* at \*3.

10 *Id.*

11 *See* No. 2020-0385-SG, 2020 WL 4016085, at \*1 (Del. Ch. July 15, 2020) (“[T]he parties have conferred and determined to jointly request that the Court lift the TRO pursuant to paragraph 4 of the Court’s order entering the TRO and to dismiss the above-captioned action, including the Complaint and Counterclaims, with prejudice ....”).

12 *See*  *Montana v. Egelhoff*, 518 U.S. 37, 69 (1996) (O’Connor, J., dissenting) (recognizing “the slow progress typical of the common law”);  *Nielsen v. Wal-Mart Store #2171*, 57 A.3d 1121, 1124 (2013) (“Our understanding of the legal principles applicable here must commence with an understanding of how the common law has progressed to this point. Or, as better stated by Justice Holmes during his series of groundbreaking lectures in 1880, ‘[t]he history of what the law has been is necessary to the knowledge of what the law is.’”) (quoting OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 26 (Barnes & Noble Publ’g 2004) (1881)).

13 *See, e.g.,* *DeShields v. Zaken*, No. 17-cv-0784, 2020 WL 3218290, at \*1 (W.D. Pa. June 15, 2020) (“In light of the COVID-19 pandemic, the court is not currently conducting jury trials. The court will schedule a telephone status conference to discuss pretrial procedures and set a trial date upon notification from the magistrate judge that the case is trial ready.”); *United States v. Russell*, No. CR-19-00315-PRW, 2020 WL 3260066, at \*1 (W.D. Okla. June 16, 2020) (“The Western District simply could not summon the number of potential jurors necessary to try all the cases set to be tried on the July 2020 trial docket or conduct all those trials without jeopardizing the health and wellness of jurors, parties, and court personnel alike.”).

14 464 F. Supp. 3d 1262 (M.D. Ala. 2020).

15 *Id.* at 1263.


16 *Id.*



17 *Id.*

18 *See, e.g.,* *Gov’t Emps. Ins. Co. v. Saco*, Nos. 12-cv-5633, 15-cv-634, 2020 WL 3414531, at \*3 (E.D.N.Y. June 22, 2020) (“GEICO has failed to specify how its trial strategy would be prejudiced in any way if the court were to allow the Estate to file a late jury demand .... Nor does GEICO explain how the simple passage of time demonstrates prejudice. This is especially true in this case: because no trial date has been set--and, given the current COVID-19 pandemic, one will not likely be set in the near term--GEICO will have ample time to prepare to try this case before a

jury.”).

<sup>19</sup> See *In re Alle v. Gales*, Nos. 20-cv-11116-MCS, 13-bk-38801-SK, 14-ap-01146-SK, 2021 WL 3032712 (C.D. Cal. July 19, 2021) (“The bankruptcy court did not abuse its discretion in finding there was good cause in compelling circumstances sufficient to order the trial to proceed by remote means .... In finding that the COVID-19 pandemic was good cause in compelling circumstances, the bankruptcy court implied its decision was not an outlier, but that courts across the country have ordered remote trials .... The bankruptcy court’s exercise of discretion continues to be well-founded--since the bankruptcy court entered its Zoom Trial Order in August 2020, several more Ninth Circuit district courts have also entered similar orders.”).


<sup>20</sup>  561 U.S. 742, 765 n.13 (2010) (“In addition to the right to keep and bear arms ..., the only rights not fully incorporated are (1) the Third Amendment’s protection against quartering of soldiers; (2) the Fifth Amendment’s grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment’s prohibition on excessive fines .... Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement long predate the era of selective incorporation.”).

<sup>21</sup>  *Gasperini v. Ctr. for Humans. Inc.*, 518 U.S. 415, 432 (1996) (quoting U.S. CONST. amend. VII). See also  *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1897 (2021) (“[C]onsider the Seventh Amendment, which gives a specified group of people (parties in most civil ‘[s]uits at common law’) ‘the right of trial by jury.’ Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment’s scope?”) (emphasis in original).

<sup>22</sup> Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 855 (2013).

<sup>23</sup> *Id.* (“For example, Virginia’s Declaration of Rights of 1776 provided, ‘[t]hat in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.’”).

<sup>24</sup> *Id.* Forty-seven state constitutions provide for this right and over thirty of those states hold the right to be “inviolable.” *Id.* The “Declaration of Rights” article is the state constitution counterpart to the U.S. Constitution’s Bill of Rights. *Id.*

<sup>25</sup> Unanimity in the jury’s verdict has been all but universally accepted as the standard for any jury trial but there is still some debate on the subject. Since no one appears to have argued, during the COVID-19 pandemic, that jury deliberations online would be somehow tainted or unreliable, however, that factor is not discussed in this article. *But see*  *Ramos v. Louisiana*, 140 S. Ct. 1390, 1423 (2020) (“There is ... considerable evidence that this understanding [that jury verdicts should be unanimous] persisted up to the time of the Fourteenth Amendment’s ratification. State courts, for example, continued to interpret the phrase ‘trial by jury’ to require unanimity in felony guilty verdicts .... The Missouri Supreme Court in 1860 called unanimity one of the ‘essential requisites in a jury trial’ ... and the Ohio Supreme Court in 1853 called it one of ‘the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country’ ... A leading work on criminal procedure explained that if a ‘statute authorizes [a jury] to find a verdict upon anything short of ... unanimous consent, it is void.’”) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE OR PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 532 (Boston: Little, Brown, and Company 1866)).

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26   512 P.2d 575 (1973) (citing  *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946)).

27   *Malvo*, 512 P.2d at 580-81 n.8 (1973) (citing  *Smith v. Texas*, 311 U.S. 128 (1940);  *Glasser v. United States*, 315 U.S. 60 (1942)).

28 Michael Pressman, *The Challenge of Achieving a Representative Cross-Section of the Community for Jury Trials during the Pandemic*, JURY MATTERS (Civil Jury Project at NYU School of Law), July 2020.

29 CT. OPERATIONS DURING COVID-19 TASK FORCE, GUIDELINES ON REMOTE JURY SELECTION IN CIVIL TRIALS 2, <https://www.illinoiscourts.gov/Resources/689a0468-beb1-4635-a2f7-1757f915bfa7/Guidelines%20on%20Remote%20Jury%20Selection%20in%20Civil%20Trials.pdf> (last visited Sept. 26, 2021); *id.* (“The NCSC survey asked the following question: ‘Are you more comfortable with in-person or remote jury service?’ In response, 23% said ‘in-person,’ 44% said ‘remote,’ and 32% said ‘no difference.’ The NCSC also broke down the data by the demographics of those who responded, and the main demographic groups that were noted were age, race, and gender .... From greatest to lowest likelihood of reporting in-person, the demographic groups fell into three broad categories. The group most likely to report in-person, at about 80%, was young white men, and especially those who were conservative and non-college-educated. Next, at the median likelihood of reporting in-person of 67-75%, from most to least likely, were: Hispanic men, younger white women, older and college-educated white men, older Hispanic men, and older African American men. Last, those with the lowest likelihood of reporting in person-- below 67% and, for some groups, below 50%--were, from most to least likely: younger Hispanic women, younger African American women, older white women, older Hispanic women, and older African American women (below 50%).”).

30 CT. OPERATIONS DURING COVID-19 TASK FORCE, *supra* note 29, at 2.

31 Pressman, *supra* note 28.

32 *Id.*

33 *See also* *New Jersey v. Vega-Larregui*, 248 A.3d 1224, 1244 (N.J. 2021) (“Defendant and amici have provided no evidence that the grand jury in this case did not represent a fair cross-section of the community .... [Not only has the selection process] remained largely unchanged, but the grand jurors [here] were selected when in-person grand juries were still in session .... Had this Court not followed health-safety protocols and kept in place in-person grand juries during the pandemic ... it is not likely that vulnerable populations, such as the elderly and those with underlying conditions, would have appeared for service at the risk of their lives.”).

34 *Arizona v. Story*, No. 1 CA-CR 20-0523, 2021 WL 3160854, at \*3 (Ariz. Ct. App. July 27, 2021).

35 Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021),

<https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

<sup>36</sup> U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., NAT'L HOUSEHOLD TRAVEL SURV., MOBILITY CHALLENGES FOR HOUSEHOLDS IN POVERTY (2014); BUREAU OF LAB. STAT.: DEP'T OF LABOR, CONSUMER EXPENDITURES - 2012 (2013).

<sup>37</sup> See, e.g., Owen Bowcott, *Ethnic Minorities Get Tougher Sentences Due to Distrust in Courts*, THE GUARDIAN (March 27, 2017), <https://www.theguardian.com/law/2017/mar/28/ethnic-minorities-get-tougher-sentences-due-to-distrust-in-courts>.

<sup>38</sup> 507 F. Supp. 3d 1262, 1264, 1266 (W.D. Wash. 2020).

<sup>39</sup> *Id.* The court also discussed that FRCP 43(a) could be satisfied through the use of remote videoconferencing. *Id.* FRCP 43(a) states that “the witnesses’ testimony must be taken in open court .... For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” FED. R. CIV. P. 43(a).

<sup>40</sup> FED. R. CIV. P. 77(b).

<sup>41</sup> *Liu*, 507 F Supp. 3d at 1264.

<sup>42</sup> *Id.* (quoting *Gould Elecs. v. Livingston Cnty. Rd. Comm’n*, 470 F. Supp. 3d 735, 738 (E.D. Mich. 2020)).

<sup>43</sup> *Id.* at 1266.

<sup>44</sup> *Id.*

<sup>45</sup> 470 F. Supp. 3d 735, 738-39 (E.D. Mich. 2020).

<sup>46</sup> See *Goldstine v. Fedex Freight Inc.*, No. C18-1164 MJP, 2021 WL 952354, at \*12 (W.D. Wash. Mar. 11, 2021).

<sup>47</sup> Over the course of the pandemic, Judge Pechman was believed to have overseen more jury trials using the Zoom video conferencing portal than any other federal judge in the United States. See Cara Salvatore, *How Seattle’s Federal Court Has Pioneered Zoom Jury Trials*, LAW 360 (Nov. 20, 2020, 8:11 PM), <https://www.law360.com/articles/1331134/how-seattle-s-federal-court-has-pioneered-zoom-jury-trials>.

<sup>48</sup> *Goldstine*, 2021 WL 952354, at \*11.

49 *Id.*

50 *See supra* Section III.C.

51 470 F. Supp. 3d 735, 742, 744 (E.D. Mich. 2020).

52 FED. R. CIV. P. 43(a). Moreover, if a court finds that a witness is unavailable, the FRCP permit the use of deposition testimony instead of requiring that the witness personally appear. FED. R. CIV. P. 32(a)(4).

53 *Gould Elecs.*, 470 F. Supp. 3d at 743.

54 *Id.*

55 *Aoki v. Gilbert*, No. 2:11-CV-02797-TLN-CKD, 2019 WL 1243719, at \*2 (E.D. Cal. Mar. 18, 2019) (quoting *Warner v. Cate*, No. 1:12-CV-1146-LJO-MJS, 2015 WL 4645019, at \*1 (E.D. Cal. Aug. 4, 2015)) (“Because a witness testifying by video is observed directly with little, if any delay in transmission ... courts have found that video testimony can sufficiently enable cross-examination and credibility determinations, as well as preserve the overall integrity of the proceedings.”).

56 JURY SUBGROUP: COVID-19 JUD. TASK FORCE, CONDUCTING JURY TRIALS AND CONVENING GRAND JURIES IN THE AGE OF COVID-19 at 4 (2020), [https://www.uscourts.gov/sites/default/files/combined\\_jury\\_trial\\_post\\_covid\\_doc\\_6.10.20.pdf](https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf).

57 *Id.* at 3.

58 *Id.* The same documents would also reassure jurors “that answering the medical questions is solely for the purpose of determining whether a juror can serve and the answers to the questions will be filed under seal.” *Id.*

59 *Id.*; *see* AM. BD. OF TRIAL ADVOCS.: COVID-19 TASK FORCE, GUIDANCE FOR CONDUCTING CIVIL JURY TRIALS DURING THE COVID-19 PANDEMIC 8-9 (2020), [https://www.abota.org/Online/Resources/Guidance\\_for\\_Conducting\\_Civil\\_Jury\\_Trials\\_During\\_the\\_COVID-19\\_Pandemic.aspx](https://www.abota.org/Online/Resources/Guidance_for_Conducting_Civil_Jury_Trials_During_the_COVID-19_Pandemic.aspx) (follow “Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic” hyperlink) (“[T]here are a series of limitations and challenges with jury selection during the pandemic, including but not limited to ... a reduction in the diversity of prospective jurors appearing for jury service due to transportation issues ...; fears of contracting COVID-19 resulting in a ‘chilling’ effect on jury participation; and limitations based upon technology not being available to all socioeconomic groups ....”).

60 *See New Jersey v. Dangcil*, 249 A.3d 855, 855 (N.J. 2021) (“[D]efendant’s challenge to the hybrid virtual/in-person jury selection procedure shall be deemed pending on appeal in the Supreme Court, and further proceedings on that issue shall be conducted in accordance with [an] expedited, peremptory schedule ....”). Because this was a criminal

trial, the defendant's right to be tried by an impartial jury was protected by the Sixth Amendment. *Id.*

61 Tom Nobile, *Is Virtual Jury Selection Legal? Bergen County Arson Case Could Answer That Question*,  
NORTHJERSEY.COM (July 22, 2021),  
<https://www.northjersey.com/story/news/2021/07/22/virtual-jury-selection-legal-bergen-county-nj-case/8014729002/>.

62 *New Jersey v. Dancil*, 256 A.3d 1016, 1027-28 (N.J. 2021).

63 *Id.* at 1021.

64 *Id.* at 1033.

65 *Id.* at 1034.

66 *Id.* at 1033.

67 *Id.* at 1034.

68 Brief of Proposed Amicus Curiae N.J. State Bar Ass'n at 4, *Dancil*, 256 A.3d 1016 (No. AM-0053-20).

69 *Id.* at 18 (“The Jury Management Office’s unilateral exercise of authority to excuse jurors, without input from counsel, interferes with Defendant’s right to counsel during the jury selection process. Indeed, in an ordinary trial, the concerns of an eligible juror who has not been deferred or exempted from service on statutory grounds are discussed in open court, with counsel present.”).

70 Brief on Behalf of Amici Curiae State of N.J. Off. of the Pub. Def. and ACLU of N.J. at 8, *Dancil*, 256 A.3d 1016 (No. AM-000053-20T4) [hereinafter ACLU Amicus Brief].

71 *See* Pressman, *supra* note 28 (“The NCSC survey asked the following question: ‘Are you more comfortable with in-person or remote jury service?’ In response, 23% said ‘in-person,’ 44% said ‘remote,’ and 32% said ‘no difference.’”).

72 ACLU Amicus Brief, *supra* note 70, at 9 (citing Mark Curriden, *Harris County Juries Projected to Be Whiter, More Conservative as Pandemic Persists*, HOUS. CHRON. (July 2, 2020), <https://www.houstonchronicle.com/business/article/harris-county-jury-white-male-conservative-covid-15380341.php>, and *Republicans, Democrats Move Even Further Apart In Coronavirus Concerns*, PEW RES. CTR. (June 25, 2020), <https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/> (“The gaps between white adults’ concerns about getting or spreading the coronavirus and Hispanic and black adults’ concerns also have grown since April, as the concerns of white adults have declined while those of black and

Hispanic adults have not.”)).

73 *Id.* at 8-9. This was a survey of 650 potential jurors in Houston and Dallas. *Id.* at 8.

74 *Id.* at 9.

75 *Id.* This could be true especially because “the virus is harming people of color in disproportionate numbers, and ... white people and Republicans are least concerned about spreading and contracting the virus.” *Id.*



76 *Id.* at 11.


77 *The West Wing: Post Hoc, Ergo Propter Hoc* (NBC television broadcast Sept. 29, 1999).

78 Oscar Bobrow & Lois Heaney, *A Response to Michael Pressman’s ‘The Challenge of Achieving a Representative Cross-Section of the Community for Jury Trials during the Pandemic,’* JURY MATTERS: COMMENT. n.3 (July 30, 2021), <https://civiljuryproject.law.nyu.edu/a-response-to-michael-pressmans-the-challenge-of-achieving-a-representative-cross-section-of-the-community-for-jury-trials-during-the-pandemic/> (noting that “[a] 2011 study conducted for the Chief Administrative Judge of the NYS Unified Court System found that among those who appeared for jury service, 11% of white jurors received temporary excusals, while 20% of Black jurors were excused.”).

79 870 F.3d 164, 170 (3d Cir. 2017).

80 *Id.*; see also TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY & SCIENCE 227-43 (Thomson Reuters ed., 2020) (“[T]he decision whether to allow a juror to be excused for hardship remains a question of almost unbridled judicial discretion, both during voir dire and during any ensuing trial.”).

81 See, e.g.,  [Flowers v. Mississippi](#), 139 S. Ct. 2228, 2244-45 (2019) (“Batson lowered the evidentiary burden for defendants to contest prosecutors’ use of peremptory strikes and made clear that demonstrating a history of discriminatory strikes in past cases was not necessary”);  [State v. Listoe](#), 475P.3d534, 542 (Wash. Ct. App. 2020) (“Whereas the prior *Batson* formulation required the party contesting use of a peremptory challenge to prove ... a discriminatory purpose, GR 37 represents a sweeping change that focuses instead on the perspective of an objective observer who is presumed to be aware that implicit, institutional, and unconscious bias, as well as purposeful discrimination, have all contributed to the unfair exclusion of jurors.”).

82 See  [Williams v. Georgia](#), 349 U.S. 375, 388 (1955) (“Georgia has a rule, as the State Supreme Court noted in this case, that an objection to the whole panel must be made by way of a challenge to the array at the time the panel is put upon the defendant .... But none of [the cases cited in these proceedings] declare that an extraordinary motion is not available *in a proper case* for granting a new trial when the objection is to the panel. On the contrary, several factors indicate that the trial judge and the appellate court have the same degree of discretion in the ‘array’ cases as in cases



involving individual jurors.”).

<sup>83</sup> New Jersey v. Dancil, 256 A.3d 1016, 1029 (N.J. 2021).

<sup>84</sup> See, e.g., U.S. DIST. CT.: W. DIST. WASH., VIRTUAL TRIALS HANDBOOK FOR ATTORNEYS (2021), <https://www.wawd.uscourts.gov/sites/wawd/files/VirtualTrialHandbookforAttorneys.pdf>.

<sup>85</sup> See Nancy Holtz, *Building A Successful Virtual Mediation*, ABA (Aug. 3, 2020), [https://www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2020/summer2020/successful-virtual-mediation/](https://www.americanbar.org/groups/construction_industry/publications/under_construction/2020/summer2020/successful-virtual-mediation/).

<sup>86</sup> See, e.g., *Grondal v. United States*, No. 2:09-CV-18-RMP, 2020 WL 6720930, at \*13-14 (E.D. Wash. Nov. 16, 2020) (“Pursuant to Fed. R. Civ. P. 39(c), the Court on motion or on its own may try any issue with an advisory jury .... [T]he Court does not find it necessary to impose on citizens during a pandemic to serve on an advisory jury in a case that can be resolved by the Court alone”). Had the use of an online advisory panel been available as an option, the court in *Grondal* would have had less to worry over because the jurors for such a panel, if asked to appear remotely, would not have had to bear the imposition or personal risk of traveling to court.

<sup>87</sup> *U.S. District Courts-Civil and Criminal Trials Completed*, U.S. CTS. (Sept. 30, 2020), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_6.4\\_0930.2020.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_6.4_0930.2020.pdf).

<sup>88</sup> *Funding/Budget-Annual Report 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/fundingbudget-annual-report-2019> (last visited Sept. 26, 2021).

<sup>89</sup> *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> (last visited Aug. 29, 2021).

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